IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 66,150

FREDERICK P. CHAPIN, III,

Respondent.

FREDERICK P. CHAPIN, III,

Petitioner,

vs. Case No. 66,272

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT/CROSS-PETITIONER'S BRIEF

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STATEMENT OF THE CASE

On October 11, 1984, the District Court of Appeal, Fifth District, filed an opinion affirming the trial court's order denying a Motion To Suppress filed by the Defendant (Cross-Petitioner) and revising and vacating a sentence entered against the Defendant in violation of the double jeopardy clauses of the State and Federal Constitutions (R. 31-32).

The State of Florida, as Appellee below, filed a Notice To Invoke the Discretionary Jurisdiction of this Court on November 9, 1984, (R. 40). The State of Florida requested discretionary review of the double jeopardy question, certified by the Fifth District Court as a question of great public importance (R. 40).

The Supreme Court ordered an initial briefing schedule on November 15, 1984, requiring the State to file its brief on the merits on December 5, 1984.

On December 4, 1984, the State of Florida served a Motion To Toll Time for serving its initial brief on the grounds that on that same date it served "Motion To Travel" requesting that this Court order that the appeal taken by the State in this case be governed by whatever occurred in the case of State v. Snowden, FSC No. 65,179.

At that time, realizing that the State was attempting to limit the scope of the review powers of this Court, the Respondent, Chapin, served an objection to the Motion To Travel on December 13, 1984. The grounds for the objection was that the Supreme Court

of this State had previously held that a question certified to be of great public interest "...extends our scope of review of this controversy to a determination of whether the opinion and judgment of the District Court is correct." Giblin v. City of Coral Gables, 149 So.2d 561 (Fla. 1963).

On that same basis, on December 6, 1984, the Respondent filed a Notice To Invoke Discretionary Jurisdiction citing Giblin and other case law. The reason Respondent filed an original notice instead of a cross-petition was due to the understanding that the additional grounds for appeal had to be taken separately.

Respondent/Cross-Petitioner then filed a Motion To Consolidate the two appeals (as amended) on January 10, 1985. Thereafter, this Court granted the Amended Motion To Consolidate for "all appellate purposes" and ordered that the Respondent/Cross-Petitioner file the initial brief.

Therefore, this brief will address the legal issues raised by the opinion of the Fifth District Court of Appeal on October 11, 1985.

IDENTIFICATION OF PARTIES

The Respondent/Cross-Petitioner will be referred to by his name. The Petitioner will be referred to as the State.

IDENTIFICATION OF RECORD

The symbol (R. page no.) shall refer to the record on appeal. The transcript of proceedings previously filed with the Fifth District Court shall be identified in the same fashion as it was in Appellant's Initial Brief served August 18, 1983. The appendix filed herein shall be identified as (A. page no.).

STATEMENT OF THE FACTS

On December 1, 1980, B. Buscher and R. Bosco, deputies of the Volusia County Sheriff's Department prepared an Affidavit for Search Warrant in order to enter and search the home of Mr. Chapin to find "...certain article of evidence, to wit, one knife with a broken blade tip." (A. 1).

Chapin moved to suppress the evidence including a large quantity of marijuana which was discovered upon entry to a locked closet in a back bedroom of his residence on the grounds that the search warrant which was based solely on the affidavit was insufficient in its face (there was) an absence of probable cause and (there was) illegal execution of the affidavit, all of which resulted in a violation of Chapin's constitutional rights afforded to him by the 4th amendment of the U.S. Constitution and Article I, Section 9 of the Constitution of the State of Florida (A. 7).

After two days of hearings and testimony on November 23, 1981, and December 28, 1981, the trial judge entered an Order on February 15, 1982, stating in pertinent part in paragraph 7 that "as a result, the Affidavit for Search Warrant was entered into in good faith and upon probable cause, notwithstanding the fact that microscopic and laboratory tests at a later date demonstrated the officers belief to be in error. However probable cause is the standard test which must be applied and not absolute fact." (A. 7a).

The Fifth District Court stated in its opinion that: "We affirm the denial of Chapin's motion to suppress because we find

the record supports the trial judge's determination that the inaccurate statements made in the search warrant affidavit were made by the police officers in good faith, and not with reckless disregard for the truth. Franks v. Delaware, 438 US 154,98 S.Ct. 2674,57 L.Ed. 2d 667 (1979). These issues were in dispute at the hearing on the motion to suppress and this Court will not substitute its judgment for that of the trial court. DeGoningh v. State, 433 So.2d 501 (Fla. 1983), cert. den. 79 L.Ed. 2d 228 (1984)." (R. 31-32)

Chapin challenges the legal and constitutional validity of this opinion as set forth below will argue that the Appellate Court had a duty to review the entire record and if the trial court's finding was erroneous in light of the constitution principles, set the ruling aside. The Fifth District failed to state in its opinion how the record factually supported good faith by the police officers. Since the Appellate Court made this factual finding, Chapin challenges the correctness of Fifth District Court's conclusion in light of the consititutional law argued below.

In order to understand the incorrect legal conclusion that the record factually supported the trial judge's determination of good faith, it is necessary to recite the facts in the record which clearly evidenced that the police officers acted with reckless disregard for the truth.

On December 1, 1980, the Defendant Chapin was the lessee of a home located at 1023 Calle Grande Drive in the City of Ormond Beach, Florida (F-3). The residence was basically a three bedroom house. The main bedroom was in the front portion of the home with a

a small den adjacent, which leads into a dining room. To the left of the dining room was a kitchen which extended into a Florida room with a fireplace. The remaining two bedrooms were at the opposite end of the house from the Florida room. One of the bedrooms had been converted into an office. At the time of the shooting and the events surrounding the subsequent investigation, the doors to the back bedrooms were locked (F-6-17).

It is undisputed that a shooting took place in the early morning hours of December 1, 1980. In an act of self defense, Mr. Chapin shot an individual who threatened him with a gun while standing on the threshold of the front doorway to Chapin's home. Mr. Chapin was just inside his front door when the shooting occurred (E-168).

At approximately 2:30 A.M., the sheriff's deputies arrived at Mr. Chapin's house and requested entry into the home (F-22). When Mr. Chapin was convinced that the knock on the door was from members of the Volusia County Sheriff's Dept. and not another intruder, he allowed the deputies to come inside (F-22).

Initially, the law enforcement officers did not request him to remain in any particular part of the house (F-24). As the officers began their investigation into the shooting, Mr. Chapin waited on a sofa in the living room (F-24,25). He subsequently telephoned his personal attorney, David Vedder (F-23). The law enforcement officers stayed in the area of the front door of the house where the shooting occurred.

When the deputies arrived at the Chapin residence, they taped off what they considered to be the crime scene. The tape essentially crossed the doorways leading to the living room and

marked off the general perimeter of the living room as it was established by a partition and sofa. (F-27,28,29) A number of law enforcement officers were present during the initial investigation into the shooting, including Deputy Bosco, Deputy Buscher, and Sergeant Mellon, all of the Volusia County Sheriff's Department.

Almost immediately upon arrival, at approximately 2:45 A.M., Sergeant Mellon was informed by the Sheriff's Dept. dispatcher that the Sheriff's Dept. had received information from an anonymous source that there was an undetermined amount of narcotics in the garage of the residence (E-8,11,25-27). When Deputy Bosco arrived at the scene several minutes later, at approximately 3:00 A.M., Sergeant Mellon informed him of the confidential information (E-12, 130-131). Shortly thereafter, the Sheriff's Dept. received a second confidential telephone call at approximately 3:10 A.M. again concerning the presence of narcotics at the Chapin residence (E-26). This information was relayed to the deputies over a public address system contained in Sergeant Mellon's automobile parked in front of the house. Both Deputy Bosco and Deputy Buscher were present to hear the radio dispatch (E-25-27).

Armed with the belief that contraband was located somewhere within the residence and without obtaining a search warrant or advising Mr. Chapin of their purpose, the deputies searched for narcotics in the garage area and other portions of the house with negative results (E-33,34;131). Shortly after 3:00 A.M., the deputies discussed their intentions of searching the locked bedrooms for narcotics (E-16,17). Sergeant Mellon and Deputy Bosco became involved in a dispute as to

whether it would be necessary to obtain a search warrant before prying into the locked back bedrooms at the residence to search for contraband (E-17;40).

At approximately 3:10 A.M., Mr. Chapin's personal attorney, David Vedder, arrived at the residence. After the arrival of Mr. Vedder, the officers became concerned about his presence at the scene. Officer Bosco commented to Mr. Vedder that he was there prematurely (F-32). The investigating officers requested that both Mr. Vedder and Mr. Chapin move from the living room into the den and the two men obeyed the instructions (F-25). The inquest into the shooting continued with Mr. Chapin and Mr. Vedder seated on a couch in the den of the residence. During this time, Mr. Chapin and Mr. Vedder were separted by one of the deputies so that Mr. Chapin was unable to discuss the situation with his attorney in private (F-26,27).

Mr. Chapin became chilled during the early morning hours of December 1, 1980. He requested permission to cross through the area under investigation to obtain warmer clothing from his bedroom but was denied this request (F-28,29). However, his house guest, Gail Higgins, was allowed to penetrate the area. In addition, firemen, paramedics, and other persons were free to move about the house at their leisure (F-30). Mr. Chapin remained in the den between one to two hours (F-30). Throughout this period of time Mr. Chapin obeyed the instructions of the officers and stayed where he was told (E-135). In the spirit of continued cooperation, Mr. Chapin filled out a written statement for Officer Bosco (F-31).

As the investigation continued, it became obvious to the deputies that Mr. Chapin's account of what had transpired was truth-

ful (E-113). In fact, on several occasions the officers reassured Mr. Chapin that he was in no danger of being arrested (E-113). The deputies specifically found no evidence in the house of a scuffle which would have indicated that Mr. Chapin had been dishonest when relating the account of the shooting (E-44).

Although convinced that Mr. Chapin had been honest when explaining the events surrounding the shooting, the deputies were determined to search the entire residence for the presence of contraband. At approximately 4:00 A.M., they decided to obtain a search warrant in the morning and search the house for contraband (E-17,18). When Sergeant Mellon left the scene at about 4:45 A.M., Deputy Bosco reassured him that a complete investigation would be made into the possibility of the existence of contraband in the residence (E-29).

Ultimately, Mr. Chapin was told that he would have to leave the premises by Officer Bosco (F-33). He was informed that he would have to stay with relatives or friends but would be unable to remain in his residence (F-35). Mr. Chapin replied unequivocally that he wished to stay in his own home to protect his valuables. He advised the deputies that he did not want to be expelled from his own home under any circumstances (F-33,34). Although Mr. Chapin could have comfortably remained in his abode out of the way of the investigators, he was abruptly forced to vacate the premises, as was Mr. Vedder, by Officer Bosco (F-36).

Mr. Chapin was bodily removed from his home by Deputy Buscher. Deputy Buscher took Mr. Chapin by the arm and forced him out from the premises into the cold of the evening with no shirt

and no personal belongings (F-37).

At no time did Mr. Chapin consent to the search of the two locked back bedrooms of his house. Prior to leaving the residence, Mr. Vedder in no uncertain terms requested that the officers contact him if it was their intention to obtain a search warrant to explore the entire house (E-122). Additionally, Mr. Vedder demanded that he be present if such a warrant was requested from a neutral and impartial magistrate (E-112). Mr. Chapin ultimately left the premises at approximately 4:30 A.M. (F-41).

At approximately 5:10 A.M., Robert Kropp, the special investigator for the Volusia County Medical Examiner's office arrived at the scene (E-148). He examined the decedant's body while Deputy Bosco was present (E-149). It was not until around 7:30 A.M. that the personnel of the Sanford Crime Lab arrived at the shooting scene to perform their investigation (E-148). At some point during the investigation, and after the members of the Sanford Crime Lab had arrived at the scene, the deputies noticed gouge marks on the wall just inside the front door of the residence (E-148;F-157-158). They discovered a foreign object embedded in a piece of wallboard in the same area (F-138). Neither Deputy Bosco nor Deputy Buscher could identify the foreign object. Specifically, neither deputy could determine whether the object embedded in the wall was the point of a knife blade or some other unknown metallic item (F-164;E-152,153).

Ultimately, a section of the wallboard which contained this unknown metallic object was removed and transported to the Sanford Crime Lab for analysis (E-81). The section of wallboard was identified as "Submission Q-12" and was submitted to the Sanford

Crime Lab at approximately 11:00 A.M. on December 1, 1980 (E-76). It was not until July of 1980, approximately six months after the shooting incident, that the Sanford Crime Lab was actually requested to examine this foreign object and determine what it was. The item was eventually identified as a piece of the decedant's gun sight (E-77,78).

The scene investigation into the shooting incident at Mr. Chapin's residence was concluded at approximately noon on December 1, 1980. The house was locked at that time having been placed under seizure by the Sheriff's Dept. One deputy was left at the scene (E-177).

At approximately 11:00 A.M. on the morning of December 1, 1980, Dr. Joseph Botting, M.D., Volusia County Medical Examiner, performed an autopsy on the decedant (E-52,53). Deputy Bosco was present during the autopsy (E-53). As Dr. Botting performed the autopsy, he informed these present in general terms of his findings (E-66).

Among the wounds the decedant had suffered were wounds to the left hand and right thumb. Dr. Botting indicated that the wound on the decedant's left palm was a very superficial laceration (E-63). As a result of the autopsy, Dr. Botting also determined that the wound on the decedant's right thumb was caused by the jacket of a bullet (E-65,66). Dr. Botting did not find any knife wounds on the decedant whatsoever. At no time did he tell Deputy Bosco that either the wound on the left palm or the wound on the right thumb had been caused by a knife (E-69).

At some time after the autopsy was completed, Dr. Botting

spoke with Deputy Buscher and related his findings. At no time did he tell Deputy Buscher that the wounds to the decedant's left palm and right thumb had been caused by a knife (E-68).

Dr. Botting never informed any deputy from the Volusia County Sheriff's Dept. that the decedant had suffered a knife wound as a result of the events which occurred on December 1, 1980 (E-71).

Following the autopsy, Deputy Bosco and Deputy Buscher with the assistance of Assistant State Attorney George Pappas, prepared an affidavit relevant to the results of the investigation made at the Chapin residence. The purpose of the affidavit was to obtain a search warrant from the Honorable Robert Miller. The deputies intended to obtain a search warrant to gain access to the entire house, including the locked back bedrooms (G-1). Both Deputy Bosco and Deputy Buscher swore under oath that they observed wounds on the decedant's hands which appeared to have been caused by a knife (G-1). Additionally, the deputies swore that the tip of a knife blade was embedded in a wall just inside the front door of the Chapin residence (G-1). The deputies leaped to the conclusion in their affidavit that the so called defense wounds were made by a knife and possibly the very same knife, part of which was allegedly embedded in the wall of the Chapin residence (G-1).

Deputy Bosco and Deputy Buscher made their sworn statements in the Affidavit for Search Warrant after Dr. Botting, who performed the autopsy on the decedant, had failed to locate any knife wounds whatsoever on the body of the decedant (E-68,69). The representations of Deputy Bosco and Deputy Buscher were made even though Robert Kropp, the Chief Investigator for the Medical Examiner's Office, had similarly failed to find any knife wounds whatsoever on the body (E-149).

The findings of both Dr. Botting and Robert Kropp were known to the deputies. Deputy Bosco was present when Investigator Kropp examined the body of the decedant and was also present during the autopsy performed by Dr. Botting (E-149;E-53). Dr. Botting had related his findings to Deputy Buscher prior to the drafting of the Affidavit For Search Warrant. At no time did Dr. Botting or Investigator Kropp ever suggest to Deputy Buscher or Deputy Bosco that the decedant had any knife wounds whatsoever on his body (E-149; 68-69).

In preparing the Affidavit For Search Warrant, Deputy Bosco and Deputy Buscher swore under oath and without hesitation that part of the blade of a knife was found embedded in the wallboard of Mr. Chapin's residence (G-1). It was not until six months after the shooting, however, that the Volusia County Sheriff's Dept. sought to confirm this conclusion by further investigation. In July of 1981, the Sanford Crime Lab was requested to examine "Submission Q-12" and identify it. As a result of the examination, the object was determined to be not part of a knife but a portion of the gun sight of the decedant's weapon (E-77-78).

Based solely on the deputies representations concerning the alleged knife wounds on the decedant's hands and the object embedded in the wallboard, Judge Miller issued a Search Warrant at 1:30 P.M. the afternoon of December 1, 1980 (E-178).

The Search Warrant was executed by Deputy Bosco and Deputy Buscher as well as other members of the Volusia County Sheriff's Dept. at 2:00 P.M. the afternoon of December 1, 1980 (E-178). The

entire house was searched including the locked back bedrooms. Interestingly enough, although the front bedroom remained unlocked throughout the initial investigation, at no time did any deputy or other investigator examine the contents of that room including the contents of certain pieces of furniture contained in the room. At no time did the investigators search this room for a knife (F-122,123). In executing the Search Warrant, the deputies found it necessary to force the lock of one of the back bedrooms with a knife or screwdriver (F-150). To gain access to the other locked bedroom, the deputies forcibly entered by shattering its door on the hinges (E-190,191). Upon their forced entrance into the locked bedrooms, the officers discovered a number of valuable items, including paintings, jewelry, stereo equipment, currency, and firearms, just as Mr. Chapin indicated (E-138,139). Additionally, however, marijuana and assorted narcotics paraphernalia was found in a closet of one of the locked bedrooms (F-146). During the search of the house, the officers also seized a personal address book and an appointment book belonging to Mr. Chapin which had been located in a desk drawer in the unlocked front bedroom. At no time on December 1, 1980, had this front bedroom been locked (F-74). When the deputies finally completed their quest pursuant to the Search Warrant, they had failed to discover a knife with any portion of its blade missing (F-146).

ISSUES ON APPEAL

I. DOES THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW AND CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTION OF THE STATE OF FLORIDA BY FAILING TO ORDER EXCISION OF MISREPRESENTATIONS CONTAINED IN AN AFFIDAVIT FOR SEARCH WARRANT USED TO ALLOW SEIZURE OF EVIDENCE OBTAINED AFTER ILLEGAL ENTRY INTO THE DEFENDANT'S HOME?

(APPELLANT ARGUES AFFIRMATIVELY)

II. WAS THE FIFTH DISTRICT COURT'S ORDER VACATING A SENTENCE FOR AN UNDERLYING FELONY IN A FELONY MURDER CASE ON THE GROUNDS THAT SENTENCING ON BOTH THE FELONY MURDER AND THE UNDERLYING FELONY IS A VIOLATION OF STATE AND FEDERAL DOUBLE JEOPARDY CLAUSES, CONSTITUTIONALLY CORRECT?

(APPELLANT ARGUES AFFIRMATIVELY)

ARGUMENT

I. THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF THE LAW AND CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUION OF THE STATE OF FLORIDA BY FAILING TO ORDER EXCISION OF MISREPRESENTATIONS CONTAINED IN AN AFFIDAVIT FOR SEARCH WARRANT USED TO ALLOW SEIZURE OF EVIDENCE OBTAINED AFTER THE ILLEGAL ENTRY INTO DEFENDANT'S HOME.

Chapin will not waste this Court's time. This case involves a serious infringement of a man's constitutional rights. Protection of these rights means this man's freedom. Violation of these rights means his imprisonment. He is in prison now because the system failed. His right to protection against unreasonable searches and seizures without due process of law was violated. When the system fails one man, the entire system is in dangerof failure. Putting one man in prison unjustly will lead to imprisoning all of us because we are throwing out the basic safeguard which keep us a free people.

The Fifth District Court simply paid lip service to the

United States Supreme Court case of Franks v. Delaware, 438 U.S. 154 (1978). The District Court wrote an opinion which it would not have tolerated as an Order from a lower Court. By stating "the record supports..." without reciting the facts in the record which support a basis for validating this Affidavit For Search Warrant, the District Court takes the easy way out. We require trial Court's to detail their factual findings. Why is an Appellate Court free to leave the law in chaos? This opinion tells other Courts and attorneys nothing about what the Affidavit contained or how it was attached. Petitioner believes there is a very good reason for this. Judge Sharp cannot intellectually support the conclusion that "the inaccuarte statements made in the search warrant were made by the police officers in good faith..." If anyone recites the facts as they were clearly and truthfully set forth in Appellant's Initial Brief below and again in this brief, there is no way to conclude that the entire affidavit was a fabrication given birth by the imagination of police officers who zealously wanted a "drug bust".

Why would the Appellate Court take the easy way out? The answer is simple. We live in difficult times. Our courts are sensitive to a political system which sees too much crime, too many criminals and too little justice. No one can deny Mr. Chapin had a large quantity of marijuana locked in his back bedroom closet. No one can deny that having control of the marijuana in his home is a violation of the law. No one can deny that if properly prosecuted for this crime by due process of law, that society is benefited by Chapin's imprisonment. Thus, a trial judge knowing he had a lawbreaker in front of him weighed the lawbreaker's rights against the

need to protect society from a lawbreaker by overlooking a search warrant affidavit filled with imagination but not facts. The guilty are behind bars and everyone sleeps better.

The District Court fell into the same trap. Judge Sharp cited this Court in DeGoningh v. State, 433 So.2d 501 (Fla. 1983) for the legal proposition that if the trial judge has weighed it out, then the Appellate Court is not going to second guess a trial judge. However, there is an inherent contradiction in the District Court's opinion. If DeGoningh means that whenever a trial judge rules one way or the other on a motion to suppress the Appellate Court cannot review that decision then why bother to look at the record and find (legally) that the record supports the trial judge? The Fifth District knew they had the judicial responsibility to examine the legal basis for the trial court's ruling. An Appellate Court must reverse a trial court when it departs from the essential requirements of due process of law. Likewise, a Supreme Court must reverse an Appellate Court when its opinion departs from those same constitutional requirements.

A. How the District Court Opinion conflicts with State and Federal Constitutional principles and the requirement of due process of law.

Looking carefully at the State's Answer Brief filed below reveals that even the State cannot support the conclusions of the police officers that they needed a search warrant to enter Chapin's home to find a "broken knife". None of the investigation conducted between the police officers led them to believe there was a broken knife locked behind a bedroom door in a home where a shooting had occurred on the front steps. The victim had a gun near his body. The

defendant had his own firearm which he used in self defense. Not even a child would believe that Chapin reasonably cut the victim with a knife at the front door then embedded it in a door frame and then shot the victim while the victim was brandishing his own firearm.

The medical examiner who examined the body and the scene never indicated that any marks on the body were knife wounds. The medical examiner who conducted the autopsy in the presence of one of the affiants prior to the execution of the affidavit never told him there were any knife wounds on the body. None of the investigators who examined the scene indicated that a small piece of metal in the door jam was a piece of a knife. A metal analysis completed by the crime lab months later showed that it was a piece of a gun. The same test could have been conducted the morning of the shooting. But then the officers' clever or ridiculous hypothesis about a missing knife would have been disproven. The magistrate would never have issued the warrant.

Two police officers decided that since an anonymous informant told them there were drugs on the premises, they had a duty to search every corner of the house. Unfortunately, the anonymous information was a phone call from an unidentified source and thus lacked any of the reliability requirements to sustain a warrant. If the truth won't work, the District Court's opinion stands for the legal proposition that imagination will.

The District Court's opinion does not follow Franks or any of the cases cited by Chapin in his Initial Brief.

The United States Supreme Court has held that it the Defendant shows by a preponderance of the evidence that statements contained in an Affidavit were made with reckless disregard for the truth and that after setting aside false material, the Affidavit's remaining

content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded. Franks v. Delaware, 438 US 154, L.Ed 2d 667 at 672 (1978).

The United States Supreme Court predicated this rule upon the language of the Warrant Clause itself, stating:

> ...a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o warrants shall issue, but upon probable cause, supported by Oath or Affirmation...**** "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause', the obvious assumption is that there will be a truthful showing.****"truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true." Supra at 677-678.

The Eleventh Circuit Court of Appeals has followed this rule by stating that an affidavit containing material mis-statements which evidence a reckless disregard for the truth, will void the warrant. U.S. v. Strauss, 678 F.2d 886 (11th Cir. 1982).

This Court has applied the Franks decision in Antone v. State, 382 So.2d 1205 (Fla. 1980). The Court in that case affirmed a conviction because there were remaining truthful matters in the affidavit which after excising the allegedly false statements established probable cause. This is distinguishable from the case before the Court because the bulk of the affidavit rested on the patently false and mis-leading statements in the affidavit.

> The right of the people to be secure in their persons, houses, papers and effects against reasonable searches and seizures...shall not be violated. No warrant shall be issued except upon probable cause, supported by Affidavit, particularly describing the place of places to be searched...and the nature of the evidence to be observed. This right shall be construed in conformity with the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall be admissible in evidence if such articles

of information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.

The United States Supreme Court has held that the Fourth Amendment, in terms that apply equally to the seizures of property and to seizures of persons, has drawn a firm line at the entrance of houses which may not reasonably be crossed without a warrant in the absence of exigent circumstances. Payton v. New York, 445 US 573 (1980). Those exigent circumstances were set forth in Katz v. United States, 389 US 34 (1967) and reaffirmed in Vale vs. Louisiana, 399 US 30 (1970), where the Court held that only in a few specifically established and well-delineated situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it, the burden rests on the prosecution to show the existence of such an exceptional situation. Those situations are officers responding to an emergency or a fleeing felon, the goods ultimately seized were about to be destroyed or removed from the jurisdiction, or there was a consent to the search. None of these situations existed in this case.

If the exceptions to the warrant requirement are not present, then the admissibility of any evidence obtained pursuant to the warrant stands or falls on the legality of the warrant itself and on the affidavit used to establish probable cause for its issuance. An affidavit which contained false statements or statements made with a reckless disregard for the truth will invalidate the warrant. Franks v. Delaware, supra. The affidavit in this case was fabricated by the law enforcement officers involved in the investigation. The purpose and motive was simple. They created a story to convince a

Judge to allow them access to the locked bedrooms for a purpose unrelated to investigation of the shooting incident. None of the true facts known to these officers at the time the affidavit was executed comports with their fictional account.

The following chart is a recapitulation of the facts known by the law enforcement officers at the time the affidavit was executed juxtaposed against the contents of the affidavit itself.

FACTS KNOWN TO THE AFFIANTS (By 1:30 P.M. 12/1/80)	ASSERTIONS CONTAINED IN AFFIDAVIT (Completed at 1:30 P.M. 12/1/80)
The body of a white male was found in the driveway of Defendant's residence.	The body of a white male was found in the driveway of Defendant's residence.
The body was examined in front of the affiant by the Volusia County Medical Examiner at the scene at 5:10 A.M.	No mention is made of a medical examiner investigation, Kropp's examination, or Dr. Botting's autopsy.
An autopsy completed at 11:00 AM that morning revealed death by gunshot. The autopsy was performed while one of the affiants was present. There was a very superficial laceration on the left palm and a wound on the right palm made by a bullet jacket.	No mention is made of the autopsy. Affiants call wound on the left hand a defense wound despite lack of evidence of any struggle. No mention is made of abrasion by bullet jacket. Superficial wound now is said to have been made "possibly by knife".
Neither the medical examiner or the doctor who performed the autopsy either at the scene or at the autopsy, or anytime thereafter, concluded or told the affiants that there were any knife wounds on the body.	No mention is made of medical examiner's scene investigation or autopsy report. The affiants assert their unsupported opinions that these are possible knife wounds.
Investigators from the Sanford Crime Lab arrived at 7:30 AM that morning.	No mention is made of crime lab's participation or fact that identity of metal object is unknown.
Gouge marks and a "metallic object" embedded in the wallboard discovered by crime lab and deputies at 7:35 AM.	What the crime lab scientist described as a metallic object now becomes "Tip of knife blade embedded in wall."

FACTS KNOWN TO THE AFFIANTS	ASSERTIONS CONTAINED IN AFFIDAVIT
The section of the wallboard with the metallic object is submitted to Sanford Crime Lab at 11:00 AM that day.	Analysis of "metal object" not requested until July, 1981, eight months later.

Once the facts are understood in chronological order and there is an appreciation for what the law enforcement officers were trying to accomplish, the total fabrication of the affidavit becomes apparent.

The trial court erred in setting forth the facts in its Order denying the Motion To Suppress. Judge Blount states that a disinterested witness from the crime lab agreed that the metallic object might be a tip of a knife blade. This is not present in any of the testimony in the record. No one from the crime lab ever said this. The only persons hypothesizing that the object was a knife blade were the affiants. The affiants were the same officers that had decided hours earlier to get a warrant and get in those locked bedrooms to find the contraband.

The system of criminal justice cannot work unless the police do their job honestly. In this case, the affiants took their own speculation (far reaching as it was) and elevated it to a sworn fact. The affidavit did not say there was the possibility of a missing knife or knife blade tip. They said unequivocally that the tip of a knife blade was found embedded in the wall.

This is one of the legally fatal problems with the opinions of the trial court and the district court. Both courts state that this portion of the affidavit was a mistake. The trial judge said "The Affidavit For Search Warrant was entered into in good faith and upon probable cause, notwithstanding the fact that microscopic and

laboratory tests at a later date demonstrated the officers belief (that there was a missing knife) to be in error. However, probable cause is the standard test which must be applied and not absolute fact..." This is wrong! Probable cause must be based on a truthful factual showing that there is a basis for issuing the warrant. See page 678 of Franks, 57 L.Ed. 667. As Franks states the information must be believed by the affiant as true. Common sense tells anyone reading this record that the police officers did not believe any of the affidavit. The entire affidavit was contrary to the collected facts revealed by their investigation.

Thus, the trial court clearly misunderstood the law. Unfortunately so did the Appellate Court. Judge Sharp states that the "inaccurate statements made in the search warrant affidavit were made by the police officers in good faith" so the trial judge was correct. Then Judge Sharp cites Franks. The District Court states that Franks holds there is a good faith test. There is a complete absence of such language in Franks.

Petitioner contends that the Fifth District's opinion is in direct conflict with Franks because the U.S. Supreme Court stated that "recklessly false statements" must be excluded from an affidavit when they are revealed.

Justice Blackmun wrote:

> Because it is the magistrate who must determine independently whether there is probable cause (citing cases), it would be an unthinkable imposition upon his authority if a warrant affidavit revealed after the fact to contain a deliberate or reckless false statement, were to stand beyond impeachment.

All Chapin is asking this Court to do is examine the record and conclude that the affidavit did not contain "recklessly false

statements". That is the Franks test. Neither of the lower courts have applied it. Chapin challenges the State in its brief to take the record and show that the "inaccuracies" as they were described by Judge Sharp, are not recklessly false. The Fifth District could not recite the facts and correctly reach this conclusion.

This Court must preserve our system. While the lower courts protected society by allowing a man in possession of marijuana to be convicted, both courts failed to see the danger to society by this otherwise laudable goal. That danger is the overzealous police officer who believes he can bend the truth whenever it is necessary to arrest the criminal. The United States Supremem Court has recognized the danger and the reason for the Fourth Amendment:

> "The point of the Fourt Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. U.S., 333 US 10 (1959).

In Aguilar v. State of Texas, 378 US 108 (1964), the Supreme Court reversed a conviction where the police had presented the magistrate with an affidavit which did not set forth any of the underlying circumstances surrounding the affiant's belief that there were narcotics in the home. The affiant essentially brought a statement to the magistrate and expected the magistrate to accept it on its face. The Supreme Court upheld the Defendant's objection to the illegally seized evidence. The Court cited United States v. Lefkowitz, 285 US 452, and said:

> "An evaluation of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants****are to be

preferred over the hurried action of officers****who may happen to make arrests." Aquilar, supra, at 111.

If these rules are not followed by this Court, then "...the inferences from the facts which lead to the Complaint will not be drawn by a neutral and detached magistrate, as the Constitution requires, but instead by a police officer engaged in the often competitive enterprise of ferreting out crime." Aquilar, supra at 115; citing Giordenello v. United States, 357 US 486.

When the false and recklessly made statements are removed from the affidavit in this case, there are no other statements contained in it to give a magistrate probable cause to issue a warrant. Therefore, under the Franks rule there is no other way that the warrant and subsequent search can withstand constitutional attack.

By failing to follow Franks and the Supreme Court decisions it is based upon, the Fifth District Court's opinion directly conflicts with the search and seizure protections afforded Mr. Chapin under the State and Federal Consititutions and therefore it must be reversed. See also Spinelli v. U.S., 393 U.S. 421 (1969).

ARGUMENT

II. THE DISTRICT COURT'S ORDER VACATING A SENTENCE FOR AN UNDERLYING FELONY IN A FELONY MURDER CASE ON THE GROUNDS THAT SENTENCING ON BOTH THE FELONY MURDER AND THE UNDERLYING FELONY IS A VIOLATION OF STATE AND FEDERAL DOUBLE JEOPARDY CLAUSES WAS CONSTITUTIONALLY CORRECT.

The Information charged Chapin in three separate counts. Count one charged him with violation of Florida Statute 782.04 for murder occurring while he was "engaged in the perpetration of, or attempt to perpetrate the unlawful possession of a controlled substance, to wit: Cannabis, or the trafficking in cannabis..."

On April 14, 1983, Judge Blount entered judgment against Appellant on both counts one and two. The trial court entered sentence on count one (felony murder) for a term of ten years and entered sentence on count three (the underlying felony) for a term of ten years to run concurrent with the sentence in count one.

The imposition of the concurrent sentences violates Chapin's consitutional right against double jeopardy. This situation was addressed by this Court in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). In Hegstrom, the Court upheld separate convictions for a felony murder and the underlying felony robbery but quashed the separate sentences as being statutorily prohibited.

The question of punishment is authorized by the legislature. In Florida, Section 775.021(4) controls this question. This Statute provides:

> "Whoever, in the cause of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode..."

The Court applied this Statute to hold that Hegstrom could not be sentenced on both counts.

It has been held that the convicting and sentencing of a defendant for an offense which may or may not be included in the offense charged depending on the accusatory pleading and evidence, can constitute prosecution for the same criminal offense for purposes of determining whether the defendant has been exposed to double jeopardy. Baker v. State, 425 So.2d 36 (Fla. 5th DCA 1983).

Judge Cobb addressed the problem of distinguishing necessarily lesser included offenses from cases where the issue of

whether one offense is a lesser included offense of another is not as clear (so called, possibly lesser included offenses). In Baker, the Defendant was charged with premeditated murder and with the use of a firearm in the commission of a felony. The Court ruled that F.S. 775.021(4) is not restricted to necessarily lesser included offenses and revised the conviction of the second count.

Whether a completed underlying felony is a necessarily lesser included offense of a felony murder was addressed directly by Judge Cowart in Baker v. State, supra, at 61, when he wrote "...the completed crime, being in gross an alternative element of felony murder, is wholly included in felony murder. Thus, the underlying completed felony is also a necessarily lesser included offense of felony murder."

Whether Judge Cobb's analysis of the review process is used or Judge Cowart's conclusion is accepted, it is clear that the Fifth District Court and the Florida Supreme Court in Hegstrom have concluded that a defendant cannot be sentenced for both a felony murder and the completed underlying felony.

This Court applied Hegstrom to reverse a sentence in an underlying felony in a felony murder situation in State v. Thompson, 413 So.2d 757 (Fla. 1982).

Petitioner is aware of the United States Supreme Court decision of Missouri v. Hunter, 103 S.Ct. 673 (1983), and believes it to be fully distinguishable from these series of decisions because of the legislative intent present in Missouri's statutes differs from Florida Statute 775.021(4).

Appellant is also aware that Florida Statute 775.021(4) has been changed by the legislative effective June of 1983. However

this Statute cannot be applied retroactively without violating the constitutional prohibition against ex post facto laws. Furthermore, it can be argued that the change does not affect the outcome of this case.

This Court has recently heard argument in the case of State v. Snowden, S.C. No. 65,179. Snowden arose out of the Fifth District and held that a trial court erred in convicting and sentencing a criminal defendant for grand theft in addition to third degree felony murder, which was based on the grand theft as the underlying felony. 449 So.2d 332 (Fla. 5th DCA 1984).

The Fifth District Court vacated the lower court's ruling sentencing Chapin to ten years on the underlying felony on the basis of Snowden and certified the question to be of great public interest.

Petitioner argues on the basis of the reasoning set forth in the above cited cases that the certified questions before this Court should be answered in the affirmative and that the dual convictions do violate the double jeopardy clause of the State and United States Constitutions.

CONCLUSION

Petitioner asks this Court to review the entire record of the Fifth District Court and in consideration of that record and the constitutional principles cited herein, reverse the opinion of the Fifth District Court Appeal and order that the portions of the Affidavit For Search Warrant containing the fabrications of the police officers be excised and that the trial court re-hear and review the warrant and search in light of the excised portions. Further, Chapin requests this Court affirm the holding of the District Court vacating the sentence of ten years for trafficking as a violation of the double jeopardy clause.

Respectfully submitted,

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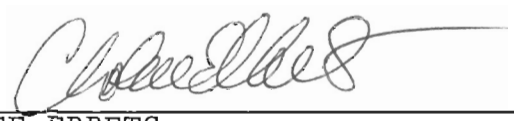
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Sean Daly, Asst. Attorney General, 125 N. Ridgewood Ave., Daytona Beach, FL 32014; and to Frank J. Habershaw, Clerk of the Fifth District Court of Appeal, Daytona Beach, Florida, by mail this 4th day of February, 1985.



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