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.	)	
	)	

PETITIONER/CROSS-RESPONDENT'S REPLY/
ANSWER BRIEF ON THE MERITS

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ARGUMENT

IN REPLY TO THE RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE DISTRICT COURT ERRED IN HOLDING THAT DOUBLE JEOPARDY BARRED CONVICTION AND SENTENCING FOR BOTH THE UNDERLYING FELONY AND A THIRD-DEGREE FELONY MURDER CHARGE BASED ON THAT FELONY IN THE CONTEXT OF A SINGLE CRIMINAL PROCEEDING.

Respondent/cross-petitioner fails to address the specific argument raised by the state in its initial brief, i.e., that under the Blockburger[1] test applied by this court there is no double jeopardy bar to convicting and sentencing a defendant upon the statutory offenses at issue; third-degree murder and drug trafficking. Rather, Chapin simply continues to rely on the decision in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981) to support his claim that he could not be sentenced to both the felony murder charge and the drug trafficking offense.

Chapin presents no legal argument or logical reasoning in support of the Hegstrom analysis nor does he address the obvious anomaly in the law, noted by the state in its initial brief, which mandates that the conviction and sentence for the greater offense in this case be vacated (i.e., drug trafficking) while the conviction and sentence for the lesser statutory offense (i.e., third-degree felony

[1] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 70 L.Ed. 306 (1932)

murder) is allowed to stand.

Furthermore, and most importantly, Chapin fails to rebut the state's contention that under the Blockburger/ statutory elements analysis applied by this court in its most recent decisions addressing the double jeopardy issue raised, neither double jeopardy constraints nor the sentencing proscription of section 775.021(4) Florida Statutes(1983) precludes convictions and sentences for both the drug trafficking and third-degree murder charges at issue. Apparently, the respondent is equally at a loss to explain how, under the Blockburger/statutory elements analysis applied by this court in recent cases,[2] the two offenses at issue here could be considered necessarily lesser included offenses under section 775.021(4) or for double jeopardy purposes. Indeed, as this court has most recently held under the statutory elements test of Blockburger applied in evaluating whether two offenses are indeed the same offense or necessarily included offenses of one another, the specific allegations of the the information in the proof at trial are of no import; rather a reviewing court in determining that question must focus only on the statutory elements of the offense and not on the actual evidence to be presented at trial or the specific allegations in the information. Accordingly, the offenses at bar are not

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[2] State v. Baker, 456 So. 2d 419 (Fla. 1984); State v. Baker, 452 So.2d 927 (Fla. 1984); Scott v. State, 453 So.2d 798 (Fla. 1984); State v. Carpenter, 417 So.2d 986 (Fla. 1982).

considered necessarily lesser included offenses of one another for each is capable of being proven under its respective statute without necessarily proving the other. For example, it is quite possible to prove a third-degree felony murder under the statute without providing drug trafficking since any of a number of felonies will support such a conviction.

SUMMARY OF ARGUMENT

As correctly determined by the district court below the trial court's order denying cross-petitioner's suppression motion is supported by adequate competent and substantial evidence such that this appellate tribunal should not sit as a de novo fact-finder and should defer to the factual determination of the trial court below.

ARGUMENT

THE APPELLATE COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS AT ISSUE WHERE THERE WAS AMPLE COMPETENT AND SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE LOWER COURT'S FACTUAL DETERMINATION THAT CERTAIN STATEMENTS CONTAINED IN THE AFFIDAVIT FOR SEARCH WARRANT WERE MADE IN GOOD FAITH AND THUS WERE NEITHER FABRICATED NOR INCLUDED WITH A RECKLESS DISREGARD FOR THE TRUTH; THIS COURT, LIKE THE DISTRICT COURT, SHOULD REFUSE TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE LOWER TRIBUNAL AS A DE NOVO APPELLATE FACT-FINDER SO AS TO REVERSE THE LOWER COURT DETERMINATION WHICH COMES TO THIS APPELLATE TRIBUNAL CLOTHED WITH A PRESUMPTION OF CORRECTNESS.

Cross-petitioner's argument is nothing more than a resurrected effort to have this appellate tribunal determine a totally factual issue so as to reach a factual conclusion opposite to that of the trial court judge. The district court of appeal has already properly refused to substitute its judgment for that of the lower court as trier-of-fact in the motion to suppress context. The state submits that this court should do the same.

Chapin's argument that the district court inadequately performed its appellate role because it did not reject the clear and unequivocal factual finding made by the trial court after careful consideration of the testimony and evidence presented is totally unsupported. Similarly, Chapin's apparent claims that the district court and specifically Judge Sharp intentionally omitted the "facts" as Chapin interprets them from the opinion in order to cover up an error in the appellate court decision is

as worthless as his assertion that law enforcement officers intentionally "fabricated" and "created a story" in their search warrant affidavit. This baseless assertion has already been rejected as a matter of fact by the trial judge invested with the authority to determine just such a factual issue, after extensive testimony and due consideration of the evidence presented. Chapin's "sour grapes" attack on the factual conclusion reached by the trial court fact-finder was properly rejected by the district court, and this court should likewise refuse to sit as a de novo appellate fact finder.

As this court has consistently held, a trial court's ruling upon a motion to suppress is presumed correct. Medina v. State, 10 F.L.W. 101 (Fla. Jan. 31, 1985); Johnson v. State, 438 So.2d 774 (Fla. 1983); McNamara v. State, 357 So.2d 410 (Fla. 1978). More specifically, the presumption of correctness that attaches to the trial court's ruling is the same as that afforded jury verdicts and final judgments, and a reviewing court should, as did the district court below, defer to fact finding of the trial court and should not substitute its judgment for that of the lower tribunal. DeConingh v. State, 433 So.2d 501 (Fla. 1983). There is no basis for disturbing the lower court's ruling or the district court's affirmance thereof in this cause inasmuch as the determination is amply supported by the unequivocal testimony of the police officer's involved, which testimony reveals that the statements contained in the affidavit for search warrant were neither intentionally fabricated nor included with a reckless disregard for the truth but were instead the result of the officers' good faith investigation and their evaluations based on their experience and the circumstances of the case.

Suffice to say that the lower court judge sitting as the trier-of-fact, after hearing and considering the testimony presented at the motion to suppress hearing, did not believe that the police had been involved in any conspiracy to circumvent Chapin's Fourth Amendment rights. In fact, Judge Blount clearly determined that no such chicanery was afoot, specifically noting in his order denying the motion to suppress that the assertions made by police officers in the affidavit for search warrant were submitted "in good faith and upon probable cause" (R 434).[1] Yet despite this clear factual finding, Chapin persists in rearguing the evidence submitted at the suppression hearing apparently attempting to persuade this court to sit as a de novo fact-finder at the appellate level and to thereby substitute its factual judgment for that of the lower court judge below in finding that the police officers involved in this case either intentionally fabricated certain assertions in the affidavit or that they did so with a reckless disregard for the truth. Yet, the tone and import of Judge Blount's order denying the suppression motion is crystalline in its revelation that Judge Blount was obviously unconvinced that Chapin had met his burden to prove that the police officers who prepared the search

[1] (R 434) refers to the record on appeal; (SR) refers to the supplemental record on appeal; (SSR) refers to the second supplemental record (Volume Five).

warrant affidavit did so dishonestly or without factual support therefore, i.e., with a reckless disregard for the truth.

In fact, the order denying the suppression motion and the factual findings contained therein clearly reflect the fact-finder's determination that there was no intentional misconduct by the police officers who prepared the search warrant affidavit and that in fact the assertions contained in that affidavit were "reasonable in light of their observations" of the scene of the crime and the surrounding circumstances (R 434).

Bernard Buscher, an investigator with the Volusia County Sheriff's Department with eighteen (18) years experience in law enforcement and who had investigated numerous shootings, testified that he arrived at Chapin's home at 3:15 a.m. on December 1, 1980 (R 314-316, 328). Corporal Bosco and other officers of the sheriff's department were also there (R 316). Buscher and Bosco talked with Chapin at the scene, and Chapin stated that he had been awakened by a knock at his window in the early morning by an individual who then shouted that there had been an accident up the street. Chapin became suspicious and armed himself with a 9 mm. pistol and went to the front door (R 322-326). Chapin opened the door, and the individual again told him that there had been an accident but then attempted to draw a weapon from his coat at which point Chapin asserted he fired four (4) times at the man from the front and then kicked the door shut. Chapin told Buscher and Bosco that he then ran back into the bedroom, armed himself with a shotgun and called

the sheriff's department (R 327).

Buscher noted that he found what appeared to be bullet holes outside the house, but he could not tell from where any of the shots had been fired. A shell casing was found on the ground and other spent cartridges were found in Chapin's home (R 328).

A woman, Gail Higgins, told Buscher she had been in Chapin's home at the time of the shooting. She had heard two (2) gunshots and ran toward the door where she found Chapin on one knee with a gun while looking at the front door which was cracked open (R 332-333).

Buscher then noted that a number of observations he made that morning did not fit Chapin's version of the shooting. For instance, the victim (Talbot) had a number of wounds to the rear of his body while Chapin had stated that he had shot Talbot in the front. Buscher also observed a "defense wound" on the palm of one of the victim's hands which appeared to have been made by a knife (R 335). He also explained that in further investigation he observed what appeared to him to be the tip of a knife blade stuck in the wall moulding near the doorway in the house (R 336). Although Buscher admitted that later testing (performed months later) revealed that the knife blade was actually part of a gunsight, he made it clear that at the time of his investigation and contemporaneous with the preparation of the affidavit for search warrant he believed the item to be a knife blade tip (R 336-337).

On cross-examination by the prosecutor, Investigator Buscher reiterated that he observed what he believed to be "defense wounds" on the victim's left palm, which wounds appeared to have been made by a knife, and a photograph of the wound was identified by Buscher (R 352-353). In addition, the investigator reiterated that he had observed certain gouges on the inside wall near the door of Chapin's home which appeared to have been caused by a knife and that he had further observed abrasions on the victim's wrist apparently caused by his watch being torn off (R 353).

Each of these observations aroused Buscher's suspicions that Chapin's account of the shooting might not have been complete and that some form of altercation between the victim and Chapin may have occurred. Buscher's incredulity was further heightened by the discovery of a piece of metal embedded in the gouges in the wall near the doorway of the home which, when considered by Buscher in light of the apparent defense wound on the victim's hand and the other inconsistencies in Chapin's story, brought him to the belief that the piece of metal was in fact the tip of a knife blade which might have become embedded in the wall during a physical confrontation between the victim and Chapin (R 356-357).

Buscher further noted that he was unable to question Chapin about the inconsistencies between his claim that there had been no physical contact with the victim and the evidence which Buscher had observed including the "knife tip", defense wound on the victim's hand, and gouge marks on the wall,

because Chapin had already left the scene (R 355-356). Buscher then, piecing together the facts as he observed them, came to the conclusion that an altercation had taken place involving a knife (R 356-357). Accordingly, the police searched that area of the home to which they had been afforded entry but were unable to find any apparently damaged knife; they sought a search warrant to allow a search of those bedrooms of the house which had not to that point been examined (R 357-358).

Buscher was adamant that based on his examination of the inside wallboard of the house he believed the small piece of metal discovered therein to be the tip of a broken knife blade, and he made it clear that although the Sanford Crime Lab ultimately determined that the object was not the itp of a blade, that information was not available until well after the affidavit was completed and the search warrant obtained (R 356-357, 362-364).

Deputy Sheriff Bosco, who was also present at the shooting scene, noted that both he and Buscher perceived the metal piece found in the wallboard gouges to be the tip of a knife blade. He further noted that based on his personal experience and observations of the victim's palm wound, he believed the wound could have been made by a sharp object, possibly a knife (R 150-153). Indeed, the medical examiner who performed the autopsy on Talbot noted that the type of wound on the palm, which he described as a laceration, could possibly be caused by a knife although he expressed no such opinion in this cause (R 69-71).

Bosco, like Buscher, noted the inconsistencies between Chapin's story and the evidence observed as the basis for his suspicions. He too explained that Chapin had informed him that no physical contact had occurred between himself and the victim, yet the victim's palm had what appeared to be a laceration or defense wound, and the victim's watch had been ripped from his wrist and the band broken (R 165-166). In addition, Chapin had indicated that he had fired into the front of the victim; however, bullet entrance wounds were found on Talbot's back (R161,163). These factors, together with the gouge marks on the interior wall of the home and certain inconsistencies between Ms. Higgins' and Chapin's statements, had led him to believe that the cross-petitioner had not told him the full story and that there was a possibility that a physical altercation or scuffle had taken place between Chapin and the victim and that a knife had been involved in that altercation and in inflicting the laceration/defense wound on the victim's left arm. Since no such knife was observed in that portion of the home investigated by police, the decision was made to obtain a search warrant for the bedrooms based on the information procured (R 183-190).

Given the testimony of Buscher and Bosco there is no basis for overturning the lower court's denial of Chapin's motion to suppress. As previously noted, the fact-finder's ruling is clothed with a presumption of correctness under which this Court must affirm the lower court's decision if there is any basis for doing so after drawing all inferences and factual

conclusions in favor of that finding.

Clearly, in this case the judge sitting as fact-finder could well have determined that Investigator Buscher and Deputy Bosco, based on their observations of the physical evidence as well as their experience in such investigations, believed that a knife had been utilized in a possible altercation between Chapin and the victim and that the evidence discovered (the gouges and apparent tip of a knife wedged in the wallboard inside the house, the defense wound/laceration on the victim's palm, the watch torn from the victim's wrist, etc.) was inconsistent with Chapin's story of a non-physical contact encounter in which he shot the victim in the front of his body. It is equally clear that implicit in the judge's rejection of Chapin's suppression motion is his factual determination that the allegations included in the affidavit were not made in bad faith or with any intent to obtain a warrant through deliberate falsehood or with reckless disregard for the truth. Indeed, Judge Blount's order specifically finds that the assertions included by the police officers in their affidavit were entered into in good faith and upon probable cause (R 434). Accordingly, this court should not now substitute its own factual judgment for that of the trial court and thus second guess the good faith investigative work done by the police officers in this cause. At most, the evidence revealed an innocent or negligent mistake of fact (discovered only through subsequent laboratory miscroscopic analysis) and not a deliberate falsity or reckless disregard on the part of Buscher or Bosco; accordingly, there

is no basis for reevaluating the property of the search warrant. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed 2d 667 (1978); West Point-Pepperell, Inc., v. Donovan, 689 F.2d 950 (11th Cir. 1982). In this case, the trial court clearly determined the Appellant had failed to meet his burden of proof that the statements at issue were incorporated by the police officers involved in a deliberate attempt to mislead or with a reckless disregard for the truth, and given that finding it is clear the denial of Chapin's motion to suppress should be affirmed. United States v. Strauss, 678 F.2d 886 (11th Cir. 1982); Antone v. State, 382 So.2d 1205 (Fla. 1980); Francis v. State, 412 So.2d 931 (Fla. 1st DCA 1982); see also, Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 102 S.Ct. 2211 (1982).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District, and reinstate the conviction and sentence for drug trafficking but affirm the disctrict court decision in all other respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner/Cross-Respondent's Reply/Answer Brief on the Mertis has been furnished, by mail, to Chobee Ebbets, Esquire counsel for respondent/petitioner, at P. O. Box 390, Daytona Beach, Florida 32015, this 25th day of February, 1985.

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