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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	
Petitioner,	
-VS-	CASE NO. 66,315
GENE MOORE,	
Respondent.	

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RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This appeal brings before the Court the certified question: Can a conviction be sustained which is based **solely** on recanted Grand Jury testimony of witnesses who admit that they perjured themselves when giving the Grand Jury testimony relied upon to sustain the conviction. In broader terms, this appeal brings before the Court the question of whether, in trial of a criminal case, an uncorroborated prior inconsistent statement, that is rendered admissible as substantive evidence by the **Florida Evidence Code,** can serve as the **sole** substantive evidence of an essential element of the crime. It is not a question of the admissibility of such evidence in the first place, but of its sufficiency standing alone to support proof, at conclusion of trial, of any essential element of the crime charged.

In this case the element sought to be proven by uncorroborated, inconsistent prior statements under oath is that of identity. The procedural history and factual predicate for this appeal are as follows.

Respondent Gene Authur Moore was indicted by the Palm Beach County Grand Jury for murder in the first degree. The lead police officer who investigated this murder case had obtained statements from four alleged eyewitnesses who all identified respondent as the person who committed the murder. Two of the four testified before the Grand Jury when the Grand Jury handed

down an indictment against Gene Moore for first degree murder. But after the indictment was handed down and before trial, in pre-trial defense depositions of the four "eyewitnesses," all four of the alleged witnesses recanted their prior statements, saying they were not present at the murder and did not see Gene Moore or anyone else commit it. The two who had testified before the Grand Jury recanted their Grand Jury testimony, too. **State v. Moore,** 424 So.2d 920 (Fla. 4th DCA 1982), at 920-921.

Respondent Moore moved pre-trial to dismiss pursuant to **Rule 3.190(c)(4), Florida Rules of Criminal Procedure.** At hearing on that motion the State conceded to the trial court that, in light of the four witnesses having recanted their eyewitness identification testimony, there was **no evidence** indicating Gene Moore was the murderer, and that, under the present status of the law, the trial court was compelled to dismiss -- but advised the court the State would appeal the dismissal nonetheless. Based on the State's concession, the trial court dismissed. The State appealed, won on appeal, and the case was remanded for trial. **State v. Moore**, id.

On appeal the Fourth District Court of Appeal reversed, holding that the use of certain prior inconsistent statements given under oath, as substantive evidence, is now authorized by the **Florida Evidence Code, Section 90.801(2)(a), Florida Statutes (1981).** That statute provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.
>
> **Florida Statutes, Section 90.801(2)(a), (1981)**

The Fourth District construed that provision to authorize the use of grand jury testimony of a witness as substantive evidence of guilt, and not just for impeachment purposes. **State v. Moore,** 424 So.2d at 921-922.

The case was remanded for trial, and at the same time Respondent Moore sought certiorari review by the Florida Supreme Court of that decision.

In the certiorari review pursued by Respondent Moore, the Florida Supreme Court affirmed that decision.

> We therefore hold that under section 90.801(2)(a), Florida Statutes (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact.
>
> **Moore v. State,** 452 So.2d 559 (Fla. 1984)

Meanwhile, on remand at trial by jury Respondent Gene Moore was convicted of second degree murder. From that conviction an appeal was taken to the Fourth District, resulting in the post-

trial appellate decision now on review, in which the certified question outlined above has been put to this Court.

Following the Fourth District's original remand for trial, prior to trial commencing Respondent Moore filed several motions. One was a motion to suppress the Grand Jury testimony of the two witnesses who testified before the Grand Jury and later recanted it when deposed by defense counsel. (TR 956) In that motion and supporting memorandum of law filed with it, Respondent Moore sought suppression of the Grand Jury testimony not because it had been recanted, but because the State -- after remand of the **Moore** case for trial -- had speedily prosecuted the two witnesses for perjury by inconsistent statements, and had entered into negotiated guilty pleas with the two witnesses. When the two witnesses plead guilty to perjury, pursuant to their agreement with the State, the judge who accepted their pleas required them to testify under oath in open court as to which of their inconsistent statements were true, which false. Both testified at time of entering their guilty pleas that their Grand Jury testimony had been false, and their later testimony in depositions was true. Both testified that, in fact, they had not been present at the murder, had not been witnesses to it.

Respondent Moore's position, in his pre-trial motion, was that use of the Grand Jury testimony by the State at Gene Moore's trial would constitute knowing use of perjured testimony, and,

since the State -- indeed, since the same prosecutor -- had stood silent before the other judge when the witnesses testified they perjured themselves before the Grand Jury, and the State allowed that court to accepted their guilty pleas based on that testimony, the State now was collaterally estopped from contending that the Grand Jury testimony is not only true, but is sufficiently reliable standing by itself to constitute proof beyond a reasonable doubt of Gene Moore's identity as the murderer.

However, the judge in Gene Moore's case denied suppression of the grand jury testimony on those grounds. (TT 23-28, at 28)

Respondent Moore also filed another motion to dismiss pursuant to **Rule 3.190(c)(4), Florida Rules of Criminal Procedure,** on grounds the **sole** evidence the State had to present at trial, on the fundamental issue of the identity of the murderer, was the recanted Grand Jury testimony of two witnesses who would testify at trial as they had in depositions, and as they had before the judge who later accepted their guilty pleas to perjury. The defendant's position was that, at trial, the prior inconsistent statements were "admissible" in evidence pursuant to the Fourth District's ruling in the pre-trial appeal, in **State v. Moore,** supra, but nonetheless those statements could not constitute the **sole proof** of an essential element, and since the State had no corroborating evidence on the issue of identity of the murderer, the State necessarily would not be able to prove up their case at

trial. Moore contended that, with those facts, the case should be dismissed now. (TT 1003-1012)

The trial judge, by written order, denied the motion to dismiss, and rejected the argument that the Grand Jury testimony cannot serve as the **sole** evidence of an essential element required to be proved at trial. (TR 1019-1022) The trial judge said,

> In reliance upon **State v. Moore,** supra, this court finds that the prior inconsistent grand jury testimony of Tumblin and Price, even standing alone without other corroboration, is legally sufficient to make out a prima facie case of guilt against Gene Moore on his Motion to Dismiss.
>
> * * * The petit jury in the trial of this case will have a difficult, if not impossible, task. They will be asked to decide if the grand jury testimony of Tumblin and (Price) Copen inculpating Gene Moore is true and trustworthy enough to constitute sufficient evidence to convict Moore of a capital crime beyond a reasonable doubt, subjecting him to the supreme penalty of death in the electric chair, even though Tumblin and (Price) Copen have since judicially confessed that their grand jury testimony inculpating Moore was false and perjured. * * * It is noted in **Webb v. State,** 426 So.2d 1033 (Fla. 5th Dist. 1983), that there was other evidence presented at trial in corroboration of the victim's recanted grand jury testimony. See also **State v. Maestas,** 584 P.2d 182 (N.M. 1978), affirming a conviction of aggravated battery by holding that the victim's prior inconsistent statement had been corroborated; but see **Marquette v. State,** 541 P.2d 1099 (Nev. 1975), where the court rejected corroboration that did not connect the defendant with the crime itself.
>
> Therefore, based on the mandates of **State v. Moore** and **Webb v. State,** supra, this court

> feels constrained to deny the defendant's Motion to Dismiss. But see **California v. Green**, 90 S.Ct. 1930 (1970), where the Supreme Court strongly hinted that prior inconsistent statements may not be sufficient substantive evidence by themselves to sustain a conviction. Also see **United States v. Orrico**, 599 F.2d 113 (6th Cir. 1979), where a conviction based solely on a prior inconsistent statement was reversed; * * *
>
> (TR 1020-1021)

After that the case went to trial by jury, on April 26, 1983, and at that trial the Grand Jury testimony of the two witnesses, Ms. (Price) Copen and Mr. Tumblin, was used by the State to establish the identity of Gene Moore as the person who committed the murder. However, before their Grand Jury testimony was read to the jury trying Gene Moore's case, both Ms. (Price) Copen and Mr. Tumblin testified to the circumstances in which they came to give their prior statements to the Grand Jury, and testified that their Grand Jury testimony had been false, (where they had said they saw Gene Moore commit the murder), and their testimony in deposition and again in court now was true (in which they said they had not been there and had not seen the murder). (TT 339, 440-441) The two witnesses told in some detail how they came to give that particular testimony to the Grand Jury.

Concerning the circumstances of her giving such testimony to the Grand Jury in the first place, Ms. (Price) Copen testified she had been interviewed by the investigating officer about a dozen times, had been taken by him to the crime scene, and had

been shown by him crime-scene photographs of the victim, all before she gave her statement incriminating Gene Moore. (TT 442, 444, 446) She also had been threatened by him with prosecution herself, she testified, so eventually she just fed back the officer's own information to him, and at the Grand Jury she merely had repeated the story again just as she understood the officer wanted it. (TT 434-436, 435, 446-447) Later she plead guilty to perjury for what she did, and was on probation for it right now, and, as she understood her position now, it was for giving false testimony to the Grand Jury that she had plead guilty, and for which she was on probation. (TT 434, 437, 440)

Mr. Tumblin also testified to the circumstances leading up to his testimony before the Grand Jury. He told about numerous interviews of him by, and phone calls to him from, the same officer, and also about the officer taking him to the crime scene too, all before he ever gave his statement incriminating Gene Moore. (TT 326-329) Furthermore, before he ever incriminated Gene Moore in his original statements to the officer, the officer had told him that Gene Moore and the girls being interrogated already had implicated him (i.e., Tumblin himself) as the guilty party. It was only after Tumblin later gave a statement implicating Moore that he learned that that was a false story entirely made up by the officer. (TT 329-330) And when Tumblin did go before the Grand Jury, it was the same officer who brought him

there and talked with him just before he walked in the door to testify. (TT 332)

Tumblin also testified that he had wanted to tell the truth at the Grand Jury, but was too scared to do it. (TT 337) He testified at trial that the facts he did given before the Grand Jury, had all been learned from the officer who had interrogated him. (TT 326-329)

Mr. Tumblin testified he has never been threatened by Gene Moore or any member of Moore's family. (TT 332-333)

Later on in the State's case, after the above testimony by Ms. (Price) Copen and Mr. Tumblin, their prior inconsistent statements before the Grand Jury were read to the jury. (TT 583-617)

The police officer referred to in their testimony, Sgt. Ralph Franklin of the Riviera Beach Police Department, also testified for the State at Gene Moor's trial. As to his contacts with Ms. (Price) Copen, he admitted that before taking her statement he "briefed her what the interview was about," (TT 502) and presented her with "all the facts" in his briefing (TT 503). He interviewed her five or six times (TT 544), plus contacted her by phone and stopped her on the streets to talk with her several times (TT 544-545). He also took her to the crime scene, i.e., to the parking lot where the murder occurred, (TT 503) and once

they got there he, not she, picked out the parking lot where it happened (TT 527).

As to his contacts with Mr. Tumblin, the same officer testified he also interviewed Tumblin a number of times, sometimes when Tumblin was intoxicated (TT 517, 545), and even tape-recorded three of the interviews (TT 546-547). He also reviewed the facts with Mr. Tumblin before taking his statement, too (TT 543). He told Tumblin how he could spend the rest of his life in prison unless he told the truth (TT 541-542). The officer indicated specifically to Tumblin what he wanted to find out from him (TT 543). The officer initially denied, on the stand, telling Mr. Tumblin a made-up story about how Gene Moore had given a statement fingering Mr. Tumblin as the triggerman; but, later in trial, admitted he had said it, "Not in those exact words, but I said something similar to that." (TT 554)

The officer also testified that in fact he did transport Mr. Tumblin to the Grand Jury, and did talk with him in a little room outside the Grand Jury room just before Tumblin went in to testify. (TT 548)

Finally, and significantly for purposes of this appeal, the officer testified that, as result of his work as head investigating officer on this case, he had come up with absolutely no scientific evidence, absolutely no physical evidence, and abso-

lutely no crime scene evidence that indicated the identity of the person who committed this murder. (TT 548)

* * *

At conclusion of the State's case when the State rested, the defense also rested without presenting any witnesses. Respondent Moore moved for a directed verdict of acquittal. (TT 629-637) His grounds for acquittal were:

(1) No live witness ever took the stand and said they saw Gene Moore commit this murder, or said Gene Moore admitted doing the murder, or testified to any circumstantial, scientific, or crime scene evidence that in any manner addressed the issue of identity of the perpetrator of the crime.

(2) The now recanted Grand Jury testimony was totally uncorroborated on the issue of identity, and thus cannot serve as a basis for proof of any essential element of the crime, i.e., standing alone it cannot constitute proof beyond a reasonable doubt.

(3) The two witnesses who gave the Grand Jury testimony have been convicted for perjury, and have plead guilty with a judicial confession that their Grand Jury testimony was false; and they testified at trial that their later testimony in depositions saying they were not present at or witness to the murder was true; and in that setting the Grand Jury testimony, though admissible as substantive evidence, still could not constitute proof beyond a reasonable doubt of identity, uncorroborated.

(4) Principles of collateral estoppel prevent the State being allowed to rely on the Grand Jury testimony as their sole substantive evidence on the identity issue, since the State stood silent when the judicial confessions were given, and allowed the guilty pleas to be accepted by another judge based on those facts.

(5) It would be a fundamental violation of due process to allow a conviction to result from such evidence at this.

(6) In any event, the physical evidence at the crime scene, and the time sequences involved, were impossibly inconsistent with the version of events related in the recanted Grand Jury testimony of the two witnesses. (TT 630-637)

The trial judge denied the motion for directed verdict of acquittal, but made his feelings rather clear as to the questionable nature of the State's case, saying:

> * * * were it not for the case of State versus Moore, 424 So.2d 920 and Webb versus State, 425 so.2d 19 -- 920 I would grant your motion so fast it would make your head swim because prior to those two cases and prior to the adoption of the new Florida Evidence Code, no legal scholar could disagree that the State had not made out a prima facie case. * * * I find that I am compelled to follow Webb versus State, 426 So.2d 920 because that case did talk about some corroboration to some other evidence to corroborate the recanted grand jury testimony of the victim of that sexual battery.
>
> The one thing that bothers me most about the case and it is unlike Webb versus State. See, in Webb versus State the victim in that case had not pled guilty to perjury before the

> grand jury. That is the only distinguishing characteristic we have before me today and Webb versus State.
>
> The case before me today, **the only evidence that the State can point to to convict the Defendant is the sworn testimony of Copen and Tumblin given to the grand jury,** which after the Moore decision came down they pled guilty in front of Judge Mounts and admitted, under oath, that that testimony was false and perjured.
>
> Judge Mounts accepted that plea of guilty and found that they had committed perjury by an inconsistent statement. He did not make a finding that their grand jury testimony was false. He merely found that they were guilty of perjury by a contradictory statement, so when they plead guilty, that was a judicial proceeding. That was a judicial confession which is altogether different then an extra judicial confession and they confessed to that in Court, under oath. That was an admission against penal interest, which to some extent corroborates their testimony or would corroborate their testimony given in deposition and given in this jury trial, but that is a question of fact for the jury to decide.
>
> (TT 638-639) (emphasis added)

During the charge conference, Respondent Moore made two special requests for jury instructions. One related to instructing the jury to use great caution before convicting a person based on a recanted inconsistent statement, which recanted statement, if believed true, constituted an "accomplice's" statement. (TT 676-679) The court denied that instruction. (TT 679)

The other would have instructed the jury that they cannot base a conviction solely upon a prior inconsistent statement if they find it is uncorroborated by any other evidence, but,

rather, they must find from all the evidence that the prior inconsistent statement and its corroborating evidence together are proof beyond a reasonable doubt, before they can return a verdict of guilty. (TT 679-680) The court denied that instruction, too. (TT 680)

Defense counsel made it clear he wanted one or the other of the points raised in the two proposed instructions to be given to the jury, and if the wording proposed was not satisfactory to the court, he would redraft the proposed instructions in a manner satisfactory to the court (TT 679-680). The court denied instructions on those points, period. (TT 676-680)

The jury convicted Respondent Gene Moore, not of first degree murder, but of second degree murder. (TR 1044)

Respondent Moore filed post-trial motions, including a renewed motion for judgment of acquittal (TR 1045-1055), and memorandum of law, raising the same issues again, and a motion for new trial (TR 1056-1061), challenging the sufficiency of the evidence as well as the correctness of the court's rulings admitting the Grand Jury testimony in evidence as the sole substantive evidence on the issue of identity, and its rulings relying upon them at trial as the sole substantive evidence on the issue of identity. Those motions, of course, were denied.

From his conviction a direct appeal was taken by Gene Moore to the Fourth District Court of Appeal, resulting in reversal of

his conviction. The Fourth District held that the trial court erred in denying Respondent Moore's motion for judgment of acquittal made at close of the State's case. The Court followed the earlier decisions in **Moore** concerning the "admissibility" of evidence of prior inconsistent sworn testimony as "substantive" evidence, but concluded that the "sufficiency" of such evidence to prove an essential element of a crime was a question of first impression in Florida law. And the Court reasoned that since the provision of the **Florida Evidence Code** that rendered such evidence admissible as substantive evidence was itself based upon the same provision in the **Federal Evidence Code,** the Fourth District should follow Federal court interpretations in the absence of any Florida state appellate authority on the matter. Then the Court made two findings, one general, the other specific to the facts of this case. The general finding went as follows:

> Since no Florida precedent exists on the sufficiency of the evidence before this Court, we choose to follow the conclusion reached by the Sixth Circuit Court of Appeal in **United States v. Orrico,** 599 F.2d 113 (6th Cir. 1979), that prior inconsistent statements standing alone do not constitute sufficient evidence to sustain a conviction.
>
> **Moore v. State,** at p. 4 of slip-sheet opinion

Following that general conclusion of law, the District Court made further findings in regard the unique facts of this specific case on review.

> Additionally, this case involves not just prior inconsistent statements, but prior inconsistent statements which the witnesses admitted in their perjury trial had been false. We hold that in the absence of some competent corroborating evidence the admittedly perjured testimony of the witnesses did not constitute sufficient competent evidence to support appellant's [i.e., Respondent Moore's] conviction of second degree murder.
>
> **Moore v. State,** at p. 4 of slip-sheep opinion

The Fourth District went on to find the question raised here to be one of great public importance, and so the District Court certified the following question to the Florida Supreme Court:

> WHETHER A CONVICTION CAN BE SUSTAINED WHICH IS BASED SOLELY UPON RECANTED GRAND JURY TESTIMONY OF WITNESSES WHO ADMITTED THAT THEY PERJURED THEMSELVES WHEN GIVING THE TESTIMONY RELIED UPON TO SUSTAIN THE CONVICTION.

POINT ON APPEAL

A CONVICTION CANNOT BE SUSTAINED WHICH IS BASED SOLELY UPON RECANTED GRAND JURY TESTIMONY OF WITNESSES WHO ADMIT AT TRIAL THAT THEY PERJURED THEMSELVES WHEN THEY GAVE THE PRIOR TESTIMONY RELIED ON TO SUSTAIN THE CONVICTION.

In the pre-trial appellate proceedings in this case, **State v. Moore,** 424 So.2d 920 (Fla. 4th Dist. 1982), and **Moore v. State,** 452 So.2d 559 (Fla. 1984), the Fourth District and the Florida Supreme Court construed **Section 90.801(2)(a), Florida Statutes (1981),** to authorize the use of the witnesses' recanted grand jury testimony as substantive evidence of guilt and not just for impeachment purposes. The two courts ruled that, since it was admissible, the trial court had erred in finding there was "no evidence" on the issue of identity, thus erred in dismissing the case pre-trial. However, neither the Fourth District's original decision in **Moore,** nor the Florida Supreme Court's, says anything about the **sufficiency** of such evidence, standing alone, to serve as proof of an essential element to be proved by the State at trial. That issue simply was not yet raised by the facts, was not yet before the courts for decision, and consequently the issue of the sufficiency of such evidence at trial is nowhere addressed in those appellate decisions. Admissibility as substantive evidence, not the sufficiency of such evidence, was ruled upon in those appeals.

But that is not to say there was no case authority dealing with the issue of its sufficiency in a authoritative manner, because Section 90.801(2)(a), as with many other provisions in the **Florida Evidence Code**, was patterned after the same provision in the **Federal Rules of Evidence.** And, as the Florida Supreme Court said in this case:

> Because section 90.801(2)(a) was patterned after Federal Rule of Evidence 801(d)(1), we should construe the former in accordance with federal court decisions interpreting the latter. See, e.g., **Hightower v. Bigoney**, 156 So.2d 501 (Fla. 1963).
>
> **State v. Moore,** 452 So.2d at 562.

Also see: **Brown v. State,** 426 So.2d 76 (Fla. 1st Dist. 1983), at 88 n.19.

Federal court interpretations of this provision support the proposition that grand jury testimony may be introduced as substantive evidence, just as held by the Florida Supreme Court and the Fourth District in the earlier **Moore** decisions -- yet once admitted as substantive evidence it still may be found insufficient to support proof of an essential element of an offense, when uncorroborated by any other evidence.

Of the same provision in the **Federal Rules of Evidence,** Weinstein has this to say:

> The fact that the prior statement is admitted and given substantive effect does not mean that it will suffice as the sole basis for a conviction. The question of the sufficiency of the evidence remains, "for the due process

> clause of the fourteenth amendment may require a minimal standard of evidentiary support to sustain a conviction."

> **4 Weinstein's EVIDENCE Section 801.89**

In **United States v. Orrico,** 599 F.2d 113 (6th Cir. 1970), a Federal court did find that such evidence, though admissible as substantive evidence under this provision of the Federal Rules of Evidence, was not -- was not -- sufficient standing alone to support a conviction.

Orrico had been convicted by jury of participation in a scheme to convert funds belonging to a corporation in which he was an officer. The strongest evidence the government could offer was a prior inconsistent statement by one of the government's own witnesses. In grand jury testimony (as in the instant case), that witness had stated that Orrico had told him to misdirect a particular check, but in his testimony at trial he stated he could not remember whether Orrico had told him any such thing.

The Federal rule, of which the Florida rule is a copy, would seem to suggest that Orrico could properly be convicted on the basis of what the government's witness said to the grand jury. All the same, the Sixth Circuit Court of Appeals reversed his conviction and remanded for entry of a judgment of acquittal. The court reviewed the evidence against Orrico in light of the legislative history of Rule 801(d)(1)(A), then held:

> [W]hen such evidence is the only source of support for the central allegations of the charge, especially when the statements barely, if at all, meet the minimum requirements of admissibility, we do not believe that a substantial factual basis as to each element of the crime providing support for a conclusion of guilt beyond a reasonable doubt has been offered by the Government.

United States v. Orrico, 599 F.2d 113 (6th Cir. 1979)

The legislative history of the rule involved, as reviewed in the **Orrico** decision, renders it quite clear that this is a correct interpretation of the legislative intent of this provision of the evidence code.

The State in its brief on the merits takes a curious position on **Orrico** precedent. The State gives no reasons for rejecting **Orrico,** cites no conflicting case authorities at all, but merely dismisses **Orrico** with the the unsupported statement that the **Orrico** decision is "reasonably imaginable" but the facts in that case "do not justify that court reaching the result which it did," and the adage that "hard facts make bad law." Then the State says, "In any event, the decision is not binding on this Court." (Petitioner's Brief on the Merits, at page 9).

The State offers a broad and sketchy general category of argument for rejecting **Orrico.** Like the plaster, paint and trimming on a building, it adds interest and color, but it cannot sustain much weight. The solid framework of an argument must be constructed out of facts, logic, and legal authorities or it will

not stand up to pressure. The State's argument has no framework at all. It buckles under the pressure of this Court's own earlier ruling in **Moore,** where this Court acknowledges that Federal Court interpretations of this rule of evidence do control, since the Florida rule is an adaptation of that Federal rule and there are no Florida appellate decisions on the matter. It buckles under the heavy facts in this case, and under the logic of the Fourth District's ruling appealed here.

The **Orrico** court also based its decision on constitutional mandates as well as on the legislative intent and history of the rule. The court cited to **California v. Green,** 399 U.S. 149 (1970). In **Green** the U.S. Supreme Court upheld a California statute similar to the Federal and Florida rule, but strongly hinted that such evidence might violate due process standards in some cases.

The Fourth District's specific findings relating to the specific facts of the present case, seem to hinge upon that same Due Process element, beyond the general finding and general proposition of law that prior inconsistent statements do not constitute sufficient evidence, standing alone and uncorroborated, to support proof of an essential element of a crime.

The only authority the State does urge upon this court as a basis for rejecting the **Orrico** precedent, is what the State refers to as the "somewhat analogous situation" in **Brown v.**

State, 413 So.2d 414 (Fla. 5th DCA 1982). The **Brown** precedent does not apply, for several reasons. To begin with, the **Brown** decision involves a different exception to the hearsay rule, and a different subsection of the **Evidence Code** provisions than is involved in the present case. **Brown,** as noted in the decision itself, involved **Section 90.801(2)(c),** which makes a hearsay exception to the hearsay rule for prior inconsistent statements which are "ones of identification of a person **made after perceiving him."** **Brown** relates to prior photo and line-up identifications. The present case involves incriminating statements implicating the defendant, naming him, but not photo or line-up or in person identifications of him.

For another thing, **Brown** did involve corroborating evidence tending to show the truthfulness of the original statements of the witnesses, for, as the appellate court noted in their decision, there was evidence of coercion of those witnesses subsequent to their identification of Brown -- coercion of them by Brown and members of his family. Unlike in the present case were the witnesses' prior inconsistent statements were wholly uncorroborated, in **Brown,**

> * * * there were circumstances the jury could have relied upon in choosing to believe the Boatmans' earlier identifications of Brown as one of their assailants, rather than their in-court denials.
>
> **Brown v. State,** id., at 415.

The present case involves totally "uncorroborated" prior inconsistent statements. The lead officer who prosecuted the case so testified. The trial court so held. The Fourth District so held. And the State nowhere contends in its brief on the merits anything to the contrary. The facts in **Brown** are completely distinguishable. The issue in **Brown** was significantly different. **Brown** is, at best, "somewhat analogous," but not controlling.

For still another thing, the prior inconsistent statements in **Brown** were not later the subject of a perjury charge and conviction, and, perhaps more significantly, the witnesses in **Brown** did not make judicial confessions against interest admitting, at their own court proceedings for purposes of guilty pleas to perjury, that their prior inconsistent statements were false testimony.

Along the same lines, there was not testimony in **Brown** as there was in the present case, from both the two witnesses whose prior inconsistent statements were in issue, and from the interrogating police officer himself, revealing threats and coercion to get the witnesses to give their prior statements in the first place, and revealing how they could have done precisely what they told the jurors they did do, that is, get all the facts from the police officer himself and then merely feed back to the officer his own facts.

The trial court relied upon certain authorities for its rulings which the State does not raise now. Respondent Moore will address those authorities here, too.

The trial court at Moore's trial relied upon **Webb v. State,** 426 So.2d 1033 (Fla. 5th Dist. 1983), to make its finding that such evidence standing alone properly can be the sole substantive proof of an essential element of the State's case. Or at least the trial court appeared to do so, for at the same time the trial judge also distinguished the circumstances in **Webb** from those in the instant case.

Webb was convicted for sexual battery and lewd assault upon a child, his stepdaughter. The issue before the appeals court was whether his convictions could be "based primarily" on the testimony of the child given before the grand jury, which she later recanted at trial. Id., at 1033. The issue was not whether the convictions could be based "solely" on such evidence. In fact, the appellate court specifically noted in its opinion the existence of corroborating evidence.

> Before the grand jury, the child testified the sexual battery and assault had taken place. **There was other corroborating evidence at trial,** but were it not for this grand jury testimony, the State concedes the evidence would not be sufficient to sustain Webb's conviction.
>
> **Webb v. State,** id, at 1033

It should be noted exactly what Webb's argument on appeal actually was, which is, that the admission of that grand jury testimony violated his constitutional right to confront witnesses against him. Id. at 1034. That is not the issue raised in the instant appeal -- at least, not the primary line of attack upon the rule's application in the setting of this unique case. Even if the issues were identical, the facts hear have some very significant differences, for in the present case before Moore's trial ever commenced the witnesses' grand jury testimony had been recanted in a judicial confession against penal interests, in a court proceeding at which the witnesses plead guilty to perjury by inconsistent statements and confessed to lying to the grand jury -- and the State stood silent as a plea bargain based on that testimony was accepted by the trial judge who found the witnesses guilty of perjury and sentenced them accordingly. Unlike in the Webb case, here the State, in two different courtrooms, used the same grand jury testimony for two conflicting purposes. Here there exists an estoppel argument, in addition to the due process standards for sufficiency of evidence, both being issues that were not presented in **Webb.**

Other recent cases following the pre-trial appellate ruling in **State v. Moore,** supra, also deal only with the admissibility issue, not with the sufficiency issue. **Hills v. State,** 428 So.2d 318 (Fla. 1st Dist. 1983), follows this court's ruling on

admissibility as substantive evidence, relating to a prior inconsistent statement before the grand jury by the defendant himself. In **Diamond v. State,** 436 So.2d 364 (Fla. 3rd Dist. 1983), the decisions in **Moore** and **Hills** are followed where the defendant himself used as substantive defense evidence a prior inconsistent statement under oath by a co-defendant who testified at trial as a prosecution witness. And **Mazzara v. State,** 437 So. 2d 716 (Fla. 1st Dist. 1983), concerned admissibility as substantive evidence of prior inconsistent statements under oath, where a co-defendant unexpectedly recanted his prior testimony on the stand when called as a prosecution witness. None of the cases subsequent to **Moore** have involved the issue of the sufficiency of such evidence standing along, totally uncorroborated, to serve as a basis for conviction.

The logic of Respondent Moore's position in this appeal, and of the Fourth District's decision under review now, is consistent with the whole history of evidence law.

Prior to adoption of this provision in the Florida Evidence Code, when prior inconsistent statements were admissible only for impeachment purposes and not as substantive evidence, such evidence still was **in**admissible in evidence in the first place, even for that limited purpose, so long as it was the **sole** evidence to an essential element. **Wallace v. Roshkow,** 270 So.2d 743 (Fla. 3rd Dist. 1972). There is no logical reason why the same rule

should not still apply now, even though the evidence now is admissible both for impeachment and as substantive evidence if the prior statement was made under oath and pain of perjury.

The courts well may find prior inconsistent statements sufficient to support a civil judgment, for that may follow from the lower quantum of proof required in civil cases. See, for example, **Hawthorne v. Davis,** 594 S.W. 2nd 844 (1980). But, as in **Orrico,** a higher standard may and, Respondent Moore suggests, clearly should be applied in criminal cases. The **Orrico** court cited **California v. Green,** 399 U.S. 149 (1970), which upheld the constitutionality of a California statute similar to the Federal rule, but the Supreme Court there said that such evidence might violate due process. If there ever could be a factual situation where that holds true -- i.e., where such evidence does in fact violate due process and minimal constitutional requirements for sufficiency of the evidence -- then, Respondent Moore contends, the facts of the present case certainly must present just such a case.

The **Green** decision of the U.S. Supreme Court hinged entirely on the Confrontation Clause, as it related to a rule rendering prior inconsistent statements admissible in evidence, and found it not to be violated so long as the declarant who made the prior inconsistent statement was on the stand at trial, subject to cross-examination.

Indeed, this Court may want to consider, in the very unique facts of the present case, whether the Confrontation Clause is nonetheless violated. Respondent Moore suggests it is violated. He suggests that the facts of this case were not anticipated by decision in **Green.**

Consider this unique fact. Mr. Tumblin testified at trial that he wanted to tell the truth when he was before the grand jury, but he was too scared to do so, since the police officer who provided him with the facts and pressured him into giving a statement against Gene Moore in the first place, also brought him to the grand jury and gave him a talk in a little room outside the grand jury room just before he went inside to testify. (TT 326-332) In that factual setting, it is rather clear that the only reason the State even had the prior inconsistent statement available as substantive evidence at all, is because there was not opportunity for cross-examination when it was made. Cross-examination at the time of making of the statement, very well would have destroyed the State's ability even to procure an indictment or bring the charges in the first place.

And at trial, the defendant in truth had no real opportunity to effectively cross-examine the witness who made the prior statement. This witness was, practically speaking, treated as two witnesses: one outside the court and one inside. If, by effective cross, defense counsel destroys the witness inside the

courtroom, he helps the witness outside the courtroom. Nothing happened or could happen in cross-examination of the witness inside the courtroom that could prevent the jury from believing, or that could show the jury why they should not believe, the witness outside the courtroom. Indeed, what occurred inside the courtroom at trial was not cross-examination at all, but, in every sense of the word, was direct examination. It was not "confrontation" of the adverse witness.

Even if it were not the law that a prior inconsistent statement cannot serve as the sole substantive basis for proof of an essential element of the crime, Respondent Moore's conviction in this case would still have to be reversed for an insufficiency of the evidence. From another perspective altogether, the conviction of Gene Authur Moore should be reversed for an insufficiency of the evidence.

In light of the witnesses' judicial confession to perjury for their prior inconsistent statements to the grand jury, the evidence is insufficient. Logic and law both confirm that a witness's testimony in a criminal trial can be so contradictory, so flagrantly contradictory, as to make the testimony entirely unworthy of belief, to the point that a finding of guilt based on it violates due process and fundamental fairness. Florida law, as reflected in **24 Fla. Jur. EVIDENCE AND WITNESSES Section 695**, is:

> Where a party relies on the testimony of a single witness to prove a given issue, and the testimony of that witness is contradictory and conflicting, one version thereof tending to prove the issue, the other tending to disprove it, with no explanation of the contradiction and no other fact or circumstance in the case tending to show which version of the evidence is true, no case is made, and the jury should not be permitted to speculate or guess which statement of the witness should be accepted. On the other hand, if, in such a case, the conflicting and contradictory statements of the witness are reasonably explained, or if there are other facts and circumstances in the case tending to show which story of the witness is true, and from a fair consideration of all the facts and circumstances in evidence a jury could reasonably determine which statement of the witness should be accepted as true, then the credibility of the witness and the weight to be given to his testimony are questions for the jury.

At trial of this case, as noted by the trial judge when he denied a directed verdict of acquittal, "the only evidence that the State can point to to convict the Defendant is the sworn testimony of (Price) Copen and Tumblin given to the grand jury." (TT 638)

There was nothing else in the evidence to confirm which statements were true, which false. Consequently the jury could not be permitted merely to speculate or guess which statements of the witnesses should be accepted. It necessarily follows that, so long as there were no other facts or circumstances in the case tending to show which version of the evidence is true, which false, the jurors could only speculate. The State makes no

claim, in this appeal, that any such additional or supportive evidence exists.

The case of **Rowe v. State,** 98 So.2d 613 (Fla. 1924), stands for the legal principle that a jury's verdict of guilty will not be disturbed unless the witness's testimony to an essential element is so contradictory and flagrant that it is unworthy of belief. In **Rowe** the witness was a young boy who was present, and injured, in an attack in which his father and grandfather had been viciously killed. He also had been pulled by his hair from the car by the killers, and told to get away. Immediately after the murders he was interviewed by a county judge, and described the murderers, but during that interview he volunteered, without being asked or the name coming up, that "It wasn't none of the Rowe boys, I know, because I know them as far as I can see them walk." At trial he testified it was the Rowe boys who killed his grandfather and father. This inconsistency in his testimony was cited by the defendant on appeal as grounds for insufficient evidence on the issue of identity, since there was nothing other than the boy's identity testimony at trial on that issue.

The Florida Supreme Court reasoned that fear of the Rowe boys immediately following the murder certainly accounted for his denial that they committed the crime immediately following the offense.

> His voluntarily disclaiming that the Rowes were the perpitrators of the crime, when no

> one accused them, and their names had not even been mentioned or suggested to him, is corroborative of his subsequent testimony implicating them, rather than a contradiction.
>
> **Rowe v. State**, id. at 614.

The same principle of law, relating to corroboration, must be applied here, too, but with a different result, since here there was a total absence of corroboration.

Rowe was relied on for this same principle of law, and the principle itself reaffirmed, in **Bright v. State**, 257 So.2d 612 (Fla. 3rd Dist. 1972), where the court said, again, that "inconsistent testimony of a witness is also insufficient for reversal **unless the testimony is such as to be unworthy of belief.**" Id., at 612. (emphasis added)

The present case is, of course, considerably stronger for reversal on grounds of "unworthiness" of the testimony, since here, unlike in any of the others cited, the same witnesses already had given judicial confessions against penal interests, to perjury for their testimony to the grand jury, i.e., for the very prior inconsistent statements relied on by the State.

Consider this, also. The credibility of a witness may be impeached by evidence of prior criminal convictions, but the nature of the convictions used to impeach them is not even permitted to be disclosed to the jury -- except where the conviction is for perjury, because such a conviction has greater weight against the credibility of the witness than any other crime.

Johnson v. State, 361 So.2d 767 (Fla. 3rd Dist. 1977). Indeed, as noted in **Ward v. State,** 343 So.2d 77 (Fla. 2nd Dist. 1977),

> It is interesting to note that prior to amendment of Section 90.08 by the 1971 Legislature, any person who had been convicted of perjury was barred from testifying as a witness in any court proceeding.
>
> Id., at 78.

In light of that history, if Moore's conviction should stand then we will have gone from total inadmissibility of a convicted perjurer's testimony at all, and inadmissibility of a prior inconsistent statement as substantive evidence, to admissibility of a convicted perjurer's prior inconsistent statement for which he was convicted of perjury in the first place, as the sole substantive evidence in support of a murder conviction. Such, clearly, was not the legislative intent when the controlling provision of the **Evidence Code** was enacted. See, **United States v. Orrico,** supra. Consequently, Respondent Moore's conviction must be reversed because the evidence was insufficient under general rules for passing on the sufficiency of the evidence, and it also must be reversed under the rule that prior inconsistent statements cannot serve as the sole substantive evidence of an essential element of the crime.

If this section of the **Evidence Code** were interpreted to uphold Moore's conviction, then it would authorize the conviction for murder of an accused who has no accusor, with no supporting

evidence, on grounds that a witness who says the defendant is not guilty of anything has a poor memory or is a liar or is a confessed and convicted perjurer, even when the witness has been convicted of perjury for the very same prior inconsistent statement. Such evidence, standing alone, ought not be enough to support a conviction. Such evidence, standing alone, does not meet minimal Due Process standards. As a matter of logic and common sense, it cannot be enough, standing by itself, to support a conviction.

What all of the proceeding means is that the Fourth District applied the correct legal standard in finding that prior inconsistent statements cannot serve as the sole substantive evidence of an essential element required to be proved by the State in trial of a criminal case. It means that the reversal of Respondent Gene Author Moore's conviction for second degree murder, based on such evidence, must be affirmed.

> A fundamental principle of our criminal law is that the prosecutor must establish beyond a reasonable doubt the identity of the accused as perpetrator of the charged offense. When the State fails to meet its burden of proving each and every element of the offense charged beyond a reasonable doubt, the case should not be submitted to the jury, and a judgment of acquittal should be granted.
>
> **Owen v. State,** 432 So.2d 579 (Fla. 2nd Dist. 1983), at 581.

The State, in its brief on the merits, also contends that the Fourth District merely substituted its judgment for that of the jury, and that it passed on the "weight" rather than the "sufficiency" of the evidence, contrary to **Tibbs v. State** 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Clearly the State is wrong. Clearly, there is no violation of **Tibbs** here.

For one thing, **Tibbs** does recognize that reversal of a conviction "in the interest of justice" is a viable and independent ground for appellate reversal. **Tibbs v. State,** id., at 1126. The convoluted facts in the instant case warrant reversal on that grounds, Respondent Moore would respectfully suggest.

For another, the **Tibbs** case read in its entirety makes it rather clear that there is a fundamental difference betweem, on the one hand, an appellate court ruling on the "sufficiency" of the evidence, (i.e., holding such evidence to be insufficient in this or any case), and, on the other hand, the court finding that certain evidence is "technically sufficient" but of inadequate "weight" in the factual setting of the case under review to sustain the conviction now under review. In other words, the appellate courts cannot have it both ways, by finding the "weight" of the evidence in a particular case insufficient to support conviction, but sustaining the "sufficiency" of such evidence to support convictions in other cases.

Building on the differences between "weight" and "sufficiency" issues which the court attempted to draw in **Tibbs,** it becomes rather clear that this case properly involves a question of the sufficiency of the evidence, not of its weight. Here it is not simply a question of whether the "weight" of the particular evidence in this particular case is sufficient to support the conviction, but, instead, it is a genuine question of the legal sufficiency of this category of evidence in any and all cases. Even beyond that, there is a question here of whether the evidence meets constitutional Due Process standards adequately to sustain a conviction. In other words, there is even a question of its constitutional sufficiency, as well as one of its legal sufficiency under applicable rules of evidence.

The Fourth District, following the **Orrico** precedent, correctly has held the evidence insufficient to support a conviction, period. If, as the State suggests, the Fourth District determined the issue by simply giving the evidence a different weight than did the jury, then the District Court would have done it on basis of the balance or preponderance of the evidence. Instead, the Fourth District found that, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, there does not exist a sufficient amount of substantial, competent evidence to support the verdict -- as a matter of law, not as a matter of the weight to

be accorded any particular evidence. See: **Tibbs v. State**, id., at 1123. There is no conflict with **Tibbs** in that holding.

Tibbs is no bar to a trial court or appellate court reversing a conviction and discharging a defendant on grounds of insufficient evidence.

The standard for appellate review of a trial court's denial of a defendant's motion for judgment of acquittal made pursuant to **Rule 3.380(a), Florida Rules of Criminal Procedure,** is whether the jury might have reasonably concluded from all the evidence that it excluded every reasonable hypothesis of innocence. **Owen v. State,** id.; and, **Tsararis v. State,** 414 So.2d 1087 (Fla. 2nd Dist. 1982). The facts surrounding the giving of the recanted grand jury testimony in this case, do not exclude every reasonable hypothesis of innocence.

A motion for judgment of acquittal is evaluated on the basis of whether the state has presented legally sufficient evidence on which a jury lawfully can find a verdict of guilty. **McKnight v. State,** 341 So.2d 261 (Fla. 3rd Dist. 1977), cert. den. 348 So.2d 953. A motion for judgment of acquittal should be granted if it is apparent that no legally sufficient evidence has been submitted on which the trier of fact could reach a finding of guilt. **Machado v. State,** 363 So.2d 1132 (Fla. 3rd Dist. 1978), cert. den. 373 So.2d 459; **Shifrin v. State,** 210 So.2d 18 (Fla. 3rd Dist. 1968), cert. den. 218 So.2d 161.

In determining whether the jury could find guilt beyond a reasonable doubt, the court must apply the special rules concerning circumstantial evidence. This means that the trial judge must determine whether the jury might reasonably conclude that the circumstantial evidence excludes every reasonable hypothesis but that of guilt. **Pressley v. State,** 395 So.2d 1175 (Fla. 3rd Dist. 1981), review den. 407 So.2d 1105; **Adams v. State,** 102 So.2d 47 (Fla. 1st Dist. 1958). In the present case there were no circumstances that removed or disproved the doubt, referring to the doubt created by the two identification witnesses themselves, who both testified their identification testimony before the grand jury was false, and explained how those statements came to be made in the first place.

CONCLUSION

WHEREFORE, based on the foregoing analysis, argument, and authorities, the Florida Supreme Court should uphold the Fourth District Court of Appeal in its interpretation of the **Florida Evidence Code,** and should answer the certified question in the negative: A conviction can not be sustained which is based solely upon recanted grand jury testimony of witnesses who admit that they perjured themselves when giving the testimony relied upon to sustain the conviction. There must be corroborative evidence, which, in conjunction with the recanted grand jury testimony, proves the truthfulness of the grant jury testimony beyond a reasonable doubt -- and the trial jury must be so instructed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this RESPONDENT'S BRIEF ON THE MERITS was served by mail upon Florida Attorney General Jim Smith [ATTN.: **MARLYN J. ALTMAN, Assistant Attorney General**], Department of Legal Affairs, Palm Beach County Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401, on this date, the 1st day of the month of February, A.D. 1985.

Respectfully submitted,

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