OA 1-8-86 c17

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO.: 66,691
ROBERT WILLIAM HUME. Respondent	)	
		CONSOLIDATED
ROBERT WILLIAM HUME, Petitioner,	)	
vs.	)	CASE NO.: 66,704
STATE OF FLORIDA, Respondent.	)	

RESPONDENT HUME'S ANSWER BRIEF ON THE MERITS

Case No.: 66,691

and

PETITIONER HUME'S INITIAL BRIEF ON THE MERITS

Case No.: 66,704

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PRELIMINARY STATEMENT

Robert HUME, appellee below, would agree with the State's decision on record citations and other matters addressed in the PRELIMINARY STATEMENT of the State's initial brief at 1. However, to avoid confusion since this is a consolidated appeal wherein HUME is both Petitioner and Respondent, as is the State, the undersigned will refrain from employing appellate designations and will refer to HUME as the "defendant" and the State as the same or "prosecution".

RESTATEMENT OF THE CASE AND FACTS

The undersigned must voice some disagreement with the facts as presented in the State's initial brief. While there is no suggestion that the briefwriter for the state attempted to present anything but an accurate portrayal of the facts and proceedings giving rise to this consolidated appeal, a restatement, of the opinion of the undersigned, in necessary to truly reflect the language and findings of the trial Court, the Honorable Chester B. Chance, in State v. Hume, Case Number 83-105-CF [R 127-32].

FACTS

In early September, 1982, Terrance Lee McKinney [R-325] volunteered to work as an undercover informant against certain fellow student acquaintances for pay. [R-375].

Initially, Detective Louis Acevedo of the Narcotics and Organized Crime Unit (NOCU), having never met McKinney before, decided to run a cursory criminal background check on informant McKinney [R-368] and discovered two outstanding charges against him: First, grand theft which, according to the information, occurred on 24 February 1982, just six months prior; and second, burglary of a conveyance on 15 May 1982, just three months prior [R-371]. Both cases appeared active as there were no reported dispositions. [R 372-73]. However, no effort was made by the Detective to ascertain a definitive

answer to the question of soundness of the allegations against McKinney, the status of the pending charges, or McKinney's reliability if invested with a position of trust. [R 373-74]. Only one thing was clearly known to the detective: McKinney was an admitted thief. [R-389].

Arrangements were then made for the informant McKinney to be paid, cash compensation for his efforts, contingent upon the success of his and the Investigator's endeavors:

> ... "He was told that he would receive some compensation, depending on the investigation, yes."

[R-375].

The target? Robert HUME. On September 8, McKinney telephonically arranged for the purchase of a small amount of cocaine--three grams--from HUME; and later that day, while accompanied by Detective Acevedo using the alias "Joe", completed the transaction. [R-337]. HUME was paid $235 [R-333] for the contraband and McKinney was paid $126 for his successful efforts toward arranging and consummating the sale. [R-375].

Later, during the next four month period, HUME was recontacted three more times in an effort to get cocaine. Each attempt proved fruitless. [R-399]. HUME simply could not, or would not, give the undercover detective the contraband he was seeking.

Yet efforts persisted; in fact, were escalated by the Detective.

Two things must be borne in mind: First, Detective Acevedo intended from the beginning to purchase at least an ounce of cocaine [R 405-06]--a trafficking amount with its more severe mandatory penalties--notwithstanding HUME's reluctance, indeed, protestations against being involved with such a quantity of contraband.

And, second, shortly after being hired by Acevedo, informant McKinney, according to Detective's information, disappeared after having stolen a stereo, cash, and other items including, not insignificantly, an ounce of cocaine [R 386-89] from an individual unrelated to this case.

Yet, to reiterate, Detective Acevedo's efforts to purchase a trafficking quantity from HUME intensified despite several unsuccessful attempts over the next four months.

In stark contrast, Acevedo's efforts to locate his absconding informant--who had previously admitted to his unsavory crimes--fell by the wayside. And this is true notwithstanding McKinney's theft of a trafficking amount of cocaine--a quantity ten times that heretofore purchased from HUME--and despite strong suspicion regarding McKinney's whereabouts in West Palm Beach. [R 392-93].

Finally, on January 5th, Detective Acevedo successfully

persuaded HUME [R 406-07] to sell what appeared to be a trafficking amount of cocaine [R 409] and by January 10 had an arrest warrant, in hand, commanding HUME's arrest "instanter". [R 428].

However, it was discovered that the suspected ounce of cocaine was, in fact, less than an ounce [R 409]. As a consequence it was not possible, yet, to prosecute the trafficking charge so earnestly sought by the Detective. [R 405-06].

Any thought presumably given to arresting HUME was abandoned notwithstanding continuous knowledge of his whereabouts, frequent contact by phone, and despite the order of the court to execute arrest "instanter". [R 411, 428].

> MR. TURNER: "And you then continue to negotiate with him by telephone from the 10th of January through the 17th of January ...
>
> DET. ACEVEDO: Yes, sir.
>
> MR. TURNER: ...toward the purchase of the larger quantity of cocaine.
>
> DET. ACEVEDO: Yes, sir."

Acevedo's efforts accelerated. HUME's responses, as characterized by Acevedo, were "on again off again." [R 412]. Finally, HUME agreed to try to secure the amount requested, and on January 17, after a week of persistent phone calls by Acevedo, HUME admitted that he had acquired, for Acevedo, the

trafficking amount of cocaine. [T 348].

Bingo.

The stage was set, and the time ripe for a search warrant to nail-down the trafficking charge. However, seeking judicial approval or advice was rejected. The Detective and the NOCU opted for a warrantless "buy-bust" instead.

During the next three hours awaiting the planned buy-bust [R 413] with ample time to contact a magistrate for a court order authorizing the surreptitious electronic interception of HUME's anticipated conversation in the privacy of his home, or to request the issuance of a search warrant for the residence, [R 418], the scheme was hatched by the entire NOCU for the warrantless entry of HUME's residence, the warrantless arrest of HUME, and warrantless search of the home and seizure of the contraband. [R-348].

According to the plan, Acevedo was to gain entry of HUME's home by subterfuge, as a drug buyer. Considering the Detective's enviable success in persuading HUME to secure a trafficking quantity fo the controlled substance, virtually the entire Narcotics Unit (NOCU) was to participate in the raid. Acevedo was wired with a body bug, and linked from inside the home by hidden transmitter to the several teams of eavesdropping officers outside. No thought was given to securing court approval of this strategy. Upon giving the

signal to move-in, the code word "Tallahassee", Acevedo was to open the door and back-out of the way of the inrushing officers so the bust could be executed flawlessly. And, it was flawless.

Later, after having observed the cocaine inside HUME's home, Acevedo, under the pretense of going to his car to get money, gave the signal, unlocked and opened the door to HUME's house and quickly stepped aside to avoid the stampeding arrest team. Officers O'Quinn, Huckstep, and Schewchuck--the heftiest men in the unit known as the "Knockdown Team" [R 423]--barrelled in with guns drawn, and had HUME flat on his floor in seconds. [R 423]. The premises were then seized by Acevedo [R 445] and secured by "The Knockdown Team" checking every room to see that no confederates were in the residence. [R 431]. Then, virtually the entire Narcotics and Organized Crime Unit (NOCU), consisting of a dozen officers, appeared to witness the arrest and the warrantless gathering of evidence from room to room. Again, the fact that the entire residence was seized and teeming with narcotics officers with admitted "ample time" to secure a search warrant [R 446] was of little consequence. No warrant was sought nor even entertained.

Subsequent to HUME's arrest, a motion to suppress evidence was heard before The Honorable Chester B. Chance, Circuit

Judge, Eighth Judicial Circuit. Memoranda of law were submitted briefing the issues infra, and the Court, in a five-page opinion [R-127] detailed its findings of fact consistent with the foregone description.[1] Accordingly the Court suppressed the pertinent evidence seized from that homestead on three discrete bases: first, the non-compliance with Florida's "knock and announce" law;[2] second, the unauthorized and surreptitious interception of communications by uninvited third parties outside the four walls of the conversant's home inside which the conversations occurred, in accordance with this Court's decision in State v. Sarmiento, 397 So.2d 643

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[1]The opening paragraph in Judge Chance's ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS [R-127] illustrates the Court's displeasure with the Narcotics Unit's deliberate circumvention of several time-honored and constitutionally-based safeguards: "Although the recitation of the facts that gave rise to this matter may cause the reader to believe that the combined Narcotics and Organized Crime Unit (NOCU) of the Alachua County Sheriff's Office and the Gainesville Police Department are in the employ of a constitutional law professor who requested them to construct a fact situation that would give rise to walking the tight rope on several constitutional and statutory guarantees, I suspect from my years of observation it is against the "cop code" and considered it not "macho" to obtain a warrant where there is even a slight possibility that law enforcement can slip through an exception to the warrant requirement."

[2]See ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS, p.4 [R-127]: "Failure of law enforcement officers to comply with Florida Statutes regarding "knock and announce" does constitute serious violations of this case.

The facts of this case are clearly controlled by the decision of the First District Court in Bibby v. State, 423 So.2d 970.

Although the State contends that the decision in Bibby is ill-advised, the facts in this case fall squarely within the

(Fla. 1981);[3] and third, the failure of the State to show a justification or exception to the warrant requirement for the judicially unauthorized seizures of evidence from particular areas of the defendant's home.[4]

The State appealed. The First District Court of Appeal, in a unanimous decision, 463 So.2d 499, affirmed the trial

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facts of that decision and, therefore, the Defendant's Motion to suppress items seized, as a result of improper intrusion into the defendant's home, is hereby granted."

[3]See ORDER, supra ¶2: "In 1981, the Florida Supreme Court decided the case of State v. Sarmiento, 397 So.2d 643, wherein that Court determined that interception of conversations within ones home and the simultaneous transmission of those communications to an indivual outside the home violates an individual's reasonable expectation fo privacy and, further, that such interception and simultaneous transmission cannot be had unless properly authorized.

The State contends that following the Sarmiento decision, Article I, Section 12, of the State Constitution was amended to provide that as of January 4, 1983, that provision of the Constitution is to be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court.

The State cites to this Court the United States Supreme Court case of United States v. White, 401 U.S. 745, 91, S.Ct. 1122, 28 L.Ed 2d 435 (1971), for the proposition that the United States Supreme Court has authorized the interception and simultaneous transmission of conversations that occur within an individual's home without prior Court authorization. The State's reliance on the White decision and the recently amended provisions of the Florida Constitution is incorrect. A clear reading of the White decision indicates that a majority of the United States Supreme Court does not agree that said interception and transmission is appropriate under the Fourth Amendment to the United States Constitution.

Therefore, the Defendant's ROBERT HUME, Motion to Suppress Oral Communications surreptitiously transmitted and recorded from his residence is hereby granted."

[4]See ORDER, supra, n.2: "Law Enforcement officers seized from the Defendant's bedroom closet certain items of contraband, to-wit: Cannabis and cocaine without a warrant. Such

Court's finding that the officers failed to comply with the "knock and announce" statute.[5]

The State now asks this Court to reverse the decision of the First District.[6]

SUMMARY OF ARGUMENT

HUME, as Respondent on the "knock and announce" issue, case number 66,691, urges that the distinction and underlying reasoning employed by the District Court is not only consistent with the intent of the Florida legislators who authored the statute, but also shows deference to this Court's prior pronouncements requiring "strict observance" of the knock and announce requirements when the setting contemplates the sanctity of a home, as opposed to other less sanctified locations.

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seizures are unlawful unless justified by some exception to the warrant requirement. The State has failed to show by any of the evidence that there was exception which authorized them to seize such items without a warrant.

Therefore, the Defendant's Motion to Suppress items seized from the bedroom closet of the Defendant, ROBERT HUME, is hereby granted."

[5]That Court, 463 So.2d 499, also reversed the trial Court's holding regarding the applicability and continues viability of the Sarmiento decision, but agreed with the third basis of suppression by the trial Court, that the State failed to justify, by some exception to the warrant requirement, the legitimacy of the seizures from the walk-in closet since the arrest was "unlawful".

[6]NOTICE OF INTENT TO INVOKE DISCRETIONARY JURISDICTION was filed by the State on the "knock and announce" issue, followed by a timely NOTICE by Defendant HUME, on the

HUME, as Petitioner in the second argument, case number 66,704, urges that this Court's Sarmiento decision, 397 So.2d 643 (Fla. 1981), survives the recent "conformity amendment" to Article I, Section 12, Florida Constitution. Because no authoritative decision of the United States Supreme Court has yet squarely addressed, or ruled upon the narrow Sarmiento facts, the law as it existed prior to the conformity amendment survives until that High Court confronts the precise issue.

RESPONDENT HUME'S ANSWER BRIEF ON THE MERITS FOR CASE NO. 66,691

I. THE PLANNED CIRCUMVENTION OF FLORIDA'S KNOCK AND ANNOUNCE REQUIREMENT

The prosecution's analysis of the existing caselaw on "knock and announce"[7] is accurate until it reaches the lone decision at bar which it seeks to reverse. Somehow, that analysis turned from appropriate statutory construction--legislative intent underlying a state statute[8]--to entirely inapplicable "good faith" analysis applied, recently, to

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Sarmiento issue. Jurisdictional briefs followed, and with jurisdiction on both issues accepted, the separate appeals [Nos.: 66,691 and 66,704] were consolidated.

[7]Section 901.19(1), Florida Statues.

[8]Id.

police conduct by constitutional analysts.[9] The Fourth Amendment to the United States Constitution, and the concomitant "good faith" justification for constitutional transgressions, have no bearing on the issue sub judice; viz: the proper analytical framework for a state statute.

The real question to this Court is whether or not the unanimous panel of judges below was wrong in deciding, in accordance with the trial Court, that the police conduct contravened the intent, and spirit, of Florida's "knock and announce" requirement.[10]

Note that Invesigator Acevedo never left, thus never re-entered HUME's residence. In fact, it is clear he never intended to leave:

> MR. TURNER: And the plan is that you're going to tell Mr. Hume, "I'm going to go to the car and get the money," but, in fact, when you open the door they are to enter the residence and place him under arrest.
>
> DET. ACEVEDO: That's correct.

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[9]The suggestion is made, despite this Court's repeated admonitions that Florida's statutes like that at issue must be "strictly" complied with, e.g. Benefield v. State, 160 So.2d 706, 709, (Fla. 1964), that somehow this Court should retreat and apply the recent Fourth Amendment "good faith" analysis in United States v. Leon, 468 U.S. _____, 104 S.Ct._____, 82 L.Ed 2d 677 (1984). The State's brief at 10-12: "Such super-technical hair-splitting has no place in the resolution of issues grounded upon Fourth Amendment protections. ... A similar view was expressed by the United States Supreme Court in United States v. Leon...."

[10]Two noteworthy observations: first, "[n]either party has challenged [to date] the trial court's findings of fact, 463 So.2d at 500, n.2; and second, while there are four judicially

MR. TURNER: And, in fact, that is what happened.

DET. ACEVEDO: That is correct.

[R 421]

DET. ACEVEDO: ...I then reached for the door and unlocked it, opening it and getting out of the way for the arrest team, who was positioned at the front door, to enter it in a safe manner.

[R 356]

Examine the case law. One common thread running through the entire line allowing reentry by police without the necessity of accomodating the legislative requirement to "knock and announce" is just that--reentry. Obviously, if one is given an invitation to reenter, one need not go through the formal amenities of knocking on the door. Yet, would the State suggest that while HUME and Acevedo were in the bedroom, the "knockdown team" could have charged the door? Or, by uttering magic words, that the undercover officer was "going to leave" somehow sounded the trumpets of Gideon to the outside world to swarm in?

The only case on point is Bibby v. State, 423 So.2d 970 (Fla. 1st DCA 1982) where Robert P. Smith, Jr., Chief Judge,

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recognized exceptions to the legislative pronouncement that police should, at a minimum, knock on a residence door and announce their presence and authority, "none has been shown to apply here" according to the District Court. See n.4, 463 So.2d at 501, and accompanying text.

writing for unanimous panel described the facts: "Bibby was arrested in his home by officers who entered without a warrant[11] or consent upon a signal that the incognito officer

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[11]The so-called distinction from Bibby, that one of the dozen-or-so onrushing plainclothes policemen may have possessed an arguably stale arrest warrant, for HUME, hardly legitimizes their unwarranted mode of entry. See State's initial brief at 10. Bursting through the front door, opened by ruse, cannot seriously be regarded as exemplary police conduct in compliance with the mandate of Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980).

Moreover, that arrest warrant, commanding HUME's arrest "instanter", was deliberately ignored, and execution delayed, for a full week to implement the single-minded plan to escalate HUME to the crime of trafficking. Detective Acevedo not only had the ammunition to arrest HUME for possession and sale of a controlled substance, a lesser charge than trafficking, the record is unequivocal that Acevedo had also been ordered, by the Court, to do so. It is indisputable, from the outset, that Acevedo intended to purchase a trafficking amount of cocaine from the Defendant:

> MR. TURNER: In fact, it was your intention from the start in this case to try to buy at least an ounce of cocaine from Mr. Hume. Isn't that true?
>
> DET. ACEVEDO: That's true.
>
> Mr. TURNER: And the reason for that was because an ounce or more is a trafficking amount.
>
> DET. ACEVEDO: That's correct,...

[R 405-06]. However, the record reverberates with HUME's reluctance to fill the Detective's requests:

> MR. TURNER: Okay. And so you began talking to him on the 4th day of January about an ounce.
>
> DET. ACEVEDO: Yes
>
> MR. TURNER: After having previously talked about grams and the quarter ounce, now

within the home had made the sale that put Bibby in possession of the marijuana then to be seized." The court also noted, as

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> we're talking about the ounce.
>
> DET. ACEVEDO: I do recall mentioning the possibility of wanting--me wanting bo buy an ounce of cocaine on the 30th when I contacted him in the parking lot.
>
> MR. TURNER: And yet he didn't know when you said an OZ on the 4th of January, some five days later, that you were talking about cocaine. He thought you were talking about marijuana.
>
> DET. ACEVEDO: That is correct.
>
> MR. TURNER: ...did (Hume) tell you on the 4th of January during the telephone conversations that took place at sixteen-oh-five hours, military time, that he would give you three quarters, "But I don't want to give you a whole one." Did he tell you that?
>
> DET. ACEVEDO: Yes, he did.

[R 406-09].
Observe Detective Acevedo's plea for a full ounce of cocaine despite HUME's clear protest against being involved with such a large quantity of contraband [R 407]:

> "Listen. The other thing is can you get the whole one?"
>
> "Well I'd appreciate it if you could get the full OZ, man."
>
> "I was really counting on that. Why don't you go ahead and do that for me?"

Finally HUME relented and gave Detective Acevedo what appeared to be a full ounce. The arrest warrant was, thus, secured. However, when it was learned that the quantity was shy of an ounce and concomitantly, just shy of the leverage that accompanies a trafficking charge, all efforts to obey the order to arrest "instanter" were held in abeyance until the officer was successful in procuring another quantity safely above the trafficking minimum. [Footnote continued on next page].

in the case at bar, that there were no exigent circumstances. The evidence, as a consequence, was suppressed and Bibby's conviction reversed.

The officers' actions sub judice, particularly those of the inrushing "knockdown team", cannot seriously be described as going the extra mile to meet every Fourth and Fifth Amendment requirement as the State would have this Court believe. The plan was to circumvent, not satisfy, all statutory and constitutional obstacles and demonstrates an utter disregard for the sanctity of the home as well as the law designed to protect it.

Florida's "Knock and Announce" Law, codified in Section 901.19, Florida Statutes, provides:

> If a peace officer fails to gain admittance after he has announced his authority and

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By deliberately ignoring the Court's command to arrest "instanter", for a full week while pressing HUME, the resultant escalation of a small-time gram dealer to a "trafficker" presents a manifest example of the sort of unpalatable police practice that is universally condemned.

Finally, that one of the officers may have possessed this warrant, albeit while ignoring its command, surely cannot legitimize the failure to properly "knock and announce", particularly when it is revealed that Acevedo never executed the warrant and, according to the record, he doesn't know, nor does anyone else know, who eventually executed it, if at all. [Compare R 417 with the deposition of O'Quinn at R 270].

> purpose in order to make an arrest ... he may use all necessary and reasonable force to enter ....

Id. [Emphasis added]. The essence of this provision is not that it empowers the police to forcibly enter to effect arrest, but that it divests the officer of the right to do so until he has complied with what common sense, if not common courtesy, would require of him in the first place; that is, knock on the door and announce his authority and purpose.[12] In the words of Justice Terrell, in the leading "Knock and Announce" case; Benefield v. State, 160 So.2d 706 (Fla. 1964):

> "When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building. He should then knock on the door and announce his name and authority, sheriff, deputy, sheriff, policeman or other legal authority and what his purpose is in being there.... If the building happens to be one's home, these requirements should be strictly observed."

Any suggestion that this time-honored procedure evincing respect for the sanctity of the home was "strictly observed" in the instant case would be ludicrous indeed. In fact, all efforts were directed toward circumventing the legislative requirement.

The arrest, sub judice, was executed as planned: Once Detective Acevedo gained admission into HUME's residence and

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[12]The State suggests, on brief at 3, n.1 that the arrest team verbally and visually announced "as they entered "by wearing raid jackets and hollering police... (continued)

observed contraband, he signaled the entourage of officers to move-in and prepare to pour through the front door when he--not HUME--"on his own initiative" unlocked and opened it.[13] And, having transmitted the code word "Tallahassee", signaling the charge, Acevedo opened the floodgates to the onrushing, "knockdown team", who, within seconds, swarmed through the door, put HUME to the floor and seized the entire household for resulting warrantless gathering of evidence from room to room. [R 423, 431, 445].

Speed and strength are the keys to success of the "knockdown" entry and arrest. The three brawniest members of the unit barge in, led only by upraised gun barrels, and floor the suspect before he has time to think, much less resist.

This hardly demonstrates respect for the American sentiment that has moulded our concept of the home as one's castle as well as the challenged Florida Statute designed to protect it.

> "There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the

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That, however, shows inadequate deference to the spirit, as well as the letter of Section 901.19, Florida's "Knock and Announce" Law. The legislative language could not be clearer: The officer may not enter until "after" he has announced his authority and purpose.

[13]See n.2, 463 So.2d at 500, and accompanying text.

> insignia of his office. This is why the law protects its entrance so rigidly. The law so interpreted is nothing more than another expression of the moral emphasis placed on liberty and the sanctity of the home in a free country. Liberty without virtue is much like a spirited horse, apt to go berserk on slight provocation if not restrained by a severe bit.

Benefield at 709.

The sancity of HUME's home has been trampled, intentionally, as was the Florida "Knock and Announce Law" drafted so carefully to govern such unbridled displays of force. This, succinctly stated, is not permitted under Florida law, and should not be tolerated by this Court.

II. THE DELIBERATE SURREPTITIOUS INTERCEPTION OF DEFENDANT HUME'S CONVERSATIONS, WHILE IN HIS HOME, WITHOUT COURT AUTHORIZATION

While the recent Amendment[14] to Florida's Constitution[15] has undoubtedly impacted upon Florida search and seizure law, the Sarmiento decision[16] remains untouched, intact, and unequivocally controlling.

Strong language? Yes. Unequivocally controlling.

The recognition of two propositions, neither of which can be seriously debated by the State, is necessary to reach this conclusion. First, Sarmiento -- the final word by the Florida Supreme Court on the subject of unauthorized surreptitious eavesdropping of conversations conducted in the privacy of one's home -- remains dispositive unless modified by a decision of the United States Supreme Court construing the same factual setting under Fourth Amendment jurisprudence. Second,

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[14]In November, 1982, Florida's constitutionally based exclusionary rule, embedded in Article I, Section 12 of our State Constitution, was changed to provide that it was to be "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Effective date: 4 January 1983.

[15]Art. I, Sec. 12, Fla. Const.

[16]State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

no decision of that High Court, including the White[17] decision previously relied upon by the State, has addressed, much less ruled definitively upon, the Sarmiento problem.

The first proposition needs little explanation. The amendment to Florida's exclusionary rule leaves unscathed Florida decisions unless altered by the highest court in the land -- the Supreme Court of the United States. The voters of Florida required no less, as evinced by the operative language: ". . . as interpreted by the United States Supreme Court." See Art. I, §12, Fla. Const. (1983). Thus, with that in mind, the second inquiry: What decision of this nation's highest court has disposed of the Sarmiento issue?

None.

Starting with White, supra, previously cited by the State as rendering Sarmiento "irrelevant", White does not and, indeed, cannot modify the Sarmiento case. The fragmented White Court could not muster a majority for any substantive consensus or legal statement. The White "plurality" simply ruled that the reasoning of Katz v. United States, 389 U.S. 347 (1967), could not be applied retroactively to facts occurring before Katz was decided in 1967 -- a situation hardly on point with the case at bar.[18]

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[17]United States v. White, 401. U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971).

[18]Recall Katz v. United States, 389 U.S. 347, 358, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) held that "antecedent justifica-

Indeed, only four Justices[19] joined in the single-minded White opinion -- refusing to apply Katz retroactively -- while four others would have required judicial authorization for electronic eavesdropping in the Sarmiento context.[20]

At best, White can stand as authority for procedural precedent only -- the retroactivity of Supreme Court pronouncements -- and cannot seriously be viewed as a substantive statement.

Moreover, a careful review of the doctrinal underpinnings of Katz and White, and the evolution of Supreme Court law on the subject leading to White, quickly reveals no case on point. Recall, Sarmiento stands unique -- as does the case sub judice -- due to two coalescing features: (1) The uninvited third-party ear (2) intercepting conversations occurring within the sanctity of the home. No case to date has found the United States Supreme Court confronted with these two

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tion" was a "constitutional precondition" for the surreptitious electronic surveillance in that case; a holding that, had it been applied retroactively in White, would certainly have changed its outcome.

[19]White, J. announced the judgment of the Court, joined by Burger, Ch. J., Stewart, J. and Blackmun, J. See 401 U.S. at 746.

[20]See concurrence of Brennan, J., 401 U.S. at 755: "Neither position commands the support of a majority of the Court. . . .In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement. . . ."

According to Douglas, J., 401 U.S. at 760: "I would stand by

essentials.[21]

Starting with Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963)[22] previously cited by the State on brief, there was no eavesdropper, nor was the setting

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Berger and Katz and reaffirm the need for judicial supervision under the Fourth Amendment. . ."

Harlan, J., at 401 U.S. at 784, 795: "Indeed, the plurality opinion today fastens upon our decisions in Lopez, Lewis v. United States [citations omitted], and Hoffa v. United States, [citations omited]. . . . No surreptitious ear was present, and in each opinion that fact was carefully noted. . . .I would hold that On Lee is no longer good law and affirm the judgment below."

Marshall, J. dissenting, 401 U.S. at 705: "I am convinced that the correct view of the Fourth Amendment in the area of electronic surveillance is one that brings the safeguards of the warrant requirement to bear on the investigatory activity involved in this case."

[21]Ignoring, for a moment, that White is purely procedural. Were it viewed as a substantive ruling, one can hardly argue that the Court was confronted with, addressed, or focused upon interception of conversations occurring in the privacy of one's home. The several conversations in White occurred in different locations: "On four occasions the conversations took place in [the informant's home, one in [the Defendant's] home, one in a restaurant, and two in [the informant's] car. . . ." 401 U.S. at 747.

[22]Lopez serves as an appropriate analytical starting point since all prior case law, even remotely addressing the subject, not only fails to address the instant issues but also relies upon the universally discredited "technical trespass doctrine" -- a doctrine which declared no invasion of Fourth Amendment rights absent a "physical penetration" of a "constitutionally protected area". This archaic mode of analysis was, and continues to be, expressly declared constitutionally unsound by Katz. Cf. Olmstead v. United States, 277 U.S. 438, 457, 464, 466, 72 L.Ed.2d 944, 947, 950, 951, 48 S.Ct. 564, 66 A.L.R. 376, cited by Katz. 389 U.S. at 352.

the defendant's home.[23]

Three years later, on 12 December 1966, the Supreme Court decided a trilogy: Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) and Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966. The former two, Lewis and Hoffa, were also previously offered by the State, as support for its suggestion that Sarmiento is now somehow overruled. Yet, while Lewis[24] centers within the defendant's home, there was no outside eavesdropper nor electronic surveillance. The defendant merely contested the admission of the narcotics he sold to the undercover officer who had entered the home by pretense.

In Hoffa,[25] also relied upon by the State before the First District, there was neither Sarmiento factor: no uninvited eavesdropper, and the comunications did not occur in the home. In that case, James R. Hoffa merely objected to the

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[23]In Lopez, the defendant offered a bribe to an Internal Revenue agent for the purpose of obtaining his assistance in concealing a cabaret tax liability. The agent recorded the conversation. There were no outside monitoring officers, and the conversation took place in the defendant's office.

[24]In Lewis, a Federal narcotics agent, by misrepresenting his identify, consummated a "controlled buy" of narcotics in the defendant's home. There was no issue concerning unauthorized interception of communications.

[25]Hoffa, among others, was charged with endeavoring to bribe members of the petit jury sitting in a trial in which he was charged with violations of the Taft-Hartley Act. A government

testimony of an informant who had been invited to his hotel suite by subterfuge.

Finally, the third case in the trilogy, Osborn[26] scarcely collides with Sarmiento. Again, there was no uninvited eavesdropper and the conversations occurred in the defendant's office -- not his home. In fact, Osborn, the last word by a majority of the Supreme Court on the topic of intercepts before Katz, made special note that:

> "We thus deal here not with surreptitious surveillance of a private conversation by an outsider ...
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> * * *
>
> After considering [the informant's] affidavit, the judges agreed to authorize agents of the Federal Bureau of Investigation to conceal a recorder on [the informant's] person. . .
>
> * * *
>
> It was this judicial authorization which ultimately led to the recording here in question.
>
> * * *
>
> There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as a 'precondition of lawful electronic surveillance'".

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informant was permitted to testify to several incriminating statements made by Hoffa, in the informant's presence, while in the hotel.

[26]Osborn is another Hoffa-connected case. Z.T. Osborn, one of Hoffa's attorneys in Nashville, was charged with endeavoring to bribe a member of the jury panel in a federal

385 U.S. at 327-30.

The only remaining case, in the Supreme Court's repertoire on this subject, in the evolutionary path to the White decision is Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).[27] Recall, as the White court was fragmented on the substantive issue, and could only muster a plurality on the procedural issue of retroactivity of Katz, Katz remains as the last word by a majority of the Supreme Court predating White.[28] And, according to that majority:

> "One who [speaks in a public telephone booth] is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."

389 U.S. at 352. This observation could easily have been the focus of this Court when it was also pointedly observed in

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criminal trial involving Hoffa. A tape recording of an incriminating conversation between Osborn and a local police officer, acting as an informant for the FBI, was admitted into evidence against Osborn. The conversations were recorded, not by uninvited eavesdroppers, but by the informant during face-to-face discussions with Osborn, not in his home, but in his office. Finally, the recording and interception of the conversation was judicially authorized, a point stressed by the Court upholding the admissibility of the tapes.

[27]FBI agents, in Katz, had attached an electronic listening and recording device to the outside of a telephone booth and, as a result, intercepted calls placed by Katz to substantiate a federal charge of transmitting wagering information by telephone. No judicial authorization, for the interception or monitoring, was obtained from the court. As a consequence, the evidence, according to the Court, should have been suppressed.

[28]In the words of Judge Hubbart, author of the Sarmiento opinion on the District Court level: ". . .[T]he authority of the White Court's equivocal ruling is itself doubtful as it is

Sarmiento that:

> ". . .Sarmiento did enjoy a reasonable expectation of privacy that no one else was listening to the conversation in the home besides the undercover police officer and others present therein. To assume the risk that one who participates in a conversation held in the home might later reveal the contents of that conversation is one thing, but to assume the risk that uninvited and unknown eavesdroppers might clandestinely participate in that conversation and later reveal its contents is another, and indeed proves too much."

397 So.2d at 645.

Contrary to the State's position, and unwarranted assumption and advice to Detective Acevedo that Sarmiento is dead law, the State should have erred on the side of caution and secured judicial authorization or, at least, an offhand judicial opinion on the propriety of proceeding in direct disregard to the clear pronouncement of this tribunal. Until it is eventually addressed by the United States Supreme Court, Sarmiento remains binding law.

For the sake of the devil's advocate, should one regard Sarmiento as expired, recall that the Florida populace rallied in 1980 to create a constitutional right of privacy -- Article

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a plurality opinion and did not muster a majority of the court. We are thus left, at best, with federal support for both sides of the constitutional issue stated herein." See, State v. Shaktman, 389 So.2d 1045, 1049 (Fla. 3d D.C.A. 1980). See also, Sarmiento v. State, 371 So.2d 1047 (Fla. 3d D.C.A. 1979); accord State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

I, Section 23, Fla. Const. -- a right to be "free from governmental intrusion into [one's] private life."[29]

This mandate by the people not only serves to illustrate an attempt to tether such unbridled governmental intrusion, but also serves to reinforce the need to recognize and acknowledge the wisdom and reasoning underlying the Sarmiento opinion, if not the viability of the case itself.[30]

It cannot be disputed that this new privacy amendment operates synergistically to strengthen other areas of the Florida Constitution, including Article I, Section 12, and stands to gather concomitant reinforcement from those otherwise independent rights as well. In the words fo the Florida Supreme Court nearly forty years ago:

> "A general rule is that no one provision of the constitution is to be separated from all others, to be considered alone, but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Thus a constitutional amendment becomes a part of the constitution and must be construed in pari materia with all of those portions of the constitution which have a bearing on the same subject.

Sylvester v. Tindall, 18 So.2d 892, 900 (Fla. 1944).

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[29]See Art. I, §23, Fla. Const., which provides in pertinent part: "Every natural person has the right to be let alone and free from governmental intrusion into his private life. . ."

[30]Recall, "The protection of a person's general right to privacy is left largely to the states." Shevin v. Sunbeam Television Corp., 351 So.2d 723, 727 (Fla. 1977) citing Katz

One thing is clear. The Florida Constitution now affords broader protection than the prenumbral right inferred from the United States Constitution. Were that not the case, there would have been no need to amend the Constitution.[31]

Although there is virtually no recorded history to Florida's new right of privacy, assistance in ascertaining some purposes may be obtained from analogy to similar provisions recently enacted in other states. Especially instructive is State v. Glass, 583 P.2d 872 (Alaska 1978) which not only deals with a factual situation "on all fours" with the case at bar, but also turns on that state's independent privacy amendment and cites case law spanning the country from Hawaii to Alaska.

In Glass, members of the area-wide narcotics team fitted a police informant with a radio transmitting device. Once the informant gained consensual entry into the defendant's home to consummate a narcotics transaction, the narcotics team, surveilling from outside the home, intercepted and recorded every word. No warrant was sought or obtained.

The Glass court was asked on appeal, as that state's court of last resort, to find that the trial court erred in granting

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v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[31]". . .[T]he citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States

a motion to suppress the recordings.

It is noteworthy to observe that, while the court could have ruled on Fourth Amendment grounds, it did not, and instead chose to interpret the propriety of the police conduct under the privacy amendment. The opinion is worth quoting at length -- an attempt to paraphrase would utterly fail to capture the compelling presentation:

> "In its petition, the State relies primarily upon Federal decisions dealing with the Fourth Amendment to the United States Constitution. The authority is questionable. . . .In any event, those authorities should not be regarded as determinative of the scope of [this statute's] right to privacy amendment, since no such express right is contained in the United States Constitution.

583 P.2d at 874, 875.

> The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. . . .
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> * * *
>
> The risk that one's trusted friend may be a gossip is of an entirely different order than a risk that the friend may be transmitting and recording every syllable.

Id. at 878.

Constitution." State v. Sarmiento, 397 So.2d 643, 645 (Fla. 1981).

The Florida Supreme Court, in 1977, was confronted with a similar question, though restricted to our then prenumbral state right of privacy as the voice of the people had not yet been codified in Article I, Section 23. In Shevin v. Sunbeam Television Corporation, 351 S.2d 723 (Fla. 1977), the press challenged the legislative alteration to Section 934.03(2)(d), Florida Statutes, disallowing interception of communications when one particpant gave prior consent, and requiring consent of all civilian parties. The press complained that this impaired its news-gathering activities. In response, the Florida Supreme Court pointed out:

> "The protection of a person's general right to privacy is left largely to the states. Katz v. United States [citations omitted]. . . .The First Amendment is not a license to trespass or to intrude by electronic means into the sanctity of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.
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> This was the reasoning followed in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). . . . [which pointed out that a person should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording in full living color and hi-fi to the public at large. A different rule would have a most pernicious effect upon the dignity of man."

Shevin, 351 So.2d at 727.

The simple requirement that police respect the privacy

mandate of the citizens of this State will not unreasonably impinge upon legitimate law enforcement efforts. In the White case, cited by the State, there was testimony about eight conversations that were monitored -- not unlike the instant case. Certainly, based on the affidavit of the informant, or here the undercover agent, as to earlier non-monitored conversations, a warrant was obtainable.

CONCLUSION

In conclusion, for the reasons urged in the body of this brief, Robert W. HUME respectfully requests that this Court affirm that portion of the decision of the First District finding, as a matter of fact and law, that the activities below contravened Florida's Knock and Announce Law; and further, enter its order reversing that portion of the District Court's decision disagreeing with the trial Court's determination that the Sarmiento decision has not yet been squarely addressed, nor ruled upon by the U.S. Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by U. S. Mail to Gregory G. Costas, Assistant Attorney General, The Capitol, #1502, Tallahassee, Florida, 32301 this 4th day of October, 1985.

THOMAS W. KURRUS