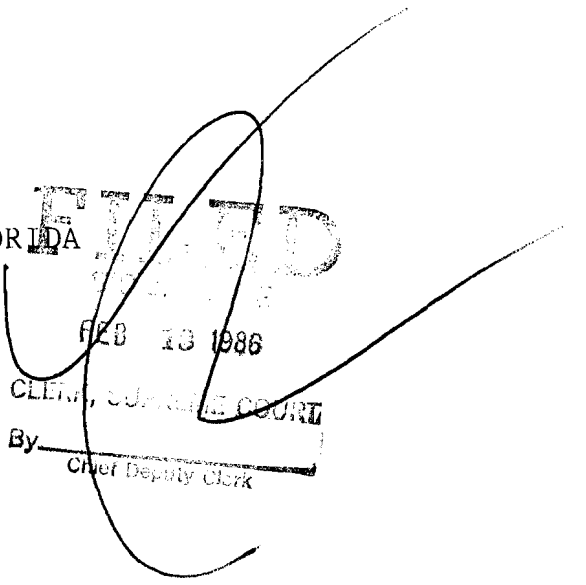
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,330



TIMOTHY MICHAEL JOYCE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent

On Petition to Invoke Discretionary Jurisdiction to Review Decision of the District Court of Appeal of Florida, Fourth District

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BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CITATIONS

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TABLE OF CITATIONS (Cont'd.)

OTHER AUTHORITIES

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INTRODUCTION

The petitioner, TIMOTHY MICHAEL JOYCE, was the appellant in the District Court of Appeal of Florida, Fourth District, and the defendant in the Circuit Court. The respondent, THE STATE OF FLORIDA, was the appellee in the Fourth District and the prosecution in the Circuit Court. In this brief, the parties will be referred to as the defendant and the State respectively. The symbol "R" represents the record on appeal. The decision sought to be reviewed is reported at 468 So.2d 1011, and will be referred to herein by the symbol "D" followed by the page number of the Southern Reporter. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The defendant, along with seven co-defendants, was charged in an information filed May 27, 1982, with (I) trafficking in cannabis; (II) conspiracy to traffick in cannabis; and (IV) possession of a firearm while engaged in a felony offense (trafficking). (R. 2864-A).[1] The trafficking offense encompassed in count I alleges that the defendants had in their actual or constructive possession in excess of

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[1] Co-defendant Ronald Matheson, charged with the identical offenses as the defendant, with the exception that he is charged in Count III with the possession of a firearm while engaged in a felony offense (trafficking), also sought certiorari review in this Court. See Case No. 67,331. This Court entered an order on August 20, 1985, ordering both cases consolidated "for all appellate purposes." The defendant respectfully adopts all arguments raised by co-petitioner Matheson in his brief filed in this Court simultaneously with the filing of this brief.

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100 pounds but less than 2,000 pounds of cannabis on May 7, 1982. (R. 2864).

The defendant filed or adopted[2] several Motions to Dismiss prior to trial. (R. 2868-71, 2896-2926, 2939-43, 2944-47, 2990-92). The motions challenged the constitutionality of a "reverse sting" operation on due process grounds and the language of the conspiracy charge embraced in count II of the information. The trial court denied all of these motions. (R. 47-71, 221-24, 236, 250, 782-3, 2948, 3010). The defendant was tried together with co-defendants Ronald Matheson, Harry William Dietrich, and Robert Bieleau Loos.[3]

Trial by jury commenced before the Honorable Arthur J. Franza on November 29, 1982. The trial was concluded on December 16, 1982, when the jury returned verdicts of not guilty as to trafficking (count I), guilty as to conspiracy to traffick (count II), and guilty of carrying a concealed firearm, a lesser included offense (count IV). (R. 3019-21). The court adjudicated the defendant guilty (R. 3049), and sentenced him to nine years on count II, and five years on count IV, to run concurrently (R. 3051-53). The defendant

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[2]From the inception of the proceedings, it was established that any motion or objection by one party was deemed adopted by all. (R. 149, 224, 822-823, 1331).

[3]Prior to trial, on October 5, 1982, four co-defendants, Gerald Michael Laboda, Franklin Harry Scholes, Albert Richard Adams, and Robert Glenn Gibbs, pleaded guilty. (R. 161).

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filed several timely post-trial motions and adopted those motions of co-defendant Joyce. (R. 2962-64, 2966-7, 2968-9, 3028-9, 3030-34, 3054-5). The court denied all post-trial motions. (R. 2840, 3038, 3056-7). The defendant timely filed his appeal to the Fourth District which resulted in a decision affirming his judgment and sentence. The defendant's timely rehearing petition was denied. This certiorari proceeding followed.

This prosecution arose out of a "reverse sting" conducted by the Fort Lauderdale Police Department, whereby the police obtain large quantities of high-grade marijuana from unrelated seizures, pose as "large scale marijuana suppliers" and through the use of informants, locate "buyers" for the confiscated marijuana only to arrest the would-be purchasers as soon as the "sale" is consummated. (R. 856, 1123, 1335, 1669). It is purely up to the discretion of the informants as to which prospective defendants to bring into the operation; here, none of the prospective purchasers for the marijuana was particularly targeted by the police department in advance or the subject of any ongoing investigation. (R. 238, 1641). There is no established policy within the Fort Lauderdale Police Department by which such "reverse stings" are to be conducted. (R. 1236, 1671-2). In conducting the "sting", the police have no prior information as to the predisposition of the prospective buyers in any given case and, in this prosecution, they had no evidence of defen-

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dant Joyce's predisposition prior to his arrest on May 7, 1982. (R. 238, 1048, 1633-4, 1641). In a reverse sting, the police "sell the contraband as opposed to a buy when the police buy it and get it off the street." (R. 1669).

In the operation of a sting, samples of marijuana are distributed through the informants into the community and not retrieved. (R. 157, 237, 1671-2). In this case, at least three separate samples of marijuana were given to one of the co-defendants, the first weighing some 3.2 ounces. (R. 157, 867-8, 870, 872, 1549, 1671-1672). These samples were circulated into the general population never to be retrieved by the police. (R. 238). The marijuana utilized to sell to the buyers is taken from other seizures (R. 762, 782-3, 886), and in this case, three of the six bales ultimately "sold" came from other sting cases (R. 329-30, 1215).

In the particular sting operation here, the police agreed to "front" a quantity of marijuana, here 300 pounds, in addition to the marijuana to be "sold", as an inducement to get the buyers to accept the deal. (R. 239-40, 898-9, 1030). Another aspect of the "reverse sting" is that the police, in virtually every case, attempt to sell over 100 pounds of marijuana in order to reach the threshold quantity for a trafficking prosecution. See R. 236-250.

Prior to trial, the defendant filed a motion to dismiss attacking the constitutionality of the reverse sting operation. (R. 2868-71, para. 20). Extensive argument was

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heard and police depositions were stipulated into evidence (R. 221-24, 236-250); the court ultimately denied the motion to dismiss (R. 250, 2948). The court, however, twice expressed its feelings on the matter: ". . .I don't particularly like reverse stings. I think that the police have better things to do." (R. 248). "[T]hese sting operations -- you know the police could do something better with their time than to do this unless the defendants had a real propensity and were disposed to commit the crime and that they were known organized crime figures or something else." (R. 1750).

The operation in the case at bar began on April 30, 1982, when a confidential informant, who later became known as Sandy Ryan, introduced Detectives Gregory Kridos and Scott Israel to co-defendant Dietrich. (R. 861). Dietrich purportedly[4] represented himself to be a marijuana broker who had four or five buyers interested in buying large quantities of marijuana. The detectives delivered a 3.2 ounce sample of marijuana to Dietrich's apartment on one occasion (R. 1549), and on two subsequent occasions, delivered other comparable samples (R. 868, 870, 872).

Detective Kridos testified that on May 7th, Dietrich

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[4]Co-defendant Dietrich ultimately testified on his own behalf and presented an elaborate entrapment defense. (R. 2012-2022, 2258-2350). The jury acquitted co-defendant Dietrich of all charges. (R. 2808-2809). The jury also acquitted co-defendant Loos of all charges. (R. 2809).

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called him and told him that a girl named "Gail" in Miami had two buyers for 700 pounds of marijuana. (R. 875).[5] Later that day, Kridos sent Detective Israel to meet co-defendants Scholes, Laboda, and Gibbs at Dietrich's house. (R. 877-81). Kridos stated that the buyers were going to leave their money at a Howard Johnson's motel, and that the marijuana would be delivered to Dietrich's residence. One of the buyers (Laboda) would accompany Israel to the hotel to see the money, while the other buyers were inspecting the marijuana. (R. 882-84).

The plan thus proceeded and the two detectives, Kridos and Israel, along with the assistance of other Fort Lauderdale police officers, took co-defendant Gibbs' pick-up truck to the police marijuana shed and loaded it with 812 pounds of marijuana. (R. 884-5). The two detectives then returned to Dietrich's house where co-defendants Scholes and Gibbs selected some six bales out of the 21 bales contained in the truck for purchase. (R. 904). It was Gibbs who had provided the truck and who gave the keys to the undercover officers; in fact, Gibbs was "running this show." (R. 1026, 1556).

Detective Israel, accompanied by co-defendant Laboda,

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[5]These two buyers named by "Gail" were later determined to be co-defendants Gibbs and Scholes, from Miami. Defendant Joyce was determined not to be one of these two buyers. (R. 1052).

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drove to the Howard Johnson's hotel where the money was to be paid to Israel. (R. 1350). It was Scholes who rented the room at the Holiday Inn (R. 1026), and Gibbs who told Detective Israel that only co-defendant Laboda and Israel would be in the room at the Howard Johnson's. (R. 1026, 1345-6). Detective Kridos ascertained that the ultimate purchaser of the marijuana was co-defendant Gibbs. (R. 1052).

During the ride from Dietrich's house to the Howard Johnson's hotel, Detective Israel was wearing a Unitel transmitter which was being monitored and recorded on tape by Sergeant Jonathon Smith of the Fort Lauderdale police. (R. 1178).[6] Sergeant Smith was following Detective Israel and co-defendant Laboda in a police vehicle from Dietrich's house to the Howard Johnson's. (R. 1178). Upon arriving at the Howard Johnson's motel, Room 318, Detective Israel found co-defendants Adams, Loos, Matheson, and defendant Joyce.

Detective Israel, "preparing for trial," had listened to a copy of the tape recording some eight to ten times, because without his use of the tape, Israel would not have been able to recall which defendant made what statement. (R.

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[6]The subject matter of the tape recording thus produced by the police gives rise to a major portion of the defendant's appeal in the Fourth District and in this Court. This Statement of Facts will contain some of the pertinent factual background pertaining to the tape, while a more detailed factual recitation will appear in the argument portion of this brief, pertaining to the issue of the discovery violation, Point I, as well as the issue of the exclusion of copies of the tape for impeachment purposes, Point II.

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1558-9, 1591-93).[7]

Detective Israel presented extensive testimony at trial attributing numerous incriminating statements to the various defendants in Room 118 of the Howard Johnson's motel. As observed by the Fourth District, Detective Israel "recounted the meeting in detail and ascribed several incriminating statements to each defendant." (D. at 1013). None of these incriminating statements appear on the tape recording which was admitted into evidence. See, e.g., R. 1657. Among the statements Israel attributed to the defendants are that defendant Joyce said he was hoping there would be repeat business (R. 1385), co-defendant Matheson, along with co-defendant Adams, answered Detective Israel's question in unison that Gibbs' partner was watching Israel as he counted the money (R. 1395), Laboda's statement that all of the people in the room were making money on the deal (R. 1369), defendant Matheson's statement that Detective Israel could not cut them out of the money (R. 1375), defendant Matheson's statement that he was present for security purposes to protect the money (R. 1385), defendant Matheson's use of the term "broker" (R. 1397), and defendant Matheson's

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[7]During his trial testimony, Detective Israel changed his prior sworn statements made in deposition after listening to the tape some eight to ten times (R. 1700), and admitted changing his testimony regarding the sequence of events in Room 318 only after listening to the tape (R. 1591-1593). The trial court observed that Israel's "memory got better after he heard the tape. There is no question about that." (R. 1742-1743).

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statement that Detective Israel would get the rest of the money when the defendants got the rest of the marijuana (R. 1406). Since none of these statements appear on the tape recording, Detective Israel's testimony comprises the sole evidence of the defendant's involvement in the conspiracy for which he was found guilty.

The coordination of events between the two locations (Dietrich's apartment and the Howard Johnson's room) was such that after Gibbs and Scholes had selected the six bales they intended to buy, Scholes telephoned the Howard Johnson's, spoke to Adams[8] and gave permission for Detective Israel to leave the room with $46,414. (R. 911). It was Adams who had the money, totaling $125,000, money which belonged to Gibbs. (R. 1374, 1633-4). After Detective Israel saw the money, he telephoned Detective Kridos and, through a code, instructed him to proceed to Dietrich's apartment with the marijuana. (R. 1382). Subsequently, Israel received a call to the motel room from Detective Kridos. (R. 1400). It was during this call that the figure of $46,414 was communicated to those in the Howard Johnson's room; this figure represented the price for the 204.8 pounds of marijuana, absent the wrappings, contained in the six bales selected by Gibbs and Scholes. (R. 909-12). At Dietrich's residence, Detective Kridos

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[8]Defendant Joyce never spoke on the telephone while in the Howard Johnson's room and it was co-defendant Adams who did most of the talking to Detective Israel in the room. (R. 1642).

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placed a call to his department and signaled the surveillance units to move in and make arrests at Dietrich's premises. (R. 913). Meanwhile, at the Howard Johnson's, Detective Israel left the room with the money and met with Sergeant Smith in the stairway where it was decided that Israel was to return to the room on the pretense of making a telephone call, and then the arrests would be effectuated in the motel room. (R. 1408-09).

When Israel entered the room, he was followed by Officer John Abrams, Sergeant Smith, and several other Fort Lauderdale police officers. The three remaining co-defendants in the room, Matheson, Joyce, and Adams, were arrested.[9] Officer Abrams testified that defendant Joyce was either standing up or kneeling by a bed. (R. 1141). According to Abrams, the defendant's left hand was under a pillow and Abrams jumped on the defendant, grabbing his hands; Abrams found a blue-steel revolver under the pillow. (R. 1142). Abrams testified that Sergeant Smith seized a chrome color revolver from defendant's rear pocket. (R. 1141). Smith himself, however, testified that when he entered the room, he saw the defendant standing between the two beds with a gun in his hand. (R. 1192). As the arrests were being made at the Howard Johnson's room, other officers from the Fort Lauderdale Police Department arrested co-defendants

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[9]Co-defendants Loos and Laboda had left the room earlier at Israel's insistence. (R. 1380).

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Dietrich, Scholes, and Gibbs. (R. 914).

QUESTIONS PRESENTED

POINT I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S DISCOVERY VIOLATION OF FAILING TO PROVIDE INCRIMINATING STATEMENTS PURPORTEDLY MADE BY THE DEFENDANT DESPITE DEFENDANT'S TIMELY DISCOVERY DEMANDS FOR SAID STATEMENTS AND WHERE THE DEFENDANT WAS MISLED INTO BELIEVING THAT A TAPE RECORDING PROVIDED TO HIM CONTAINED ALL STATEMENTS, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

POINT II.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

POINT III.

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CONSPIRACY COUNT WHERE THE INFORMATION WAS UNCONSTITUTIONALLY VAGUE AND INDEFINITE IN ALLEGING THAT THE DEFENDANT "INDIVIDUALLY OR SEVERALLY" CONSPIRED WITH VARIOUS CO-DEFENDANTS, MAKING IT IMPOSSIBLE TO DETERMINE WITH WHOM THE DEFENDANT WAS ALLEGED TO HAVE CONSPIRED, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

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POINT IV.

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT AS A MATTER OF LAW BASED ON OUTRAGEOUS GOVERNMENTAL MISCONDUCT ARISING FROM A "REVERSE STING" OPERATION WHEREBY THE POLICE MANUFACTURE CRIMINAL ACTIVITY WHICH WOULD NOT OTHERWISE HAVE OCCURRED AND UTILIZE METHODS WHICH CREATE A SUBSTANTIAL RISK THAT THE OFFENSE WOULD BE COMMITTED BY PERSONS OTHER THAN THOSE WHO WERE READY TO COMMIT IT, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

POINT V.

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON THE TRIAL COURT'S PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY AND THE PROSECUTOR'S CLOSING ARGUMENTS TO THE JURY WHERE SAID JUDICIAL AND PROSECUTORIAL COMMENTS DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

SUMMARY OF THE ARGUMENT

The trial court's failure to conduct a Richardson inquiry into the State's discovery violation requires a reversal of the defendant's conviction and sentence. The failure to provide the defendant with his purportedly incriminating statements pursuant to his express discovery demand therefor, whether inadvertent or willful, deprived the defendant of his due process rights to a fair trial. By informing the defendant prior to trial that the tape recording of the events at the Howard Johnson's motel contained all of the conversations in that room, and then, for the first time at trial, surprising the defendant with inculpatory statements purportedly made by him to Detective Israel, the State made it impossible for the defendant to confront his

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accuser. The trial court's failure to conduct a Richardson inquiry is reversible error per se.

The trial court's exclusion of defense Exhibits B and C, consisting of copies of the purported "original" of the tape recording of the events in the motel room deprived the defendant of his right to due process and a fair trial by prohibiting him from impeaching both the "original" tape recording and Detective Israel's testimony which was predicated almost entirely on his repeated listening to a copy of the tape recording in preparation for his trial testimony.

The trial court erred in denying defendant's motion to dismiss the conspiracy count where the information was unconstitutionally vague and indefinite in alleging that the the defendant "individually or severally" conspired with various co-defendants, making it impossible for him to determine with whom he was alleged to have conspired, thus depriving defendant of his right to due process of law.

The Fort Lauderdale Police Department's operation of a "reverse sting" whereby undercover police provide high quality, low-priced marijuana to persons not suspected of any ongoing criminal activity, absent any established procedure, and through the method of distributing felony quantities of marijuana as samples into the community never to be retrieved, and by offering to "front" hundreds of pounds of marijuana as an inducement into the transaction, constitutes entrapment as a matter of law and a denial of the defendant's

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right to due process of law. This state cannot tolerate the manufacture of criminal activity which would not otherwise have taken place but for this outrageous governmental misconduct.

The trial court's blatant statement to the jury that it disbelieved the defense expert on his ability to identify voices on the crucial tape recording, and the court's rebuking defense counsel in the presence of the jury by accusing the defense of conducting a "charade" deprived the defendant of due process of law. In addition, the prosecutor's inflammatory, prejudicial and impermissible comments to the jury concerning their children growing up in a country overrun by drugs and drug dealers, police officers risking their lives, the defendant's failure to explain why he was in the motel room with the money, the defendant's putting drugs on the street, and the defendant's laughing and walking out of the courtroom if acquitted, all served to deprive the defendant of a fair trial and due process of law, and the trial court's denial of his repeated motions for mistrial was reversible error.

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ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S DISCOVERY VIOLATION OF FAILING TO PROVIDE INCRIMINATING STATEMENTS PURPORTEDLY MADE BY THE DEFENDANT DESPITE DEFENDANT'S TIMELY DISCOVERY DEMANDS FOR SAID STATEMENTS AND WHERE THE DEFENDANT WAS MISLED INTO BELIEVING THAT A TAPE RECORDING PROVIDED TO HIM CONTAINED ALL STATEMENTS, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The defendant submits that the trial court reversibly erred when it overruled the defendant's motion for mistrial predicated upon the State's discovery violation in failing to produce for the defense purportedly incriminating statements made to Detective Israel "without conducting a full Richardson[10] hearing." (D. 1013). Inasmuch as the incriminating statements attributed to the defendant by Detective Israel during Israel's trial testimony constitute the only evidence to implicate the defendant in the conspiracy charged, the failure to conduct the Richardson inquiry is reversible error even if the harmless error doctrine is applicable to such a failure.

As set forth in the factual recitation above, the events giving rise to the defendant's conspiracy conviction arose "from a motel room meeting between an undercover officer [Israel] and the defendants." (D. at 1012). Detec-

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[10] Richardson v. State, 246 So.2d 771 (Fla. 1971).

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tive Israel wore a hidden recording device which was being monitored by Sergeant Smith outside of the motel room. (D. at 1012).

The defendant expressly requested discovery pursuant to Rule 3.220(a)(1)(iii), Fla.R.Crim.P., seeking "[a]ny written or recorded statements and the substance of any oral statements made by the accused. . .", as well as Rule 3.220 (a)(1)(viii), seeking "any electronic surveillance, including wire-tapping. . .of conversations to which the accused was a party. . .". (R. 2982-83, para. 1, 8). Pursuant to the discovery demand, the State provided the defense with a copy of the tape recording produced from the motel room meeting. After listening to this tape, defense counsel sent two separate letters to the prosecutor essentially requesting the State to advise whether the tape recording was complete. See R. 2882, 2987-88. Neither letter was ever answered by the State. (D. at 1012).

As part of its pretrial investigation, the defense conducted extensive discovery including, inter alia, the deposition of the monitoring police officer, Sergeant Smith. The Fourth District correctly summarises the facts pertaining to the discovery violation as follows:

> [Sergeant Smith] stated that the motel room meeting had lasted for an hour and ten minutes, but the tape contained only a half-hour of conversation. This discrepancy resulted from [Smith's] unfamiliarity with the tape recorder and his failure to switch tapes when the first ran out. On cross-examination,

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> [Smith] admitted that, at his pre-trial deposition, he had testified that the tape was complete. Only later did he realize the error, but he did not communicate further with defense counsel. The record also discloses that the prosecutor became aware of the problem with the tape sometime after a pre-trial hearing on the defendant's motion to suppress the tape. However, he did not convey this information to defense counsel. (D. at 1012-13).

When, during the seventh day of trial, the defense learned for the first time that the tape did not contain all the conversation in the motel room and that Detective Israel was about to testify to unrecorded statements purportedly made by the defendant while in the motel room, the defendant moved for a mistrial. (R. 1325-31). The mistrial motion was predicated upon the discovery violation, the defense arguing that Detective Israel ought not be permitted to testify regarding statements of the defendant when, pursuant to specifically requested discovery, no such statements had been provided to the defense. Id. The defendant specifically argued:

> [Defense counsel]: There is a great deal of difference when we are told by Detective Israel at the motion to suppress that we have a tape from beginning to end in the Holiday Inn [sic: Howard Johnson's].
>
> THE COURT: He's [Detective Israel] going to be here in a minute. We'll find out.
>
> [Defense counsel]: Then we're told today [the seventh day of trial] for the first time, when the prosecutor has known about it.***I asked specifically for any

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> recorded statements of the defendant or co-defendants. (R. 1329).

The trial court denied the defendant's motion for mistrial and Detective Israel immediately took the stand. (R. 1331). As is set forth in the factual recitation above, Detective Israel "recounted the meeting in detail and ascribed several incriminating statements to each defendant." (D. at 1013). See, e.g., R. 1369, 1379, 1375, 1385, 1395, 1397, 1403, 1406. Not one of these incriminating statements was contained on the tape recording, see, e.g. R. 1657, which defense counsel had been previously informed contained all of the motel room conversation "from beginning to end." (R. 1224, 1329). During Detective Israel's testimony, and outside the jury's presence, counsel for a co-defendant made the following argument to the trial judge:

> Detective Israel stated on his direct testimony that the tape stopped when he first went down to make the telephone call at the pay phone. So, he knew at that point there were more things to be recorded after the tape had stopped. And no one notified defense counsel. . .. (R. 1447-8).

The trial court, to "be consistent" overruled the defense objection made during Detective Israel's testimony. (R. 1448).[11]

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[11]Notwithstanding this express defense objection made during Detective Israel's testimony, the Fourth District found that Israel's "testimony was received without objection predicated on an alleged discovery violation." (D. at 1013). Of course, the defendant made a motion for mistrial immediately prior to Israel's testimony (R. 1329), as well as the quoted

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In Richardson v. State, 246 So.2d 771 (Fla. 1971), this Court held that a violation of the discovery rules by the State would require an appellate court to reverse unless the trial court had made an inquiry into all of the circumstances surrounding the breach, with the State having the burden of showing that there was no prejudice to the defendant. The inquiry required by Richardson must involve a determination of whether the violation was inadvertent or willful, trivial or substantial, and whether the defendant was prejudiced in his ability to prepare for trial. Subsequent decisions of this Court and every appellate court in this state have made it clear that a trial court's failure to conduct a Richardson inquiry when the State failed to reveal statements made by the defendant is "reversible as a matter of law." Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Smith v. State, 372 So.2d 86 (Fla. 1979); Cooper v. State, 377 So.2d 1153 (Fla. 1979).

The District Courts of Appeal, no less than this Court, have insisted on compliance with the Richardson rule.

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11 (Cont'd.) objection during Israel's testimony (R. 1447-8). If these steps were insufficient in the view of the Fourth District to preserve the discovery issue, perhaps that court would prefer to exhume the taking of "exception" to an overruled objection or a denied mistrial as a precondition to appellate review were the logic of the court below to be extended to its conclusion. But see State v. Heathcoat, 442 So.2d 955, 956 (Fla. 1983); Spurlock v. State, 420 So.2d 875, 876-7 (Fla. 1982).

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The most recent such decision is remarkably similar to the case at bar. In Gant v. State, 477 So.2d 17 (Fla. 3d DCA 1985), a cocaine trafficking conviction was reversed where the prosecutor incorrectly informed the defense that a tape recording of the purported drug transaction was unintelligible; when it later appeared that the prosecutor had merely played the tape at the wrong speed and that it was indeed intelligible, the prosecutor did not make this fact known until the night before opening arguments were to begin. 477 So.2d at 18. The trial court admitted the tape recording into evidence without conducting a Richardson hearing. Id. In reversing, the Third District observed as follows:

> [T]he last-minute revelation that the tape was intelligible and usable was as surprising and potentially prejudicial as if it were the first disclosure of the tape's existence. When it was discovered on the day of trial that the statement did exist (was intelligible), it is clear that a discovery violation, though unintentional, had occurred. Id. at 19.

The court noted that the only thing established on the record was "the inadvertent nature of the violation." Id. However, without further inquiry, "it was impossible for the trial court to ferret out the procedural prejudice which a Richardson hearing is meant to discover and fashion an appropriate sanction or remedy." Id. [Footnote omitted.]

In both Gant and the case at bar, the State's failure to inform the defendants of their purported statements to the police officers during the alleged drug transaction consti-

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tuted a discovery violation triggering the requirement for a Richardson inquiry. It is certainly no distinction that in Gant, the missing statements appeared on a tape recording previously thought to be unintelligible, whereas in the case at bar, the statements were introduced through the testimony of the police officer. In both cases "surprising and potentially prejudicial" statements were introduced at trial without prior notice to the defendants despite their discovery demands for such statements.

Again in Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985), a drug trafficking conviction was reversed when the trial court failed to conduct a Richardson hearing upon the State's failure to provide the defense oral statements purportedly made by the defendant to police. The Fourth District refused to apply an "impeachment exception" to the Richardson rule and instead decided to "opt for its uniform, consistent application to all phases of the trial." 464 So.2d at 612.[12]

This state, with impressive consistency, has continued to enforce the due process rights of those accused of crime. As recently observed, ironically by the Fourth District in a Richardson situation:

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[12]It is unfortunate that the Fourth District did not apply its own Donahue decision when, a few weeks later, it decided the case being reviewed herein.

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> This scenario offers the perfect example of why the Florida Supreme Court adopted the rule of Richardson: The defense is suddenly faced with critical evidence to which it has little or no opportunity to respond. This is contrary to the entire scheme of Florida's criminal discovery rules which seek to enforce the defendant's due process right to know in advance the nature of the charges and the evidence against him.
>
> Alfaro v. State, 471 So.2d 1345, 1346 (Fla. 4th DCA 1985).

Accord, Griffis v. State, 472 So.2d 834 (Fla. 1st DCA 1985); Wortman v. State, 472 So.2d 762 (Fla. 5th DCA 1985); McCollough v. State, 443 So.2d 147 (Fla. 1st DCA 1983); Thompson v. State, 374 So.2d 91 (Fla. 2d DCA 1979); Stradtman v. State, 334 So.2d 100 (Fla. 3d DCA 1971).

Clearly the purpose of the Richardson rule, to avoid unfair surprise and to ferret out prejudice arising from discovery violations, was thwarted in this case, both by the State's violation and by the trial court's failure to conduct any inquiry into the circumstances of the violation. The resulting prejudice to the defendant is of constitutional dimension, especially where as here the State's sole evidence consisted of the surprise testimony of Detective Israel. In these circumstances, the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution require a reversal and a remand for a new trial.

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POINT II.[13]

> THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

The defendant submits that the trial court's refusal to admit as impeachment evidence purportedly identical copies of the "original" tape recording of the events in the motel room deprived the defendant of due process of law, his right to confront his accusers, the right to present a defense, and the right to effective assistance of counsel, thus requiring reversal of his conviction. During the heated battle on the question of the admissibility of the tape recording, the trial court expressly asked the State if its "case is going to rise and fall on that tape". (R. 1446). The prosecutor responded:

> MR. NEAL: Your Honor, this tape is really the only corroboration of Detective Israel's testimony about what occurred. And without it defense counsel can effectively argue that he's been an unreliable witness, and everything he

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[13]Although this issue, as well as the issues raised in Points III, IV and V, infra, does not arise from the conflict which vested jurisdiction in this Court, the Court has jurisdiction "over all issues" obtained once conflict has been established. Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1985); Tillman v. State, 471 So.2d 32 (Fla. 1985); Savoie v. State, 422 So.2d 308 (Fla. 1982).

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> said on the stand was fabrication. With this tape, they can't so argue. In that respect, I think it's an extremely crucial piece of evidence. (R. 1446).

Pursuant to discovery, the State provided copies of the tape recording at issue and assured the defense as well as the trial judge that the copies were identical to the original tape recording. (R. 81-2, 93-4, 1650). The "original" tape recording of the events in the Howard Johnson's motel room was played once prior to trial at a suppression hearing and purportedly the same tape was played once during the trial before the jury. (R. 95-117; 1455-1483). On each occasion, the court reporters indicated in the record that transcriptions of the recording could not be certified as to accuracy or content due to poor audibility and inability to identify the speakers. (R. 1455-6, 2355, 2358). After hearing the tape played in front of the jury, defendant Joyce moved to strike the tape on the grounds that it was different than the one which was played at the pre-trial suppression hearing. (R. 1485-1501). The trial court denied the motion to strike. (R. 1501). There then followed a great dispute at the trial concerning differences between the "original" tape and the copies which were made and supplied to the defense attorneys and to Detective Israel, and as to the differences between the tape which was played at the suppression hearing and the one which was played during the trial.

After the trial court's ruling that the tape would not

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be stricken (R. 1501), the defense presented the testimony of Dr. Harry Hollien, whom the State stipulated was an expert in the field of forensic communications. (R. 1778-9). Dr. Hollien testified that the original tape recording could not be distinguished from a copy (R. 1794) and that it could not be determined within reasonable scientific certainty whether the original tape, State Exhibit 15, is an original or a copy. (R. 1796-7). Moreover, it was Dr. Hollien's opinion that the copies of the tape recording which had been furnished to the defense, which copies the prosecutor assured the court were identical to the original (R. 81-2, 93-4), were not the same as the purported original. There were "several rather substantial differences" between the original and the copies. (R. 1917). Since an expert could not distinguish the original from the copy (R. 1794, 1796-7), and since there were several "substantial differences" between the purportedly identical original recording and the copies, Dr. Hollien concluded that there was a substantial likelihood that the original tape had been tampered with. (R. 1804-5). The importance of the tape recording, as revealed by the prosecutor's own assessment (R. 1446), is best illustrated by the testimony of Detective Israel who related that in preparation for his trial testimony, he listened to his copy of the recording some eight to ten times, and actually changed his account of both the sequence of events and which defendant made which statement, only after repeatedly

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listening to the tape; moreover, he acknowledged that his memory got better after he listened to his copy of the tape. (R. 1422-3, 1437-8, 1588-9, 1591-93, 1700, 1742-3).

Thus, since as the prosecutor (R. 93-4) and Detective Israel (R. 1650) assured, the copy and the original were identical, and since the sole evidence of the defendant's complicity in the conspiracy derived from the tape recording and Detective Israel's testimony, it became crucial to the defense to be permitted to attempt to impeach both the original tape recording and Detective Israel's testimony. (R. 1936-7, 1940-41). In an effort to effectuate such impeachment, the defense sought the admission of the two purportedly identical copies of the tape recording provided to the defense by the prosecution. (R. 1827-9). These copies were designated defense Exhibits B and C for identification. Id. However, the trial judge refused to allow these copies of the tape into evidence and further refused to allow them to be played before the jury so that the defendant could show the differences between the original and the copy. (R. 1829-31).[14] Subsequently, when the defense renewed its motion to permit the tapes to be introduced into evidence and played before the jury, the court again refused. (R. 1936-7). The defense noted that the only objection offered by the

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[14]Instead, the trial judge would allow the tapes to be marked for identification purposes only. (R. 1831).

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prosecution was on grounds of materiality and relevance; the defense proffered that the tapes were material to demonstrate that they differed from the original and that these differences would serve to impeach both the original and Detective Israel's testimony. (R. 1936-7). Again, the court refused to permit the tapes to be introduced into evidence. (R. 1941). Subsequently, in his closing arguments to the jury, the prosecutor took advantage of the court's refusal to introduce the defense copies; the prosecutor stated:

> Now, if you wish to listen to the tape, you have the right to do so. And I suggest that that may be the only piece of evidence that nobody can change. . .I invite you to, I urge you to, if you have any doubt, listen to it. (R. 2511).

Further, in his closing arguments, the prosecutor referred to the copies of the tapes and noted that they were not in evidence and that the copies were "an obvious attempt to mislead you. . .". (R. 2620). It is submitted that these arguments compounded the trial judge's error in refusing to admit the copies of the tapes. The prosecutor was thus able to seize upon the fact that the defense could present no evidence to impeach the original tape. Safe in this knowledge, the prosecutor implored the jury no less than 26 times during the course of his closing arguments to "[l]isten to the tape.***Don't take Detective Israel's word for it." (R. 2510). Finally, the prosecutor acknowledged that absent the tape, the defense could "effectively argue [Israel's] been an unreliable witness, and everything he said on the tape was

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fabrication." (R. 1446).

Before advancing to a discussion of the controlling statutory and decisional law on this issue, the defendant must note that the prosecutor made a representation during the pre-trial suppression hearing that the original tape recording

> is precisely the same as the copy you received, the same quality. And there are no discrepancies between the two and there is nothing included in the original. And the quality of the copy is not inferior to this original. (R. 81-2).

Notwithstanding this representation, the prosecutor, in his closing argument to the jury, admitted that the copies of the tape were not as good as the original. (R. 2629). Indeed, the following is a list of differences which appear in the record between the tape which was played at the suppression hearing and the one which was played before the jury during the trial:

1. R. 1456, lines 3-21 are not the same as the corresponding lines in the suppression hearing at R. 95-96, except for the word, "okay."

2. At the suppression hearing, only "SPEAKER NUMBER ONE" is identified; all other speakers are labeled "UNIDENTIFIED SPEAKER." During trial, the speakers are initially identified as "SPEAKER NUMBER ONE", "SPEAKER NUMBER TWO", etc.; however, subsequently during the trial, with the exception of "SPEAKER NUMBER ONE", other speakers are all, apparently, collectively identified as "UNIDENTIFIED SPEAKER." See R. 1461-83.

3. During trial, more words are transcribed and less are designated "inaudible." Compare R. 1457 to R.

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96, when the tape was played during the suppression hearing. However, even during trial, the "inaudible" designation appears some 181 times.

4. R. 1458, lines 1-11, when the tape was played at trial, are not the same as the corresponding pages during the suppression hearing at R. 97.

5. Compare R. 1458-1459 to R. 97, line 20.

6. R. 97, lines, 21-25, at the suppression hearing, are different from R. 1459, lines 5-10, at trial.

7. R. 1461, line 12 through R. 1462, line 18, is not transcribed at all at the suppression hearing.

8. R. 1467, lines 3-4, are not found on the corresponding page at the suppression hearing at R. 103.

9. R. 1467, lines 23-25, and R. 1468, lines 2-7, are not found on the corresponding pages of the suppression hearing at R. 104.

10. R. 1470, lines 14-15, at the trial, are not found on the corresponding pages at the suppression hearing at R. 106.

11. R. 1470, lines 20-21, at trial, are attributed to "UNIDENTIFIED SPEAKER". Those words are attributed to "SPEAKER NUMBER ONE" at the suppression hearing at R. 106. In the same section, lines 23 and 24 on R. 1470 are not found on R. 106.

12. R. 1472, lines 10-24, are different than lines 6-10 at R. 108.

13. R. 1472, lines 5-11, are different from lines 23-25 at R. 111, and lines 1-3 on R. 112.

14. Compare R. 113, line 25, and R. 114, line 1, to R. 1479, lines 11 and 12.

These differences between the tape played at the pretrial suppression hearing and that played before the jury are by no means intended to be all inclusive. They are merely set forth herein to demonstrate the foundation for the

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excluded impeachment evidence.[15] In these circumstances, the trial court's repeated refusal to permit introduction of defense Exhibits B and C, and to allow these copies to be played before the jury, deprived the defendant of his right to present a defense, to confront the evidence against him, the right to effective assistance of counsel, and due process of law.

Section 90.608(1)(e), Florida Statutes, gives any party except the party calling the witness the right to attack the credibility of the witness by other proof that material facts are not as testified to by the witness sought to be impeached. See Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983). Here, defendant Joyce sought to impeach Detective Israel, his testimony concerning the tape recording, and the tape recording itself, by introducing the two copies provided by the State in discovery, and represented by the State to be identical in all respects to the original. (R. 81-2, 93-4, 1650). Defendant sought to show the jury that the copies were different from the original, that there may have been tampering with the tapes, and that Detective Israel could not have identified defendant from the tape because of its poor quality. Detective Israel had clearly testified that it was the copy that he had listened to 8 to 10 times to prepare his

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[15]Another indication of the importance of the tape and Detective Israel's testimony is the prosecutor's acknowledgement that Detective Israel, "after listening to the tape. . . was able to reconstruct who said what and when." (R. 2515).

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testimony for trial. (R. 1650).

The right to present impeachment evidence is so important that Florida courts have held on numerous occasions that other rules of evidence must give way to that right. In Onontario of Florida, Inc. v. R.P. Trucking Co., 399 So.2d 117, 118 (Fla. 4th DCA 1981), the plaintiff offered into evidence exhibits which constituted a compilation typed by the defendant's secretary from a daily log. The defendant objected on the grounds that the original book and daily log were the best evidence. The trial court agreed. However, the Fourth District disagreed and reversed, holding:

> Appellant's purpose for offering the two compilations instead of the original log was to show inconsistencies among them, thereby bearing on the credibility of the witness and the record keeping of his company. For impeachment purposes the exhibits should have been admitted. The best evidence rule is not applicable where the matter being offered is not used to prove the truth of statemrnts contained therein. See Urga v. State, 104 So.2d 43 (Fla. 2d DCA 1958). 399 So.2d at 118.

In Fogel v. Mirmelli, 413 So.2d 1204 (Fla. 3d DCA 1982), the testimony of a proffered rebuttal witness was excluded because her name was not listed on a pre-trial catalogue as required. The Third District reversed, holding that the proffered testimony was in the nature of impeachment, and the pre-trial order requiring the parties to exchange witness lists expressly excluded the listing of impeachment witnesses. The proffered witness was an examiner of ques-

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tioned documents. Prior to trial, the defendant had produced copies of six letters, the contents of which tended to be exculpatory of any negligence on his part. The defendant's secretary testified that she typed the letters on an IBM Selectric Bold typewriter. The proffered testimony was to the effect that the letters in question were not typed on an IBM Selectric, that they were typed on a different typewriter than other letters which came from the defendant's office, and that they were typed by someone with less skill than the defendant's secretary. The court held that such testimony was impeachment testimony and was not subject to the same rules as substantive testimony:

> Of course, the content of the disputed letters, having a direct bearing on the issue of the defendant's alleged negligence, was substantive evidence. But Ms. Hart's testimony was not directed to the content of the letters which remained the same irrespective of the kind of typewriter upon which typed or the person by whom typed. Rather, her testimony went to the veracity of the defendant and Ms. Jaye and became pertinent only because of prior testimony of these two witnesses on direct examination during the defendant's case. The import of the proffered testimony of Ms. Hart, if believed, would have tended to impeach the credibility of the defendant lawyer and his secretary, the only two fact witnesses for the defendant. Id. at 1207 [original emphasis].

Similarly, in the case at bar, the tapes offered by the defendant would have tended to impeach the credibility of Detective Israel, the State's key witness against him. Given the conceded importance of the tape recording as crucial to

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the State's case (R. 1446), it became equally crucial for the defense to be able to impeach the tape recording and Detective Israel's testimony which was derived from that tape. The trial court's exclusion of defense Exhibits B and C thus effectively deprived the defendant of his due process right to present a defense. In Washington v. Texas, 388 U.S. 14, 19 (1967), the United States Supreme Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Accord, Webb v. Texas, 409 U.S. 95, 98 (1972).

The defendant submits that by excluding the impeachment evidence embraced in defense Exhibits B and C, the trial court precluded the defendant from presenting a defense. No less than the exclusion of a defense witness, exclusion of defense evidence such as the copies of the tape here was a denial of due process of law. Accordingly, this Court is requested to reverse defendant's judgment of conviction and remand for a new trial.

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POINT III.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CONSPIRACY COUNT WHERE THE INFORMATION WAS UNCONSTITUTIONALLY VAGUE AND INDEFINITE IN ALLEGING THAT THE DEFENDANT "INDIVIDUALLY OR SEVERALLY" CONSPIRED WITH VARIOUS CODEFENDANTS, MAKING IT IMPOSSIBLE TO DETERMINE WITH WHOM THE DEFENDANT WAS ALLEGED TO HAVE CONSPIRED, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

The defendant submits that the trial court erred in denying his motion to dismiss count II of the information on the grounds that the conspiracy charge contained therein is fatally defective in that it is vague, overbroad, and violates defendant's right to due process of law. (R. 2990-1). After extensive argument in the trial court, the motion was denied and defendant was forced to trial on the vague conspiracy charge. (R. 30-47, 55-56).

The information in the case at bar charges, in count II, that all of the defendants conspired with one another to traffick in cannabis; however, the information goes on to state that

> . . .as part of this conspiracy, Harry William Dietrich, Franklin Henry Scholes, Robert Glen Gibbs and Gerald Michael Laboda, jointly or severally did meet at a residence located at 100 North Birch Road, Fort Lauderdale, Florida where jointly or severally price, amount and the arrangements for the purchase and delivery of the cannabis was discussed and an examination of various bales of marijuana was made; and as part of the conspiracy, Gerald Michael Laboda, Robert Bielau Loos, Albert Richard Adams, Ronald Matheson and Timothy Michael Joyce, jointly or severally did meet at the

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> Howard Johnson Hotel Room [No.] 318 located on A1A, Fort Lauderdale, Florida where jointly or severally arrangements for the purchase and delivery of the cannabis was discussed and a large sum of money was displayed and counted. . .. (R. 2864-2864A).

The defendant submits that this information violates the holding of this Court in Goldberg v. State, 351 So.2d 332 (Fla. 1977), as well as Goldberg's progeny. Goldberg recognized the effectiveness of the conspiracy charge as a tool in combatting organized crime, but observed that the charge has been expanded to "dragnet proportions in some instances." Id. at 334. The Court cautioned that "it is the duty and responsibility of the judiciary to eliminate, or at least to minimize the dangers of abuse." Id. The language in the Goldberg indictment made it impossible to tell with whom the defendants conspired, because of the use of the word "or". The Court was also unable to determine from the language in the indictment whether there were one or two conspiracies alleged. Further, the Court was unable to tell from reading the indictment whether certain acts were done by Rothstein or MacLean, or both. Most importantly with regard to the case at bar, the Court found it impossible to tell whether the defendants were accused of soliciting or accepting bribes or unauthorized compensation "jointly or severally". Id. at 335.

As the above-quoted language from the conspiracy charge in the case at bar reveals, just as in Goldberg, it is

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impossible to tell whether defendant Joyce met at the Howard Johnson's hotel "jointly or severally" and it is further impossible to tell whether he made arrangements for the purchase and delivery of the cannabis and displayed and counted money "jointly or severally" with one or more of the named co-defendants. This is precisely the defect which condemned the indictment in Goldberg:

> The shot-gun approach of a conspiracy charge could amount to a prosecution for general criminality resulting in a finding of guilt by association. The courts should, at all times, guard against this possibility so that the constitutional rights of an individual are not curbed or clouded by the web of circumstances involved in a conspiracy charge. 351 So.2d at 333.

Citing State v. Smith, 240 So.2d 807, 809 (Fla. 1970), the Goldberg Court required that a conspiracy charge must contain "concise language" and be presented "in such a manner as to enable a person of common understanding to know what is intended, and with such precision that the accused may plead his acquittal or conviction to a separate indictment or information based on the same facts." 351 So.2d at 334-5. Certainly a person of common understanding would not be able to know, from reading count II of the information in the case at bar, what role defendant Joyce was alleged to have played in the conspiracy. First, does the information allege two separate conspiracies, one charging co-defendants Dietrich, Scholes, Gibbs, and Laboda, jointly or severally, with acts alleged to have transpired at the 100 North Birch Road resi-

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dence, and another separate conspiracy charging co-defendants Laboda, Loos, Adams, Matheson, and defendant Joyce "jointly or severally" with committing acts at the Howard Johnson's motel? This precise defect appeared also in Goldberg where the indictment possibly charged two conspiracies, "one between some of the appellants and Rothstein, and the other between the remaining appellants and MacLean." 351 So.2d at 335.

Second, did defendant Joyce make arrangements at the Howard Johnson's with some of the co-defendants, with all of them, or by himself?[16] Did he and one or more of the co-defendants meet jointly in Room 318 at the Howard Johnson's, or did he meet severally? In that the State chose to use the passive tense in alleging that "jointly or severally arrangements for the purchase and delivery of the cannabis was discussed and a large sum of money was displayed and counted. . .", we are not advised whether the defendant himself (or with one or more of the named co-defendants) made these arrangements and displayed and counted the large sum of money. This passive tense compounds the vagueness created by the use of the nebulous "jointly or severally" language. These defects present no trivial or hyper-technical flaws in the information; arguably, any one or more of the following

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[16]It is, of course, settled law that one cannot conspire with oneself. See Pearce v. State, 330 So.2d 783 (Fla. 1st DCA), cert. denied, 341 So.2d 293 (Fla. 1976); Tomlin v. State, 333 So.2d 500 (Fla. 2d DCA 1976).

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permutations can be derived from the language employed in count II; the defendant may have met at the Howard Johnson's with:

(a) Laboda, Loos, Adams, and Matheson

(b) Laboda, Loos, and Adams

(c) Laboda, Loos

(d) Laboda only

(e) Laboda and Adams

(f) Laboda and Matheson

(g) Loos only

(h) Adams only

(i) Matheson only

(j) Defendant met with himself[17]

Moreover, the information is susceptible of an interpretation that the defendant, either alone or with one or more of the named co-defendants, met at the Howard Johnson's and did no more; or, he met, either by himself or in any of the above-listed permutations, and the arrangements for the purchase and delivery of the marijuana "was discussed" and the large sum of money "was displayed and counted. . .". Quite possibly, the defendant merely met at the Howard Johnson's while any of the above-listed permutations of co-defendants did the discussing, displaying, and counting. In such case, defendant was merely present when the various co-defendants did the discussing, displaying, and counting. And of course, it is settled law that mere presence at the scene of an

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[17]The possibility that the information charges that the defendant met with himself derives from the use of the word "severally". The word "several" is defined in Webster's New Universal Dictionary of the English Language (1977 ed.), p. 1662, as "1. separate; distinct. 2. single; individual. . .". The word "severally" is defined as "1. separately; distinctly."

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offense [in this case, the Howard Johnson's], is insufficient to establish a conspiracy. Ashenoff v. State, 391 So.2d 289, 291 (Fla. 3d DCA 1980).

Battle v. State, 365 So.2d 1035 (Fla. 3d DCA 1979), involved an indictment charging conspiracy to commit murder; that indictment was similar to the information in the case at bar in that it was unclear which individuals were alleged to have taken which action:

> Also, it is impossible to tell whether Appellant met with Acuna and Hernandez jointly or severally or whether Appellant met with persons unknown to plan the murder of Torres. Because Appellant was left to guess who these other conspirators might be, and because the vagueness of the allegations did nothing to protect him from further prosecution, we are of the opinion that they were too vague and indefinite to meet the requirements set forth above. Accordingly, in our opinion, the trial court erred in failing to dismiss Count I of the Indictment for conspiracy against Appellant. 365 So.2d at 1037.

As set forth above, the identical defects plague the instant conspiracy allegations which do "nothing to protect [Joyce] from further prosecution. . .". Use of the "jointly or severally" language gives rise to the spectre of subsequent, and repeated, prosecutions alleging that any of the permutations of defendants described above met at the Howard Johnson's and discussed arrangements for the purchase and delivery of cannabis, discussed a large sum of money, and displayed and counted it. Such exposure to subsequent prose-

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cution invokes both the due process and double jeopardy clauses of the State and federal constitutions.

Yet another example of a defective conspiracy charge appears in State v. Giardino, 363 So.2d 201 (Fla. 3d DCA 1978), where the court was confronted with "a classic example of what this Court condemned in Goldberg, namely, confusing alternative pleading in a conspiracy indictment." Id. at 203. The court undertook an analysis of the conceivable permutations of defendants committing the various acts set forth in the indictment. Id. The court then concluded: "The indictment charges in the alternative each of the above multitude of acts as constituting part of the charged conspiracy. As such, the indictment is mired in hopeless confusion." Id. at 204. Recognizing that there were "technical differences" between the Giardino indictment on the one hand and the Goldberg indictment on the other, the Third District nonetheless concluded that "the confusion which the Supreme Court found so objectionable in the Goldberg indictment is the same generic confusion which is found in the instant indictment." Id. Precisely the same must be said in the case at bar.

The requirements of the Goldberg-Battle-Giardino trilogy are all the more vital in cases such as the one at bar where the object of the charged conspiracy involves trafficking in cannabis, an offense which can be accomplished by alternative methods. Thus, unlike a charge of conspiracy to

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commit first degree murder, State v. Smith, 240 So.2d 807, 810 (Fla. 1970); State v. Rodriguez-Jiminez, 439 So.2d 919 (Fla. 3d DCA 1980), an allegation charging conspiracy to traffick in drugs must set forth the manner and means of the object of the conspiracy with as much precision as the nature of the case will permit. Goldberg v. State, supra at 334-5. The instant conspiracy allegation does not survive that constitutional test. Just as in Goldberg, the prejudice to the defendant "resulting from the defective conspiracy Count is itself sufficient to mandate a new trial on the remaining charges." 351 So.2d at 335. Accordingly, defendant requests this Court to reverse his conviction and sentence on the conspiracy count as well as the remaining charge.

POINT IV.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT AS A MATTER OF LAW BASED ON OUTRAGEOUS GOVERNMENTAL MISCONDUCT ARISING FROM A "REVERSE STING" OPERATION WHEREBY THE POLICE MANUFACTURE CRIMINAL ACTIVITY WHICH WOULD NOT OTHERWISE HAVE OCCURRED AND UTILIZE MEANS WHICH CREATE A SUBSTANTIAL RISK THAT THE OFFENSE WOULD BE COMMITTED BY PERSONS OTHER THAN THOSE WHO WERE READY TO COMMIT IT, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

The defendant respectfully adopts co-defendant Matheson's Point II in which he raises this issue.

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POINT V.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON THE TRIAL COURT'S PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY AND THE PROSECUTOR'S CLOSING ARGUMENTS TO THE JURY WHERE SAID JUDICIAL AND PROSECUTORIAL COMMENTS DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

The defendant respectfully adopts co-defendant Matheson's Point III in which he raises this issue.

CONCLUSION

The very prosecution of this "reverse sting" must be precluded as a matter of public policy and in order to protect the defendant's due process rights. The reverse sting clearly constitutes entrapment as a matter of law. See co-defendant Matheson's brief, Point II, pages 22-31. Accordingly, the defendant requests this Court to reverse his conviction and remand with directions that he be discharged.

Alternatively, the defendant requests this Court to reverse his conviction and remand with directions that he be granted a new trial predicated upon the the trial court's failure to conduct a Richardson hearing concerning the State's discovery violation, the trial court's and prosecutor's prejudicial statements and comments in the presence of the jury, the trial court's refusal to admit the purported copies of the original tape recording as impeachment evidence, and finally the trial court's denial of defendant's

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motion to dismiss the vague conspiracy count.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon the Honorable SARAH B. MAYER, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 10th day of February, 1986.

Respectfully submitted,

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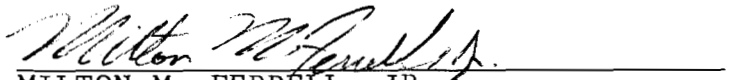

MILTON M. FERRELL, JR.