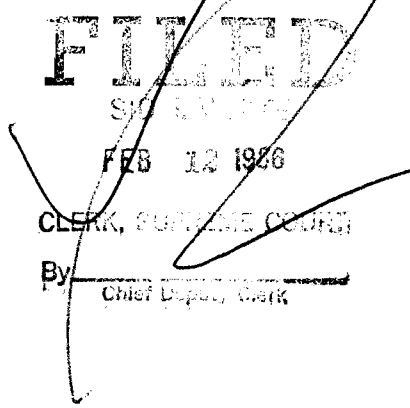
O/A 5-8-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,331



RONALD MATHESON,

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

---

BRIEF OF PETITIONER ON THE MERITS

LAW OFFICES OF MARK KING LEBAN, P.A.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 374-5500

and

RONALD C. DRESNICK, ESQUIRE
Bailey, Gerstein,
Rashkind & Dresnick, P.A.
4770 Biscayne Boulevard
Suite 950
Miami, Florida 33137

BY: MARK KING LEBAN
Counsel for Petitioner

TOPICAL INDEX

TOPICAL INDEX (Cont'd.)

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd.)

TABLE OF CITATIONS (Cont'd.)

OTHER AUTHORITIES

Florida Rules of Criminal Procedure

INTRODUCTION

The petitioner, RONALD MATHESON, 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 (III) 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

[1] Co-defendant Timothy Michael Joyce, charged with the identical offenses as the defendant, with the exception that he is charged in Count IV with the possession of a firearm while engaged in a felony offense (trafficking), also sought certiorari review in this Court. See Case No. 67,330. 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 petitioner Joyce in his brief filed in this Court simultaneously with the filing of this brief.

excess of 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 Timothy Michael Joyce, 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 III). (R. 2957-59). The court adjudicated the defendant guilty (R. 2972), and sentenced him to five years on count II, and two years on count III, to run concurrently (R. 2974-76). The defendant filed several timely post-trial motions and adopted those

---

[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).

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" isconsummated. (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). 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 defendant Matheson's predisposition prior to his arrest on May 7, 1982.

(R. 238, 1008, 1029). 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 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 samples (R. 868, 870, 872).

Detective Kridos testified that on May 7th, Dietrich called him and told him that a girl named "Gail" in Miami had

---

[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).

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, drove to the Howard Johnson's hotel where the money was to be

---

[5]These two buyers named by "Gail" were later determined to be co-defendants Gibbs and Scholes, from Miami. Defendant Matheson, from Delray Beach, was determined not to be one of these two buyers. (R. 1014).

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, Joyce, Loos, and defendant Matheson.

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.

---

[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 discovery violation. And see co-defendant Joyce's brief regarding the issue of exclusion of copies of the tape for impeachment purposes.

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. Among the statements Israel attributed to the defendants are that co-defendant Joyce said he was hoping there would be repeat business (R. 1385), 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 statement that Detective Israel would

---

[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).

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.

Detective Israel also testified that while in the room, he observed a handgun fall from defendant Matheson's jacket; Matheson purportedly picked up the gun and, after Israel told him that he would not stay in the room with a loaded gun, removed the bullets and replaced the gun in his waistband. (R. 1403-05). Nothing on the tape, however, revealed this event and, after the police entered the room and effectuated the arrests, neither Officer John Abrams (R. 1143), nor Sergeant Jonathon Smith (R. 1192), could corroborate Israel's testimony that, upon entering the room, defendant Matheson was holding the gun in his hand (R. 1410).

In any event, 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

[8]Defendant Matheson 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. 1639, 1722).

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 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] As the arrests were being made at the Howard Johnson's room, other officers from the Fort Lauderdale

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

Police Department arrested co-defendants 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 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 III.

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON

(A) THE TRIAL COURT'S PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY EXPRESSLY STATING, CONTRARY TO A DEFENSE EXPERT'S TESTIMONY, THAT THE COURT COULD DISTINGUISH VOICES ON THE TAPE RECORDING, AND THAT THE DEFENSE WAS CONDUCTING A "CHARADE"; AND

(B) THE PROSECUTOR'S CLOSING ARGUMENTS TO THE JURY RAISING THE SPECTRE OF THE JURORS' CHILDREN GROWING UP IN A COUNTRY OVERRUN BY DRUGS AND DRUG DEALERS, THE DEFENDANTS PUTTING DRUGS ON THE STREET, LAUGHING AT HAVING BEATEN THE SYSTEM,

POLICE OFFICERS RISKING THEIR LIVES, AND DIRECTLY COMMENTING ON THE FAILURE OF THE DEFENDANT HIMSELF TO TESTIFY,

WHERE JUDICIAL AND PROSECUTORIAL COMMENTS DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

POINT IV.

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 V.

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DIMISS THE CONSPIRACY COUNT WHERE THE INFORMATION WAS UNCONSTITUTIONALLY VAGUE AND INDEFINITE, THUS DENYING DEFENDANT 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 accuser. The trial court's failure to conduct a Richardson inquiry is reversible error per se.

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 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.

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 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 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.

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-

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

tive Israel wore a hidden recording device which was 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,

> [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 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, 1375, 1385, 1395, 1397, 1406. Not one of these incriminating statements was contained on the tape recording 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).

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 defen-

dant. 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. 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 constituted 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.[11]

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:

> 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

---

[11] 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.

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.

POINT II.[12]

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.

This case presents this Court with a unique opportunity to address the propriety of a pervasive police tech-

---

[12]Although this issue, as well as the issue raised in Point III, 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).

nique utilized throughout this state known as the "reverse sting". The defendant submits that the creation of criminal activity necessarily involved by a "reverse sting" constitutes entrapment as a matter of law and results in a denial of due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

Prior to trial, the defendant filed a motion to dismiss in which he attacked the constitutionality of the reverse sting operation utilized in this case. See R. 2868-71, para. 20; R. 2939-2943. A hearing was held on this motion at which police deposition testimony was stipulated into evidence and extensive argument was heard by the trial court. (R. 221-24, 236-50). While denying the dismissal motion, the trial judge clearly voiced his disdain for reverse sting operations and observed: "I think that the police have better things to do." (R. 248, and see R. 1750).

The facts giving rise to the reverse sting operation utilized by the Fort Lauderdale police have been set forth in the factual recitation of this brief at pages 3-5, and will not be herein repeated in detail except to observe that police, through the use of a confidential informant, spread the word that "large scale marijuana suppliers" had high quality, well-priced marijuana for sale to anyone who had the money to buy; no particular ongoing criminal activity was targeted, it was entirely up to the discretion of the

informants as to who the prospective buyers were to be, none of whom were particularly targeted by the police in advance or were the subject of ongoing investigation. (R. 238, 856, 1123, 1335, 1669). The police had no prior information as to the predisposition of any of the prospective buyers in this case,[13] and the Fort Lauderdale police had no established policy by which the reverse sting was to be conducted. (R. 1236, 1671-2). In the operation of this particular "sting", samples of marijuana in quantities greater than felony amounts were distributed to the prospective purchasers never to be retrieved by the police. (R. 157, 237, 867-8, 872, 1549, 1671-2). Finally, in order to induce the prospective buyers into the transaction, police agreed to "front" 300 pounds of marijuana in addition to the marijuana to be "sold". (R. 239-40, 898-9, 1030).

In Cruz v. State, 465 So.2d 516, 518-19 (Fla. 1985), this Court recognized the defense of entrapment as a matter of law and held that the objective test for determining whether entrapment has occurred can co-exist with the subjective test. In the latter, the question of entrapment concerns a defendant's predisposition to commit the offense involved and is one for the jury, whereas in the former,

---

[13] In particular, police had no evidence of either defendant Matheson's (R. 238, 1008, 1029), nor defendant Joyce's (R. 238, 1048, 1633-4, 1641) predisposition to engage in narcotics purchases prior to their arrests on May 7, 1982.

predisposition of the defendant is irrelevant and the existence of the entrapment defense is one for the trial court to determine as a matter of law. The Cruz Court recognized that "[e]ntrapment is a potentially dangerous tool given to police to fight crime." Id. at 519. Cruz applied the entrapment as a matter of law defense to the police-drunken bum decoy technique whereby the "[p]olice were not seeking a particular individual, nor were they aware of any prior criminal acts by the defendant [Cruz]." Id. at 517. In applying the entrapment as a matter of law defense to the drunken bum decoy technique, this Court observed that "sometimes police activity will induce an otherwise innocent individual to commit the criminal act the police activity seeks to produce." Id. at 517. This Court traced the history of the entrapment defense through the United States Supreme Court's relevant decisions and quoted with approval from United States v. Russell, 411 U.S. 423, 431-2, 93 S.Ct. 1637, 1642-3 (1973), wherein the Court "recognized that 'we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" 465 So.2d at 519 n. 1. Moreover, this Court quoted approvingly from Justice Frankfurter's concurring opinion in Sherman v. United States, 356 U.S. 369, 382-3, 78 S.Ct. 1819, 1825-6 (1958), as follows:

> No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . .. Appeals to. . .the possibility of exhorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. 468 So.2d at 520.

Accordingly, this Court held that "there are times when police resort to impermissible techniques" and that in those cases, "[t]he objective view requires that all persons so ensnared be released." Id.

Moreover, this Court approved of the First District's analysis of the entrapment as a matter of law defense in State v. Casper, 417 So.2d 263, 265 (Fla. 1st DCA 1982), wherein the court distinguished between "succumbing to temptation" and "readily acquiescing" and held that when the former exists, "the matter shall not be put to a jury." 465 So.2d at 518-19.

Finally, this Court in Cruz set forth the following test for determining whether or not the entrapment as a matter of law defense has been established:

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. 465 So.2d at 522.

The first prong of the test involves a determination of whether the "police activity seek[s] to prosecute crime where

no such crime exists but for the police activity engendering the crime." In this regard, this Court observed, with significance to the case at bar, that while police must fight the war on crime, they may "not engage in the manufacture of new hostilities." Id.

The Cruz Court stated with regard to the second prong of the entrapment as a matter of law test that the question involves a determination of whether law enforcement "induces or encourages another person to engage in conduct constituting [the] offense by. . .employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." 465 So.2d at 522.

This Court then applied its newly stated test to the "drunken bum decoy" technique and found that since the record failed to demonstrate what specific activity was targeted, the resulting "lack of focus [was] sufficient for the scenario to fail the first prong of the test."[14] As for the second prong, the use of "inappropriate techniques", resulting in methods of persuasion or inducement creating a substantial risk that an offense would be committed by persons other than those ready to commit it, this Court found such a

---

[14]Similarly, in the case at bar, none of the prospective marijuana purchasers was particularly targeted by the Fort Lauderdale police in advance or was the subject of any ongoing investigation. (R. 238, 1008, 1029, 1048, 1633-4, 1641).

substantial risk to exist.[15] Accordingly, this Court found entrapment as a matter of law and reversed the defendant's conviction.

It is significant that this Court in Cruz condemned "police activity engendering the crime" and engaging "in the manufacture of new hostilities" in the war on crime. 465 So.2d at 522. Less than two months before deciding Cruz, this Court, in a different context, condemned the use of informants paid by police in reverse sting operations "to manufacture, rather than detect, crime." State v. Glosson, 462 So.2d 1082, 1084 (Fla. 1985). This Court approved the First District's decision[16] wherein that court had held:

> The circumstances of this case are not a situation where the state merely seeks evidence of criminal activity but is more akin to the manufacturing of criminal activity by the state. We cannot tolerate such behavior under our system of constitutional protections. 441 So.2d at 1179.

After setting forth the United States Supreme Court's entrapment decisions, this Court rejected the State's position that

---

[15] Similarly here, the Fort Lauderdale police had no established policy by which they operated their reverse stings (R. 1336, 1671-2), and, as an inducement to prospective purchasers, distributed felony quantities of marijuana as samples, never to be retrieved (R. 1671-2, 1549), and agreed to "front" 300 pounds of marijuana in addition to the marijuana to be "sold", in order to encourage the "buyers" into the deal (R. 239-40, 898-9, 1030). This method of persuasion "create[d] a substantial risk that [the] offense will be committed by persons other than those who are ready to commit it." Cruz, supra at 522.

[16] State v. Glosson, 441 So.2d 1178 (Fla. 1st DCA 1983).

defense there at issue:

> The due process defense appears to fare better when used by predisposed defendants in state court proceedings.
>
> * * *
>
> We reject the narrow application of the due process defense found in the federal cases. Based upon the due process provision of article I, section 9 of the Florida Constitution, we agree. . .that governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges. 462 So.2d at 1085.

Of course, the Glosson contingent fee informant issue is not before the Court in the case at bar. However, Glosson's condemnation of a police technique whereby crime is a defendant's predisposition foreclosed the due process manufactured rather than merely detected, applies equally to the reverse sting operation utilized by the Fort Lauderdale police in the case at bar. Moreover, the extension of the Cruz-Glosson rationale to a reverse sting has recently occurred in a decision of the Third District in Marrero v. State, 10 FLW 2317 (Fla. 3d DCA Oct. 8, 1985), rehearing denied, 11 FLW 59 (Dec. 24, 1985). There, police used an informant to initiate a reverse sting sale of marijuana from the police to prospective buyers, including defendant Marrero. Quoting from this Court's decision in Cruz, supra at 521, the Third District "conclude[d] that the police activity leading to Marrero's arrest 'has overstepped the bounds of permissible conduct'. . . and thus constitute[d]

entrapment as a matter of law." 10 FLW at 2318. There, as in the case at bar, police made no inquiry whatsoever as to whether the defendant wanted to participate in a drug sale. 10 FLW at 2318, cf. R. 1008, 1029, 1048, 1633-4, 1641. The Third District applied the Cruz two-pronged test to the reverse sting in Marrero and held:

> Therefore, as a matter of law, the police activity fails to meet either of the two parts of the threshold test for entrapment: it did not "have as its end the interruption of a specific ongoing criminal activity;" nor did it "utilize means reasonably tailored to apprehend those involved in the ongoing criminal activity." Cruz v. State, 465 So.2d at 522.
>
> Marrero v. State, supra at 2318.

Precisely as in Marrero, the two-pronged test, when applied to the case at bar, reveals that the reverse sting here employed by the Fort Lauderdale police did not have as its end "the interruption of a specific ongoing criminal activity", nor did it "utilize[] means reasonably tailored to apprehend those involved in the ongoing criminal activity." 465 So.2d at 522. In particular, the reverse sting here employed resulted in the prosecution of crime where no such crime existed but for the employment of the sting "engendering the crime." Id. See R. 238, 1641. Clearly, the sting resulted in the manufacture of a trafficking offense where none existed but for the use of the sting. Next, the Fort Lauderdale police employed a method of persuasion or induce-

ment, the distribution of felony samples of marijuana into the community (R. 870, 872, 1549, 1671-2), and the "fronting" of hundreds of pounds of marijuana as an inducement to the prospective "buyers" (R. 239-40, 898-9, 1030) such that the police created a substantial risk that a trafficking offense would be committed by persons other than those ready to commit it.[17]

The reverse sting here employed by the Fort Lauderdale Police Department adds fuel to the raging fire that constitutes the drug problem in Florida. It is singularly counterproductive and results in the "manufacture of new hostilities" in the war on crime, rather than furthering the laudatory purpose it purports to serve. This Court has set the stage for the demise of the reverse sting in its Cruz and Glosson decisions. Accordingly, the defendant respectfully requests this Court to remove from the arsenal of Florida law enforcement the ill-conceived "reverse sting" now employed indiscriminately throughout this state.[18]

---

[17] For the edification of the Court, 300 pounds of marijuana translates roughly into approximately $90,000 "wholesale" value which, on the street, would be substantially greater.

[18] The defendant expressly raised this issue before the trial court (R. 2868-71, para. 20; 2939-43, 2962-64, para. 15; 2966-7, para. 3), and the trial court erroneously denied the motions (R. 47-71, 221-4, 236, 250, 782-3, 2948, 3010, 3038, 3056). The defendant also raised the issue in the Fourth District, however, that court chose not to address it.

POINT III.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON

(A) THE TRIAL COURT'S PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY EXPRESSLY STATING, CONTRARY TO A DEFENSE EXPERT'S TESTIMONY, THAT THE COURT COULD DISTINGUISH VOICES ON THE TAPE RECORDING, AND THAT THE DEFENSE WAS CONDUCTING A "CHARADE"; AND

(B) THE PROSECUTOR'S CLOSING ARGUMENTS TO THE JURY RAISING THE SPECTRE OF THE JURORS' CHILDREN GROWING UP IN A COUNTRY OVERRUN BY DRUGS AND DRUG DEALERS, THE DEFENDANTS PUTTING DRUGS ON THE STREET, LAUGHING AT HAVING BEATEN THE SYSTEM, POLICE OFFICERS RISKING THEIR LIVES, AND DIRECTLY COMMENTING ON THE FAILURE OF THE DEFENDANT HIMSELF TO TESTIFY,

WHERE JUDICIAL AND PROSECUTORIAL COMMENTS DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

The defendant submits that two categories of improper conduct committed by the trial judge and the prosecutor deprived him of a fair trial and due process of law. The defendant will first address the trial judge's improper statements in the presence of the jury and then proceed to a discussion of the prosecutor's prejudicial comments in closing argument.

A. The Trial Court's Disbelief In The Testimony Of A Defense Expert On Ability To Distinguish Voices On The Tape And The Court's Chastisement Of Defense Counsel As Conducting A "Charade"

In an effort to impeach the State's tape recording of

the events in Room 118 of the Howard Johnson's motel, the defense called an expert in the field of forensic communications, Dr. Harry Hollien, whom the State stipulated was an expert. (R. 1778-9). Dr. Hollien testified that the identity of voices on the tape recording could not be determined by merely listening to it. (R. 1814-15). He further opined that the ability of anyone, even one who knew the speakers' voices, to identify them on this tape would be "quite low" because of the lack of clarity in the recording. (R. 1825). He believed that, with the exception of Detective Israel, the voices on the tape could not be identified: "There just wasn't enough intelligible speech to do that." (R. 1921). At a point during Dr. Hollien's cross-examination by the prosecutor, the trial judge interjected a question in the presence of the jury, and asked Dr. Hollien if he could tell the difference between the voices on the tape; Dr. Hollien responded that he could not. The court then stated: "Well, I can." (R. 1864). At a sidebar conference immediately requested by the defense, the defendant moved for a mistrial and argued that the court's comment on the evidence was improper and prejudicial. (R. 1864-66). It is here submitted that the trial court's express refutation of Dr. Hollien's expert opinion that voices on the tape could not be differentiated served to denigrate Dr. Hollien's entire testimony on this and other topics, and further served to inform the jury that the judge disbelieved Dr. Hollien's

testimony.

At a subsequent point during Dr. Hollien's cross-examination, when counsel for a co-defendant interposed an objection, and counsel for defendant Joyce took a contrary position, the court stated in the presence of the jury that defense counsel should "have a little meeting and decide what your real objection is so we can hear it." When defendant Joyce's counsel protested that he represented his own client, and not the co-defendant, the court responded: "And you can play that charade every time with every question." (R. 1884-85). Subsequently, out of the jury's presence, when the defendant moved for a mistrial predicated on the court's "charade" remark (R. 1942-3), the trial court had the jury returned and asked if it had done or said anything to prejudice them and the jury responded negatively. (R. 1947). The court thereafter denied the mistrial motion. (R. 1948).

The defendant submits that both comments by the trial judge, his disagreement with the defense expert on voice identification and his characterization of the defense tactics as a "charade", violated the time-honored rule that "a trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced." Leavine v. State, 109 Fla.

447, 147 So. 897, 902 (1933). This Court has continued to require that trial judges "scrupulously avoid commenting on the evidence in a case." Whitfield v. State, 452 So.2d 548, 549 (Fla. 1984). See also, Raulerson v. State, 102 So.2d 281, 285 (1958). Here, the trial judge's statement that he could differentiate the voices on the tape, in the face of Dr. Hollien's contrary opinion, served to vitiate that opinion "[b]ecause of the judge's exalted position. . .". Raulerson v. State, supra at 285. Accord, Hamilton v. State, 109 So.2d 422, 424 (Fla. 3d DCA 1959) (judicial comment tending to express view as to credibility of witnesses destroys impartiality of the trial); Gordon v. State, 449 So.2d 1302, 1304 (Fla. 4th DCA 1984) (judicial comment discrediting defense testimony constituted prejudicial error).

The above caveats against judicial comment on the credibility of witnesses were surely violated when the trial judge here directly refuted the opinion of the defense expert on perhaps the most significant aspect of the State's case, the identity of the persons speaking on the tape. Detective Israel himself, a participant in the conversations in the motel room, found it necessary in order to prepare for his trial testimony to repeatedly listen to a copy of the tape and admitted to changing his sworn statements regarding both the sequence of events in the room (R. 1591-3) and which defendant made what statement (R. 1588-9, 1700), only after such repeated playing of the tape. Moreover, when the court

reporter attempted to transcribe the tape as it was played before the jury, she was unable to identify particular speakers with particular statements other than Detective Israel. (R. 2358). This issue then is no tempest in a teapot: the trial court's unequivocal contradiction of Dr. Hollien's opinion could leave no room for doubt as to the court's view of the weight to be afforded Dr. Hollien's testimony. Worse, it served to bolster Detective Israel's testimony attributing particular statements to the defendant. Accordingly, this comment alone served to undermine the reliability of the entire trial and requires reversal.

In addition to its improper "testimony" on the voice identification, the trial court made yet another highly prejudicial comment in the presence of the jury concerning the "charade" being conducted by defense counsel. In Mathews v. State, 44 So.2d 664 (Fla. 1950), this Court held that the trial judge improperly rebuked defense counsel in the presence of the jury for speaking with a witness in counsel's office prior to trial. The Court held that the trial judge's remarks "were highly prejudicial to the cause of the appellant and may well have served to tip the scales against the accused and in favor of the prosecution." Id. at 670. See also, Jones v. State, 385 So.2d 132, 134 (Fla. 4th DCA 1980) (observing that while there are occasions when rebuking defense counsel in the presence of the jury is proper, "the better practice is to require the retirement of the jury

before rebuking counsel."); Hunter v. State, 314 So.2d 174, 175 (Fla. 4th DCA 1975).

The defendant submits that the trial court's statements here were unprovoked and deprived the defendant of a fair trial. Coupled with the court's earlier "testimony" about its ability to distinguish voices on the tape, perhaps the central issue in the trial, the remarks require a reversal and a new trial.

B. The Prosecutor's Multiple Comments In Closing Argument To The Jury Were Grossly Prejudicial And Require A New Trial

The "mail-order catalogue of prosecutorial misconduct", Peterson v. State, 376 So.2d 1230, 1231 (Fla. 4th DCA 1979), which appears throughout the prosecutor's closing argument to the jury in this case destroyed the defendant's due process right to a fair trial. All of these comments were the subject of defense objections and mistrial motions, all of which were overruled and denied. The prosecutorial misconduct in this case can be grouped roughly into four separate categories: (1) a golden rule argument; (2) unsupported comment about police risking their lives; (3) comment on defendant's failure to testify; and (4) an acquittal will lead to future crime by the defendant. These categories will be discussed in the order presented as follows.

During the prosecutor's closing argument to the jury, he stated:

> Do you want your children to grow up in a country overrun by drugs and drug

> dealers, would you want your police to do their job? (R. 2524).

At a subsequent juncture in his argument, the prosecutor stated to the jury:

> They weren't going smoke all that marijuana. They were going to sell it. And it's these people who put drugs on the street and into the general populous, not the police. (R. 2656).

After the first quoted comment, the defense, not wishing to interrupt, asked to reserve a motion and to approach the bench later; subsequently, outside the jury's presence, the defendant moved for a mistrial predicated upon the first comment. The prosecutor argued that his comment was invited by a defense attorney's earlier comment (R. 2439) wherein the defense posed the question to the jury if they wanted their children to grow up where police officers offered them drugs.[19] The trial judge stated that he did not think that this one comment would "turn this case around. . .". (R. 2531). Subsequently, the court denied a mistrial motion predicated upon prosecutorial comments. (R. 2714.

After the second quoted comment, supra, defense counsel reserved a motion (R. 2656), and subsequently expressly raised the comment about putting drugs on the

---

[19] It is submitted that defense counsel's comment was entirely justified based upon the "reverse sting" upon which this prosecution was predicated. In no manner did the defense argument invite a prosecutorial response asking the jurors if they wanted their children to grow up in a country overrun by drugs and drug dealers. (R. 2524).

street. (R. 2712). The trial judge denied all mistrial motions. (R. 2714). In addition, the court denied post-trial motions raising all of the prosecutor's prejudicial comments to the jury. See R. 2962-64, para. 11; 2966-7, para. 2; 3030-34, para. 2(h); R. 3038, 3056.

The defendant submits that the above-quoted prosecutorial statements constitute impermissible "golden rule" arguments long condemned by the courts of this state. In State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985), this Court recently found similar comments to be "highly prejudicial and an independent basis for reversing the convictions." There, the defendant was convicted for trafficking in methaqualone and the prosecutor argued to the jury that the police

> know there are drugs out there. It's all over the place. It's in the school yard, it's in the playground, it's in the homes -- it doesn't matter whether you are rich or poor, the drugs are out there. These officers know there is only one way to stop it and that is to go after the dealer. Ladies and gentlemen, Mr. Dale Wheeler is one of these people. He is one of these dealers. He is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your own homes. He is one of the people who is supplying this. 468 So.2d at 981.

This Court, in reversing, observed that there was no evidence in the record to support a finding that the defendant ever sold drugs which ended up in the school yard nor was there any evidence that the defendant intended the drugs in the case to end up in the jurors' homes.

At another juncture in his closing argument, the prosecutor stated to the jury that it was a sad commentary on our system that the police officers are treated like criminals "for risking their lives and enforcing the laws in an attempt. . .". (R. 2526-7). The defendant's mistrial motion predicated on this comment (R. 2530) was subsequently denied (R. 2714). Later in his arguments, the prosecutor again commented about "police officers who risk their lives in enforcing the laws of this State. . .". (R. 2659). When the defense sought to make a motion, the trial court requested that they wait until closing arguments were concluded. (R. 2661). The subsequent mistrial motion (R. 2712-13) was denied (R. 2714). It is submitted that the twice repeated argument about police officers "risking their lives" (R. 2527, 2659) constituted an impermissible and totally unsupported argument which the courts of this State have steadfastly condemned. Peterson v. State, 376 So.2d 1230, 1233 (Fla. 4th DCA 1979); Washington v. State, 343 So.2d 908, 909 (Fla. 3d DCA 1977).

In addition, during his argument to the jury, the prosecutor addressed himself to why both defendant Matheson and defendant Joyce were in the motel room, and stated:

> We haven't heard why Mr. Matheson [and] Mr. Joyce. . .were in room 318 with that [$]125,000 -- (R. 2654).

Defense counsel once again reserved a mistrial motion; subsequently, after the judge permitted the motions to be heard,

the defense argued that the prosecutor had commented on the defendants' not testifying. (R. 2713). Again, the court denied the mistrial motions. (R. 2714).

The defendant submits that the above-quoted argument constituted a direct and express comment to the jury on the defendant's failure to testify in his own behalf, contrary to Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. See also, Rule 3.250, Fla.R.Crim.P. This Court, as well as every court in this state, has repeatedly prohibited such comments. In State v. Sheperd, 479 So.2d 106, 107 (Fla. 1985), this Court very recently made the distinction between a permissible comment on the failure of the defense to present evidence and the failure of the defendant himself to testify:

> [W]e hold that a prosecutorial comment in reference to the defense generally as opposed to the defendant individually cannot be "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify. 479 So.2d at 107.

In Sheperd, the prosecutor argued to the jury that he hadn't heard any "defense". In sharp contrast, in the case at bar, as above quoted, the prosecutor expressly advised the jury that "we haven't heard why Mr. Matheson [and] Mr. Joyce were in room 318. . .". (R. 2654). This comment, unlike the comment in Sheperd, cannot withstand the "fairly susceptible" test, to which this Court recently adhered, rather than

adopting the stricter federal test. State v. Kinchen, 10 FLW 446 (Fla. Aug. 30, 1985). Moreover, it is the State's burden to demonstrate to this Court beyond a reasonable doubt that the trial court's error in denying the mistrial motions predicated on the improper direct comments on the failure of the defendant to testify was harmless. State v. Marshall, 10 FLW 445 (Fla. Aug. 30, 1985); State v. DiGuilio, 10 FLW 430 (Fla. Aug. 29, 1985). Since here, the only evidence of defendant's participation in the drug conspiracy consists of the statements attributed to him by Detective Israel in the motel room, and Israel's ability to attribute voices to particular defendants was severely attacked by the defense (R. 1591-3, 1588-9, 1700), that difficult standard cannot be met. This is specially so where, as here, the comment on the defendant's failure to testify was direct and egregious; in such circumstances, "the less likely the state can prevail on this high standard test for harmless error." State v. DiGuilio, supra at 432.

Finally, the prosecutor argued to the jury as follows:

> What you see before you is a group of drugtraffickers and would-be drug traffickers who are ready to walk out of this courtroom if they are able to and laugh about having beaten the system if they can. The people of this State will be the only people who lose if that happens, and I think the people of this State deserve better than that. (R. 2658).

Defense counsel objected and the trial court, for the only time, sustained the objection. (R. 2659). However, the

court subsequently denied the defense motion for mistrial predicated on this comment. (R. 2712-14). It is submitted that this argument, in addition to constituting an improper Golden Rule argument, see discussion, supra, suffers the vice of effectively telling the jury that if the defendant is acquitted of the crime, he will leave the courtroom only to commit it again. This type of comment has been uniformly condemned throughout the courts of this state. See Stewart v. State, 51 So.2d 494 (Fla. 1951); Grant v. State, 194 So.2d 612 (Fla. 1967); Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970); Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977); Gomez v. State, 415 So.2d 822 (Fla. 3d DCA 1982). In particular, this comment is reversible error pursuant to Salazar-Rodriguez v. State, 436 So.2d 269, 270 (Fla. 3d DCA 1983) (reversal where prosecutor commented: "[I]f you all condone what happened. . .well there is the front door. You can all walk them right through that front door."); Perdomo v. State, 439 So.2d 314, 315 (Fla. 3d DCA 1983) (reversal where prosecutor told jury to "walk him out the door, set him free, that is fine with me. If that is what you want to happen in Dade County. . .".). See also, Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984).

Based upon both the trial court's improper statements in the presence of the jury about the credibility of defense witness Hollien and his chastisement of defense counsel as

conducting a "charade", as well as the prosecutor's inflammatory, unsupported, and prejudicial comments, the defendant respectfully requests this Court to reverse his conviction and sentence and remand for a new trial.

POINT IV.

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

POINT V.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CONSPIRACY COUNT WHERE THE INFORMATION WAS UNCONSTITUTIONALLY VAGUE AND INDEFINITE, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

The defendant respectfully adopts co-defendant Joyce'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. 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 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 motion to dismiss the vague conspiracy count.

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,

LAW OFFICES OF MARK KING LEBAN, P.A.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 374-5500

and

RONALD C. DRESNICK, ESQUIRE
Bailey, Gerstein, Rashkind
and Dresnick, P.A.
4770 Biscayne Boulevard
Miami, Florida 33137

BY: Mark King Leban
MARK KING LEBAN
Counsel for Petitioner