IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 67,740

(5th DCA Case No. 84-695)

GEORGE GARCIA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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PETITIONER'S INITIAL BRIEF
ON THE MERITS

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(NOTE: THROUGHOUT THIS BRIEF, PETITIONER SHALL BE REFERRED TO AS "GARCIA", OR "DEFENDANT"; PETITIONER'S TRIAL COUNSEL AS "ATTORNEY TANNER"; THE PROSECUTOR AS "THE STATE"; AND, THE TRIAL JUDGE AS "JUDGE MILLER".

REFERENCES TO THE RECORD-ON-APPEAL SHALL BE "R-pg.#"; AND, REFERENCES TO THE APPENDIX SHALL BE BY THE SYMBOL "A-pg.#)

I S S U E S

ISSUE I — IS THE CONVENIENCE OF THE STATE IN TRYING CO-DEFENDANTS TOGETHER SUFFICIENT REASON, IN AND OF ITSELF TO EXTEND AN OBJECTING DEFENDANT'S SPEEDY TRIAL TIME AND DENY A MOTION TO SEVER WHEN A DELAY IS NECESSARY TO ACCOMMODATE A CO-DEFENDANT, IF THE DEFENDANTS ARE CHARGED WITH CONSPIRACY?

ISSUE II — WAS IT ERROR FOR THE TRIAL JUDGE TO REFUSE TO COMPEL THE STATE TO PROVIDE A DEFENDANT WITH COPIES OF VERBATIM TRANSCRIPTS OF CO-DEFENDANT'S TAPE-RECORDED CONVERSATIONS BEFORE TRIAL?

ISSUE III — WAS IT ERROR FOR THE TRIAL JUDGE TO LIMIT DEFENDANT'S CROSS-EXAMINATION OF A LAW ENFORCEMENT OFFICER CONCERNING A PENDING CRIMINAL INVESTIGATION AGAINST THAT OFFICER?

ISSUE IV — WAS IT ERROR FOR THE TRIAL JUDGE TO INSTRUCT THE JURY THAT ANY PERSON COULD PROVIDE SUBSTANTIAL ASSISTANCE TO THE STATE AND RECEIVE A REDUCED OR SUSPENDED SENTENCE UNDER F.S. 893.135?

ISSUE V — DID THE TRIAL JUDGE ERR IN REFUSING TO INSTRUCT THE JURY THAT WHEN ONE OF TWO PERSONS WHO CONSPIRE TO COMMIT A CRIME IS AN UNDERCOVER POLICE OFFICER, THERE MUST BE PROOF THAT THE DEFENDANT ALSO CONSPIRED WITH SOMEONE OTHER THAN THE POLICE OFFICER, TO PROVE CONSPIRACY?

STATEMENT OF THE CASE

On February 28, 1983, the State filed an Information charging Petitioner, GEORGE GARCIA, with Conspiracy To Traffic In Cocaine and Trafficking In Cocaine.

On April 11, 1983, GARCIA filed a Motion For Severance. (R-pg. 1303-1309)

On April 21, 1983, GARCIA filed a Demand For Speedy Trial. (R-pg. 1315; A-pg. 1)

On July 9, 1983, the State filed with the Court a Motion For Continuance and Extension Of Speedy Trial. (R-pg. 1318; A-pg. 2)

On June 15, 1983, Judge Miller entered an Order denying GARCIA'S Motion For Severance; granting the State's Motion For Continuance of GARCIA'S Trial; and, extending the time required for Trial under the Speedy Trial Rule. (R-pg. 1320; A-pg. 3)

On June 15, 1983, Judge Miller entered an Order specifically denying GARCIA'S Motion For Severance from his Co-Defendants. (R-pg. 1322, A-pg. 4) On June 28, 1983, GARCIA filed his Second Motion For Severance Of Defendant, which the Court denied. (R-pg. 1323; A-pg. 5)

On July 5, 1983, GARCIA filed a Motion For Discharge under Florida's Speedy Trial Rule and upon the grounds that his constitutional right to a speedy trial had been denied. (R-pg. 1326; A-pg. 6) Judge Miller denied that Motion. (R-pg. 1328; A-pg. 7)

On July 14, 1983, GARCIA filed a Motion For Stay Of Trial, specifically reserving and not waiving his right to speedy trial. (R-pg. 1329; A-pg. 8) That same day, Judge Miller entered an Order staying the Trial and again extending the time for Trial; but, recognizing that GARCIA had not waived his speedy trial demand. (R-pg. 1331; A-pg. 9)

On February 27, 1984, GARCIA filed a Motion For Discharge under Florida's Speedy Trial Rule and on the grounds that his constitutional right to a speedy trial had been denied. (R-pg. 1334; A-pg. 10) Judge Miller denied that Motion. (R-pg. 1338; A-pg. 11)

On February 28, 1984, GARCIA filed a Motion For Discharge under Florida's Speedy Trial Rule on the grounds that his constitutional right to a speedy trial had been denied. (R-pg. 1339; A-pg. 12) Judge Miller denied the Motion. (R-pg. 1341; A-pg. 13)

On February 18, 1984, GARCIA was found guilty of lesser included offenses under the Information. On April 17, 1984, the Court adjudged GARCIA guilty of both crimes and sentenced him to thirty months imprisonment, plus a $10,000.00 fine and five years probation. (R-pg. 1380-1385)

On May 7, 1984, GARCIA filed Notice Of Appeal from the convictions and sentences entered against him on April 17, 1984. (R-pg. 1391)

On July 5, 1985, the Fifth District Court of Appeal of the State of Florida affirmed GARCIA'S convictions; and, on September 3, 1985, denied GARCIA'S Motion For Rehearing. (A-pg. 14 & 15)

Petitioner timely filed his Notice To Invoke this Court's Discretionary Jurisdiction and on February 20, 1986, after consideration of Petitioner's Brief On Jurisdiction, this Court accepted jurisdiction and ordered the filing of Briefs.

STATEMENT OF THE FACTS

On February 10, 1983, GARCIA arrived at a motel and delivered cocaine to Narcotic's Agent Parks. That was the first contact that Parks or either Co-Defendant ever had with GARCIA and there was no evidence whatever that GARCIA was involved prior to the date of the drug delivery. (R-pg. 73-76, 511)

On February 10, 1984, GARCIA filed a Motion To Compel Discovery of transcripts of Co-Defendants' taped conversations; the Motion was denied on the theory that the transcripts were "work product". (R-pg. 1346) On February 14, 1984, GARCIA filed and argued an Addendum to that Motion which was also denied upon the same "work product" theory and the Judge also decided that discovery was "cut off" because of GARCIA'S speedy trial demand. (R-pg. 24, 25) GARCIA continued to seek the transcripts of the Co-Defendants' tape-recorded conversations, one of whom had become a State's witness. (R-pg. 210, 211, 238, 243, 263, 286-300, 309-331)

On February 16th, the third day of Trial, the Court ordered the State to provide GARCIA'S counsel with a copy of the verbatim transcripts which the State had deliberately withheld in violation of the Rules of Criminal Procedure. (R-pg. 309-331)

The only evidence of GARCIA'S involvement was his actions and statement at the motel on February 10, 1983. There was no reference to GARCIA, nor did his voice appear on any of the thirty three tape-recorded conversations which were admitted into evidence and played for the Jury. (R-pg. 463)

When Narcotic's Agent Parks was testifying, GARCIA'S attorney attempted to impeach him by showing that Parks had an extraordinary motive to obtain a conviction in this case, at any cost, because of pending criminal complaints against Parks for allegedly attempting to improperly influence the testimony of witnesses in criminal cases; for improperly soliciting perjury; and, for committing perjury. Judge Miller refused to permit such cross-examination, contrary to established case law. (R-pg. 213-219)

Later during the Trial, GARCIA'S attorney discovered that Agent Parks had illegally tape-recorded said attorney's telephone conversation with the key State's witness, Lamaire. GARCIA's counsel again unsuccessfully attempted to cross-examine Agent Parks about the circumstances of the ongoing Grand Jury investigation into Park's alleged witness tampering and his subornation of perjury to show Parks' bias, prejudice and motive. (R-pg. 808-820) That cross-examination was prohibited.

Judge Miller refused to instruct the Jury that where one of two persons involved in an alleged conspiracy is an undercover police officer, and the other person (GARCIA) is not proven to have conspired with any person other than the officer (Parks), that a conspiracy has not been proven. That requested instruction was critical and germane to GARCIA'S defense. (R-pg. 995-998, 1361)

Judge Miller instructed the Jury, over GARCIA'S attorney's objection, that any person arrested for Trafficking In Cocaine could receive a reduced sentence if he would just

cooperate and provide substantial assistance to the State. GARCIA was thereby cast in the light of an "uncooperative" defendant. (R-pg. 998, 999, 1001, 1005, 1037, 1038)

ARGUMENT, ISSUE I

ISSUE I — IS THE CONVENIENCE OF THE STATE IN TRYING CO-DEFENDANTS TOGETHER SUFFICIENT REASON, IN AND OF ITSELF TO EXTEND AN OBJECTING DEFENDANT'S SPEEDY TRIAL TIME AND DENY A MOTION TO SEVER WHEN A DELAY IS NECESSARY TO ACCOMMODATE A CO-DEFENDANT, IF THE DEFENDANTS ARE CHARGED WITH CONSPIRACY?

This Court held that the convenience of the State in trying co-defendants together is not an exceptional circumstance upon which a trial judge may base an extension of speedy trial time under Rule 3.191(f), Rules of Criminal Procedure (Miner v. Westlake, #66,401); thereby affirming the First District Court's decision in Westlake v. Miner, 460 So.2d 430 (Fla., 1st DCA, 1984). This Court quoted with approval, Machado v. State, 431 So.2d 337 (Fla., 2nd DCA, 1983), in which that Court stated:

> "(A) Defendant's right to a speedy trial takes precedence over the mere convenience to the state of trying him and his co-defendants together."

In the instant case, the Fifth District Court of Appeal held that:

> "In summary, where defendants are joined on conspiracy charges, and the state timely moves for an extension of the speedy trial time period, showing that the extension is necessary to accommodate a co-defendant, the state's interest in a joint trial prevails over the defendant's speedy trial right provided the extension is not to an unreasonably distant date."* * * (A-pg. 15)

The Opinion in Miner v. Westlake, (supra), of this Court had not been rendered in July of 1985, when the Fifth District Court of Appeal rendered its Opinion and it did not have the benefit of this Court's decision when it affirmed GARCIA'S conviction.

On April 21, 1983, GARCIA filed a Demand For Speedy Trial, having sat in jail for sixty one days, unable to post bond. (R-pg. 13, 15; A-pg. 1) GARCIA'S Trial was scheduled to begin on June 6, 1983; but, the State continued it over GARCIA'S objection and then, on June 9, 1983, the State filed a Motion seeking an extension of the speedy trial time. (R-pg. 1318; A-pg. 2) The only grounds cited or argued by the State in support of the extension Motion were the conclusionary allegations:

> * * *"(5) There is reason not to sever these defendants in that the defendants are properly joined as co-defendants because the offenses are based on the same acts and transactions and the defendants are charged with Conspiracy in Count II of the Information.
>
> (6) On June 9, 1983, this Court granted a continuance to co-defendants Lamaire and Rice upon their requests. This action placed the State of Florida in the position of having to request this continuance and request for extension of speedy trial time based upon the actions of the co-defendants and for reasons that these developments could not have been anticipated until such time as the Court granted the continuance to the co-defendants and said action by the Court will materially affect the trial of this cause.
>
> Wherefore, the State prays for an Order granting its continuance and Extension of Speedy Trial Time for exceptional circumstances as a matter of substantial justice and fairness to the State."

(R-pg. 318, 319; A-pg. 2)

On June 15, 1983, five days before the time for trial would have expired and over GARCIA'S specific objection, Judge Miller continued the trial for a second time and entered an Order ruling that exceptional circumstances existed as defined in Rule 3.191(d)(2)(f)(5), Rules of Criminal Procedure. (R-pg. 1320, 1321)

The pertinent parts of the Rules upon which Judge Miller based his decision are as follows:

> "(d)(2) When Time May Be Extended. The periods of time established by this Rule may be extended"* * *"on the court's own motion or motion by either party in exceptional circumstances as hereafter defined in section (f)."* * *
>
> "(f)(5) a showing that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the cases in order to proceed promptly with trial of the defendant;"* * *

Rule 3.191(d)(2)&(f)(5), Rules of Criminal Procedure.

Exceptional circumstances justifying an extension of trial time periods is defined as circumstances:

> "which as a matter of substantial justice to the accused or the State or both require an order by the court." (Emphasis supplied)

Rule 3.191(f), Rules of Criminal Procedure.

There was no evidence or testimony offered during the Motion Hearing, and the only grounds asserted by the State in support of its motion are quoted above from the State's written Motion. There were no unique problems in giving GARCIA a separate Trial. GARCIA objected to the continuance and the extension of time in pressing his speedy trial demand. (R-pg. 1320)

An in pari materia reading of Rule 3.152, Rules of Criminal Procedure, dealing with severances, and Rule 3.191, Rules of Criminal Procedure, the Speedy Trial Rule, compels the conclusion that even in a conspiracy case, the convenience to the State of a joint trial is not an exceptional circumstance upon which to base an extension of the speedy trial time. GARCIA was languishing in jail, having demanded a speedy trial, while his Co-defendants persistently continued and delayed his trial.

GARCIA'S Demand For Speedy Trial caused the Trial to be set on June 13, 1983, and prompted the prosecutor's Motion For Continuance And Extension Of Speedy Trial. (R-pg. 1318-¶#4) Judge Miller's Order specifically states that the June 13th, Trial date was set "to accommodate" GARCIA, i.e., comply with his Speedy Trial Demand. (R-pg. 1320-¶#4) Judge Miller's Order states that GARCIA objected to the State's Motion For Continuance And Extension Of Speedy Trial Time. (R-pg. 1320-¶#3)

On July 5, 1983, GARCIA argued a Motion For Discharge on the grounds that the Trial Court's Order extending the time of Trial denied his right to speedy trial. (R-pg. 1327-¶#8) The Court denied the Motion For Discharge and set all three Defendants for a joint Trial for the week of July 18, 1983, a month after the speedy trial time had expired. (R-pg. 1328)

On June 21, 1983, the sixty first day after GARCIA filed his Demand For Speedy Trial, he should have been either tried or discharged. But, because of the Court's Extension Order, it would be an additional two hundred thirty two days before GARCIA was finally brought to Trial.

The following is a chronology of pleadings and elapsed times relevant to GARCIA'S argument that his convictions should be reversed because he was denied his procedural and constitutional rights to a speedy trial:

(a) 363 Days between arrest (2/10/83) and Trial (2/8/84)

(b) 293 Days between Demand For Speedy Trial (4/21/83) and Trial (2/8/84)

(c) 281 Days between denial of Motion For Discharge (7/5/83) and Trial (2/8/84)

(d) 292 Days between Demand For Speedy Trial (4/21/83) and denial of Second Motion For Discharge (2/7/84)

(e) 293 Days between Demand For Speedy Trial (4/21/83) and denial of third Motion For Discharge (2/8/84)

(f) 209 Days between second Order extending speedy trial time (7/14/83) and Trial (2/8/84)

(g) 55 Days between Demand For Speedy Trial (4/21/83) and first extension of Speedy Trial time (6/15/83)

(h) 30 Days between final Appellate Court activity on Co-Defendants' Motion For Clarification (1/9/84) and Trial (2/8/84)

The case against GARCIA was simple and could have been presented in less than one day. (R-pg. 67, 73-76, 463, 511) Narcotic's Agent Parks and the officers on surveillance could have merely testified as to GARCIA arriving, delivering the cocaine and his conversations with the undercover agent and his Co-Defendants. There was nothing complex or unique about the presentation of GARCIA'S case, nor was there any necessity demonstrated for GARCIA to be tried with his Co-Defendants, except for the usual "convenience and economy" arguments that

prosecutors voice when they don't want to try co-defendants separately.

A delay in GARCIA'S Trial was "necessary" to accommodate his Co-Defendants only if a joint Trial was necessary. The "reason not to sever the cases", and denying GARCIA is right to speedy trial, did not meet the standard required by the Rule. Under the Rule, exceptional circumstances are defined as:

> those which "as a matter of substantial justice to the accused or the State or both require an order by the court". (Emphasis supplied)(Rule 3.191(f)(5), RCrP)

Would a severance have resulted in a substantial injustice to the State? No!

The mere fact that the State would like the convenience of trying co-defendants together should not outweigh an indigent citizen's right to a speedy trial, even in conspiracy cases. Note, Robert Lamaire, the Co-Defendant for whose convenience GARCIA was denied a speedy trial, entered a guilty plea and became the star State's witness against GARCIA. The other Co-Defendant, Rice, was free on bond, awaiting Trial, and in no hurry to get to Court. (R-pg. 1318, 1320; A-pg. 3, 4)

Fifty Five days had elapsed from GARCIA'S Demand For Speedy Trial until the Court first extended the time of Trial. (R-pg. 1315, 1320; A-pg. 1, 4) When the time for Trial resumed after the Co-Defendants' Writs were disposed of by the Fifth District Court of Appeal, there were only five days remaining on the original sixty days within which the State should have brought GARCIA to trial. Yet, it was another thirty days before

GARCIA was finally tried. The Fifth District Court of Appeal ignored that issue and erroneously applied the 90 day rule contrary to precedence from the Third District Court of Appeal. State v. Barreiro, 460 So.2d 945 (3rd DCA, 1984); and, State v. Dante, (3rd DCA, #83-2626, 4/2/85)

GARCIA remained in jail, an indigent Defendant, unable to post bond, for three hundred and sixty three days before he was given a Trial. A one year delay from arrest to trial for a citizen who is being held without bond and is continuously demanding speedy trial, is an intolerable violation of our Constitutional guarantee of a speedy trial, under Article 1, Section 16 of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

ARGUMENT, ISSUE II

ISSUE II — WAS IT ERROR FOR THE TRIAL JUDGE TO REFUSE TO COMPEL THE STATE TO PROVIDE A DEFENDANT WITH COPIES OF VERBATIM TRANSCRIPTS OF CO-DEFENDANT'S TAPE-RECORDED CONVERSATIONS BEFORE TRIAL?

On April 11, 1983, GARCIA'S counsel filed a Demand For Discovery And Disclosure under Rule 3.220(a). (R-pg. 1303) On April 18, 1983, he received the State's Response to the discovery demand, but was never provided a copy or given an opportunity to copy the numerous verbatim transcripts of tape-recorded conversations between GARCIA'S Co-Defendants and certain law enforcement officers.

On February 9, 1984, after the Jury was selected, GARCIA'S counsel learned for the first time that the State had in its possession transcripts of tape-recorded conversations of GARCIA'S Co-Defendants and law enforcement officers. Counsel promptly filed a Motion to compel the State to provide him with a copy of the verbatim transcripts. (R-pg. 1346) On February 10, 1984, Judge Miller entered a verbal Order permitting GARCIA'S attorney to read the transcripts; but, prohibiting him from making copies of them. That Order was reduced to writing on February 12, 1984. (R-pg. 1351)

On February 14, 1984, GARCIA'S attorney filed an Addendum To Motion To Compel, advising the Court that at the time he went to the State Attorney's office to read the transcripts, the Prosecutor prohibited him from taking any notes or making any memorandum concerning the contents of the transcripts. (R-pg. 1355)

Prior to the swearing of the Jury, GARCIA'S counsel again unsuccessfully urged the Court to compel the State to provide him with a copy of the verbatim transcripts of the tape-recorded conversations of the alleged co-conspirators. (R-pg. 24) Throughout the Trial, GARCIA continued to seek said transcripts. (R-pg. 210-211, 238, 243, 262, 286-300, 317, 320-331)

Finally, on the third day of Trial, following two days of testimony by the State's primary witness, Warren Parks, a party to many of the recorded conversations; the Court ordered the State to give GARCIA'S attorney copies of the transcripts.

Most of Parks' testimony on direct and considerable cross-examination had been presented before the transcripts were made available for defense preparation for cross-examination. (R-pg. 61-396)

The deliberate withholding of the discoverable verbatim transcripts deprived GARCIA'S attorney of a useful trial tool; and, the appropriate sanction is a reversal of GARCIA'S conviction.

ARGUMENT, ISSUE III

ISSUE III WAS IT ERROR FOR THE TRIAL JUDGE TO LIMIT DEFENDANT'S CROSS-EXAMINATION OF A LAW ENFORCEMENT OFFICER CONCERNING A PENDING CRIMINAL INVESTIGATION AGAINST THAT OFFICER?

GARCIA'S attorney attempted to cross-examine a key State's witness, Agent Warren Parks of the Volusia County Narcotics Task Force, concerning the fact that, at the time of Trial, Parks was under actual or threatened criminal charges, being investigated by the Volusia County Grand Jury. (R-pg. 213) Judge Miller prohibited such cross-examination of Parks, stating that the established rule permitting such cross-examination did not apply to law enforcement officers because they would have nothing to gain. (R-pg. 213, 214)

The Court accepted the proffer that the evidence would show that County Councilman, Alice Cycler, and others had made criminal complaints that Agent Parks had attempted to improperly influence the testimony of witnesses in criminal cases, that he

had improperly solicited perjury in cases and that he, himself, had committed perjury in connection with criminal matters; and, that those charges were, at the time of Petitioner's Trial, under active investigation by the Volusia County Grand Jury. (R-pg. 214-219)

Upon the Court's ruling, the Jurors were returned to the courtroom and Judge Miller instructed them to disregard GARCIA'S attorney's questions in their entirety. (R-pg. 219)

Judge Miller, by restricting defense counsel's cross-examination of Parks, deprived GARCIA of his right o confront and cross-examine a key State's witness to discredit his testimony by showing his bias, prejudice or interest in obtaining a successful, major drug conviction at a time when the witness' honesty, integrity, ethics and efficiency as a law enforcement officer was under investigation by the Volusia County Grand Jury. That limitation violated GARCIA'S fundamental right to confront and cross-examine his accuser and denied him a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 9, of the Florida Constitution.

On February 16, 1984, the day after the Court restricted counsel's cross-examination of Parks, Robert Lamaire revealed on cross-examination that Agent Parks had induced him to call GARCIA's counsel, John Tanner, on the telephone during the Trial; and, that Agent Parks tape-recorded the telephone conversation without the attorney's knowledge. (R-pg. 513, 554, 559-573) Parks later testified that he directed Lamaire to call

Tanner and surreptitiously taped the phone conversation with the knowledge and consent of Assistant State Attorney Clyde Shoemake, without the benefit of a warrant or other court authority, in an effort to create a situation inviting either illegal or unethical conduct by GARCIA'S counsel. (R-pg. 820-854)

After the illegal surreptitious taping of Attorney Tanner's phone conversation was revealed, GARCIA'S counsel, again requested that the Court permit him to cross-examine Agent Parks concerning the ongoing criminal investigation against him, to expose Parks' motive to testify falsely at GARCIA'S Trial. Parks wanted desperately to obtain a conviction to improve his image in the eyes of the State Attorney's office, the Sheriff's office and the Volusia County Grand Jury. Counsel's second attempt to pursue such cross-examination was again barred by Judge Miller. (R-pg. 806-820) The second adverse ruling by the Court compounded the previous error by again unconstitutionally restricting GARCIA'S right to cross-examine the witness on relevant and substantial impeachment issues.

Judge Miller recognized the proper impeachment value of evidence that Agent Parks persuaded Lamaire to assist him in taping Attorney Tanner's telephone call; to show Lamaire was even willing to participate in an attempted entrapment of an innocent lawyer to obtain a more favorable sentence. (R-pg. 566-573) Judge Miller permitted GARCIA'S Co-Defendant to play the tape-recorded conversation between Lamaire and Tanner for the Jury. (R-pg. 1025)

The Fifth District Court of Appeal, in recognizing the importance of cross-examination to expose a witness' motive, said:

> * * *"The exposure of a witness' motivation in testifying is a proper function of the constitutionally protected right of cross-examination. Davis v. Alaska, 415 U.S. 308, 315-376 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). Any evidence which tends to establish that a witness is appearing for the State for any reason other tan merely to tell the truth should not be kept from the jury. Cowherd v. State, 365 So.2d 191, 193 (Fla., 3rd DCA, 1978)."

Holt v. State, 378 So.2d 106 (5th DCA, 1980)

In Coxwell v. State, 361 So.2d 148 (Fla., 1978), this Supreme Court recognized the constitutional right to full cross-examination of State's witnesses as "an absolute right, as distinguished from a privilege". Limiting the scope of cross-examination of a key prosecution witness, so as to keep from the jury relevant facts bearing on the witness' credibility, constitutes error. Stradtman v. State, 334 So.2d 100 (3rd DCA, 1976)

This Court and every other appellate court in Florida has ruled that a defendant in a criminal case has an absolute right to cross-examine a key State's witness concerning an ongoing criminal investigation against him and that denial of the right constitutes reversible error, to-wit:

Fulton v. State, 335 So.2d 280 (Fla., 1976)
Watts v. State, 450 So.2d 265 (2nd DCA, 1984)
Moreno v. State, 418 So.2d 1223 (3rd DCA, 1981)
Lee v. State, 318 So.2d 431 (4th DCA, 1975)
Morrell v. State, 297 So.2d 579 (1st DCA, 1974)

Judge Miller was fully apprised of the case law; but, created a unique exception for law enforcement officers and said:

> "THE COURT: Let the record reflect that defense counsel has argued the case of Morrell v. State, 297 So.2d 579 and Fulton v. State, 335 So.2d 280 for the proposition that this testimony is admissible. The Court finds after reviewing both of defense cases that they're not applicable to this witness in that he's a law enforcement officer and there's no way that he had anything to gain by testifying in this case such as a person with pending State charges would have."* * * (Emphasis supplied)

(R-pg. 213, 214)

Judge Miller's belief that law enforcement officers will not lie is naive. Judge Miller decided that Parks was credible because he was a police officer and that the established case law on the subject was inapplicable. The determination of credibility of witnesses is the exclusive province of the jury. Stovall v. State, 24 So.2d 528 (Fla., 1946)

Other applicable courts have determined that police officers are subject to full cross-examination, the same as any other witness, and that their badge is no guarantee of integrity. In Lutherman v. State, 348 So.2d 624 (3rd DCA, 1977), the Court held it was improper to restrict cross-examination of police officers concerning a pending criminal investigation into their conduct. In Kurfin v. State, 378 So.2d 1341 (3rd DCA, 1980), the Court held that the trial judge erroneously restricted cross-examination by disallowing questions intended to show an undercover narcotics agent's personal bias against the defendant.

If the witness is telling the truth, he has nothing to fear from cross-examination. A defendant has the right to search out every witness' motive and expose it to the jury. Judge Miller simply determined that Agent Parks was credible and disallowed legitimate cross-examination because he was a narcotics officers.

ARGUMENT, ISSUE IV

ISSUE IV — WAS IT ERROR FOR THE TRIAL JUDGE TO INSTRUCT THE JURY THAT ANY PERSON COULD PROVIDE SUBSTANTIAL ASSISTANCE TO THE STATE AND RECEIVE A REDUCED OR SUSPENDED SENTENCE UNDER F.S. 893.135?

The prosecutor asked Judge Miller to instruct the Jury regarding substantial assistance under F.S. 893.135. (R-pg. 998, 999) GARCIA objected to the instruction on the grounds that it was inherently prejudicial, and violated his Fifth Amendment privilege by challenging him to come forward and give State's evidence and because the instruction advised the Jury that GARCIA had an opportunity to come forward and testify and avoid the severe, mandatory punishments of the drug trafficking laws. (R-pg. 999-1003)

Judge Miller recognized the possible error in giving the instruction; nonetheless, the prosecutor insisted on the instruction and persuaded the Court that the State would defend it before the Appellate Court. (R-pg. 1001, 1005)

Judge Miller's Jury Instruction emphasized that the State believed Lamaire was providing substantial assistance to

convict his co-conspirators and that the Judge, himself, found Lamaire credible. The Judge told the jury:

> * * *"The State Attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, co-conspirators or principals"* * * "<u>The Judge will hear the motion and reduce or suspend the sentence if he finds that the Defendant has rendered such substantial assistance</u>."* * * (Emphasis supplied)

(R-pg. 1037, 1038)

There was trial testimony that Judge Miller had already agreed to grant the State's Substantial Assistance Motion. The Judge's commitment to a sentence reduction for Lamaire, in spite of the mandatory/minimum sentence requirement, clearly told the jury that Judge Miller had already determined that Lamaire was testifying truthfully. The following is an excerpt of the cross-examination of Lamaire:

> "Q. Number two, in return for the truthful testimony, the State would be filing a recommendation that the minimum mandatory sentence be eliminated in your case and also would recommend that you be sentenced to no more than five and a half to seven years, correct?
>
> A. I believe that is it, yes.
>
> Q. <u>And the Judge indicated that His Honor would be bound by that, that he would</u>

accept that five and a half to seven year?

A. Yes, sir."* * * (Emphasis supplied)

(R-pg. 648, 649)

GARCIA'S counsel objected to the erroneous instruction and raised the obvious Fifth Amendment issue. (R-pg. 999-1007) The Fifth Amendment objection alone was sufficient reason for the Court not to give the Instruction.

The erroneous Instruction also bolstered the credibility of Lamaire. The due process clause of the State and Federal Constitutions contemplate correct Instructions to the jury which do not indicate the judge's opinion as to the truthfulness of any witness. Henderson v. State, 20 So.2d 649 (Fla., 1945)

The Jury Instruction was so patently erroneous and prejudicial that it must be considered as fundamental error, striking at the very heart of GARCIA'S right to a fair trial; thus, reviewable without objection. Any Instruction that constitutes a comment on the evidence or the credibility of witnesses invades the province of the jury and rises to the magnitude of fundamental error. Jones v. State, 187 So.2d 915 (2nd DCA, 1966); Forceir v. State, 133 So.2d 336 (2nd DCA, 1961); Austin v. Wainwright, 305 So.2d 845 (4th DCA, 1975); Smith v. State, 282 So.2d 179 (2nd DCA, 1973); Canada v. State, 139 So.2d 753 (2nd DCA, 1961)

ARGUMENT, ISSUE V

ISSUE V DID THE TRIAL JUDGE ERR IN REFUSING TO INSTRUCT THE JURY THAT WHEN ONE OF TWO PERSONS WHO CONSPIRE TO COMMIT A CRIME IS AN UNDERCOVER POLICE OFFICER, THERE MUST BE PROOF THAT THE DEFENDANT ALSO CONSPIRED WITH SOMEONE OTHER THAN THE POLICE OFFICER, TO PROVE CONSPIRACY?

A defendant in a criminal case is entitled to a jury instruction on the theory of his defense if there is evidence in the record to support it, regardless of how weak or improbable it may be. Solomon v. State, 436 So.2d 1041 (1st DCA, 1983); Holley v. State, 423 So.2d 562 (1st DCA, 1982)

GARCIA was entitled to a Jury Instruction on the theory of his defense--that the only person the State proved he conspired with was Agent Parks. The mere proof that he had participated in the crime was not sufficient to sustain a conspiracy conviction. State v. Sanchez, 398 So.2d 847 (2nd DCA, 1981); Little v. State, 393 So.2d 775 (2nd DCA, 1974); Ramirez v. State, 371 So.2d 1063 (3rd DCA, 1979)

Agent Parks said GARCIA had a conspiracy-type conversation with him; but, concert of action between GARCIA and Parks did not constitute a conspiracy. King v. State, 104 So.2d 730 (Fla., 1958); Tomlin v. State, 333 So.2d 500 (1st DCA, 1976)

GARCIA'S defense was the State's failure to prove that he conspired with anyone except Agent Parks. The jury should have been instructed that proof of a conspiracy with Parks alone

was insufficient for a conviction. The prosecutor conceded that the requested Instruction was a correct statement of law, to-wit:

"MR. TANNER: * * *I think 6 is law and we're entitled to that one.

THE COURT: * * *You got any case with you?

MR. TANNER: I do.

Tomlin versus State and _King v. State_.

* * *

MR. STARK: Here is the King case, Judge and I would agree with Mr. Tanner if the only person that Mr. Garcia ever came in contact with at any time was Warren Parks, there would not be a conspiracy between Mr. Garcia only and Mr. Parks, I would agree to that.

THE COURT: That's what this says.

MR. STARK: That's not the case here.

THE COURT: _That's for the Jury to decide. Shouldn't they be aware that a conspiracy can't be between Parks and one of them_? (Emphasis Supplied)

MR. TANNER: They really should. That's the heart of my defense on conspiracy.

* * *

MR. TANNER: But the Jury will never know if you conspire with a police officer it's not conspiracy. We have evidence that he told Parks that he was going down there and get the stuff and bring it back and that's the only evidence that he told anybody that.

MR. STARK: Right,* * *

* * *

THE COURT: I don't think anybody disagrees with that law.

MR. TANNER: But Judge, the Jury won't know it.

* * *

THE COURT: But the Jury is not involved in that. There's no allegation of that. This should not be involved in the Jury Instructions. I'm going to sustain the objection."* * *

(R-pg. 995-998)

GARCIA'S first contact with any of the co-conspirators was around midnight the final day of the conspiracy. (R-pg. 511) The only direct evidence that GARCIA conspired with anyone was his conversations with Parks. GARCIA did not speak on, nor was he mentioned on any of the thirty three tape recordings. (R-pg. 143, 147, 269) The only proof of conspiracy was his conversations with Agent Parks. (R-pg. 126-135)

Judge Miller's failure to give Instruction #6 (R-pg. 1361), left the Jury to speculate as to whether or not conversations between Parks and GARCIA were sufficient upon which to base a conspiracy conviction.

SUMMARY OF ARGUMENT

In July, 1985, the Fifth District Court of Appeal decided that in a case where Conspiracy is charged, the convenience of the State in trying co-defendants together is

sufficient reason, standing alone, to extend an objecting defendant's trial date past the time allowed by speedy trial and to deny that defendant's motion for a severance. (A-pg. 15)

On November 25, 1985, this Court held that the convenience of the State in trying co-defendants together is not an exceptional circumstance upon which a trial judge may base an extension of speedy trial time under Rule 3.191(f), Rules of Criminal Procedure; affirming Westlake v. Miner, 460 So.2d 430 (Fla., 1st DCA, 1984).

In GARCIA'S case, the only grounds for the State's Motion for an extension of speedy trial time were that:

1. There is reason not to sever because the Defendants are properly joined as Co-Defendants; and

2. The offenses were based on the same acts and transactions; and

3. The Defendants were charged with Conspiracy in one Count of the Information; and

4. The Trial Court had granted a continuance to the Co-Defendants; and

5. The State could not have anticipated the Co-Defendants' continuance. (A-pg. 2)

The State did not offer any testimony or evidence at the time the Motion For Extension Of Speedy Trial Time was heard, nor did the State offer any argument other than those presented above.

The grounds upon which the Trial Court denied GARCIA'S Motion For Severance, granted the State's Motion For Continuance, and granted the State's Motion To Extend The Time Of Trial can

not be sustained under the requirements for extension as elucidated in the applicable Rule, Rule 3.191(d)(2)(f)(5), Rules of Criminal Procedure. "Exceptional circumstances" to justify an extension of speedy trial time must be circumstances which:

> "as a matter of substantial justice to the accused or the state or both require an order by the court."
>
> Rule 3.191(f), Rules of Criminal Procedure

There was nothing complex or unique about GARCIA'S Trial. A total of three witnesses and perhaps one days testimony would have been sufficient to present the State's case against GARCIA alone. Nonetheless, the prosecutor persuaded the Trial Judge to disregard GARCIA'S Demand For Speedy Trial and two hundred and thirty eight days would pass after that extension until GARCIA'S Trial would begin. A total of three hundred sixty three days would elapse between GARCIA'S arrest date and the commencement of his Trial.

Several days before Trial, GARCIA'S counsel learned that the State had transcribed tape-recorded conversations of GARCIA'S Co-Defendants and law enforcement officers during the pendency of the conspiracy. Counsel immediately filed a Motion to compel the State to provide him with the transcripts; but, the Trial Judge ruled that the transcripts were "work product"; and, further, that GARCIA'S Demand For Speedy Trial, ten months earlier, had "cut off" the State's obligation to surrender discoverable transcripts of witness statements. The third day of the jury trial, after the usefulness of those transcripts was

largely lost, the Trial Judge finally relented and required the State to turn copies of the transcripts over to GARCIA'S attorney.

The prosecutor deliberately withheld valuable, discoverable evidence from GARCIA'S attorney and deprived GARCIA of effective cross-examination of a key State's witness.

At the time of GARCIA'S trial, Agent Warren Parks, a key State's witness, was under investigation by the Volusia County Grand Jury and the Sheriff's Department for criminal complaints that Agent Parks had attempted to improperly influence the testimony of witnesses in criminal cases, that Parks had solicited perjury in cases, and that Parks had committed perjury in connection with criminal matters.

When GARCIA'S attorney attempted to cross-examine Parks concerning the fact that he was under threatened criminal charges, based on criminal complaints that were being investigated by the Volusia County Grand Jury, Judge Miller prohibited counsel's cross-examination, stating that the general rule permitting such cross-examination did not apply to law enforcement officers because "they would have nothing to gain". GARCIA was again deprived of a valuable cross-examination tool in his defense.

The Trial Judge instructed the jury, over Defendant's objection, that the Court could reduce a minimum mandatory drug trafficking conviction if the Court found that the convicted party had rendered substantial assistance to the prosecutor in identifying his accomplices, accessories, or co-conspirators.

During the Trial, the jury had learned that the Trial Judge had agreed to reduce one of the co-conspirator's fifteen year sentences to something between five and seven and one half years; having found that the testifying Co-Defendant, who had entered a plea of guilty, had rendered substantial assistance under F.S. 893.135.

The erroneous and objected to Instruction obviously bolstered the credibility of the State's witness who had received benefit from the Substantial Assistance Statute. The credibility of that State's witness was a critical issue at GARCIA'S Trial and the Court's Instruction clearly told the jury that the Judge had already decided the witness' credibility issue in favor of the State.

GARCIA delivered the cocaine to the motel room in which the undercover officer, Parks, was waiting with the Co-Defendant, (State's witness) Lamaire. Neither Lamaire, or the other Co-Defendant, Rice, had ever met, seen or talked to GARCIA; and, the only conspiratorial type statements made by GARCIA were made directly to Agent Parks.

GARCIA requested an Instruction that "conspiracy" with a police officer does not constitute a crime; but, there must be proof that GARCIA also conspired with someone other than the police officer to sustain a conviction.

The prosecutor and the Trial Judge both agreed that the Instruction was a correct statement of the law, but Judge Miller refused to instruct the jury, ruling that the jury shouldn't be involved in that issue because there was "no allegation of that".

GARCIA, as every other defendant in a criminal case, was entitled to a Jury Instruction on the theory of his defense and the Judge's ruling deprived him of that right.

CONCLUSION

The initial basis for this Court accepting jurisdiction in this case was the limited issue of GARCIA'S right to speedy trial after a speedy trial demand, despite the fact he was charged with the crime of Conspiracy. But, the other issues addressed in this Brief deserve consideration by this esteemed and Honorable Court. Under the stringent and narrow guidelines restricting review in this forum, many defendants aren't afforded judicious consideration of substantial fundamental issues and are deprived of their right to a fair trial. GARCIA was not only denied a speedy trial, he was denied a fair trial.

The prosecutor was permitted to deliberately withhold critical, discoverable material from GARCIA'S attorney.

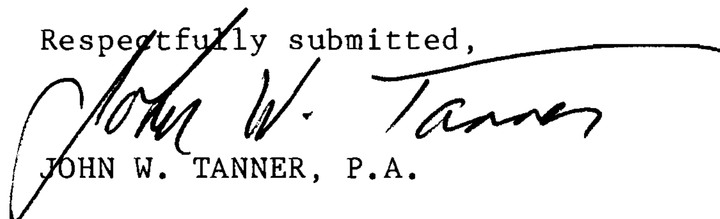
GARCIA'S attorney was not permitted full and fair cross-examination of critical State's witnesses.

The Trial Judge instructed the jury in such a way that the jury knew the Court believed the key State's witness and had agreed to reduce that witness' sentence from fifteen to five to seven and one half years in return for his cooperation.

Finally, the Judge would not even give a proper Instruction to the jury which was essential to GARCIA'S defense and his right to a fair trial.

GARCIA respectfully prays that this Court will rescind its administrative decision to dispense with Oral Argument and permit his counsel to appear before this esteemed and honored tribunal to offer argument before this Court to assist the Justices in deciding all of the issues raised on Mr. Garcia's behalf.

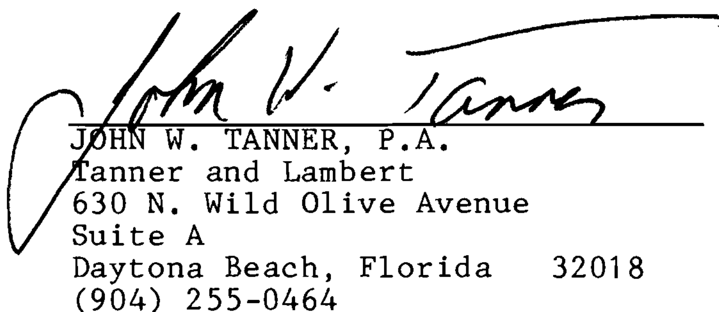
Respectfully submitted,



JOHN W. TANNER, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the HONORABLE JIM SMITH, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 11th day of March, A. D., 1986.



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