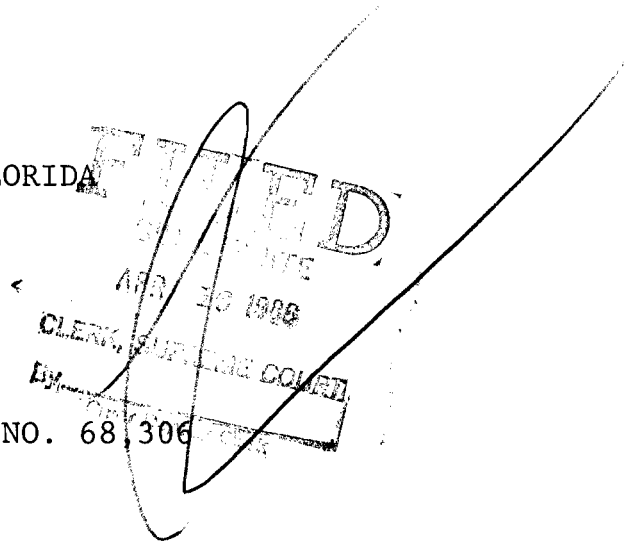
IN THE SUPREME COURT OF FLORIDA



JOE EDWARD LEE,

Petitioner,

vs. CASE NO. 68,306

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENTS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Joe Edward Lee, the Appellant, Defendant below, will be referred to as Lee or Petitioner. Respondent, State of Florida, the prosecuting authority below, will referred to as the State.

References to the one volume of the record of appeal containing the legal documents filed in this cause will be made by the symbol "R" followed by the appropriate page number in parenthesis (R-). References to the one volume of the record of appeal containing the transcript of the hearing on the motion to dismiss for improper governmental conduct will be made by the symbol "MD" followed by the appropriate page number in parenthesis (MD-). References to the one volume of the record of appeal containing the transcript of the hearing on the motion to withdraw plea of nolo contendere will be made by the symbol "WP" followed by the appropriate page number (WP-). References to the supplemental record containing the presentence investigation will be made by the symbol "SR" follwed by the appropriate page number in parenthesis (SR-).

STATEMENT OF THE CASE AND FACTS

On January 18th and 20th, 1984, confidential informant Ronald Carn, made two separate controlled purchases of cocaine from Petitioner (MD 15-17). Both transactions were supervised and closely monitored by Florida Department of Law Enforcement Agent Jimmy Collins (MD 24). Petitioner was then charged by information on November 19, 1984, with two counts of possession of cocaine and two counts of delivery of cocaine (R 3-4).

On January 25, 1985, Petitioner moved for dismissal of the information on the ground of improper governmental conduct in violation of his constitutional right to due process (R 19-21).

A hearing on the motion to dismiss was held on February 20, 1985. Special Agent Jimmy Collins testified that he entered into an oral contract with confidential informant Ronald Carn whereby Carn would receive $25 for each purchase of controlled substances made by him; that on January 18, and 20, 1984, Carn made two separate controlled purchases of cocaine from Petitioner that prior to each purchase, Carn was thoroughly searched; each purchase was carefully observed by Collins; he observed the exchange of money as well as the exchange of cocaine from Petitioner (MD 24).

The fee arrangement with Carn was subsequently changed to a weekly salary (MD 17).

The motion to dismiss was denied at the close of the hearing (MD 52) and by written order on March 4, 1985 (R 31).

On February 20th, 1985, Petitioner freely and voluntarily entered a plea of nolo contendere to one count of possession of cocaine, pursuant to a negotiated plea (R 23-26). The negotiated plea provided, inter alia, that the State would recommend probation and enter a nolle prosequi to counts II, III, and IV of the information (R 26).

A presentence investigation was then ordered. In the PSI, agent Collins stated that he discovered Petitioner to be a "bigger cocaine dealer than realized" and therefore opined that Petitioner deserved a period of incarceration (PSI 11). Collins was not involved in the plea negotiations. The assistant state attorney, as spokesman for the State, complied with the plea bargain and recommended probation.

On March 13, 1985, Petitioner moved to withdraw his plea of nolo contendere and set the cause for trial, on the ground that the State had breached the plea bargain because Agent Collins recommended incarceration in the PSI (R 33-34). A hearing was held on the motion on April 1, 1985. The court denied Petitioner's motion to withdraw his plea of nolo contendere (R 35). Petitioner was adjudicated guilty of possession of cocaine and sentenced to three years probation and sixty (60) days incarceraton (R 36-38).

On appeal to the First District, Petitioner raised the following issues:

I. THE CONTINGENT FEE AGREEMENT WITH THE INFORMANT TO PRODUCE EVIDENCE AGAINST THE APPELLANT VIOLATED APPELLANT'S DUE PROCESS RIGHT.

II. THE COURT ERRED IN REFUSING TO ALLOW THE APPELLANT TO WITHDRAW HIS PLEA BECAUSE THE POLICE BREACHED THE PLEA AGREEMENT BY RECOMMENDING INCARCERATION.

By opinion filed January 15, 1986, the First District affirmed the trial court's rulings and certified as in direct conflict with Fortini vs. State, 472 So.2d 1383 (Fla. 4th DCA 1985), the following question:

> WHEN A LAW ENFORCEMENT OFFICER MAKES AN INDEPENDENT RECOMMENDATION TO THE TRIAL COURT THAT RUNS COUNTER TO THE RECOMMENDATION IN A PLEA AGREEMENT ENTERED INTO BY THE STATE ATTORNEY'S OFFICE FOR THE "STATE", MUST THE TRIAL COURT PERMIT A WITHDRAWAL OF THE PLEA?

Petitioner's Brief on the Merits was filed March 10, 1986. Brief of Amicus Curiae was submitted under the sponsorship of the Florida Criminal Defense Attorneys Association on March 18, 1986.

SUMMARY OF ARGUMENT

A sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant, if not essential, to the selection of a fair and appropriate disposition. The fact that the state, while providing the fullest information possible, might have indirectly made a different recommendation through the investigating agent regarding Petitioner's sentence, did not vitiate its bargain because the trial court was not bound by any such recommendation and Petitioner clearly understood it.

This Court should decline to review Petitioner's assertion that his right to due process was violated by the State's involvement with and method of obtaining evidence on Petitioner because said issue is wholly separate and collateral to the certified question on review. This Court should respect the First District's conclusion in its capacity as a court of final jurisdiction. Alternatively, this Court should affirm the District Court's decision regarding this issue as the circumstances of this case are clearly distinguishable from State vs. Glosson, 462 So.2d 1082 (Fla. 1985), on which Petitioner relies, and is therefore without the purview of the holding in that case.

ARGUMENT

ISSUE I

THE FIRST DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO WITHDRAW HIS PLEA WHERE THERE HAD BEEN NO VIOLATION OF THE PLEA AGREEMENT.

The foregoing issue is on review to this Honorable Court via the following certified question from the First District Court of Appeal:

> WHEN A LAW ENFORCEMENT OFFICER MAKES AN INDEPENDENT RECOMMENDATION TO THE TRIAL COURT THAT RUNS COUNTER TO THE RECOMMENDATION IN A PLEA AGREEMENT ENTERED INTO BY THE STATE ATTORNEY'S OFFICE FOR THE "STATE" MUST THE TRIAL COURT PERMIT A WITHDRAWAL OF THE PLEA?

The State submits that this question was answered in the negative and favorably disposed of in Wood vs. State, 346 So.2d 143 (Fla. 1st DCA 1977). The decision below and the decision in Wood vs. State, is in conflict with the Fourth District's decision in Fortini vs. State, 472 So.2d 1383 (Fla. 4th DCA 1985) and therefore this Court has jurisdiction. Art V § 3(b)(3), Fla. Constitution.

Based on policy considerations, it is the State's position that this Court should adopt the holding of the First District and disapprove the Fourth District's decision in Fortini.

The United States Supreme Court recognized that, "in non-capital cases, the established practice of individualized sentences rests not on constitutional demands, but on public policy enacted into statutes". Lockett vs. Ohio, 438 U.S. 586, 605; 57 L.Ed.2d 973, 990: 98 S.Ct. 2954 (1978).

Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account. Moreover, it is well established that a sentencing judge is not bound by a prosecutor's recommendation in plea bargain negotiations. "And where sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is 'highly relevant - if not essential - [to the] selection of an appropriate sentence...' Williams vs. New York, 337 U.S. 247, 93 LEd 1337, 69 S.Ct. 1079(1949)". Lockett vs. Ohio, supra, at 602,603. In Williams vs. New York, supra, the Supreme Court enunciated the rule that a sentencing judge can "exercise a wide discretion in the sources and types of evidence" he uses "to assist him in determining the kind and extent of punishment to be imposed" Id. at 246. The Supreme Court continues to adhere to Williams and recently noted that it "reaffirmed the 'fundamental sentencing principle' that 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " Roberts vs. United States, 445 U.S. 552,556, 100 S.Ct. 1358,1362, 63 LEd.2d 622(1980) quoting United States vs. Grayson, 438 U.S. 41,50, 98 S.Ct. 2610, 2615, 57 LEd.2d 582(1978).

Applying the foregoing reasoning to the factual situation sub judice, the State emphatically submits that a personalized opinion by the arresting agent which recommended incarceration,

contained in the PSI report is clearly within that scope of information which is highly relevant to the selection of an appropriate sentence.

In pertinent part, the assistant State Attorney promised that he would recommend probation and remain mute as to the withholding of adjudication of guilt. He did not promise that all other people who had an input into the presentence investigation would remain mute nor did he have any knowledge that Agent Collins was going to say anything or what he would say in the presentence investigation. The State Attorney represents the State, he negotiated the plea bargain, not the agent; he promised a recommendation of probation and in no way deviated from that promise.

The information supplied by the agent in the PSI, although different from his deposition taken two months earlier, could hardly have been so prejudicial to the Petitioner that it would deny him a fair disposition hearing by the trial judge. The accuracy of the statements was not even challenged by Petitioner or his counsel, nor was the judge asked to disregard any of them or to afford Petitioner a chance to refute or discredit any of them by cross-examination or otherwise. Apparently the trial judge was not even concerned with what Agent Collins thought the court should do (WP-8,9) Since the sentencing was left entirely to the trial court's discretion, the fact that the state <u>might</u> have indirectly made a recommendation through the investigating agent regarding the length of Petitioner's sentence did not vitiate its bargain because the

trial court was not bound by any such recommendation and Petitioner clearly understood it. (R23-25) State vs. Adams, 342 So.2d 818 (Fla. 1977).

To quote the Honorable Justice Black in Williams vs. New York, "to deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation". Id. at 250. Singularly and collectively, it is apparent that no good cause was demonstrated to the trial court to vacate the nolo contendere plea prior to imposition of sentence. Fla. R. Crim. P. 3.850 and Williams vs. State, 316 So.2d 267 (Fla. 1975).

An important distinction which was made below and should be pointed out to the Court is the fact that a plea was negotiated in this case, not a sentence. The trial judge properly considered the fullest information available to him, including the agreed-upon recommendation by the State Attorney, consistent with the orderly disposition of the case. The State having fully complied with its plea bargain agreement, this Court should affirm the order denying Petitioner's motion to withdraw his plea of nolo contendere which was freely and voluntarily entered into.

ISSUE II

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DUE PROCESS ISSUE AS IT IS COLLATERAL TO THE CERTIFIED QUESTION ON REVIEW.

Petitioner is challenging the lower court's decision regarding the due process issue, which is wholly separate and collateral to the certified question on review (Issue I).

Article V, Section (b)(4) of the Florida Constitution provides that the Supreme Court:

> May review any decision of a district court of appeal that passes upon a question by it to be of great public importance...

This Court has construed this provision to mean that "Once the case has been accepted for review..., this Court may review any issue arising in the case that has been properly preserved and properly presented." Tillman vs. State, 471 So.2d 32 (Fla. 1985); Trushin vs. State, 425 So.2d 1126 (Fla. 1983). (Emphasis supplied). In so concluding, however, this Court in the past has not been unmindful of the need to avoid the usurpation of the district court's constitutional function as courts of final jurisdiction. Specifically, in Trushin, this Court stated:

> While we have the authority to entertain issues ancillary to those in a certified case, Bell vs. State, 394 So.2d 979 (Fla. 1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified question. Id. at 1130.

The State asserts that the instant case represents an instance in which this Court should refrain from using its authority to entertain the collateral issue raised by Petitioner sub judice. As the instant case is significantly different from the circumstances in State vs. Glosson, 462 So.2d 1082 (Fla. 1985), it is clear from a perusal of the issue raised by Petitioner that it will not affect the outcome of the Petition. Morever, this Court has recently refused to address constitutional arguments by recognizing that "[i]t is a fundamental maxim of judicial restraint that 'courts should not decide constitutional issues unnecessarily' " Johnson vs. Feder, 11 F.L.W. 120, (Fla. March 28, 1986)

While this Court has in the past reviewed decisions of the district courts even where the certified question has already been answered, see,e.g., Tillman, this Court has made it clear that undertaking a review of ancillary issues in such a case is purely within its discretion. Trushin. Petitioner is not entitled to such review as a matter of right, and, under the facts of the instant case, for this Court to exercise its "authority" to review this issue, which is essentially factual in nature, could only have the undesirable effect of curtailing the constitutionally mandated function of the district courts as courts of final jurisdiction.

If this Court truly intends to refrain from usurping the district courts' authority as the courts of final jurisdiction, the State respectfully submits that this Court must avoid the routine

acceptance and review of issues separate and collateral to certified questions. As a result, this Court should respect the First District's conclusion in its capacity as a court of final jurisdiction and decline to consider Petitioner's argument as it pertains to the alleged violation of his due process right.

Assuming this Court decides to consider that issue, the State responds accordingly.

Petitioner contends that the First District's opinion pertaining to the alleged violation of his due process right is in direct conflict with this Court's ruling in State vs. Glosson, supra, in the instant case, the First District concluded "that the facts of this case do not rise to that level of state involvement which in Glosson constituted a violation of constitutional due process", and therefore affirmed the trial court's denial of the motion to dismiss. (A 4). Apparently, Petitioner is intent on ignoring the import of this Court's holding in Glosson.

This Court in Glosson, found that the due process clause of the Florida Constitution was violated under the stipulated facts in which an informant received a contingent fee conditioned on his cooperation and testimony in a criminal prosecution when that testimony was critical to a successful prosecution. While recognizing that federal due process was apparently not violated under the same factual circumstances, this Court found a state due process violation because the informant had not only an enormous financial incentive to manufacture criminal cases but also an incentive to perjure his testimony in order to make it more crucial to the prosecution. Id. at 462 So.2d 1085.

The effect of Glosson only applies to the narrow set of facts of which this Honorable Court is fully aware. In other words, Florida due process is violated only if the state attorney participates in the operation, the informant receives a contingent fee, and the fee is contingent upon the informant's cooperation in a successful prosecution of the defendant. See Yolman vs. State, 473 So.2d 716 (Fla. 2nd DCA 1985).

In the case sub judice, Petitioner's charges arose as a result of his sale and delivery of cocaine to the informant, whereas in Glosson, the charges were the result of a reverse sting operation whereby the government provided the drugs, thus making the case more susceptible to an issue of entrapment. Although here, the informant's fee was on a per-buy basis for each drug purchase (later negotiated to a weekly salary), it was not contingent upon his cooperation in Petitioner's prosecution (MD 20). Additionally, the record is devoid of any evidence that the state attorney supervised the investigation or even had any knowledge of the fee arrangement. These significant differences in no way rise to the level of state involvement which existed in Glosson.

Contrary to Petitioner's assertion, the State did not stipulate that Petitioner was targeted by law enforcement in this case. The State stipulated "that after receiving information, the Florida Department of Law Enforcement did target Joe Edward Lee as a person who would be a possible defendant... "(emphasis supplied). The information was received from the informant, Ronald Carn, initially

and controlled purchases were subsequently made by the informant under the supervision of the Florida Department of Law Enforcement. This arrangement is clearly distinguishable from that condemned by the Court in Williamson vs. United States, 311 F.2d 441 (5th Cir. 1962), since Carn was not told that a reward was dependent on making a case against specified individuals in advance. His initial contacts with Petitioner did not come about at the direction of law enforcement officials. As the same Court stated in United States vs. Walker, 720 F.2d 1527, (11th Cir. 1983), cert, denied, ___ U.S. ___, 104 S.Ct. 1614 (1984), "... there are strong public policy jusitifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes." Id. at 1539-1540.

The State would further submit that the informant's testimony in this case was not critical to a successful prosecution. Agent Collins supervised the informant on both controlled buys from the Petitioner (MD 20). Collins testified that he searched the informant just prior to each purchase, observed the exchange of money as well as the exchange of cocaine from Petitioner (MD 24). Obviously that testimony would have been sufficient to convict Petitioner on all charges.

Particulary noteworthy is the distinction between the fee agreements in Glosson, and the instant case. In Glosson, the contingent fee agreement provided that the informant would recieve ten percent of all civil forfeiture proceedings resulting from the

criminal investigations initiated and participated in by the sheriff. The agreement required the informant to testify and cooperate in criminal prosecutions resulting from his investigations in order to collect the contingent fee. 462 So.2d at 1083. The Florida Supreme Court found such conduct to be improper and therefore a violation of the defendant's constitutional right to due process.

Similar governmental misconduct is clearly not present in the instant case. The record establishes that the informant was merely paid $25 for each controlled purchase which was closely monitored by Special Agent Collins. He was immediately paid subsequent to each purchase form Petitioner and was not required to testify in order to collect (MD 19, 20). There were no other contingencies attached to the agreement.

From the foregoing, it is obvious the instant case is clearly distinguishable from Glosson, and, as stated by the trial judge, is therefore without the purview of the holding in that case.

Petitioner concludes his brief by requesting this Honorable Court to suggest alternative investigative methods other than contingent fee arrangements available to law enforcement. (Initial Brief of Petitioner on the Merits). Similarly, the amicus, which was granted leave to file brief amicus curiae, is clearly requesting this Court to issue a dissertation on police interrelationships with so-called prospective defendants in a federal due process setting. Such Requests by Petitioner and Amicus Curiae.

are actually for advisory opinions, a policy which this Court has specifically refrained from except in those instances where a request is made by the Governor pursuant to Rule 9.500, Florida Rules of Appellate Procedure and Article IV, Section 1(c), Florida Constitution. Interlachen Lakes Estates vs. Brooks, 341 So.2d 993 (Fla. 1976). This principle is predicated on the well established rationale that issues should be decided on concrete and specific questions framed by both parties.

CONCLUSION

WHEREFORE, the State respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the decision of the First District affirming the denial of Petitioner's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Terry N. Silverman, Silverman and Silverman P.A., 605 North East 1st Street, Suite G, Gainesville, Florida, 32601, by U.S. Mail this 16th day of March, 1986.

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