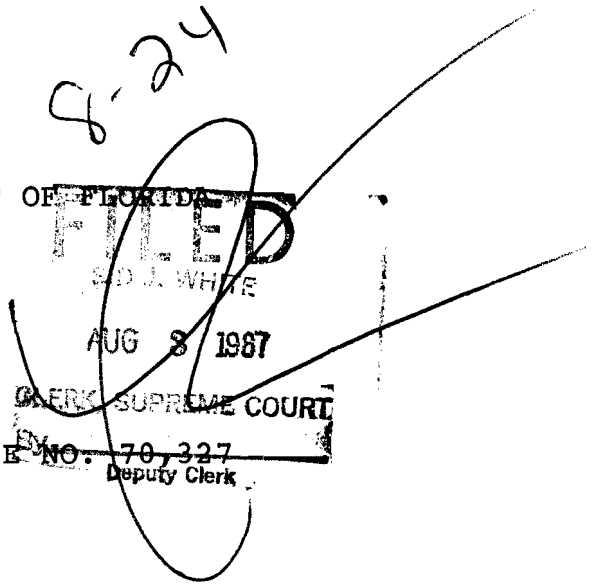
IN THE SUPREME COURT OF FLORIDA



PAUL L. MADSEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

CASE NO. ~~70,327~~

RESPONDENT'S ANSWER BRIEF ON MERITS

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PRELIMINARY STATEMENT

The Petitioner was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The Respondent was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appeared before the trial court.

The symbol "R" will be used to designate the record on appeal. The symbol "SR" will be used to designate the supplemental record on appeal. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Defendant's Statement of the Case and Facts as a generally accurate account of the proceedings below with such additions and exceptions as are set forth below and in the argument portion of this brief.

1. David Ball testified that pursuant to his substantial assistance agreement with the state, he was to find illegal activity and to be an informant. He was required to provide information about cases involving up to ten kilograms of cocaine. (R.307). Ball stated that he was never told by anyone from the state that he was required, as part of the agreement, to have to testify in order to perform the substantial assistance. (R.316, 359).

Ball testified that he did not tell Holden about the substantial assistance agreement, rather he told Holden that he needed money, was eager and had good buyers. (R.311). He stated that he never discussed with Holden the possibility of setting someone up to satisfy his agreement with the state. (R.326).

Ball testified that when he met Defendant, Defendant mentioned something about how he lost something, had been on the outside with someone and that he was now trying to get back in good with him. Defendant told Ball that if he was half as good a friend as Holden was, that everything would be fine. (R.325). Ball further testified that Defendant appeared apprehensive about the size of the transaction, that heroin was a dangerous drug to deal

with, and that the only things Defendant feared was his buyers being police (R.330) or being ripped off. (R.357). Ball stated that Defendant called him in the United States every time, except near the end of the transaction. In those calls, Defendant asked him if his buyers were still coming and talked about when he would get the heroin to put the deal together. (R.355). Defendant never indicated that he was being forced to participate. (R.357).

Ball testified that Holden told him that Defendant had approached Holden on the beach and that Defendant had a pound of heroin for sale. Defendant quoted a price of $150,000. (R.372). Ball told Holden that he was interested, and then the introduction was made. (R.372). Ball then informed Detective Gavalier. Gavalier said he wanted to do the deal in the States. (R.353).

2. Holden testified that he knew of Ball's drug problem (R.556), but did not know that Ball had signed the substantial assistance agreement with the state. (R.564). Ball told him that if he heard of anyone trying to sell drugs, he was interested. (R.603). Holden stated that Defendant approached him and asked if he knew anyone interested in purchasing heroin. (R.557). Holden thought of Ball, and approached Ball about the drug deal. (R.552-553). Holden testified that even though he had contacted Detective Gavalier before the deal happened (R.555), he did not consider himself as working for the

police. (R.562). Holden denied setting up the Defendant, and stated that he did not threaten the Defendant. (R.576-577).

3. Detective Gavalier testified that as part of the agreement with Ball, Ball could not carry a firearm or use drugs or sex to make a case. (R.169). He stated that Ball had reported to him as to whom he had met in the Bahamas prior to setting up the deal. (R.175). Gavalier testified that although he knew Holden's name over a year before this incident, Holden's involvement in this case did not become known to him until May 25 or 30, prior to the arrest. (R.222-223).

4. During the transaction, Defendant made various statements including that he has waited twenty or thirty years for this (R.107-108), that he was making ten percent off of the deal (R.115), that this was good for a first time (R.116), and that the drugs had been there for two months and the boys had not been able to get rid of it. (R.105).

5. David Rose, Defendant's landlord/roommate testified by deposition that Defendant told him Holden had introduced him to somebody that he could help and that they wanted him to make a connection. Defendant never told Rose that he did not want to make that connection (R.413), that Holden had ever threatened him, or that he was afraid of Holden. (R.414-415).

6. Defendant testified that he never contacted any law enforcement agencies in the States to tell them he was being threatened. (R.479). He also never told his mother about the threats. (R.525).

7. In Defendant's motion for judgment of acquittal and in his motion for new trial, Defendant argued only that the informant's actions combined with the lack of supervision by the police amounted to a due process violation and cited in support State v. Glosson, 462 So.2d 1082 (Fla. 1985). (R.915-916, 1084). Defendant never argued that he was entrapped as a matter of law.

8. In Defendant's written motion to suppress and argument on the motion, Defendant argued only that the introduction of the tapes would be in violation of Article I, Section 12 of the Florida Constitution. (R.1076, SR.48, 50). Appellant never cited Article I, Section 23 of the Florida Constitution.

9. During the presentation of his case, Defendant's counsel brought to the court's attention that his expert, Chuck Schultz had indicated that he was frightened to testify. (R.394). Counsel stated that he was trying to obtain the expert services of a Dr. Harry Holding, from the University of Florida. (R.395). The prosecution objected stating that he had already spent 8 to 9 hours on deposition on three different occasions with Schultz. (R.397). The trial court refused to grant any delays. (R.404). Later that day, Defendant's counsel stated that he was able to contact Mr. Schultz and that Mr. Schultz would be there to testify the next morning. (R.491).

The next morning, prior to Schultz' testimony, Defendant's counsel stated that he had made arrangements for another witness, Brian Clepper to review the tape and make findings. He stated that Clepper's findings were that the integrity of the tape was comprised because the tape was turned off initially and some of the clicks and other material that he heard on the tape were a clear indication of electronic edits. Counsel also stated that both Clepper and Schultz believed that the original tape had been tampered with because of the difference in quality with the copies. (R.616). Counsel moved that Mr. Clepper be permitted to testify, along with Mr. Schultz, stating that the state would not be prejudiced because Clepper's testimony was "not going to be substantially different than the testimony of Schultz." (R.608).

The prosecutor again responded that he would be prejudiced, because of how long he had worked with Schultz (R.609-610), how the state's experts had reviewed Schultz' depositions, and how he was prepared to rebut Schultz' expertise and analysis. (R.612). The prosecutor stated that the area was one of extreme expertise and that he did not have the time to scrutinize Clepper's testimony, or have his experts do likewise, and without that opportunity, the state would be prejudiced. (R.613). The prosecutor argued that what had really happened was that after eight months, the defense had finally concluded that they were not satisfied with their expert's conclusions, so they had to find another expert. (R.613).

At no time during the argument to the trial court did Defendant state that the exclusion of Mr. Clepper as a defense witness violated either his state or federal constitutional rights to compulsory process to present a defense, or to a fair trial.

10. When the jury returned and asked "what is entrapment" (R.1064), the trial court asked the foreman if the jury wanted the instruction read on entrapment. The juror responded, yes, they wanted an explanation of entrapment. (R.1065).

11. When Defendant requested its instruction on the state's burden on entrapment, counsel never stated that the standard jury instructions violated his federal right to due process. (R.919-920).

POINTS INVOLVED ON APPEAL

POINT A

WHETHER THIS COURT SHOULD ENTERTAIN ANY ISSUES OTHER THAN POINT III AS JURISDICTION IS VESTED IN THIS COURT SOLELY BY POINT III, THE OTHER ISSUES AFFECT THE OUTCOME OF THE PETITION AND HAVE BEEN FOUND NON MERITORIOUS BY THE DISTRICT COURT?

POINT B.

WHETHER THE ISSUE VESTING JURISDICTION ON THIS COURT, POINT III -- THE ADMISSION OF A TAPE RECORDED CONVERSATION MADE WITHIN THE DEFENDANT'S HOME -- WAS PROPERLY AFFIRMED BY THE DISTRICT COURT? (Restated.)

POINT C.

WHETHER, SHOULD THIS COURT CHOOSE TO ENTERTAIN THE ISSUES ANCILLARY TO THE ISSUE VESTING JURISDICTION WHICH DO NOT AFFECT THE OUTCOME OF THIS PETITION AND HAVE BEEN FOUND BY THE DISTRICT COURT TO BE NON MERITORIOUS, ERROR IS SHOWN?

POINT I

WHETHER INSTRUCTION AND REINSTRUCTION ON ENTRAPMENT DENIED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL? (Restated.)

POINT II

WHETHER CONTINGENT AGREEMENT AND CONDUCT ON PART OF STATE AGENTS REQUIRE DISMISSAL? (Restated.)

POINT IV

WHETHER EXCLUSION OF A DEFENSE WITNESS FROM TESTIFYING WHERE DUE TO THE NATURE OF THE EXPERT TESTIMONY THE STATE'S ABILITY TO PREPARE FOR TRIAL WAS ADVERSELY AFFECTED AND WHERE THE TESTIMONY WAS CUMULATIVE DENIED DEFENDANT OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS?

SUMMARY OF THE ARGUMENT

A. This court should not entertain any issues other than Point III as jurisdiction is vested in this court solely by Point III. The other three issues do not affect the outcome of the case and have been found to be "non-meritorious" by the Fourth District Court of Appeal.

B. The issue which actually confers jurisdiction upon this court, Point III -- the admission of a tape recorded conversation made within Defendant's home -- was properly affirmed by the district court. Defendant's reliance upon Article I, Section 23 of the Florida Constitution, the right to privacy clause, is misplaced. Said clause does not provide broader protection than Article I, Section 12 of the Florida Constitution which provides the right of the people to be secure against unreasonable interception of private communications. To hold so would effectively nullify the amendment to Article I, Section 12 requiring construction of same in conformity with the Fourth Amendment to the U.S. Constitution. Further, as the privacy clause applies solely "except as otherwise provided" where it is inconsistent with Article I, Section 12, Article I, Section 12 and not the privacy clause must prevail.

Lastly, Article I, Section 12, of the Florida Constitution as recently amended has overruled State v. Sarmiento. Thus, under prior United States Supreme Court decisions, the warrantless electronic interception by state

agents of a conversation between Defendant and the undercover police officer in the Defendant's home was not an unreasonable interception of Defendant's private communications.

C. Should this court choose to entertain the issues ancillary to the issue vesting jurisdiction which do not affect the outcome of this petition and have been found by the district court to be non-meritorious, no error is shown.

I. Proper instruction and reinstruction on entrapment did not deny Defendant his right to a fair trial. The standard jury instruction on entrapment was adequate in combination with the general reasonable doubt instruction to inform the jury that the state must prove beyond a reasonable doubt that the Defendant was not entrapped. As to reinstruction, the trial court properly reinstructed the jury as they solely requested an explanation of entrapment and not reinstruction. Consequently, an instruction on the State's burden of proof was not necessary to give a complete charge based upon the narrow request by the jury.

II. The contingent agreement and conduct on the part of the state agents did not require dismissal. There was no true contingency agreement between the State and the informant as the informant was not required to testify against the Defendant, the state did not select the Defendant as the person against whom the informant was to direct his efforts, nor was the informant's

reduced sentence contingent upon Defendant's conviction. Defendant has also failed to establish entrapment as a matter of law where drug trafficking in South Florida was the specific criminal activity targeted, and the means used by the state were not such as to create a substantial risk that such an offense would have been committed by a person other than those who were ready to commit it.

IV. The exclusion of a defense witness from testifying where due to the nature of the expert testimony the State's ability to prepare for trial was adversely affected and where the testimony was cumulative did not deny Defendant his fundamental constitutional rights. The witness was added as a defense witness after the State had rested, during Defendant's case, and the State had shown sufficient procedural prejudice. Further, the witness' testimony was not substantially different but was instead cumulative of the Defendant's other expert witness.

ARGUMENT

POINT A

THIS COURT SHOULD NOT ENTERTAIN ANY ISSUES OTHER THAN POINT III AS JURISDICTION IS VESTED IN THIS COURT SOLELY BY POINT III, THE OTHER ISSUES DO NOT AFFECT THE OUTCOME OF THE PETITION AND HAVE BEEN FOUND NON MERITORIOUS BY THE DISTRICT COURT.

In order to obtain the jurisdiction of this court as to Points I, II and IV, Defendant argued solely express conflict jurisdiction and express construction of provisions of the State and Federal Constitutions (Petitioner's Brief on Jurisdiction, p. 8-9). These two types of jurisdiction, however, are required to be "express[ed]" within the opinion. Fla.R.App.P. 9.030(2)(ii)(iv). Express conflict or express construction of a statute or constitution must be apparent from the "face of the district court's opinion", Quevedo v. State, 436 So.2d 87, 88 (Fla. 1983); Dodi Publishing Co. v. Editorial America, 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). It must appear within the "four corners of the majority decision", Reeves v. State, 485 So.2d 829, 830 (Fla. 1986); can not be by "implication", Dept. of HRS v. National Adoption Counseling Service, 498 So.2d 888, 889 (Fla. 1986); and this court may not look at the record itself to conclude jurisdiction exists, Reeves, supra.

The Fourth District Court of Appeal's opinion obviously declined to address any of the instant three issues except to state:

> We find no merit in appellant's other points on appeal.
>
> Madsen v. State,
> 502 So.2d 948, 950
> (Fla. 4th DCA 1987)

As such, none of these three issues could possibly have vested jurisdiction in this court. Consequently, as to these issues, the Fourth District Court of Appeal must remain the court of final jurisdiction. This Court must refrain from exercizing its authority to entertain issues ancillary to the issue vesting jurisdiction as said jurisdiction is reserved solely for the instance where the ancillary issues affect the outcome of the Petition, Lee v. State, 501 So.2d 591, 592 (Fla. 1987) n.1; Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983). Clearly these non meritorious, ancillary issues can not affect the outcome of the Petition.

POINT B

THE ISSUE WHICH ACTUALLY CONFERRED JURISDICTION ON THIS COURT, POINT III -- THE ADMISSION OF A TAPE RECORDED CONVERSATION MADE WITHIN DEFENDANT'S HOME -- WAS PROPERLY AFFIRMED BY THE DISTRICT COURT. (Restated.)

It is certain that discretionary jurisdiction was conferred by this issue alone. This is the sole issue addressed by the Fourth District Court of Appeal, see Madsen v. State, 502 So.2d 948 (Fla. 4th DCA 1987), and this court has at the present time pending before it State v. Hume, 463 So.2d 499 (Fla. 1st DCA 1985) review granted Florida Supreme Court case numbers 66,691 and 66,704, oral argument held January 8, 1986. Hume, case no. 66,704, presents an issue identical to the instant issue. It is argued that this is the sole issue to be addressed by this court.[1]

Further, as to the merits of the instant Defendant's argument, Defendant appears to be relying primarily upon Article I, Section 23 of the Florida Constitution -- the right to privacy clause.[2] Said clause, approved by the voters in the November 4,

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[1]Without being redundant, the State herein adopts the content of Respondent's Brief on the merits in Hume, case no. 66,704.

[2]Reliance must be had on this section as in implementing the right to be free from unreasonable searches and seizuers, Article I, Section 12 of the Florida Constitution, the Florida legislature enacted a statute which prohibits the interception of private conversations and contains its own (Cont'd. on next page

1980 general election, provides in pertinent part:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein . . .

In its opinion the Fourth District Court of Appeal properly found that said clause could not be applied in the manner proposed by Defendant to grant a broader right of privacy than guaranteed by the Fourth Amendment to the U.S. Constitution. The voters, in the November 2, 1982 general election, had amended Article I, Section 12 of the Florida Constitution, to provide that the right of the people to be secure in their persons, houses, papers, and effects against, inter alia the unreasonable interception of private communications, shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Consequently, to hold as Defendant argued would "effectively nullify" this constitutional amendment to Article I, Section 12.

The State further maintains that the "except as otherwise provided" language of Article I, Section 23, precludes reliance upon said section as support for the proposition that it operates synergistically with Article I, Section 12, to afford

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exclusionary clause. This statute exempts from its operation the interception or oral communications by a police officer when the officer is one of the communicants or where one party to the conversation has given prior consent to the interception as in the instant case, see §934.03(2)(c), Fla. Stat. (1977).

broader protection than the penumbral right inferred from the United States Constitution. Obviously conflict is established and as such this "except as otherwise provided" language results in Article I, Section 12 prevailing.

This proposition is bolstered by the general principles of construction governing constitutional ~~elements~~ amendments. In Sylvester v. Tindall, 154 Fla. 709, 18 So.2d 892 (1944), this court held in interpreting constitutional amendments that:

> A general rule is that no one provision of the constitution is to be separated from all the others, to be considered alone, but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Thus a constitutional amendment becomes a part of the constitution and must be construed in pari materia with all of those portions of the constitution which have a bearing on the same subject. But a somewhat different rule prevails if a constitutional amendment conflicts with the pre-existing provisions. In 11 Am.Jr., Sec. 54, p. 663, it is well said:
>
> > "A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except in so far as the old order is in manifest repugnance to the new Constitution, but such a provision should be read in the light of the former law and existing system. Amendments, however, are usually adopted by the express purpose of making

> changes in the existing system. Hence, it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time. In such a case the rule is firmly established that an amendment duly adopted is a part of the Constitution and is to be construed accordingly. It cannot be questioned on the ground that it conflicts with pre-existing provisions. If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people." [Emphasis added.]
>
> 18 So.2d at 900-901

The electorate has mandated construction of Article I, Section 12 in conformity with the Fourth Amendment of the United States Constitution as interpreted by the United States Supreme Court, and were that not the case, there would have been no need to amend the Constitution. Consequently, Defendant's argument, on its face, establishes a real inconsistency between Article I, Section 23 and Article I, Section 12 as amended, necessarily demonstrating that the amendment must prevail as the latest expression of the will of the people. Sylvester v. Tindall, supra.

Defendant's reliance on Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985) is misplaced. Winfield involved the subpoena of bank records by a state agency without notification to the petitioner whose bank accounts were

the subject of the subpoena. After analyzing the case under a compelling state interest standard, the court found there was no violation of the petitioner's right to privacy. The Court held that before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist. Id. at 549. In the area of unreasonable searches and seizures, including the interception of private communications, such a determination must be made in accordance with the United States Supreme Court's position as mandated by Article I, Section 12. See e.g., Dean v. State, 478 So.2d 38 (Fla. 1985). (The determination of a defendant's reasonable expectation of privacy in subpoenaed records must be viewed under United States Supreme Court decisions). Thus, if Defendant is to obtain relief it must be through the interpretation of Article I, Section 12, not Section 23.[3] See Adams v. State, 436 So.2d 132 (Fla. 5th DCA 1983) (rejecting defendant's reliance on Article I, Section 23).

The State submits that the First, Third and Fourth District Courts have properly found, State v. Sarmiento, 397 So.2d 63 (Fla. 1981), which held that the warrantless, electronic

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[3]Defendant's reliance on State v. Glass, 583 P.2d 872 (Alaska 1978) and related cases, offers him little support because it appears that the people of said states had not imposed a constitutionally mandated interpretation of search and seizure issues, as in the case in Article I, Section 12 of the Florida Constitution, thereby affording the Glass court the option of resolving the issue in terms of "right to privacy" rather than in terms of federal precedent established by the United States Supreme Court's interpretations of the Fourth Amendment.

interception by state agents of a conversation between the defendant and undercover police agents in the defendant's home was an unreasonable interception of the defendant's private communications in violation of Article I, Section 12 of the Florida Constitution, has not survived the 1982 amendment to Article I, Section 12.[4] See State v. Hume, 463 So.2d 499 (Fla. 1st DCA 1985); State v. Roman, 472 So.2d 886 (Fla. 3d DCA 1985); State v. Ridenour, 453 So.2d 193 (Fla. 3d DCA 1984). Most persuasive is Judge Hubbart's reluctant concurring opinion in Ridenour, 453 So.2d at 194, especially because Judge Hubbart authored the Third District's opinion on Sarmiento which was adopted by the Florida Supreme Court. 397 So.2d at 645.

Thus, under the authority of United States v. White, 401 U.S. 745 (1971), Lopez v. United States, 373 U.S. 427 (1963), see Hume, Case no. 66,704, and where the subject electronic surveillance took place after January 3, 1983, the effective date of the amendment to Article I, Section 12 of the Florida Constitution, this Court must affirm the trial court's order denying Defendant's motion to suppress.

Lastly, as applies to the facts of the instant case, should this court hold that the tape recording in question was properly suppressed, because Detective Gavalier, the undercover

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[4]Defendant's barebone challenge to the constitutionality of Article I, Section 12, as amended, contained in his fn. 2, preserves no argument for review in this Court.

agent testified as to what occurred in the house and what was said, (R.89-93), the introduction of the tape was cumulative and harmless. See Odom v. State, 403 So.2d 936, 940 (Fla. 1981).

POINT C

SHOULD THIS COURT CHOOSE TO ENTERTAIN THE ISSUES ANCILLARY TO THE ISSUE VESTING JURISDICTION WHICH DO NOT AFFECT THE OUTCOME OF THIS PETITION AND HAVE BEEN FOUND BY THE DISTRICT COURT TO BE NON MERITORIOUS, NO ERROR IS SHOWN.

POINT I

PROPER INSTRUCTION AND REINSTRUCTION ON ENTRAPMENT DID NOT DENY DEFENDANT HIS RIGHT TO A FAIR TRIAL. (Restated.)

Defendant alleges that the trial court committed reversible error when it refused to initially instruct the jury separately that the state had the burden of disproving entrapment beyond a reasonable doubt, and then again on reinstruction. Defendant asserts this was a violation of his federal due process rights.

The State submits that Defendant's position is without merit. As pointed out by Defendant, the Florida Supreme Court in Rotenberry v. State, 468 So.2d 971 (Fla. 1985) held that the standard instruction on entrapment is adequate in combination with the general reasonable doubt instruction to inform the jury that the state must prove beyond a reasonable doubt that the defendant was not entrapped.

Although, the Rotenberry court did not specifically discuss the decision in Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978), it did discuss its prior decision in State v. Wheeler, 468 So.2d 970 (Fla. 1985) which adopted Moody. 468 So.2d at 981. Furthermore, this court approved the Fourth District Court of Appeal's opinion in McCray v. State, 433 So.2d 5 (Fla. 4th DCA 1983), in which it was held that the standard jury instructions when considered with the instructions on reasonable doubt and the state's burden, meets the Moody requirements. McCray v. State, 473 So.2d 203 (Fla. 1985).

Thus, it is clear that the trial court did not err in its initial instructions to the jury. The issue then becomes whether the trial court erred in refusing to reinstruct the jury when they asked only for an explanation of entrapment (R.1065), of the state's burden of proof.

The feasibility and scope of a reinstruction to the jury is a matter residing within the discretion of the trial judge. Henry v. State, 359 So.2d 864, 866 (Fla. 1978). It is proper for a judge to limit the repetition of the charges to those specifically requested provided that the repeated charges are complete on the subject requested. Id. When the jury's request for clarification is a narrow one, then the trial court is not compelled to repeat the entire set of instructions initially given. Engle v. State, 438 So.2d 803, 811 (Fla. 1983).

In the instant case the jury only wanted an explanation of what entrapment was, i.e., its elements. They obviously were only concerned with whether the Defendant had met his initial burden of adducing evidence of entrapment. The trial court had already instructed the jury on the state's burden of proof. The jury was not concerned with that. Thus, the trial court was not required to reinstruct as given was complete on the subject involved. See, e.g. Cheatham v. State, 346 So.2d 1218 (Fla. 3d DCA 1977) (trial court not required to reinstruct jury on reasonable doubt when jury requests reinstruction on the elements of the charge.[5]

(Cont'd. on next page)

POINT II

CONTINGENT AGREEMENT AND CONDUCT ON PART OF STATE AGENTS DOES NOT REQUIRE DISMISSAL. (Restated.)

Defendant alleges that his conviction must be reversed and that he be discharged because of alleged actions by the state which violated his right to due process. Defendant asserts that the evidence shows an invalid contingent fee agreement and entrapment as a matter of law.

Defendant raised the issue of the substantial assistance agreement entered into between David Ball and the state as constituting an illegal contigency fee agreement, like that condemned in State v. Glosson, supra, for the first time on appeal. The State submits that Defendant's interpretation of the agreement is absurd. Pursuant to his substantial assistance agreement with the state, Ball was required to provide information about cases involving up to ten kilograms of cocaine. (R.307). The fact that ten kilograms is fives times the amount he was arrested for, and that if he provided substantial assistance, his sentence would be reduced to the three year minimum mandatory, instead of the maximum of fifteen, hardly makes the agreement a "contingency" agreement.

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[5]The cases cited by Defendant are not analogous because in each case the reinstruction required instruction on the element of the charge or as in Reynolds v. State, 322 So.2d 29 (Fla. 1st DCA 1976), the jury specifically requested reinstruction on circumstantial evidence and reasonable doubt, and the presumption of innocence was integral to understanding the latter.

State v. Glosson, supra is not applicable to the instant case because in Glosson the major concern of the Court was the fact that the informant was required to testify and cooperate in the criminal prosecution in order to receive his contingent fee from the forfeitures. The Court was concerned that such a situation had a potential for the abuse of a defendant's due process right because there was an enormous financial incentive by the informant to not only make criminal cases but to color his testimony or perjure himself. In the instant case, Ball was not required as part of the agreement to have to testify in order to perform the substantial assistance. (R.316, 359).[6] In fact, Ball was not even called by the state, but rather was the Defendant's witness. In Owen v. State, 443 So.2d 173 (Fla. 1st DCA 1983), the court distinguished Glosson on the fact that the informant's fee was not dependent on the informant's cooperation at trial. 433 So.2d at 176. See also Dodd v. State, 475 So.2d 310 (Fla. 2d DCA 1985); Yolman v. State, 473 So.2d 716 (Fla. 2d DCA 1985). In addition, the federal courts have found that a due process violation is not present in contingency fee agreements where the government agents themselves do not select the person against whom the informant will direct his efforts and do not make the informant's payments contingent upon the convicting of a particular person. See United States v. Richardson, 764 F.2d 1514, 1520 (11th Cir. 1985); United States

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[6]Nor did Ball perjure himself on the stand as alleged by Defendant in his brief (Petitioner's Brief, p.25-26).

v. Walker, 720 F.2d 1527, 1539 (11th Cir. 1983); United States v. Onori, 535 F.2d 938, 942-943 (5th Cir. 1976). Because the state did not select the Defendant nor was Ball's substantial assistance contingent upon the Defendant's conviction, Defendant has failed to show the type of governmental misconduct which requires dismissal.

The State further submits that Defendant has failed to demonstrate that the state's actions in the instant case amounted to entrapment as a matter of law such as to require dismissal under Cruz v. State, 465 So.2d 516 (Fla. 1985). This Court in reviewing the facts must review them with all inferences and conflicts in testimony resolved in favor of the state.

The facts show that David Ball, acting as a confidential informant contacted O. J. Holden, whom Ball knew to be a source of drugs (R.320, 325) and told Holden that if he knew of anyone trying to sell drugs, he was interested. (R.310-11, 603). Holden, who denied working for the police (R.562), and whose involvement Detective Gavalier testified to, was not known to him until after the initial contact, (R.222-223) when Ball told him (R.353), was then approached by the Defendant who asked him if he knew anyone interested in purchasing heroin, (R.557), in that he had a pound of heroin for sale at a price of $150,000. (R.372). Holden then contacted Ball and made the introduction. (R.372). After talking with Gavalier, Ball told Defendant that his buyer wanted to do the deal in the United States. (R.353). A number of phone calls then took place

between Defendant and Ball. Ball testified that Defendant initiated most of them. (R.330). They finally reached an agreement, when Defendant would deliver the heroin to Ball's buyer in Fort Lauderdale. (R.355). At no time did Defendant indicate that he was in fear or was being threatened. He only appeared to be afraid that the buyers would be police or he would be ripped off. (R.330, 357). Defendant never expressed his fear of Holden to David Rose, his landlord/roommate (R.414-415) or to his mother (R.525) or tell any law enforcement agencies. (R.479).

This Court has held that there is no constitutional prohibition against a law enforcement officer providing the opportunity for a person who has the willingness and readiness to break the law. A high degree of law enforcement participation does not per se constitute a defense to a criminal charge. State v. Dickerson, 370 So.2d 762, 763 (Fla. 1979).[7] "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 reasonable tailored to apprehend those involved in the ongoing criminal activity." Cruz v. State, 465 So.2d 522.

Defendant seems to be under the impression that the first prong of Cruz requires that before the state can use an informant they must have first known or suspected the defendant

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[7]Dickerson is not inconsistent with Cruz. See Cruz v. State, 465 So.2d at 523 (Overton, J., concurring).

to be specifically involved in the targeted criminal activity. The State submits that is not what Cruz stands for, because if it did, it would be saying to all potential defendants with predisposition, that they will be allowed to engage in one free crime, because only the next time will the police be able to say that they were specifically targeting the defendant because of his past conduct.

Rather Cruz must be interpreted based on its facts, i.e., that in that case there was no specific criminal activity targeted. In the instant case, drug trafficking in South Florida was clearly targeted. That was the purpose of the substantial assistance agreement. As recognized in State v. Thennes, 422 So.2d 46, 47 (Fla. 4th DCA 1982), in South Florida, drug trafficking is an ongoing deadly game. See also United States v. Mendenhall, 446 U.S. 562, 100 S.Ct. 1870, 1881 (1980) (Powell, J., concurring). Where drug trafficking was specifically targeted, the fact that Defendant, who was previously unknown to the informant as being involved, may have been solicited by the informant and offered the opportunity to commit the crime of trafficking in narcotics, does not show entrapment as a matter of law. See United States v. Gunter, 741 F.2d 151, 153-154 (7th Cir. 1984).

The State would further submit that Defendant has even failed to demonstrate that he was the victim of entrapment. The evidence shows that Ball, the informant, contacted Holden, who was then contacted by Defendant. There was evidence shown that

Holden was not a government agent. If there was any entrapment, Holden was the only one who could claim it. Defendant cannot avail himself of entrapment as a defense, where the state refuted Defendant's story that Holden was a knowing agent of the police whose inducing conduct the state would unquestionably be responsible. In other words, Defendant cannot claim vicarious entrapment. See Acosta v. State, 477 So.2d 9 (Fla. 3d DCA 1985); State v. Perez, 438 So.2d 436 (Fla. 3d DCA 1983).

The informant did not initiate the offense, except to make a single inquiry of Holden. It was Holden who was approached by Defendant. Holden then relayed that information to Ball. Clearly, the means used in the case were reasonably tailored to apprehend only those involved in the ongoing criminal activity, i.e., drug trafficking. If Defendant had not been involved, based on the evidence presented which was favorable to the state, he would not have been apprehended. Persons who were not ready to commit the offense would not have approached Holden. They would not have delivered the heroin. Thus, there was not a substantial risk that such an offense would have been committed by persons other than those who were ready to commit it.

The only thing which society cannot sanction in the instant case is Defendant's actions in trafficking in one of the most dangerous drugs, heroin. The actions of the state in the instant case were not fundamentally unfair to Defendant. He was not deprived of his due process rights, and the trial court properly denied his motion for judgment of acquittal.

POINT IV

EXCLUSION OF A DEFENSE WITNESS FROM TESTIFYING WHERE DUE TO THE NATURE OF THE EXPERT TESTIMONY THE STATE'S ABILITY TO PREPARE FOR TRIAL WAS ADVERSELY AFFECTED AND WHERE THE TESTIMONY WAS CUMULATIVE DID NOT DENY DEFENDANT OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS (Restated).

Defendant alleges that the trial court erred in excluding Brian Clepper, an expert in audio tape analysis, as a defense witness for a discovery violation, thereby violating Defendant's Sixth and Fourteenth Amendment rights to compulsory process and due process of law as well as his state constitutional rights.

During the presentation of his case, Defendant's counsel brought to the trial court's attention that his expert, Chuck Schultz had indicated that he was frightened to testify. (R.394). Counsel stated that he was trying to obtain the expert services of a Dr. Harry Holding, from the University of Florida. (R.395). The prosecutor objected stating that he had already spent 8 to 9 hours in deposition on three different occasions with Schultz. (R.397). The trial court refused to grant any delays. (R.404). Later that day, Defendant's counsel stated that he was able to contact Mr. Schultz and that Mr. Schultz would be there to testify the next morning (R.491).

The next morning, prior to Schultz' testimony, Defendant's counsel stated that he had made arrangements for another witness, Brian Clepper, to review the tape and make

findings. He stated that Clepper's findings were that the integrity of the tape was compromised because the tape was turned off initially and some of the clicks and other material that he heard in the tape were a clear indication of electronic edits. Counsel also stated that both Clepper and Schultz believed that the original tape had been tampered with because of a difference in quality with the copies. (R.616). Counsel moved that Clepper and Schultz both be permitted to testify, stating that the state would not be prejudiced because Clepper's testimony was "not going to be substantially different than the testimony of Schultz." (R.608).

The prosecutor again responded that he would be prejudiced because of how long he had worked with Schultz (R.609-610), how the state's expert had reviewed Schultz' depositions, and how he was prepared to rebut Schultz' expertise and analysis. (R.612). The prosecutor stated that the area was one of extreme expertise and that he did not have sufficient time to scrutinize Clepper's testimony, or have his experts do likewise, and without that opportunity, the state would be prejudiced. (R.613). The prosecutor argued that what had really happened was that after eight months, the defense had finally concluded that they were not satisfied with their expert's conclusions, so they had to find another expert. (R.613).

The trial court was concerned that the state would not have the opportunity to learn what the new expert was going to say, or to take a deposition or have their expert analyze the

defense expert's report. (R.618-619). At no time during the argument to the trial court did Defendant claim that the exclusion of Mr. Clepper as a defense witness violated either his state or federal constitutional rights to compulsory process, to present a defense, or to a fair trial. Thus, any alleged constitutional violation was not preserved for appeal.[8]

As to the propriety of the trial court's sanction under the Florida Rules of Criminal Procedure, the State submits that the trial court conducted an adequate Richardson hearing[9] and after considering all the circumstances, imposed an appropriate sanction.[10]

Where a defendant has committed the discovery violation, he has a burden burden similar to that placed upon the state under Richardson, to demonstrate not only a lack of substantial procedural prejudice to the state, but also of demonstrating the prejudice he would suffer by exclusion of the

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[8]The State would submit that Defendant, by invoking Rule 3.220(b)(3)(4) of the Florida Rules of Criminal Procedure, waived any absolute right to call witnesses. If he had not invoked the rule, he would not have been obligated to file any reciprocal witness list. Thus, the restrictions imposed under 3.220(g) of the Florida Rules of Criminal Procedure do not become operable unless the defense activates them. Thus, there is no violation of the defendant's right to compulsory process. See Cacciatore v. State, 226 So.2d 137, 139-140 (Fla. 3d DCA 1964).

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

[10]In fact, it must be noted that Defendant does not argue otherwise. Defendant's complaint concerns the sanction imposed after the inquiry.

witness who would allegedly testify in his favor. Nava v. State, 450 So.2d 606, 609 (Fla. 4th DCA 1984). The decision to impose sanctions for a discovery violation, and the severity thereof, are matters for the trial court's sound discretion. State v. Alfonso, 478 So.2d 1119 (Fla. 4th DCA 1985). Furthermore, an appellate court "cannot interfere with the trial court's decision absent a finding that no reasonable person would have imposed the sanction in question." Id. Moreover, on appeal, the Appellant has the burden of demonstrating that the trial court abused its discretion in its choice of sanctions. Id. Defendant failed to meet his burden.

In Woody v. State, 423 So.2d 971 (Fla. 4th DCA 1982), it was held that the trial court did not abuse its discretion in excluding the testimony of a surprise witness produced by the defendant on the last day of trial. The court noted that there was no explanation as to why the defendant, who had known of the witness for some time, did not disclose his existence earlier. In Lewis v. State, 411 So.2d 880, 882 (Fla. 3d DCA 1981), the Third District held that the trial court reasonably exercised its discretion in excluding the testimony of unlisted alibi witnesses who were not listed by the defendant until after the State had rested, and the State would be unduly prejudiced since it was not in a position to impeach or rebut the testimony. See also Morgan v. State, 405 So.2d 1005 (Fla. 2d DCA 1981) (the court affirmed the exclusion of defense witnesses, whose names were not provided until after the State had rested).

The State submits that the facts of the instant case fall within the decisions of Woody and Lewis, rather than those cases cited by Defendant in which the state was unable to show prejudice and the witnesses excluded were material to the defense. The defense witness, Brian Clepper, was not revealed until after the state rested, during the middle of Defendant's case. There was no satisfactory explanation as to why the Defendant after eight months, and being aware of the substance of his other expert's testimony, did not attempt to procure another expert sooner. Furthermore, and most important, the state clearly showed that it would be prejudiced despite Defendant's "generous" offer to provide the witness for deposition, because based on the amount of time the state invested in preparing for Schultz' testimony, there was insufficient time to properly impeach Clepper's findings, including having the state's expert review those findings as the expert did with Schultz. (R.841-842).

Finally, the State would submit that Defendant failed to demonstrate any substantial prejudice from the exclusion of Clepper, where his testimony as proffered was substantially similar to Schultz'. (R.608). Like Clepper, Schultz testified that the integrity of the tape was compromised by the recorder being shut off in the beginning (R.685, 693), that the clicks and other material sounded electronic (R.671), and the quality of the original tape compared to the copy was suspicious. (R.715).

Where there has been substantial, competent evidence presented to the jury on the issue of the tampering of the tape, any other evidence on this issue was merely cumulative, and its exclusion harmless. See, e.g., Valle v. State, 474 So.2d 796, 804 (Fla. 1985); Rivers v. State, 425 So.2d 101, 105-106 (Fla. 1st DCA 1982). Thus, the trial court did not abuse its discretion in excluding the surprise defense witness.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully submitted that the lower court's decision affirming the trial court's decision again be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on Merits has been sent by United States Mail to: JAMES M. RUSS, ESQUIRE, Counsel for Petitioner, Tinker Building, 18 West Pine Street, Orlando, Florida 32801, this 30th day of July, 1987.

Diane Leeds

Of Counsel