IN THE FLORIDA SUPREME COURT

CASE NO. __________

70,327

FILED
SID J. WHITE
APR 6 1987
CLERK, SUPREME COURT
By ________
Deputy Clerk

PAUL L. MADSEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW DECISION OF DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

# PETITIONER'S BRIEF ON JURISDICTION

SUBMITTED BY:

JAMES M. RUSS, ESQ.
THOMAS F. EGAN, ESQ.
Law Offices of James M. Russ, P.A.
Tinker Building
18 West Pine Street
Orlando, Florida 32801
(305) 849-6050

Attorneys for Petitioner,
PAUL L. MADSEN

## TABLE OF CONTENTS

| | Page |
|---|---|
| TABLE OF CONTENTS ........................................ | i |
| TABLE OF AUTHORITIES .................................... | ii, iii |
| PRELIMINARY STATEMENT .................................. | 1 |
| STATEMENT OF THE CASE AND THE FACTS ................ | 1 |
| SUMMARY OF THE ARGUMENT ............................... | 4 |
| ARGUMENT .................................................... | 4 |
| I. REVIEW OF THE DECISION OF THE FLORIDA FOURTH DISTRICT COURT OF APPEAL IS WITHIN THE DISCRETIONARY JURISDICTION OF THIS COURT BECAUSE THAT DECISION EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL, AND CONSTRUES PROVISIONS OF THE FLORIDA AND FEDERAL CONSTITUTIONS. | |
| CONCLUSION .................................................. | 10 |
| CERTIFICATE OF SERVICE .................................. | 10 |
| APPENDIX .................................................... | 11 |

## TABLE OF AUTHORITIES

Cases | Page


Bradford v. State,
278 So.2d 624 (Fla. 1973) .......................... 3, 9

Cruz v. State,
So.2d 516 (Fla. 1985) ............................ 2, 7

Hoffman v. Jones,
280 So.2d 431 (Fla. 1973) .......................... 6

Jaffe v. State,
438 So.2d 72 (Fla. 5th DC 1983) .................... 9

Jollie v. State,
405 So.2d 418 (Fla. 1901) .......................... 6

Jones v. Hoffman,
272 So.2d 521 (Fla. 4th DCA 1973) .................. 6

Moody v. State,
359 So.2d 557 (Fla. 4th DCA 1978) .................. 3

Morgan v. State,
453 So.2d 394 (Fla. 1984) .......................... 3, 9

Morris v. State,
487 So.2d 291 (Fla. 1986) .......................... 3, 8

Ray v. State,
403 So.2d 956 (Fla. 1981) .......................... 2, 9

State v. Glosson,
462 So.2d 1082 (Fla. 1985) ......................... 2, 7

State v. Hume,
463 So.2d 499 (Fla. 1st DCA 1985) .................. 6

State v. Ridenour,
453 So.2d 193 (Fla. 3d DCA 1984) ................... 6

State v. Sarmiento,
397 So.2d 643 (Fla. 1981) .......................... 2, 5, 6

State v. Wheeler,
468 So.2d 978 (Fla. 1985) .......................... 3, 8

United States Steel Corp. v. Save Sand Key, Inc.,
303 So.2d 9 (Fla. 1974) ........................... 6

OTHER AUTHORITIES | Page


Fifth Amendment, U.S. Const. .......................... 8

Sixth Amendment, U.S. Const. .......................... 9

Fourteenth Amendment, U.S. Const. ..................... 8

Art. I, §9, Fla. Const. ............................... 8

Art. I, §12, Fla. Const. .............................. 5, 7

Art. I, §16, Fla. Const. .............................. 9

Art. I, §23, Fla. Const. .............................. 5, 7

Art. V, §3(b)(3), Fla. Const. ......................... 4

Fla.R.App.P. 9.030(a)(2)(ii) .......................... 4

Fla.R.App.P. 9.030(a)(2)(iv) .......................... 4

"Amendments to Florida Standard Jury Instructions, Criminal Cases", The Florida Bar News, October 15, 1986, at 7, col. 1 ....................... 3

## PRELIMINARY STATEMENT

In this brief, the Petitioner, PAUL L. MADSEN, will be referred to as "Mr. Madsen", and the Respondent, STATE OF FLORIDA, will be referred to as "the State".

Pursuant to Fla.R.App.P. 9.220 and 9.120(d), a separately bound Appendix accompanies this brief. Reference to items in the Appendix will be by reference to the Appendix, followed by the relevant Appendix letter and page number; for example, "App. A-1".

## STATEMENT OF THE CASE AND THE FACTS

### Trial And Conviction

On June 6, 1984, Mr. Madsen and Kim DeGregory were arrested for trafficking in a controlled substance and conspiracy to traffic in a controlled substance. Sixteen days later, on June 22, 1984, Mr. Madsen and Mr. DeGregory were charged in a criminal information with delivery of a controlled substance in the amount of 28 grams or more and conspiracy to traffic in a controlled substance in the amount of 28 grams or more. Subsequently, Mr. Madsen filed a number of pretrial motions, including a motion to suppress an audio cassette tape recording due to an illegal search. On October 15, 1984, the trial court held a hearing on the suppression motion and subsequently denied it.

On February 28, 1985, the trial began. On March 8, 1985, the jury returned a verdict of guilty on both counts as to Mr. Madsen and verdicts of not guilty on both counts as to Mr. DeGregory. The trial court then directed entry of a judgment of acquittal on

the conspiracy count as to Mr. Madsen and entered a judgment of conviction on the remaining count, sentencing Mr. Madsen to the mandatory minimum term of twenty-five (25) years imprisonment, mandatory minimum fine of $500,000, plus a $25,000 surcharge.

## Review And Decision Of The Florida Fourth District Court Of Appeal

Mr. Madsen filed a notice of appeal of his conviction and sentence. All briefs for the appeal were filed; oral argument was held on May 23, 1986, before a panel of the Florida Fourth District Court of Appeal. In his initial and reply briefs, Mr. Madsen argued five issues (App. F and G).

First, Mr. Madsen argued that the contingent agreement between an informant/witness violated Mr. Madsen's right to due process and was contrary to the rulings of this Court in State v. Glosson, 462 So.2d 1082 (Fla. 1985), and Cruz v. State, 465 So.2d 516 (Fla. 1985) (App. F-12 and G-1).

Second, Mr. Madsen argued that he could not be convicted of the offense of trafficking, when that offense was not charged. This argument was consistent with the decision of this Court in Ray v. State, 403 So.2d 956 (Fla. 1981) (App. F-23 and G-7).

Third, Mr. Madsen argued that the trial court erred in admitting into evidence against Mr. Madsen a police tape recording of a conversation in Mr. Madsen's home. Mr. Madsen relied on the decisions of this Court, in particular State v. Sarmiento, 397 So.2d 643 (Fla. 1981) (App. F-28 and G-10).

Fourth, Mr. Madsen argued that the trial court committed reversible error by excluding a defense witness due to the

failure of the Defendant to provide the State with sufficient notice. This exclusion was contrary to Bradford v. State, 278 So.2d 624 (Fla. 1973), and Morgan v. State, 453 So.2d 394 (Fla. 1984) (App. F-33 and G-17).

Fifth, Mr. Madsen argued that the trial court committed reversible error by failing to instruct the jury that the State had the burden of disproving entrapment beyond a reasonable doubt. This argument was based on the holding of the Fourth District Court of Appeal in Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978), and this Court's adoption of that decision in State v. Wheeler, 468 So.2d 978 (Fla. 1985), and Morris v. State, 487 So.2d 291 (Fla. 1986) (App. F-38 and G-21). See also "Amendments to Florida Standard Jury Instructions, Criminal Cases", The Florida Bar News, October 15, 1986, at 7, col. 1 (App. B-4, C-4 and D-4).

On January 22, 1987, the Fourth District panel issued a written opinion affirming Mr. Madsen's conviction and sentence (App. A). The Fourth District panel rejected four of the issues, finding that they lacked merit (App. A-4). The panel decision addressed and rejected the fifth issue; that the trial court erred in admitting into evidence against Mr. Madsen the police tape recording of a conversation in Mr. Madsen's home.

Mr. Madsen, following this decision, filed a motion for certification of issues as ones of great public importance, a motion for rehearing, and a motion for rehearing en banc on February 4, 1987 (App. B, C and D). These motions were denied on March 10, 1987 (App. E).

This brief is filed in support of Mr. Madsen's petition to invoke the discretionary jurisdiction of this Court to review this decision.

## SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction and review the Fourth District's decision which expressly conflicts with the decision of this Court and other district courts of appeal on the same questions of law and which additionally construes provisions of the Florida and federal constitutions. The Fourth District's decision expressly rejects this Court's ruling in State v. Sarmiento, 397 So.2d 643 (Fla. 1981), an issue presently before this Court in State v. Hume, Case No. 66,704. The Fourth District decision also conflicts with Florida appellate decisions on due process, entrapment, a defendant's right to call witnesses, and convicting an accused of a crime not charged.

## ARGUMENT

### I.

REVIEW OF THE DECISION OF THE FLORIDA FOURTH DISTRICT COURT OF APPEAL IS WITHIN THE DISCRETIONARY JURISDICTION OF THIS COURT BECAUSE THAT DECISION EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND CONSTRUES PROVISIONS OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

### A. Discretionary Jurisdiction

The decision of the Fourth District Court of Appeal comes within the discretionary jurisdiction of this Court on two grounds. First, the panel decision is in express conflict with the decisions of this Court and other district courts of appeal on the same questions of law. Second, the panel decision construes provisions of the Florida and federal constitutions. For both reasons, this decision is within the jurisdiction of this Court. See Fla.R.App.P. 9.030(a)(2)(ii) and (iv); Art. V, §3(b)(3), Fla. Const. This Court should grant jurisdiction in this case to resolve these conflicts and review these constitutional interpre-

tations. The resolution of these five issues will ensure uniformity and constitutional correctness in the Florida criminal justice system.

## B. Five Issues

### 1. Sarmiento Issue

This issue was considered at length by the court below (App. A). The decision construed two provisions of the Florida Constitution; and held that a decision of this Court, namely State v. Sarmiento, 397 So.2d 643 (Fla. 1981), to no longer be the law of Florida.

The decision holds that a person's right to privacy in his home, guaranteed under Art. I, §23, Fla. Const., does not limit or diminish the authority of the police to enter that person's home and secretly record conversations without judicial authorization, where such police acts are permissible under federal law. The reasoning is that the 1982 Amendment to Art. I, §12, Fla. Const., repealed, limited, or diminished this specific privacy guarantee against police intrusion into a person's home. This effectively nullifies Florida's express constitutional right to privacy under Art. I, §23, in the area of criminal law.

As to conflict jurisdiction, this Court's jurisdiction cannot be clearer. In the decision below, the panel stated (App. A-3):

> Appellants contention . . . is based primarily on State v. Sarmiento, 397 So.2d 643 (Fla. 1981). Sarmiento involved an almost identical fact situation . . . .

Relying on the decisions of two district courts of appeal, the panel then held that (App. A-4):

> We concur in the conclusion that Sarmiento is no longer viable.

The panel relied on the decisions of the First District in State v. Hume, 463 So.2d 499 (Fla. 1st DCA), petition for review docketed Case No. 66,704 (Fla. April 1, 1985), and the Third District in State v. Ridenour, 453 So.2d 193 (Fla. 3d DCA 1984), to reach its holding. This Court accepted jurisdiction in Hume, and heard oral argument on January 8, 1986. Hume has been pending before this Court during this entire appellate review process, and was brought to the attention of the Fourth District (App. F-30, 33). Because this decision did not follow this Court's holding in Sarmiento and relied on the Hume decision that is now being reviewed by this Court, the decision below is in prima facie express conflict for purposes of jurisdiction. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

The two cited decisions of the Florida District Courts of Appeal are not controlling authorities. They are not authority at all where this Court has ruled to the contrary. Where this Court has expressly ruled on the same issue, a judicial change in the law is only within the province of this Court.

> "[I]f and when such a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal . . . ."

See Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973)(quoting Jones v. Hoffman, 272 So.2d 521, 529, 534 (Fla. 4th DCA 1973); see also United States Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974). As this Court has said:

> To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.

Hoffman, 280 So.2d at 434.

Section 23 is an express constitutional guarantee of privacy not present in the United States Constitution. The decision below argues, that by implication, the 1982 amendment of Art. I, §12, Fla. Const., repealed, limited or diminished the §23 guarantee against police intrusion into a person's home. The reasoning is implied because nothing in §12 or §23 specifically states such a purpose or intent. None of the decisions of this Court supports this position.

Rather than being diminished, §23 provides constitutional protections in excess of those provided under the federal constitution. On the basis of this guarantee of privacy, Mr. Madsen had a right to have the audio tape excluded from evidence. Because this Court has the authority and an obligation to construe provisions of the Florida Constitution, this Court should grant jurisdiction in this case and resolve the legal issue concerning the scope of §23.

By taking jurisdiction in this case, this Court will be able to resolve the present conflict among Florida appellate decisions. This Court will also be able to clarify the distinctions between the privacy rights guaranteed by §§23 and 12.

2. Glosson/Cruz Issue

In State v. Glosson, 462 So.2d 1082 (Fla. 1985), this Court held that due process is violated where an informant stands to gain a benefit, conditioned on his cooperation and testimony in a criminal prosecution. Id. at 1085. In Cruz v. State, 465 So.2d 516 (Fla. 1985), this Court held that, as a matter of law, entrap-

ment exists as a defense when the police activity does not seek to interrupt a specific ongoing criminal activity by means which are reasonably tailored to apprehend those involved in this ongoing criminal activity. Id. at 522. Mr. Madsen argued, in reliance on both cases, that due process required a dismissal of the charges against him (App. F-13-14; F-18-21; G-1-2; G-5-6). Because the decision held such a claim and argument to be without merit, this decision is in conflict with both the legal decisions of this Court. The decision also construes the due process provisions of the state and federal constitutions. Art. I, §9, Fla. Const.; Fifth and Fourteenth Amendments, U.S. Const.

3. Wheeler/Morris Issue

This Court has held in two decisions that where entrapment is a defense, the State has the burden of disproving entrapment beyond a reasonable doubt. See State v. Wheeler, 468 So.2d 978 (Fla. 1985), and Morris v. State, 487 So.2d 291 (Fla. 1986). At trial, Mr. Madsen requested such an instruction; and argued on appeal that the court committed reversible error in failing to give this instruction (App. F-44). Because the panel held this legal claim also to be without merit, the decision is in conflict with these decisions of this Court. The decision also construes the due process provisions of the state and federal constitution. Art. I, §9, Fla. Const.; Fifth and Fourteenth Amendments, U.S. Const.

4. Bradford/Morgan Issue

In Bradford v. State, 278 So.2d 624 (Fla. 1973), this Court held that a trial court cannot deny a defendant the testimony of a witness due to the mere failure of the defendant to give the state notice. See also Morgan v. State, 453 So.2d 394 (Fla. 1984)(error to exclude defense expert witnesses for insanity defense). At trial, the trial court denied Mr. Madsen the right to present an expert witness on his own behalf. Mr. Madsen argued on appeal that this was reversible error (App. F-36-38; G-17-19). Because the decision below found this claim to be without merit, the panel decision is in conflict with these decisions of this Court. The decision also construes the compulsory process provisions of the state and federal constitutions. Art. I. §16, Fla. Const.; Sixth Amendment, U.S. Const.

5. Ray/Jaffe Issue

This Court held in Ray v. State, 403 So.2d 956 (Fla. 1981), that it is fundamental error to convict an accused of a crime not charged. See also Jaffe v. State, 438 So.2d 72 (Fla. 5th DCA 1983). Mr. Madsen was convicted and sentenced for trafficking in a controlled substance; yet that offense was not charged. On appeal, Mr. Madsen argued unsuccessfully that it was fundamental error to be convicted for a crime not charged (App. F-23-28; G-7-8). Because the decision below rejected his claim, the panel decision is in conflict with the decisions of this Court in Ray and the Fifth District in Jaffe. The decision also construes the notice provisions of the state and federal constitutions. Art. I, §16, Fla. Const.; Sixth Amendment, U.S. Const.

## CONCLUSION

For all the reasons stated above, Mr. Madsen petitions this Court to exercise its jurisdiction over this case, and thereafter decide these five issues on their merits.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this day, by U.S. mail, to Penny H. Brill, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

RESPECTFULLY SUBMITTED this 3rd day of April, 1987, at Orlando, Orange County, Florida.

LAW OFFICES OF JAMES M. RUSS, P.A.
Tinker Building
18 West Pine Street
Orlando, Florida 32801
Telephone (305) 849-6050

Attorneys for Petitioner,
PAUL L. MADSEN

By:
JAMES M. RUSS

By:
THOMAS F. EGAN