IN THE SUPREME COURT OF FLORIDA

RICHARD A. DOWNING,

Petitioner,

v. CASE NO. 71,629

STATE OF FLORIDA,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner Richard A. Downing was the appellant below and the defendant in the trial court. Respondent, the State of Florida, was the appellee below and the prosecuting authority in the trial court.

References herein to the record on appeal will be made by the symbol "R" followed by the appropriate page number in parenthesis. Otherwise, respondent adopts the preliminary statement of petitioner.

STATEMENT OF THE FACTS

Respondent takes exception to petitioner's extensive discourse on co-defendant Martha Munroe's trial testimony relative to her allegedly being forced into the illicit drug business by some unnamed sinister criminal syndicate in Gadsden County, in order that alleged debts of her deceased husband be paid off. Allegedly, the husband was an alcoholic, compulsive gambler, victim of loan sharks, etc., which resulted in his being in debt to the extent of one hundred and sixty-eight thousand dollars ($168,000) to this mysterious organization of criminals in Gadsden County. Respondent concedes that this was her testimony but in stating the facts of the case petitioner makes only fleeting reference to the fact that certain Gadsden County residents, namely, Jack Polk, W. A. Woodham, Pat Suber and Dwight Clark testified but "all that testimony pertained to Munroe and is irrelevant to the present appeal and therefore is not detailed in these facts." Nothing could be further from the truth as these witnesses were law enforcement officers (Polk and Woodham) and friends and business associates of the late George Munroe. Collectively speaking, they testified that they had known George Munroe to be an honest, astute businessman, not a drunkard and not indebted to any criminal syndicate. (T 148-215) The importance and significance of this omission will be dealt with in more detail in the argument portion of respondent's brief.

For respondent's part, the facts of this matter are much more objectively set out in the lower court's written opinion which is now before this court on review in the instant case. Downing v. State, Case No. BM-88, (1st DCA October 30, 1987) From respondent's viewpoint, the written opinion of the lower court pertaining to the appeal of Martha B. Munroe is also an accurate statement of the facts. Munroe v. State, 511 So.2d 415 (Fla. 1st DCA 1987) Copies of the slip opinions published in those two appeals are included in the appendix to petitioner's brief. On January 8, 1988, this court entered its order declining to accept jurisdiction after review of the parties' jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980). Munroe v. State, Case No. 71,113.

SUMMARY OF ARGUMENT

ISSUE I - Police reports are not, per se, discoverable under the rules. A police officer's surveillance report pertaining to an investigation where he was, although involved in a reverse sting drug sale operation, not an eye-witness to the actual crime is not a witness "statement" within the meaning of the discovery rules. In the case sub judice, if the trial court's refusal to order production of the reports or conduct an in camera inspection was error it was only harmless error. The First District Court of Appeal correctly found, after unsealing the reports and inspecting same, that they contained no information that had not been brought out either in the officers' depositions or courtroom testimony and that production of the reports would have had absolutely no effect on the outcome of the trial.

ISSUE II - The crime of conspiracy to traffic in cocaine need not be proven by direct evidence. Circumstantial evidence can constitute the basis for a jury verdict of guilty. It is the province of the jury to determine whether or not the evidence produced is inconsistent with any reasonable hypothesis of innocence. Absent a showing of manifest injustice, a jury's verdict should not be disturbed.

ISSUE III - Conspiracy to merely possess cocaine is not a necessarily lesser included offense within conspiracy to traffic in cocaine. Conspiracy to possess cocaine contemplates actual

possession and control of the cocaine whereas it is entirely possible to conspire to traffic in cocaine without any intent to actually physically possess or control the contraband. Jury "pardon power" is neither a constitutional right nor does it have any legislative underpinnings.

ISSUE IV - This was not petitioner's first excursion with co-defendant Munroe for the purpose of participating with her in the acquisition of cocaine. Although petitioner put on no evidence, his defense strategy was obvious in Munroe's fanciful tale that petitioner's accompanying her in the matter sub judice was for some purpose other than to purchase cocaine or was to purchase the cocaine for some party other than petitioner. It was petitioner's hope and strategy that if Martha Munroe could convince the jury that her co-conspirators were persons other than petitioner, both of them could avoid responsibility for conspiracy in the case sub judice as the actual purchase and aquisition of the cocaine was aborted. Evidence of similar acts are admissible under the Williams Rule to show design, purpose, lack of mistake, etc. Neither petitioner nor his co-defendant presented any evidence that petitioner did not know or understand what was transpiring during his participation with Munroe in a plan to purchase and acquire a large amount of cocaine.

ISSUE V - Petitioner concedes that at least a fifteen year sentence as a minimum mandatory sentence for trafficking in more

than 400 grams of cocaine, is required by law. The fact that this court has already ruled in Atwaters v. State, that the "amount" of ilicit drugs involved is not a valid basis for a departure sentence, the required minimum mandatory sentence provision in the law is unaffected. As to the other grounds for departure stated by the trial court, including the "professional manner" in which petitioner went about the business of planning, functioning and endeavoring to acquire five kilos of cocaine through the offices of co-defendant Munroe, such reasons had been held to be valid basis for sentencing departures. One valid reason is sufficient and under current law such may be shown by a preponderance of the evidence and will be upheld if based upon circumstances or factors which reasonably justify the aggravation of the sentence. The extent of departure is not subject to appellate review.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETIONARY AUTHORITY IN NOT ORDERING THE STATE TO PRODUCE POLICE REPORTS AND NOT CONDUCTING AN IN CAMERA INSPECTION OF THE POLICE REPORTS. (Restated)

The First District, in the case sub judice, has certified the following question to be one of great public importance:

> [w]hether the written reports of the FDLE agents who were involved - by actual participation in the drug transaction or by witnessing the same - in the undercover reverse sting operation are discoverable as 'statements' under Fla.R.Crim.P. 3.220(a)(1)(i).

While respondent finds no particular fault with the lower court's phrasing of the question, which might be simply its way of obtaining guidance for the future and an answer to an important question for the benefit of the trial courts, state attorneys, law enforcement agencies and all other concerned citizens, the question is all but moot. The question is an interesting one, the answer to which will no doubt enlighten, for the future all concerned with such matters.

As to the case sub judice, respondent has no desire to engage in hair-splitting distinctions but actually the drug sting

operation sub judice never materialized and the concerned FDLE agents never claimed to have witnessed any conspiratorial pact between Downing and Munroe. The record indicates that the police officers never saw Downing or even had a word with him until he was arrested. Respondent readily concedes that the conspiracy was proved by circumstantial evidence, but it was proved beyond a reasonable doubt and to the jury's satisfaction. The concerned officers dealt only with Monroe and their lay informant/go-between. As petitioner points out, neither money nor cocaine ever changed hands because before a sample could be tested or cocaine delivered Munroe spotted someone in a van in the parking lot, taking pictures. She and Downing then fled and that was the end of the operation. The "participation" of the officers, vis-a-vis, Downing is questionable. They were simply not involved with him until they arrested him.

Regardless of how this court answers the above certified question of the First District, petitioner is not entitled to a new trial because, if error there was, it was harmless error. Even if petitioner had had access to the officers' reports, what the lower court found in them after examination, would have had absolutely no effect on the outcome of the trial. Respondent respectfully defers to Judge Nimmons draftsmanship as a precise statement of respondent's position on the issue presented:

> Although the trial court's denial of discovery was error, we conclude that

> the error was harmless. The trial judge refused to conduct an in camera examination of the FDLE reports. But, he did order that they be delivered to the court for sealing and be made a part of the record of this case. We have examined the reports and have carefully compared their contents with the trial testimony of the agents who offered the various report. Basically, the agents testified to the same things which are set forth in their reports and to the same things they had testified to on their discovery depositions which were taken by defense counsel well in advance of the trial. Defense counsel was also permitted pre-trial discovery of the audio tape recordings which the officers made during this undercover operation.
>
> It is manifestly clear from the record in this case that disclosure of the police reports to the defense would have had absolutely no effect on the outcome of the case. We therefore hold that the trial court's denial of discovery of the police reports, or failure to conduct an in camera examination of the same, was harmless. See **Whiddon v. State**, 431 So.2d 290 (Fla. 1st DCA 1983); **Black v. State**, 383 So.2d 295 (Fla. 1st DCA 1980)."

Appendix to petitioner's brief at 5-6

Not even petitoner contends that police reports are per se discoverable. Respondent concedes that the statements of witnesses whose names are provided by the prosecution pursuant to the rules of discovery are discoverable Petitioner's attempts to obtain the subject police reports were a fishing expedition. After all, he had deposed all of the agents involved and had had every opportunity to learn everything that they knew about the

matter at hand.

Not even petitioner contends that there was any Brady material involved and, in the absence of facts or circumstances set out by a defendant from which it might be inferred that such evidence is likely to exist, the trial court was not required to conduct an in camera inspection for the purpose of determining whether any portion of the police reports should have been made available to the defendant. Glow v. State, 319 So.2d 487 (Fla. 2nd DCA 1975) Likewise, petitioner has made no allegation that any of the police officer witnesses whose reports he sought to be disclosed, actually used their reports to refresh their memories while on the witness stand, either at deposition or at trial.

Notes to refresh a witness' memory other than while actually being deposed or testifying may or may not be disclosed to the adverse party, according to the trial court's discretion. Merlin v. Boca Raton Community Hospital et al., 479 So.2d 236 (Fla. 4th DCA 1985) See also, State v. Johnson, 284 So.2d 198 (Fla. 1973).

The Fourth District has held that defense counsel has no right to demand or inspect a written memorandum of report, for cross-examination purposes, when that memorandum or report is not used by the witness while on the witness stand. Lockhart v. State, 384 So.2d 289, 291 (Fla. 4th DCA 1980)

Petitioner has failed to state with any degree of specificity whatsoever what said reports might contain that allegedly would have either influenced his trial preparation or the result in the case at bar. Police reports are not per se public records. Glow, supra. See also, §119.07(3)(d), Fla. Stat. re: "active" criminal investigative information as defined in §119.011(3)(d)(i).

Petitioner only asserts that he might have prepared for trial in a different manner or along different lines if he had known whether the agents' reports agreed with their testimonies on deposition. What nonsense! Petitoner has failed to demonstrate that the information contained in the subject police reports was never available to him through reasonably diligent preparation. Breedlove v. State, 414 So.2d 1 (Fla. 1982). There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work. Moore v. Illinois, 408 U.S. 786 (1972). Nor is this required by Fla.R.Crim.P. 3.220. The rules are not designed to provide a procedural escape hatch on appeal for avoidance of the jury's verdict, absent a showing of prejudice or harm to the defendant. Further, petitioner has not urged in his brief that the trial court erroneously refused to make proper inquiry concerning the state's refusal to give up the police reports for discovery. Johnson v. State, 427 So.2d 1029 (Fla. 1st DCA 1983), cert. denied, 464 U.S. 1048 (1984) Appellant

merely complains that the refusal of the trial court to conduct an in camera inspection is the equivalent of failure to make a proper Richardson inquiry. As petitioner has pointed out in his brief he made several demands for discovery and even filed a motion to compel production. The matter was exhaustively aired in the trial court as a pre-trial matter. By the time all of that was over, the trial court could not have helped being thoroughly informed as to what was involved and intricately informed as to petitioner's position. As Judge Nimmons put it "The discoverability of the police reports was fully aired in the hearings well in advance of the trial, resulting in a ruling that the reports were not discoverable." This brings us to the lower court's second certified question of great public importance, to wit:

> We certify as of great public importance the question of whether the trial court's failure to conduct a Richardson hearing after denying the defendant's pre-trial motion to compel discovery of the police reports requires automatic reversal under Richardson and Smith.

The rule announced in Richardson v. State, 246 So.2d 771 (Fla. 1971) serves a good purpose. If the rules of discovery are violated by a party and the other party, on account of such violation is surprised at trial, it is then incumbent upon the trial court to conduct an inquiry into such questions as whether the violation was intentional, substantial or resulting in

prejudice to the other party. The purpose of a Richardson inquiry is to inform the court as to these important aspects of the alleged discovery violation. At that point, in the course of the trial, the trial court would be ignorant as to the background of the matter and if the court summarily ruled without making inquiry, logic might dictate that this is per se reversible error. See Smith v. State, 500 So.2d 125 (Fla. 1986). However, consider a situation where, as in the case at bar, the trial court is already informed, ad nauseam, concerning the defendant's efforts to obtain the police reports and affords the defendant inumerable opportunities to renew his demands and, finally rules that the subject reports are not discoverable. What purpose, on earth, would another hearing serve? There was no surprise involved. A Richardson hearing would not have provided the court or the parties with any more information than they already had. It was simply a pre-trial argument over discoverability of police reports and that, in reality, is the only aspect of the discovery rules that is genuinely before this court at this time. Thus, it is respectfully submitted, that the lower court's second certified question relating to the trial court's failure to conduct a Richardson hearing after the question of discoverability of police reports had been aired time and time again, is mergeable into the first certified question which deals with discoverability of the police reports in this particular context. The second question pre-supposes a discovery rules

violation. There was none here!

Smith v. State, supra, cited by petitioner, is inapposite here. As the lower court pointed out, application of Smith presupposes a discovery violation, a surprise to a party at trial occasioned by the other side's failure to comply with the rules of discovery. Because there was no discovery violation in the case at bar, no Richardson hearing was either required or appropriate.

Inasmuch as the police officer witnesses did not make use of their reports while testifying and because their depositions revealed that they were not eye-witnesses to the actual conspiracy between Martha Munroe and Richard Downing, the trial court's pre-trial rulings on the discovery issue were eminently correct.

ISSUE II

THE EVIDENCE WAS SUFFICIENT AS A MATTER OF LAW TO PROVE BEYOND A REASONABLE DOUBT THAT A CRIMINAL CONSPIRACY EXISTED AND THAT RICHARD A. DOWNING WAS A KNOWLEDGEABLE PARTICIPANT. (Restated)

Petitioner begins his argument with the flat statement that there was no evidence at trial as to an agreement between Downing and Munroe. Then he contradicts himself and attempts to convince this court that even though Downing was up to his neck with Munroe in the over-all operation and that he functioned as the "moneybags" with respect to payment for the cocaine, all of this came about without the existence of a common scheme to acquire five kilos of cocaine between himself who was carrying the money in his personal luggage and clothing and Martha Munroe who was negotiating the purchase after viewing the cocaine that was for sale. This was too much for the jury to swallow and not enough for the First District to set aside the jury's verdict.

Respondent is aware of this court's rulings in McArthur v. State, 351 So.2d 972, 976 (Fla. 1977), which is relied upon by petitioner. In that case, Nadine McArthur took the stand and explained, in detail, to the jury how the gun went off accidentally killing her husband. The state's forensic evidence was not inconsistent with this version. In the case sub judice, petitioner put on no evidence and the jury was free to draw its

own conclusions from the evidence presented by the state and the incredible version offered by Martha Munroe when she testified in her own defense.

Before proceeding with its argument relative to application of the law of conspiracy to the facts of this case, respondent feels compelled to analyze for the court Martha Munroe's desperate trial strategy in that her only hope for acquittal was to convince the jury that her co-conspirator(s) was not Downing but members of some sinister criminal syndicate operating in Gadsden County. She claimed these people had forced her to become a cocaine broker in order to pay off her husband's gambling debts to the syndicate, hereinafter referred to by respondent in its argument as the "Gadsden County Mafia." On first examination, this concocted story appears too stupid to influence a Gadsden County jury panel. Gadsden County is a small rural, mostly agricultural county and the Munroes are an old and prominent family. Certainly, a Gadsden County jury would know whether or not there was a criminal syndicate operating in the county, conducting illicit gambling activities and extorting monies from people like George Munroe. But Munroe's trial strategy was not as stupid as it appears to be. Munroe could not escape the fact that there were taped conversations between her and the undercover officers relative to inspecting the cocaine that the officers had brought with them, testing same and a price per kilo that had been arrived at. The evidence that Munroe was

involved in a plan to acquire five kilos of cocaine was overwhelming. But she knew that she was not charged with conspiring with the Gadsden County Mafia, only with Downing. Incidentally, Munroe declined to name anyone who had allegedly forced her into the cocaine brokerage business. Thus, she could, with impunity, tell a story, freely admitting involvement with these unnamed extortionists. If she could convince the jury that the co-conspirator was the Gadsden County Mafia rather than Downing, she would be acquitted because one cannot be convicted of conspiring with oneself and she was not charged with conspiring with anyone other than Downing. If she could pull this off then Downing would also "walk" as he was not charged with conspiring with anyone other than Martha Munroe. The strategy did not work. The jury did not believe her story about an alleged Gadsden County Mafia and several prominent citizens and business associates of her late husband testified that George Munroe was a responsible, honest businessman, not a drunkard, not a compulsive gambler and not involved as a debtor with any criminal syndicate in Gadsden County. The jury saw through this strategy and correctly concluded that the only person she had conspired with other than Evans, the lay informant, and the police officers was Richard Downing, her companion through most of the relevant events and who carried and counted out the money that was to be used to pay for the cocaine that Martha Munroe had inspected. In other words, she had nothing to lose and

everything to gain by telling her weird, fanciful story about being forced into the cocaine brokerage business by an unknown, sinister criminal organization. She even had the gall to tell the jury that the one hundred and fifty-five thousand dollars ($155,000) that was found in Downing's personal luggage and boots had been put in the trunk of her car the night before by the unnamed persons that had forced her into the cocaine business.

There is no way that Martha Munroe could have avoided the jury's knowing that she was involved in brokering or marketing cocaine but she only had to convince them that she was involved with someone other than Downing. If she could have pulled that off then she and Downing would both "walk". Regardless of how deeply she was involved in the cocaine business, she was only charged with conspiring with Downing and neither she nor Downing could be convicted of conspiring either with third parties or with their own selves. This strategy was clever but not believable, under the facts and circumstances of the case.

While the evidence strongly suggests that Downing was, in fact, Munroe's principal and the ultimate recipient of the cocaine, this is not nearly so important as the fact that he had knowledge of the essential objectives of their joint efforts and that armed with such knowledge he was an active participant. That is all the state needed to prove. United States v. Rodriguez-Arevalo, 734 F.2d 612 (11th Cir. 1984) To prove a

conspiracy, the government must prove existence of an agreement between two or more persons to combine efforts for an illegal purpose. Direct proof of such an agreement is not necessary to establish conspiracy and it may be proven by inferences from actions of actors or substantial evidence of a scheme. United States v. Hitsman, 604 F.2d 443 (5th Cir. 1979) It is sufficient that only one of the conspirators do any act in furtherance of the agreement. United States v. Rosado-Fernandez, 612 F.2d 50 (5th Cir. 1979)

As will be shown in the paragraphs to follow, the evidence was clear that petitioner was squarely in the middle of all of the activities that were the culmination of the conspiracy charged in the state's information. It was only the intervening event of Martha Munroe's spotting a person in a van taking pictures that interrupted what was to have been a routine cocaine buy. Up to this point, petitioner was deeply involved, involved enough and desparate enough at trial to rely upon the testimony of his co-defendant Martha Munroe, an admitted (R 1836) and proven trafficker of cocaine (R 910) for whom appellant had, on at least one other occasion (R 894, 926, 929), come across the country to Florida to be at her side when she bought cocaine. Petitioner Downing, a/k/a Geronimo a/k/a John Adams, elected not to favor the jury with a firsthand account as to why he would journey across the nation on these occasions, risking arrest, and rip-off violence just to protect Martha while she went about her

cocaine brokerage business, all the while having no involvement or pecuniary interest in the cocaine trafficking himself. (R 1116)

He was "family" - blood is thicker than water, etc. What is "family" good for if they won't help "kinfolk" safely consummate a dope deal? (R 1147) No matter that such an unselfish gesture could result in a long prison sentence as an aider and abettor or that the other parties might rip-off the purchase money and kill the buyers. Richard Downing was a prince of a guy who would even take charge of the purchase money and count it out when Martha was ready to make a buy. (R 832, 833) A generous man was he who pocketed not a brass farthing for his time, expense, exposure to arrest and exposure to theft and violence from other "dopers". This was insulting to the jury's intelligence and the jury didn't believe it. In short, the jury didn't believe Martha Munroe and it heard nothing from appellant in the way of explanation of his presence and participation in an abortive cocaine purchase. It was only Martha Munroe's perception that a police officer was in a van taking pictures of her movements between the first floor motel room occupied by the phony cocaine sellers (undercover FDLE agents) and Downing's second floor room that "spooked" the deal. (R 842) Martha Munroe had left the first floor room after she had seen the cocaine offered for sale, in order to see about testing it. On her way up to Downing's room she spotted the van in the parking lot with a photographer inside. (R 842) She and

Downing fled together and were apprehended by agents of the Florida Department of Law Enforcement while they drove west on I-10. (R 1593, 1595) There was one hundred and fifty-five thousand dollars ($155,000) in Downing's suitcase of which one hundred and forty thousand dollars ($140,000)[1] was stuffed in his western boots. The rest was stuffed in socks and other parts of the suitcase. (R 1636-1641) There was more than thirteen hundred dollars found in the pockets of the street shorts Downing wore under his dungarees. (R 1556) A bottle of Clorox was found in the rear seat area of Martha Munroe's car. (R 1595) Clorox is used in a crude method and procedure for field-testing cocaine. (R 1597) Interestingly enough, Martha Munroe admitted purchasing the bottle of Clorox but denied knowing how to field-test cocaine. (R 1880) From the evidence, the jury found enough knowledge and direct participation on the part of Downing to exclude any reasonable hypothesis that his was only the role of devoted protector of his kinswoman who was engaging in cocaine traffic, without any confederation with her or common objective to gain possession of some cocaine. What rubbish! The jury wasn't stupid and its verdict did not have to be based upon direct evidence of a verbalized conspiracy.

The jury was entitled to infer from the circumstances that

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[1] Five kilograms (2.2 pounds per kilogram) at $28,000 per kilogram, totals $140,000.

Martha Munroe was a cocaine broker and that Downing was her customer, ergo, they planned that which they were about to do but for Martha Munroe's spotting the unmarked police van. Even if Downing was not the ultimate buyer but merely a purchasing agent, his participation in and knowledge of the anticipated cocaine purchase put him squarely in the middle of a plan to possess cocaine in an amount punishable as trafficking. The jury knew that the two defendants had to have planned and discussed, combined and confederated in order to carry out the purpose of their being together on this occasion, i.e., the acquisition of a large amount of cocaine. Even if Downing and Munroe spoke not to each other but read each other's minds with respect to the objective at hand or used body language or winked at each other or simply acted in concert, the existence of a conspiracy, as a matter of law, was apparent.

At trial, the state conceded that if Martha Munroe was innocent it followed that Downing was also innocent. Likewise, if Munroe were guilty (as charged) that Downing was also guilty. Thus, it became incumbent upon Martha Munroe to concoct a defense that would completely exonerate herself (visa-vie Downing) and thus exonerate her alleged kinsman Downing. Martha Munroe's history as a cocaine trafficker and her activities with respect to the charge sub judice were well-documented during the trial and she could not deny what she had done in the presence of so many witnesses. Under the facts presented, the jury had

little difficulty in finding that at the very least, Munroe and Downing were working together and intended to acquire and possess five kilos of cocaine. His role, whatever it was, is not as critical as the fact of his knowledge of an participation in the exercise that was to lead to the acquisition of a large amount of cocaine. Munroe never testified that Downing did not know what was going down.

The legal issue presented here by Downing is whether the evidence presents a circumstantial case of conspiracy. Even petitioner does not contend that the state was required to prove that there was a formal agreement. The existence of an agreement by two or more persons to violate the narcotics laws may be proved by circumstantial evidence, such as inferences from the conduct of the participants or from circumstantial evidence of a scheme. United States v. Lee, 694 F.2d 649 (11th Cir. 1983), cert. denied, sub nom, Grindrod v. United States, 103 S.Ct. 1779 (1983) Direct evidence of the elements of a drug conspiracy is not required, and a defendant's knowing participation may be established through proof of surrounding circumstances, such as acts committed by defendant that furthered the purpose of the conspiracy. United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985), cert. denied, sub nom, Hernandez v. United States, 106 S.Ct. 274 (1985) Intentional participartion in a criminal conspiracy need not be proved by direct evidence but may be inferred from a development and collocation of circumstances.

United States v. Perez, 648 F.2d 219 (5th Cir. 1981) Direct proof of an agreement is not necessary to establish a conspiracy, but, rather, the jury is free to infer from all the circumstances surrounding and accompanying the act that the common purpose to commit the crime existed. McCain v. State, 390 So.2d 779 (Fla. 3rd DCA 1980) Proof of a formal agreement is not necessary to establish existence of a conspiracy. The existence of a conspiracy can be inferred from circumstantial evidence as indicative of an overall plan. It is not necessary to prove a specific conversation in which an agreement was made but circumstantial evidence of a conspiracy is sufficient for conviction. Borders v. State, 312 So.2d 247 (Fla. 3rd DCA 1975) Evidence of knowledge of the presence of cocaine can be a key element upon which a jury could find a defendant guilty of conspiracy to possess or trafficking cocaine. Manner v. State, 387 So.2d 1014 (Fla. 4th DCA 1980) Presence and flight are factors to be considered with other evidence in evaluating totality of circumstances by which a jury can determine whether the evidence supports a finding of guilt beyond a reasonable doubt. United States v. Castro, 723 F.2d 1527 (11th Cir. 1984)

In a case of circumstantial evidence, the standard of review in all federal circuits is not that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt but only that a reasonable trier of fact could find that the evidence establishes guilt

beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence. United States v. Bell, 678 F.2d 547 (5th Cir. 1982) See also, United States v. Lopez-Llerena, 721 F.2d 311 (11th Cir. 1983) cert. denied, 104 S.Ct. 1602 (1984)

Appellant is aware that there are Florida cases holding that the sufficiency of evidence test, applicable when a case is based upon circumstantial evidence, is whether the evidence is inconsistent with any reasonable hypothesis of innocence. However, the question of whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to determine, and where there is substantial competent evidence to support the jury verdict, the verdict will not be reversed on appeal. Buenoano v. State, 487 So.2d 387 (Fla. 1st DCA 1985) See also, Heiney v. State, 447 So.2d 210, 212 (Fla. 1984), cert. denied 83 L.Ed.2d 237 (1984)

In State v. Allen, 335 So.2d 823 (Fla. 1976), Justice England wrote:

> Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be

> inadequate to establish a preliminary showing of the necessary elements of a crime.

Id. at 826

Based upon Allen, the law seems clear that the jury in the case at bar was free to draw from the evidence a reasonable inference that there had been a conspiracy, i.e., a plan or agreement to buy cocaine from the undercover officers who were posing as cocaine suppliers. In this regard, it is important to consider what the actual factual situation was and what Downing did in the way of particpation in the plan. While mere presence and flight alone might not make for a strong circumstantial case of involvement in a conspiracy, there was much more involved here as far as Downing was concerned.

Downing, the faithful family friend, first checks into the Tallahassee Hilton and after communication with Martha Munroe ends up on the second floor of the Red Roof Inn. Once there, he was joined by Munroe and Bruce Evans, the state's principal witness, who acted the part of contact man between Munroe and the phony cocaine suppliers. In the presence of Evans in room 225 of the Red Roof Inn, Downing counted out a hundred and forty thousand dollars ($140,000) in cash for Munroe to show to the cocaine suppliers. (R 832) The money came from Downing's suitcase and had been stuffed inside his cowboy boots. (R 833) Evans told Munroe, in the presence of Downing, to go downstairs

and look at the cocaine. (R 839) It should be remembered that Downing's involvement with Martha Munroe in cocaine purchases or attempted purchases was not new. On a prior occasion, Evans, in his role as Martha Munroe's "mule", had been given a Denver telephone number which agent Cornelius found written down on papers seized from Downing at the time of his arrest in the case at bar. (R 976, 1568) Evans also testified about a conversation that took place in a motel room in Marathon, Florida about buying cocaine from Evans' source in that area. The participants were Martha Munroe, Downing and Evans. (R 894, 926, 929) Again, the jury had to have concluded that there was some sort of plan to acquire cocaine and that Downing was more than a mere onlooker. The evidence showed that he certainly had knowledge of the transaction and that he participated at least to the extent of safeguarding the money in his suitcase, inside his boots and then counting it out for Munroe to make the purchase downstairs. Munroe had testified that Downing was there for her protection and the jury would have been rather imperceptive if it had not concluded that Downing had not only been custodian of the purchase money but was also there to safeguard the cocaine after he and/or Munroe had completed the purchase. Downing was very much involved in this aborted purchase and the jury knew it from the evidence before it. Downing's argument that the evidence in the case sub judice was insufficient as a matter of law is absurd.

One thing more that the jury must have realized - and that is the fact that up until the time of their arrest, neither Munroe or Downing knew who the police were. As far as they knew, the cocaine suppliers in the first floor room of the Red Roof Inn were exactly that. Therefore, when Martha Munroe spotted the photographer in the van in the parking lot and decided to flee, there was no immediate reason why Downing had to flee also unless he had been involved in the abortive transaction. The deal had gone sour and Martha Munroe no longer needed any protection. After all, according to her, she arrived at the Red Roof Inn with the money supplied by the "organization" that was blackmailing her, without any protection. Evans and Munroe arrived together but Evans had not seen any money until he saw Downing counting out one hundred and forty thousand dollars ($140,000) out of the one hundred and fifty-five thousand dollars ($155,000) that was in his suitcase and handing it to Munroe for her to make the purchase downstairs. The jury used its common sense and the verdict was proper, correct and conforming to the evidence.

The conspiracy cases cited by petitioner are, for the most part, cases where there was scant evidence of culpability and appellee finds no fault with the courts' rulings in those cases but the case sub judice is not one of those and the jury did not exceed its prerogative in determining that the evidence presented excluded any reasonable hypothesis of innocence. Such a determination is the province of the jury. Buenoano v. State,

supra See also, Bragg v. State, 487 So.2d 424 (Fla. 5th DCA 1986); LaPolla v. State, 504 So.2d 1353, 1357 (Fla. 4th DCA 1987)

ISSUE III

CONSPIRACY TO POSSESS COCAINE IS NOT A NECESSARILY LESSER INCLUDED OFFENSE WITHIN CONSPIRACY TO TRAFFIC IN COCAINE. THEREFORE THE TRIAL COURT'S REFUSAL TO GIVE SUCH AN INSTRUCTION WAS NOT ERROR. (Restated)

Petitioner was charged in the information with conspiracy to traffic in more than four hundred (400) grams of cocaine in violation of §893.135(4), Fla. Stat. (1985). However, the only quantity of cocaine ever discussed amongst any of the persons involved in the matter sub judice was five kilos (5,000 grams). That is the amount that the undercover agents brought to the motel and the agreed price per kilo was twenty-eight thousand dollars ($28,000). One hundred and forty thousand dollars ($140,000) was the amount for payment counted out by petitioner. At twenty-eight thousand dollars ($28,000) per kilo, five kilos goes for precisely one hundred forty thousand dollars ($140,000).

Petitioner's reliance upon Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986) is misplaced. The Fourth District held that:

> It is axiomatic that jury instructions are required in Florida on all lesser included offenses supported by the evidence, and where applicable, the jury is to be afforded the opportunity to find the defendant guilty of a lesser included offense, sometimes referred to as a jury 'pardon'. (Emphasis added) (Citations omitted)

Id. at 1292

One cannot discern from the court's opinion how much cocaine was involved in Weller. It might well be that the amount was in dispute and that charging the jury with conspiracy to possess as a lesser included offense might have been appropriate in that case but certainly not in the case sub judice. The only amount of cocaine that Downing and Munroe conspired to possess was the amount that Munroe asked the undercover officers to provide and that was five kilos, no less. Therefore, Weller is inopposite.

The standard jury instruction in effect at the time of Downing's trial designates the possession of cocaine in violation of §893.13(1)(e) as a necessarily lesser included offense of trafficking in cocaine. Petitioner contends that conspiracy to possess cocaine in an amount constituting "trafficking" requires an instruction on the lesser included offense of conspiracy to possess cocaine.[2]

On this point, respondent adopts the rationale announced by the First District in Munroe v. State, 511 So.2d 415 (Fla. 1st DCA 1987), the companion appeal of the co-defendant Martha B.

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[2] But see, The Florida Bar Re: Standard Jury Instructions - Criminal, No. 69,804 (Fla. May 28, 1987) [12 F.L.W. 259]. Simple possession of cocaine is no longer a necessarily lesser included offense of trafficking.

Munroe:

> The general conspiracy statute, §777.04(3), creates a distinct crime and is designed to punish 'whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense....' The mere possession of contraband in violation of section 893.13(1)(e), Florida Statutes, exposes to prosecution any person 'in actual or constructive possession of a controlled substance unless such controlled substance was lawfully ob ained.' On the other hand, the crime of conspiring to 'traffic' in cocaine, as was charged in the information, is predicated upon at least one person agreeing, conspiring, combining or confederating with another 'who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine as described in s. 893.03(2)(a)(4) or any mixture containing cocaine....' §893.135(1)(b), Fla. Stat. (1985). A significant difference exists between section 893.135(1)(b) and section 893.13(1)(e). In order for a person to commit the offense of trafficking it is not necessary that he be in 'actual or constructive possession of a controlled substance.' It is readily apparent without reference to graphic examples that a conspiracy to traffic within the state can be achieved without the conspirators ever coming into either actual or constructive possession of the contraband. A conspiracy to violate section 893.13(1)(e), however, is wholly dependent upon some form of possession being within the conspirators' capability. Hence, it cannot be said that the elements constituting the offense of 'simple possession' are consistently embedded within the crime of 'trafficking.'

> In sum, it is our judgment that the offense of simply conspiring to possess concaine is, at best, a permissible lesser included offense of conspiracy to traffic. A permissible lesser included offense is one which may or may not be included in the charged offense. **Wilcott v. State**, 509 so.2d 261 (Fla. 1987). A jury instruction encompassing a permissible lesser included offense, in contrast to a necessarily lesser included offense, must be given only when the pleadings and the evidence demonstrate that the lesser offense is included in the charged offense. **Wimberly; see** Rule 3.510(b), Fla.R.Crim.P.

Id. at 419

As with Munroe, the evidence is certain that the amount of cocaine conspired to purchase and possess was not less than 28 grams and not a contemplated purchase for personal use. United States v. Pirolli, 742 F.2d 1382, 1387 (11th Cir. 1984), cert. denied, 471 U.S. 1067, 85 L.Ed.2d 500 (1985). The object of the conspiracy was to acquire five kilos of cocaine, nothing less. Without evidence to support the requested instruction, the trial court did not err in declining Downing's proposed charge. This was the view expressed by the First District and it should be affirmed.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN ADMITTING WILLIAMS RULE TESTIMONY. (Restated)

Petitioner complains that evidence of certain prior acts of Evans and Munroe with respect to cocaine trafficking and/or conspiracy as well as one prior exercise of theirs in Marathon, Florida that did involve Downing was heard by the jury. Petitioner seems to forget that this was a joint trial of Munroe and Downing as co-defendants and there had been no motion for serverance. The jury was quite capable of understanding Evans' testimony both on direct and cross. It was expertly brought out by petitioner's counsel and abundantly clear to the jury which of the prior similar acts involved Downing and which did not. That is one of the purposes of cross-examination and petitioner's trial counsel ably availed himself of it. Furthermore, adequate instruction was given to the jury by the court, viz:

> "THE COURT: Let the record reflect that the jury has returned to the jury box and all members are present.
>
> Ladies and gentleman, I need to instruct you before we continue with the testimony of this witness, so please pay your continued good attention here.
>
> The evidence you are about to receive concerning the evidence of other crimes allegedly committed by these defendants will be considered by you for the limited purpose of proving motive,

> intent, knowledge on the part of the defendants and you shall consider it only as it relates to those issues. However, the defendant or these defendants are not on trial for crimes that are not included in the charges that I have already instructed you on."

(R 879-880)

It is pure conjecture on the part of appellant that the jury could not distinguish between which of the prior similar acts involved Downing and which did not. Respondent reiterates that Martha Munroe was also on trial and the court's instructions were sufficient to prevent any prejudice to Downing. Given the totality of the circumstances, Downing has failed to demonstrate any resulting prejudice.

The similar fact evidence introduced did, in fact, show that Martha Munroe on a number of occasions had worked with Bruce Evans in cocaine trafficking in that he had on other occasions served as her "mule" in transporting cocaine and on another occasion in Marathon had attempted to procure cocaine for Martha Munroe during which time she was accompanied by Downing in whose presence such discussions took place. In all of these instances the cast of characters was small and always included Evans and Munroe and at least on one occasion included Evans, Munroe and Downing. The consistency of Munroe's modus operandi and Downing's prior knowledge and expected participation in one role or another all comes within the ambit of the Williams Rule.

Downing and his co-defendant Martha Munroe were jointly charged with conspiring to commit the crime of possessing more than 400 grams of cocaine. They were tried together as co-defendants and their conduct vis-a-vis each other was essential to proving the existence of a conspiracy. Likewise, prior similar acts of the two defendants in concert with the other are very relevant to the showing of a pattern of behavior, which is admissible in evidence under the applicable rule of evidence and permitted by the Florida Supreme Court as a result of its decision in Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959).

Williams has oft been quoted and Justice Thornal's analysis of this issue is most comprehensive as to historical background and the philosophical basis of such a rule of admissibility as contrasted to a rule of exclusion. Justice Thornal expressed the view of the court succinctly:

> Our view of the proper rule is simply that relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is lack of relevancy. (Emphasis the court's)

Id. at 659-660

Certainly, another excursion across the county by Downing for the purpose of participating with Martha Munroe in a common

objective of acquiring cocaine as witnessed by Bruce Evans meets the test of relevancy as announced in Williams. Petitioner is quick to point out that during the Marathon excursion the only thing Evans was privy to what Downing said was "how long are we gonna have to stay here?" Petitioner should be reminded that while Downing was growing impatient, Evans and his local source were attempting to locate some cocaine for purchase. Under the circumstances, if the jury interpreted that remark to be the equivalent of asking how long Evans and his companion were going to need to find some cocaine then it was a fair interpretation and germane to proof of the elements of conspiracy. Everywhere that Martha went (to purchase cocaine), Downing was sure to follow. He lived in Denver but several trips across county just to hold Martha's hand while she acquired or attempted to acquire large amounts of cocaine and allegedly without any interest in the transactions was too much for the jury to buy, too much for the First District to take seriously and not enough credible substance for this court to justify anything but affirmation of the lower court.

ISSUE V

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE. (Restated)

Respondent is aware of this court's action in Atwaters v. State, Fla.S.Ct. Case No. 69,555, (January 28, 1988), 13 F.L.W. 53, disallowing the quantity of drugs as a basis for a sentencing departure.

The trial court provided a number of other reasons for the sentencing departure, among which were the "professional manner" displayed by Downing in the commission of the crime through the use of the aliases "Geronimo" and an assumed name of John Henry Adams. The court also noted that during booking procedures at the Leon County Jail, Downing "brazenly falsified" his identification and told the officers his name was John Henry Adams. The court also noted that Downing had lied to the interviewing officers concerning his name and criminal past. The court referred to Downing's "mendacious propensity to prevaracate at will to gain profit and favor for only himself at the expense and corruption of others." (R 413-414) Respondent submits that all of the foregoing points to the modus operandi of a seasoned professional. In the instant case Martha Munroe made a fatal mistake in not having recompensed Bruce Evans for a prior cocaine caper. It was Evans who fingered the pair for this arrest. Otherwise, Downing displayed a great deal of the cunning of a

seasoned operator in the ilicit drug business. It has been held in the past that "professional manner" in committing a crime is a clear and convincing reasons for departure from the sentencing guidelines. Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984)

Martha Munroe had nothing to lose and everything to gain in attempting to protect Downing with her testimony. She was deeply involved with the undercover police officers in the aborted cocaine buy and implicating Downing would have only hurt her defense. Her only chance was to try to convince the jury that some omniscient, omnipotent secret organization had forced her to engage in this business to pay off her husband's alleged debts under the threat that "they" would kill her children. She was not charged with conspiring with anyone other than Downing and Downing couldn't conspire with himself hence, her childish and contrived explanation. To her it didn't matter whether the jury believed that rubbish, only that it not believe that it was Downing, and only Downing with whom she was involved.

Finally, respondent would call to the court's attention the trial judge's statement in his written reason for departure wherein he clearly indicated that he would have imposed a departure sentence regardless of how many reasons might pass muster as being clear and convincing under the sentencing

guidelines. (R 414) See Albritton v. State[3] 476 So.2d 158 (Fla. 1985) The extent of departure from a guidelines sentence is not subject to appellate review. §921.001(5), Fla. Stat.

Appellee concedes that appellant was originally sentenced prior to July 1, 1987, the effective date of Ch. 87-110, Laws of Florida. However, these changes in the law, relevant to proper reasons for departure sentences deserve some notice here as they are a clear indication that the legislature believed that the old guidelines were a millstone around the necks of Florida's trial judges and should be done away with. Now, one valid reason is enough to support a sentencing departure based only upon reasonable indication that a departure is warranted. The burden of proof is now that of preponderance of the evidence, a far more reasonable standard.

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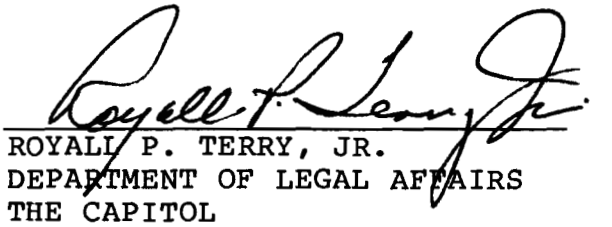
[3] But see section 921.001(5), Ch. 87-110, Laws of Florida.

CONCLUSION

The lower tribunal and the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH



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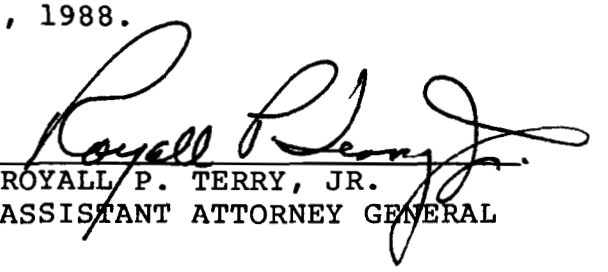
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by U.S. Mail to John F. Tierney, III, 215 N. Olive Avenue, Suite 130, West Palm Beach, Florida 33401, on this 9th day of February, 1988.



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