O/a 4-29-88

THE SUPREME COURT OF FLORIDA

RICHARD A. DOWNING,

Petitioner,

v. CASE NO. 71,629

STATE OF FLORIDA,

Respondent,

_____/

RESPONDENT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Respondent adopts the preliminary statement of petitioner.

STATEMENT OF THE FACTS

Respondent relies upon the statement of the facts as reported in the opinion of the First District Court of Appeal as Downing v. State, 515 So.2d 1032 (Fla. 1st DCA 1987).

SUMMARY OF ARGUMENT

The subject FDLE investigative and surveillance reports contain nothing of any significance not already known to counsel for petitioner well in advance of trial. Such inconsistent information as there might arguably be would not have influenced either trial preparation or conduct of the trial, but more likely would have provoked a decision on the part of petitioner's counsel as to whether or not to impeach Martha Munroe on whose testimony or the credibility thereof his own fate rested. In short, petitioner has failed to demonstrate that the outcome of the trial would have been any different whether or not information in the reports could have influenced trial preparation.

ARGUMENT

ISSUE

THE TRIAL COURT'S DENIAL OF MOTIONS FOR DISCLOSURE AND DISCOVERY OF FDLE AGENT REPORTS WAS HARMLESS ERROR. (Restated)

The real question before this court is whether petitioner's inability to examine the investigative and surveillance reports of the assigned FDLE agents so hindered petitioner's trial preparation that the ultimate case outcome would likely have been different.

Prior to demonstrating to this court that the contents of the agents' reports could have had no substantial impact on the outcome of the trial, respondent would first point out that petitioner Downing, at the close of the state's case, elected to present no defense whatsoever. This fact alone should cast some doubt concerning petitioner's assertions that the result in the trial would likely have been different. The state took its best shots but still respondent remained silent and hoped that the concocted story of co-defendant Martha Munroe could generate in the minds of the jurors the necessary reasonable doubt. Perhaps this was petitioner's only hope but this hope was dashed when the jury found Munroe's story and version of the events unworthy of belief.

With the court's indulgence, respondent earnestly believes that a brief analysis of Munroe's trial strategy will aid in demonstrating for the court that the availability of the subject FDLE reports would have had no effect whatsoever on the outcome of the trial despite protestations of petitioner's counsel that

he would have done this or done that differently if he had only had the reports. Respondent urges that the First District Court of Appeal was correct in finding that a comparison of the reports to deposition and trial testimony of the agents revealed that the reports contained nothing significant beyond what petitioner's counsel had already been exposed to prior to trial and during the course of the trial. In other words, there were no surprises of note.

Petitioner Richard A. Downing and Martha B. Munroe were charged in a one-count information with conspiring (only with each other) to traffic in cocaine. Munroe was too deeply involved with the undercover officers in consumating the purchase of five kilos of cocaine to expect a jury to believe that she was not involved in such doings. But because one cannot be convicted of conspiring with one's self and because there were no other co-conspirators except Downing, Munroe could with impunity concoct a story employing fictional characters as her co-conspirators in a cocaine transaction that went sour when Munroe spotted someone taking pictures from a van. Munroe could, with impunity, as she did, and pathetic as it was, weave a tale about a sinister, omniscient, and diabolical criminal organization operating in rural, sparsely populated Gadsden County which forced her into cocaine trafficking under threat of death to her children. As it turned out, the state's rebuttal witnesses, prominent citizens and law enforcement officials of Gadsden County knew nothing about any "Gadsden County mafia" and discounted Munroe's testimony that her husband had been a drunk and a gambler and

became heavily indebted to this mythical criminal syndicate. Although the jury was unimpressed, therein lay Munroe's only chance for acquittal. If she could convince the jury that, as involved as she had been in cocaine trafficking, past and present, if the involvement, as a conspirator, was with person or persons other than Downing, she would walk out of the courtroom a free woman. She was not charged with conspiring with anyone other than Downing. Therefore, her principal strategy was to exonerate Downing rather than herself for, if she could exonerate Downing then she too would "walk" regardless of how many other people she may have been involved with in this nefarious trade. She had to create a role for Downing other than that of co-conspirator so she told the jury that on this and other occasions Downing would accompany her in her cocaine escapades for her protection, moral support, as custodian of the buy money, etc. but no, not as a co-conspirator. There was never any denial that Downing both knew that a cocaine transaction was to go down and that it was his intention that the transaction take place. Otherwise, why would he travel across the country, on more than one occasion, risk death or injury from a drug rip-off of arrest and imprisonment by the authorities without having a stake in the outcome? Nonetheless, Munroe persisted in telling the jury that he did all this, including handling and counting out the cocaine purchasing money, just because he was a sweet guy who happened to be distantly related to her, by marriage. What are kinfolk for if they won't help you consumate cocaine transactions?

At trial it was the state's position and, still is, that Munroe was merely brokering a cocaine transaction for Downing in a part of the country that she knew well and that Downing was the ultimate purchaser for redistribution in other parts of the country. Munroe's testimony that Downing did not share in the proceeds of her cocaine transactions was actually pointless as the elements of the crime of conspiracy, from the jury's viewpoint, had been satisfied. Downing knew that a cocaine transaction would be going down, it was his intention that it go down and he combined and conspired with Martha Munroe to this effect. Whether he pocketed any of the profits is and was immaterial. Again, why would he take all the risks inherent in such operations, just to help out his kissing cousin, or whatever she was, in her cocaine trafficking business. Such was her obvious strategy coupled with an appeal to the jury's sympathy for a "jury pardon" because she was a poor widow woman threatened by a cruel criminal syndicate that would murder her children if she did not do their bidding. Even Munroe might have known that this was a bit much for the jury to swallow but her only chance for her own acquittal was to take the spotlight off of Downing and cast herself as a victim forced into the business. Sure, she conspired with the "Gadsden County mafia" to traffic in cocaine but not with Downing. Therefore, the jury could not find her guilty because she was charged only with conpsiring with Downing.

The whole point of respondent's recapitulation of its earlier argument in the briefs that have been filed is to show Downing's utter dependence upon Munroe saving the day for him.

In other words, her strategy had been set in concrete, as it were, long before trial time and for anyone to suggest that counsel for the respective defendants had not coordinated, rehearsed and planned a common strategy would be the height of naivety and innocence. Indeed, it would have been a case of dereliction if counsel for the defendants had not coordinated. There were no antagonistic differences, no motions for severence, just a desperate plan that Munroe could convince the jury that Downing's role in her cocaine transactions was something other than that of co-conspirator. This would result in acquittal for both of them irrespective of her admissions as to her own involvement in the business of cocaine trafficking. Thus, respondent will proceed to show that the few bits and pieces contained in the FDLE reports could never have had any effect on either trial preparation or the ultimate result of the trial. Martha Munroe played the only hand she had and Downing played the only hand he had, in not testifying. The few bits and pieces in the FDLE reports not known to Downing prior to trial would never have affected what was already planned strategy for trial and most certainly provided nothing in addition for the jury's consumption that would have affected their verdict in the slightest.

Turning now to a direct analysis of petitioner's arguments sub judice, respondent categorically refutes the notion that there was anything in the agents' reports that would have been in any way exculpatory with respect to Downing. Respondent would point out, in passing, that Agent Layman's report actually

reinforces a critical point of which counsel for Downing was already aware, to-wit:

Bruce Evans, the lay informant testified that after Munroe saw the purchase money in Room 105 of the Red Roof Inn where the undercover agents were ensconced that she left the room for the purpose of going up to Room 225 where "Geronimo" (Downing) was waiting so that he could test the cocaine. (R 842) On deposition, Agent Layman testified:

> **Q.** What made you think that? Did she say something directly, or did you just infer that?
>
> **A.** No, it was more than an inference. She said, "I will go upstairs and get him," I think. But that may not be the exact words, but that it would only take her a minute to get her tester. "Let me go upstairs and I will be right back," to that effect.
>
> **Q.** At any time during the investigation did you ever learn anything to make you think that she was going to get somebody that was located somewhere else other than in the hotel to test the cocaine?
>
> **A.** No.

(R 110)

Agent Layman wrote in his report of April 2, 1985, FDLE Case No. 522-18-0442:

> [S]he ask (sic) if she could take it upstairs for the test . . . Munroe agreed to get her man from upstairs and return for the deal. Munroe stated that if they were satisfied with the test, they would exchange the money right then.

Counsel for petitioner argues in his brief that had he had the police reports he would probably have deposed the agents before he deposed the lay informant Bruce Evans. Respondent is at a loss as to how reversing the order of depositions, in this instance, could have made a particle of difference in either trial preparation or the ultimate result of the trial. Is counsel saying that he did not know even at that stage that Evans was a confidential informant? If, after deposing the agents, counsel for petitioner learned things about Evans that he was unaware of there was no obstacle to redeposing Evans. In view of the trial court's rulings on discoverability of the police reports, certainly petitioner could have shown adequate grounds for redeposition. Because there was no attempt to redepose Evans this court should dismiss this argument as spurious and probative of nothing. When one shunts aside this kind of rhetoric and petitioner's rehash of his Richardson argument there remains only one point that petitioner has raised that even merits this court's consideration. Petitioner makes much of the fact that Agent Layman's report contained the following phrase:

> The figure of $25,000 per kilo was mentioned and the CI advised that Munroe had shown him $25,000 on the previous day.

Presumably, the reference was to March 26, 1985 as that day would have been the day previous to March 27, 1985, the date referenced as a contact between Martha Munroe and Bruce Evans.

Petitioner argues that this is irrefutable proof that because Martha Munroe had that kind of money in her possession

before Downing came to town (at least for this visit) it was somebody else, not Downing who was her financial backer. What nonsense! Even if true, this proves nothing. Who is to say that Martha Munroe did not have $25,000 of her own "flash money".[1] Who is to say when Downing was not in town on a prior occasion and transferred monies to her for an earlier unsuccessful attempt to procure cocaine for him? Who is to say that she did not receive the money from Downing via UPS or transported by a "mule" such Bruce Evans? All the foregoing notwithstanding, what is interesting is that Martha Munroe herself testified that the "Gadsden County mafia" people put the money in the trunk of her car only "the night before the transaction took place." (R 1145) Munroe said she received the money the night before which would have been April 1, 1985 and not March 26, 1985 as petitioner argues. If petitioner had had this information what would he have done with Martha Munroe on cross-examination - impeach her? He could ill afford to do that as his own fate rested on her credibility. Respondent submits that petitioner would have held his tongue as Martha Munroe was looking bad enough already. One thing certain, counsel for petitioner did cross-examine Munroe and an examination of that portion of the transcript shows clearly that counsel was perfectly happy with Munroe's story that the alleged extortionists had put all of the

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[1] The term "flash money" is sometimes used in the illicit drug trade in reference to substantial amounts of money that may be "flashed" in front of potential sellers as evidence of the buyer's good faith and to allay fears of a drug rip-off.

cocaine purchase money in the trunk of her car the night before. One falsehood is as good as another as long as she stuck to her story that she brought the money to the party and not Downing. Either way, she denied that the money was Downing's. Even petitioner concedes that the testimony showed that no fingerprints of Munroe's was lifted by the officers from the plastic bags that encased the money - only Downing's fingerprints.

Respondent's position is that it does not matter whether the $25,000 referenced in Agent Layman's report was Martha Munroe's own flash money, whether it was part or all of an advance of monies furnished by Downing, or whether the report of the money by the confidential informant was true or not. The irrefutable facts were that Downing had custody of the money in Evans' presence, he counted out the exact amount necessary for the purchase ($140,000) at Munroe's direction, the money was in his suitcase, his boots and his socks, he knew what the money was for and that it was his intent that the transaction take place. That is all the jury needed to convict him of conspiracy to traffic in cocaine and Martha Munroe's silly tale of extortion by a sinister criminal organization, in any but a courtroom setting would have brought on gales of laughter.

Nothing in the police reports would have warranted any different strategy on the part of petitioner's very capable and experienced attorney and his arguments sub judice to this effect amount to nothing more than a tribute to counsel's creative thinking in connection with this, his last opportunity to

convince this court that the police reports were in any significant way either inconsistent with or expansive of what counsel already knew, well in advance of the trial.

CONCLUSION

The trial court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to John F. Tierney, III, Esquire, 324 Datura Street, Suite 312, West Palm Beach, Florida 33401, this 20th day of June, 1988.

Royall P. Terry, Jr.
Assistant Attorney General