THE SUPREME COURT OF FLORIDA

By

RICHARD A. DOWNING,

Petitioner,

vs. CASE NO. 71,629

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER DOWNING

APPEAL FROM FIRST DISTRICT COURT OF APPEAL

JOHN F. TIERNEY, III
Attorney for Petitioner
215 N. Olive Avenue
Suite 130
West Palm Beach, FL 33401
Telephone: (305) 832-5354

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PRELIMINARY STATEMENT

References to the Record on Appeal will be made by the designation "R" followed by the appropriate page number, i.e. (R-page number).

It should be noted that the portions of the Record which contain the transcript of the trial are not in chronological order but are in the order that the transcripts were filed with the Clerk's office.

The trial in this case was a joint trial with two co-defendants. The trial court agreed that objections made on behalf of either co-defendant were construed by the trial court to be made on behalf of both defendants. (R-512-513).

References to the Supplemental Record on Appeal will be made by designation "SR" followed by the appropriate page number, i.e. (SR-page number).

STATEMENT OF THE CASE

On April 19, 1985, the State filed a two count Information charging Richard Arnold Downing and Martha A. Munroe with:

1. Conspiracy to possess in excess of 400 grams of cocaine, contrary to Section 893.135(4), Florida Statutes; and

2. Displaying, using, threatening or attempting to use a firearm in the commission of a felony, contrary to Section 790.07(2), Florida Statutes (R-1).

Appellant DOWNING filed a Plea of Not Guilty, Demand for Jury Trial, and Demand for Discovery (R-10-12).

The State filed approximately 11 responses to the Demand for Discovery (R-16-19, 37, 45, 46, 49, 52, 53, 346, 362, 370, and 388).

Appellant DOWNING filed a Motion to Compel Discovery (R-24-36) which included a request for the production of reports or statements of police officers. The Motion was denied (R-39-40).

Appellant DOWNING filed a Second Motion to Compel Discovery which again sought production of reports or statements of FDLE agents (R-42-44). The Motion for disclosure of the police reports was denied (R-57, 1285-1307).

The State filed a Notice of Intent to Rely on Similar Fact Evidence (R-41) and Appellant DOWNING filed a Motion to Strike the Notice of Intent to Rely on Similar Fact Evidence (R-54-56). That Motion was heard before the trial court before

trial and was denied orally, but no written order was entered (R-455-480).

Appellant DOWNING filed a renewed Motion to Compel Discovery (R-347-348) which again for the <u>third time</u> sought production of reports and statements of FDLE agents. The Motion was heard by the trial court before trial and was denied orally but no written order was entered (R-480-491).

The case was tried before a jury on January 7 through 11, 1986. The trial court granted both defendants' Motions for Judgment of Acquittal as to Count Two of the Information at the close of the State's case (R-1660-1694). However, the trial court denied Appellant DOWNING'S Motion for Judgment of Acquittal as to Count One (R-1660-1694) and denied the Appellant DOWNING'S Motion for Judgment of Acquittal at the close of all the evidence (R-1969-1977).

Both defendants were found guilty of Count One (R-1509). Appellant DOWNING filed a post-trial Motion for Judgment of Acquittal and a post-trial Motion for a New Trial (R-385-387, 382-384, and 1171-1207). Both Motions were denied (R-397, 1171-1207).

The trial court adjudicated the Appellant DOWNING guilty of the offense of conspiracy to traffic in cocaine in violation of Section 893.135(4), Florida Statutes, and exceeded the sentencing guidelines and sentenced the Appellant DOWNING to twenty-five (25) years (R-1311-1330, 412-414).

DOWNING timely filed his Notice of Appeal with the First District Court of Appeal on March 24, 1986. DOWNING also filed a Motion to Unseal and Disclose Police Reports with the First District Court of Appeal, wherein DOWNING asked the Court to unseal police reports which had been submitted with the record on appeal under seal. The Court entered an Order deferring ruling on this issue to the panel that was to decide the case on the merits. On June 30, 1987, the Court held oral argument in this cause and on October 30, 1987 the First District Court of Appeal rendered its decision affirming the conviction and sentence. A copy of the Opinion of the First District Court of Appeal is included in Petitioner's Appendix. The opinion of the Court adopted conclusions and rationale of the panel in the co-defendant's case, Munroe v. State (Florida District Court of Appeal BM-117), and therefore, Petitioner has included the opinion in the companion Munroe case in his Appendix.

On November 12, 1987 DOWNING served a Motion for Rehearing and Motion for Rehearing En Banc and on December 8, 1987 the Court entered its Order denying the Motion for Rehearing.

STATEMENT OF THE FACTS

Bruce Evans testified he was a 36 year old pipe fitter from Taylor County, Florida (R-814). In March, 1985, Martha B. Munroe asked him if he could procure cocaine (R-15).

Evans attempted to procure cocaine; however, he was unsuccessful (R-816). Evans contacted Simmie Moore, the ex-Sheriff of Madison County, and advised he wanted to get out of the cocaine business. Moore put him in touch with Madison County Sheriff Joe Peavy (R-819), who then contacted the Florida Department of Law Enforcement and arrangements were made for Evans to meet with FDLE agents (R-820).

Evans met with Agents Cornelius and Layman (R-821), advising them he had been contacted by Munroe about cocaine. A plan was formulated to put the agents in contact with Munroe. (R-823).

On April 2, 1985, Munroe contacted Evans by phone and he advised her to go to a truckstop at Greenville on Interstate 10 and wait for a phone call (R-824). Agent Layman contacted Munroe by phone and recorded the conversation wherein they discussed a cocaine transaction involving 5 kilos of cocaine. There was a disagreement as to price and the negotiations were terminated.

Later Munroe contacted Evans by phone and advised that "she was leaving" (R-827). Munroe later called Evans back and agreed they could still do business if the deal could be put together that day (R-827). Munroe and Evans agreed to meet the

next morning at Shoney's on Highway 27 North in Tallahassee (R-828).

On the morning of April 3, Evans and Munroe met at Shoney's. They proceeded to Room 225 at the Red Roof Inn, which was occupied by "Geronimo" (Downing) (R-830). Evans was following Agent Layman's instructions to view the money before the cocaine deal was to occur (R-831). Munroe instructed "Geronimo" (Downing) to show Evans the money (R-832, 833, 1906, 938).

Evans and Munroe left the room, went to a payphone and Evans phoned Layman to advise he had seen the money. He received instructions to sit tight. Evans and Munroe went to Munroe's home in Gadsden County, ultimately returning to the Red Roof Inn at least once, if not on two other occasions (R-834, R-937).

At some time around 11:00 a.m. on April 3, 1986, Evans and Munroe returned to Room 225 at the Red Roof Inn and joined "Geronimo" (Downing). They chit-chatted about turkey hunting (R-836-837), but there was no discussion about the cocaine, about testing the cocaine, about whether anyone had seen the cocaine, and Downing (Geronimo) never said anything about any cocaine deal (R-938-939, 969-970).

Some time around 11:30 a.m. to 12:00 noon, Layman called and said he was in Room 105 at the Red Roof Inn. Evans and Munroe went and met with Layman and Agent McKeehan in Room 105 (R-838). Layman displayed five kilos of cocaine (R-840). A tape

recording of the meeting was played for the jury and the jury was given a transcript to aid in their listening to the tape (R-1012, 415-423). There was a discussion between the agents and Munroe about testing the cocaine and Munroe wanted to take the cocaine or a sample to her tester. The agents refused and Munroe left the room to presumably make arrangements for the testing (R-1018).

Munroe left the motel and phoned Evans indicating there was a van outside with somebody taking pictures, and that she was gone and if Evans wanted to meet her, she would see him where she did that morning, which was Shoney's (R-842). Evans then left and went home. Evans later received three payments of $500 in cash from the agents, or a total of $1,500 (R-843).

Over pretrial and trial objections by defense counsel, Evans was permitted to testify to the following similar facts or collateral crimes evidence:

In late 1983 or the first part of 1984, Evans was contacted by a friend of Munroe, Bobby Harrison, for the purpose of having Evans transport cocaine for Munroe (R-881). They agreed on a price of $3,500 and Munroe and Evans drove to San Francisco, California with a box that Evans believed contained cocaine (R-884). After arrival, Munroe left Evans at their hotel and came back after an hour or two. The next morning, she gave him $3,500 and he drove her to an airport for her to fly back to Tallahassee. He then drove the car back to Tallahassee (R-884).

Evans became involved in another incident where he operated as a "mule" for Munroe. In this incident, Munroe and Evans went to Atlanta where they stayed at a Ramada Inn for approximately three days (R-885). Evans returned home, stayed for a day or two and he was recalled to Atlanta by Munroe (R-886). Munroe provided him with $600 in expense money and told him to go to Denver, Colorado and call a phone number she provided (R-887).

Evans arrived in Denver, called the phone number from the hotel room and waited for Munroe to show up. She arrived at the hotel, obtained the car keys, left and came back and paid Evans $3,500 (R-888). The telephone number that Evans called in Denver, Colorado was turned over to Cornelius.

Approximately two days after he returned from Colorado, Munroe contacted Evans again and asked if he was ready to go again (R-890). He met Munroe at McDonald's on Highway 319 North in Tallahassee and Munroe gave him a small attache case which was supposed to contain cocaine (R-890). Evans put the case in the trunk of the car and drove to San Francisco. Upon arrival in San Francisco, he contacted Munroe at a number that Munroe had provided (R-890). Munroe arrived at the motel he was staying at, took the car keys, left and came back in an hour and told Evans it wasn't any good and that he had to take it back (R-891).

In 1985 Munroe contacted Evans and inquired if he could find some cocaine. He indicated he thought that he could through a friend of his, Sonny Parnell (R-892). Evans and Parnell

traveled to Marathon, Florida and later met Munroe and "Geronimo." This was the first time that Evans met "Geronimo" (Richard Downing).

Evans and Parnell's sources weren't able to obtain any cocaine and no deal was consummated. There was allegedly a conversation about cocaine in the presence of Geronimo in a motel room where Munroe and Geronimo were staying (R-894). On deposition Evans testified there was no discussion of any cocaine in the presence of Geronimo (R-927-928, 932), and that he did not know where Munroe and Geronimo were staying. Evans kept the identity of the drug sellers from Munroe and also from the agents (R-907). Evans conceded that he had lied in his deposition testimony under oath concerning his involvement in prior drug deals (R-919, 966). Evans had a prior felony conviction and a grand theft and larceny conviction (R-933).

In reference to the similar fact evidence or collateral crimes, Geronimo (Downing) had nothing to do with the alleged cocaine deal on the first trip to San Francisco (R-921). In reference to the second collateral crime or trip to Denver, "Geronimo" (Richard Downing) had nothing to do with that transaction either (R-923).

In reference to the third collateral crime or similar fact evidence involving the second trip to San Francisco, "Geronimo" (Downing) had nothing to do with the alleged cocaine deal on the first trip to San Francisco (R-921). In reference to

the second collateral crime or trip to Denver, "Geronimo" (Richard Downing) had nothing to do with that transaction either (R-923).

In reference to the third collateral crime or similar fact evidence involving the second trip to San Francisco, "Geronimo" (Downing) had nothing to do with that transaction (R-924).

In Evans' various discussions with Munroe concerning the people she was dealing with, Munroe referred to the people as "they" (R-923-924).

In the Marathon deal, the only thing that Geronimo said was, "How long are we gonna have to stay here?" (R-932). Geronimo didn't participate in any other fashion at any time in terms of any drug deal in Marathon (R-932).

When Evans first met Agents Cornelius and Layman, he did not know that "Geronimo" was involved and the first time he had any knowledge that Geronimo was in the state of Florida is when he saw him at the Red Roof Inn (R-935). On the morning of April 3, when Munroe and Evans on one occasion went to the Red Roof Inn, Geronimo left and went to get something to eat (R-937). Geronimo did not have anything to do with Evans' discussions with Munroe. He never said anything at all about cocaine (R-938-939).

FDLE Agent Layman testified that he and Agent Cornelius interviewed Evans on the night of April 1, 1985 (R-974). A plan was formulated where Evans was to advise Munroe that he had

someone that had 5 kilos of cocaine and to arrange a meeting. Evans provided Layman with a Denver, Colorado telephone number (R-976).

On April 2, Layman called Martha B. Munroe to arrange the sale of the cocaine (R-978). A tape recording of the conversation was made and the tape was played to the jury (R-981). The substance of the phone conversation was Layman advising the cocaine was very good and offering to sell it at $32,000 a kilo and Munroe arguing and suggesting a purchase price of $25,000 a kilo (R-984). The phone call did not result in an agreement. Later Evans and Munroe conversed on the phone and an agreement was reached (R-986-987).

On April 3, 1985, Layman obtained the cocaine from the evidence room and took it to Room 107 at the Red Roof Inn. Agent Layman wore a microphone and transmitter (R-989-992). The tape recorded conversation was played for the jury and the jury was given a transcript to aid and assist in following the tape (R-1013-1018) (R-415-423).

The substance of the conversation concerned negotiations between Munroe and Layman and Munroe's concern about testing the quality of the drugs (R-1016).

Special Agent Wayne Bass of the FDLE testified that on April 3, 1985, he surveilled the activities that were to take

place at the Red Roof Inn (R-1037). Bass was set up in a van located in the parking lot. Bass took photographs from the back of the van that were introduced into evidence as Composite 6A-G.

Agent McKeehan accompanied Layman to Room 107 at the Red Roof Inn basically for security purposes. During the course of the meeting, Munroe requested the cocaine be tested but that she did not test it. It would have to be tested by someone else, but she never indicated who that was (R-1527-1529).

After the transaction was called off, McKeehan secured Room 225 for evidentiary purpose and subsequently obtained a search warrant for the room and a tan leatherette zipper type suitcase (R-1530). Over objection, the warrants were admitted into evidence as State's Exhibits 7 and 8 (R-1531-1533). Nothing of evidentiary value was found in the room (R-1533). The contents of the suitcase were photographed and introduced into evidence. Within the suitcase, $155,000 was seized (R-1533, 1639). The money was admitted into evidence as State's Exhibit 16 (R-1642). Also seized from the suitcase were two packs of matches that came from Angelo's Steakhouse from Panama City, Florida, a Delta Airlines ticket folder from Davidson's Travel Service & Company, Freemont, California, with the name John Henry, a Delta Airlines ticket receipt in the name of Henry/John. The ticket was from San Francisco International to Dallas/Ft. Worth to Atlanta, Georgia, to Tallahassee, Florida (R-1646-1647).

Also inside the suitcase was an itinerary from Davidson's Travel which shows invoice date of March 28, 1985. Also in the suitcase was a piece of paper from the Holiday Inn Beach Resort, Panama City, Florida (R-1648). There was also a Hilton Hotel receipt in the name of John Adams, with a date of 3/31 (R-1649).

Agent McKeehan expected to find writings and notes relating to drug transactions in the hotel room occupied by Muroe and Downing, but found nothing (R-1657-1658).

There was a stipulation between the State and defense counsel as to the fingerprint analysis. The State's Exhibit 17 which contained three plastic bags, JMIA, JMIB and JMIC (which contained portions of the $155,000), Downing's fingerprints, thumb and right index finger, appeared on one of the three bags, JMIA (R-1643).

Downing's fingerprints did not appear anywhere on the five ziploc bags which contained the cocaine (R-1643). Downing's fingerprints did not appear anywhere on the gun and holster or on the five cartridges that were in the gun (R-1643-1644). Downing's fingerprints did not appear on the Clorox bottle and bag introduced into evidence as Exhibit 13 (R-1644).

FDLE Agent Mike Ellis assisted in surveillance on April 3, 1986 in the area of the Red Roof Inn (R-1544). Ellis observed Munroe and Downing leaving the Red Roof Inn and traveling to a Chevron Service Station on North Munroe Street (R-1548). Munroe used the payphone and then reentered her vehicle (R-1549).

Munroe testified that she called Evans at the Red Roof Inn and the man that provided the money for the cocaine deal and the "tester" at Shoney's (R-1907, 1145).

Munroe then proceeded westbound on Interstate 10 (R-1551). Agents Ellis, Cornelius and McLaughlin stopped Munroe's vehicle to arrest the occupants, Munroe and Downing (R-1551-1552). Ellis placed Downing under arrest. Downing presented a Colorado driver's license with the name John Henry Adams (R-1554). Downing had $1,362.09 in his pants pocket (R-1556).

Downing's wallet was seized from his person and it contained the Colorado driver's license. Over objection, copies of the contents of the wallet were admitted into evidence (R-1561-1571). The wallet contained a card that indicates a second night free at the Tallahassee, Hilton Hotel; a piece of paper with the names Ricky, Kathy, and Denise and three different phone numbers, (R-1568); a piece of paper with two different phone numbers on it from area code 904; a receipt from Caesar's Palace, Lake Tahoe, Nevada; a piece of paper identified by the name of Best Western with a phone number (R-1569); a guest key to the Playboy Club in Miami under the name of Adams (R-1570); a piece of paper with several names on it and a telephone number; a torn piece of paper from a newspaper with a handwritten address on it (R-1570); a piece of paper with the name Rich, with a phone number and an address of 7681 Granada Road, Denver, Colorado (R-1571); a torn piece of paper from a pad that would be used to

refer messages to business people; an invitation issued by the Best Western Miami Airport Inn indicating the guest would be welcome to the Playboy Club, with a date of 6-21 (R-1571). One of the phone numbers was the same number Evans gave Layman that Evans used to call Munroe in Denver, Colorado.

The parties stipulated that the State could introduce into evidence the registration from the Red Room Inn of April 2, 1985; (Exhibit 12) (R-1591).

Cornelius arrested Munroe on April 3, 1986. He removed a suitcase, a jacket and a bottle of Clorox in a brown paper sack from her vehicle (R-1595). The bottle of Clorox was in the rear floorboard on the passenger side (R-1596). It was seized because Cornelius felt it was a field type test for cocaine (R-1597). His inventory of the Munroe car produce an extensive list of items found inside the car (R-1604, 1696, 1699).

The State rested and both Defendants moved for Judgment of Acquittal as to Counts I and II of the Information. The Motion as to Count I was denied as to both Defendants, but was granted as to Count II as to both Defendants (R-1660-1695).

Munroe called Agent Corneilus as her first witness. Cornelius recovered a letter from the glove compartment that was introduced into evidence as Defense Exhibit No. 1 (R-1700). Cornelius also received a letter that Sheriff W. A. Woodham provided him (R-1701) (Defense Exhibit 2).

Corneilus read to the jury the contents of the letter that was Defense Exhibit No. 1. The substance of the letter was that Munroe had been living a nightmare for the past two years and it started when her deceased husband paid someone to get rid of her and her son; there had been threats against her and her children; that the people were nuts; and she had been blackmailed into all of this for the past several years (R-1710-1711). Cornelius felt the letter was a plant (R-1713).

Cornelius interviewed Munroe after her arrest. She advised him that her deceased husband had a drinking, gambling, and drug problem and became indebted to people she would not name. The debt was approximately $168,000. Munroe related that her deceased husband had tried to sell property they owned to satisfy the debt (R-1716) and that she stood in the way of selling the property. She was later advised by Law Enforcement Officers that her husband was going to kill her and her son, Drew Miller (R-1716). Cornelius attempted to find out the names of the people, but she refused to give the names. She did request to speak to Sheriff W. A. Woodham of Gadsden County (R-1717).

Munroe advised that after viewing the cocaine, she was supposed to call someone back at Shoney's (R-1720), and that person would "check on the cocaine." Cornelius felt that even if there had been someone at Shoney's, he probably would be gone by the time the officers could attempt to return to Shoney's (R-1720, 1726).

Munroe related that Downing was a close friend, stating that he was only along to provide protection for her while meeting with Layman. She acknowledged that his nickname was Geronimo. Munroe advised that Downing was not involved with the cocaine (R-1724).

Cornelius advised Munroe of "substantial assistance" in Chapter 893, but denied advising her she was facing serious penalties. He indicated he didn't know the number of years for the penalties.

Munroe was unwilling to provide a physical description of the men who she alleged were threatening her (R-1747).

Munroe advised Cornelius that after seeing the cocaine, she was to call at a payphone at Shoney's Restaurant to advise the individual there that he could test the cocaine (R-1757, 1759). Munroe again advised Adams (Downing) was there to help her, but was not involved in the actual purchase. Munroe refused to advise where the money came from (R-1759).

Munroe then testified. Her testimony is quite lengthy and is summarized in these facts, but is not set out in great detail.

Munroe admitted her involvement in illegal drug activities with Evans (R-1115). Downing was "family" and did not have a financial or any other interest in the cocaine transaction and was there in case anyone tried to hurt her (R-1116, 1146-1147).

Munroe stated she had been blackmailed by individuals to whom her deceased husband, George Munroe, owed money (R-1117-1166). One day a man appeared in her driveway advising that her deceased husband owed them $168,000 (R-1133-1134). The man indicated she would have to pay it and if not, her children would be killed one by one (R-1136). Over a period of time, Munroe paid the men some money (R-1137-1140). Eventually, she was unable to pay any more money and they indicated she would work for them (R-1140), in the drug business. Although she wasn't willing to do it, she did so after being threatened at gunpoint. (R-1141). Munroe indicated that on one occasion she carried cash to San Francisco (R-1141). On another occasion she took a suitcase (R-1142), and on this occasion she involved Bruce Evans (R-1143).

The money seized in this case ($155,000) came from the people who had been blackmailing her. It was put in the trunk of her car the night before the transaction took place (R-1145, 1849-1852). After she and Downing left the Red Roof Inn, she called Evans and told him the deal was off and then called Shoney's and told them that something was wrong (R-1146).

On cross-examination Munroe detailed her family history, business dealings and dealings with the men who were "blackmailing" her (R-1777-1830).

Downing owned a lumber yard and was "family" (R-1832). Downing's mother was married to Munroe's uncle (R-1147). Munroe

was aware that Downing had a false ID (R-1834). Munroe and Downing had been to Panama City Beach from March 31, to April 2, and she dropped him off at the Red Roof Inn sometime on April 2 (R-1838-1840, 1855-1856).

Downing advised Munroe to move to California (R-1854, 1904). On the night of April 2, Downing was under the impression that he had convinced Munroe to call Evans and tell him that she wasn't going through with the cocaine transaction. Munroe called Evans and advised that she wasn't going through with the transaction (R-1904-1905). Downing did not have anything to do with the cocaine transaction (R-1906).

Munroe's tester of the cocaine was at Shoney's and she wanted to make a phone call to contact him and also to take a sample or all of the cocaine for him to test (R-1907).

Downing rested without presenting any evidence. Motions for a Judgment of Acquittal were renewed, but the trial court deferred them to the close of the case (R-1909).

The State called as rebuttal witnesses Charles Layman, Jack Pope, W. A. Woodham, Pat Suber and Dwight Clark. However, all that testimony pertained to Munroe and is irrelevant to the present appeal and therefore is not detailed in these facts.

Downing then moved once again for Judgment of Acquittal as to Count I. The Court denied it on the same basis as it did at the close of the State's case and noted that even though mere presence is questioned, there was sufficient evidence for the case to go to the jury (R-1977).

SUMMARY OF THE ARGUMENT

A trial court's failure to order production of police reports containing statements or to conduct an in camera inspection and full inspection as requested by DOWNING constitutes reversible error. The harmless error standard used by the First District Court of Appeal is inapplicable to the facts of this case and a conviction based entirely on circumstantial evidence.

The evidence was insufficient, as a matter law, as to a co-conspiratoral agreement between Petitioner DOWNING and his co-defendant Munroe. The circumstantial evidence failed to exclude a reasonable hypothesis of innocence.

The trial court erred in failing to instruct the jury on the complete Trafficing Statute as mandated in the standard jury instructions in criminal cases. The Court also erred in refusing to instruct the jury on the schedule 1 lesser included offense of conspiracy to possess cocaine.

The trial court erred in admitting evidence of crimes not charged or similar fact evidence. The State's notice was insufficient and there was insufficient evidence to connect Petitioner to the similar fact evidence which became a feature of the trial.

The trial court erred in exceeding the sentencing guidelines in imposing a 25 year sentence. The departure was not warranted and the extent of departure was unauthorized.

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ORDER THE STATE TO PRODUCE POLICE REPORTS WHICH WERE "STATEMENTS" OF LAW ENFORCEMENT OFFICERS WHO WERE EYE WITNESSES AND PARTICIPANTS AND IN REFUSING TO CONDUCT AN IN CAMERA INSPECTION

Petitioner DOWNING filed a General Demand for Discovery pursuant to Rule 3.220, Florida Rules of Criminal Procedure and specifically requested that the police reports concerning the case be produced for counsel's inspection (R-12).

The State refused to produce the police reports and Petitioner moved to compel their production (R-24-36). The trial Court denied the Request to Produce the police reports (R-39, R-1212-1236).

Petitioner filed a second Motion to Compel the police reports. The trial court again denied production (R-42-44, R-57, R-1285-1302). Petitioner specifically requested that the police reports of the FDLE Agents who were eye witnesses and participants in the reverse sting operation. Therefore, unlike the ordinary case where police officers file an investigative report, the reports requested herein were the reports and statements of officers who directly participated or were eyewitnesses in the events of the alleged crime (R-1212-1236, R-1285-1302). The trial court held that the reports of officers are not discoverable as statements (R-1295) (R-1212-1236).

Petitioner filed a third Motion to Compel the police reports (R-347-348). The renewed Motion sought production of the police reports on the same basis as the earlier Motions but also under grounds that all of the officers involved had utilized their reports to refresh their recollection for purposes of their deposition testimony. It is undisputed that all of the officers had used the reports to refresh their recollection prior to their deposition testimony. However, the trial court again denied the request for production (R-481-491). Petitioner on two occasions asked the trial court to review the police reports _in camera_ to determine if the reports were subject to discovery under Rule 3.220, but the State objected to an _in camera_ inspection (R-1301) and trial court refused to do so (R-1297) (R-1230). Although the reports are not listed in the index of the record on appeal, they have been filed under seal as discussed in the decision of the First District Court of Appeal. The trial court refused to let defense counsel issue a Subponea Duces Tecum to the officers to produce all items of tangible physical evidence, including the police reports for the purpose of making a record (R-1240-1259). Therefore, there is no record as to the exact number of reports. However, all officers at deposition indicated that they had completed reports.

On appeal, DOWNING filed a Motion to Unseal and Disclose the Police Reports for purposes of arguing the issues in reference to the reports on appeal. That Motion was deferred to the panel that decided the case and although the Court has held that it was error not to produce the police reports, it did not address the Motion in the decision. After the decision was rendered, DOWNING again demanded the reports from the State. However, the State again refused to produce the reports and it is significant to note that counsel still has not seen the reports and is therefore forced to brief the issues concerning these reports without ever having reviewed them. A copy of the letter requesting the reports after the decision and the State's response are included in Petitioner's Appendix.

A general rule is that police reports are not discoverable pursuant to Rule 3.220, as "statements". However, there is no dispute that reports are statements and are discoverable at least to the extent that the reports constitute statements of officers that are participants or eyewitnesses and that recount the events which they observed or participated in. Miller v. State, 360 So.2d 46, 47 (Fla. 2d DCA 1978); Lockhart v. State, 384 So.2d 289, 291 (Fla. 4th DCA 1980); Potts v. State, 399 So.2d 505, 507 (Fla. 4th DCA 1981); State v. Dumas, 363 So.2d 568 (Fla. 3d DCA 1978).

> Certainly a defendant in a criminal case should have access to the

> written statements of witnesses in possession of the State, particularly where, as in this case, they pertained to essential elements of proof and are used by witnesses to refresh their memories before taking the witness stand.

Miller v. State, 360 So.2d 46, 47 (Fla 2d DCA 1978). The Court in Miller reversed the Defendant's conviction due to the failure of the State to produce the police reports of the offiers who allegedly witnessed the offense charged which is precisly the situation in this case. Similarly in Potts v. State, supra at 507, the Court held

> "There is no question that appellant was entitled to a copy of that part of the offense report in which the officer was an eyewitness to or participant in the events which led to appellants arrest."

The First District, in this case, held that

> "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 authored the various reports. Basically, the agent's testified to the same things which are set forth in their reports and to the same things they had testifed to on their discovery depositions which were taken by defense counsel well in advance of trial. Defense

> counsel was also permitted pretrial 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 this case. We therefore hold that the trial court's denial of discovery of the police reports, or failure to conduct an _in camera_ inspection of the same, was harmless."

The Court went on to discuss Petitioner's argument that the discovery problem should be treated as a "Richardson" violation because of the trial court's failure to conduct a Richardson hearing or _in camera_ inspection. The Court certified as of great public importance the following question:

> "Whether the trial court's failure to conduct a "Richardson" hearing after denying the defendant's pretrial Motion to Compel Discovery of the Police Reports requires automatic reversal under _Richardson_ and _Smith_."

It is suggested that the First District's analysis is faulty and fails to follow the dictates of this Court in _Smith v. State_, 500 So.2d 125 (Fla. 1986). In _Smith_ this Court held that a new trial is required where a trial court fails to conduct an inquiry into a State discovery violation regardless of whether or not the error in failing to conduct the inquiry was harmless. In this case, the failure of the trial court to conduct an _in camera_ inspection of the reports is the equivalent of the failure

to conduct a "Richardson" inquiry. As this Court noted in Smith, the question of prejudice applies to the Defendant's ability to prepare for trial. In the absence of a proper "Richardson" inquiry on discovery violations or an in camera inspection as in this case, neither a trial court nor an appellate court such as the First District can make an accurate judgment as to prejudice. The First District has attempted to do exactly that in the present case. The Court has ignored the issue of the prejudice to the Defendant's ability to prepare for trial and instead has chosen to focus on comparing the reports with the contents from the trial testimony of the agents; and therefore, held that discovery of the reports would have had absolutely no effect on the outcome of the case. The First District did not discuss the fact that the trial court noted in denying the Request for Production of the reports that, for purposes of appellate review, the reports contained inconsistent statements from trial testimony and/or contained information that would be of helpful assistance to counsel in the preparation of the case (R-1297-1301) (R-1212-1236). It is suggested that the First District cannot substitute their judgment for a finding on the record that the Defendant was prejudiced in preparation of his case by not having the police reports. DOWNING repeatedly argued pre-trial that the reports were necessary to properly prepare pre-trial. (R-1299, 1212-1237).

With all due respect, the District Court's decision does not address the issue of the Defendant's ability to prepare for trial. Counsel made it clear in hearings before the trial court that the reports were necessary not only for trial preparation but also preparation for taking discovery depositions (R-1299). Counsel's ordinary practice would be to review the reports to prepare for the deposition of the witnesses (R-1226). Counsel may well have chosen to change tactics or deal with witnesses in an entirely different manner on deposition and at trial based on information available in reports. Counsel may have chosen to not deal with certain matters on depositions that were treated in reports, but without benefit of the reports, counsel was totally in the blind at the time of taking the officers depositions.

At the risk of sounding redundant, it is extremely difficult to address the issue of harmless error and prejudice based on information that I don't even have. The State even after the District Court's opinion still refuses to produce the reports. In Smith, supra this Court held

> "One cannot determine whether the State's transgression of the discovery rules has prejudiced the Defendant (or has been harmless) without giving the Defendant the opportunity to speak to the question. We repeat what the Court made clear in Wilcox. A reviewing Court cannot determine whether the error is harmless without giving the defendant the opportunity to show prejudice or harm. 367 So.2d at 1023. In Wilcox

> the state sought to resist reversal by asserting that no prejudice resulted because the trial court instructed the jury to disregard the [previous undisclosed] statement. i.d. at 1022. In rejecting this argument, this Court explained that the question of "prejudice" in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder, but rather upon the <u>impact on the defendant's ability to prepare for trial</u>." [Emphasis added]

Reviewing the record as the First District did in this case is not a sufficient or adequate substitute for a trial court's determined inquiry into all aspects (including <u>in camera</u> inspection) of the State's breach of discovery rules. <u>Cumbie v. State</u>, 345 So.2d 1061, 1062 (Fla. 1977).

It is most respectfully submitted that the State's position is not even made in good faith. Discovery in this case was exceedingly difficult to obtain. (Note the 14 State responses to the Defendant's Demand for Discovery) (R-1212-1265, 1285-1307, 481-491). Moreover, the law had been well settled for sometime that the reports Petitioner asked to see were clearly discoverable as a matter of right. <u>Miller v. State</u>, <u>supra</u>; <u>Lockhart v. State</u>, <u>supra</u>. There was no authority anywhere to contradict the proposition that reports of officers who are eyewitnesses or participants are discoverable. Counsel also asks the Court to note the standard form discovery response that was included in the Appendix to Petitioner's Reply Brief in the First District Court and is included in the Appendix submitted herein.

The office of the same State Attorney had a pre-printed form for discovery responses that indicates that all police reports are attached and that that is consistent with all that was required under Rule 3.220. In this case the over zealous prosecutor made it exceedingly difficult to obtain discovery. Counsel was not permitted to issue a Supoena Duces Tecum to make a record of the reports and the tangible physical evidence in the case (R-1240-1259, 1229). This case also was the first and only case that counsel has handled in the Second Judicial Circuit wherein the State refused to provide police reports (1228). There is no question but there was prejudice in preparing for trial.

The purpose of a "Richardson" inquiry is to get to the issue of procedural rather than substantive prejudice. Smith, supra. To affirm the First District Court of Appeal, this Court would have to disregard procedural prejudice and abandon the Rules enunciated through Richardson, Smith, Wilcox, and Cumbie.

It is submitted that once it is determined that a discovery violation occurred, then on appeal it is the State's burden, not the Defendants to demonstrate that no prejudice resulted. Lavigne v. State, 349 So.2d 178 (Fla. 1st DCA 1977). The State has failed to carry its burden to show that no prejudice has resulted and cannot do so where there is a finding by the trial court that if Petitioner was entitled to the reports then he was prejudiced in his preparation for trial. The harmless error test should be the most stringent in the law and should

require the Court to find beyond a reasonable doubt that the error had no effect. This should place an extremely high burden on the State to show the error was harmless; DiGuilio v. State, 491 So.2d 1129, 1139 (Fla. 1986).

Pursuant to this Court's authority in DiGuilio, supra, and their analysis and rationale contained therein, this Court should hold as a matter of law that there cannot be "harmless error" in a case where the conviction is based soley on circumstantial evidence.

Finally, counsel wishes to note that in the context of determining whether the error was harmless it should be noted that no one has ever disagreed that this was an extremely close case. The State's evidence at trial as to Downing was entirely circumstantial. The trial court, in ruling on the Motion for Judgment of Acquittal at the close of all the evidence, noted on the record that clearly "mere presence" was at issue. Based on the issues, points and authorities raised in the remaining portions of this Brief; there were other errors committed in the trial. The prosecutor repeatedly took advantage of those errors in closing argument. In a case like this where the State has consciously and deliberately withheld reports and statements that have long been established as discoverable under Rule 3.220, then the only remedy should be a reversal for a new trial.

II.

THE EVIDENCE AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER RICHARD A. DOWNING CONSPIRED WITH MARTHA B. MUNROE

At trial this case was submitted to the jury on a single charge of conspiracy to traffic in cocaine. DOWNING'S Motion for Judgment of Acquittal at the close of the State's case (R-1660-1694); at the conclusion of the case (R-1969-1979) and post-trial (R-385-387) were denied by the trial court (R-1397, 1171-1207).

The District Court's decision below adopted the conclusions and rationale of the Munroe panel desicion. The Munroe Court elected to review the sufficiency of the evidence because Petitioner in this case DOWNING, had filed a post-trial Motion challenging the sufficiency of the evidence. The Munroe panel though went on to determine the sufficency of the evidence as to Petitioner herein, DOWNING. The DOWNING Court then expressly adopted that conclusion and rationale. The Munroe Court held that although the evidence was entirely circumstantial it was adequate to support the conviction for conspiracy to traffic in cocaine.

In order to establish criminal conspiracy to traffic in cocaine, the State was required to prove beyond and to the exclusion of every reasonable doubt that DOWNING intended that the offense of possession of more than 400 grams of cocaine would be committed and in order to carry out that intent DOWNING

agreed, conspired, combined and confederated with Munroe to cause possession of more than 400 grams of cocaine (R-1490). Saylor v. State, 491 So.2d 340 (Fla. 3d DCA 1986); Ashenhoff v. State, 391 So.2d 289 (Fla. 3d DCA 1980); Gonzalez v. State, 455 So.2d 1131 (Fla. 2d DCA 1984).

There was no evidence at trial as to an agreement between DOWNING and Munroe. The State's evidence as to DOWNING was entirely circumstantial. When circumstantial evidence is used to establish one or more elements of a crime, no matter how strongly the evidence suggests guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972, 976 (Fla. 1977).

Conspiracy is a separate and distinct crime from the object of the conspiracy, and it is incumbent upon the State to offer some proof other than commission of, or the attempt of a substantive offense. Conspiracy may not be inferred from aiding and abetting alone. Ashenhoff v. State, 391 So.2d 289, 291 (Fla. 3d DCA 1980); Beke v. State, 423 So.2d 417, 419 (Fla. 2d DCA 1982); Gonzalez v. State, 455 So.2d 1131 (Fla. 2d DCA) 1984; Ramirez v. State, 371 So.2d 1063, 1065 (Fla. 3d DCA 1979), cert. denied 383 So.2d 1201 (Fla. 1980); Saylor v. State, 491 So.2d 340 (Fla. 3d DCA 1986); Velunza v. State, 12 F.L.W. 788, 789 (Fla. 3d DCA 1987).

It is necessary to review the facts and record in this case to determine whether the evidence at trial was susceptible to only one inference, and that inference was inconsistent with the Defendant's hypothesis of innocence. The version of the events relied upon by the defense must be believed if the circumstances do not show that version to be false. McArthur v. State, supra at 976; Fowler v. State 492 So.2d 1344 (Fla. 1st DCA 1986), review denied, 503 So.2d 328 (Fla. 1987).

The State here presented evidence that Munroe intended to possess more than 400 grams of cocaine. However, the evidence presented by the State relating to DOWNING'S involvement was circumstantial, inconclusive and failed to exclude a reasonable hypothesis of innocence. DOWNING and Munroe were "family" and related by marriage (R-1147). DOWNING advised Munroe he was going to come to Florida on vacation and Munroe confided in him. When DOWNING arrived in Tallahasse, on March 30, 1985, he checked into the Hilton Hotel and checked out on March 31. (See Composit Exhibit 15, airplane ticket and Hilton receipt for March 30, 1985). DOWNING then traveled to Panama City Beach to go to the beach with Munroe. DOWNING and Munroe stayed at Panama City Beach and returned to Tallahassee on April 2, 1985. DOWNING checked into the Red Roof Inn on the afternoon of April 2, 1985. (See Exhibit 12 Red Roof Inn Registration) (R-1646-1649, R-1838-1840, undisputed testimony).

DOWNING attempted to convince Munroe not to go any further with a cocaine transaction (R-1854, 1904-1905). Munroe

never mentioned DOWNING being involved in cocaine in her discussions with the FDLE Agents. She never advised Evans that DOWNING had an interest in the transaction and most importantly, when Evans, DOWNING and Munroe were together in the Red Roof Inn hotel room, there was never any discussion concerning a cocaine transaction (R-938-939, 969-970). DOWNING only expressed interest in discussing turkey hunting with Evans and on one occasion when DOWNING, Munroe and Evans were at the Red Roof Inn DOWNING left Munroe and Evans and went to get something to eat (R-937-942, 969-970, 836-837).

The bottle of Clorox that was seized from Munroe's car was allegedly to be used to test the cocaine. The bottle of Clorox and the bag it was in were tested for fingerprints and DOWNING'S fingerprints were not on the bottle or bag (R-1644). Munroe testified that the tester was the person at Shoney's waiting for her phone call. Munroe had met Evans at Shoney's on the morning of April 3 (R-1757-1759, 1720, 1907). Munroe also advised the Agents immediately after her arrest that DOWNING was not involved and that she was to make a phone call to the person at Shoney's to test or check the cocaine (R-1720). While meeting with the Agents and Evans to view the cocaine, Munroe noted to the Agents that she had to use the telephone (See transcript of tape).

Agent McKeehan obtained a search warrant for DOWNING'S hotel room and suitcase. Based on his knowledge of the facts of the case, he expected to find writings and notes relating to drug

transactions in the hotel room and in the suitcase but found nothing (R-1657-1658).

There was no testimony to show that DOWNING'S fingerprints appeared anywhere on the money.

The State also subpoenaed Munroe's phone records and the phone records from the Denver, Colorado number that Evans called Munroe at when he went to Denver. DOWNING'S toll records were also obtained. However, the State elected not to utilize them into evidence (R-19, 129-131).

DOWNING was merely present, possessed false identification and on the morning of April 3, 1985, held the money that Munroe had obtained the night before and he later displayed it to Mr. Evans. That action was probably sufficient to establish aiding and abetting an attempt to traffic in cocaine but is not sufficient evidence of a "conspiracy" and the case should never have been submitted to the jury. Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979); Saylor v. State, 491 So.2d 340 (Fla. 3d DCA 1986); Ashenhoff v. State, supra; Gonzalez v. State, supra; Velunza, supra.

There was absolutely no proof at trial as to an agreement between Martha Munroe and RICHARD DOWNING. The conviction for conspiracy without proof of an agreement is analogous to lemonade without lemons. Just as sugar and water may taste sweet, the State's evidence in this case that DOWNING was present may have been "sweet" but it is insufficient proof of an agreement.

At trial and on appeal, the State has repeatedly argued that the jury was entitled to infer or free to infer that there had been a conspiracy and that the State's case was proven by inferences (See State Brief on Appeal). That argument ignores a long line of cases that hold that circumstantial evidence is insufficient to establish a prima facie case where pyramiding of inferrences is necessary in order to arrive at a conclusion of guilt. Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986); Collins v. State, 438 So.2d 1036, 1038 (Fla. 2d DCA 1983). See generally: Goldberg v. State, 351 So.2d 234 (Fla. 1977).

The State's position is that the jury was free to infer that (1), Munroe was a cocaine broker, (2) DOWNING must have been her customer, and (3) even if he was not her customer, his mere presence at the Red Roof Inn where Munroe met Evans must mean that the Defendants planned, discussed, combined or confederated, and that DOWNING intended for the crime of trafficing in cocaine to be completed.

> "Where two or more inferrences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramiding to prove the offense charged, the evidence lacks the conclusive nature to support a conviction."

Collins v. State, 438 So.2d 1036, 1038 (Fla. 2d DCA 1983).

In Goldberg v. State, 351 So.2d 332 (Fla. 1977), this Court noted the dangers inherent in conspiracy charges.

> "The shotgun approach of a conspiracy charge could amount to

> a prosecution for general criminality resulting in a finding of guilt by association. The court should, at all times, guard against this possiblity so that the Constitutional rights of an individual are not curved or clouded by the web of circumstances involved in a conspiracy charge.
>
> * * *
>
> More than 50 years ago, the conference of senior circuit judges, ..., condemned the prevalent use of conspiracy charges brought for the purpose--or at least with the effect--of bring in much improper evidence, and emphasised that the rules of evidence in conspiracy cases make them the most difficult to try without prejudice to an innocent defendant.
>
> * * *
>
> Although the conspiracy doctrine has been referred to as the darling of the modern prosecutors nursery, it is the duty and responsibility of the judiciary to eliminate, or at least to minimize the dangers of abuse.

Goldberg, supra at 333-334.

This case graphically illustrates this Court's concern as noted in Goldberg on conspiracy charges. DOWNING was convicted on the strength of the evidence against Munroe. Over objection, the State was permitted to argue to the jury that if you convict one you must convict the other (R-1389). Evidence that only applied to Munroe, and irrelevant evidence was used by the prosecutor to attempt to paint DOWNING has a "fast mover" (R-1590, 1385-1407). The proof at trial as to a co-conspiratoral agreement was non-existent. There was a reasonable hypothesis of

innocence and the case should never have been submitted to the jury. The First District did not discuss any of the numerous conspiracy cases cited by counsel. The result reached by the Court directly conflicts with the result of Saylor v. State, which is directly on point. It also directly conflicts with Ashenhoff, supra; Ramirez, supra; Velunza, supra; Gonzalez, supra; and this Court's decision in McArthur, supra.

The record in this case does not contain any evidence, circumstantial or direct, that was legally sufficient to establish the crime of conspiracy. Neither knowledge nor mere presence are sufficient. Horton v. State, 442 So.2d 1064 (Fla. 1st DCA 1983); Ashenhoff v. State, supra; Saylor v. State, supra. Participation in counting money is not sufficient. Di Sangro v. State, 422 So.2d 14 (Fla. 4th DCA 1982), cert. denied 434 So.2d 887 (Fla. 1983); See also Velunza v. State, 12 F.L.W. 788, 789 (Fla. 3d DCA 1987); Cockett v. State, 12 F.L.W. 1402 (Fla. 4th DCA 1987); Voto v. State, 12 F.L.W. 1708, 1709 (Fla. 4th DCA 1987). Saylor v. State, supra.

Petitioner requests this Court to reverse on this issue and remand with directions to discharge DOWNING.

III.

TRIAL COURT'S FAILURE TO GIVE THE COMPLETE INSTRUCTION ON TRAFFICING IN COCAINE AND THE FAILURE TO GIVE ANY INSTRUCTIONS ON NECESSARY LESSER INCLUDED OFFENSES CONSTITUTES PER SE REVERSIBLE ERROR

The trial court was specifically requested to give the complete instruction on conspiracy to traffic in cocaine in violation of Section 893.135(b)(1)(2), Florida Statutes. The State charged this offense as conspiracy to traffic by possession alone. Petitioner DOWNING requested the trial court to give the conspiracy to traffic in cocaine complete instruction. That is, if you review the standard jury instructions in criminal cases under trafficing in cocaine, the note requires the trial court to give the various graduations of the Trafficing Statute up to the offense charged. There are three graduations--more than 28 grams but less than 200 grams, 200 to 400 grams and then over 400 grams. Therefore, the trial court should have instructed on all of the graduations but the Court refused to do so. The trial court also refused to give the instruction on conspiracy to possess as a schedule 1 lesser included offense (R-1067-1077).

At the time of the offense and trial, possession was a schedule 1 or a necessary lesser included offense of trafficing. Therefore, conspiracy to possess would be a necessary lesser included offense of conspiracy to traffic in cocaine. Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986).

The decision of the First District Court of Appeal in Downing adopted the conclusion and rationale of the Munroe panel decision on this identical issue. It is suggested that Judge Ervin's dissenting decision where he dissented on the issue of the failure of the trial court to instruct the jury on the necessary lesser included offense of conspiracy to possess cocaine is a correct statement of the law.

In State v. Wimberly, 498 So.2d 929, 932 (Fla. 1986), this Court held that a trial court has no discretion in whether to instruct the jury on a necessary lesser included offense.

In the case of In the Matter of the Use by the Trial Courts of the Standard Jury Instructions In Criminal Cases, 431 So.2d 594 (Fla. 1981), this Court held that the category 1 and 2 lesser included offenses effective July 1, 1981 were an authoritative compilation in which trial judges should be able to rely on. Under that schedule, possession of cocaine is a category 1 necessary lesser included offense of trafficing in cocaine. See also: DiPaola v. State, 461 So.2d 284 (Fla. 4th DCA 1985).

In Butler v. State, 497 So.2d 1327 (Fla. 4th DCA 1986), the Court held that possession of cocaine was a category 1 necessary lesser included offense to trafficing in cocaine. The Fourth District later held in Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986) that the Court must instruct on the lesser included offense of conspiracy to possess cocaine as a lesser included offense of conspiracy to traffic in cocaine.

In Robinson v. State, 12 F.L.W. 1391 (Fla. 4th DCA 1987) and Reeve v. State, 12 F.L.W. 1391 (Fla. 4th DCA 1987), the Court reversed convictions for conspiracy to traffic in cannabis due to the failure of the Court to instruct on conspiracy to possess as required by the precedent in Weller v. State, supra.

In Daophin v. State, 12 F.L.W. 1877 (Fla. 4th DCA 1987), the Court held that the trial court committed reversible error in refusing to instruct the jury on simple possession of cocaine where the defendant was charged by trafficing in an amount greater than 400 grams of cocaine.

It is submitted that the Downing decision which adopts the conclusions and rationale of the Munroe decision directly conflicts with all of the above-cited cases. This Court has jurisdiction to reach this issue. Savoir v. State, 422 So.2d 308, 312 (Fla. 1982).

Judge Ervin in his dissent (Munroe v. State, dissenting opinion) went to great pains to distinguish Rotenberry v. State, 468 So.2d 971 (Fla. 1985). Judge Ervin noted that the majority's reasoning in Munore was supported by Rotenberry but that it conflicts with Wimberly and various other cases. Apparently though, Judge Ervin, and more importantly the marjority were not aware that this Court has expressly receded from the holding of Rotenberry in Carawan v. State, 12 ~~F.L.W. 445~~, 449 (Fla. 1987). There this Court stated: 515 So.2d 161

> "Likewise, we must recede in part from our holding in Rotenberry v. State, 468 So.2d 971 (Fla. 1985). There, the accused was convicted of three separate offenses--trafficing in, sale of, and possession of, cocaine. While we agree that sale of drugs can constitute a separate crime from possession, our analysis in this opinion compels us to conclude that a defendant cannot simultaneously be convicted of both sale and possession in addition to trafficing.

It is suggested that in light of this Court's decision in Carawan, there is no question but that Judge Ervin was imminently correct in his dissent. The failure of the trial court to instruct on the necessary lesser included offense of conspiracy to possess cocaine was reversible error.

Recently in Carvalho v. State, 513 So.2d 1321 ~~12 F.L.W.~~ 2338 (Fla. 3d DCA 1987), the Court held that even where a defendant stipulates that he possessed over 400 grams of cocaine at trial, the failure to instruct the jury on possession of cocaine as a category 1 necessary lesser included offense of trafficing in cocaine is reversible error.

Finally, under the facts of this case, it is clear the State charged trafficing by possession alone. Under the facts of this case and by virtue of the approved schedule of lesser included offenses, conspiracy to possess cocaine is a schedule 1 and a necessary lesser included offense which must be instructed

upon if requested by the defendant. State v. Wimberly, supra; State v. Weller, supra; Munroe v. State, supra (Ervin dissenting opinion). Carvalho, supra; Doaphin, supra.

Likewise, the trial court does not have the discretion to refuse to instruct the jury on the full extent of the trafficing charge as set out in the standard jury instructions in criminal cases. The trial court here, as noted, only gave the instruction on more than 400 grams of cocaine and refused DOWNING'S specific request that the jury be instructed on all three graduations as mandated by the standard jury instructions.

It is obvious from the decisions cited and Judge Ervin's dissenting opinion in State v. Munroe, that there is a conflict between this case and those cited above, and this Court should resolve this issue and more importantly to Petitioner, reverse and remand for a new trial.

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF ALLEDGED CRIMES NOT CHARGED IN THE INFORMATION

After DOWNING had completed depositions of the State's witnesses, the State filed a Notice of Intent to Rely on Similar Fact Evidence (R-41). DOWNING moved to strike the State's Notice of Intent to Rely on Similar Fact Evidence because the notice was insufficient and did not allege the essential facts, Statutes violated, time, date and place (R-54-56, 455-480). The Motion was denied (R-455-480). Pursuant to Section 90.404(2)(b)(1), the Notice did not provide the particulars required of an Information. Rule 3.140(b), Florida Rules of Criminal Procedure.

The similar fact evidence admitted is summarized as follows: (1) Evans drove Munroe with cocaine to San Francisco, California (R-881-884); (2) Evans took cocaine to Munroe in Denver, Colorado (R-885-888); (3) Evans took cocaine to Munroe in San Francisco, (R-890-891); (4) Evans, Sonny Parnell, Munroe and Downing participated in a conspiracy to traffic in cocaine in Marathon, Florida (R-892, 927-932).

The only evidence as to DOWNING'S alleged involvement in the Denver, episode was that Evans called Munore in Denver, at a phone number and at the time of DOWNING'S arrest that same phone number was written on a piece of paper in his wallet (R-976, 1571).

For similar fact evidence to be admissible, there must be <u>clear and convincing</u> proof of a connection between the Defendant and the collateral acts. Mere suspicion is

insufficient. State v. Norris, 168 So.2d 541, 543 (Fla. 1964); Chapman v. State, 417 So.2d 1028 (Fla. 3d DCA 1982). The record in this case fails to contain any evidence other than the phone number which would connect DOWNING to any of the first three collateral crimes admitted. The trial court made it very clear it permitted all of that testimony as to both Defendants (R-878). This ruling deprived DOWNING of having the jury instructed that the first three collateral crimes episodes were not admissible as to DOWNING. DOWNING moved for a mistrial which was denied (R-898).

The fourth collateral crimes episode involved the Marathon, transaction. At trial, Evans testified there was allegedly a conversation about cocaine in the presence of DOWNING in a motel room (R-894). On deposition, Evans testified there was never a discussion of cocaine in the presence of DOWNING, and that Evans did not know where DOWNING and Munroe stayed (R-927-928, 932). The only thing DOWNING purportedly said was "how long are we gonna have to stay here?" (R-932).

The evidence was only admitted to establish propensity and became a feature of the trial. In closing argument, the State tried to paint the Defendant as a drug dealer (R-1385-1438).

The collateral crimes evidence should have been presumptively inadmissible. Malcomb v. State, 415 So.2d 891 (Fla. 3d DCA 1982); Diaz v. State, 467 So.2d 1061 (Fla. 3d DCA 1985); Wilson v. State, 11 F.L.W. 1487 (Fla. 5th DCA 1986).

The State's notice was insufficient, there was insufficient evidence to connect DOWNING to the "similar fact" evidence, and the evidence was utilized or misused to show propensity. Therefore, the conviction should be reversed.

V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DEPARTURE FROM THE SENTENCING GUILDLINES

The trial court departed from the sentencing guidelines in this case and sentenced DOWNING to 25 years in prison (R-408-410, 311-1330). DOWNING'S guideline score sheet reflects a range of 3 1/2 to 4 1/2 years (R-438-439). DOWNING scored the minimum points possible for the offense.

The Court's reasons for departure (R-408-410) are set out in consecutive numbered paragraphs. Petitioner replies consecutively to the paragraphs as follows:

Reasons 1 and 2. The minimum mandatory 15 years is a valid reason for departure.

Reasons 3 and 4. Defendant possessed $155,000 in cash. Money is not a sufficient basis for departure. Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985); Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985).

Reasons 5 and 6. The amount of drugs. Some cases have held that the amount of drugs is a valid basis for departure. However, in Atwaters v. State, 11 F.L.W. 2187 (Fla. 1st DCA 1986), review pending, the First District noted there is an issue as to an improper departure because of the quantity of drugs in a trafficing case because the quantity is an inherent component of the offense of trafficing and has already been scored into the guidelines. The Atwaters case is pending before

this Court and Petitioner would be entitled to relief if this Court reverses the decision in Atwaters. Moreover, this case is a conspiracy conviction. Conspiracy is one step removed from an attempt to commit an offense and it is thus two steps removed from the commission of a substantive offense. Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979). It would be fundamentally unfair to punish one who is two steps removed from the commission of a substantive offense the same as those guilty of a substantive offense. Therefore, departure in a conspiracy case should be improper if the Defendant did not actually possess the drugs.

Reason 7. The professional manner in the commission of the crime by use of an alias. It is submitted the record does not establish that the State proved beyond a reasonable doubt that a "professional manner" was utilized. In fact, the prosecutor referred to DOWNING as "bumbling drug dealer" (R-1468). Moreover, the use of an alias is insufficient as a matter of law as a basis for departure. Pastor v. State, 11 F.L.W. 2133 (Fla. 4th DCA 1986); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984).

Reason 8. Investigation by law enforcement to determine DOWNING'S true identity. This is not true. There was no evidence to reflect this. The evidence reveales that at first appearance, the morning after Petitioner's arrest, Petitioner advised the Court and all parties of his proper identity (R-1434).

Reasons 9 and 10. Petitioner lied to the probation officer. This cannot constitute a proper basis for departure. Evrard v. State, 502 So.2d 3 (Fla. 4th DCA 1986); Grant v. State, 10 F.L.W. 2084 (Fla. 4th DCA 1986); Denson v. State, 493 So.2d 60 (Fla. 2d DCA 1986); Daniels v. State, 11 F.L.W. 1433 (Fla. 1st DCA 1986).

The First District below affirmed the 25 year sentence by finding that the quantity of drugs was a valid reason for departure and that the "professional" manner in which Petitioner attempted the crime was sufficient, and that it had been demonstrated beyond a reasonable doubt that the trial court would have imposed the same sentence even in the absence of the invalid reason. First, there were more than one invalid reason. Second, it is suggested the only arguably valid reason is the quantity of drugs but that issue depends on the outcome of the Atwaters case pending before this Court.

The "professional" manner of the crime is not supported by the evidence or proved beyond a reasonable doubt. In fact, the professional manner was allegedly the use of an alias and having false identification, etc. All of those are invalid reasons for departure. It doesn't matter if the Court chooses to call use of an alias as "professional manner", it is still invalid.

DOWNING raised the issue of "extent of departure", but the First District did not address that pursuant to State v.

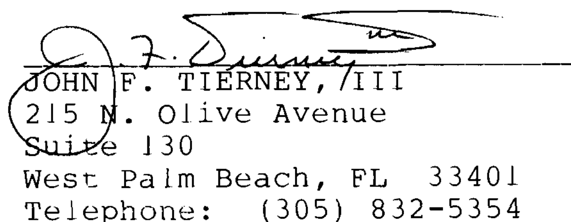
Mischler, 488 So.2d 523 (Fla. 1986) and Albritton v. State, 476 So.2d 158 (Fla. 1985). The Court, at the time of DOWNING'S conviction and sentence, had an obligation to review the extent of departure. Campos v. State, 12 F.L.W. 2715 (Fla. 4th DCA 1987). The extent of departure based on drugs has been limited to an increase of 4 cells. Mullins v. State, 483 So.2d 754 (Fla. 5th DCA 1986); Smith v. State, 480 So.2d 754 (Fla. 5th DCA 1986). In this case, the guidelines reflected 3 1/2 to 4 1/2 years. Therefore, the 25 year sentence exceeded that range by 7 cells. (The Court was required to impose the mandatory 15 year sentence).

DOWNING scored the minimal points possible for the offense (R-438-439). His co-defendant, Martha Munroe received 18 years for the same offense and even though the evidence at trial was overwhelming as to Munroe, the Munroe panel (see Appendix) reversed Munroe's 18 year sentence and yet in this case, DOWNING'S 25 year sentence is affirmed. The purpose of the guidelines was to establish consistency and uniformity in sentencing. The First District Court of Appeal declined to address the issue of extent of departure and the disparity between DOWNING and Munroe. The result in this case is absurd and is contrary to the spirit and the intent of the sentencing guidelines. This Court should reverse and remand with directions to re-sentence Appellant to the minimum mandatory 15 years or in the alternative to the equivalent period of time that the Court sentences Munroe in her re-sentencing hearing.

CONCLUSION

Pursuant to the authorities, principals and reasonings set forth herein, Petitioner requests this Court to reverse the conviction based on insufficiency of the evidence and remand with instructions to discharge Petitioner. In the alternative, Petitioner reqests the Court to reverse and remand for a new trial, and at a minimum reverse and remand the departure sentence for re-sentencing within the guidelines.

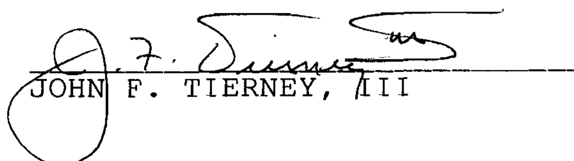
Respectfully submitted,



JOHN F. TIERNEY, III
215 N. Olive Avenue
Suite 130
West Palm Beach, FL 33401
Telephone: (305) 832-5354

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Federal Express ~~U. S. Mail~~ to Royall P. Terry, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, on this 19th day of January, 1988.



JOHN F. TIERNEY, III