IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,735

THE STATE OF FLORIDA

Petitioner,

vs.

CESAREO BREA

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, **THE STATE OF FLORIDA**, was the prosecution in the trial court and the Appellant before the Third District Court of Appeal. The Respondent, **CESAREO BREA**, was the defendant in the trial court and the Appellee in the Third District. The parties, in this brief, will be referred to as they appear before this court.

The symbol "R" will be used, in this brief, to refer to the Record on Appeal as it appeared before the district court and the symbol "T" will identify the transcript of lower-court proceedings in the same manner. The appendix to this brief will be designated by the symbol "App." All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The respondent was charged by Information, together with others, with Trafficking in Cocaine (Count I) and Conspiracy to Traffick in Cocaine (Count II), on August 21, 1985. (R. 1-2A).

During the first trial of this action, which began on April, 1986 (T. 1), the trial court reluctantly granted defendant Perez' Motion for Judgment of Acquittal on the

grounds that his testimony established entrapment as a matter of law, since there was a lack of any evidence that he was predisposed to commit the crime. (T. 538-544). Subsequently, respondent Brea's Motion for Mistrial was granted, in an abundance of caution. (T. 545-557).

The respondent then filed numerous pretrial motions, two of which are concerned in this appeal. A Motion in Limine, filed October 16, 1986, alleged that the acquittal of Mr. Perez meant that he was no longer a co-conspirator and that, therefore, his tape recorded statements would no longer be admissible under the co-conspirator exception to the hearsay rule, but would be inadmissible hearsay. (T. 66-67). Similar allegations were contained in respondent's "Motion to Dismiss Count II of the Information and/or Motion to Strike," filed December 9, 1986. (R. 72-73).

These motions were heard on December 9, 1986 and were granted. (T. 559, 606). The Order Suppressing Admissions of Co-conspirator was entered on December 12, 1986 on the grounds that, since Perez had been found to be entrapped as a matter of law, the co-conspirator exception to the hearsay rule no longer applied. (R. 73-A, 81-82, T. 609-613). The Notice of Appeal was timely filed on December 15, 1986. (R. 83).

Subsequent to the filing of briefs and oral argument, the district court dismissed the action on the grounds that it had no jurisdiction to review it, either on direct appeal or on certiorari. (App. 2-3). The district court reasoned that, although co-conspirator's statements were defined as "admissions" in F.S. 90.803 (18)(e)(1985) and orders suppressing "admissions" are specifically appealable by the State in accordance with Rule 9.140 (c)(1)(B), Fla.R.App.P., that the "admissions" referred to in the rule concerns only statements made by the defendant, himself. (App. 2). The district court further believed that it had no jurisdiction to review on certiorari issues which it could not review on direct appeal, although it certified that question to this court as being one of great public importance. (App. 3).

QUESTIONS PRESENTED

I

WHETHER THE STATE HAS THE RIGHT TO APPEAL AN ORDER SUPPRESSING BEFORE TRIAL ADMISSIONS OF A CO-CONSPIRATOR?

II

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING THE CO-CONSPIRATOR'S ADMISSIONS ON THE GROUNDS THAT HE COULD NOT BE A CO-CONSPIRATOR BECAUSE HE HAD BEEN FOUND TO BE ENTRAPPED AS A MATTER OF LAW?

III

WHETHER THE ORDER SUPPRESSING ADMISSIONS OF THE CO-CONSPIRATOR IN THIS CASE CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW?

SUMMARY OF THE ARGUMENT

I

The State has a right to appeal an order suppressing admissions of a co-conspirator where State statute and other authorities define such statements as "admissions" and where orders suppressing "admissions" are specifically appealable by the State.

Further, a broad interpretation of the rule permitting state appeals is mandated by this court in State v. Palmore, 495 So.2d 1170 (Fla. 1986).

II

The trial court erred in suppressing the co-conspirator's admissions on the grounds that he had previously been found to be entrapped as a matter of law because both the quantity and the nature of proof necessary to establish the required predicate for the admission of such a statement are significantly different than those required for the criminal conviction of the declarant.

Both reasoning and case law support this distinction and the State proferred that it could lay the required predicate, but was precluded from doing so by the trial court.

III

The order suppressing the admissions of a co-conspirator, in this case, constitutes a departure from the essential requirements of law, results in irreparable and highly prejudicial damage to the state's case, and should, therefore, result in certiorari being granted even if the State does not have the right to directly appeal such orders.

ARGUMENT

I

THE STATE HAS THE RIGHT TO APPEAL AN ORDER SUPPRESSING BEFORE TRIAL ADMISSIONS OF A CO-CONSPIRATOR.

First, there is certainly no question that orders suppressing admissions before trial are appealable by the State where Rule 9.140 (c)(1)(B) specifically states that the State may appeal an order:

> (B) Suppressing before trial confessions, admissions or evidence obtained by search and seizure;

This rule specifically refers to what kind of evidence is concerned in orders, the suppression of which is appealable. Therefore, the rules of evidence, which define statements of co-conspirators as "admissions" would appear to require that orders suppressing such statements be appealable. F.S. §90.803 (18(e)(1985).

However, there is even further support for this position in State v. Palmore, 495 So.2d 1170 (Fla. 1986) which mandates a broad interpretation of the rule concerned.

Also, the broader interpretation of the term "admission" is espoused by Black's Law Dictionary, which states:

> ". . . .More accurately regarded, they are statements by a party, or some one identified with him in legal

> interest, of the existence of a fact which is relevant to the cause of his adversary. . . .
>
> Henry Campbell Black, Black's Law Dictionary, Revised Fourth Edition, 68.

Further, the assumption that statutes on the same or similar subject, even broadly, must be read in para materia and should, to the extent that understanding of one may aid in interpretation of another, be read and considered together, also supports applying the statutory definition of "admission" to the rule concerned. See, Goldstein v. Acme Concrete Corporation, 103 So.2d 202 (Fla. 1958).

The attempt by the district court to urge a more restrictive definition based on three out-of-jurisdiction cases provides little support for such a restriction, where the definition was dicta in all three cases. Further, the defendant's convictions were affirmed, based partially on admissions of the defendant, in two of the cited cases and the third case, Lenarchick, held that the defendant's statement was properly admitted, but reversed because the defendant was not permitted to take the witness stand to deny having made it. Geer v. State, 92 Nev. 221, 548 P.2d 946 (1976); State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976); People v. Hobbs, 400 Ill. 143, 79 N.E. 2d 202 (1948). (App. 2).

Also, the convoluted reasoning of the district court is totally unnecessary to distinguish State v. Palmore, 495 So.2d 1170 (Fla. 1986) from McPhadder v. State, 475 So.2d 1215 (Fla. 1985) where McPhadder concerned a statement of an informant, not a conspirator, and, therefore, was not one of the ". . . confessions, admissions or evidence obtained by search and seizure. . . ." covered by the rule by any reasonable definition. Certainly, it did not concern the definition of "admission" which is the focus of the district court's rather convoluted reasoning in this case. (App. 2, n. 1).

That this case concerns a ". . . routine ruling concerning admissibility. . . " (App. 2), is clearly irrelevant where such rulings concerning confessions or evidence obtained by search and seizure are also "routine rulings concerning admissibility" and are, nevertheless, appealable under Rule 9.140(c)(1)(B) Fla.R.App.P.

The fact remains that the legislature has defined co-conspirator's statements as admissions, the Rules of Appellate Procedure permit the State to appeal orders suppressing admissions before trial, and, therefore, the State should be permitted to directly appeal in this case, pursuant to State v. Palmore, 495 So.2d 1170 (Fla. 1986); F.S. §90.803 (18)(e)(1985) and Rule 9.140 (c)(1)(B), Fla.R.App.P.

II

THE TRIAL COURT ERRED IN SUPPRESSING THE CO-CONSPIRATOR'S ADMISSIONS ON THE GROUNDS THAT HE COULD NOT BE A CO-CONSPIRATOR BECAUSE HE HAD BEEN FOUND TO BE ENTRAPPED AS A MATTER OF LAW.

The trial court did err in suppressing the co-conspirator's admissions on the basis that he had been found to be entrapped because the burder of proof for laying the predicate for the admission of the statements is significantly different than the burden necessary to prove criminal conspiracy.

The general rule concerning co-conspirator's statements is that all acts and declarations of members of a conspiracy constitute acts and declarations of, and are therefore admissible against, each member of the conspiracy. Resnick v. State, 287 So.2d 24 (Fla. 1973). The predicate for such admissions is independent evidence of the existence of a conspiracy and of the objecting party's participation in it. Id. at 25. However, the ability of the State to present such a predicate is not an issue in this appeal, where the State proffered that it could present such independent evidence establishing the conspiracy (T. 589), but was never given an opportunity to do so. (T. 589-612).

Federal cases are particularly applicable to the issue concerned herein because there have been many more federal

than Florida cases concerning it and since the federal rule and the first sentence (the substantive portion) of the Florida Rule are virtually identical. Fed.R.Evid. 801 (d)(2)(E); F.S. §90.803 (18)(e)(1985). Thus, it is well-settled that the fact that a co-conspirator remains unindicted has no significance to whether or not his statements are admissible under the co-conspirator exception. United States v. Liefer, 778 F.2d 1236 (7th Cir. 1986); United States v. Plotke, 725 F.2d 1303 (11th Cir. 1984); cert. denied, Holmes v. United States, 105 S.Ct. 151 (1984); United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982); United States v. McManaman, 606 F.2d 919 (10th Cir. 1979).

Similarly, there is no question in either federal or Florida law that the applicability of the co-conspirator exception to the hearsay rule is not dependent on any charge of conspiracy against a defendant. United States v. Robinson, 651 F.2d 1188 (6th Cir. 1981), cert. denied, 454 U.S. 875 (1981); United States v. Cotton, 646 F.2d 430 (10th Cir. 1981); cert. denied, 454 U.S. 861 (1981); United States v. Trowery, 542 F.2d 623 (3d Cir. 1976); cert. denied, 429 U.S. 1104 (1977); United States v. Jones, 540 F.2d 465 (10th Cir. 1976); cert. denied, 429 U.S. 1101 (1977); Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981); rev. denied, 408 So.2d 1096 (1981); Hernandez v. State, 323 So.2d 318 (Fla. 3d DCA 1975).

Closing in on the specific issue concerned herein, the majority of the federal circuits (including the Fifth Circuit at a time when Florida was within its jurisdiction), as pointed out by the prosecutor below (T. 588-589, 598-600, 604) have held that the acquittal of a co-conspirator does not render his statements in furtherance of the conspiracy inadmissible, where independent evidence shows the existence of the conspiracy and that the declarant and the defendant were both members (as proferred by the State). United States v. Robinson, 651 F.2d 1188 (6th Cir. 1981); cert. denied, 454 U.S. 875 (1981); United States v. Beasley, 545 F.2d 403 (5th Cir. 1977); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976); cert. denied, 430 U.S. 983 (1977); United States v. Blackshire, 538 F.2d 569 (4th Cir. 1976); cert. denied, 429 U.S. 840 (1976). This argument, promulgated by the prosecutor below, effectively rebutted the defense allegation that, since co-defendant Perez was acquitted, he was found not to be a co-conspirator and his statements were, therefore, inadmissible. (T. 591). This was a position that the defense admitted was without support in case law. (T. 592).

However, the defense alleged, although without support in the law, two (2) more sophisticated arguments in support of its position. The first was that, since the court had ruled that Perez was entrapped, there was no conspiracy but for the entrapment and statements made by him could not, therefore, have been in furtherance of a nonexistant

conspiracy. (T. 593, 600-601). The State responded that the burden of proof necessary to prove criminal conspiracy is different than that to lay a predicate for the admission of a co-conspirator. (T. 598-600). This issue has been specifically dealt with in United States v. Gil, 604 F.2d 546 (7th Cir. 1979), which states in pertinent portions:

> Defendant-appellant Guillermo Gil was indicted along with his brother-in-law Oscar Villegas, and charged with distribution of heroin. The defendants were tried together in a bench trial, and Gil was found guilty. His codefendant Villegas was found not guilty by reason of entrapment on the part of the Government. The trial judge specifically relied upon several statements made by Villegas to the undercover investigators, implicating Gil, in finding Gil guilty. On appeal, Gil presents a sophisticated logical argument, urging that Villegas's statements were not properly admitted against him. Rule 801 (d)(2)(E) excludes the statements of co-conspirators from the general barrier against the use of hearsay, but the existence of a conspiracy is an obvious necessary precondition before the Rule comes into play. Gil contends that Villegas's entrapment acquittal made the existence of a conspiracy a legal impossibility, and thus the use of the evidentiary rule against him was improper.
>
> * * *
>
> . . . . As the Third Circuit pointed out in United States v. Trowery, 542 F.2d 623 (3d Cir. 1976):
>
> The distinction should be noted between "conspiracy" as a crime and the co-conspirator exception to the hearsay rule. Conspiracy as a crime comprehends more than mere joint

enterprise. It also includes other elements, such as a meeting of the minds, criminal intent and, where required by statute, an overt act. When these elements are established, the crime of conspiracy is proved.

The co-conspirator exception to the hearsay rule, on the other hand, is merely a rule of evidence founded, to some extent, on concepts of agency law. It may be applied in both civil and criminal cases.

Its rationale is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not. Id at 626. . .

* * *

. . . . Furthermore, the differences between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference in burden of proof, mean that neither collateral estoppel nor res judicata automatically bars the use of statements by a person who has been acquitted of the crime of conspiracy. United States v. Cravero, 545 F.2d 406, 419 (5th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), though an acquittal might be relevant and persuasive in the determination of whether the Government has demonstrated the requisite criminal joint venture.

* * *

. . . . Thus, once the existence of a joint venture for an illegal purpose, or for a legal purpose using illegal means, and a statement made in the course of and in furtherance of that venture have been demonstrated by a preponderance of the evidence, it makes no difference whether the

> declarant or any other "partner in crime" could actually be tried, convicted and punished for the crime of conspiracy.
>
> * * *
>
> . . . . The Government succeeded in showing by a clear preponderance of the evidence that Gil and Villegas agreed together to sell narcotics, and therefore Villegas's statements, made during the pendency of and in furtherance of the agreement, are admissible against Gil. The subsequent determination that Villegas could not be punished for his part in the agreement, because of the conduct of the Government in inducing his participation in the crime, does not affect the determination of admissibility. (emphasis added).

Thus, the difference in both the nature and burden of proof between proving a criminal conspiracy and laying a predicate for the admission of a co-conspirator's statement means that finding that a defendant was entrapped does not preclude the admission of his statements under the co-conspirator exception, in direct contradiction to the order of the trial court. (R. 81-82). See, United States v. Trowery, 542 F.2d 623 (3d Cir. 1976); cert. denied, 429 U.S. 1104 (1977).

The second additional argument by the defense, although mixed together with the other allegations, appears to be that the case sub judice is distinguishable from Cravero because, in this case, the Judge granted a Judgment of Acquittal as a matter of law and was, therefore estopped by its own prior ruling from finding that the proper predicate for admission

of the statements could be laid. (T. 592-595, 601-602). This argument would appear to have some validity if the reason for the Judgement of Acquittal had been failure to present a prima, facie case. See, United States v. Davis, 578 F.2d 277 (10th Cir. 1978); United States v. Ratcliffe, 550 F.2d 431 (9th Cir. 1977). However, such an analysis makes no sense where the reason for the Judgment of Acquittal was not the State's failure to make out a prima facie case, but defendant Perez' success in establishing an affirmative defense. It makes even less sense where the affirmative defense which was held to be proven would have been precluded if Perez had denied the acts which constituted the conspiracy. United States v. Newcomb, 488 F.2d 190 (5th Cir. 1974); cert. denied, 417 U.S. 931 (1974).

Further, if the defense were correct in its allegation that a judgment of acquittal precludes the State from even attempting to lay a predicate for the acquitted defendant's statements, then the trial judge becomes not only the final, nonreviewable arbiter of the case against the acquitted defendant (since a state appeal of a judgment of acquittal is precluded on double jeopardy grounds), but, also, the final, nonreviewable arbiter of the admissibility of his statements, as well. Such a situation establishes the trial court as the supreme and nonreviewable authority on the admissibility of co-conspirator's statements, whether its original decision in granting the acquittal was correct or not. It is

respectfully submitted that such a situation is to be avoided, if possible. See State v. White, 470 So.2d 1377 (Fla. 1985).

The trial court clearly erred in suppressing Perez' admissions on the grounds that his acquittal precluded the State from establishing that he was a co-conspirator for purposes of the exception to the hearsay rule.

III

THE ORDER SUPPRESSING ADMISSIONS OF THE CO-CONSPIRATOR IN THIS CASE CONSTITUTES A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW.

The Third District, in this case, certified the following question to be one of great public importance:

> WHETHER THE HOLDINGS IN JONES V. STATE, [477 So.2d 566 (Fla. 1985)]; AND STATE V. C.C., [476 So.2d 144 (Fla. 1985)], PRECLUDE THE STATE FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NON-APPEALABLE INTERLOCUTORY ORDERS IN CRIMINAL CASES?
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> (App. 3)
> See also, State v. Cecil, 508 So.2d 1249 (Fla. 3d DCA 1987); State v. Arriagada, 508 So.2d 1247 (Fla. 3d DCA 1987).

That question was recently answered by this court in the negative, in the case of State v. Pettis, No. 69,097 (Fla. Jan. 21, 1988), in which this court stated:

> The ability of the district courts of appeal to entertain state petitions for certiorari to review pretrial orders in criminal cases is important to the fair administration of criminal justice in this state. Otherwise, there will be some circumstances in which the state is totally deprived of the right of appellate review of orders which effectively negate its ability to prosecute. If a nonfinal order does not involve one of the subjects enumerated in Florida Rule of Appellate Procedure 9.140(c)(1), the State would not be able to correct an erroneous and highly

> prejudicial ruling. Under such circumstances, the State could only proceed to trial with its ability to present the case significantly impaired. Should the defendant be acquitted, the principles of double jeopardy prevent the State from seeking review; thus, the prejudice resulting from the earlier order would be irreparable. The filing of a petition for certiorari is an apt remedy under these circumstances. . . (headnote omitted).
>
> * * *
>
> Our statements in State v. C.C., State v. G.P., and Jones v. State, that no right of review by certiorari exists in criminal cases if no right of appeal exists are limited to orders of final dismissal. These cases shall not be construed to prohibit district courts of appeal from entertaining state petitions for certiorari from pretrial orders in criminal cases. (headnote omitted).
>
> Id. at 5-7.

The Pettis opinion also reiterates that the requirement of certiorari, which is more stringent than that of direct appeal, is the demonstration of a departure from the essential requirements of law. Id. at 6.

It is respectfully submitted that, pursuant to the reasoning under Issue II of this brief, which is readopted, realleged and incorporated by reference as though fully set forth under Issue III, the issue concerned in this appeal is precisely the kind of erroneous and highly prejudicial ruling which significantly impairs the ability of the State to

present its case which concerned this court in the Pettis case.

Therefore, even if this court were to disagree with the State's position that it has a right to appeal the order concerned, certiorari should be granted to reverse the trial court's suppression order.

Certainly, there is no doubt that excluding all tapes which contain conversations with co-conspirator Perez, as was done in this case (R. 66-67, 81-82; T. 587-588, 606) is highly prejudicial to the State, results in irreparable harm to its case, and could clearly result in a miscarriage of justice.

Therefore, even if the State does not have a right to directly appeal an order suppressing the admissions of a co-conspirator, certiorari should be granted on the grounds that the order concerned constitutes a departure from the essential requirements of law, as was previously demonstrated.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petitioner respectfully submits that this court should quash the order of the Third District Court of Appeal dismissing the State's appeal and remand the case with instructions to reverse the trial court's Order Suppressing Admissions of Co-conspirator so that the State may present its proper predicate for admission of the co-conspirator's statements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **JOHN LIPINSKI**, Attorney for Respondent, 15912 S. W. 92nd Avenue, Miami, Florida 33157, on this 5th day of February, 1988.

Charles M. Fahlbusch
CHARLES M. FAHLBUSCH
Assistant Attorney General

ss/