IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. JACKIE ANDERSON, Respondent.	)	CASE NO. 72,051

REPLY BRIEF OF PETITIONER ON THE MERITS

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SUMMARY OF THE ARGUMENT

The filing of a signed and sworn amended information has the legal effect of a nolle prosequi on the original information. The record supports the view that the trial court was cognizant of this rule and was prepared to continue the case in order to allow the state to file a new information and protect Respondent against surprise due to the late filing of the amended information. Because it was to his advantage to proceed to trial on the original information which charged him with burglary as a second-degree felon under §810.02(1)(3), as opposed to the amended information charging burglary as a first-degree felony under §810.02(1)(a), Respondent prompted and agreed to proceed to trial on the original information without giving the state any further chance to perfect the information to charge burglary as a first-degree felony. Respondent should not be allowed to now complain of an error which he promoted, and specifically waived at the trial level. Under the facts of this case, Respondent is barred from advancing the claim of an invalied information on appeal.

ARGUMENT

A SUBSEQUENTLY AMENDED INFORMATION CAN BE REVIVED BY MUTUAL AGREEMENT OF THE STATE, THE DEFENDANT AND THE COURT.

Respondent alleges the State only addressed the issue of invited error, and ignored "the concept of revival of an extinguished information." The State, however, submits that the Fourth District Court's certified only one question, not two. The question is whether the original information was properly revived by the trial court, notwithstanding the filing of the amended information, solely upon the insistence by the defendant, and after the agreement between the prosecutor and the defendant was fully and personally endorsed by the defendant. As can be seen by the defendant's argument, these are not two questions which can be neatly separated. A review of the record makes it abundantly clear that the amended information was filed the day before trial (R 264-265). Faced with the idea of agreeing to a continuance due to the lateness of the filing of the amended information, and proceeding to trial on a less severe charge, the defendant convinced the prosecutor to proceed on the original information so the case could be disposed of quickly, and in return he would waive the refiling of the original information. Defendant, personally, informed the trial court he was waiving the issue for appellate purposes (SR 3-4). Therefore, the invited error and revival of the original information are so intertwined that it cannot be contended that these are two separate

theories under the facts and circumstances of the case at bar.

It is true that the prosecutor could have stood fast and proceeded to trial on the amended information whether the defendant exercised his right to a continuance. However, for whatever reason, the prosecutor buckled under the defense' pressure to abandon the amended information, and agreed to proceed to trial on the original information that very day. The record makes it abundantly clear that the agreement and the options were clearly explained to the defendant. The defendant personally waived his rights, and urged the trial court to reinstate the original amendment (SR 3-4). It is, further, very clear, that due to the defense urging, and only because of the agreement between the prosecutor and the defendant, that the original information was "revived" (SR 4, R 254, 264). Under the facts of this case, the original information was revived by the trial court solely due to the urging of the defendant. Thus, under the invited error theory, and the reviving of the information with the full knowledge and consent of the defendant, the trial court did not lose jurisdiction to try defendant on the second degree burglary charge.[1]

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[1] The United States Court of Appeals, Eleventh Circuit was recently presented with an analogous situation in Ornelas v. U.S., 840 F.2d 890, (11th Cir. 1988). In Ornelas the defendant was convicted on a plea of guilty to an information. Under Fed.R.Crim. P. 7(b), a defendant may not plead guilty to an information charging a felony unless he "waives in open court prosecution by indictment." The defendant subsequently challenged the conviction alleging that when he tendered his plea he did not (Cont'd on next page)

waive in open court his right to be prosecuted by indictment. The Eleventh Circuit noted that during the plea colloquy, the defendant acknowledged that if the court accepted his plea, the trial then in progress would be aborted and he would lose the right to proceed to a verdict at the hands of the jury already empaneled to try his case. In denying relief, the Eleventh Circuit held:

> Considering the circumstances under which the appellant chose to change his plea and what transpired at his rearraignment, we conclude as a matter of law that he waived prosecution by indictment in this case. During his plea negotiations with the prosecutor, the appellant's lawyer apparently indicated that his client refused to plead guilty to any of the charges contained in the existing indictment but would be willing to plead to a less serious charge, e.g., a section 1952 offense. Such a plea could not be entertained, however, unless the appellant waived indictment and pled to an information; the parties were in the midst of trial and the prosecutor simply had no time to re-present the case to the grand jury and acquire a new indictment. Because the appellant wanted to abort his trial and bring his prosecution to an end, his lawyer advised the prosecutor that the appellant would waive indictment and plead to an information. Counsel then agreed that the information would allege a section 1952 offense, and a tentative plea agreement was reached. The appellant promptly accepted the deal and changed his plea. At rearraignment, when the appellant informed the court that he wished to plead to the information, which superseded his pending indictment, he effectively waived reindictment within the meaning of Rule 7(b).
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> [Emphasis added; footnotes omitted.]

Id. 840 F.2d at 892. A copy of the Ornelas opinion is attached as an appendix to this reply brief.

CONCLUSION

WHEREFORE based on the foregoing analysis and the authorities cited, Petitioner respectfully requests this Court answer the certified questions in the AFFIRMATIVE, QUASH the District Court's opinion of February 3, 1988 and AFFIRM the judgment and sentence of the trial court.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished, by courier, to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, Ninth Floor, West Palm Beach, Florida this 4th day of May, 1988.

Georgina Jimenez-Orosa

Of Counsel