IN THE SUPREME COURT OF THE STATE OF FLORIDA

TRAVIS GILLION,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO.74,708

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

All emphasis has been supplied by petitioner unless otherwise noted.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Petitioner was charged by amended information with sale of cocaine (Count I) robbery (Count II) and battery on a police officer (count III). R 376.

Petitioner proceeded to trial by jury. During its course, petitioner moved for a mistrial after the first state witness, Officer Mintus, testified that he drove through the area where the incident occurred and observed unrelated cocaine transactions. R 136. Petitioner argued the testimony was irrelevant and prejudicial. R 136-138. The motion was denied. R 138. Petitioner objected and again moved for a mistrial when Mintus testified he saw an individual who he had observed during his previously mentioned trip through the area walk toward Agent Tenety's vehicle. R 143. Mintus testified that he had seen this person several times before. R 143. Petitioner argued that the testimony gave rise to an inference that petitioner was a known drug dealer since Mintus testified that he recognized several known drug dealers. R 145. The motion was denied. R 146. Petitioner was compelled to move for a mistrial on a third occasion during his cross-examination of Mintus. In response to the question "You never saw anybody, you never saw Travis sell any cocaine", Mintus asked "On that date?" R 158. Petitioner contended that this evidence again suggested petitioner was a known drug dealer. R 159. The motion was denied. R 160.

The jury returned its verdict finding petitioner guilty as

charged as to Counts I and II. R 334-335, 396-397. As to Count III, a verdict of guilty of battery a lesser offense was returned. R 335, 398. Petitioner was adjudicated accordingly. R 402.

Petitioner received concurrent guideline sentences of seven years imprisonment for his convictions on Count I and II. R 333, 403-404. A sentence of time served was imposed in Count III. R 405.

Petitioner filed a written motion for new trial. R 406. Petitioner contended that admission of Mintus' testimony concerning the character of the area and petitioner as drug related was barred by Beneby v. State, 354 So.2d 98 (Fla. 4th DCA 1978). After hearing argument of counsel, the motion was denied. R 360-365.

On November 20, 1987, a timely notice of appeal was filed. R 408. On August 16, 1989, the Fourth District Court of Appeal affirmed petitioner's convictions and sentences and certified the following question as one of great public importance:

> DOES THE MERE IDENTIFICATION OF A LOCATION AS A HIGH-CRIME AREA UNDULY PREJUDICE A DEFENDANT WHO IS ARRESTED THERE?

On September 11, 1989, petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. On September 20, 1989 this Court issued an order setting a briefing schedule for this cause.

STATEMENT OF THE FACTS

Delray Beach police officer Mintus was working undercover along with Palm Beach County Sheriff Deputy Tenety, a rookie. On May 14, 1987, Mintus drove along N.W. 5th Avenue, Delray Beach, scouting the area for narcotics activity. R 136. Mintus testified over objection that due to daylight conditions he was able to easily identify persons standing on the Avenue. R 140.

Mintus returned to headquarters where he met with Tenety. Mintus advised Tenety that a group of known drug dealers were located on that street. R 140. Mintus instructed Tenety in the do's and dont's of drug buys. Mintus told Tenety to remove all jewelry; to remain on the main street to facilitate surveillance and avoid alleyways. R 141.

Thereafter, Mintus and Tenety returned to the area in separate vehicles. Tenety proceeded to the designated location, met with unidentified individuals and circled the block. R 142. When Tenety returned, he pulled off the main street thereby precluding surveillance by Mintus. R 142. Mintus observed petitioner, who he had seen during his initial scouting mission, cross the street and proceed in the direction of Tenety's vehicle. R 143, 146. Mintus testified over objection that he had seen this person on several prior occasions. R 143.

Mintus testified that a short while later, he learned via radio communication that Tenety had been robbed. A physical and clothing description of the perpetrator was broadcast. R 147. Although Mintus was not positive of the suspect's identity based

upon the description, Mintus testified that he thought he had seen someone earlier that evening similarly attired. R 148. Mintus proceeded to Tenety's location where Tenety offered a more detailed description. R 148. Although Mintus was unable to recall the specifics of the description, he testified it included a bandanna with a gold thread through it which was worn around the perpetrator's neck. R 149. This fact caused Mintus to develop petitioner as a suspect since Mintus had seen such an accessory while on his earlier patrol. R 149-150. Tenety held a cocaine rock. R 152.

The two officers returned to the police station where Mintus assembled several photographs to present to Tenety. Included among the group of 18 to 24 pictures was a likeness of petitioner. R 150-151. Tenety identified petitioner as the offender. R 152.

On cross-examination Mintus testified that he did not mention the bandanna at deposition although inquiry was made as to the suspect's clothing description. R 156. Mintus considered it jewelry not clothing. R 165. The photographic array presented to Tenety was not brought to court. R 158. Mintus testified that Tenety did not remove his chain despite instructions to do so because Tenety thought he was too quick. R 161. Tenety made several tactical errors. R 163. Mintus did not see petitioner sell cocaine nor did he observe petitioner in possession of contraband. R 161. There were hundreds of black males in the area. R 162. However, it is not particularly a residential neighborhood. R 163.

Palm Beach County Sheriff deputy Tenety testified that on May 14, 1987 at approximately 7:45 p.m. he was working undercover in an effort to purchase cocaine rocks. R 168-169. Mintus was acting as a surveillance unit as the two were in separate vehicles. R 170. On the corner of First Street and Fifth Avenue was a group of black males. R 171. An unidentified black male signaled to him to stop. R 171. The black male asked Tenety what he needed to which he responded a twenty-cent piece. R 171. The black male told Tenety to drive around the corner and return at which time he would have the merchandise. R 171. Tenety complied and parked near a market leaving his motor running. R 171. The original black male now accompanied by a second black male approached the vehicle. The second black male who Tenety identified as petitioner displayed a cocaine rock which he handed to Tenety. R 172. Tenety held a $20.00 bill. R 172. Tenety did not think the rock was real and confronted the men with his opinion. R 173. The second black male stated "You touch my dope, you got to buy it now." R 174. The first black male reached for the keys to the car and turned the ignition off. Tenety grabbed him as he leaned into the car with one hand and reached for his badge under the seat with the other. R 174. The first black male punched Tenety. Tenety produced his sheriff's identification. R 174. The first black male grabbed Tenety's necklace and ran from the scene with Tenety in pursuit. R 175. Tenety however lost sight of him. R 181. Tenety returned to his car where he issued a broadcast over the radio which included a description of the suspect wearing the

bandanna with the gold braid. R 183. Tenety and Mintus searched the area but to no avail.

During the chaos, the $20.00 bill was "snatched" from Tenety's hand by the first black male. R 175. The incident lasted between 30 and 60 seconds. Tenety held the cocaine rock throughout. R 188. Once at the station, he performed a field test on it. The result was negative for the presence of cocaine. R 190. At the Delray Beach Police Station, Mintus told Tenety he thought he knew the identity of the perpetrator. R 190. Tenety looked through a "picture book" and identified petitioner as the offender. R 191-193.

On cross-examination, Tenety testified that it was possible that he was drinking a beer as he arrived in the area. R 202. The only similarity among the photographs which Tenety reviewed at the station was that they all depicted black males. R 202.

Forensic Chemist Betty Fisch testified as an expert witness that she received the rock at issue. She analyzed it and determined it contained cocaine. R 221. She stated that the field test is only as good as the people who use it. R 219.

SUMMARY OF ARGUMENT

The state elicited testimony that the area where the incident occurred was known for narcotics activity, many drug dealers were in that area, petitioner was seen in that area and a special narcotics agent had prior contacts with petitioner. Petitioner's two motion for mistrial lodged upon admission of these statements were denied. The same special agent then smiled and responded "On that date?" when asked if he had ever seen petitioner sell cocaine. After this remark, petitioner's third motion for mistrial was denied. The trial court's rulings constitute error for the testimony was irrelevant. The infamous nature of the area was not probative of any material issue. Further the testimony related to uncharged crimes of third parties having no connection to petitioner. Prejudice arise from its admission since the jury is free to classify petitioner as a member of this illicit group engaged in illegal activity and consider this association in arriving at its verdict. Thus, the jury may consider irrelevant evidence which diverts their attention from the true issues in the cause. In light of the controverted issue at bar, identity of the perpetrator, the erroneous admission of this evidence may not be excused by resort to the harmless error doctrine.

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE AREA WHERE PETITIONER WAS OBSERVED IS KNOWN FOR STREET LEVEL NARCOTICS TRANSACTIONS AND THAT PETITIONER HAD SEVERAL PRIOR CONTACTS WITH A SPECIAL NARCOTICS AGENT THEREBY SUGGESTING THAT PETITIONER WAS A KNOWN DRUG DEALER.

The state sought to prove petitioner guilty of sale of cocaine, strong arm robbery and battery on a police officer. R 376. The state theorized that petitioner handed a cocaine rock to undercover officer Tenety and snatched his necklace when the officer challenged the quality of the drugs. The defense countered that this was a case of mistaken identity. To buttress its claim that petitioner was in fact the perpetrator along with an unidentified accomplice, the state introduced the testimony of officer Mintus that the area where the incident occurred was known for narcotics activity, many drug dealers were in that area, petitioner was seen in that area and Mintus, a special narcotics agent, had prior contacts with petitioner. In rejecting petitioner's challenge to the erroneous admission of this testimony, the Fourth District Court of Appeal certified the following question to this Court as one of great public importance:

> DOES THE MERE IDENTIFICATION OF A LOCATION AS A HIGH-CRIME AREA UNDULY PREJUDICE A DEFENDANT WHO IS ARRESTED THERE?

Petitioner submits that the appropriate answer is a qualified yes. The significant focus of this cause is really whether such evidence as well as the additional contested testimony is relevant to the issue of petitioner's guilt or innocence. Petitioner submits it

is not. Further, any marginal relevance is far outweighed by the prejudicial impact of such testimony on the trier of fact.

All relevant evidence is admissible unless excluded by law. §90.402, Fla.Stat. To be relevant, evidence must prove or tend to prove a fact in issue. Stano v. State, 473 So.2d 1282 (Fla.) cert. denied, 474 U.S. 1093, 106 S.Ct. 879 (1985); §90.401, Fla.Stat. Where however the prejudicial effect of such evidence overshadows any probative value relevant evidence must be excluded. §90.403, Fla.Stat. Likewise, evidence which suggests an accused's criminal propensity but which does not tend to prove a fact at issue is inadmissible. Williams v. State, 110 So.2d 654 (Fla.) cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); §90.404, Fla.Stat.

It has long been held that while reference to a location may be relevant to a material issue, the nature of that location is not necessarily also relevant. Young v. State, 141 Fla. 529, 195 So. 569 (Fla. 1939). In Young, this Court found that the defendant's street address was admissible in her trial for causing death by culpable negligence. It was, however, error for the prosecutor to argue that the street was situated in a "red light" district so as to infer that defendant was a whore. The testimony was irrelevant and constituted an improper attack upon the defendant's character which had not been placed at issue. The defendant's character was impugned through association with a particular area without showing the defendant's connection to that area other than that of mere residence. Admission of such evidence violates the rule excluding

testimony which is "res inter alios acta"[1]. Roach v. State, 108 Fla. 222, 146 So. 240 (1933). As this Court recognized long ago in Watkins v. State, 121 Fla. 58, 163 So. 292, 293 (1935):

> The rule "res inter alios acta" forbids the introduction against an accused of evidence of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue. (citation omitted).
>
> In civil as well as in criminal cases, facts which on principles of sound logic tend to sustain or impeach a pertinent hypothesis of an issue are to be deemed relevant and admitted in evidence, unless proscribed by some positive prohibition of law. But this rule is always subject to the well-recognized exception that proof of collateral facts "res inter alios acta" are never to be admitted,especially in a criminal case where the facts laid before the jury to convict an accused person should consist exclusively of the transaction which forms the subject of the indictment and matters relating thereto, and which alone the defendant can be expected to come prepared to answer. (citation omitted).

A body of case law developed predicated upon this logical analysis which found error in the admission of the nature of a locale of dubious character where it was not of relevant to a material issue. Beneby v. State, 354 So.2d 98 (Fla. 4th DCA) cert.denied, 356 So.2d 1220 (Fla. 1978) (error to admit testimony that several narcotics arrests made at location of defendant's arrest for possession of heroin); Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982) (error to admit testimony in defendant's trial for sale and possession of

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[1] "A thing done between others or between third parties or strangers (citation omitted)" Black's Law Dictionary, 3d Edition (1933).

marijuana of prior unrelated sale of narcotics at same location as that involved in defendant's cause); Periu v. State, 490 So.2d 1327 (Fla. 3d DCA 1986) (in defendant's trial for grand theft of a motor vehicle, error to admit testimony that other stolen vehicles recovered at defendant's body shop); See also Eberhardt v. State, 14 F.L.W. 2272 (Fla. 1st DCA Sept. 26, 1989) (in defendant's trial for burglary, error to admit testimony that the same business was burglarized the night before the event in question); Blanco v. State, 452 So.2d 520 (Fla. 1984) cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985) (in homicide prosecution, no error to exclude defense evidence that two (2) weeks earlier, an armed robbery occurred at a residence situated behind the home where the murder occurred upon a speculative defense theory that someone else may have done the crime)[2].

Absent a showing of some connection between the defendant, the infamous location of his arrest and the crime of which he is accused, prejudice results from the erroneous admission of testimony describing the nature of the area because the jury is

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[2] Error which arises from the admission of testimony of the reputation of a place as evidence of a defendant's guilt because he committed a crime at that location has been recognized in other jurisdictions. See State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (N.C. 1965) wherein the court wrote:

> North Carolina is included among those jurisdictions which hold "that evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor law violations involving a charge of unlawful sale or possession of intoxicants at particular premises."
>
> 144 S.E. 2d at 46.

lead to consider an improper "construction of inference upon inferences". State v. Norris, 168 So.2d 541, 543 (Fla. 1964). The trier of fact is free to speculate that because a person is located on a street notorious for its narcotics sales, the accused too must be engaged in such illicit activity. The trier of fact may find the accused guilty not because of his conduct but by association with an area recognized for such activity. The tendency of the fact finder to convict based upon a defendant's presence at the scene of a crime absent more is evinced by convictions which are later reversed due to such legally insufficient evidence. M.F. v. State, 14 F.L.W. 2257 (Fla. 3d DCA Sept. 26, 1989)[3]. Thus, the Fifth Circuit Court of Appeal has repeatedly condemned efforts to suggest guilt by association for it encourages reliance upon improper innuendo rather than focus upon the defendant's guilt for the crime charged. U.S. v. Ochoa, 609 F.2d 198, 204-206 (5th Cir. 1980) (error to cross-examine defendant on bad conduct of family and friends); U.S. v. Forrest, 620 F.2d 446, 451 (5th Cir. 1980) (proof of defendant's guilt through association with kingpin husband); U.S. v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. 1981) cert. denied 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 518 (1982) ("What is relevant is the long established rule that a defendant's guilt may not be proven by showing he associates with unsavory characters"). The prejudice which arises from the reference to

[3] Even the Supreme Court of the United States has paused to note that mere presence at the scene of a crime is insufficient proof to support a conviction. U.S. v. Williams, 341 U.S. 58, 64 n.4 71 S.Ct. 595, 599 n.4 (1951).

evidence of guilt through association is so severe that it may not be cured by instruction. U.S. v. Romo, 669 F.2d 285, 289-290 (5th Cir. 1982). See also Finklea v. State, 471 So.2d 596 (Fla. 1st DCA 1985) (where state introduces evidence of unrelated criminal activity failure to request curative instruction does not bar appellate review for the wrongfully admitted evidence is too prejudicial for the jury to disregard).

At bar, contrary to the limited description of the contested evidence portrayed by the certified question, the state elicited testimony from which the trier of fact was free to infer that petitioner was a known drug dealer who frequented an area notorious for narcotics activity. The first witness, agent Mintus, testified that he was part of the Palm Beach County Sheriff Department multi-agent narcotics unit. R 135. On May 14, 1987, he and officer Tenety were working the first block of N.W. 5th Avenue for the purpose of engaging in narcotics transactions. R 135-136. On direct examination, the following occurred:

> PROSECUTOR: On that evening, what did you observe in that area?
>
> MINTUS: Well, I drove through the area and I observed several individuals. I observed cocaine, street cocaine transactions take place.
>
> MR. RICHSTONE (defense counsel): Objection, I would like to make a motion for the Court now.

R 136. Petitioner's objection and motion for mistrial on the basis that the nature of the area as a site for narcotics activity was irrelevant to the controverted issues and admission of the testimony prejudiced appellant was overruled and denied. R 137-

138. Soon thereafter Mintus testified:

> As I drove down Northwest 5th Avenue, I knew individuals known to me as what we call street narcotic dealers out in the area and in turn, I drove back to a prearranged location meeting with Agent Tenety and advised him that this would be a good location and good time for him to go and make an undercover purchase.

R 139. Although there was no objection to this testimony, it followed closely after petitioner's motion for mistrial. Over objection Mintus next stated "It was still daylight. It was very easy to identify individuals..." R 140. Mintus described how he returned to his Station, met with Tenety, and instructed him on undercover narcotics purchases. R 142-143. Mintus next described Tenety's activities. Mintus' testimony proceeded as follows:

> MINTUS: From that location at that time it was approximately a hundred feet. But I observed an individual cross the street, go over to the exact same location where Agent Tenety was. And I, even though I could not see that individual approach Agent Tenety's car, I had observed that individual when I first made my round, when I went to surveil the area prior to sending Agent Tenety there.
>
> PROSECUTOR: Have you seen that individual before that day?
>
> MINTUS: Several times.
>
> PROSECUTOR: Okay. So you would recognize that individual?
>
> MINTUS: Most definitely.
>
> MR. RICHSTONE (defense counsel): Objection at this time, like to approach the bench.

R 143. Petitioner lodged his second motion for mistrial. Petitioner argued that the testimony suggested that petitioner was a known drug dealer since he was seen in an area where narcotics transactions predominated. Petitioner's motion was denied. R 143-

146. Mintus identified petitioner as the individual who crossed the street heading in the direction Tenety's vehicle had taken. R 146. Mintus, however, did not witness any incident involving Tenety and petitioner. Nonetheless, after discussing the identity of the perpetrator of this incident, the following transpired on cross-examination:

> DEFENSE COUNSEL: You never saw anybody, you never saw Travis sell any cocaine?
>
> MINTUS: On that date?
>
> MS. BURK (prosecutor): Objection.
>
> THE COURT: Okay, let me have you go back in the jury room, please.

R 158. Once again, petitioner moved for mistrial noting that after the question was propounded the witness smiled at defense counsel prior to making his response. R 159. Petitioner maintained that had his question specified the particular day and time it would have highlighted the inference already before the jury, that petitioner was a known narcotics dealer. R 160. The motion was denied. R 160.

Through this testimony, the state placed evidence before the jury that the area where the incident occurred was notorious for narcotics activity. R 136. This is contrary to the well established rule of Young for the nature of the area was of no probative value in resolving any material issue. The prosecutor could easily eliminate reference to this prejudicial surplusage by identifying the location of the incident by reference to the block and street (i.e. 100 block of N.W. 5th Avenue). Further, the proof

showed that many drug dealers were in the area that night R 139; that petitioner was seen in the area shortly before the incident R 143, 146; and that Mintus had seen petitioner several times before. R 143. Lacking, however, was any nexus between petitioner and the collateral crimes of the uncharged third parties. State v. Norris, 168 So.2d at 543; Hirsch v. State, 279 So.2d 866 (Fla. 1973).

If this was not enough to give rise to the inference that petitioner was guilty of this case through his association with a known drug area and was himself a known narcotics dealer, the telling blow came on cross-examination. The agent could not resist smiling and the response "on that date?" when asked if he had ever seen petitioner sell cocaine. R 158-159. The officer's remark coupled with his smile can fairly be termed snide as the question was posed following discussions concerning the identity of the instant perpetrator. The witness, an experienced law enforcement officer, should have been on notice that the question pertained to this case and no earlier incident since that was the focus of the examination. Such behavior has no place in the court room and should not be sanctioned lest others are led to believe it acceptable. Hippensteel v. State, 525 So.2d 1027 (Fla. 5th DCA 1988). When viewed in context, it should not be held that petitioner invited such a sarcastic response from an experienced witness. Compare Brown v. State, 472 So.2d 475 (Fla. 2d DCA 1985) (although question to unsophisticated lay witness was open ended, defense did not solicit testimony, the content of which was ruled

inadmissible on pretrial motion in limine, so as to bar reversal by reliance upon the invited error doctrine).

As the testimony illustrates, the jury at bar was exposed to more than mere reference to a high crime area, as noted by the instant certified question. Rather, it learned that petitioner was present in an area notorious for street level narcotics transactions. Further, persons known to be engaged in such activity were also present. The state thus established that this particular locale, not all of South Florida, was a high traffic drug area and petitioner's association with it is a circumstance from which to infer his guilt.

Admission of this erroneous evidence which branded petitioner a criminal by virtue of his presence at an infamous local along with infamous others was not harmless error. Where collateral crime evidence is erroneously admitted, its harm is presumed. Straight v. State, 397 So.2d 903, 908 (Fla.) cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). This Court reaffirmed the rationale for this principle in Keen v. State, 504 So.2d 396, 401 (Fla. 1987):

> As we explained over a half a century ago:
>
> > Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty. (Citation omitted).

Harmless error analysis places the burden upon the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135. This Court revisited the focus of harmless error analysis in the context of collateral crime errors in State v. Lee, 531 So.2d 133 (Fla. 1988). Again, this Court approved the DiGuilio test. Even where the evidence is more than ample to support the verdict, an error may be harmful where it is significant to the state's case and may have affected the jury's verdict of guilt.

Sub judice, the single issue for the jury to resolve was identity. The most damaging testimony indicated that the perpetrator wore an unusual bandanna which caught Mintus' attention earlier that evening. R 149. However, Mintus was impeached on this point. During cross-examination, he acknowledged that he did not mention the bandanna at deposition despite questioning about the offender's clothing description. R 156. He explained on redirect that he considered the bandanna jewelry and thus saw no need to comment about it at deposition. R 164-165. This transparent explanation in combination with vigorous cross-examination on other subjects may have discredited the witness' testimony. Nonetheless, the evidence improperly pointed to petitioner as the offender for Mintus had seen him in the area known for narcotics activity and Mintus, an undercover drug agent, knew petitioner from prior contacts. One can hardly expect the jury to disregard these repeated references to drug activity, especially absent appropriate instruction. As noted by the Second

District Court of Appeal in Clark v. State, 337 So.2d 858, 860 (Fla. 2d DCA 1976):

> Understandably, those involved in the trafficking of heroin are held in the highest disrepute by law-abiding members of the community. It is too much to ask a juror to put this out of his mind while he is deliberating over the defendant's guilt of another crime. (citation omitted).

Furthermore, admission is not excused by the state's argument in the court below that other evidence suggested that persons not engaged in drug sales were also in the area. R 145. Plainly, the purpose of adducing the contested evidence at bar was not to suggest that petitioner was a member of the law abiding group. To the contrary, having had several contacts with a special narcotics agent, it is mere rhetoric to question in which group one might infer petitioner belonged. Moreover, by its contention, the state implicitly acknowledged that the opposite inference, that petitioner was classed with the narcotics dealers, was in fact before the jury. Accordingly, one may not exclude the likelihood that the impropriety did not contribute to the verdict. DiGuilio, Keen; Lee. Thus, this Court should quash the decision of the Fourth District Court of Appeal, reverse petitioner's convictions with directions to remand the cause for a new trial.

CONCLUSION

In light of the testimony elicited in the cause sub judice, the long standing rules precluding its admission and consideration of the harmless error analysis as it applies to the instant cause, petitioner requests that this Court answer the certified question in the affirmative and reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Alfonso Saldana, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 16th day of October, 1989.

Of counsel