OA 9-4-90

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

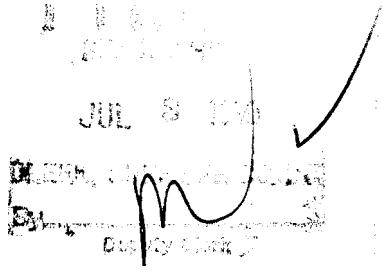
vs.

FREDERICK ALDINE BAIRD, JR.,

Respondent.

CASE NO. 75,161

_____/



ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial Court and Appellee below. The Petitioner shall be referred to as such in this brief. Respondent, Frederick Aldine Baird, Jr., was the Defendant in the trial Court and the Appellant in the First District Court and shall be referred to as Respondent in this brief.

Record on Appeal shall be referred to as (R-page number of record). All emphasis shall be in the original unless otherwise indicated.

STATEMENT OF THE CASE

Petitioner's statement of the case is acceptable to Respondent.

STATEMENT OF THE FACTS

This cause proceeded to trial August 17, 1987 in Escambia County, Florida. A verdict of guilt as to all 3 counts of a Third Amended Information was returned by the jury August 21, 1987. Petitioner incorrectly asserts that the jury in this cause took only one hour and fifty minutes to convict the Respondent on all counts as charged, when in fact the jury deliberated four hours and fifteen minutes before reaching its verdict. (R-1160, 1172).

In September, 1986, the Florida Department of Law Enforcement began an investigation into football betting in Pensacola, Florida. Agent LARRY *SAMS* with FDLE testified that he established an alias and began to frequent a lounge in Pensacola known as Sir Richard's, which was owned by RICHARD MERRIT (hereafter DICKIE). (R-15) SAMS testifiedthat he began to place bets through DICKIE at the lounge, and was eventually given a betting number by DICKIE whereby he placed wagers on football games by calling a designated phone number and speaking to an individual identified as "BOB". (R-146 through 148)

SAMS testified that it was part of his investigation to set up pen registers on several of Respondent's telephones, as well as telephones owned by JOSEPH NUNNERI and the betting line. (R-167) Communication devices were placed upon several of Respondent's telephones from September, 1986 through January, 1987.

SAMS stated that he later met NUNNERI, (R-15) who was identified by ***SAMS*** as the individual that functioned as a collector concerning the football wagers. *SAMS*, after losing money, made arrangements to meet NUNNERI to pay the money he owed and NUNNERI was arrested at that time. (R-161) Upon his arrest NUNNERI was taken to the United States Courthouse in Pensacola, read the racketeering statute, and was told he could receive a 30 year prison term. (R-179) NUNNERI, although initially refusing to make any statement at all, eventually named Respondent as being involved in the football betting. (R-180) The same day that NUNNERI was arrested, Co-defendants DICKIE and DOUGLAS VICKERY were also arrested. DICKIE was later identified as a bookie (R-146), and VICKERY was later identified as "BOB" who answered the phone and took bets.

Through the testimony of numerous witnesses it was established that betting on football games in Pensacola has been a long standing practice. (R-312, 520, 521, 545) It was further established that in **1980** an individual by the name of GRAHAM answered the telephone and keep track of wagers called in by bettors and used the code name "BOB" in pursuing this practice. (R-537, 543) Additionally, it was established that another individual by the name of PUGH had used the name "BOB" when he took bets over a phone line in **1978** or 1979. (R- 544,545) DICKIE testified that he had bet with Respondent in approximately **1980** for probably two seasons. (R-447) He further testified that he had been placing his bets on the

phone with "BOB" for many years, and that "BOB" could have been present before he began to bet with Respondent. (R-448) DICKIE further testified that there had been a series of collectors over the years. (R-449) Finally, DICKIE testified that the bets he held for approximately 20 to 25 individuals had nothing to do with NUNNERI, and that several of the people that bet with DICKIE placed bets with "BOB" through the betting line. (R-451)

CLARK MERRIT (hereafter CLARK) testified that while working for Respondent in one of his businesses he had collected money on football wagers for Respondent in 1980. (R-426) CLARK stated that he received various pieces of information from a person on the phone named "BOB" (R-427) and further testified that he and Respondent ceased bookmaking during the football season in 1980. (R-435)

BRUCE ATHEY testified that he worked as a collector for Respondent in 1981. (R-408) ATHEY also testified that there were several people in 1981 that had similar booking operations. (R-42) DICKIE, CLARK, and ATHEY all testified that Respondent informed them in 1980 or 1981 that he was getting out of the bookmaking business and would no longer be involved. (R-458, 435, and 416 respectively.)

NUNNERI did in fact testify that he worked for Respondent from 1982 through 1986, and that it was his job to collect and pay the players. NUNNERI admitted that he wanted to combine his bettors with Respondent's. (R-317) He further indicated

that Respondent's responsibility was to finance the operation. (R-194 through 196) He stated that he received the total on the wagers from an individual named "BOB", and that he paid and collected on that basis. (R-196) He conceded that prior to the time he began to function as a collector he had been a bookie himself and brought 10 to 12 players of his own with him, and also stated that several other bookies had 15 to 20 players playing with them at the same time. (R-197, 224)

NUNNERI testified as to his substantial involvement with bookmaking in the Pensacola area. He stated he was the person that made arrangements to rent the facility for the telephone, set up the phone line, change the number and location of the betting line, set the points on each game, adjust the line, determine which players would be given the correct line and which would be given the adjusted line, decide the betting limit for each player, set up payment arrangements for players and kept track of the wagers. (R-251, 257, 258, 259, 340, 344, 347) NUNNERI admitted that the frequency of his contact with Respondent became less over the years, (R-238) and that in 1981 Respondent had informed NUNNERI he was going through a divorce and stated at that time that he was getting out of bookmaking.

NUNNERI stated that he and VICKERY were the only ones that knew how much money was being made, and that he was the only person that collected the money. (R-323) He further admitted that he, Respondent, and VICKERY had never met together at anytime, that he had told several people that Respondent was

in no way involved with NUNNERI's bookmaking operation, (R-318, 319) that he had told many people that VICKERY worked for him, that he had been the person to pay VICKERY the last two years, that he had never mentioned Respondent's name while talking with VICKERY on the phone, (R-32) nor did he have any knowledge that Respondent had ever called the betting number although he himself called it numerous times a day. (R-321) Finally, NUNNERI testified that he was to receive 10 percent of all profits, as was VICKERY. He admitted that it makes a difference in his profit and would be to his advantage to allow VICKERY to believe that someone else was involved, and further admitted that he was the only person in possession of any records, which he destroyed each week. (R-324) Petitioner incorrectly asserts that NUNNERI was furnished a list of names of bettors by Respondent which included "BOB", as NUNNERI testified that he was betting with "BOB" prior to his association with Respondent. (R-197) Petitioner further incorrectly asserts that NUNNERI testified that he obtained a special rate in return for new business, and no record citation is made.

Petitioner played some tape recorded conversations between NUNNERI and VICKERY. (R-199, 274) No mention is ever made by NUNNERI or VICKERY of Respondent's name. Several references made by NUNNERI and VICKERY to "the other man" were admitted by NUNNERI to refer to several different individuals and used as a means by which to avoid naming names. Although NUNNERI

identified "the other man" as Respondent, (R-210, 211) "the other man" was used to refer to any number of people. NUNNERI also admitted that he would openly discuss betting on the telephone with other people while using their names. (R-355, 356)

NUNNERI testified concerning Respondent's alleged involvement in bookmaking. NUNNERI admitted that he was concerned when he discovered that Respondent's telephone records had been subpoenaed, although Respondent was himself not at all concerned. (R-337) NUNNERI stated that he and Respondent were business partners in various business establishments in Pensacola, and that he and Respondent had many business reasons for contacting one another. (R-337) NUNNERI stated that Respondent would occasionally call him from out of town concerning some of their businesses, and that there had been numerous telephone calls back and forth between Respondent, Respondent's businesses, Respondent's girlfriend, Respondent's sister, and NUNNERI. (R-358)

NUNNERI testified that Respondent did not understand the implication of a half-point in bookmaking and that he did not have a high opinion of Respondent as a bookie. He conceded that if Respondent was actually involved to the extent NUNNERI indicated, that he should know of such things. (R-378 through 379)

NUNNERI testified that he had admitted at the time of his arrest to FDLE that his football operation was not the biggest

in Pensacola, and that others were bigger because they operated throughout the year. (R-359) He further admitted that he may have told FDLE at the time of his arrest that someone named BOB AXLEY ran the operation, and that all NUNNERI did was collect. NUNNERI testified that several people in Pensacola had been bookmakers and bettors at the time of his arrest, but none of them had been arrested. (R-331 through 332)

He stated that at the time of his arrest he was afraid, and that he was taken to the Federal Courthouse and after being advised of his rights did not make a statement. He was told by the authorities that he would be given five minutes to make up his mind as to whether or not he wished to give any statement. (R-367) He also testified that he asked if he could consult an attorney, and was told that he did not have time. He was further told that if he disclosed some information all charges against him would be dropped but for one, and that he would only face a possible maximum sentence of two and one-half years as opposed to the 30 years that were indicated earlier. He was also told that the State would make a recommendation that he receive no more than one year in jail. (R-368 through 369) He further conceded that he had originally been charged with over twenty charges, and was at the time of his testimony charged with a single count only. (R-364) It was after being given this information that NUNNERI implicated Respondent.

Petitioner correctly asserts that a tape recording between

NUNNERI and Respondent was played wherein a bet was discussed over the phone. Additionally, there was some conversation concerning NUNNERI's and Respondent's restaurant. NUNNERI indicated that the betting conversation referred to a private bet between Respondent and one ALAN LEVIN. (R-385, 386) Petitioner asserts that another tape was then played wherein NUNNERI and the Respondent spoke, but that there was an indication that it was not secure for them to discuss business over the phone. No indication of this is contained in Petitioner's cited reference.

VICKERY testified that he became involved in 1981 when he heard that Respondent needed some help and VICKERY came to Pensacola and asked for the job. (R-612) He stated that he worked for Respondent for the first year, but after the first year Respondent had taken on a partner, NUNNERI. VICKERY stated that he worked for both of them from that time forward. (R-612) VICKERY further testified that he and NUNNERI frequently set the line between them, and they would discuss the day to day operations of the betting line. He testified that NUNNERI was the person that set the limits on the bets, (R-675) and that he took his directions as to where to locate the betting line from NUNNERI. (R-676) NUNNERI gave him his instructions as to how to operate the betting line. (R-677, 679 through 682)

Concerning Respondent's involvement, VICKERY stated that when he had been hired by Respondent in 1981 Respondent would

call him and ask what the figures were. Respondent would call several times a week to check their finances. (R-678) VICKERY testified that when NUNNERI was taken on as a partner VICKERY was told that he would work under NUNNERI and that they were 50/50 and that Respondent was slacking up and was not going to be involved in it much. (R-677 through 678) VICKERY further admitted that the only time Respondent had called him and placed bets himself was the first year, and that Respondent had not called to place a bet at all the last three years. (R-655)

VICKERY testified that it was his understanding that he was to receive 20 percent of the profits. (R-686) He conceded that if NUNNERI had no partner NUNNERI would be getting the bulk of the profit and VICKERY would be receiving 20 percent if VICKERY is believed and 10 percent if NUNNERI is believed. (R-695) VICKERY also admitted that NUNNERI had come to see VICKERY in Alabama after their arrests, and mentioned to him that he had told the authorities that VICKERY was receiving 10 percent, (R-692) and admitted that NUNNERI had probably suggested to him during that visit that VICKERY should testify that he was receiving 10 percent and not 20 percent. (R-693)

VICKERY testified that upon his arrest he called a friend for help and stated that a week or so later he received a phone call and was told to go to an attorney's office in Pensacola, (R-630) which he did, but that he did not receive any money when he went to the attorney's office. (R-632) He further testified that he was disappointed and upset when he did not

receive any money, (R-701) and it was after this visit to the attorney's office for money as well as the visit by NUNNERI in Alabama that VICKERY first gave his statement. (R-703)

He stated that he was told that the charges against him would be reduced and that his possible sentence went from two and one-half to three and one-half years to a recommendation by the State that he receive one year in jail. He indicated, as had NUNNERI, that he had originally been told he could receive thirty years upon his arrest. (R-704)

VICKERY's ex-wife, LORRIE TAYLOR, testified that she assisted VICKERY in 1981 when he first became involved with the betting line. She conceded that she never heard Respondent hire VICKERY for any subsequent years, (R-491 through 492) and that everything she knew after the 1981 season to the date of her testimony was based on information she had received from someone as she was not directly involved. (R-494) TAYLOR witnessed Respondent pay VICKERY for the first year of his involvement only, which was 1981. (R-488)

Petitioner presented testimony of long distance telephone records. Documentation was produced indicating that over a six year period there were 16 long distance telephone calls from Respondent's phone lines to phone lines belonging to NUNNERI; 20 phone calls from NUNNERI's numbers to Respondent's numbers; two phone calls from Respondent's numbers to VICKERY's; and 171 calls from NUNNERI's numbers to VICKERY's numbers. (R-764)

Agent CHARLES GRIFFITH with FDLE testified that he had

received information that Respondent was a major gambler and operating a major gambling operation in the Pensacola area. (R-77) Upon objection and motion for mistrial the trial Court ruled that Respondent had opened the door to this type of hearsay during opening statement when counsel for Respondent indicated to the jury that Respondent had been selected by FDLE for prosecution. (R-78, 79) Throughout the trial Petitioner continued to solicit and present hearsay and opinion testimony concerning Respondent's alleged involvement in bookmaking activities. Testimony was presented from three different witnesses that it was either opinion or they had heard that Respondent was involved. (R-479, 527, 533, 722) Several of the gamblers and bookies who testified stated that they had been assured by the State that they would not be prosecuted in exchange for their testimony at trial against Respondent. (R-420, 436, 445)

No other testimony was presented at trial by Petitioner as to Respondent's alleged involvement in the football gambling operation managed by NUNNERI and VICKERY. Although other witnesses testified that they had bet with Respondent in the past, no other witnesses testified that Respondent was involved in the operation of the betting line.

POINTS ON APPEAL

I

THE DISTRICT COURT CORRECTLY RULED THAT THE TESTIMONY OF A WITNESS WAS INADMISSABLE HEARSAY AND THEREFORE IMPROPERLY ADMITTED. (RESTATED)

II

THE DISTRICT COURT OF APPEAL PROPERLY APPLIED THE HARMLESS ERROR DOCTRINE SET FORTH BY THIS COURT IN DIGUILIO V. STATE, 491 SO.2D 1129 (FLA. 1986) AND CICCARELLI V. STATE, 531 SO.2D 129 (FLA. 1988)(RESTATED).

SUMMARY OF ARGUMENT

Respondent asserts that the First District Court of Appeal properly reversed his conviction and remanded to the trial court for a new trial. The trial court improperly admitted the hearsay statement of a law enforcement officer which was offered for the truth of the matter asserted therein. The officer related to the jury more than the fact that he had received information from an anonymous source, in effect telling the jury that he had heard that Respondent was guilty of the crimes for which he stood accused. The testimony was not offered to lay a framework for the jury concerning a sequence of events that would be necessary to explain to the trier of fact the officer's presence. The First District Court of Appeal properly held that the testimony was clearly hearsay and, not falling within any exception to the hearsay rule, was improperly admitted by the trial court.

Having found the admitted testimony to be impermissible, the District Court correctly ruled that the State had failed to meet its burden of proving that the error was harmless pursuant to State v. Diguilio, 491 So.2d 1129 (Fla. 1986) and State v. Ciccarelli, 531 So.2d 129 (Fla. 1988). Due to the inconsistencies in the testimony presented concerning Respondent's involvement in football gambling in Pensacola as well as a lack of physical evidence against Respondent the

District Court properly ruled that the State had failed to show the error was harmless. The District Court should be affirmed.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY RULED THAT THE TESTIMONY OF A WITNESS WAS INADMISSABLE HEARSAY AND THEREFORE IMPROPERLY ADMITTED. (RESTATED)

In Baird v. State, 553 So.2d 189 (Fla 1st DCA 1989) the First District Court of Appeal found err in the admission of certain hearsay testimony at the trial level, and reversed Respondent's conviction for a new trial. The First District ruled that:

> "The testimony was obviously hearsay and improperly admitted. See Bauer v. State, 528 So.2d 6 (Fla 2nd DCA 1988). The officer could testify to what he did as a result of information received from others; but should not have been permitted to relate the information so received unless it otherwise met some recognized exception to the hearsay rule. See Collins v. State, 65 So.2d 61 (Fla. 1953). We find no basis for its admission in this case."

In Collins, supra, this Court held that an officer testifying in a criminal action may say what he did pursuant to information received from another, but he may not relate the information itself in that such testimony constitutes hearsay evidence. Collins at 67. This Court in Collins could find no support for admitting testimony that the Defendant on trial was said by some anonymous person to have been engaged in the very criminal transaction for which he was being tried. The Officer in Collins was questioned as follows:

> "Did you investigate FRANK COLLINS and ESMA COLLINS, you and the Sheriff's Office?"... and replied, ..."I did"....
>
> ..."Did you have information that FRANK COLLINS and ESMA COLLINS were in this business (lottery) in this County?"....
>
> ..."I did"....
>
> ..."Did you have information that FRANK COLLINS was collecting money in this proceeding and delivering it to some other person?"....
>
> ..."I did"... Collins at 66.

The Collins court noted that at this point in the Officer's testimony the jury was being told, in effect, that an officer of the law had made inquiry and been told by someone or another that the Defendant was guilty. The Court held that the testimony was obviously incompetent, as it was plainly hearsay. Additionally, the Court instructed that another reason for the testimony's incompetency was that the Defendant was deprived of the opportunity to cross-examine the informant who was an accuser "in absentia". The Court noted that the mischief that can result from such a method was emphasized by what later transpired, referring to the fact that the Defendant had then been deprived of the opportunity to discover the identity of the accuser in absentia. Collins at 66. The Court concluded that it found no support for the admission of testimony that the Defendant on trial was said by some anonymous person to have been engaged in the very criminal transaction for which he was being tried.

The Collins court cited Kirby v. State, 32 So.2d 836 (Fla. 1902) wherein the Defendant's conviction was reversed based on the admission of testimony from a State witness to the effect that he went to the scene of a homicide because of a remark made to him by a third party. The Kirby Court indicated that although proper for the witness to state such fact, it was improper for the witness to repeat in evidence the substance of that remark that was the cause of his appearance at the scene, as such is hearsay. Kirby at 836. As in Collins, the damaging testimony in question amounted to an attempt by the witness to indicate to the jury that the Defendant was guilty of the offense for which he stood charged.

This Court's holding in Collins, supra, has never been repudiated, nor has it ever been limited. The rule of law enunciated in Collins is well recognized by Florida Courts, as is evidenced by the words of the Third District Court of Appeal in Postell v. State, 398 So.2d 851, 854,n.5 (Fla. 3rd DCA 1981) wherein the Court stated that "Florida Courts have consistently condemned testimony which recounts the actual statement made by the out-of-court declarant implicating the accused... That condemnation necessarily reaches testimony where the actual statement, although unexpressed, is implicit in the testimony." The Postell Court noted that where the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of

a Defendant's guilt, such testimony is hearsay and the Defendant's right of confrontation is defeated notwithstanding the fact that the actual statements made by the non-testifying witness are not repeated by the officer.

In the case at Bar, the admitted testimony by GRIFFITH was hearsay testimony pursuant to Collins v. State, supra, and Kirby v. State, supra. The testimony presented by Officer GRIFFITH amounted to a statement by an officer of the law to the effect that the Respondent was guilty of the offense charged. The State asked Officer GRIFFITH..."would you explain to the members of the jury whether or not the Defendant was picked on or targeted in this case." Officer GRIFFITH could very easily have answered the question "no". Instead, he responded by stating..."I had received information that he was involved in the major...". At this point counsel for Respondent objected. Said objection being overruled, the witness then informed the jury "I had received information that he was a major gambler and operating a major gambling operation in the Pensacola area..." (R-77) Defense counsel again objected to these remarks, moved for mistrial, and requested that the jury be instructed to disregard the testimony. All of these requests were denied by the trial Court. (R-78, 79).

It is important to note that the testimony of Officer GRIFFITH came at the end of direct examination by the State. The testimony was not offered to explain why the officer

answered a dispatch or was present at the scene of a homicide or some other similar circumstance but was instead asked by the State at the conclusion of its direct examination at the end of the first day of Respondent's trial. (R-79, 80) There is simply no justification for the admission of GRIFFITH's testimony, and the impact of an officer of the law informing the jury that the Respondent is in fact guilty of the offenses charged is immeasurable.

Petitioner asserts that the State presented the testimony not for the truth of the matter contained therein, i.e. that Respondent was a gambler, but to refute a defense assertion that the officer was motivated by greed or vindictiveness and that he had preselected Respondent for prosecution. No assertion was ever made by Respondent that any officer was motivated by greed or vindictiveness. Respondent did assert that he had been singled out for prosecution, and in light of the fact that Respondent was the only person out of a group of 50 or 60 individuals that was prosecuted, other than Co-defendants NUNNERI and VICKERY, both of whom cut deals with the State to testify against Respondent, Respondent's assertion of selected prosecution is undoubtedly true.

Petitioner relies upon Johnson v. State, 456 So.2d 529 (Fla 4th DCA 1984) and Freemen v. State, 494 So.2d 270 (Fla 4th DCA 1986) in support of its position. In both Johnson and Freemen the Fourth District held that testimony as to the contents of a police dispatch to which an officer responded was admissable

to explain why the Officer was at a particular place at a particular time. In Johnson, supra, an officer was allowed to testify as to the contents of a dispatch for the purpose of establishing that the statements were made, but not that they were true. The Court stated that it was a commonsense way to explain why the officers were at the particular place at the particular time, their purpose in being there, and what they did as a result. The Court noted that jurors have the right to expect to hear a logical sequence, which begins at the beginning. In the case at bar, the testimony from GRIFFITH was not solicited for the purpose of providing a logical sequence but came at the end of his testimony and was not propounded for the purpose of clarifying any confusion as to why GRIFFITH was at a particular place or what his purpose was in being there. The testimony was not presented for the purpose of laying groundwork for an essential recitation of facts, but rather went to the guilt of Respondent.

The Johnson court cites United States v. Walling, F.2d 229 (9th Cir. 1973). In Walling, the out-of-court information testified to was admitted because it demonstrated those circumstances which served as a foundation for the witness's own observations and actions immediately prior to and during the detention of a vehicle (emphasis added). The Court clearly held that the witness was not communicating to the jury the substance of that which was reported to him by another, but rather was merely furnishing the basis in fact

for those circumstances which resulted in an investigative lead. Again, that is not the case in the matter presently before this Court.

Petitioner cites Freeman v. State, 494 So.2d 270 (4th DCA 1986) in support of its position. In Freeman, police officers went to investigate a disturbance by an informant who stated that an individual in room number 9 had tried to sell him narcotics. The officers went to room number 9 and there found the Defendant as well as a quantity of cocaine. The Freeman Court held that the testimony only explained why the officers went to the apartment. The Court held that the record supported the State's argument as to the purpose of providing the testimony. Again, the information provided related to the immediate circumstances surrounding the initiation of a criminal investigation, necessitating the explanation for the officer's presence. The information which the officer attempted to convey to the jury in Respondent's case was not the type of information that would typically be associated with an emergency situation.

Recently, the Fourth District revisited Johnson and Freeman, somewhat repudiating the rulings therein and bringing the Fourth District closer in line with this Court's holding in Collins v. State, 65 So.2d 61 (Fla. 1953). In Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989) the Fourth District Court of Appeal found problems with the Freeman rationale:

> "The problem with the Freeman rational is that the jury was permitted to hear

> incriminating evidence against the accused which is hearsay and which was not essential to establish a logical sequence of events... It was not permissible to relate the accusatory remarks of the informant. Such information is inadmissable hearsay. Collins v. State, 65 So.2d 61 (Fla. 1953). While the error in Freeman may have been harmless, as suggested by the special concurrence, we emphasize that it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officers presence at a particular location or some action taken as a result of the hearsay statement. There is a fine line that must be drawn between a statement merely justifying or explaining such presence or activity and one that includes incriminating (and usually unessential) detail. Our reasoning is further supported by the following from McCormick on evidence (3rd Edition 1984):
>
> > '... In criminal cases, an arresting or investigating officer... should be allowed some explanation of his presence and conduct. His testimony that he acted 'upon information received', or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relay historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.'"

Thereafter, the Fourth District reversed and remanded Harris for a new trial specifically because inadmissable hearsay was admitted at the trial Court level. Thus, it would

appear that the holdings in Johnson and Freeman have been rethought by the Fourth District and consequently greatly limited. The Court particularly noted that the testimony in question was not essential to show a logical sequence of events.

Petitioner correctly asserts that merely because a statement is not admissable for one purpose does not mean it is inadmissable for another purpose and that if an extrajudicial utterance is offered not as an assertion to evidence the matter asserted, the hearsay rules do not apply. See Breedlove v. State, 413 So.2d 1 (Fla 1982), Brown v. State, 299 So.2d 37 (Fla. 4th DCA 1974), and State v. Lofton, 418 So.2d 1259 (Fla 4th DCA 1982). In Breedlove, supra, the questioned testimony was admitted to show the effect said testimony would have on the Defendant rather than being admitted for the truth of the comments. Likewise, in Brown, supra, the questioned information was admitted to show the state of mind of the Defendant and the inducement of a confidential informant in a drug prosecution wherein the Defendant raised the defense of entrapment. In Lofton, supra, the objection to testimony was admitted to show the state of mind of the lead officer in a stop and frisk arrest investigation who was no longer available to testify. In all three of these cases, there was a sense of immediacy and urgency surrounding the circumstances. In Breedlove and Lofton the elicited testimony was necessary to show why the

officers acted in the manner in which they did, and the statements were simply not offered for their truth. In Brown, the Defendant was allowed to testify concerning conversations with an unavailable police informant as to the Defendant's state of mind on a defense of entrapment as the statements of the informant were relevant. In the case at bar, there was no urgency or sense of immediacy about the purported information received by GRIFFITH. In fact, he testified that the investigation into football gambling in Pensacola had been intermittently conducted since 1986. (R-61)

In Bauer v. State, 528 So.2d 6 (Fla. 2nd DCA 1988) the Second District Court of Appeal followed this Court's ruling in Collins v. State, supra. The Bauer Court held that a government agent could not testify to information he had received from a confidential informant regarding a Defendant's alleged prior criminal activities. The Court noted that any reasonable interpretation of the agent's testimony lead to the conclusion that it was introduced by the State to prove the truth of words spoken by the confidential informant, i.e., that the Defendant was engaged in illegal activity prior to initiation of the agent's investigation. The Court noted that although the agent could have testified as to what action he took pursuant to information received from a confidential informant, no testimony regarding the content of that information would be allowed because it is clearly hearsay and therefore inadmissable. Bauer at 7.

In the case presently before the Court Petitioner asserts that the testimony was introduced to show why GRIFFITH began his investigation of Respondent and to rebut Respondent's argument that the police had selected Respondent for prosecution. The testimony was not introduced to show why an investigation was begun, nor was it necessary to show a logical sequence of events as mentioned in Harris v. State, supra. To the contrary, the information was elicited in an effort to show that Respondent was involved in criminal activity prior to the initiation of GRIFFITH's investigation and that Respondent was in fact "a major gambler" as stated in GRIFFITH's testimony. The First District correctly followed the Second District's lead as stated in Bauer v. State, 528 So.2d 6 (Fla. 2nd DCA 1988). See also Haynes v. State, 502 So.2d 507 (Fla. 1st DCA 1987) wherein the First District held that the comment of the nontestifying confidential informant presented at trial by a police officer constituted evidence of the Defendant's guilt, and also Davis v. State, 493 So.2d 11 (Fla. 3rd DCA 1986) wherein the Court held that the inescapable inference from the testimony presented was that a nontestifying witness had furnished evidence of guilt to the police which lead the police directly to the Defendant.

Petitioner's assertion that Baird v. State, supra, and Bauer v. State, supra, create separate and distinctive evidentiary rules for the parties in a criminal case is incorrect. In the First District Court of Appeal, a criminal

Defendant may introduce evidence of what was said to explain his state of mind when he propounds the defense of entrapment, not when he is making allegations of "police misconduct" as asserted in Petitioner's Brief at page 23. Similarly, Baird v. State, supra, does not hold that the State is precluded from introducing similar evidence to refute allegations of police misconduct. Rather, Baird simply holds that hearsay testimony is inadmissable for the obvious purpose of proving the truth of the matter asserted by corroborating a witness's testimony where there has been no charge of improper influence, motive, or recent fabrication. See also Adams v. State 15 FLW D930 (April 20, 1990), Ralston v. State, 555 So.2d 443 (Fla. 4th DCA 1990).

Petitioner asserts that Respondent initiated a claim of selective prosecution by law enforcement of Respondent and that Petitioner was therefore entitled to present the hearsay statement of GRIFFITH as appropriate rebuttal. Petitioner then asserts that although an officer's state of mind is not normally relevant in a criminal prosecution, Respondent made GRIFFITH's state of mind an issue by raising a claim of selective prosecution, giving the State an "open door" to respond regarding GRIFFITH's motivation for the case. Petitioner cites Crumley v. State, 534 So.2d 909 (Fla. 1st DCA 1988) in support of its position. In Crumley, the First District ruled that testimony from the Defendant regarding an informant's out of court statements to the Defendant inducing

the Defendant to engage in a narcotics sale was admissable as it was not offered to proof the truth of the informant's statements but rather the statement's effect on the Defendant. Crumley, supra, is distinguishable by the fact that the defense of entrapment necessarily makes the state of mind of the accused a relevant issue. The state of mind of GRIFFITH is not a relevant issue.

Petitioner complains of essentially three comments made by counsel for Respondent during opening argument, and offers those comments as justification for the hearsay statements of GRIFFITH that were admitted by the trial Court. First, counsel for Respondent stated "first of all, I think the evidence will show that they selected the man, Dean Baird, sitting over there, maybe a year before that, they also selected the offense, racketeering to charge him with". (R-39) Second, that counsel for Respondent stated that Respondent was "flamboyant". (R-41, 42) And third, that counsel for Respondent stated "...they selected Mr. Baird to prosecute, and they selected the offense of racketeering, and after you have heard all the evidence in this case, I am going to ask you to find him not guilty..." (R-43) Petitioner asserts that these three statements "opened the door" to the State's solicitation of inadmissable hearsay from a police officer that was tantamount to the officer telling the jury that Respondent was guilty of the offenses charged.

GRIFFITH's statement that Respondent was operating a major

gambling operation can hardly be considered "invited response" to the statement that Respondent is flamboyant as one would appear to have nothing to do with the other. As to the two statements made by Respondent's counsel concerning the State selecting Respondent for prosecution and selecting the charge of racketeering, these comments were isolated comments during an opening statement that ran for several minutes and generally focused on factual issues surrounding the evidence rather than the motivation of either the State or the Defendant. (R-39 through 60)

In Clark v. State, 363 So.2d 331 (Fla. 1978) this Court stated that no err occurred when defense counsel comments on or elicits testimony concerning a Defendant's exercise of his right to remain silent and that Defendant may not make or invite improper comment and later seek reversal based on that comment. The Clark court admonished that a Defendant could not use a prophylactic rule designed to obviate the possibility of conviction by the improper inference that a Defendant's silence evidenced guilt to set up an automatic reversal. As repeated by this Court in Brown v. State, 367 So.2d 616 (Fla. 1979) the rule concerning fair comment was not designed to serve Defendants as a "no lose" trial tactic. The case at bar is dissimilar. First, the comments made by counsel for the Respondent were essentially innocuous. Second, were such comments to be taken by Petitioner as serious enough to require a response, the officer simply could

have responded that he in fact had not selected Respondent for prosecution. Finally, under no circumstances can the hearsay testimony presented by the officer be considered "fair response'' even if counsel for Respondent's statement could be interpreted as inviting a response. GRIFFITH's testimony was nonresponsive overkill.

The Second District in Wise v. State, **546** So.2d **1068** (Fla. 2nd DCA **1989)** discussed the admissability of hearsay testimony after reference was made in defense counsel's opening statement. The Court noted that defense counsel's opening statement clearly indicated that he intended to attack the credibility of a child witness. The child's mother was then allowed over objection to disclose a prior consistent statement made by the child to the mother. The Second District reversed because the prior consistent statement was presented at a point in the trial when there was no evidence of a prior inconsistent statement or that the witness denied making such statements. The State presented the child's out of court statements through the testimony of her mother before defense counsel had an opportunity to cross-examine the child or impeach her credibility. The general rule against prior consistent statements was, therefore, applicable.

The Wise court further noted that the manner in which the Defendant's alleged misconduct was discovered was not disputed or relevant to establishing any of the charges. Even if the circumstances were relevant to prove the Defendant's guilt,

they could have been established without presenting the contents of the conversation in question. Similarly, the manner in which Respondent's alleged misconduct was discovered was not disputed or relevant to establishing any of the charges against him. Finally, assuming arguendo, that the statement by GRIFFITH was a nonhearsay statement, it would be inadmissable as it does not tend to proof or disproof a material fact. Wise, supra.

Respondent urges this Court to affirm th ruling of the First District Court of Appeal on the basis that the statement made by GRIFFITH was clearly hearsay and inadmissable because it failed to meet some recognized exception to the hearsay rule.

II

THE DISTRICT COURT OF APPEAL PROPERLY APPLIED THE HARMLESS ERROR DOCTRINE SET FORTH BY THIS COURT IN DIGUILIO V. STATE, 491 SO.2D 1129 (FLA. 1986) AND CICCARELLI V. STATE, 531 SO.2D 129 (FLA. 1988)(RESTATED).

In Baird v. State, supra, the First District held that GRIFFITH's testimony was obviously hearsay and improperly admitted. Moreover, the First District concluded that the State had failed to carry its burden of showing the error was harmless. Therefore, the Court found it necessary to reverse Respondent's conviction and remand this matter for a new trial. The First District cited State v. Diguilio, 491 So.2d 1129 (Fla. 1986) in holding that the err was not harmless.

Petitioner now complains that the First District, in holding that the State must prove the err harmless, is in direct and express conflict with this Court's opinion in Ciccarelli v. State, 531 So.2d 129 (Fla. 1988). However, the First District applied both Diguilio and Ciccarelli in determining that this was not a case of harmless error and that reversal and remand of this matter was necessary.

Pursuant to Diguilio, supra, the harmless error test places the burden upon the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Diguilio at 1135. Further, this Court noted that oftentimes the analysis

requires "more than a mere totaling of testimony, and, in most instances, more than a mere reading of a portion of the record in the abstract." Ciccarelli at 132. The Court went on to note:

> "This is not to say that every case will require a reading of every word in a trial transcript. We can envision certain errors, such as improper leading questions or admission of totally irrelevant matters, that would not require such a demanding task. The decision of how much to read in order to apply the harmless error test 'vigorously' and appropriately must be left to the conscience of each individual judge." Ciccarelli at 132. (emphasis added)

Petitioner asserts that the District Court erred in not finding GRIFFITH's statements to be harmless error as said statements were allegedly cumulative of other trial evidence. In this Court's most recent discussion of the harmless error rule, State v. Lee, 531 So.2d 133 (Fla. 1988), this Court held that the Defendant was entitled to a new trial even though properly admitted evidence was sufficient to support a jury verdict of guilty where the Court could not say beyond a reasonable doubt that the erroneously admitted evidence of a collateral crime did not affect the verdict. The Lee court reaffirmed that the focus of any harmless error analysis must the effect of the error on the trier of fact and not whether or not the permissible evidence of guilt is overwhelming ever if not conclusive.

Following the analysis in Lee, supra, the First District Court of Appeal in Bradley v. State, 540 So.2d 445 (Fla. 1st DCA 1989) reversed the Defendant's sexual assault conviction. The First District wrote that admission of testimony concerning the portion of a health history form indicating the victim told a clinic staff member that she had previously been raped was a prejudicial statement that likely affected the result in the case. The information was entered on a medical form and testified to by a medical authority which made it likely that the statement was imbued with an authoritative conclusiveness that was inappropriate, according to the Court. Although the Court noted that the jury may well have come to the same conclusion without admission of the statement in a case which would have depended primarily on the jury's assessment of the witness's credibility the erroneous admission of the "raped" statement injuriously affected the Defendant's substantial right to a fair trial. In the case at Bar, the complained of statement was presented by the first witness in the State's case in chief, which witness was an officer of the law. After testifying to a number of matters seemingly unrelated to Respondent, GRIFFITH made his statement that he had received information that Respondent was running a major gambling operation in Pensacola. GRIFFITH's statement served to set the stage for the reception of all future testimony in the case, and it cannot be said that this testimony did not influence the jury in its deliberations.

In Avila v. State, 545 So.2d 450 (Fla. 3rd DCA 1989) the Third District Court of Appeal reversed the Defendant's conviction for first degree murder, rejecting the State's suggestion that the error involved was harmless. The testimony in question consisted of a videotaped confession. The Court noted "given the inconsistencies in the testimony of the State's key witnesses, certain recantations of earlier testimony, and a dearth of physical evidence linking Avila to the murder scene, the jury's viewing of Avila's videotaped confession may well have erased any reasonable doubt previously entertained". Avila at 451.

The Fourth District Court of Appeal in Harris v. State, supra, found that statements made by a juvenile confidential informant to an officer were inadmissable hearsay and the error could not have been cured by an instruction and was not harmless. Similarly, in Bauer v. State, supra, the Court held that the State's presentation of the hearsay evidence of the agent involved was crucial to the State's ability to rebut the Defendant's defense of entrapment and was therefore not harmless error. In Haynes v. State, supra, citing Postell v. State, supra, the Court found the comment of a nontestifying confidential informant to constitute evidence of the Defendant's guilt which was not harmless error. Likewise, in Adams v. State, supra, the First District again reversed, finding that the error was not harmless where the testimony was offered to prove the truth of the matter asserted by

corroborating other witnesses testimony and further because it suggested the Defendant's involvement in another crime. The Court found that as a result it could not conclude beyond a reasonable doubt that the error did not affect the jury's verdict.

In the case at bar, there were repeated inconsistencies between the testimony of NUNNERI and VICKERY as well as other key State witnesses. Additionally, although the State introduced substantial physical evidence concerning pen registers, wire taps, photographs, charts, and tape recorded conversations between various parties, virtually none of this information had any direct link to Respondent. To the contrary, it chronicled consistent ongoing criminal activity between NUNNERI and VICKERY, who subsequently pointed the finger at Respondent. Several witnesses testified that Respondent had indicated to them in the early 1980's that he was getting out of gambling. (R-238, 416, 435, 458, 677, 678) Further, NUNNERI told several other people that Respondent was not involved (R-32) and it was clear that it would be to NUNNERI's advantage to let VICKERY think that he had a partner. (R-324) Finally, upon arrest NUNNERI initially may have named AXLEY as the person involved rather than Respondent, (R-331, 332) and VICKERY made no statement implicating Respondent until after he made inquiry as to whether or not Respondent would retain an attorney for him and was apparently told no. Given the fact that the credibility

of NUNNERI and VICKERY was crucial to Respondent's conviction, as they were the only two witnesses able to directly implicate Respondent, GRIFFITH's statement cannot be considered harmless. The unnamed accuser in absentia referred to by GRIFFITH in his testimony who was not subject to cross-examination could very well have presented the reasonable doubt turning point for the jury.

CONCLUSION

Based on the foregoing arguments and citations of authority, Respondent respectfully requests tha the decision of the First District be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Robert A. Butterworth, Esquire, Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 2 day of July, 1990.

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