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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 75,161

FREDERICK ALDINE BAIRD, JR.,

Respondent.

On Discretionary Review From the District Court of Appeal, First District of Florida

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PETITIONER'S 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. Respondent, Frederick Aldine Baird, Jr., was the defendant in the trial court and the appellant in the district court. Parties shall be referred to as "Petitioner" and "Respondent" respectively in this brief.

References to the record on appeal will be by use of the symbol "R" followed by the appropriate page numbers in parentheses. All emphasis shall be in the original unless otherwise noted.

STATEMENT OF THE CASE

Frederick A. Baird, Jr., was charged by information on January 8, 1987, with forty-three counts of racketeering and bookmaking offenses pursuant to §895.03, Fla. Stat., and §849.25, Fla. Stat. (R 1185). Subsequently the State of Florida filed a third amended information, (R 1217-1225), charging Baird with racketeering offenses.

Baird was tried by jury in the First Judicial Circuit of Florida beginning on August 7, 1987. On August 21, 1987, the jury returned verdicts of guilty on all three counts as charged in the information. After denial of his motion for judgment of acquittal and arrest of judgment, (R 1504, 1512), the trial court sentenced Baird on November 18, 1987, to seven years in the state prison to be followed by five years probation.

Baird filed a timely appeal in the First District Court of Appeal and raised eight issues. The district court of appeal rejected seven of the eight arguments[1], but reversed on a finding that the trial court had allowed the admission of inadmissible

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[1] In its original opinion, the district court certified as a question of great importance the so-called "pen-register" issue outlined in Shaktman v. State, 529 So.2d 711 (Fla. 3d DCA 1988), *approved*, 553 So.2d. 148 (Fla. 1989). Based upon the State's notification of this Court's decision in Shaktman, the district court subsequently issued a revised opinion which omitted the certified question.

hearsay and that it could not be said that the error was harmless. Baird v. State, 553 So.2d 187 (Fla. 1st DCA 1989). The State's timely motion for rehearing was denied.

The State timely filed its notice to invoke the jurisdiction of this Court and the Court accepted jurisdiction by a vote of 4-3. This appeal follows.

STATEMENT OF THE FACTS

After four days of reviewing and weighing the testimony and evidence and listening to the arguments from counsel, the jury in this case took only one hour and fifty minutes to convict the Respondent, Frederick A. Baird, Jr., on all counts as charged. (R 1171-1172).

The jury heard Joseph Nunnari and Douglas Vickery, Respondent's convicted co-defendants,[2] paint a detailed picture of Respondent's role as a major gambling financier in the Pensacola, Florida, area. Their testimony outlined a sophisticated and widespread football gambling operation that existed for many years.

The jury heard Joseph Nunnari testify that he had worked for the Respondent collecting on football bets on Baird's behalf from 1982 through 1986. (R 194). Under their arrangement, Nunnari received ten percent of the profits gained from the gambling operation every year. (R 195). Respondent's role in the operation was financier; he gave Nunnari a list of names which included "Bob", a code name for Mr. Vickery. (R 196-97).

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[2] Vickery and Nunnari pled no contest and reserved the right to appeal the question of the constitutionality of the racketeering statute. Their appeal was denied by the First District Court of Appeal in the decision reported as Vickery and Nunnari v. State, 539 So.2d 499 (Fla. 1st DCA 1989).

Nunnari knew Vickery and also Dickey Merritt prior to working for Baird because he had bet with them for the prior two years. (R 197).

According to Nunnari, he had between 10 and 15 bettors that used him as their "bookie." If he brought new clients to Baird's operation, he got a special rate in return for the new business. He also told the jury that prior to his taking on the role as debt collector for Baird, Merritt and Bruce Athey handled that responsibility. (R 197-98).

Nunnari and Vickery used telephone numbers 932-6860 and 479-9676 to conduct their gambling business. The state's prosecutor played portions of tapes recorded by FDLE agents during Nunnari's testimony, During the playing of these tapes, the prosecutor would periodically stop them to allow Nunnari to clarify points such as indicating when "somebody was mentioned who that somebody was." (R 199-223). Nunnari told the jury that the business grew from year to year and that at one point they had between 50 and *60* callers each of whom had others betting with them. Thus, for every caller tied in with Nunnari (and therefore Baird), there might be 5 to 20 other bettors involved in the gambling ring. (R 223). Indeed, the organization was sophisticated enough that Vickery and Nunnari were the "exposed" figures who protected Baird from any tie-in with the operation.

Nunnari said that Baird claimed he had sources who would let him know if anything was going on in terms of law enforcement or tax investigation. (R **241-243**).

Nunnari also detailed for the jury how often and how much he was paid by Baird and how they operated various details of the betting organization. (R **247-264**).

Interspersed with Nunnari's testimony were tape recordings of conversations involving this gambling operation. (R **264-268**; **269-277**; and 279-300). According to Nunnari, the "other man" mentioned in the tapes was Baird. (R **304** and **308**). Nunnari concluded the direct examination portion of his testimony by telling the jury that after his arrest he freely confessed to the police and was testifying pursuant to a plea agreement. (R **310-314**).

On cross-examination, defense counsel brought out that Baird had told Nunnari that he was getting out of the bookmaking business. It was also revealed during cross-examination that Nunnari and Vickery called each other on a phone number (**932-6860**) that was listed in Baird's name and located in a condominium owned by Baird. (R **341**).

On redirect, the prosecutor played a tape recording which Nunnari identified as a discussion between himself and Baird

where they discussed a bet over the phone. (R **381).** The prosecutor then played another tape wherein Nunnari and the Respondent talked but there was an indication that it was not secure for them to discuss business over the phone. (R **381-386).**

Douglas Vickery testified during the latter portion of the trial. (R **611).** He told the jury that he received bets on behalf of Respondent and Respondent's "bookie operation." (R **611).** Vickery told the jury that in **1984** he received **$30,000** directly from Baird at Baird's office in payment for his work in the gambling operation. (R **612-625).** He also told the jury that in **1985,** Joseph Nunnari gave him **$19,000** and Baird gave him an additional **$7,000** or **$8,000.** Vickery indicated that he picked up the money from Baird at Baird's office although Baird was not there at the time. (R **626).**

Vickery also told the jury that he borrowed **$4,000** from Baird in **1986** on an oral contract. The loan was to be repaid from any football monies accumulated by Vickery on Baird's behalf. (R **628).**

Vickery also told the jury that Baird had agreed to provide an attorney to Vickery if he were ever arrested in conjunction with the gambling operation. (R *629).*

The prosecutor played a variety of taped recordings involving Vickery and Nunnari for the jury during Vickery's testimony. Vickery clarified various references made in the tapes and indicated to the jury that part of the conversation involved Baird's making side bets and otherwise being involved in the betting operation. (R **634-666).**

Vickery concluded his direct testimony by indicating that the state attorney had made a recommendation as part of a plea agreement but that he had no deals with the prosecutor. (R **671).**

Vickery's ex-wife, Laurie Taylor, also testified. (R **481).** She told the jury that Doug Vickery applied for a job in the bookmaking business with Dean Baird and that Baird and Vickery agreed that Vickery would receive twenty percent of the profits he brought into the operation. (R **484).** She also testified that she observed Baird pay Doug the $30,000 in Baird's office. (R **488).**

The prosecution also presented testimony from two law enforcement officers, Charles Griffith and Larry Sams. Griffith testified that he was an agent of the Florida Department of Law Enforcement ("FDLE") and that, based upon information known to the FDLE, an effort was made to infiltrate the gambling organization, (R **60-62).** Griffith detailed for the jury how he and Sams obtained phone numbers used for gambling and then

proceeded to obtain information by use of the "pen register" technique to trace the phones. (R **63-65**). The officers were also able to obtain wiretaps to review gambling information, (R **67**), including taps for Joseph Nunnari's home phone, **479-9676**, and Respondent Baird's condominium, **932-6860**. (R **65-68**).

Recordings made from conversations overheard pursuant to the wiretap were introduced as State's Exhibits **1-3**. (R **69-71**). Additionally, the State introduced Exhibits **4**, **5** and **6** which were extracts from calls from those three wiretapped numbers. (R **73**).

The prosecution also presented testimony from FDLE Agent Frank Troy who had special training in gambling techniques. (R **118**). Troy explained how money flowed through bookmaking operations and explained different terms that were germane to the operation, such as "vigorous gain" and "lay off." (R **128-135**). Troy also testified that it was normal in this type of gambling operation to distance the financial backer from the actual operatives to provide him with protection. (R **144**).

Agent Sams testified that he was the agent responsible for infiltrating the gambling operation at Sir Richard's Lounge in Pensacola, Florida. (R **144-147**). On his first visit, he saw many people entering and leaving Sir Richard's Lounge, a bar, without drinking any alcohol. **(R 147)**. Me also noted that the manager, Dickie Merritt, would take bets. After a two week period, Merritt allowed Sams to place a bet with him. **(R 147)**.

One weekend Merritt was going to be out of town; so at Sams' request, Merritt gave Sams a phone number and a "code number" **(2-A-10)** to use instead of a name. The phone number was **478-6637**. It was later changed to **932-7752**. (R **148-49).** Sams then placed bets with Vickery whose code name was "Bob." (R **149).**

Sams met Joseph Nunnari at Sir Richard's when Nunnari arrived to pay a gambling debt. (R **150).** According to Sams, Nunnari indicated that bets could be placed with Merritt, Vickery by phone, or directly with Nunnari. (R **150-153).**

During this portion of Sams testimony, the prosecution introduced and played tapes involving conversations between Vickery and Agent Sams wherein bets were placed by Sams. (R **154-158).** Sams then testified that Nunnari gave him a new code number (# **116)** and Sams quit betting through Merritt and began betting directly with Nunnari. (R **158-159).**

Ultimately, Sams met Nunnari at Jerry's Drive-In to settle his betting debts. (R **161).** Sams paid Nunnari and then placed him under arrest. He then took Nunnari to the federal courthouse where he began cooperating with the police. (R 161).

At the conclusion of Sams' testimony, the State recalled Agent Griffith to verify the voices on the previously played tapes as Vickery and Nunnari. (R 189-190).

The prosecution also presented testimony from a variety of bettors which indicated further ties between Nunnari, Merritt, Vickery and Respondent Baird. These witnesses included Mike Shuttleworth (R 401-404), Robert Athey (R 407-417), Clark Merritt (R 424-445), Richard Merritt (R 446-458), Art McGraw (R 467-470), and Rocky Jones (R 470-479). The State also produced testimony from William Lee who indicated that he had bet with Respondent Baird for five years. (R 518-519). The jury also heard testimony from State witness Harlan Jennings, Baird's limousine driver, who indicated that he had bet with Baird and once saw Baird give cash to Joseph Nunnari some time in 1983. (R 830-33).

The defense presented no testimony.

SUMMARY OF THE ARGUMENT

It is the Petitioner's contention that the First District Court of Appeal erred in two respects when it reversed the judgment and sentence in this case. First, the district court plainly misapplied the prohibition against the admission of hearsay evidence. The trial court allowed a State witness to respond regarding what he had heard so as to refute the defense's assertion that the witness had targeted Baird for prosecution out of bad faith or vindictiveness. Every major treatise on evidence supports the trial court's determination that the evidence was not hearsay and a number of decisions from Florida and federal courts support the State's position in this regard. This is especially true where the defense "opened the door" to the question during its opening statement wherein it accused the police of bad faith.

Secondly, any error should have been found harmless under the rule of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and State v. Ciccarelli, 531 So.2d 129 (Fla. 1988). Rather than adhere to the standards set forth in these cases, the First District Court of Appeal, held that the State had failed to carry its burden of proving harmlessness of the error. That holding is wholly inconsistent with harmless error review and should be reversed.

ARGUMENT

ISSUE I

THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S DETERMINATION THAT REMARKS OF A WITNESS DID NOT CONSTITUTE HEARSAY GIVEN THE CONTEXT IN WHICH THEY WERE UTTERED.

The theory of the defense at trial was that Mr. Baird, due to his flamboyant life-style, became known to agents of the Florida Department of Law Enforcement who, for personal reasons (career enhancement), singled him out for prosecution. (R 39-43). In presenting this theory to the jury, defense counsel told them that Agent Sams had heard about Baird's gambling activities, stating:

> 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).
>
> * * *
>
> Mr. Baird undoubtedly is flamboyant. The testimony is going to show that. He likes to gamble. He has gambled, and I think the evidence will show that he goes to Vegas, that he bets on football games, and that years ago, in fact, he did bet and book football like some of these other people.
>
> * * *
>
> And Mr. Edgar would have you think that millions of dollars were going back and

> forth, but I think the evidence is going to show many things, hardly any money passed, because half the people in Sir Richard's bet one way and half bet the other way. So little money passed.
>
> But in any event, Mr. Baird was flamboyant. He himself went through a divorce in **1981**, a divorce from his wife, Bonnie Baird. And as result of that, he got out of gambling completely. He got scared of it. He didn't need to gamble. He gambled because he had a lot of money. He gambled because he enjoyed it, because it was exciting. But he decided to get out of gambling because his wife, as many times do when you go through depositions, people say angry things, and apparently some testimony came out that he had a lot of cash from gambling, and he told people he was getting out of it. (R **41-42**).

Accordingly, based on this version of the facts, defense counsel summed up his opening statement with this request for acquittal:

> I think after you have heard all the evidence in this case, that you are going to find, as I indicated to you from the start, 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'm going to ask you to find him not guilty based upon justice and the evidence that is presented. Thank you.
>
> (R **43**).

Shortly after these arguments were concluded, the State began the evidentiary portion of its case. With defense counsel's rhetoric

ringing in their ears, the jury then heard the following exchange between the prosecutor and Agent Griffith:

> Q: (By Mr. Edgar) It was just a number to you?
>
> A: Yes, sir.
>
> Q: Now, sir, in this particular case, there has been some question came [sic] up about targeting this defendant and it was just selecting him out of all these people to prosecute him. Would you explain to the members of the jury whether or not the defendant was picked on or targeted in this case.
>
> A: I'm not sure. I understand the word "targeting". I have received information that he was involved in the major . . .
>
> MR. BEROSET: Objection, hearsay.
>
> THE COURT: Overruled.
>
> MR. BEROSET: Move for mistrial, Your Honor.
>
> THE COURT: Denied.
>
> THE WITNESS: 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 but the trial court overruled the objection noting the opening statement by defense counsel. (R 78).

Clearly, the State presented the testimony about what Officer Griffith had heard from someone else not for the truth of the matter (that Baird was a gambler) but rather to refute a defense assertion that the officer was motivated by greed or vindictiveness and that he had pre-selected Baird for prosecution. The prosecution was not asking the jury to accept this testimony as proof that Baird was a gambler. Rather, the testimony was directed to "why" Griffith acted not "what" Baird was alleged to be.

In Johnson v. State, 456 So.2d 529, 530 (Fla. 4th DCA 1984), *review denied,* 464 So.2d 555 (Fla. 1984), and Freeman v. State, 494 So.2d 270, 271 (Fla. 4th DCA 1986), the Fourth District Court of Appeal held that an investigating officer's testimony as to the content of a dispatch to which he responded was admissible to explain why the officers were at a particular place at a particular time and what their purpose was. The Fourth District cited United States v. Walling, 486 F.2d 229, 234 (9th Cir. 1973), in support of its position.

The Fourth District's position is advanced by Professor Ehrhardt in his treatise on Florida Evidence. In Chapter 8, he concludes:

> An out-of-court statement which is not offered to prove the truth of the matters asserted, i.e. to prove that the

facts contained in it are true, is not hearsay.

In support of this position, Ehrhardt cites Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982), and Brown v. State, supra, and State v. Lofton, 418 So.2d 1259 (Fla. 4th DCA 1982)(See appendix).

Fourth District cited Wigmore on Evidence for the proposition that "if an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, the hearsay rules do not apply." Id. at 38.

The First District relied on Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988), to support its reversal. Bauer was a split decision which Chief Judge Campbell vigorously dissented from the majority's reversal of a drug trafficking conviction. The Bauer majority held a police officer could not testify to information

he received from a confidential informant regarding defendant's alleged prior criminal activities in order to rebut a defense of entrapment because such testimony would be hearsay.

In his dissent, Chief Judge Campbell forcefully points out:

> The very definition of "hearsay" is that it is a statement other than one by the declarant, offered to prove the truth of the matters asserted. Section **90.801** (1)(c), Fla. Stat. **(1985).** The testimony of Agent Chouinard *as* to what the informant informed him that created Agent Chouinard's reasonable suspicion, was therefore, not hearsay. As the trial judge below held in allowing the testimony; the state has the right to show that Mr. Scaglione and Mr. Bauer were not randomly selected or exposed, and I will allow the state to ask Mr. Chouinard as to why he sought introduction to Mr. Scaglione and Mr. Bauer concerning the proffer, also, the other cases show that a confidential informant and hearsay may be utilized to show predisposition.

Bauer, supra, at 12-13.

In the instant case, the First District commits the same error as the majority in Bauer. Officer Griffith's testimony was not introduced to prove the truth of the matter asserted, i.e., that Baird was a major gambler. Rather, that testimony was introduced to show why Officer Griffith began his investigation of Baird and to rebut the defense's argument that the police had targeted or selected Baird for prosecution. In United States v.

Makhlouta, 790 F.2d 1400 (9th Cir. 1986), the court made the following finding:

> Mahklouta argues that the district judge improperly admitted hearsay testimony when he permitted Miller to testify, over objection, that he first met Makhlouta after an informant, Khawan, told Miller that Makhlouta and an associate were looking for a buyer of large quantities of cocaine. The district judge correctly determined that Khawan's statement was not hearsay because it was offered not to prove the truth of the matter asserted but rather to show Miller's state of mind when he began investigating Makhlouta. *See* Fed.R.Evid. 801(c); *McCormick's Handbook of the Law on Evidence* §249, at 733-34 (3d ed. 1984)

Id. at 140 . The federal court went on to hold that although the evidence was not hearsay, it was not relevant because Miller's state of mind was not relevant to the case. Under federal law of entrapment, it is only the state of mind of the defendant that is relevant. This may be the rationale used by the Bauer majority to justify their decision. However, there is still a critical distinction between those cases and the instant situation wherein the defense initiates a claim of selective or vindictive prosecution by the law enforcement officer. Clearly, in such a case the evidence is appropriate rebuttal evidence.

The Third District Court of Appeal discussed the distinction between statements offered to establish or refute motive as op-

posed to proving the truth of a matter in Nelson v. State, 388 So.2d 1276 (Fla. 3d DCA 1980). Judge Barkdull noted:

> The trial court erred in excluding the victim's statement. It is a fundamental principle of law of evidence that "if, . . . an extrajudicial utterance is offered, not as an assertion to evidence to the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply. 6 ***Wigmore, Evidence*** **ss.** 1776 (Chadbourne rev. 1976).
>
> Thus; "whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned." 6 ***Wigmore, Evidence,*** *ss.* 1789 (Chadbourne, rev. 1976).

Id. at 1278. The district court then went on to highlight three cases which highlight how the rule should properly be applied, Brown v. State, 299 So.2d 37 (Fla. 4th DCA 1974); Flynn v. State, 351 So.2d 377 (Fla. 4th DCA 1977); and 194th Street Hotel Corporation v. Hoff, 383 So.2d 739 (Fla. 3d DCA 1980). Each of these cases shows how the rule was properly applied by the trial court and misinterpreted by the district court of appeal.

Further support for the State's position is found in Weinstein's Evidence, Vol. 4, in its discussion on Federal Rule of Evidence 801(c):

> An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The hearsay rule does not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted. For example, statements of complaint may be admitted to show that the recipient was on notice that his customers were generally dissatisfied, continued operation despite this knowledge may then be indicative of a scheme to defraud. An accused may proffer statements consistent with good faith on his part to rebut the inference of criminal intent which might otherwise be drawn from his actions. Statements may also be admitted to show other states of mind such as knowledge, motive or reasonableness in reaching a particular conclusion. (Footnotes omitted).

While an officer's state of mind is not normally relevant in a criminal prosecution, Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981), and Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989)(en banc), the defense made it an issue by raising a claim of a vindictive or selective prosecution against Baird in opening statement. Thus, the State had an "open door"[3] to respond regarding Griffith's motivation for the case. In this regard, the instance case is similar to Crumley v. State, 534 So.2d 909 (Fla. 1st DCA 1988), wherein it was held:

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[3] See, e.g., Pitts v. State, 307 So.2d 473 (Fla. 1st DCA 1975), cert. dismissed, 423 U.S. 918 (1975); Henderson v. State, 94 Fla. 318, 113 So.2d 689 (1927); and Ferguson v. State, 417 So.2d 639 (Fla. 1982), on the doctrine of invited response or fair reply.

> The pertinent facts are as follows. On several occasions, the appellant met with Leon Weaver, who was paid by the police to set up a meeting between the appellant and a undercover police officer to discuss selling narcotics. The appellant sought to testify about these conversations which he believed would show he was induced to traffic in drugs. The state objected to this testimony as hearsay; the court agreed and conditioned the appellant's right to present such testimony upon counsel's ability to cite a suitable exception to the hearsay rule. Unable to cite an exception, the appellant could only refer the court to the "Mercury Morris case" for which the appellant had no citation. Finding this to be an inadequate basis to admit supposed hearsay, the trial court refused to allow the appellant to testify about the conversations with Weaver.
>
> The trial court incorrectly sustained the state's improperly asserted objection. The proffered testimony was not hearsay, inasmuch as it clear from the record that the statements were offered not to prove the truth of the matters contained in the statements, but to show their effect on the appellant, especially his inducement by the police informant. See *Brown v. **State***, 299 So.2d 37 (Fla. 4th DCA 1974). This testimony was crucial to the appellant's defense of entrapment.

Id. at 910. The clear problem with the First District's analysis and the analysis in Bauer is that it creates separate and distinct evidentiary rules for the parties in a criminal case. In the First District Court of Appeal, a criminal defendant may introduce evidence of what was said to explain his state of mind

regarding allegations of police misconduct, see Crumley, supra, but the State cannot introduce similar evidence to refute such allegations. Baird. Given the basic premise that the State carries the entire burden of proving the defendant's guilt beyond any reasonable doubt, this is a curious rule which unnecessarily burdens the prosecution. This Court should not tolerate this double standard as it contrary to the concept of equal and fair justice in our criminal court system.

Accordingly, Petitioner urges this court to reverse this case upon a holding that it is not hearsay for the State to introduce testimony from a police officer regarding "what he has heard" if the basis for the admission of the evidence is clearly to refute a defense initiated complaint of vindictiveness, entrapment, or ill-motivation on the part of the law enforcement officer. Such a ruling would be consistent with the various treatises on the hearsay rule and with the majority rule in this state and in the federal system.

ISSUE II

ASSUMING THE TRIAL COURT DID ERR IN ITS RULING, THE DISTRICT COURT OF APPEAL IMPROPERLY APPLIED THE HARMLESS ERROR STANDARD 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).

As previously outlined, the jury heard Nunnari and Vickery, Respondent's convicted co-defendants, paint a detailed picture of Respondent's role as a major gambling figure in Pensacola. (R 194-360 and R 612-704).

They heard Vickery's ex-wife tell how Respondent hired Vickery to run his gambling business, (R 482-84), and of how Vickery was later paid $30,000 for this work by Respondent. (R 488).

They also heard Clark Merritt (R 426-35), Richard Merritt (R 451-57), and Mr. Athey (R 408-20) detail Respondent's long-standing involvement with gambling.

All this the jury weighed, in addition to undercover police testimony, electronically seized phone conversations, "pen register" records, and most critically, the opening statements of defense counsel in which he conceded his client was a gambler and bookmaker. (R 41-42).

Based on his version of the facts, defense counsel summed up the defense theory for acquittal:

> I think after you have heard all the evidence in this case, that you are going to find, as I indicated to you from the start, 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'm going to ask you to find him not guilty based upon justice and the evidence that is presented. Thank you.
>
> (R 43).

Yet, all this was apparently overlooked by the district court. Otherwise, the district court would certainly have applied controlling precedent to the effect that improperly admitted evidence will not constitute harmful error or reversible error if that evidence is merely cumulative of the other trial evidence.

In Cook v. State, 531 So.2d 1369, 1371 (Fla. 1st DCA 1988), the district court held that a hearing violation involving §90.803(23), Fla. Stat., would not require reversal because the hearsay was "merely cumulative." Judge Wentworth relied on Judge Smith's earlier decision in Salter v. State, 500 So.2d 184 (Fla. 1st DCA 1986), wherein the district court held:

> . . . thus, we conclude that the portion of Lorenzo's statement to Dr. Mallea describing those who shot him and

> the circumstances under which he was shot were not admissible under either exception to the hearsay rule urged by the state. However, since the improperly admitted statement that the perpetrators were black and that they tried to take Lorenzo's medallion was merely cumulative to the testimony of George Williams which we find was properly admitted, admission of the statement to Dr. Mallea was harmless beyond a reasonable doubt.

The harmless error rule is best explained in Ciccarelli v. State, 531 So.2d 129 (Fla. 1988). The rule has three prongs: (1) error identification, (2) appellee presentation of a *prima facie* case of harmlessness, and (3) court review of the record to determine impact of the error. Id. at 137.

Pursuant to Ciccarelli, the critical aspect of point (3) is record examination. The key is looking closely at the case in totality:

> . . . The function of an examination for this purpose is to
>
> > take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 1247-1248, 90 L.Ed.2d 1557 (1946).

> This 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. It entails an evaluation of the impact of the erroneously admitted evidence in light of the overall strenqth of the case and the defense asserted. Unlike the initial decision of whether error occurred, which in many instances can be made from a fragment of the record of the examination of the law alone, the effect of error on the verdict is a different inquiry. It must, in most cases, be evaluated through the examination of the entire trial transcript. The court must determine ***not*** if there is overwhelming evidence of guilt, but if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error.

Id. at 132. (Emphasis added).

Here, the offending evidence is nothing more than testimony by Officer Griffith that, "I had received information that he [Baird] was a major gambler and operating a major gambling operation in the Pensacola area. . . " (Slip, 2). These two facts (major gambling and gambling operator) first came to light in the defense's opening statement, (R 41-42), and must be viewed in light of the asserted defense. Ciccarelli, at 132. Since Baird's attorney conceded he was a gambler and bookie (albeit now reformed), the defense was twofold: (1) discreditation of State witnesses and (2) vindictive prosecution.

As to discreditation, the jury was well aware of the motives for the other gamblers to testify. The State put those facts on the table, warts and all. (See prosecutor's closing argument, R **1128-35).** That Griffith briefly chimed in on what he "had heard" should not tip the scale for reversal. Absent any indication the remark was a focal point of the trial (it was not), a focal point of closing argument (it was not), or subject to jury inquiry during deliberation (it was not), the error cannot be said to raise to the level of error ". . . that constituted a substantial part of the prosecutor's case . . ." State v. Lee, **531 So.2d 133, 137** (Fla. **1988),** or that it may have played a substantial part in the jury's deliberation regarding the sufficiency and veracity of the State's case. Compare Bauer, supra (error in admitting hearsay harmful because it was critical to rebuttal of defense theory of entrapment).

Despite the clear pronouncements from this Court, the First District Court held that this case would be reversed because ". . . the state has failed to carry its burden of showing that this error was harmless.'' It is respectfully submitted that the district court's application of harmless erorr test is still not consistent with this Court's pronouncements in State v. Lee or Ciccarelli, supra. For example, the Court noted in State v. Lee that the State had offered no arguments in support of harmless error in its brief to the district court or during oral arugment

in the district court. This Court rejected the State's contention that the appellate court was obliged to apply the harmless error test without argument or guidance from the State. 531 So.2d at 136.

However, this case is markedly different from Lee. The State outlined the same arguments presented in this brief for the First District and argued them at oral argument. Yet, the State's presentation is dismissed in a single line concluding that the court is unconvinced that the State has carried its burden. This is an extremely curious result particularly given the nature of the case, nature of the evidence presented against Respondent, the nature of the admissions and consessions made by Respondent's counsel in front of the jury, and the lack of any defense presentation other than their allegation of selective or vindictive prosecution. Compare, Snowden v. State, 537 So.2d 1383, 1389 (Fla. 3d DCA 1989), for an appropriate example of how the harmless error test should be evaluated.

Second, the defense's theory of subjective and vindictive prosecution is what opened the door to this remark in the first instance! The district court has overlooked this critical distinction from Bauer as well as the long list of cases holding a defendant should not benefit from his own mistakes at trial. Stanley v. State, 357 So.2d 1031 (Fla. 3d DCA 1978); Francois v.

Wainwright, 741 F.2d 1275, 1282 (11th Cir. 1984); and United States v. McGuire, 808 F.2d 694 (8th Cir. 1987). After all, "the idea of invited response is used not to excuse improper comments but to determine their effect on the trial as a whole." Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 158 (1986).

Because the record in this case reflects that the State was able to prove beyond any reasonable doubt that Frederick Baird was involved in these gambling organizations, and because Baird's attorney essentially conceded Baird's role as a gambler, and because the remark by Officer Griffith was fair reply to a defense assertion, and because it never again played any role in the jury's determination of Baird's guilt or innoncence, it is respectfully submitted that the First District Court of Appeal has wholly failed to adhere to the standards set forth in Ciccarelli, DiGuilio and Lee for analyzing harmless errror. We urge this Court to reverse and remand this case for reimposition of the guilty verdict.

CONCLUSION

Based on the foregoing arguments and citations of authority, Petitioner prays this Honorable Court will reverse the decision of the First District and reinstate the judgment and sentence of the trial court.

Respectfully submitted,

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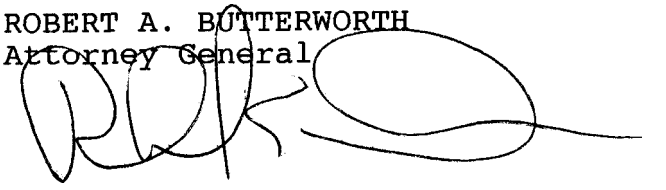

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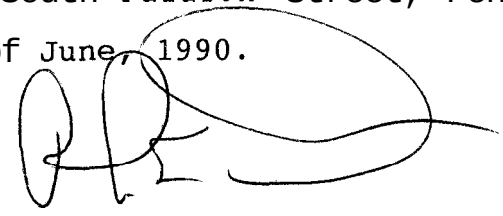
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MS. LAURA KEENE, ESQUIRE, Beroset & Keene, 701 South Palafox Street, Pensacola, Florida 32501, this 8th day of June, 1990.



RICHARD E. DORAN