IN THE SUPREME COURT OF FLORIDA

CASE NO: 75,551

STATE OF FLORIDA,

Petitioner,

v.

ALLEN TASCARELLA, and
BARBARA AMBS TASCARELLA,

Respondents.
_____/

RESPONDENT, ALLEN TASCARELLA'S ANSWER BRIEF ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW

Respectfully submitted,

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PRELIMINARY STATEMENT

The Respondent, ALLEN TASCARELLA, was also the Respondent in the Fourth District Court of Appeal and the Defendant at the trial court level in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The State of Florida was the Petitioner and Prosection/Plaintiff respectively in the courts below. In this brief, the parties shall be referred to as they appear before this Honorable Court.

All factual references shall be cited to the material contained in the Respondent's Appendix submitted to this Court by ALLEN TASCARELLA, attached hereto, and shall be indicated by an "A" followed by the appropriate page number. (A.)

Factual references to material contained the Petitioner's Appendix shall be indicated by an "EX" followed by the appropriate page number. (EX.)

All emphasis has been added by the Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, ALLEN TASCARELLA, adopts the statement of facts set forth in the Initial Brief on the Merits of the State of Florida in that it is generally correct, yet incomplete, and thus the Respondent asserts the following additions and changes.

The State of Florida, as Petitioner, brought a Petition for Writ of Common Law Certiorari to review an Order by the Honorable Russell E. Seay, Jr., excluding witnesses [agents of the Drug Enforcement Administration (hereinafter referred to as "D.E.A.")] from testifying without first submitting to deposition pursuant to Rule 3.220, Florida Rules of Criminal Procedure. (A. 1 - 3) In the Order, the trial court set forth detailed factual findings. The facts are uncontroverted. On February 8, 1989, Respondent, ALLEN TASCARELLA, and his wife, BARBARA AMBS TASCARELLA were arrested by representatives of the D.E.A. for the offenses of trafficking in cocaine and conspiracy to traffic in cocaine. Respondents were subsequently charged by Information on March 2, 1989 by the Broward County State Attorney's Office. The Respondents were arraigned on or about March 21, 1989, wherein a formal plea of not guilty and demand for jury trial were filed on behalf of the Respondents. (A. 2)

Subsequently, in response to the Defendant's Demand for Discovery, pursuant to Rule 3.220 the State responded on March 22, 1989 and listed numerous witnesses who "may have information

relevant to the offense charged." The majority of the witnesses were employees of the D.E.A. Pursuant to the Response received from the State, the Respondents filed their Motion to Compel Production of any and all reports compiled by witnesses listed on the witness list inclusive of any and all witnesses employed by D.E.A. Thereafter, the State of Florida complied by amending its Response to Discovery by providing the reports generated by agents of the D.E.A.

Thereafter, service of process of defense subpoenas for deposition was effectuated upon the various witnesses listed by the State in the State's Answer to Defendant's Demand for Discovery. The witnesses failed to appear after having been appropriately served with subpoenas. On May 19, 1989, after conducting a full hearing, the trial court advised counsel for the Respondents, counsel for the State, and an Assistant United States Attorney that the witnesses were to submit to Rule 3.220 of the Florida Rules of Criminal Procedure if the State intended to use the witnesses at trial. As a result, depositions were again scheduled over various days. Subpoenas were likewise issued by the State. (EX 2 pgs. 11-13) Shortly before the depositions commenced, the United States Attorney's Office advised that the witnesses were not authorized to give depositions in this case. The United States Attorney's Office acknowledged that it was aware of the trial court's prior ruling of May 19, 1989, however the Assistant United States Attorney on behalf of the D.E.A. agents requested compliance with 28 C.F.R. §16.21 et. seq. Respondents, following state law, sought

to take the agent's depositions on several occasions. Respondent's counsel did not "[choose] to ignore the federal regulations" as alleged by the State. (State's initial brief at 3) Counsel were concerned that the disclosure required by the federal regulations would prejudice their defense.

> What they are basically asking us to do is divulge our theory of defense as to what questions we are going to ask of the agents, what the scope of the inquiry will be, what the relevancy of the inquiry will be, all of which is adverse to the rules of procedure under 3.220...
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> * * *
>
> If they are going to turn this over to the State for prosecution, then they should appear and abide by the State rules. ((EX. 2 pgs. 16, 17)

Respondent, ALLEN TASCARELLA's counsel, noted that the D.E.A. agents had given depositions in other cases without compliance with the federal regulations at issue by the defense. The United States Attorney acknowledged to the court that, in fact, "the D.E.A. does show up because they want to show up". (EX. 2 pg. 15)

The circuit court judge was well aware that he could not enter a coercive order directing the agents to appear for deposition. The court did not view itself as being powerless to control its own process merely because the witnesses happened to be federal employees. The court instead vindicated the powers secured to it under the Constitution by excluding the federal witnesses. The circuit judge stated "I am not compelling anyone to do anything except the State". (EX. 2 pg. 4) The court's written order

contained an express finding that the defendant's had "diligently sought to investigate the allegations against them" and had "complied fully and completely with the requirements of Rule 3.220 of the Florida Rules of Criminal Procedure". The trial court further stated

> The defendant's have been, and will continue to be prejudiced by the actions of the United States Attorney's office and the representatives of the federal government listed on the State's witness list to the extent this court is without authority to hold said witnesses in contempt of court and/or in any fashion to force said witnesses to appear other than the entry of an appropriate order pursuant to Rule 3.220(j)(1) of the Florida Rules of Criminal Procedure. Based upon the foregoing it is hereby
>
> ORDERED AND ADJUDGED that the defendant's ore tenus motion to exclude (the named federal agents) be and the same is hereby granted. (A. 3; EX. 4 pg. 3)

On August 11, 1989, the State filed a Petition for Common Law Certiorari with the 4th District Court of Appeal. (A. 4 - 8) A response was filed on behalf of ALLEN TASCARELLA. (A. 15 - 29) The Writ was denied on January 10, 1990.[1] (A. 30, 31) The opinion held, inter alia

> The trial court, after a hearing, found that the defendants would be prejudiced if they were forced to confront these witnesses without pretrial discovery. The court recognized that contempt was not an alternative under the circumstances, and

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[1] After the Fourth District Court of Appeal denied the State's Petition for Writ of Common Law Certiorari, the government instituted a Federal prosecution alleging identical criminal acts to those alleged at bar in the State prosecution. United States of America v. Dominic Allen Tascarella and Barbara Ambs Tascarella, 90-6015-CR-PAINE.

> imposed the exclusion sanctions under the authority of Rule 3.220(j) of the Florida Rules of Criminal Procedure. We conclude that the petitioners have failed to demonstrate a departure from the essential requirements of law and, therefore, deny the petition. (A. 31)

Further, the 4th District certified the following question as one of great public importance:

> Is it an abuse of discretion to exclude evidence as a sanction against the State where government agents disregard a court order because they are restricted by law from disclosing information without approval.

Notice to Invoke Discretionary Jurisdiction of this Court pursuant to the certified question was thereafter filed. Respondent, ALLEN TASCARELLA filed a motion to strike the suggestion of certified question based upon the Petitioner's failure to follow Rule 9.125 Florida Rules of Appellate Procedure. (A. 32 - 34) The motion to strike suggestion of certified question was denied. (A. 35)

Thereafter, on April 30, 1990 a Petition for Writ of Prohibition was filed by Petitioner, ALLEN TASCARELLA. (A. 36 - 49) A Rule to Show Cause was issued and the State was directed to address the Fourth District Court of Appeal's jurisdiction. (A. 50) The State did not contest the Fourth District Court of Appeal's jurisdiction and thereafter the Writ of Prohibition was granted by an order from the 4th District Court of Appeal dated May 15, 1990. (A. 53, 54) A corrected order, identical in all respects save a scrivenor's error was entered the following day.

(A. 51, 52) The order directed that the Petitioners, ALLEN TASCARELLA and BARBARA TASCARELLA "be discharged forthwith". Accordingly, on May 18, 1990 the Honorable Russell E. Seay entered an order discharging ALLEN TASCARELLA and his wife, BARBARA AMBS TASCARELLA. (A. 58) Subsequently, the State of Florida sought a rehearing on the granting of the Writ of Prohibition. An order issued on July 5, 1990 denied the State's motion for rehearing. (A. 55 - 57) No appeal of the trial court's Order of Discharge was ever taken. However, the State did file a Writ of Prohibition and/or Motion to Vacate Order of the District Court of Appeal, Fourth District, of May 15, 1990 Granting Writ of Prohibition Without Jurisdiction in this Court. The Petition was denied. (A. 59) Nonetheless, the State filed it's Notice to Invoke Discretionary Jurisdiction with regard to the Writ of Prohibition.[2]

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[2] State v. Tascarella, Case No: 76,020, Florida Supreme Court, May 24, 1990.

SUMMARY OF THE ARGUMENT

The trial court did not depart from the essential requirements of law nor abuse its discretion in excluding evidence as a sanction against the State under Rule 3.220(j) of the Florida Rules of Criminal Procedure where government agents disregarded a court order. As such the Fourth District Court of Appeal correctly denied the State of Florida's Petition for Common Law Certiorari based upon the prejudice which the Defendants would suffer if they were forced to confront the witnesses without pretrial discovery. The trial court properly recognized that contempt was not an alternative under the circumstances and imposed the exclusion sanction under the authority of Rule 3.220(j) of the Fla.R.Cri.P.

Rule 3.220, Fla.R.Cri.P. allows an accused to depose any person who may have information relevant to the offense charged. This is true of any witness, whether he is an "ordinary" State witness or a D.E.A. agent who is acting as a State witness in a State prosecution. Further, the trial court did not depart from the essential requirements of law in excluding evidence as a sanction against the State. The exclusion of the witnesses was a proper sanction based upon the facts herein.

The trial court's Order did not violate the Supremacy Clause, and follows the 10th Amendment to the United States Constitution as well as the Doctrine of Comity. The Doctrine of Comity makes it clear that the federal government should not interfere in a State criminal proceeding. At bar, the D.E.A. agents were not

required to violate the federal regulations. They were not held in contempt of court by the trial court, and were not forced to give depositions. They were only required to submit to deposition in the event that the State wished them to testify at trial.

Finally, the prosecution of ALLEN TASCARELLA is moot as the trial court entered an Order of Discharge which was not appealed by the State. Accordingly, the proceedings against ALLEN TASCARELLA cannot go forward.

ARGUMENT I

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW NOR DID IT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE AS A SANCTION AGAINST THE STATE UNDER RULE 3.220(j), FLORIDA RULES OF CRIMINAL PROCEDURE WHERE GOVERNMENT AGENTS DISREGARDED A COURT ORDER.

The Petitioner, ALLEN TASCARELLA, submits that the certified question, as above modified must be answered in the negative. The trial court properly exercised its discretion in sanctioning the State pursuant to Rule 3.220(j), Florida Rules of Criminal Procedure. The 4th District Court of Appeal properly entered its order denying the state's petition for writ certiorari based upon the finding that:

> The trial court, after a hearing, found that the defendants would be prejudiced if they were forced to confront these witnesses without pretrial discovery. The court recognized that contempt was not an alternative under the circumstances and imposed the exclusion sanction under the authority of Rule 3.220(j) of the Florida Rules of Criminal Procedure. We conclude that the petitioners have failed to demonstrate a departure from the essential requirements of law and, therefore, deny the petition.

Contrary to the Petitioner's assertion, the Honorable Russell E. Seay, Jr. did not depart for the essential requirements of law in imposing sanctions based upon flagrant violations of Rule 3.220, Fla.R.Cri.P. The sanctions imposed were appropriate under the circumstances, and the court's imposition of the sanctions did not

violate any "clearly established law".

A) RULE 3.220, FLA.R.CRI.P. ALLOWS AN ACCUSED TO DEPOSE ANY PERSON WHO MAY HAVE INFORMATION RELEVANT TO THE OFFENSE CHARGED.

Rule 3.220, Fla.R.Cri.P. allows a Defendant to "at any time" take the deposition "of any person who may have information relevant to the offense charged." See Rule 3.220(h) 1, Fla.R.Cri.P. Rule 3.220(d) states that:

> "At any time after the filing of the indictment or information the Defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged."

Accordingly, the Respondent fully complied with the Florida Rules of Criminal Procedure by scheduling the deposition of persons who had information relevant to the charged offense. Service of process was effectuated properly. Reasonable notice was given. The Supreme Court of Florida has recently reaffirmed the necessary role that depositions play in the criminal justice system by insuring fairness and equal administration of justice. See In Re: Amendment to the Fla.R.Cri.P. 3.220 (discovery) 550 So.2d 1097 (Fla. 1988). The Supreme Court of Florida considered extensive evidence regarding the role of depositions and stated:

> Indeed, the records and transcripts lead to a single inevitable conclusion. Discovery depositions are a necessary and valuable part of a criminal justice system, and they are clearly worth the risk of some minor abuse." Id. at 241.

In its Initial Brief, the State argues that Law Enforcement Officers often cite reasons for justifying the limiting of depositions "at the whim of the defense." (State's Initial Brief p. 15) The State's argument is imaginary. Since Florida does allow depositions to be taken of all witnesses when they may have information relevant to the issues, and since the Prosecution in discovery listed said witnesses, it is axiomatic that the defense have the opportunity to depose the witnesses. The Federal witnesses are witnesses to a state crime, and they must abide by State rules if the State is to use their testimony. At bar, all of the crucial witnesses were members of D.E.A., and to force the defense to go forward without allowing full use of Rule 3.220 would run afoul of the due process cause of the United States Constitution, as set forth in the 5th Amendment and made applicable to the State via the 14th Amendment. The State speculates that discovery should be "limited to the report already given defense counsel." The record is devoid of any proof to support the State's bold assertion that the officers' oral deposition would not provide more insight into the case. Even if comprehensive reports existed or had been turned over to the defense, the defense would still be allowed to conduct depositions pursuant to Rule 3.220.

In the case at bar, the Respondents fully and completely complied with the requirements of Rule 3.220 of the Fla.R.Cri.P. (A. 3). It is clear that in the situation herein the Fla.R.Cri.P. control the State criminal discovery process. The witness after

being subpoenaed initially, had the opportunity to move to quash the subpoena. This was not done. The witness could, in accordance with Rule 3.220(d), "for good cause shown, extend or shorten the time" of the deposition. This also was not done. Thereafter, the Motion to Compel was granted. In so granting the Motion, the trial court stated:

> "This is State court. This is the Seventeenth Judicial Circuit, State of Florida, and these Defendants shouldn't have to be in any double standard. They shouldn't have to be in any different position, when they are charged with a serious crime like this, than any other Defendant, if they cannot depose a witness. And that just isn't right. They shouldn't be in any different position than any Defendant in the State of Florida. They have a right to depose the witnesses, if the State is going to use those witnesses. And if they cannot be deposed, they you can't use them." (EX 2, pg. 22)

Additionally, the trial court stated:

> "I don't care who they work for. We have all kinds of witnesses. They can even have the governor subpoenaed. It doesn't matter who they work for. If it is a question of national security, you [the Assistant United States Attorney] can be there and object to certain questions. Other than that, they have to give depositions, otherwise, the State doesn't use those witnesses...".
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> * * *
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> "Let's get it resolved as to how we are going to run our State court. Those rules and regulations have nothing to do with the State court. That is my finding right there. And if there is a witness involved and the State is going to call a witness to testify against these Defendants, well, then, he has to give a deposition like every other witness in a State court." (EX. 2, pg.19, 20)

Recently, in The Miami Herald Publishing Co. v. Morejon, ___ So.2d ___ (Fla. May 18, 1990) [15 FLW 303] this Court dealt with an issue analogous to that at bar. In The Miami Herald Publishing Co. case the court dealt with whether a news journalist who had a qualified privilege under the 1st Amendment to the United States Constitution could refuse to divulge information learned as a result of being an eye witness to a relevant event in criminal case, - i.e., the police arrest and search of the defendant - when the journalist witnesses such an event in connection with a news gathering mission. This Court held that

> "There is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eye witness observations of a relevant event in a subsequent court proceeding. The fact that the reporter in this case witnessed the event while on a news gathering mission does not alter our decision." Id. at 304

As the United States Supreme Court aptly stated in United States v. Nixon, 418 U.S. 683 (1974)

> "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created not expansively construed, for they are in derogation of the search for truth." Id. at 710.

While the D.E.A. agents in question are federal employees, they are nevertheless witnesses to an alleged violation of State law. As they are witnesses, they must be required to testify. This is especially so at bar where the trial court lacked any coercive authority over the witnesses. The court could not hold the witnesses in contempt of court. The court had no alternative

but to impose the sanction set forth in the trial court's Order. The only other alternative would have been dismissal of the case, which even the Prosecutor contemplated was an appropriate remedy under the circumstances. (EX. 1 pg. 14)

Based upon the trial court's finding of fact that the Respondents had fully complied with the applicable Florida Rules of Criminal Procedure the trial court properly held that violations of the Rules of Criminal Procedure had occurred, and that violations of the trial court's Orders had occurred, thus the trial court was permitted to impose sanctions in this matter.

B) THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW.

In its Petition for Writ of Common Law Certiorari, the State mistakenly relied upon United States v. Blizzard, and United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) as setting forth the "essential requirements of law" and for its argument that the trial court departed therefrom in excluding evidence as a sanction against the State.

The Petitioner relied upon the case of United States ex rel. Touhy v. Ragen, supra, for the proposition that the Code of Federal Regulations authorized a Department of Justice employee to refuse to provide information based upon information learned in the course of the individual's duties. In actuality, Touhy is clearly distinguishable from the situation herein. In Touhy, a federal prosecution, the court stated that:

> "The validity of the superior's action is an issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers. Nor are we concerned with the effect of a refusal to produce in a prosecution by the United States or with the right of a custodian of government papers to refuse to produce them on the ground that they are State secrets or that they would disclose the names of informants." Id. at 467, 468

The Supreme Court additionally stated:

> "The constitutionality of the Attorney General's exercise of the determinative power as to whether or on what conditions or subject to what disadvantages to the government he may refuse to produce government papers under his charge must await a factual setting that requires the ruling." Id. at 469

It is indisputable that a subordinate official, such as in Touhy, relying on a validly promulgated regulation authorizing the withholding of testimony as real evidence may not under Touhy be held in contempt for failure to comply with a subpoena demanding that testimony or evidence. Boron Oil Company v. Downie, 873 F2d 67, 69 (4th Cir. 1989); Swett v. Shenk, 792 F2d 1445, 1449, 1452 (9th Cir. 1986). As stated in Boron Oil, the "policy behind such regulations is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental intrusion in controversial matters to official business." Id. at 70.

The Order entered the trial court did not require testimony in violation of the federal regulations. It did not hold the federal witness in contempt. It involved federal employees in a

case in which the Federal Government initiated and directly participated in an official investigation.

In light of the fact that the Honorable Russell E. Seay, Jr. could neither hold the federal agents in contempt of court nor require them to testify, the sanction of excluding their testimony was proper and clearly contemplated by Touhy.

The Petitioner asserts that the trial court's actions violated the holding set forth in United States v. Bizzard, 674 F2d 1382 (11th Cir. 1982). In Bizzard, the Defendant in a federal prosecution failed to comply with federal rules to subpoena a witness, and therefore the subpoena was quashed. The Petitioner failed to cite any authority for the proposition that trial court's Order based upon the factual scenario presented herein violated a "clearly established principle of law". The case sub judice is clearly distinguishable from that in Bizzard, supra, in that the case herein involves a State case, in State court, involving a State issued subpoena pursuant to Rule 3.220, Fla.R.Cri.P. Thus, the Petitioner has failed to assert any statute or court rule which supercedes the Fla.R.Cri.P. in the prosecution of criminal cases.

C) THE EXCLUSION OF THE WITNESSES WAS A PROPER SANCTION BASED UPON THE FACTS HEREIN.

The exclusion of the witnesses as a result of their failure to comply with Rule 3.220, Fla.R.Cri.P., as well as the witnesses' failure to abide by the trial court's oral and written rulings was

appropriate under the circumstances, and was permissible pursuant to Rule 3.220(j) 1, Fla.R.Cri.P. Said rule states that:

> "If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order such party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances."

In the case at bar, the trial court considered less severe alternatives than dismissing the case. The trial court acknowledged that it has broad discretion in determining sanctions pursuant to discovery rules. The court indicated that the Respondents had diligently sought to investigate the allegations against them and had complied fully and completely with the requirements of Rule 3.220 of the Fla.R.Cri.P. The trial court found, factually, that the Defendants have been, and will continue to be prejudiced by the action of the United States Attorney's Office. As prejudice was established, the court's sanction of excluding the witnesses, was far less harsh than the ultimate sanction of dismissal.

Although dismissal of an Information is a permissible sanction pursuant to the Rules of Procedure, ordinarily a trial court has no authority to order the State to produce a witness for a defense discovery deposition. In most instances, the failure of the State

to comply with such an order affords no basis for excluding the witness' testimony at trial. See State v. Jackson, 436 So.2d 985, 986 (Fla. 3rd DCA 1983); State v. Adderly, 411 So.2d 981 (Fla. 3rd DCA 1982); Knight v. State, 373 So.2d 52, 52 (Fla. 4th DCA 1979), cert. denied 385 So.2d 761 (Fla. 1980). However, while in State v. Filipowich, 528 So.2d 511 (Fla. 3rd DCA 1988) the Third District Court of Appeal held that the penalty of exclusion of trial testimony of a State witness was too drastic a remedy for technical discovery violations of the State, the court left open the exclusion of trial testimony of State witnesses when flagrant discovery violations occurred. The court indicated that "the witness perhaps may be subject to exclusion for non-compliance with such court order." Id. at 512 However, in Filipowich the State substantially complied with the court order on witness production, and the Defendant was not prejudiced by the short delay in producing the witness. In the case at bar, the trial court made a factual finding that the Defendant was prejudiced by the violation of the discovery rule in violation of the court's order, and the witnesses were never produced.

As a result of the D.E.A.'s involvement in this matter, the Respondent is being treated differently than all other defendant's charged with State offenses in the State of Florida. Such a procedure violates the Defendant's right to due process of law as required by the Fifth and Fourteenth Amendments to the United States Constitution, as well as applicable provisions of the Florida Constitution, and denies the Defendant his right to

fundamental fairness. Further, D.E.A. is presently engaged in the intentional activity of turning over "small" narcotics cases to the State authorities for prosecution. (EX 1, pg. 6 - 7, EX 2, pg. 7, 9) It is fundamentally unfair for the Federal agency to circumvent a State Criminal Defendant's rights to discovery via the mechanism used herein. The agency's position that the agents shall not testify pursuant to a State issued subpoena constitutes bad faith, and the harsh sanction of dismissal would have been warranted in the case at bar. However, the trial court chose a less restrictive alternative to dismissal by excluding the uncooperative agents' testimony.

As the State Rules of Criminal Procedure expressly provide for the taking of pre-trial depositions, the right of the accused to depose perspective witnesses for trial is governed by the Fla. Rules of Criminal Procedure, and not by the Code of Federal Regulations as submitted by the Petitioner. See Accused's Right to Depose Perspective Witnesses Before Trial in State Court, 2 ALR 4th 704 (1980).

ARGUMENT II

THE TRIAL COURT'S ORDER DID NOT VIOLATE THE SUPREMACY CLAUSE AND FOLLOWS THE 10TH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS THE DOCTRINE OF COMITY.

The State alleges that the trial court's Order excluding witnesses until they "give a deposition" abused its discretion and that under the Supremacy Clause, Rule 3.220 of the Fla.R.Cri.P was preempted by 28 CFR Sections 16.21 et. seq. The State's argument is without merit, as the trial court's Order complies with both State rules and Federal Regulations, and did not create a physical impossibility for agents.

The State of Florida alleges conflict preemption under the language of Hillsboro County v. Automated Medical Laboratories, 471 U.S. 707, 105 S.Ct. 2371 (1985). In Hillsboro County, the court held that State law was nullified to the extent that it actually conflicts with federal law. The court further stated that

> "Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Under either prone of the Hillsboro County test it is clear that the Order affirmed by the 4th District in no way created an "actual conflict" with federal law because no order compelled the federal agents to testify in the State proceeding, and no State Court Order ever held the federal agents in contempt.

The Supremacy Clause of the United States Constitution "has relevance only to state interference with federal law." See United States v. Kublock, 832 F2d 649, 651 (1st Cir. 1987). In the case sub judice, the conflict between State and federal law must be irreconcilable. See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146, 83 S.Ct. 1210, 1219 (1963). In Florida Lime and Avacado Growers it was stated

> "The settled mandate governing this inquiry [whether State regulation must yield to federal regulation], in deference to the fact that a State regulation of this kind is an exercise of the 'historic police powers of the states,' is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress.'" Id.at 146.

Thus, a presumption exists in favor of the validity of State law and the courts are not to seek out conflicts between State and federal regulation where none clearly exists. The Order affirmed by the Fourth District clearly satisfies the first prong of the Hillsboro County test, in that the officers were not asked by the court below to comply with any State requirement that conflicted with their federal obligations. The court did not have the power to hold the federal agents in contempt, nor could the court require the agents to testify. Even the Prosecutor acknowledged "this court does not have jurisdiction to compel any federal agent to do what the defense attorneys want." The court stated "I'm not compelling anybody to do anything except the State." (EX 2, pg. 22)

Under the second prong of the Hillsboro County decision, the enforcement of State law must stand as a obstacle to the federal purpose. It is not only clear that the Honorable Russell E. Seay, Jr.'s Order was not antagonistic to any avowed federal end, but the State of Florida's authority strongly suggests itself no impropriety because of the sanction imposed by the State.

The doctrine of comity sets forth that the United States of America is made up of a union of separate state governments, and makes it clear that the federal government should not interfere in State criminal proceedings. Specifically, in a related context the United States Supreme Court has stated:

> "The Court [has] ... made clear that in view of the fundamental policy against federal interference with State criminal prosecutions, even irreparable injury is insufficient unless it is "great and immediate". See Younger v. Harris, 401 U.S. 37, 43 - 46, 91 S.Ct. 746, 950-951 (1971).

Based upon Younger v. Harris, supra, the federal court should not interfere with the State prosection herein.

The Tenth Amendment to the United States Constitution provides:

> The power is not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.

The State of Florida has prescribed its discovery rules. Florida has extended the Florida Discovery Rules to provide greater

rights than those basis minimum rights afforded by the Federal Constitution or federal law. It is unquestionable that under the federal scheme, a state is always free under its Constitution and laws to extend to litigants against itself in its courts greater rights than those basic minimums afforded by the Federal Constitution or federal laws. See California v. Ramos, 463 U.S. 992, 1014, 103 S.Ct. 3446, 3460 (1983).

Thus, based upon the doctrine of comity as well as the Tenth Amendment to the United States Constitution, the State of Florida, as a sovereign government controls its criminal discovery procedures pursuant to Rule 3.220, Fla.R.Cri.P. The federal government's power to interfere with those otherwise constitutional procedures is greatly limited. In the case at bar, the federal government could not refuse to honor validly issued and served State subpoenas for deposition if they intended on testifying at trial. As a result thereof, the court properly imposed sanctions pursuant to Rule 3.220(j), Fla.R.Cri.P.

ARGUMENT III

THE PROSECUTION OF ALLEN TASCARELLA IS MOOT AS THE TRIAL COURT ENTERED AN ORDER OF DISCHARGE WHICH HAS NOT BEEN APPEALED BY THE STATE.

The Respondent, ALLEN TASCARELLA, has previously sought dismissal of the instant proceeding based upon mootness. On May 16, 1990 the Fourth District Court of Appeal entered an Order directing the Respondents, ALLEN TASCARELLA and BARBARA A. TASCARELLA, to "be discharged forthwith." (A. 58) That Order was carried out on May 18, 1990. The Order of Discharge was not appealed by the State, and thus cannot now be vacated or overturned. Rule 9.140(c)(e) of the Fla.R.App.P. specifies that the State of Florida may appeal orders discharging a defendant. Based upon the fact that the Respondents had been discharged by the trial court and the Order discharging the TASCARELLAS has not been appealed within the requisite time period, the speedy trial issue and the prosecution of the Respondents is now moot. The law is well settled that mooted appellate proceedings are subject to dismissal. Sarasota-Fruitville Drainage District v. Certain Lands, etc., 80 SO.2d 335, 336 (Fla. 1955); Dehoff v. Imeson, 15 So.2d 258, 259 (Fla. 1942). In Dehoff, the Florida Supreme Court stated that an appeal should be dismissed "where no practical purpose could be attained by review of the questions therein contained." Id. at 259.

The State of Florida has already sought review of the Writ of Prohibition. In State of Florida v. Allen Tascarella et al,

Supreme Court Case No: 76,020, the State filed a Writ of Prohibition and/or Motion to Vacate the Order of the District Court of Appeal Granting the Writ of Prohibition. That petition was denied on May 24, 1990. (A. 59)

Based upon the court's lack of jurisdiction to try the Respondent, ALLEN TASCARELLA, it is respectfully submitted that this matter is now moot with regards to ALLEN TASCARELLA.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authority, the Respondent, ALLEN TASCARELLA, respectfully requests this Honorable Court enter an Order affirming the District Court's denial of the State of Florida's Petition for Writ of Common Law Certiorari. Alternatively, Respondent, ALLEN TASCARELLA, requests that this Honorable Court enter an Order dismissing this matter based upon mootness.

Respectfully submitted,

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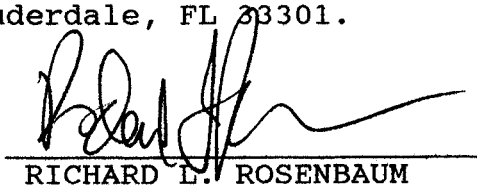
(305) 522-7000
FLA. BAR NO: 394688

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this **5th** day of AUGUST, 1990, to: OFFICE OF THE ATTORNEY GENERAL, 111 Georgia Avenue, #204, West Palm Bch., FL 33401; HOWARD GREITZER, ESQ., 600 NE 3rd Avenue, Ft. Lauderdale, FL 33304; OFFICE OF THE STATE ATTORNEY, #640 Broward County Courthouse, 201 SE 6th Street, Ft. Lauderdale, FL 33301; JUDGE RUSSELL E. SEAY, JR., Broward County Courthouse, 201 SE 6th Street, Ft. Lauderdale, FL 33301; OFFICE OF THE U.S. ATTORNEY, 155 S. Miami Avenue, #700, Miami, FL; GENE REIBMAN, ESQ., 600 NE 3rd Avenue, Ft. Lauderdale, FL 33304 and MICHAEL ENTIN, ESQ., One East Broward Blvd., Penthouse, Ft. Lauderdale, FL 33301.



RICHARD L. ROSENBAUM