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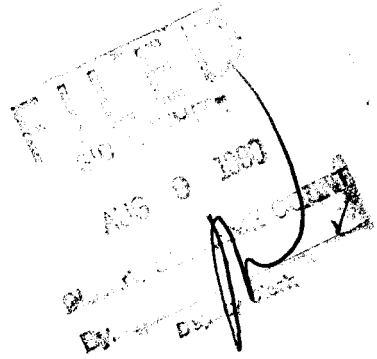
IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,551



STATE OF FLORIDA,

Petitioner,

vs.

ALLEN TASCARELLA, and
BARBARA AMBS TASCARELLA

Respondents.
_____/

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT BARBARA AMBS TASCARELLA'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, BARBARA AMBS TASCARELLA adopts the statement of facts set forth in the Initial Brief On The Merits of the State of Florida except for the following areas of disagreement.[1]

1. This prosecution for trafficking in cocaine and conspiracy to traffic cocaine was the result of an investigation conducted by the Drug Enforcement Agency of the United States Department of Justice (hereinafter "DEA"). Apparently, because of a federal policy against the prosecution of smaller drug cases, the federal agents passed their information to State authorities who then instituted this prosecution. (A. 1, p. 6-7, A. 2, p. 7,9).

2. Apart from whatever speedy trial requirements that existed in the federal jurisdiction, there were no jurisdictional impediments to the prosecution of Respondents in federal court for crimes arising from the facts alleged in the Circuit Court. In fact, a federal prosecution alleging the same criminal activities forming the basis of the prosecution in the Circuit Court was instituted by the Federal Government in the United States District Court for the Southern District of Florida shortly after the Circuit Judge's ruling.

3. The State of Florida also subpoenaed the federal witnesses for deposition and the federal witnesses refused to

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[1] All factual references shall be cited to the material contained in the Appendix submitted to this court by the State of Florida and shall be referenced by the designation A. followed by the exhibit number and the page thereof.

appear for deposition. (A. 2, p. 11-13).

4. Respondents, following State law, sought on several occasions to take the depositions of the federal agents. Respondents' counsel did not "[choose] to ignore the federal regulations" as alleged by the State. (State's Initial Brief at 3). Counsel articulated a very real concern that the advance disclosure required by the federal regulations would prejudice their defense.

> **MR. GREITZER:** ***
>
> What they are basically asking us to do is divulge our theory of defense as to what questions we're 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.... (A. 2, p. 16).

5. When counsel for Respondent, ALLEN TASCARELLA, advised the court that DEA agents had given depositions in other cases without compliance with the federal regulations at issue, the United States Attorney told the court: "[t]he DEA does show up because they want to show up." (A. 2, p. 15).

6. The Circuit Judge was well aware that it could not issue a coercive order directing the agents to appear for deposition. The court did not, however, view itself as being without power to control its own process merely because the witnesses happened to be federal employees. The court instead wisely vindicated the powers secured to it under the Constitution by excluding the federal witnesses. The Circuit Judge stated: "I'm not compelling anyone to do anything except the State." (A. 2, p. 21).

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The written Order entered by the court stated:

> The Defendants 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 Defendants' ore tenus motion to exclude [the named federal agents] be and the same is hereby granted. (A. 4, p. 3).

7. Assistant State Attorney Malavenda advised the Circuit Judge at the hearing of May 19, 1989, that the court had authority to dismiss the prosecution if the federal witnesses did not appear for deposition. Mr. Malavenda stated:

> The case law is clear that the State only has to give them names of witnesses. We don't have to make them available. I can't control witnesses. As you can see today, I can't control them. Now, if they fail to appear, pursuant to this Court's order today, **then the Court has other things it can do, like dismiss the charges.** (A. 1, p.14) (Emphasis added).

SUMMARY OF ARGUMENT

In this case the State asks this court to rule that the Order of the Circuit Court excluding the federal witnesses created an irreducable conflict with the federal regulations and is invalid under the Supremacy Clause of the Constitution of the United

States.[2]

Because the federal regulations are not violated by the lower court's order and so long as no coercive order is directed at the federal agents, the Supremacy Clause is not implicated by the order below.

The Tenth Amendment to the Constitution of the United States reserves to Florida the power to prescribe the procedures of its criminal courts free of federal interference. The State of Florida need not as suggested by the Attorney General recast its deposition rules to incorporate in them the federal regulations under which a federal official, not the Florida courts, would have the final word as to what is or is not appropriate on a myriad of issues such as the relevancy of the testimony sought; the propriety of disclosure under the rules of procedure governing the case; the propriety of disclosure under any law of privilege; whether disclosure would violate a statute or rule of procedure; whether disclosure would violate a specific regulation; whether disclosure would reveal classified information; whether disclosure would reveal a confidential source or informant; whether disclosure would reveal investigatory records compiled for law enforcement purposes; whether disclosure would interfere with enforcement proceedings or

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[2] The Supremacy Clause, Article VI, cl. 2, provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land ...and the Judges in any State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

impair the "effectiveness" of investigative techniques and procedures; or whether disclosure would improperly reveal trade secrets without the owner's consent.

A trial court has inherent power to control the conduct of proceedings and the responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten the fairness of his trial. A trial judge has authority to protect a defendant from the prejudicial conduct of a witness. The Circuit Court expressly found prejudice and properly exercised its supervisory power in this regard.

The State, by advising the Circuit Judge that he could dismiss the case if the federal agents did not give depositions and by issuing its own subpoenas for the federal witnesses without first complying with the federal regulations, waived any objection to Respondents' failure to comply with those regulations.

ARGUMENT

I.

THE ORDER DID NOT VIOLATE THE SUPREMACY CLAUSE BECAUSE IT DID NOT REQUIRE THE FEDERAL WITNESSES TO TESTIFY IN VIOLATION OF THE FEDERAL REGULATIONS NOR WAS IT A COERCIVE ORDER SOLELY DIRECTED TO THE FEDERAL AGENTS. THE ORDER OF EXCLUSION WAS AN ORDER DIRECTED TO THE STATE OF FLORIDA. THE STATE OF FLORIDA MAY UNDER THE TENTH AMENDMENT FASHION RULES OF PROCEDURE FOR CRIMINAL CASES FREE FROM FEDERAL INTERFERENCE AND THESE RULES MAY GRANT TO CRIMINAL LITIGANTS RIGHTS **GREATER** IN SCOPE THAN RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION OR PERMITTED BY FEDERAL LAW. APPLICATION OF THE FEDERAL REGULATIONS TO STATE CRIMINAL CASES ON A BLANKET BASIS WOULD SURRENDER CONTROL OF THE DISCOVERY PROCESS TO FEDERAL OFFICIALS NOT SUBJECT TO CORRECTIVE ORDERS OF THE FLORIDA COURTS, EXCEPT ORDERS IMPOSING SANCTIONS DIRECTLY ON THE STATE.

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A. THE FEDERAL REQUIREMENTS.

Under 28 CFR 16.22 (c), if oral testimony is sought in any case or matter in which the United States is not a party, the party seeking that testimony must, by affidavit, or if that is not feasible, by a statement by the party seeking the testimony, or by his attorney, set forth a summary of the testimony sought and its relevance to the proceeding. This information must be furnished to the office of the United States Attorney.

Pursuant to 28 CFR 16.23 (a), the responsible Department of Justice attorney is authorized to "furnish to any person ... or a court ... such testimony and relevant **unclassified** material...**as such attorney shall deem necessary or desirable....**" (Emphasis added). The Department of Justice attorney making the decision to permit or withhold evidence "should" consider the following:

> 1. Whether such disclosure is appropriate under the Rules of Procedure governing the case or matter in which the demand arose, and
> 2. Whether the disclosure is appropriate under the relevant substantive law concerning the privilege. 28 CFR 16.26(a).

Under 28 CFR 16.23(a), disclosure is **not authorized** without the express prior approval of the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (EOUST), or their designees, if any one of the following factors, listed in 28 CFR 16.26(b), exist:

> (1) Disclosure would violate a statute...or a rule of procedure...;
> (2) Disclosure would violate a specific

regulation...;

(3) Disclosure would reveal classified information...;

(4) Disclosure would reveal a confidential source or informant unless the investigative agency or informant have no objection;

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired;

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

If considerations of items 1 through 6 above are not present, the official may authorize disclosure "unless in that person's judgment ...disclosure is unwarranted...." 28 CFR 16.26(c). Under 28 CFR 16.28, if a "court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with sections 16.24 and 16.25, the [person subpoenaed] shall...respectfully decline to comply with the demand."

As will be fully demonstrated in this brief, neither the State nor the federal courts have authority to overrule the judgment of the federal official to withhold evidence.

B. THE FLORIDA DEPOSITION RULES.

Florida Rule of Criminal Procedure 3.220 imposes no such requirements on a party seeking to take the deposition of a material witness. Under Fla. R. Crim. P. 3.220 (h)(1), a Defendant may, "at any time" take the deposition "of any person who may have information relevant to the offense charged".

This court has recently reviewed the State's deposition rules and found them to serve the salutary goal of "insuring fairness":

> From all the evidence and testimony taken during proceedings, one factor is clear: virtually all parties at oral argument recognized that depositions in criminal cases play a necessary role in that criminal justice system by insuring fairness and equal administration of justice. Moreover, although there undeniably some abuses of the deposition process, such abuses are not as widespread as originally feared. 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. **In re: Amendment to Florida Rule of Criminal Procedure,** 3.220 (Discovery) 550 So.2d 1097, 1098 (Fla. 1989).

C. THE SUPREMACY CLAUSE IS NOT VIOLATED BY THE ORDER DIRECTED TO THE STATE OF FLORIDA THAT THE FEDERAL OFFICERS BE EXCLUDED.

As framed by the argument set forth in the Initial Brief of the State of Florida, the essential question to be resolved this case is whether in a criminal prosecution referred to the State by federal agents, the State of Florida must recast its deposition rules to accomodate Department of Justice witnesses by incorporating in them the standards and procedures of 28 CFR 16.21 to 16.28. The Circuit Judge correctly believed that the federal witnesses were operating beyond his jurisdiction and, as they did not wish to voluntarily comply with the State's discovery requirements for criminal cases, the court excluded the federal witnesses.

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Respondents start with the power reserved to the States to control the procedures employed in its criminal courts. The Tenth Amendment to the United States Constitution provides:

> The powers 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.

Florida as sovereign may in the exercise of its sovereign power prescribe rules of procedure comporting with Constitutional minimums free from the interference of the federal government. Nothing in the Constitution "delegates" to the federal government the power to intrude on State court procedures comporting with the Constitution and the exercise of the power to formulate procedural rules is most definitely **not** a power "prohibited" by the Constitution to the States. As Mr. Justice Chase stated long ago:

> It is a root proposition that power not given by the States to the federal government remains with the States. It appears to me a self evident proposition that the several State legislatures retain all powers of legislation, delegated to them by the State Constitutions, not expressly taken away by the Constitution of the United States. The establishing courts of justice, the appointment of judges, and **the making of regulations for the administration of justice,** within each state, according to its laws on all subjects not entrusted to the federal government **[is] the particular and exclusive province and duty of the State legislatures.** **Calder v. Bull**, 3 U.S. 388, 3 Dall. 388, 1 L.Ed. 648, 649 (1798). (Emphasis added).

Almost two centuries later, in **National League of Cities v. Usery**, 426 U.S. 833, 845, 96 S.Ct. 2465, 2471, 49 L.Ed.2d 245 (1976) the court struck the same theme:

> ...there are attributes of sovereignty

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attaching to every state government which may not be impaired by the Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matters but because the Constitution prohibits it from exercising authority in that matter.

See also, **Brown v. Gunter,** 562 F.2d 122, 124, n.6 (1st Cir. 1977).

In a related context the Supreme Court has stated:

> "Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases, free from interference by federal courts.
>
> * * *
>
> The underlying reason...the notion of 'comity', that is, a proper recognition for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways....The concept does not mean blind deference to 'States Rights' any more than it means centralization of control of every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States.
>
> * * *
>
> ...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'." **Younger v. Harris,** 401 U.S. 37, 43-46, 91 S.Ct. 746, 750-751, 27 L.Ed.2d 669 (1971).

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Younger was very recently applied in the case of **Kelly v. Robinson**, ___ U.S. _____, 107 S.Ct. 353, 360, 93 L.Ed.2d 216 (1986). Robinson was in a state criminal prosecution ordered as a condition of probation to pay restitution to his victim. Robinson subsequently obtained from a Bankruptcy Court a Chapter 7 order discharging the restitution obligation. The United States Supreme Court reversed the order of discharge holding that "the right to formulate and enforce penal sanctions is an important aspect of the Sovereignty retained by the States."

> This Court has emphasized repeatedly '"the fundamental policy against federal interference with state criminal prosecutions.'" **Younger v. Harris**, 401 U.S.37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1971).
>
> ***
>
> ...federal adjudication of matters already at issue in state criminal proceedings can be an '"unwarranted and unseemly disruption of the State's own adjudicative process.'" **Kelly v. Robinson, supra.**, ___ U.S. at _____, 107 S.Ct. at 360.

Given this "fundamental" policy against federal "disruption" of the State criminal process, it is hardly likely that the Supremacy Clause reaches orders of State criminal courts directed to State prosecuting authorities prohibiting the State from employing federal witnesses who for reasons of federal law cannot comply, or who for other reasons will not comply, with liberal state discovery requirements having no federal analog. The State of Florida's argument is further undermined by the unquestioned proposition that under the federal scheme a State is

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always free under its Constitution and laws to extend to criminal defendants litigating in State courts greater rights than those basic minimums afforded by the federal Constitution or federal laws.

> While the federal Constitution traditionally shields enumerated and implied individual liberties from encroachment by state or federal government, the federal Court has long held that state constitutions may provide even greater protection. **In re T.W.**, 551 So. 2d 1186, 1191 (Fla. 1989).

See also, California v. Ramos, 463 U.S. 992, 1014, 103 S. Ct. 3446, 3460, 77 L.Ed.2d 1171 (1983); Brennan, **State Constitutions and the Protection of Individual Rights**, 90 Harv. L. Rev. 489, 491 (1977). One need look no further for proof of this proposition than the discovery provisions of the Florida Rules of Criminal Procedure at issue here. Florida permits a liberal measure of discovery in its criminal courts unknown in the federal criminal courts where disclosure is very much more restricted and depositions are not allowed.

The State of Florida argues for conflict pre-emption under the language **Hillsborough County v. Automated Medical Laboratories**, 471 U.S.707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985):

> ...state law is nullified **to the extent** that it **actually conflicts** with federal law. 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.'" (Emphasis added, citations omitted.)

Under either prong of the **Hillsborough County** test it is clear

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that the order affirmed by the District Court in no way creates an "actual conflict" with federal law.

The "...Supremacy Clause of the Constitution has relevance **only**[3] to **state**[4] **interference**[5] with federal law." **United States v. Kublock**, 832 F.2d 649, 651 (1st Cir., 1987)(panel opinion) aff'd. 832 F.2d 664 (1st Cir., 1987) (En banc).[6] For the State to prevail in this case the conflict between State and federal law must be "irreconcilable." **Florida Lime and Avocado Growers, Inc. v. Paul**, 373 U.S. 132, 146, 83 S.Ct. 1210, 1219, 10 L.Ed.2d 248 (1963).

> 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.'" **Florida Lime and Avocado Growers, Inc. v. Paul, supra.,** 373 U.S. at 146, 83 S.Ct. at 1219. (Citations

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[3] Emphasis added.

[4] Emphasis in original

[5] Emphasis added.

[6] **United States v. Kublock, supra.,** involved the application of a Massachusetts ethical rule declaring it unprofessional conduct for a prosecutor without prior judicial approval to subpoena an attorney to appear before a grand jury for the purpose of obtaining testimony about the attorney's client. **United States v. Kublock,** 639 F.Supp. 117 (D. Mass., 1986). The Plaintiffs, federal prosecutors, contended that the Supremacy Clause barred the application of the State ethical rule to them. The District Court held that a Supremacy Clause problem would arise only if the rule regulated the conduct of the federal prosecutors "in a manner that creates an **actual conflict** with some provision of federal law. **United States v. Kublock, supra.,** 639 F.Supp. at 126. (Emphasis added).

omitted, emphasis added).

Thus, a presumption exists in favor of the validity of state law and "courts are not to seek out conflicts between state and federal regulation where none **clearly** exist." **Pacific Legal Foundation v, State Energy Resources Conservation and Development Commission,** 659 F.2d 903, 919 (9th Cir., 1981) cert. denied 457 U.S. 1133. (Emphasis added). [7]

It is clear that the Order affirmed by the district court passes muster under the first prong of **Hillsborough County** test. The federal officers were not asked by the court below to comply with any State requirement that conflicted with any federal obligation. All parties and the Circuit Judge well understood that the court could neither hold the federal agents in contempt nor require them to testify. Assistant State Attorney Malaveda advised: "...this court does not have jurisdiction to compel any federal agent to do what the defense attorneys want...." The court, acutely aware of the limits of its authority, correctly held: "I'm not compelling anybody to do anything except the State". [8] Thus the Circuit Court imposed no

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[7] ... federal regulation ... should not be deemed preemptive of state regulatory power in the absence of persuasive reasons-either the nature of the regulated subject matter **permits no other conclusion, or that Congress has unmistakably so ordained.** **Florida Lime and Avocado Growers, Inc., v. Paul,supra.,** 373 U.S. at 142, 83 S.Ct. at 1217. (Emphasis added).

[8] The Circuit Judge stated:

This is a State Court. This is the Seventeenth Judicial Circuit, State of

obligation nor disability on the federal agents for doing what the federal regulations "authorized them to do", **Chicago and Northwest Transp. Co. v. Kalo Brick and Tile Co.**, 450 U.S. 311, 318, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258 (1981); **Fidelity Federal Savings and Loan Ass'n. v. de la Cuesta**, 458 U.S. 141, 155, 102 S.Ct. 3014, 3023, L.Ed.2d 664 (1982), nor did it authorize "conduct that the federal [regulations] forbids." **Michigan Canners and Freezers Ass'n. v. Agricultural Marketing and Bargaining Board**, 467 U.S. 461, 478, 104 S.Ct.2518, 2527, L.Ed.2d 399 (1984)

Under the second prong of **Hillsborough County**, the enforcement of state law must stand as an obstacle to the federal purpose. On this record it is plain Circuit Judge's order was not antagonistic to any avowed federal end.

There is no dispute that under **United States ex rel. Touhy v. Ragen**, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951) a federal department head, here the Attorney General of the United States, can under a validly promulgated regulation prohibit the giving of testimony or the production of evidence by his

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> Florida and these defendants shouldn't have to be in any double standard. They shouldn't have to be in any different position, when if 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 the right to depose the witness if the State is going to use those witnesses and if they cannot be deposed, they you can't use them. (A. 2, p. 22).

subordinates. **See also, United States v. Bizzard,** 674 F.2d 1382 (11th Cir., 1982), cert. denied 459 U.S. 973. It is equally indisputable that a subordinate official relying on a validly promulgated regulation authorizing the withholding of testimony or real evidence may not under **Touhy** be held in contempt of court for failure to comply with a subpoena demanding that testimony or evidence. **Boron Oil Co v. Downie,** 873 F.2d 67, 69 (4th Cir., 1989); **Swett v. Shenk,** 792 F.2d 1447, 1452 (9th Cir., 1986); **Giza v. Secretary of HEW,** 628 F.2d 748, 751-752 (1st Cir., 1980). It is finally without dispute that 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 involvement in controversial matters unrelated to official business." **Boron Oil Co v. Downie, supra.,** 873 F.2d at 70. As the order below neither 1) required testimony in violation of the regulation; nor, 2) held a federal employee in contempt; nor, 3) thrust federal employees into a case in which the Federal Government is not a party, it is almost self-proving that no Supremacy Clause violation occurred.

The State of Florida's suggestion that the court below was **required** to engraft the federal procedures on to the State deposition rule is undercut by the **Touhy** decision which expressly left open the question of whether the government can be "disadvantage[d]" in some fashion when it refuses to provide evidence.

> "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. **United States ex. rel Touhy vs. Ragen, supra.,** 340 U.S. at 469. (Emphasis added).

In this case, the "disadvantage[] to the government" was the striking of the federal witnesses, a result not prohibited by **Touhy.**

Third, complementary federal and State policies can exist side-by-side with no Supremacy Clause ramifications. For example, **Hillsborough County v. Automated Medical Laboratories, supra.,** involved the constitutionality under the Supremacy Clause of local regulation of plasmapheresis centers in Hillsborough County, Florida, which imposed standards more stringent than those promulgated by the FDA under the authority of a program embodying a national policy of "promoting uniformity and guaranteeing a continued supply of healthy [plasma] donors." 471 U.S.at 712, 105 S.Ct. at 2374. The court unanimously rejected the regulated center's argument that the County could not impose on it restrictions more burdensome than the federal requirements.

> ...merely because federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field. 471 U.S.at 717, 105 S.Ct. at 2377.

Similarly, in **Florida Lime and Avocado Growers, Inc. v. Paul, supra.,** 373 U.S. at 145, 83 S.Ct. at 1219, the court held that "minimum standards of picking, processing and transportation of agricultural commodities, however comprehensive **for those purposes**

that regulation may be, does not of itself import displacement of state control [over other aspects]." (Emphasis in original). These and legions of other cases really too numerous to cite prove that complementary State action is rarely displaced by a federal enactment. This is particularly true where, as here, the result would be the '"unwarranted and unseemly disruption of the State's own adjudicative process.'" **Kelly v. Robinson, supra.,** ___ U.S. at _____, 107 S.Ct. at 360 (1986).

The Order affirmed by the district court which keeps the federal agents **out** of a dispute to which the federal government is not a party compliments the articulated purposes of the federal regulations of "conserv[ing] governmental resources where the United States is not a party to a suit, and minimizing governmental involvement in controversial matters unrelated to official business." **Boron Oil Co v. Downie, supra.,** 873 F.2d at 70.

Last, is the issue of enforcabilty. The federal regulation commits to the enumerated federal officials discretion to determine what, if anything, the subject matter of a federal officer's testimony will be. The judgment of the federal official, no matter how unprincipled, unfair, erroneous or prejudicial is immune from correction by the Florida courts. **Touhy, Boron Oil Co v. Downie, supra., Swett v. Shenk, supra.,** and **Giza v. Secretary of HEW, supra.,** all sustained the refusals of federal officials to provide evidence to a **federal** court. The panels in **Boron, supra.,** 873 F.2d at 70 and **Swett, supra.,** 792 F.2d at 1452, both ruled that State courts have no jurisdiction to entertain enforcement proceedings,

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and in **Giza** the State litigant was simply told by the Court of Appeals to do without crucial federal evidence needed to sustain his position. The Assistant State Attorney correctly advised the Circuit Judge that "[e]ven if a federal judge ordered them to testify, the U.S. Attorney's Office is mandated by these regulations to tell the judge that, Your Honor, we respectfully decline to follow your order." (A. 2, p.22). The Circuit Judge was well aware of his inability to assert any measure of direct or indirect control over the federal witnesses and his concern about his judicial impotence is reflected in the language of his order in which he saw the "entry of an order pursuant to Rule 3.220(j)(1)" as his only means of exercising judicial control over a difficult situation.[9] Convinced by the Assistant State Attorney of his powerlesness, the Circuit Judge can hardly be criticized for opting to break off fray, exclude the witnesses, and attempt to bring the case to trial rather than get into a losing power struggle with the federal government.

It is clear from the foregoing that the court below was correct in its belief that it was not, as the State of Florida argues, **required** to enforce 28 CFR 16.21-16.29 by engrafting

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[9] The Circuit Judge's written order noted the court's lack of "authority to hold said witnesses in contempt of court and /or in any fashion to force said witnesses to appear...." (A. 4, p. 3). Assistant State Attorney Malevenda told the court at the hearing of May 19, 1989, that the court had the authority to dismiss the case if the federal witnesses did not appear for deposition. (A. 1. p.14). The State now cavalierly takes the Circuit Judge to task for adopting the lesser sanction of witness exclusion.

the cumbersome and restrictive notice and approval requirements of the federal regulation onto the liberal disclosure rules of Fla. R. Crim. P. 3.220. The Supremacy Clause argument advanced by the State of Florida is flawed in the extreme. Florida may by its deposition rule extend to a State criminal defendant rights greater than those provided by federal law. Florida's liberality is under the Tenth Amendment beyond federal control unless a clear and actual conflict with federal law is demonstrated. Because the State of Florida, as sovereign, controls its criminal discovery procedures, the Federal Government's power to interfere with those otherwise constitutional procedures is greatly circumscribed. The order furthered rather than frustrated the federal policy of "conserv[ing] governmental resources where the United States is not a party to a suit, and minimizing governmental involvement in controversial matters unrelated to official business." **Boron Oil Co v. Downie, supra.,** 873 F.2d at 70.

II

A TRIAL COURT HAS INHERENT POWER TO CONTROL THE CONDUCT OF PROCEEDINGS AND THE RESPONSIBILITY TO PROTECT A DEFENDANT IN A CRIMINAL PROSECUTION FROM INHERENTLY PREJUDICIAL INFLUENCES WHICH THREATEN THE FAIRNESS OF HIS TRIAL. A TRIAL JUDGE HAS AUTHORITY TO PROTECT A DEFENDANT FROM THE PREJUDICIAL CONDUCT OF A WITNESS. THE CIRCUIT COURT PROPERLY EXERCISED ITS POWER IN THIS REGARD.

The Order affirmed by the district court was in all respects an appropriate exercise of supervisory power as it was

clear that the federal witnesses were going to cooperate with neither the defense nor with the State. The federal agents' failure to honor the State Attorney's subpoena is sufficient to show that they were not going to cooperate with either side. Faced with the federal stonewalling and with the reality that its mandates could be ignored by the federal witnesses with impunity, the court below took appropriate action.

This court has stated in a widely cited opinion:

> "...we ... reaffirm the basic proposition that a court possesses the inherent power to control the conduct of the proceeding before it.... This power exists apart from any statute or specific constitutional provision and springs from the creation of the very court itself; it is essential to the existence and meaningful functioning of the judicial tribunal." **State ex rel. Gore Newspaper Co. v. Tyson**, 313 So. 2d 777, 781 (4th DCA 1975).

A trial court has the inherent power to control the conduct of proceedings and the "responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten the fairness of his trial...." **State ex rel. Miami Herald Publishing Co. v. McIntosh,** 340 So. 2d 904, 909 (Fla. 1976); Silver, **The Inherent Power of the Florida Courts**, 39 Univ. Miami L. R. 257, 286-288 (1985). A trial judge has authority to protect a defendant from the prejudicial conduct of a witness. **Kirk v. State**, 227 So. 2d 40, 42 (Fla. 4th DCA 1969).

III

THE STATE OF FLORIDA WAIVED ANY RIGHT IT MIGHT HAVE TO CONTEST THE ORDER OF EXCLUSION BY ARGUING TO THE CIRCUIT JUDGE THAT THE CASE COULD BE DISMISSED IF THE FEDERAL WITNESSES

DID NOT GIVE DEPOSITIONS AND BY ATTEMPTING TO SUBPOENA THE FEDERAL WITNESSES FOR DEPOSITION WITHOUT COMPLYING WITH THE FEDERAL REGULATIONS.

The State of Florida waived in the Trial Court the basis of its appeal to this court. The Assistant State Attorney told the Circuit Judge that he could dismiss the case if the federal agents did not give depositions. It is well settled that for error to be preserved, "the specific legal argument or ground to be argued on appeal or review must be part of that presentation [to the lower court] if it is to be considered preserved." **State v. Tillman**, 471 So.2d 32, 35 (Fla. 1985). The assertion to the trial court that the State could be sanctioned if the federal witnesses did not give depositions is hardly an objection preserving a question for appeal. Moreover, the State of Florida availed itself of the very procedure, directing deposition subpoenas to the federal agents without first complying with the federal regulations, that it now claims was erroneously employed by the defense. Reversible error cannot be the claimed because of the use of a procedure one "specifically approved" of, **Meeks v. State**, 339 So. 2d 186, 189 (Fla. 1976), or agreed to. **Scull v. State**, 533 So.2d 1137, 1141 (Fla. 1988) cert. denied _____ U.S. _____, 109 S.Ct. 1937. Respondents believe that this court would have little hesitancy in finding a waiver by a criminal defendant under these same circumstances and ask that the stringent waiver rules applied to criminal defendants be applied against the State.

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CONCLUSION

The court below did nothing more than vindicate the right of the sovereign State of Florida to control its own Constitutional processes in its own courts free from federal interference. The federal agents in this case could not instigate this prosecution and then ignore Florida's lawful discovery requirements without some disadvantage being imposed on the Government. This result was clearly contemplated by the Supreme Court in **United States of America ex rel Touhy v. Ragen, supra.**, and the court below acted well within the parameters of that decision.

The exclusion of the federal witnesses was within the inherent powers of the court to assure a fair and unprejudical process.

The State by advising the Circuit Judge that he could dismiss the case if the federal agents did not give depositions and by issuing its own subpoenas for the federal witnesses without first complying with the federal regulations waived its objection to Respondents' failure to comply with those regulations.

I HEREBY certify that a copy of the foregoing has been furnished by U.S. Mail this 6th day of August, 1990 to Georgina Jiminez-Orosa, Esq., Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401 and Richard L.

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