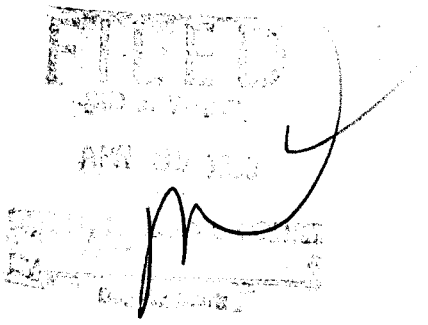
IN THE SUPREME COURT OF FLORIDA



CASE NO. 75,551

STATE OF FLORIDA,

Petitioner,

vs.

ALLEN TASCARELLA, and
BARBARA AMBS TASCARELLA

Respondents.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, State of Florida, was also the Petitioner in the Fourth District Court of Appeal and the prosecution in the trial court in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondents, Allen Tascarella and Barbara Ambs Tascarella, were the Respondents and Defendants, respectively in the lower courts. In this Brief, the parties will be referred to as they appear before this Honorable Court.

The abbreviation "Ex." followed by the appropriate exhibit number will be used for adequate reference to the exhibits attached as Petitioner's Appendix to this brief.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondents were arrested by Drug Enforcement Administration (DEA) Agents on February 8, 1989. On March 2, 1989, the Broward County State Attorney's Office filed an Information charging Respondents with one count of trafficking in cocaine and one count of conspiracy to traffic in cocaine. Respondents were arraigned on or about March 21, 1989.

In response to the Demand for Discovery, on March 22, 1989, the State Attorney's Office responded by filing the Response to Defendants' Demand for Discovery which listed eleven Drug Enforcement Administration Agents as "persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto." Pursuant to the prosecution's response, on April 4, 1989, Respondents filed a Motion to Compel production of all reports compiled by witnesses listed on the witness list inclusive of any and all witnesses employed by DEA. The State Attorney's Office complied on May 17, 1989, by filing an amended response to demand for discovery which included what is commonly referred to as the "DEA 6's" which are the reports prepared by the DEA agents as a result of their investigation and arrest of the Respondents.

As is commonly practiced in Florida under Fla. R. Crim. P. 3.220, Respondents, on April 24, 1989, issued Notices that on May 4, 1989, Respondents intended to take the depositions of each and all of the DEA Agents listed by the State in its response to the demand for discovery.

Prior to the date scheduled for depositions, Assistant U.S. Attorney, Carole Fernandez informed Respondents' trial counsel that pursuant to Federal Regulations adhered to by the U.S. Attorney's Office and DEA Agents as employees of the United States Department of Justice, the DEA Agents did not have authority to appear for the scheduled depositions, unless counsel complied with the requirements of 28 C.F.R. §16.21 et seq. (Ex. 1, pp. 3-4). Defense counsel was advised that the Federal Regulations require that before Justice Department employees may provide any testimony, counsel for the party who wishes to depose or call them must provide the United States Attorney with a summary of the testimony sought and its relevance to the proceeding; and the federal employee/witness must be provided with authorization from the proper Department of Justice official. (Ex. 1, pp. 4 - 7.)

Respondent's attorneys chose to ignore the federal regulations and purported to proceed with the depositions as scheduled -- although aware of the conflict of laws. (Ex. 1, pp. 8-9) When the DEA Agents failed to appear for the depositions, Respondents filed a Motion to Compel, and a hearing was held before the Honorable Russell E. Seay, Jr., on May 19, 1989 (Ex. 1). After listening to the arguments of counsel, the trial court, upon finding that DEA Agents do not deserve special treatment only because they are Federal agents (Ex. 1, p. 10), asked defense counsel to reset the depositions, and see what happens (Ex. 1, p. 13).

Depositions were rescheduled for June 20, June 22, 1989 (Ex. 2, p. 7), but pursuant to instructions from the U.S. Attorney's Office, the DEA Agents again did not appear for the depositions awaiting the Respondents' compliance with the requirements of 28 C.F.R. §16.21 et seq. Thereupon, on June 22, 1989, the U.S. Attorney's Office filed a Motion to Quash the Subpoenas (Ex. 3).

At a hearing held on July 11, 1989 (Ex. 2), the U.S. Motion to Quash Subpoenas was discussed (Ex. 2, p. 6), but without ruling on same, and after argument of counsel on Respondents' ore tenus motion to exclude the witnesses, the trial court excluded the DEA Agents from testifying at trial "unless and until they want to come in and give a deposition." (Ex. 2, p. 24). The reasoning of the court was a follows:

> THE COURT: Why should these defendants ... be handicapped because of a certain witness who works for the federal government? ... it's my position that they have to comply, just like any other witness in a State criminal case, ... I thought that last time we discussed this, I thought you were going to work out some kind of agreement with the Feds so they could give depositions concerning the facts of this case.
>
> * * *
>
> This is not a Federal Court and that rule is for federal cases. This is a State Court and these are witnesses. 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's a question of national security, you can be there and object to certain questions. Other than that, they have to give depositions, otherwise, the State doesn't use those witnesses.

* * *

> Those rules and regulations have nothing to do with the State court. That is my finding right there. And if there's 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.

* * *

> This is a State Court. This is the 17th 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're 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, then you can't use them.

* * *

> It is clear enough that all these agents -- and these aren't employees -- these guys are police officers just like any other police officer in the State of Florida. Just because they work for the federal government doesn't make them in any different position than any other witness. And if the Feds don't want them to give a deposition pursuant to the State laws and requirements and not because of having to go through any federal requirements, then, they're going to be excluded.

(Ex. 2, pp. 11-12, 18-20, 22-23). The court's written order is attached as Exhibit 4.

On August 11, 1989, The State of Florida filed a Petition for Writ of Certiorari with the Fourth District Court of Appeal. Certiorari was denied by opinion filed January 10, 1990 (Ex. 5).

However, the Fourth District certified the following questions 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 the Discretionary Jurisdiction of this Court pursuant to the certified question was timely filed February 6, 1990. This Court accepted jurisdiction and issued a Briefing Schedule February 19, 1990. This proceeding follows.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in excluding the DEA Agents as witnesses at the Respondents' trial unless they honored the subpoenas for deposition in contravention of the requirements of 28 C.F.R. §§ 16.21 et seq. Properly promulgated agency regulations implementing federal statutes have the force and effect of federal law which state courts are bound to follow. The action of a state court to compel an official of a federal agency to testify contrary to the agency's duly enacted regulations clearly thwarts the purpose and intended effect of the federal regulations. Such action plainly violates both the spirit and the letter of the Supremacy Clause.

The trial court had a perfect compromise that could be followed to avoid the conflict that arose herein. By compelling Respondents to comply with the requirements of the Federal Regulations, the court would have satisfied the purpose and effect of the State's Discovery Rule as well as the federal regulation. The ruling of the trial court below must be reversed.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING THE DEA AGENTS AS WITNESSES IN THE PROSECUTION AGAINST RESPONDENTS UNLESS AND UNTIL THEY "GIVE A DEPOSITION" WITHOUT FIRST COMPELLING RESPONDENTS TO COMPLY WITH THE REQUIREMENTS OF 28 C.F.R. §16.21 ET SEQ.; THE FEDERAL AGENTS WERE ONLY COMPLYING WITH FEDERAL REGULATION BINDING ON THE STATE COURT UNDER THE SUPREMACY CLAUSE OF THE UNITED STATE'S CONSTITUTION.

The State submits that the certified question, as above modified, must be answered in the **affirmative**. The witnesses at issue in this matter -- DEA Agents -- are employees of the United States Justice Department, and as such, providing of any information or testimony at Respondents' state trial is governed by Federal Regulations.

Under the provisions of 28 C.F.R. §§ 16.21 et seq. (Ex. 6) oral testimony may not be provided by a Department of Justice employee about information obtained pursuant to his employment unless that employee receives prior approval from the proper Department Official. 28 C.F.R. §16.21(a) in pertinent part provides:

> In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the

> department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

In order to obtain the approval of the Department, certain requirements must be met by the party wishing to obtain the documentation or take the oral testimony. These requirements are stated in 28 C.F.R. §16.22 (c) as follows:

> If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible United States Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

As clearly stated by the United States Supreme Court in Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 712-713, 105 S.Ct. 2371, 85 L.Ed.2d 714, 721 (1985):

> It is a familiar and well-established principle that the Supremacy Clause, U.S. Const, Art. VI, cl 2, invalidates state laws that "interfere with, or are contrary to "federal law. Gibbons v. Ogden, 9 Wheat 1, 211, 6 L Ed 23 (1824) (Marshall, C.J.). Under the Supremacy Clause, federal law may supersede state law in several different ways. . . .
>
> Even where Congress has not completely displaced state regulation in a specific area, 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," Florida Lime & Avocado Growers, Inc. v. Paul, 373 US 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, [312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941)], at 67. See generally Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-199, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).
>
> [S]tate laws can be pre-empted by federal **regulations** as well as by federal statutes. [citations omitted.] (Emphasis added.)

Under the facts of this particular case, it is clear that the DEA Agents, as employees of the Department of Justice, were ordered by federal law not to attend depositions as scheduled by Respondents in this case, until Respondents complied with the requirements of 28 C.F.R. §§16.21 et seq. The State submits therefore, that "compliance with both federal and state regulations [was] a physical impossibility." Therefore, under the Supremacy Clause, Fla. R. Crim. P. 3.220 was pre-empted by 28 C.F.R. §§ 16.21 et seq., thus the trial court had no authority to compel the DEA Agents to obey the subpoena contrary to the agency's instructions under valid agency regulations, Davis Enterprises, et al. v. United States Environmental Protection Agency, 877 F.2d 1181, 1186 (3d Cir. 1989). See, e.g., Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986); Giza v. Department of Health Education & Welfare, 628 F.2d 748 (1st Cir. 1980).

Davis, relied on a case factually similar to the case at bar, Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989), which held that the action of a state court to compel an official of a federal agency to testify contrary to the agency's duly enacted regulations clearly thwarts the purpose and intended effect of the federal regulations. Such action plainly violates both the spirit and the letter of the Supremacy Clause, Id. at 71, on the following rationale:

> It is well established that an action seeking specific relief against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to governmental privilege of immunity. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949); 3A Moore's Federal Practice §19.15. Downie's refusal to testify was at the behest of his EPA superior, the Acting Regional Counsel for Region 3. The EPA decision was made pursuant to regulations set forth at 40 C.F.R. §2.401. **These regulations provide, *inter alia*, that an employee of the EPA may testify in response to a subpoena only to the extent expressly authorized by the agency.**
>
> The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates by this type of regulation. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In *Touhy*, the Supreme Court ruled that a subordinate official of the Justice Department could not be held in contempt for refusing, in a habeas corpus proceeding by a state prisoner, to obey a subpoena *duces tecum* when his compliance had been prohibited by an order of a superior department official acting pursuant to valid federal regulations governing the release of official documents. As in the case *sub judice*, the government was not a party to the underlying action. The regulation

> in *Touhy* were promulgated under the statutory predecessor of the current "housekeeping" statute, 6 U.S.C. §301.
>
> *Touhy* is part of an unbroken line of authority which directly supports Downie's contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations. The district court clearly departed from this line of cases. * * *
>
> The policy behind such prohibitions on the testimony of agency employees 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. . . . If EPA On-Scene Coordinators were routinely permitted or compelled to testify . . . significant loss of man-power hours would predictably result and agency employees would be drawn from other important agency assignments.

Id. at 69-70. The court then held that the district court exceeded its jurisdiction in compelling the government employee to testify contrary to the direction of the EPA.

The right of the United States Attorney's Office to instruct the DEA Agents not to honor the state court subpoenas for deposition until Respondents complied with the requirements of 28 C.F.R. §§ 16.21 et seq., is thus well supported by the law. See, United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951); United States v. Bizzard, 674 F.2d 1382, 1387 (11th Cir. 1982); Boron Oil Co. v. Downie, supra; Davis Enterprises v. U.S. E.P.A., supra.

In United States v. Bizzard, supra, the U.S. Eleventh Circuit Court in affirming the order of the district court quashing the subpoenas held:

> Although defendant was aware of the regulations prohibiting a former Department employee from testifying as to information acquired during the performance of his official duties without prior approval of the Attorney General, he failed to comply with them. To obtain approval an affidavit or a statement to the local United States Attorney setting forth a summary of the desired testimony is required. 28 C.F.R. 16.21 *et seq.* (1980).

Sub judice, it is clear that the trial court abused its discretion in compelling the witnesses to appear for deposition, or be excluded from the trial, without first attempting to reach a compromise that would have satisfied both the State Discovery Rule and the Federal Regulations. Assistant U. S. Attorney, Carole Fernandez, by telephone conference prior to the first deposition advised Respondents that the agents would not be appearing for the depositions because the Federal Regulations requirements had not been met, and supplied counsel with a copy of the regulations (Ex. 1, pp. 4, 5-6, 7-8). Respondents simply refused to comply with the requirements of the federal regulations. The Assistant U.S. Attorney informed the court, the Justice Department was not saying the witnesses would not appear for deposition, but rather that if Respondents complied with the federal requirements, then the Justice Department could make its determination and grant authorization for the necessary agents to honor the subpoenas for deposition and trial (Ex. 1, pp. 7, 10).

Supremacy clause seeks to avoid the introduction of the disparity, confusion, and conflict which would follow if the federal government's general authority were subject to local

controls. Rust v. Johnson, 597 F.2d 174 (9th Cir.), cert. denied 444 U.S. 964, 100 S.Ct. 450, 62 L.Ed.2d 376 (1979). Where there is overwhelming federal interest in uniformity of practice under federal statute, Supremacy Clause gives federal government power to impose even procedural rule on state courts, In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 701 F.2d 1189, 1194 (7th Cir.), cert. denied, Haider v. McDonnell Douglas Corp., 464 U.S. 866, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983). Thus, if plain and inevitable effect of state statute is to impair operation of federal statute, state statute may not stand, Los Alamos School Board v. Wugalter, 557 F.2d 709, 715 (10th Cir.), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 455 (1977). However, federalism **does not** preclude cooperative actions between the two sovereigns when interests of both state and nation are thereby served. United States ex rel. Gereau v. Henderson, 526 F.2d 889, 894 (5th Cir. 1976).

Faced with these principles, it is clear that the court should have attempted to accommodate both the federal regulation and the State discovery rule by requiring Respondents to comply with the requirements of 28 C.F.R. §§ 16.21 et seq. Once the affidavits were provided by Respondents, the Justice Department could have made its determination as to which of the Agents had the information necessary by the Respondents, and then only those Agents would need to be deposed. Under this compromise, the State's discovery rule (inferior rule) would have been preempted only to the extent necessary to accomplish the purpose of the federal regulation (the supreme law). Those Agents not

authorized by the Justice Department to give testimony at Respondents' trial, could then be excluded under the order of the trial court pursuant to Fla. R. Crim. P. 3.220.

In the recent studies conducted by the Florida Supreme Court's Commission on Criminal Discovery for the purpose of amending Florida's Discovery Rule, the reasons most often cited by the Law Enforcement Officers to justify abolition of depositions at the whim of the defense, were **problems primarily of scheduling and cost.** One of the cited complaints by Law Enforcement Officers was that "unnecessary persons are scheduled for deposition." Unnecessary persons were classified as Officers who have no knowledge of the events. At the hearings it was testified that if an officer's name appears anywhere on a witness list, that officer is subpoenaed and deposed. As a result, transport officers, evidence technicians, SWAT team perimeter control officers, and others who would have no knowledge of the offense itself are subpoenaed to attend depositions. Also officers whose information is limited to the report already given to defense counsel were considered unnecessary persons to be deposed. A number of representatives of law enforcement agencies told the commission that frequently a single question is asked of the officer: "Have you anything to add to your report?" When the officer replies in the negative, the deposition is terminated.[1] The cost of tying up all eleven (11) DEA Agents, when Respondents already had the

[1] Excerpts from Issue Papers of the Florida Supreme Court's Commission on Criminal Discovery.

"DEA 6's" was recognized by the Court in Boron Oil Co. v. Downie, supra at 70 where it was stated that if the DEA Agents were routinely permitted or compelled to testify, "significant loss of manpower hours would result and agency employees would be drawn from other important agency assignments."

As a consequence of the Commission's Proposals and the Florida Bar Criminal Rules Committee Report, this Honorable Court did amend Fla. R. Crim. P. 3.220 in significant ways relevant to the case at bar. In re AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 (DISCOVERY), 550 So.2d 1097 (Fla. 1989). Rules 3.220(b)(1)(a)-(b) and 3.220(h)(1)(i)-(ii) were amended to provide prosecutors the discretion to designate certain witnesses who may not be deposed unless order by the trial court, upon good cause shown. This amendment also provides for sanctions against either side for abuses in designating witnesses or in taking depositions, Id. at 1098.

In response to the above cited complaints by Law Enforcement Officers, this Honorable Court amended Rule 3.220(h)(5) to provide for the establishment of Witness Coordination Offices to help coordinate the taking of depositions of law enforcement officers. Also Rule 3.220(h)(7) allows statements of law enforcement officers to be taken by telephone in lieu of depositions upon stipulation by the parties and consent of the witness. Id. at 1098.[2]

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[2] The State also finds it significant that this Court did recognize some witnesses are entitled to special treatment regarding depositions under the discovery rule. This Court stated that Rule 3.220(h)(4) was added to provide for videotaping of witnesses under the age of sixteen, and to provide that

Thus, under the facts of this particular case, the trial court abused its discretion in excluding the DEA Agents on the basis that they were not entitled to special treatment. Not only were the DEA Agents protected by and bound to enforce the requirements of 28 C.F.R. §§16.21 et seq., whereby under the Supremacy Clause the State's discovery rule was preempted, but the trial court had available a perfectly reasonable remedy that would allow compliance with **BOTH** State discovery rule and the Federal Regulation. Respondents already had in their possession the DEA Agents' police reports; a summary by Respondents in accordance with the federal regulations would have aided the Justice Department and the state prosecutor in determining which of the Agents have the "information which may be relevant to the offense charged, and to any defense with respect thereto." This procedure would have eliminated the necessity of deposing those Agents who performed only a ministerial function with respect to the case or whom the prosecutor does not, in good faith, intend to call at trial, and whose involvement with the case and knowledge of the case is fully set out in a police report or other statement furnished to the defense. Rule 3.220(b)(1)(i). By compelling Respondents to comply with the requirements of the Federal Regulation before excluding the "unnecessary" witnesses -- or those witnesses not authorized by the Justice

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depositions of witnesses of fragile emotional strength may be taken before the trial judge or special master. That the addition was intended to protect these witnesses from harassment or intimidation during the taking of a deposition. *In re AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 (DISCOVERY), supra,* at 1098.

Department to testify -- the court would have satisfied the purpose and intended effect of both the federal regulations and Fla. R. Crim. P. 3.220 as amended.

However, the actions taken by the court "plainly violated both the spirit and the letter of the Supremacy Clause." Boron Oil Co. v. Downie, supra, at 71. As such the trial court's ruling must be reversed.

CONCLUSION

WHEREFORE, based on the foregoing argument and the authorities cited therein, Respondent respectfully requests this Honorable Court to answer the modified question in the **AFFIRMATIVE**, and **REMAND** the matter to the trial court with instructions to Respondents to comply with the requirements of 28 C.F.R. §§16.21 et seq. **and** Fla. R. Crim. P. 3.220(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to: RICHARD L. ROSENBAUM, ESQUIRE, Attorney for Respondent, Allen Tascarella, One East Broward Blvd., Penthouse, Barnett Bank Plaza, Fort Lauderdale, FL 33301; and to GENE REIBMAN, ESQUIRE, Attorney for Respondent, Barbara Ambs Tescarella, 600 Northeast Third Avenue, Ft. Lauderdale, FL 33304, this 27th day of April, 1990.

Georgina Jiménez-Orosa
Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,551

STATE OF FLORIDA,

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APPENDIX
TO
PETITIONER'S BRIEF ON THE MERITS

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