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IN THE SUPREME COURT OF FLORIDA

**ROBERT WILLIAM PEOPLES,**

Petitioner,

versus

**CASE NO. 77,851**

**STATE OF** FLORIDA,

Respondent.

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# PETITIONER'S BRIEF ON THE MERITS


JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH **JUDICIAL** CIRCUIT

**BRYNN NEWTON**
**ASSISTANT PUBLIC DEFENDER**
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***904-252-3367***
Florida Bar **Number** 175150

ATTORNEY FOR **PETITIONER**

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## STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Brevard County, Florida, with trafficking in 14 to 28 grams of Dilaudid and with conspiracy to traffic in 28 or more grams of Dilaudid. (R 593-594) He was tried by a jury on February 28 and March 1, 1989, and was found guilty of trafficking in four to 14 grams of Dilaudid and of conspiracy to traffic in four to 14 grams of Dilaudid. (R 588, 639-630) On April 27, 1989, he was sentenced to consecutive prison terms totalling 18 years, including consecutive minimum mandatory terms of three years and six years, and was fined $50,000.00 for each count. (R 659-660, 662, 637-639)

The Office of the Public Defender was appointed to represent Petitioner on appeal. (R 642) His convictions were affirmed on February 28, 1991, but his sentences for conspiracy and trafficking were ordered by the Fifth District Court of Appeal to be served concurrently and the six-year mandatory term was vacated and remanded for imposition of a mandatory term of three years. Peoples v. State, 576 So.2d 783 (Fla. 5th DCA 1991), reh. denied April 4, 1991. A notice to invoke this Honorable Court's discretionary jurisdiction was timely filed in the District Court on April 29, 1991. Jurisdiction was accepted by this Honorable Court on August 15, 1991.

## STATEMENT OF THE FACTS

On February 11, 1988, Pharmacist Jerome Nelson at Campbell's Drug Store in Rockledge, Florida, filled a prescription written to "Ernest Walker" for Dilaudid, Keflex, and Compazine. (R 418, 419) The pharmacist verified the prescription by calling the telephone number on the prescription which was answered as a "doctor's office," but he became suspicious because he did not recognize the patient's Cocoa Beach address. (R 418, 419) Mr. Nelson later identified a picture of Michael Anthony Virgilio as the "patient" purchasing the drugs. (R 381-382, 383, 400, 420-421)

On February 27, 1988, personnel from Campbell's Drug Store called Rockledge Police Detective Charles Crawford, who then watched the store from the shopping center parking lot from an unmarked police unit. (R 224, 225) Detective Crawford saw Petitioner use a pay telephone outside a lounge near the drug store, and wave to a man who was later identified as Tom Sawyer who then went into the drug store. (R 226, 227, 242) Michael Virgilio then entered the drug store where, the store owner said, he paid for a Dilaudid prescription and left. (R 229, 396, 397, 398) Petitioner, Tom Sawyer, and Michael Virgilio were arrested as they began to drive from the shopping center parking lot. (R 230, 367)

Detective Crawford had traced the telephone number on the February 11th prescription to a pay telephone in the lobby of the Gold Key Inn in Orlando, Florida. (R 223, 244-245, 328) Tom

Sawyer had a Gold Key Inn match book in his possession at the time of his arrest. (R 245, 319) The car In which the three men were riding had been rented by Tom Sawyer, (R 245, 249, 276, 277, 325) In the back seat police officers found a jacket, claimed by Michael Virgilio, with a bag in its sleeve containing pharmacy bags from three other drug stores, 19.8 grams of Dilaudid in three bottles, and some prescriptions that appeared not to have been passed. (R 231, 233, 237-238, 240, 241, 243, 244, 360, 362) Rockledge Police Officer Ron Hart said that Petitioner presented a Florida driver's license issued to James Collins from his wallet as identification. (R 368, 369, 370, 373) Petitioner testified that was not carrying a wallet and did not present the driver's license to Officer Hart. (R 450, 451, 453, 468, 469) The driver's license had been issued to Petitioner upon presentation of his brother's birth certificate. (R 445, 446, 450, 453-454, 464, 466, 467)

At the Rockledge Police Department, Tom Sawyer and Michael Virgilio told detectives that Michael Virgilio had been picked up hitchhiking. (R 247, 250, 292, 321, 323-324) Petitioner gave no statement. (R 247) Petitioner testified that he did not tell the police officers what really happened because they never asked him. (R 455) He told the jury that he had gone to Orlando with Tom Sawyer and Michael Virgilio because Candy Slimon, an attractive woman in whom he was interested, was going there with Sawyer and Virgilio. (R 444, 446) She had told him he would not get in any trouble. (R 444, 446) After the four had begun their

trip, Tom Sawyer kept: Petitioner in the dark about what was going on. (R 447) Petitioner said that he handled some of the prescriptions while he was in the car; his fingerprints were found on one of them. (R 461; 340, 347, 351)

Over Petitioner's objections, the State was allowed to play tape recordings made by Rockledge detectives of Michael Virgilio's calls to Petitioner's residence from the Brevard County Jail. (R 208, 209, 211, 212, 432-434)

Petitioner was not permitted to elicit from Tom Sawyer the fact that he had previously served twenty months in federal prison for possession of heroin and marijuana. (R 268, 269, 271-272) Tom Sawyer testified that he was introduced to the drug trafficking activities for which he was arrested February 27, 1988, by Petitioner. (R 273, 280) He was a furniture store manager and a Dilaudid addict whose role was to drive the car, drop off the "walker" who presented the prescriptions, and then Petitioner would notify the "phone girl" who he said in this case was Candy Slimon. (R 275, 276, 276, 326) Motel records at the Gold Key Inn showed that Candy Slimon had been registered there. (R 245, 253, 411) No evidence except Tom Sawyer's testimony provided any link between Petitioner and the "phone girl's" room at the Gold Key Inn. (R 245, 246, 412)

Tom Sawyer said that on February 27th, Michael Giordano, the "mastermind" of the operation, gave Petitioner the printed prescriptions to be used. (R 312, 322) He said that prescriptions were presented for Dilaudid, Keflex, and Compazine,

because the latter two were compounds for settling the stomach and were not used by addicts, so the transactions would appear legitimate. (R 278) He said they often hired someone from a soup kitchen or the Salvation Army to pick up prescriptions because he would appear more likely to be legitimately in need of Dilaudid. (R 280) He said Petitioner had the drugs purchased on February 27th in his possession until he saw that they were going to be arrested, and then he put them in Michael Virgilio's jacket. (R 332, 335)

## SUMMARY OF ARGUMENT

POINT I: Petitioner's right to counsel during police interrogation was violated when Rockledge, Florida, Police detectives monitored and tape recorded telephone calls made by Petitioner's co-defendant from the Brevard County Jail, intended to obtain incriminating statements from Petitioner. Petitioner had invoked his right to counsel at the time of his arrest, so that the police would not have been able to continue questioning him directly. Their use of the co-defendant as an agent constituted an indirect continuation of their attempts to interrogate Petitioner. Petitioner's right to counsel during this interrogation had attached by virtue of his having invoked his right to counsel during initial interrogation by the police; by his having made a first appearance and retained counsel; and because the investigation had focused on him to the extent that the adversarial process had been set in motion even though no accusatory pleadings had been filed.

POINT 11: Petitioner was deprived of his right to effectively confront the primary witness against him when the trial court prohibited him from eliciting the fact of the State's main witness' prior convictions for drug dealing. The witness, the only witness who directly linked Petitioner to the conspiracy and trafficking activities in which the witness was involved, was thus able to convey the impression that he was an innocent drug addict who was drawn into the enterprise by Petitioner when in

fact he had engaged in drug trafficking prior to his alleged association with Petitioner. The necessity for producing certified copies of the witness' prior convictions was obviated by his admitting the convictions.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE OF TELEPHONE CONVERSATIONS BETWEEN PETITIONER AND A CO-DEFENDANT CONDUCTED UNDER THE DIRECTION OF POLICE OFFICERS, WHERE PETITIONER'S RIGHT TO COUNSEL HAD ATTACHED BY VIRTUE OF FLORIDA LAW AND OF HIS PRIOR INVOCATION OF HIS RIGHT TO COUNSEL DURING QUESTIONING.

The Rockledge Police detectives were unable to elicit any statements from Petitioner at the time of his arrest because Petitioner had invoked his right to remain silent and his right to confer with legal counsel. Miranda v. Arizona, 384 U.S. *436*, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Edwards v. Arizona, 451 US 477, *68* L.Ed.2d **378,** 101 S.Ct. 1880 (1981); Amends. V, VI, XIV, U. S. Const.; Art. I ss. 9 and 16, Fla. Const. (R 12-13, 247, 477-481) After Petitioner had been released on bail, however, the police were approached by his co-defendant, Michael Virgilio, who volunteered to obtain incriminating evidence against Petitioner for the investigators. (R 214, 215, 216) Michael Virgilio, who was granted immunity for his testimony, testified that he made telephone calls to Petitioner's residence because he had spoken to Rockledge Police Detective Kenneth Woodasd who "asked me if I would cooperate and give consent to record the telephone conversations." (R 95, 96-97)

Petitioner, at the time of the telephone calls, was represented by counsel Bruce Raticoff; Michael Virgilio was represented by the Public Defender. (R 98, 600) Later Sam

Baxter Bardwell was appointed to represent Petitioner, who was found to be indigent. (R 616, 618) Bruce Raticoff continued to represent Tom Sawyer.

Mr. Bardwell moved to suppress the tape recordings made by Rockledge detectives of Michael Virgilio's calls to Petitioner. (R 12-13) The objections were overruled, and the State was permitted to play the tape recordings for the jury. (R 103, 208, 209, 212, 432-434)

Petitioner's objections to the tape recordings should have been sustained, and the tapes suppressed. In Massiah v. United States, *377* U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d *246* (1964), Maasiah had pleaded not guilty to a federal narcotics violation and had been released on bond. While he was out on bond, his co-defendant, Colson, decided to cooperate with government agents and allowed the installation of a radio transmitter in his automobile. He then held a conversation with Massiah in the car, during which Massiah made several incriminating statements, while a government agent listened over the radio.

Neither Petitioner nor Massiah were in custody at the time their incriminating statements were made; but, as the Massiah Court recognized, if the right to counsel during interrogation

> . . . is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not know that he was under interrogation by a government agent.

Id., 12 L.Ed.2d at 250, quoting 307 F.2d at 72-73.

The Massiah Court also recognized that the investigators in that case had a right to continue their investigation of the drug ring of which Massiah was believed to be a part, but said:

> All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

Id., 12 L.Ed.2d at 251. (Emphasis in original,)

In State v. Wooley, *482* So.2d 595 (Fla. 4th DCA 1986), the District Court affirmed a trial court's order suppressing statements and physical evidence:

> Recently, the Supreme Court held that the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.
>
> Maine v. Moulton, [474] U.S. [159], 106 S.Ct. *477, 487,* 88 L.Ed.2d 481 (1985) (citation omitted); see also State v. Douse, *448* So.2d 1184 (Fla. 5th DCA 1984).
>
> Since there is substantial, competent evidence in the record to support the conclusion that the "State

> 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel," Maine v. Moulton, supra, 106 S.Ct. at *487*, n. 12 (quoting U. S. v. Henry, *447* U.S. *264*, *100* S.Ct. *2183*, 65 L.Ed.2d 115 (1980)) and that the statements would be related to the charges for which the defendant had been arrested, the order on appeal is [affirmed].

Id., *482* So.2d at *596*.

Under the federal constitution, therefore, the scheme employed by the Rockledge Police violated Petitioner's Sixth Amendment right to counsel if his right to counsel had "attached" at the time the telephone calls to his home were staged. Petitioner contends that under Florida's law, his right to counsel had fully attached because he had already appeared before a committing magistrate upon his arrest for the charges which Michael Virgilio was helping the police investigate. His rights to counsel and against self-incrimination were violated, additionally, because he had specifically declined to be interviewed by the police about these charges and had invoked his right to custody and terminated interrogation on the day of his arrest, (R *12-13, 247, 477-481)*

**I. PETITIONER'S RIGHT** TO COUNSEL HAD ATTACHED **UNDER** FLORIDA LAW.

In this case, the District Court held that Petitioner's right to counsel had not "attached" at the time Petitioner was interviewed by his co-defendant acting for the police, and

acknowledged conflict with State v. Douse, *448* So.2d 1184 (Fla. 4th DCA 1984).

In **Douse**, the District **Court** stated that the Florida Constitution guarantees the right to assistance in all criminal prosecutions and that:

> **Rule** 3.130, **Fla.R.Crim.P.** , in turn, states that the right to assistance of counsel attaches at **least** as early **as** the defendant's first appearance which should occur within twenty-four hours **of arrest.** Thus, in this case the incriminating statements made one day after Douse's **first** appearance were elicited **after** his right to counsel attached under Florida **law.**

Id., *448* So.2d at 1185; Peoples **v.** State, supra, 576 So.2d at **787.**

The Douse Court had recognized that the defendant had no federal constitutional right to suppress his conversations with a co-defendant because **his** Sixth Amendment right to counsel had not "attached" at the time the statements were elicited, but found that Florida's law provides **greater** protection than its federal counterpart, noting that **Article I** Section 16 guarantees the right to assistance of counsel in all criminal prosecutions, and that **Rule** 3.130 provides that counsel for indigent defendants must be appointed no later than the time of **first** appearance, and that if the defendant has retained counsel, he must be afforded the opportunity and means to contact his lawyer and confer with him. Thus, the Douse Court found, the defendant's incriminating statements, made one day after his **first** appearance, were

elicited after his right to counsel had attached under Florida Law. See also, Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), wherein the District Court found that even in the absence of a formal charge, a preliminary hearing, an indictment, an information, or an arraignment, the defendants were entitled to counsel at their court-ordered line-up because (1) Rule 3.130 provides that the right to counsel attaches as early as a defendant's first appearance and (2) Rule 3.111(a) provides that a defendant shall have counsel appointed when he is formally charged, or as soon as possible after being taken into custody, or upon his first appearance, "whichever occurs earliest." (Emphasis supplied.) And see State v. Bragg, 371 So.2d 1080 (Fla. 4th DCA 1979) (no right to counsel at a lineup that took place prior to the defendant's first appearance); and McHaney v. State, 513 So.2d 252 (Fla. 2d DCA 1987) (no right to counsel at lineup that occurred prior to the defendant's first appearance).

The citizens of Florida may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution. State v. Sarmiento 397 So.2d 645 (Fla, 1981); Amend. X, U. S. Const. To date, the voters have not repealed or modified Article I Section 16, assuring accused persons' right to counsel, as was done to Article I Section 12, to limit Florida citizens' protection against unreasonable searches and seizures to Fourth Amendment interpretations by United States Supreme Court. Rule 3.440, for example, still provides that a jury verdict in a criminal trial must be

unanimous, even though the federal constitution does not require it. See, e. g., Apodaca et al. v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (Sixth Amendment guarantee of a jury trial does not require that a 12-person jury's vote be unanimous).

The Florida Constitution and the Florida Rules of Criminal Procedure have provided that Petitioner was entitled to counsel when he was interrogated by a police agent in the investigation of these charges. This Honorable Court: is asked to enforce this right.

**11. AT THE TIME OF HIS INTERROGATION THE INVESTIGATION HAD FOCUSED ON PETITIONER.**

The District Court in this case found that neither a first appearance hearing nor a non-adversary preliminary hearing pursuant to Rule 3.133(a) "is adversarial for purposes of attachment of the right to counsel." Peoples v. State, 576 So.2d at 788. The Sixth Amendment right to counsel arising from the adversarial process' being set in motion may attach, however, even though no accusatory pleading is pending when the investigation of the crime focuses on the particular person. In Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), the Court: wrote:

> When the process shifts from the investigatory to accusatory -- when its focus in on the accused and its purpose is to elicit a confession our adversary system begins to operate, and, under the

> circumstances here, the accused must be permitted to consult with his lawyer.

Id., 378 U.S. at 492.

There appears to be no question but that the interrogation conducted by Michael Virgilio at the Rockledge Police's direction was intended to elicit evidence to be used against: Petitioner in this prosecution for the charges he had already been arrested for and for which he had already made a first appearance. The adversarial process had begun to operate.

III. PETITIONER HAD INVOKED HIS RIGHT TO COUNSEL.

At the time of his arrest, Petitioner specifically exercised his right against self-incrimination and invoked his right to counsel, so that the Rockledge Police were unable to obtain any incriminating statements from him. (R *12-13, 247, 477-481)* A request for counsel must be scrupulously honored. Arizona v. Roberson, *486* U.S. 675, 100 L.Ed.2d *704,* at 714, *108* S.Ct. *2093 (1988).* Because Petitioner had invoked his right to counsel, the police were constitutionally barred from interrogating him any further. Edwards v. Arizona, 451 US *477, 68* L.Ed.2d 378, 101 S.Ct. 1880 (1981); Amends. V, VI, XIV, U. S. Const. The Rockledge Police detectives could not have resumed their direct attempts to interrogate Petitioner following his request for counsel. Neither, the Supreme Court ruled in Massiah, could they do so indirectly.

In this case the District Court relied specifically on

Illinois v. Perkins, 495 U.S. ___, 110 S.Ct. ___, 110 L.Ed.2d 243 (1990), for its reiteration of the rule that "[a]fter charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel." (Emphasis by the District Court,) In Perkins, an undercover agent had been placed in the jail cell of Perkins "who was incarcerated on charges unrelated to the subject of the agent's investigation." (Emphasis supplied.) Justice Brennan concurred but noted significantly:

> As the case comes to us, it involves only the question whether Miranda applies to the questioning of an incarcerated suspect by an undercover agent. Nothing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. . . .

Id., 110 L.Ed.2d at 253.

Petitioner had invoked his right to counsel. For any agent of the police to interrogate him further about the same charges would require that he initiate the conversation and waive his rights. This did not happen. The tapes and testimony about Petitioner's conversations with Michael Virgilio should have been suppressed.

## POINT II

**THE TRIAL COURT ERRED BY LIMITING PETITIONER'S CROSS-EXAMINATION OF THE KEY WITNESS AGAINST HIM BY NOT ALLOWING HIM TO REVEAL THE WITNESS' INVOLVEMENT IN DRUG TRAFFICKING PRIOR TO HIS ALLEGED ASSOCIATION WITH PETITIONER.**

Prior to Tom Sawyer's taking the stand against Petitioner, the trial court granted the State's motion in limine to preclude any questioning on cross-examination about his prior convictions for possession of heroin and cocaine, which were obtained in 1971 and for which he served twenty months in a federal penitentiary. (R 256, 257, 258, 265-266, 271, 272) The prosecutor argued that Sawyer's convictions were too "remote" (18 years) to be admissible; that Sawyer had become involved in the Dilaudid trafficking business through his addiction to the drug and Petitioner's introducing him to the enterprise; and that there were no certified judgments and sentences with which Tom Sawyer could be properly impeached. (R 256, 257, 258) Petitioner's counsel pointed out that Sawyer had served prison time for his convictions, which in itself evidences the fact of conviction, and Sawyer himself admitted during defense counsel's proffer that he had been convicted. (R 258, 259-260, 268, 269)

A party may attack the credibility of any witness, including an accused, by evidence that: the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted. s. 90.610(1), Fla.Stat. (1987). Section 90.610(1)(a) provides

that:

> Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(Emphasis supplied.) The alleged remoteness of Tom Sawyer's narcotics convictions was therefore not grounds for excluding the fact of those convictions from this criminal trial as part of Petitioner's attack on his testimony.

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. s. 90.403, Fla.Stat. (1987). Tom Sawyer was the primary witness against Petitioner. His was the only testimony linking Petitioner in any way to the "phone girl's" location at the Gold Key Inn in Orlando; he was the only witness who testified that Petitioner was involved in the scheme to purchase Dilaudid. (R *245, 246,* 412) He testified that he had become involved in the drug trafficking ring through his addiction to Dilaudid and that he was introduced by Michael Giordano, the "mastermind" of the organization, to Petitioner. (R **278, 285, 320, 326)** In closing argument, the prosecutor said:

> Finally, you need to consider who made Mr. Sawyer, who really made Mr. Sawyer a witness? The Defendant has a lot of nerve coming in here and calling Mr. Sawyer a drug addict, a drug dependent, a liar, a dope dealer and everything else when he was the one that caused him to come that way in the first place. We didn't go out and pick Mr. Sawyer

> to be our star witness. Because we thought he was the greatest human being that: ever walked the face of the earth.
>
> He became a witness because [Petitioner] put him right in the middle of his operation and put him in a posture where Robert -- Torn Sawyer would know everything about what [Petitioner] and the rest of the group did,

(R 531-532) (Emphasis supplied.)

He was presented, in other words, as a former innocent who was lured into dealing in drugs by Petitioner.

In Howard v. State, 397 So.2d 997 (Fla. 4th DCA 1981), the District Court affirmed convictions for battery on a law enforcement officer and resisting an officer with violence where the defendant had called a witness whose criminal record included a conviction for obstructing justice. The State was permitted by the trial judge to bring out the nature of the conviction, and the District Court ruled that this was proper under the circumstances:

> The testimony and record of conviction objected to by appellant were introduced to show that the witness, Green, had a bias or prejudice against law enforcement personnel. To show bias it is obviously necessary to show the nature of the acts by the witness which evidence such bias. To do this it is necessary to show and explain the nature of the crime of which the witness was convicted. Thus we agree with the trial court's conclusion that conviction of a specified crime *may* be introduced to show bias of a witness.

Id., 397 So.2d at 998. (Emphasis in original.) The District Court cited the provision of Section 90.610(3) which provides that the use of criminal convictions as impeachment should not be limited where they are being utilized under Sections 90.404 or 90.608. Section 90.404(2)(a) allows an opposing party to present evidence of other crimes, wrongs or act when relevant to prove a material fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In Strickland v. State, 498 So.2d 1351 (Fla. 1st DCA 1986), the District Court affirmed another instance of the State's being allowed to do what the defense sought to do in this case: elicit the nature of the other side's chief witness' prior convictions. In Strickland, the District Court held that. the State had a right to impeach the defense's chief witness, who had entered a nolo contendere plea to trespass, stating:

> For purposes of discrediting a witness, a wide range of cross-examination is permitted as this is the traditional and constitutionally guaranteed method of exposing possible biases, prejudices and ulterior motives of a witness as they may relate to the issue or personalities in the case at hand. Davis v. Alaska, *415* U.S. 308, 316, *94* S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974); Nelson v. State, 99 Fla. 1032, 128 So. 1 (1930). The vital importance of full and searching cross-examination is even clearer when, as here, the prosecution's case stands or falls on the jury's assessment of the credibility of the key witnesses. Wooten v. State, 464 So.2d *640* (Fla. 3d DCA 1985). Moreover, the admission or rejection of impeaching testimony is within

> the sound discretion of the trial court. Winner v. Sharp, 43 So.2d 634 (Fla. 1949).

Id., 498 So.2d at 1352. (Emphasis supplied.)

Tom Sawyer's past history of drug dealing and time spent in prison would be highly relevant to prove his motive to testify against Petitioner in order to avoid returning to prison and to negate the impression on the jury that he was a newcomer to the drug scene. If the State is permitted to elicit details of a defense witness' prior convictions because the case "stands or falls on the jury's assessment of the credibility of key witnesses," then surely a criminal defendant is entitled to the same right of confrontation where the State's case hinges mainly on the testimony of a former co-defendant who had been "in the business" long before Petitioner whom he at trial was allowed to blame for his involvement in a drug ring.

In this case the District Court held that the trial court correctly granted the State's motion in limine on the ground that defense counsel did not have a certified copy of the judgments, stating:

> The attorney who seeks to introduce evidence of a prior conviction should have knowledge of the prior conviction and should possess a certified copy of the judgment of conviction. King v. State, 431 So.2d 272 (Fla. 5th DCA 1983); Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). While defense counsel argued that neither he nor the state attorney could obtain a copy of the federal conviction, we are unwilling to relax the Cummings rule and substitute for it a rule

> excusing certified copies of federal convictions because they may be difficult to obtain.

Peoples v. State, 576 So.2d So.2d 783, 789 (Fla. 5th DCA 1991). The entirety of the rule stated in Cummings, however, is:

> . . . Questions regarding past convictions should not be asked unless the prosecutor has knowledge that the witness has been convicted of a crime and has the evidence necessary for impeachment if the witness fails to admit the number of convictions of such crimes. . . .

Id., 412 So.2d at 439. (Emphasis supplied.)

The Fifth District Court also declined to apply Alvarez v. State, 467 So.2d 455 (Fla. 3d DCA 1985), rev. denied, 476 So.2d 675 (Fla. 1985), wherein evidence of a Cuban felony conviction should have been admitted even though copies of the judgment were not available "since, it is hoped, records of the United States have not reached the degree of inaccessibility as have Cuban records." Peoples v. State, 576 So.2d at 789. A reading of Alvarez shows that the procedure prescribed in that case was followed at Petitioner's trial:

> . . . The witnesses could have been questioned outside of the jury's presence to determine whether they had been convicted of crimes in Cuba and whether those crimes, if committed in Florida, would be considered felonies under our laws. If, then, the witness admitted to a prior conviction usable for impeachment, the witness could have been asked about its existence in the jury's presence.

Id., 467 So.2d at 457. (Emphasis supplied.) The purpose of the

rule requiring that counsel have certified copies of convictions in order to impeach is, as stated in Alvarez, to "merely [assure] that he will not ask questions which suggest a certain set of facts in the absence of a good faith belief that those facts are true."

The record in this case amply demonstrates that defense counsel possessed a good faith belief that the prior convictions existed. The State did not challenge the existence of the witness' prior convictions but only complained that defense counsel did not possess a certified copy thereof and the witness admitted under oath and on proffer outside the jury's presence that he had been convicted of possessing heroin and marijuana upon his plea of guilty and that he had spent twenty months in prison therefor. The witness' admission to the convictions obviates the necessity for documentary verification, i. e., Cummings holds that documentary evidence is necessary for impeaching a witness an his prior convictions only if the witness fails to admit the number of convictions of such crimes. The witness being questioned in Cummings and King, moreover, was the defendant in each case against whom the State could not produce evidence of prior convictions. In this case, it *is* a government-sponsored witness, whose own testimony and admission provided the necessary evidence of his prior record.

Petitioner was denied his right to confront his chief accuser with highly relevant evidence of the witness' less-than-pristine background. He is entitled to a new trial. Art. I ss. 9 and 16, Fla. Const.; Amends. VI and XIV, U. S. Const.

## CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the District Court's decision in this case and remand this cause to the trial court for a new trial.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Robert William Peoples, 3950 Tiger Bay Road, Daytona Beach, Florida 32124, this 9th day of September, 1991.

ATTORNEY