IN THE SUPREME COURT OF FLORIDA

Case No. 81,165

STATE OF FLORIDA,
Petitioner,

v.

PATRICIA FRUETEL,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

AMENDED BRIEF OF RESPONDENT ON THE MERITS

ANTHONY C. MUSTO
P. O. Box 16-2032
Miami, FL 33116-2032
305-285-3880
Fla. Bar No. 207535

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
INTRODUCTION	vi
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
SUMMARY OF THE ARGUMENT	12
ARGUMENT	15

I. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS AND MOTIONS FOR JUDGMENT OF ACQUITTAL WHEN THE EVIDENCE ESTABLISHED ENTRAPMENT AS A MATTER OF LAW AND WHEN APPELLANT'S RIGHT TO DUE PROCESS WAS VIOLATED 15

II. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CONSPIRACY COUNT 26

III. THE COURT ERRED IN REFUSING TO REQUIRE A FEDERAL DEA AGENT TO PRODUCE ADMITTEDLY DISCOVERABLE MATERIAL REGARDING THE SUPERVISION AND CONTROL OF CONFIDENTIAL INFORMANTS AND TO ANSWER CERTIFIED QUESTIONS ON THAT SUBJECT WHEN THE AGENT' S ONLY REASON FOR REFUSAL WAS BASED ON A DISCOVERY EXEMPTION RECOGNIZED BY THE FEDERAL COSTS THAT DOES NOT APPLY IN FLORIDA AND WHEN THE INFORMATION SOUGHT WAS CRITICAL TO APPELLANT'S DEFENSE 27

IV. THE COURT ERRED IN CONSIDERING THE ISSUE OF HOW TO DEAL WITH THE FACT THAT THE PROSECUTOR IMPROPERLY DELETED CERTAIN PORTIONS OF A TAPE RECORDING WHEN IT APPEARS FROM THE RECORD THAT NEITHER APPELLANT NOR HER COUNSEL WERE PRESENT WHILE THE ISSUE, WHICH WAS OF SIGNIFICANCE TO APPELLANT, WAS CONSIDERED AND WHEN THE COURT RULED INCORRECTLY ON THE ISSUE 30

V. THE COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL BASED ON IMPROPER COMMENTS BY THE PROSECUTOR AND THE CUMULATIVE EFFECT OF THE PROSECTOR'S IMPROPER COMMENTS DEPRIVED APPELLANT OF A FAIR TRIAL 34

PAGE

VI. THE COURT ERRED IN DENYING APPELLANT THE RIGHT TO THE CONCLUDING ARGUMENT BEFORE THE JURY BY DENYING APPELLANT'S COUNSEL'S REQUEST TO GIVE HIS ENTIRE CLOSING ARGUMENT AFTER THE STATE'S ARGUMENT UNLESS APPELLANT'S COUNSEL WOULD LIMIT HIS ARGUMENT TO REBUTTING WHAT WAS SAID BY THE PROSECUTOR AND BY THE ATTORNEY FOR APPELLANT'S CODEFENDANT 39

VII. THE COURT ERRED IN READING THE JURY INSTRUCTION ON POSSESSION TWO TIMES, THEREBY PLACING UNDUE EMPHASIS ON AN INSTRUCTION THAT WAS HIGHLY PREJUDICIAL TO APPELLANT 41

CONCLUSION 43

CERTIFICATE OF SERVICE 44

TABLE OF CITATIONS

Cases

Ashenoff v. State, 391 So. 2d 289 (Fla. 3d DCA 1981) 27

Beckham v. State, 209 So. 2d 687 (Fla. 2d DCA 1968) 42

Birge v. State, 92 So. 2d 819 (Fla. 1957) 40

Blackburn v. State, 447 So. 2d 424 (Fla. 5th DCA 1984) 38

Carawan v. State, 515 So. 2d 161 (Fla. 1987) 19

Cole v. State, 353 So. 2d 952 (Fla. 2d DCA 1978) 42

Cruz v. State, 465 So. 2d 516 (Fla. 1985), cert. den., 473 U.S. 905 (1985) 15, 17, 18, 19, 20, 24

Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982) 38

Duque v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986) 37, 38

Faulk v. State, 104 So. 2d 519 (Fla. 1958) 40

Francis v. State, 384 So. 2d 967 (Fla. 3d DCA 1980) 38

Fruetel v. State, 609 So. 2d 697 (Fla. 4th DCA 1992) 1

Garcia v. State, 492 So. 2d 360 (Fla. 1986), cert. den., 479 U.S. 1022 (1986) 34

Garcia v. State, 548 So. 2d 284 (Fla. 2d DCA 1989) 27

George v. State, 539 So. 2d 21 (Fla. 5th DCA 1989) 38

Gomez v. State, 415 So. 2d 822 (Fla. 3d DCA 1982) 39

Gonzalez v. State, 571 So. 2d 1346 (Fla. 3d DCA 1990), rev. den., 584 So.2d 998 (Fla. 1991) 16, 19

Harris v. State, 414 So. 2d 557 (Fla. 3d DCA 1982) 38

Huff v. State, 437 So. 2d 1087 (Fla. 1983) 37

King v. State, 104 So. 2d 730 (Fla. 1958) 26

Knight v. State, 316 So. 2d 576 (Fla. 1st DCA 1975) 38

Lawson v. State, 231 So. 2d 205 (Fla. 1970) 26

Marrero v. State, 493 So. 2d 463 (Fla. 3d DCA 1985), rev. den., 488 So.2d 831 (Fla. 1986) 24

Mathews v. State, 353 So. 2d 1274 (Fla. 2d DCA 1978) 33

Myers v. State, 494 So. 2d 517 (Fla. 4th DCA 1986) 24

Perkins v. State, 576 So. 2d 1310 (Fla. 1991) 19

Pezzella v. State, 513 So. 2d 1328 (Fla. 3d DCA 1987), rev. den., 523 So. 2d 578 (Fla. 1988) 24

Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986), cert. den. sub nom, Pope v. Dugger, 480 U.S. 951 (1987) 35

Ramirez v. State, 371 So. 2d 1063 (Fla. 3d DCA 1979), cert. den., 383 So. 2d 1201 (Fla. 1980) 26

Raysor v. State, 272 So. 2d 867 (Fla. 4th DCA 1973) 41

Reed v. State, 333 So. 2d 524 (Fla. 1st DCA 1976) 38

Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), rev. den., 462 So. 2d 1108 (Fla. 1985) 39

Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991) 1

State ex rel. Lee v. Buchanan, 191 So. 2d 33 (Fla. 1960) 18

State ex rel. Ridenour v. Bryson, 380 So. 2d 468 (Fla. 3d DCA 1980) 26

State v. Glosson, 462 So. 2d 1082 (Fla. 1985) 24, 25

State v. Heathcoat, 442 So. 2d 955 (Fla. 1983) 41

State v. Hunter, 586 So. 2d 319 (Fla. 1991) 17, 23, 24, 25

State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991) 1, 16

State v. Tascarella, 580 So. 2d 154 (Fla. 1991) 28

State v. Wheeler, 468 So. 2d 978 (Fla. 1985) 18, 37, 38

Strickland v. State, 588 So. 2d 269 (Fla. 4th DCA 1991) 17, 18

Tillman v. State, 471 So. 2d 32 (Fla. 1985) 26

Tuff v. State, 509 So. 2d 953 (Fla. 4th DCA 1987) 39

United States v. Pearson, 746 F. 2d 787 (11th Cir. 1984) 35

United States v. Wright, 160 U.S.App.D.C. 57, 489 F. 2d 1181 (1973) 35

Velunza v. State, 504 So. 2d 780 (Fla. 3d DCA 1987) 26

Vileenor v. State, 500 So. 2d 713 (Fla. 4th DCA 1987) 32, 33

Williams v. State, 550 So. 2d 28 (Fla. 3d DCA 1989), rev. den., 562 So. 2d 348 (Fla. 1990) 35

Wilson v. State, 589 So. 2d 1036 (Fla. 2d DCA 1991) 16

Wright v. State, 87 So. 2d 104 (Fla. 1956) 40

Other Authorities

Florida Rule of Criminal Procedure 3.250 40

Section 775.021 (1), Florida Statutes 18

Section 777.201, Florida Statutes 12, 16

House of Representatives Committee on Criminal Justice Staff Analysis, June 27, 1987 19

Senate Staff Analysis and Economic Impact Statement, May 22, 1987 20

Summary of Senate Amendments on House Bill 1467 20

INTRODUCTION

Petitioner was the prosecution at trial and the appellee on appeal. Respondent was one of two codefendants at trial and the appellant on appeal. The parties will be referred to in this brief as "Appellant" and "Appellee." The symbol "R" will constitute a reference to the record on appeal.

STATEMENT OF THE CASE

Along with a codefendant, Appellant was charged with trafficking in cocaine and conspiracy to traffic in cocaine (R 1038-9). After a jury trial, Appellant was convicted of both counts and given concurrent 15 year mandatory minimum sentences, along with a fine of $250,000 and a surcharge of $12,500 (R 1104). On appeal, the Fourth District Court of Appeal reversed Appellant's convictions and remanded the cause with instructions to discharge Appellant. Fruetel v. State, 609 So.2d 697 (Fla. 4th DCA 1992). The present proceeding arises from the fact that the district court certified that its decision was in conflict with the decisions in State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991) and Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991). Each of those cases are presently pending before this court (Munoz v. State, case no. 78,900; Simmons v. State, case no. 79,094).

STATEMENT OF THE FACTS

On January 22, 1990, a joint investigation by the United States Drug Enforcement Administration (DEA) and the Broward County Sheriff's Office (BSO) resulted in the arrest of Anibal "Cookie" Duarte (R 529). Duarte was charged with possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute (R 529). Subsequent to his arrest and prior to pleading guilty in federal court on March 30, 1990 (R 529), Duarte entered into an agreement to provide substantial assistance to law enforcement (R 531). It was agreed that if Duarte produced information that led to the arrest of a substantial violator or the

seizure of a substantial amount of illegal drugs, that fact would be brought to the attention of the federal judge that would sentence Duarte (R 531). After his plea, Duarte, who was to work under Special Agent Lou Cabanillas, was released on a recognizance bond pending sentencing (R 534-5). Although both DEA and BSO have specific guidelines for supervising confidential informants (R 537), Cabanillas, who was the only agent responsible for dealing with Duarte (R 558-9), never reviewed the guidelines with Duarte (R 531) because Cabanillas considered Duarte to be a "source of information," rather than a confidential informant (R 537).

Cabanillas only met with Duarte three or four times and did not record any of the meetings or make memoranda concerning the meetings (R 542). Likewise, he had no notes or ledgers concerning the meetings (R 545). Cabanillas had no way of knowing of any telephone calls Duarte may have initiated or participated in or any threats or bargains Duarte may have made (R 532, 547). Duarte was told to stay away from accepting money or using drugs (R 546). Doing either of those actions was a violation of Duarte's agreement (R 546).

During Duarte's tenure as an agent working for Cabanillas, he was arrested twice, once for impersonating a police officer (R 535; Duarte Sentencing, p. 24), resisting arrest without violence and defrauding an innkeeper (Duarte Sentencing, p. 24). A urine test during this period indicated that Duarte was using cocaine (R 536; Duarte Sentencing, p. 30). Duarte failed to comply with his federal agreement by failing to report to Pretrial Services when

required to report (Duarte Sentencing, p. 28), by not living at the residence where he was required to live (Duarte Sentencing, p. 28), by failing to appear for a court appearance when he was supposed to (Duarte Sentencing, pp. 29-30), by failing to show up for meetings with Cabanillas (Duarte Sentencing, p. 30) and by failing to file tax returns that he was required to file (Duarte Sentencing, pp. 34-35). Additionally, Duarte revealed the identity of a confidential informant to individuals involved in a marijuana deal (Duarte Sentencing, pp. 36-38). At Duarte's sentencing, the federal judge told him that he "made an awful mess of things for a long time (Duarte Sentencing, p. 44)," and indicated that the sentence would be impacted by the factors discussed above (Duarte Sentencing, p. 44). He then sentenced Duarte to be imprisoned for 136 months (R 534; Duarte Sentencing, p. 45).

The evidence at trial was undisputed that in early February, Duarte, having been given no direction by Cabanillas, began a series of 15 to 20 telephone calls to Appellant (R 793), a college student who lived in Virginia Beach, Virginia (R 791-2). Appellant had met Duarte a year and a half earlier when vacationing in Florida (R 793). During that trip, Appellant became friendly with a woman named Shelby, who was seeing Duarte and who introduced Appellant to him (R 793).

In the first telephone conversation between Appellant and Duarte, Duarte indicated that Shelby was in the hospital and that he needed money for her medical expenses (R 796). He asked

Appellant not to tell Shelby that he was borrowing money from Appellant (R 796). Appellant sent Duarte $250 (R 796).

Three or four days later, on about February 8th or 9th, Appellant got another call from Duarte, who indicated that another bill had come in and that he needed more money (R 797). Again, he asked Appellant not to tell Shelby that he was borrowing from her (R 797). Appellant sent Duarte and additional $225 (R 798).

On about February 18th or 20th, Duarte again called Appellant, this time claiming that his car broke down, that he needed money to pay for it, after which he would sell the car and repay Appellant (R 798). Appellant sent Duarte more money, bringing the total she had sent him to approximately $750 (T 798).

After about 30 days, Duarte had not repaid Appellant, who was getting nervous about her money (R 799). She therefore called Duarte, who said that he did not have the money to repay her and who suggested that she come to Florida and maybe work out a deal (R 800).

Appellant was involved in a difficult relationship at the time with Vaden Lee Williams, a married man (R 799), who would later become her codefendant. She wanted Williams to leave his wife, but he had been putting her off (R 799). Since Appellant and Williams had enjoyed good times on a prior trip to Florida, Appellant thought that returning to Florida might be a good idea to help her and Williams put their relationship back together, while allowing her to also get her money from Duarte (T 799). Williams agreed that it would be a good idea for them to take such a trip (R 800-1), so

he chartered a plane, to be flown by a friend of his, Mitchell Britt (R 801). Appellant and Williams indicated to Britt that they were coming to Florida to negotiate a government contract, because they did not want Britt to come back to Virginia and tell people that they travelled for a reason other than business (R 867). Williams' company was a government supply contractor (R 584).

Britt, Williams and Appellant flew from Virginia to Ft. Lauderdale on April 3rd (R 802), where they rented a car and drove to Miami, taking a room at a Holiday Inn because Appellant worked at a Holiday Inn in Virginia and received a good rate (R 803).

Appellant called Duarte and told him that she wanted her money and that if he did not pay her, she would tell Shelby that he borrowed from her or she would institute legal proceedings (R 804). Duarte begged her not to tell Shelby and indicated that he would come to the Holiday Inn in a few hours (R 805).

Appellant met with Duarte in the hotel lounge, where he stated that he had a gold watch in a pawn shop, that he had a buyer for the watch, that he would repay Appellant after he sold the watch, but that he needed $2,000 to get the watch from the pawn shop (R 806-7). Appellant gave him the $2,000, thinking that she would get the money, as well as her $750, back that evening (R 807). She required Duarte to give her the keys to his car, so that she would have collateral for the money (R 807).

Appellant and Duarte left the Holiday Inn and went to a bar, where there were no English speaking people and where Duarte introduced her to a man identified by Duarte as the potential buyer

of the watch (R 808). After Duarte spoke to the buyer in Spanish for two or three minutes (R 808-809), Appellant and Duarte went to the pawn shop, only to find it closed (R 809). Duarte said that he would pick up the watch in the morning and come to Appellant's hotel to drop off the money (R 810). Appellant, however, insisted on keeping Duarte's car overnight and picking him up in the morning to go to get and then sell the watch (R 810).

When Appellant came to pick up Duarte the next morning, Duarte told her that there was no watch, that he had given Appellant's money to an individual as part of a drug deal and that he had indicated to that individual that Appellant was involved in the deal and would conduct the actual transaction of providing the remaining money owed and accepting the cocaine involved (R 810-812). Duarte told her, "[D]on't F this up," and that if she did, they would both be in danger and maybe even killed (R 816).

That afternoon, Appellant went with Duarte to a Bennigan's restaurant to meet the individual with whom she was to do the drug deal (R 818). They took a table at the restaurant, where they were met by Cabanillas, who introduced himself as "Lou (R 820)."

Cabanillas had received a call the previous day from Duarte, who indicated that he was in a position to put together a drug deal (R 544). Cabanillas told Duarte that he was busy on something else and that he was not really interested in a deal involving less than five kilograms (R 544). Duarte persisted, however, calling again later that day and on the following day (R 544), with an attitude of wanting to encourage Cabanillas to let him put together the deal

(R 545). Finally, Cabanillas told Duarte to introduce him to Appellant at Bennigan's (R 545).

Prior to these discussions with Duarte, there was no active investigation pending against Appellant (R 541). Even after Duarte called, Cabanillas had no active investigation, didn't wish to proceed against Appellant and wasn't interested in investigating Appellant (R 541).

At Bennigan's, Cabanillas took Appellant to the bar, while Duarte remained at the table (R 495). Cabanillas and Appellant gave somewhat different accounts of their conversation.

Cabanillas testified that he told Appellant that he was not interested in selling less than five kilograms and that Appellant replied that she only wanted two kilograms, that she was selling in ounce quantities and that she didn't want to expand her business (R 496-7). Cabanillas stated that they agreed on a price of $32,000 for two kilograms. He said that the way he left things with Appellant was that they would probably get together the next day (R 499).

Appellant testified that Cabanillas told her that they would meet later that afternoon, that she should call him on his beeper at 5:30 and that she should be in the area of Ives Dairy Road, where there was a mall where she could shop and make the call (R 821).

Both Cabanillas and Appellant stated that Cabanillas wrote his beeper number on a Bennigan's matchbook that he gave to Appellant (R 498, 821). They also both testified that Appellant indicated to

Cabanillas that she had given Duarte a sum of money, Cabanillas recalling the amount as $3,000 (R 498) and Appellant as $2,750 (R 820).

After the meeting at Bennigan's, Appellant and Duarte drove back to the Holiday Inn (R 822). On the way, Duarte told Appellant that when she did the deal, she should look for a bag of white powder, open it and put a little bit on her finger, put some on her tongue and expect it to taste bitter and make her tongue numb (R 823). He gave her a knife to use and told her to remember that they were in trouble and that if she didn't do it, they would both be hurt and that possibly Williams would also be hurt (R 823).

When they got to the Holiday Inn, Duarte went to the trunk of his car and brought out a bag (R 823). He took money out of the bag and put it into a shoulder bag of Appellant's, which he then put into Appellant's trunk (R 823-4). Duarte told Appellant that $1,000 of the total was to be taken out for expenses (R 871).

At some point, Appellant was at Duarte's house and spoke to Cabanillas on the telephone. According to Appellant, this occurred in the morning, when Duarte told her about the drug deal (R 816). According to Cabanillas, it occurred at 4:00 p. m., after the meeting at Bennigan's and it was then, rather than at Bennigan's, that he told Appellant to call his beeper at 5:30 from the Ives Dairy area (R 503). Regardless of when Cabanillas gave Appellant her instructions, it is clear that she followed them and called Cabanillas' beeper at 5:30 from the mall (R 504, 826). Cabanillas had not yet completed the arrangements to have the deal monitored,

so he told Appellant to call back (R 505). She did so and Cabanillas told her to meet him at 7:00 in the lobby of a Howard Johnson's hotel on Hallandale Beach Blvd. (R 505, 827).

Williams, Britt and Appellant proceeded to the hotel where Appellant got the bag from the trunk and went into the lobby to meet Cabanillas (R 507-12, 828-30). According to Cabanillas, who observed Appellant from the lobby, both Appellant and Williams went to the trunk, where Appellant put money into the bag (R 508-9). According to Appellant, both Williams and Britt remained in the car when she went to the trunk, where she merely removed the bag (R 828). A surveillance officer, Detective Michael Kallman testified that both Williams and Appellant went to the trunk, but that he could not see what they were doing there (R 465-6).

Cabanillas asked Appellant if she had the money and Appellant replied that she did (R 512, 830). Cabanillas then took Appellant upstairs to Room 313 of the hotel, where Detective Perry Hendrick of BSO, who was acting in an undercover capacity pretending to be a drug dealer, was waiting (R 514).

Appellant produced the money and Cabanillas began to count it (R 515, 667, 832). Appellant indicated that Duarte had told her to remove $1,000 from the money for his expenses (R 668, 871). Hendrick left the room and returned with two kilograms of cocaine (R 518, 669, 832) that he had obtained earlier from the BSO property office (R 661). Hendrick had left the cocaine with Detective John Sousa (R 665), who, along with other officers (R 664), was monitoring the transaction, which was being broadcast

into Room 315 from a transmitter that had been placed in Room 313 (R 416-8).

As she had been directed by Duarte, Appellant used the knife Duarte gave her to cut open the wrappings and rubbed and tasted the cocaine (R 519, 670, 832). Remembering Duarte's admonition that the cocaine should be white, and concerned that Duarte would make her come back and do another deal (R 860), Appellant commented on the fact that one of the kilograms was yellow (R 519, 671, 833). Hendrick responded by indicating that he would give a discount in the future (R 521, 613). Appellant, terrified (R 861), put the cocaine in her bag, started to leave and was arrested (R 521, 674-5).

Appellant filed a motion to dismiss based on entrapment and due process grounds (Supplemental Record) and raised the same claims, along with others, in her motions for a judgment of acquittal, all of which were denied (R 777-83, 874-5).

Appellant also filed a motion to compel production of the DEA guidelines for dealing with confidential informants and to compel answers to certified deposition questions dealing with those guidelines (R 1070-4). The court conducted an in camera review of the guidelines and denied Appellant's requests (R 48-9, 274).

Prior to trial, the court had ordered that certain portions of the tape of the drug deal be deleted before the tape was played at trial. The prosecutor deleted those portions, but also deleted other portions of the tape in which Appellant made comments about Williams not being involved (R 446). The court considered the

question of how to deal with this situation at a time during which it appears that neither Appellant nor her counsel were present.

During the course of the trial, the prosecutor (1) contrasted the way Appellant appeared in the courtroom as a "sweet, innocent, prim and proper woman that is being presented to you here (R 400)" to her voice on the tape; (2) returned to the same theme by comparing Appellant's attire and the way she dressed every day to the way she sounded on the tape (R 948); (3) commented (R 940) on testimony to which an objection had been sustained and which the jury had been instructed to disregard (R 623-5); (4) indicated, despite the fact that none of Appellant's family members had testified at trial, that Appellant's family had been with her "tragically through this entire mess" and that he was sympathetic toward the family (R 963); (5) told the jury that he was the person who decided that Britt, who was arrested along with Appellant and Williams, would not be charged (R 402); (6) told the jury that he was shocked when Appellant was upset with Duarte when Duarte came to the Holiday Inn (R 943); (7) commented on South Florida being a capital for drugs and a location with the cheapest drug prices of any place except for South America (R 939) and on the role of a money man in drug transactions (R 950), despite the fact that no testimony or evidence was presented regarding these matters.

The only testimony or evidence presented by Appellant at trial was her own testimony. Her counsel indicated a desire to use his entire allotted time for closing argument after the prosecutor's argument (R 890). The court informed him that if that procedure

were followed, Appellant's counsel would be limited to rebutting the arguments of the prosecutor and Williams' attorney (R 890). Faced with this ruling, Appellant's counsel had to settle for presenting 30 minutes of his argument before the prosecutor's argument and 10 minutes afterwards (R 890).

In instructing the jury, the court defined possession as part of the trafficking instruction and as a separate instruction on a lesser included offense (R 989-90, 992-3). Although the trafficking count of the information charged Appellant with trafficking by purchasing or possessing cocaine (R 1038), the court did not define purchase as a part of the trafficking instruction, as it did with possession. Rather, the court defined purchase just once, as an instruction on a lesser included offense (R 991-2).

SUMMARY OF THE ARGUMENT

Objective entrapment has its roots in the Florida Constitution and it therefore cannot be abolished by the Legislature. If it is said that the Legislature can take such an action, however, it should be concluded that it did not do so. This is because Section 777.201, Florida Statutes, can be reasonably read as having been enacted for the sole purpose of shifting the burden of proving subjective entrapment from the prosecution to the defense and because when a criminal statute is subject to differing constructions, it must be construed most favorably to an accused. Further, the informant here created the criminal activity and was able to do so because the federal agent gave him free reign to act as he pleased. The agent had no investigation pending and no

interest in proceeding against Appellant. He did so only after the persistent urging of the informant, who was awaiting sentence on drug charges and who had entered into an agreement to assist law enforcement in the hope of receiving a lesser sentence. Given no supervision, the informant, who was using cocaine and who was twice arrested during his tenure as an informant, threatened Appellant with physical harm and death to force her to do the drug deal, took money from Appellant and from the money involved in the deal and repeatedly violated the terms of his assistance agreement in many respects. The informant's conduct and the agent's lack of control constituted entrapment and a due process violation.

The evidence presented at trial related only to the substantive offense of trafficking and did not show the agreement necessary to constitute a conspiracy. It was therefore insufficient to support the conspiracy conviction.

Given Appellant's reliance on the entrapment and due process defenses, her need to cross examine the federal agent on his agency's guidelines for dealing with confidential informants was acute. These guidelines were not provided because the federal courts exempt them from discovery in federal proceedings. The rules applicable in Appellant's case, however, were those of the courts of Florida, under which the guidelines were admittedly discoverable. If the federal government wanted to maintain its exemption, it should have brought the case in its own court system. It chose instead to relieve itself of the burden of prosecuting the

matter, it did so knowing the Florida discovery requirements and it should therefore have been held to those requirements.

The determination of whether to play the complete tape of the drug deal or the tape prepared by the prosecutor, which improperly deleted comments by Appellant that her codefendant was not involved, was a matter of significance to Appellant that called for a strategic decision as to which tape was preferable and as to whether some other alternative should have been urged. It appears, however, that neither Appellant nor her counsel was present when this issue was considered. The importance of the issue is such that these absences compel reversal, as does the court's ruling on the tape issue, which resulted in the playing of the tape prepared by the prosecutor.

The prosecutor made a series of improper comments that discussed Appellant's off the stand demeanor, relied on testimony to which an objection had been sustained and which the jury had been told to disregard, interjected the prosecutor's personal feelings and beliefs, were inflammatory in nature and were based on matters not in evidence. The denials of Appellant's motions for mistrial warrant reversal, as does the cumulative effect of the comments.

Having presented only her own testimony, Appellant was entitled to the concluding argument before the jury, a term that has been interpreted to mean the last argument. By ruling that if Appellant's counsel wished to give his entire argument after that

of the prosecutor, he would be limited to rebuttal, the court denied Appellant this right.

Appellant was charged with trafficking by purchasing or possessing cocaine. In instructing the jury, the court defined possession twice, once as part of the trafficking instruction and once as a lesser included offense, but only defined purchase once, as a lesser included offense. This unduly emphasized the possession instruction, which contained language unfavorable to Appellant.

ARGUMENT

I

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS AND MOTIONS FOR JUDGMENT OF ACQUITTAL WHEN THE EVIDENCE ESTABLISHED ENTRAPMENT AS A MATTER OF LAW AND WHEN APPELLANT'S RIGHT TO DUE PROCESS WAS VIOLATED

A

THE OBJECTIVE TEST FOR ENTRAPMENT IS ROOTED IN THE FLORIDA CONSTITUTION

In Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. den., 473 U.S. 905 (1985), this court made it clear that Florida recognizes both the subjective and objective tests for entrapment. Subjective entrapment focuses on the predisposition of the defendant, while objective entrapment focuses on the conduct of the police. This court set forth, 465 So.2d at 522, the test for determining whether objective entrapment occurred:

> Entrapment has not occurred as a matter of law when police activity (1) has as its end the interruption of specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

The State contends, however, that the passage of Section 777.201, Florida Statutes, which applies to offenses occurring after October 1, 1987, abolished the objective entrapment defense. This contention should be rejected.

The statute reads:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

The courts of appeal for the First and Third Districts have concluded that this statute abolishes objective entrapment. State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), rev. den., 584 So.2d 998 (Fla. 1991). The courts of appeal for the Second and Fourth Districts, on the other hand, have found that objective entrapment still exists despite the passage of the statute. Wilson v. State, 589

So.2d 1036 (Fla. 2d DCA 1991); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991).

In Strickland, the court receded from a prior decision which had held that the objective test was abolished by the statute. The reason that the court took this approach was the decision of this court in State v. Hunter, 586 So.2d 319 (Fla. 1991). Although Hunter did not deal specifically with the question of whether the objective test is still viable, this court did find that the "objective entrapment standard includes due process considerations." 586 So.2d at 322.

In an opinion concurring in part and dissenting in part (in which Justice Barkett concurred), Justice Kogan stated, 586 So.2d at 325:

> The Cruz court did not directly confront whether the objective test finds its origin in the Florida Constitution, although it did note that the federal advocates of the objective standard had not claimed a constitutional basis for their views. Id. at 520 n. 2 (discussing opinions of federal justices favoring objective standard). The Cruz court did, however, note that the objective entrapment defense involves issues that substantially overlap due process concerns. Id. at 519 n. 1 (citing cases so holding).
>
> Today, the majority opinion resolves the question of the source of Florida's objective entrapment defense. The majority holds that "this objective entrapment standard involves due process considerations." Majority op. at 322. It goes on to deny Hunter's claim because he allegedly is vicariously asserting the due process rights of Conklin. Id. at 322. Because the federal system does not recognize the objective entrapment defense, the majority opinion clearly is premised entirely on the due process clause of the Florida Constitution. Art. I, §9, Fla. Const. I fully concur in this conclusion. Indeed, I believe it necessarily flows from our prior case law.

Because the defense of objective entrapment is rooted in the Florida Constitution, it "cannot be superseded by statutory enactments." Strickland, 588 So.2d at 271. Therefore, "Cruz is still alive and well." Id. at 270.

B

LEGISLATIVE ACTION DID NOT ABOLISH OBJECTIVE ENTRAPMENT

Even if it is assumed that the legislature could abolish the defense of objective entrapment, it should not be held that the statute accomplished that end.

The statute merely states that under circumstances that constitute subjective entrapment, the defense of entrapment exists. It does not preclude the existence of the defense under other circumstances. Moreover, the statute modifies the common law entrapment defense by shifting the burden from the State, State v. Wheeler, 468 So.2d 978 (Fla. 1975), to the defense. The statute can therefore be reasonably read to be for the sole purpose of shifting the burden of proving subjective entrapment.

Section 775.021 (1), Florida Statutes, provides:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Thus, in State ex rel. Lee v. Buchanan, 191 So.2d 33, 36 (Fla. 1966) (citations omitted), this court stated:

> Statutes criminal in character must be strictly construed. . . . In its application to penal and criminal statutes, the due process clause requirement of definiteness is of especial importance.

See also Perkins v. State, 576 So.2d 1310 (Fla. 1991) (applying this rule of construction in holding that the defense of self defense is available for a killing that occurred when the defendant and the decedent were engaged in an attempt to traffic in cocaine and the decedent was the first to use deadly force); Carawan v. State, 515 So.2d 161 (Fla. 1987) (applying this rule of construction in considering a double jeopardy claim with regard to the question of whether, and under what circumstances, a defendant may be convicted of multiple criminal offenses based on a single act).

Application of these principles to the present case means that it must be assumed that the legislature did not intend to abolish the defense of objective entrapment.

This conclusion is not changed by the House of Representatives Committee on Criminal Justice Staff Analysis, June 27, 1987, at 177, which was relied upon by the Third District in Gonzalez, 571 So.2d at 1349, in finding that the legislature intended to abolish the objective test. The analysis (attached as Appendix A to this brief) states that the bill "provides that entrapment occurs" under certain circumstances and goes on to say, "This section overrules the Florida Supreme Court's decision in Cruz v. State, 465 So. 2d 516 (Fla. 1985) which held that the objective test of whether law enforcement conduct was impermissible was in the discretion of the trial court." House Analysis at 177.

Thus, the analysis indicates that this court in Cruz had held that it was within the discretion of the trial court to allow or

disallow the defense of entrapment and that the bill was for the purpose of eliminating that discretion by providing that entrapment does occur as a matter of law under particular circumstances. It is likely that a representative who read only this analysis would have assumed that the proposal was an effort to expand the defense of entrapment, not to restrict it. The language used in this analysis therefore certainly cannot be said to demonstrate an intention by the House to overrule the actual holding of Cruz.

It should also be noted that the Senate Staff Analysis and Economic Impact Statement, May 22, 1987, p. 2 (attached as Appendix B to this brief), makes no reference whatsoever to Cruz, indicating instead that the proposal clarifies that entrapment is an affirmative defense available to defendants who establish a lack of predisposition. Thus, there is no indication that the Senate intended to overrule Cruz. To the contrary, it appears that the Senate's purpose was, as suggested previously in this brief, simply to make subjective entrapment an affirmative defense.

It should additionally be recognized that the Summary of Senate Amendments on House Bill 1467 (attached as Appendix C to this brief) tracks the language of the Senate Analysis and indicates that it was the Senate version of the proposal that was accepted. Thus, there is not even any indication that any intent that may be said to have existed at one time in the House continued at the time the actual statute was adopted.

In light of the foregoing, it is apparent that even if it is held to be within the power of the legislature to abolish objective entrapment, the statute did not do so.

C

APPELLANT WAS ENTRAPPED AS A MATTER OF LAW

As noted in Section A of this point, this court in Cruz established a threshold test as to whether objective entrapment has occurred. To be proper, police activity must have as its end the interruption of a specific ongoing criminal activity and must utilize means reasonably tailored to apprehend those involved in the ongoing criminal activity. 465 So.2d at 522. The conduct of the law enforcement officials here, Cabanillas and his agent Duarte, fails to satisfy either prong of the Cruz test.

The record reflects no "specific ongoing criminal activity," demonstrating instead that Duarte created such activity in the hope that it would lead to a reduction in his sentence. Cabanillas testified that prior to his discussions with Duarte, there was no active investigation pending against Appellant (R 540) and that even after Duarte called, Cabanillas had no active investigation, didn't wish to proceed against Appellant and wasn't interested in investigating Appellant (R 541). Indeed, Duarte had to call Cabanillas repeatedly and insistently to persuade him to even meet with Appellant. These facts alone establish entrapment as a matter of law.

The same conclusion is compelled for a second reason also. Duarte's actions can in no way meet the requirement of Cruz that

the activity of the government agents be "means reasonably tailored to apprehend those involved in the ongoing criminal activity."

The evidence is undisputed that Duarte took $2,750 from Appellant, told Appellant that he had advanced her money as part of a cocaine transaction in which he had indicated to the seller that Appellant would complete the deal and told Appellant that both of them and Williams would be hurt or killed if Appellant did not go through with the transaction.

Moreover, as detailed in the Statement of the Facts, Duarte used cocaine, took actions that resulted in his being arrested twice, once for impersonating a police officer and other charges, skimmed $1,000 from the money used in the cocaine deal, consistently and cavalierly violated the requirements of his federal agreement and placed another confidential informant's life in danger.

Duarte was able to do all this because he was given carte blanche by Cabanillas, who was supposed to have been supervising him and controlling him, to act in any manner that he saw fit. Cabanillas never explained to Duarte any rules or guidelines for confidential informants, he kept no records of Duarte's activities, he failed to monitor or record any of the conversations he had with Duarte and he had no way of knowing what calls, threats or bargains Duarte made to or with Appellant. Essentially, Cabanillas allowed Duarte to do whatever he wanted to do.

Cabanillas' excuse for his lack of control over Duarte was that he considered Duarte to be a "source of information," rather

than a "confidential informant (R 528-9)," a distinction which Cabanillas drew based on whether an individual "actively participates in a continuing manner at my direction in an investigation. (R 529)."

The distinction drawn by Cabanillas cannot withstand even cursory scrutiny. Just as a rose is a rose is a rose, a confidential informant is a confidential informant is a confidential informant. Indeed, Hendrick, the BSO detective involved in the case, considered Duarte to be a confidential informant (R 710), and, during voir dire, the prosecutor, in a clear reference to Duarte, specifically told the panel that a confidential informant was involved in the case (R 159).

Further, Cabanillas' semantics lose whatever little force that might have otherwise had when it is realized that in the Declaration of Stephen H. Greene, Assistant Administrator of the DEA Operations Division, filed in opposition to Appellant's request for the production of the DEA guidelines regarding the use of confidential informants (See the argument to Point III of this brief), it is noted that the guidelines deal with "the selection, direction, and control of sources of information (R 1081; emphasis added)." Thus, whichever label Cabanillas puts on Duarte, his disregard of the requirements for the supervision and control of Duarte was clearly inappropriate.

This case is controlled by Hunter, supra. There, an individual named Ron Diamond, who had been convicted of drug trafficking, agreed to assist the police in making new drug cases

in return for sentencing considerations. Diamond instigated a drug transaction between the defendants and undercover police officers despite the lack of any specific ongoing criminal activity. Diamond made frequent telephone calls to one of the defendants, becoming insistent that the defendant become involved.

This court found that Diamond's activities met neither prong of the Cruz test and that the defendant that dealt with Diamond was entrapped as a matter of law. Hunter, supra. Moreover, a number of other cases have reached similar conclusions under similar facts. Pezella v. State, 513 So. 2d 1328 (Fla. 3d DCA 1987), rev. den., 523 So.2d 578 (Fla. 1988); Myers v. State, 494 So.2d 517 (Fla. 4th DCA 1986); Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985), rev. den., 488 So.2d 831 (Fla. 1986). The same rationale applies here.

D

APPELLANT'S RIGHT TO DUE PROCESS WAS DENIED

If this court concludes that objective entrapment was abolished by the legislature, it should nonetheless conclude that Appellant is entitled to discharge because the facts of this case, as set forth and discussed in the Statement of the Facts and Section B of this point, demonstrate that Appellant's right to due process was violated.

In State v. Glosson, 462 So.2d 1082, 1085 (Fla. 1985), this court held that "governmental misconduct which violates the constitutional due process rights of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal

charges." Although this court declined to apply the Glosson rationale to the facts of Hunter, it does apply here because the decision in Hunter dealt only with the actions of Diamond, the individual seeking a reduced sentence. The present case deals with the actions of both Duarte and Cabanillas. The total disregard by Cabanillas of his obligation to supervise and control Duarte brings this case within the scope of the due process rationale expressed in Glosson.

The State will likely argue, as it did in the Fourth District, that no due process violation can occur when an informant who is seeking a reduction in a pending sentence does not testify at trial. This argument is based on authority indicating that when an informant's motive for his actions is the sole basis for a due process claim, the fact that the informant does not testify can defeat the claim. Those cases are plainly inapplicable here because Appellant's due process claim is based not just on Duarte's motive, but also on his outrageous conduct and on the total disregard by Cabanillas of his responsibility to supervise Duarte and inform him of his obligations and duties. The fact that Duarte did not testify therefore does not defeat Appellant's argument.

E

APPELLANT'S CONVICTIONS MUST BE REVERSED EVEN IF IT IS HELD THAT SHE WAS NOT ENTRAPPED AS A MATTER OF LAW AND THAT HER RIGHT TO DUE PROCESS WAS NOT DENIED

If this court should reject Appellant's contentions with regard to entrapment as a matter of law and due process, her convictions must nonetheless be reversed. Appellant raised seven

issues in the Fourth District. Six of her issues were not reached in light of the court's conclusion that Appellant should be discharged on objective entrapment grounds. Set forth as Points II through VII of this brief are Appellant's other six issues. They are proper subjects for this court's consideration because when this court accepts jurisdiction as the result of a certified question, its review is not limited to the question, but extends to the entire decision. Tillman v. State, 471 So.2d 32 (Fla. 1985); Lawson v. State, 231 So.2d 205 (Fla. 1970).

II

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CONSPIRACY COUNT

"Conspiracy is a substantive crime that is separate and distinct from the offense which underlies it." State ex rel. Ridenour v. Bryson, 380 So.2d 468, 469 (Fla. 3d DCA 1980). A conspiracy may not be inferred from the offense which is the object of the conspiracy. Velunza v. State, 504 So.2d 780, 782 (Fla. 3d DCA 1987). Rather, in order to obtain a conviction for conspiracy, the state must how the existence of an agreement to commit a criminal offense between or among the co-conspirators King v. State, 104 So.2d 730 (Fla. 1958); Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979), cert. den ., 383 So.2d 1201 (Fla. 1980).

In the present case, the State presented no more than evidence relating to the offense of trafficking. Appellant was charged with conspiring with Williams (R 1038), but the only testimony as to any conversations between Appellant and Williams was that of Appellant

(R 791-873), which was exculpatory in nature, and that of Britt, who stated that despite spending most of the two days in question with Appellant and Williams, he was unaware up to the time of his arrest of even the existence of a cocaine deal (R 623). Clearly, there was no evidence of the agreement necessary to prove conspiracy. Garcia v. State, 548 So.2d 284 (Fla. 3d DCA 1989); Ashenoff v. State, 391 So.2d 289 (Fla. 3d DCA 1981). The court therefore erred in denying Appellant's motions for judgment of acquittal on the conspiracy charge (R 772-6, 874-5).

III

THE COURT ERRED IN REFUSING TO REQUIRE A FEDERAL DEA AGENT TO PRODUCE ADMITTEDLY DISCOVERABLE MATERIAL REGARDING THE SUPERVISION AND CONTROL OF CONFIDENTIAL INFORMANTS AND TO ANSWER CERTIFIED QUESTIONS ON THAT SUBJECT WHEN THE AGENT'S ONLY REASON FOR REFUSAL WAS BASED ON A DISCOVERY EXEMPTION RECOGNIZED BY THE FEDERAL COURTS THAT DOES NOT APPLY IN FLORIDA AND WHEN THE INFORMATION SOUGHT WAS CRITICAL TO APPELLANT'S DEFENSE

This issue arises from Cabanillas' refusal to comply with a subpoena duces tecum for the production of the DEA guidelines regarding the supervision and control of confidential informants and to answer questions on that subject during his deposition (R 1070-1). Appellant moved the court to require the production of the guidelines and answers to the questions (R 1070-4). These guidelines deal with DEA's standards for the selection of investigative targets and procedures for the selection, direction and control of sources of information (R 1081).

Despite recognizing that the information Appellant sought was discoverable (R 30), the federal government took the position that

its production should not be required due to discovery exemption recognized by the federal courts with regard to certain investigative techniques (R 30, 1075-6).

As detailed in the argument to Point I of this brief, it was Appellant's position at trial that Cabanillas' lack of supervision and control over Duarte was a major factor in denying her due process and in creating entrapment as a matter of law. Clearly, placing Cabanillas' handling of this matter in the context of his agency's standards was critical to the defense and would have been allowed but for the assertion of the federal discovery exemption by the federal government.

The court initially denied the motion to compel answers to the certified deposition questions (R 48-9), and, after conducting an in camera review of the guidelines, also denied the request for their production (R 274). The guidelines were then sealed and placed in the custody of an Assistant United States Attorney, who agreed to provide them to the appellate court for an in camera review (R 161-174). A motion to have the guidelines transmitted for such review is being filed by Appellant.

In State v. Tascarella, 580 So.2d 154 (Fla. 1991), this court upheld a trial court order excluding the testimony of two DEA agents who refused to submit the depositions under Florida's criminal discovery rules. The court stated:

> It has long been held that the states have full control over the procedural rules in their courts, in both civil and criminal cases. Bute v. Illinois, 333 U.S. 640, 652 (1948). See also Markert v. Johnston, 367

So.2d 1003 (Fla.1978) (Florida Supreme Court has the exclusive power to prescribe rules for the practice and procedure in Florida courts. In Bute the Court stated:

> They [the States] retained this control from beginning and, in some states, local control of these matters long antedated the Constitution. The states and the people still are the repositories of the "powers not delegated to the United states by the Constitution, nor prohibited by it to the States, ..." The underlying control over the procedure in any state court, dealing with distinctly local offenses. . . consequently remains in the state.

333 U.S.at 652 (footnote omitted; quoting U.S. Const. amend. X).

The case under review originated in state court and involved prosecution of the Tascarellas for violating state law. In this situation, Bute requires trial courts to follow state rules with respect to procedural matters. The supervision of discovery depositions is a procedural matter and is therefore subject to state control.

580 So.2d at 155-6.

The same reasoning applies to the present case and demonstrates that it was error for the court to deny Appellant's requests. When the federal government decides to turn a case over to a state for prosecution, the rules and requirements of that state apply. Defendants in criminal cases in Florida have much broader discovery rights than do defendants in the federal courts. This fact was well known to the federal authorities when a decision was made to pursue this case in the state, rather than the federal,

court system. The position taken by the federal government was an effort for the federal government to have its cake and eat it too. The federal government sought to maintain the discovery exemption it has in the federal courts, while being relieved of the burden of prosecuting the case.

Such an approach should not be countenanced by the courts of this state. It reflects a disregard for the authority and independence of the Florida judiciary. If the federal government wanted to maintain its federal discovery exemption, it should have proceeded in the federal courts in the first place or, when this issue arose, it should have followed the suggestion made by the court, when the court stated, "Maybe you should nol-pros [sic] and go to the Federal Government and file this case. They elected to charge this case in state court under the parameters that exist in state court (R 47)." Instead, the federal government chose to have the case prosecuted in the state system, knowing full well of the existence of the parameters noted by the court. They should therefore have been held to those parameters.

IV

THE COURT ERRED IN CONSIDERING THE ISSUE OF HOW TO DEAL WITH THE FACT THAT THE PROSECUTOR IMPROPERLY DELETED CERTAIN PORTIONS OF A TAPE RECORDING WHEN IT APPEARS FROM THE RECORD THAT NEITHER APPELLANT NOR HER COUNSEL WERE PRESENT WHILE THE ISSUE, WHICH WAS OF SIGNIFICANCE TO APPELLANT, WAS CONSIDERED AND WHEN THE COURT RULED INCORRECTLY ON THE ISSUE

Following a luncheon recess, the court conducted a hearing on Williams' motion to suppress statements that he had made. As the hearing began, the court noted that "both counsel are present. And

the defendant is present (R 435)." Williams' counsel responded by pointing out that Appellant's counsel was not present and the court then clarified its statement by indicating that the reference to both counsel was meant as a reference to the prosecutor and Williams' counsel. The court did not clarify its reference to "the defendant," singular, but it appears to be a reference only to Williams, since it was his motion being heard, his attorney was the only defense attorney present and throughout the trial, the court was very careful to note the presence of "the defendants," plural, or "both defendants," or "both the defendants," when Williams and Appellant were present at the same time (R 52, 99, 161, 174, 274, 276, 358, 455, 526, 654, 740, 790, 892, 986, 1010). It thus appears that neither Appellant nor her counsel was present.

The court proceeded to conduct the suppression hearing, eventually denying Williams' motion to suppress (R 445). After a recess, the court, the prosecutor and Williams' attorney had a discussion regarding the tape that would be played for the jury and the question of what parts of the tape had been deleted by the prosecutor pursuant to an order of the court (R 445-6). There is no indication in the record that either Appellant or her attorney had returned to the courtroom for this discussion. The court took a recess to allow Williams' counsel to listen to the tape (R 446).

After the recess, Williams' counsel pointed out that the prosecutor had deleted the portions of the tape that he was supposed to delete, but that he had also deleted other portions of the tape as well (R 446). The court resolved the matter by ruling

that Williams' counsel could choose between the admission of the original, unedited, tape and the tape as edited by the prosecutor (R 451), not allowing the alternative preferred by Williams' counsel, the preparation of a tape that deleted only the portion of the tape that the court had ordered deleted. Williams' counsel chose the edited tape (R 452). There is no indication in the record that either Appellant or her attorney had returned to the courtroom for these proceedings. After the matter was resolved, another recess was taken (R 453).

Following the recess, the court noted, for the first time since the beginning of the hearing on Williams' motion to suppress, which individuals were present, stating that "[b]oth defendants" were present, as well as "[all] three counsel (R 455)." It thus appears that Appellant and her counsel did not rejoin the proceedings until after the issue regarding the tape had been decided.

In Vileenor v. State, 500 So.2d 713 (Fla. 4th DCA 1987), the court dealt with a situation in which the defendant's attorney was absent from the courtroom for about five minutes during the jury instructions. The court found "that it was error for the trial court to proceed in the absence of a waiver, or other protection afforded the appellant, in the absence of counsel," id. at 715, but found the error to be harmless because no claim was made that the court read the instructions in an improper manner.

In the present case, the decision as to which tape to play, and as to whether the position advanced by Williams' counsel should

have been accepted, impacted on Appellant as well as Williams. The portions of the tape that were in dispute were comments by Appellant about Williams not being involved. Such comments could have been viewed as helpful to Appellant's defense, since they were entirely consistent with Appellant's testimony that she was entrapped by Duarte without any involvement by Williams. Appellant's counsel should have therefore had the opportunity to have input into the matter, to make a strategic decision as to whether he wanted those statements before the jury and to have acted accordingly in advocating whatever position he wished to adopt.

Moreover, unlike Vileenor, in which there was no question that the court did nothing wrong during counsel's absence, the court here erred in not requiring the prosecutor to prepare a tape that included the portions that were improperly deleted, since it is not appropriate for the State to determine which portions of a tape should be deleted. Mathews v. State, 353 So.2d 1274 (Fla. 2d DCA 1978).

The alleged denial of the right to the presence of counsel need not be preserved by objection. Vileenor, supra, 500 So.2d at 714. Reversal is therefore required due to the absence of counsel while the tape issue was considered in the present case. The court's erroneous ruling on the tape issue itself provides an additional basis for reversal.

Under the circumstances of this case, the absence of Appellant during this portion of the proceedings compels reversal as well.

A defendant "has a constitutional right to be present at all crucial stages of his trial where his absence might frustrate the fairness of the proceedings." Garcia v. State, 492 So.2d 360, 363 (Fla. 1986), cert. den., 479 U.S. 1022 (1986). The issue that was dealt with in Appellant's absence, as discussed above, called for a strategic decision that Appellant should have had the opportunity to participate in. Her absence therefore was one that might well have frustrated the fairness of the proceedings. Certainly, when her absence is coupled with the absence of her attorney, this must be said to be the case.

V

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL BASED ON IMPROPER COMMENTS BY THE PROSECUTOR AND THE CUMULATIVE EFFECT OF THE PROSECUTOR'S IMPROPER COMMENTS DEPRIVED APPELLANT OF A FAIR TRIAL

The record in this case reflects a series of improper comments by the prosecutor that deprived Appellant of a fair trial.

In his opening statement, the prosecutor referred to the tape of the drug deal and drew a distinction between the way Appellant sounded on the tape and the appearance and demeanor she was presenting in the courtroom. The prosecutor stated, "And the sweet, innocent, prim and proper woman that is being presented to you here sounds something different -- (R 400)." An objection by Appellant's counsel was sustained, but his motion for mistrial was denied (R 400-1).

Despite the fact that the objection was sustained, the prosecutor, in his closing argument, launched a similar attack. He

prefaced discussion of Appellant's demeanor on the stand by again contrasting her voice on the tape with her off the stand demeanor.

> And so what she's asking you to do is to, first of all, excuse her behavior and, secondly, believe that she is not the person she appears to be on the tape. That she is not in fact the skilled drug negotiator that she that she sounds like on this tape.
>
> You've seen her dress every day. You've noticed her attire. You've seen how she's been presented to you . . .

(R 947-8)

". . . [C]omments on a defendant's demeanor off the stand are clearly improper." Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1986), cert. den. sub nom, Pope v. Dugger, 480 U.5. 951 (1987) (footnote omitted). Thus, the courts have found to be inappropriate various comments of such a nature. Id., (defendant grinning); Williams v. State, 550 So.2d 28 (Fla. 3d DCA 1989), rev. den., 562 So.2d 348 (Fla. 1990)(defendant laughing and snickering); United States v. Pearson, 746 F.2d 787 (11th Cir. 1984)(defendant moving his leg up and down and appearing nervous); United States v. Wright, 160 U.S.App.D.C. 57, 489 F.2d 1181 (1973)(defendant finding part of trial humorous and being unable to stand other parts).

The prosecutor also took another inappropriate approach in his efforts to paint a picture of Appellant as a drug dealer. He argued to the jury that Britt had told the jury that Appellant had said that she would handle the negotiations of the government contracts because Williams did not get along with the people involved (R 940). This argument was made despite the fact that an

objection to Britt's testimony in this respect had been sustained and the jury had been instructed to disregard the testimony (R 623-5). Appellant made unsuccessful motions for mistrial at the time of the testimony (R 625) and at the time the prosecutor improperly argued the matter to the jury (R 941).

The impact of these improper efforts by the prosecutor to convince the jury that Appellant was a drug dealer was magnified by the fact that the prosecutor also referred to facts not in evidence in appealing to the sympathy, bias and prejudice of the jury with regard to drugs in the south Florida community.

> Plain and simple, South Florida, and all you got to do is pick up the newspaper, is a capital for drugs. This is where people come to get drugs. The drugs get shipped into South Florida from South America, sent to other locations from South Florida. Unless you go to South America to buy your cocaine, the next best price that you can possibly get drugs is in South Florida.
>
> (R 938-9)

The prosecutor later resumed his personal primer on the drug trade, once again discussing matters not supported by the evidence. When talking about the State's theory of the role played in the transaction by Williams, who remained outside the hotel when it occurred, the prosecutor stated:

> Mr. Williams -- ladies and gentlemen, in a drug deal if you got -- if the people are buying cocaine, people who are buying cocaine have someone negotiating for them and then the person behind the person negotiating is the money man. The money man, the one who has the capital to buy the product. The person who's the money man on a drug deal always keeps himself or herself out of the picture until such time as it becomes --
>
> (R 950)

After an objection was sustained and the jury was instructed to disregard the comment (R 951), the prosecutor, undeterred, revisited the subject, stating, "People who are the source of the money keep themselves in the background (R 951)" and then adding, "Until the deal is consummated or finalized those people remain in the background. This drug deal is no different than any other drug deal (R 951)." The court then reminded the prosecutor that there had been no testimony in the case about what money men do in drug deals (R 951), after which the prosecutor told the jury that it was his view of the evidence that "the money man in this case is sitting right over there, Vaden Williams, Patricia Fruetel's boyfriend (R 951-2)."

Essentially, the prosecutor told the jury that drug deals happen in a certain way and that what happened in this case was what happens in every drug deal. He thereby added support to the State's theory of the case with reliance on facts that were not reflected by the evidence. Although the comments were more directly concerned with Williams than with Appellant, they were clearly extremely prejudicial to Appellant, since the jury's acceptance of the concept of Williams being a money man and the concept of this transaction being no different from any drug deal would require the rejection of Appellant's version of the events and theory of the case.

It is plainly inappropriate for a prosecutor to comment on matters not supported by the evidence. State v. Wheeler, 468 So.2d

978 Fla. 1985); Huff v. State, 437 So.2d 1087 (Fla. 1983); Duque v. State, 498 So.2d 1334 (Fla. 2d DCA 1986).

Moreover, comments regarding drugs in the community are inflammatory and improper, Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976), as are appeals to geographic prejudice. Knight v. State, 316 So.2d 576 Fla. 1st DCA 1975).

Not only did the prosecutor base arguments on his personal view of the drug trade, but he interjected his personal feelings and beliefs in other areas as well.

In his opening statement, the prosecutor told the jury that he was the person who decided that Britt, who was arrested at the same time as Appellant and Williams, would not be charged (R 402). In his closing argument, the prosecutor stated, "I was shocked when she [Appellant] was all upset with Anibal Duarte allegedly when he comes over to the hotel at around nine p.m. (R 943)." Additionally, although none of Appellant's family members testified at trial, the prosecutor noted that Appellant's "family has been with her tragically through this entire mess" and that it was "easy to be sympathetic toward the family as I am (R 963)."

These comments were improper because they were not supported by any evidence, Wheeler, supra; Huff, supra; Duque, supra, because they expressed the prosecutor's beliefs regarding credibility, George v. State, 539 So.2d 21 (Fla. 5th DCA 1989); Blackburn v. State, 447 So.2d 424 (Fla. 5th DCA 1984); Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); Francis v. State, 384 So.2d 967

(Fla. 3d DCA 1980), and because there is no reason to comment on the family members of any trial participant if those individuals are not relevant to the case. See Gomez v. State, 415 So.2d 822 (Fla. 3d DCA 1982) (reference to victim who had admitted committing perjury as a gentleman with three children and a wife); Tuff v. State, 509 So.2d 953 (Fla. 4th DCA 1987) (mention of the number of children each juror had). The principle that it is improper to make comments about family members is particularly applicable to the facts of the present case since the comment here carried the implication that Appellant did something that necessitated the support of her family and since the effect of the comment was aggravated by being made in a context that portrayed the prosecutor as a sympathetic individual, a fact that was of no relevance and that could have only been referred to in order to curry favor with the jury.

Given the series of improper comments by the prosecutor, it is clear that Appellant was deprived of a fair trial. Under such circumstances, the denial of Appellant's motions for mistrial requires reversal, as does the cumulative effect of the improper comments. Tuff, supra; Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), rev. den., 462 So.2d 1108 (Fla. 1985).

VI

THE COURT ERRED IN DENYING APPELLANT THE RIGHT TO THE CONCLUDING ARGUMENT BEFORE THE JURY BY DENYING APPELLANT'S COUNSEL'S REQUEST TO GIVE HIS ENTIRE CLOSING ARGUMENT AFTER THE STATE'S ARGUMENT UNLESS APPELLANT'S COUNSEL WOULD LIMIT HIS ARGUMENT TO REBUTTING WHAT WAS SAID BY THE PROSECUTOR AND BY THE ATTORNEY FOR APPELLANT'S CODEFENDANT

The only testimony or evidence presented by Appellant was her own testimony. Thus, she was "entitled to the concluding argument before the jury." Florida Rule of Criminal Procedure 3.250.

The court allowed 40 minutes per side for closing argument and Appellant's counsel indicated that he wished to use his entire 40 minutes after the prosecutor presented his argument (R 890). The court indicated that if that procedure was followed, Appellant's counsel would be limited to rebutting the argument of the prosecutor and of Williams' attorney (R 890). Having thus been precluded from presenting the primary thrust of his argument as the concluding argument, Appellant's counsel had to settle for presenting 30 minutes of his argument before the prosecutor's argument and 10 minutes afterwards (R 890).

In Wright v. State, 87 So.2d 104 (Fla. 1956), this court interpreting a statute that preceded the present rule and that similarly guaranteed the right to "the concluding argument before the jury," stated that "[t]he word 'concluding' means to us the last argument if any arguments at all are made." Id. at 107. Thus, Rule 3.250 secures the right to the last argument, not just the right to rebut the arguments of the prosecution.

The right to the last argument is a "vested procedural right which cannot be denied to a defendant when he is entitled to exercise it." Faulk v. State, 104 So.2d 519, 521 (Fla. 1958). The denial of this right is "reversible error," Birge v. State, 92 So.2d 819, 821 (Fla. 1957), which is not subject to the application

of the harmless error rule. Id. at 822; Raysor v. State, 272 So.2d 867 (Fla. 4th DCA 1973).

By ruling that Appellant's counsel would be limited to rebuttal if his entire closing argument was presented after the prosecutor's closing argument, Appellant's counsel was forced to shift the bulk of his closing argument to a point at which it was not the concluding argument. This deprived Appellant of her right to the last argument and calls for reversal.

VII

THE COURT ERRED IN READING THE JURY INSTRUCTION ON POSSESSION TWO TIMES, THEREBY PLACING UNDUE EMPHASIS ON AN INSTRUCTION THAT WAS HIGHLY PREJUDICIAL TO APPELLANT

Appellant was charged with trafficking in cocaine by purchasing or possessing cocaine in an amount of 400 grams or more (R 1038).

In its instructions, the court properly told the jury that the elements of the crime of trafficking included the purchase and/or possession of the substance and the intent to purchase and/or possess the substance (R 989). The court then defined possession as a part of the trafficking instruction, but did not define purchase as a part of that instruction (R 989-90).

After giving the trafficking instruction, the court instructed the jury on both purchase and possession as lesser included offenses of trafficking, defining each of those terms at that time (R 991-3).

Thus, although Appellant was charged with trafficking by purchase or possession, the jury was instructed twice on possession

and only once on purchase. This was done despite Appellant's counsel's statement during the charge conference that just one instruction on possession should be given (R 879). Although this statement was sufficient alone to preserve this issue for review, State v. Heathcoat, 442 So.2d 955 (Fla. 1983), Appellant's counsel also noted after the instructions were given, "I guess I should object to my denial of my proposed jury instructions for the record (R 1007)." Thus, for two reasons, this issue is properly preserved for review.

Repeating a particular jury instruction gives "emphasis to an incomplete statement of the law." McCray v. State, 89 Fla. 65, 102 So. 831, 832 (1925). See also Beckham v. State, 209 So.2d 687 (Fla. 2d DCA 1968) (trial court's inadvertent repetition of the manslaughter charge was ground for reversal). Cf. Cole v. State, 353 So.2d 952, 954 (Fla. 2d DCA 1978) (partial reinstruction in response to jury question "can lead to undue emphasis on the part given as against the part omitted").

The instruction that was emphasized in the present case was particularly damaging to Appellant. One of the arguments made during closing argument by Appellant's counsel was that the State had not shown that Appellant had the possession and control necessary to establish the elements of possession (R 968). Moreover, the prosecutor, anticipating the defense argument regarding possession, specifically asked the jury to listen to the instruction on possession that the court would give (R 959). These factors take on great significance because the cocaine in this case

was found in Appellant's shoulder bag (R 521) and the instruction that was repeated told the jury that if a thing is in a bag in the hand of or on the person, it is in the actual possession of that person (R 990, 992-3).

While it was proper to give the possession instruction one time, repeating it, while instructing on purchase, the alternative method of trafficking charged and a lesser included offense of trafficking, only once, improperly highlighted the possession instruction. The instructions as a whole therefore unduly emphasized possession, an emphasis that was extremely damaging to Appellant and that requires reversal.

CONCLUSION

Based upon the foregoing argument and authorities, Appellant respectfully submits that the Fourth District decided this case correctly and that the decision of that court should be affirmed. Alternatively, Appellant requests that she be discharged on the conspiracy count and given a new trial on the trafficking count, or, as a third alternative, that she be given a new trial on both counts.

Respectfully submitted,

ANTHONY C. MUSTO
P. O. Box 16-2032
Miami, FL 33116-2032
(305) 285-3880
Fla. Bar No. 207535

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to the Office of the Attorney General, 1655 Palm Beach Lakes Blvd., Ste. 300, West Palm Beach, Fl. 33401, this 3d day of July, 1993.

Anthony C Musto

ANTHONY C. MUSTO

ACM:mkb

APPENDIX A

AMT.: CS/HB 1467/sa

: May 11, 1987
s.d: June 22, 1987
1: June 22, 1987

David Cross

HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
STAFF ANALYSIS

HB1467 1987

#: CS/HB 1467 (Enrolled version)

ATING TO: Crime Prevention and Control

NSOR(S): Criminal Justice Committee

ECTIVE DATE: Generally October 1, 1987, with some sections July 1, 1987

PANION BILL(S):

ER COMMITTEES OF REFERENCE: (1) Finance and Tax

(2) Appropriations

****

SUMMARY:

This act is known as the "Crime Prevention and Control Act." It is designed to deal in a comprehensive manner with Florida's crime problem by incorporating numerous changes in various areas of Florida's criminal code. The act not only increases penalties and creates new offenses in some areas, it also attempts to deal with the causes of crime by providing for comprehensive K-12 substance abuse education, the creation and maintenance of "Safe Neighborhoods," and the creation of study commissions to study the causes of crime and methods of coordinating and integrating criminal justice information systems.

SECTION BY SECTION ANALYSIS:

Section 1. (Page 10)

Entitles the act the "Crime Prevention and Control Act."

Section 2. (Page 10)

Section 893.03, F.S., lists chemical substances and drugs which it is unlawful to possess or sell ("controlled substances"). Schedule IV controlled substances have a low potential for abuse and are currently accepted for medical treatment in some cases. Abuse of a Schedule IV substance may lead to physical or psychological dependence. Section 2 of the act adds anabolic steroids (except those labeled for animal use) to the list of Schedule IV substances and describes them as leading to "physical damage." Steroids are sometimes used by athletes for body building purposes. Placing steroids on Schedule IV makes the sale or delivery of them, or possession with intent to sell or deliver them, a third degree

Section 41. (page 63)

Creates section 715.0415, F.S., to provide that persons selling or pledging property to a pawnbroker must sign a statement verifying ownership of such property. A person knowingly giving false verification of ownership and receiving less than $300 for the property is guilty of a first degree misdemeanor. A person giving false verification and receiving $300 or more is guilty of a third degree felony. In either instance, the person selling or pledging the property must make full restitution to the pawnbroker.

Section 42. (Page 64)

Provides that entrapment occurs when a law enforcement officer induces or encourages, and as a result, causes a person to engage in criminal activity and the method used by the law enforcement officer creates a substantial risk that the offense would be committed by someone who was not predisposed to commit the offense. The issue of entrapment shall be decided by the trier of fact and must be proven by a preponderance of the evidence by the defendant.

This section overrules the Florida Supreme Court's decision in Cruz v. State, 465 So. 2d 516 (Fla. 1985) which held that the objective test of whether law enforcement conduct was impermissible was in the discretion of the trial court.

Section 43. (Page 65)

Provides that section 42 (entrapment doctrine) applies only to offenses committed on or after October 1, 1987.

Section 44. (Page 65)

Amends section 810.07, F.S., to provide that proof of the attempt to enter a structure stealthily and without the consent of the owner or occupant is prima facie evidence of attempting to enter with the intent to commit an offense.

Section 45. (Page 65)

Amends section 914.23, F.S., to provide that a person retaliating against a witness, victim or informant, or attempting to do so, is guilty of a second degree felony if such conduct results in bodily injury to another. However, if no bodily injury occurs, such person is guilty of a third degree felony. This deletes the requirement that damage to property is necessary to constitute a third degree felony.

Section 46. (Page 66)

Amends section 924.07, F.S., by adding to the current list of grounds upon which the state may appeal a judgment to include the appeal of a ruling granting a motion for judgment of acquittal after a jury verdict. Furthermore, an appellate court is charged with mandatory

APPENDIX B

DATE: May 22, 1987

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Staff	Liepshutz MR	JCR	Fav/2 amend.
2.			ED	
3.			AP	
4.			RC	

SUBJECT:

Crime Prevention

BILL NO. AND SPONSOR:

CS/HB 1467 by House Appropriations, Criminal Justice & Rep. Gustafson et al

I. SUMMARY:

A. Present Situation:

Sentencing Guidelines

In 1983 the Legislature authorized the implementation of statewide sentencing guidelines for non-capital felony cases. Under the sentencing guidelines, parole eligibility was abolished and sentences are reduced only by forms of gain time or executive clemency. The sentencing guidelines rules and definitions are located in Rule 3.701, Florida Rules of Criminal Procedure. The forms for calculating the sentences are found at Rule 3.988, Florida Rules of Criminal Procedure.

The guidelines implementing legislation reserved to the Legislature the authority to adopt the guidelines and revise them in subsequent sessions. The revisions are recommended by the Guidelines Commission and approved by the Court before coming to the Legislature.

The habitual felony offender statute was developed as a method to provide stiffer sentences for criminal defendants who commit multiple crimes over a relatively short period of time. In a recent decision, Whitehead v. State, 498 So. 2d 863 (Fla. 1986), the Supreme Court held that the habitual felony offender statute could not operate as an alternative to the guidelines nor could it remain as a clear and convincing reason for departure from the guidelines.

Drugs

The Florida Comprehensive Drug Abuse Prevention and Control Act governs the use, regulation, distribution and prohibition of controlled substances. Chapter 893, F.S. The Act provides five schedules under which controlled substances are regulated. Currently, steroids are not a controlled substance for purposes of Chapter 893, F.S. They, therefore, are not subject to criminal laws penalizing the sale, manufacture, delivery and possession of certain substances deemed to have a potential for abuse.

The Attorney General has the authority to temporarily place by administrative rule, "designer drugs" (new chemical analogs or variations of existing controlled substances having a high potential for abuse) in Florida's Controlled Substance Schedule. s. 893.035, F.S.

Section 893.13, F.S., establishes prohibited acts and penalties that relate to the unauthorized use of controlled substances. Penalties, for the most part, are based on the type of controlled substance involved in the offense. Generally, drug violations involving Schedule I and II substances are punished

Requires school boards to adopt and distribute codes of student conduct which contain consistent policies for disciplinary action involving student drug or alcohol possession or use.

Requires teacher education centers to provide methods of instruction in substance abuse education.

Creates a statewide School Resource Officer Program to be administered by DOE in conjunction with the Criminal Justice Standards and Training Commission of FDLE; establishes criteria for contracts between school boards and local law enforcement agencies.

Forfeiture

Clarifies that personal property involved in the following offenses (currently third degree felonies) would be considered contraband and therefore subject to forfeiture under the Contraband Forfeiture Act: motor vehicles involved in violations of registration or information requirements; vessels involved in certificate of title violations or used to elude a law enforcement officer; and aircraft which was not registered or was falsely registered, or which had illegally altered or otherwise unidentifiable ID numbers, or which had non-regulation fuel tanks.

Hoax Bombs

Provides that the manufacturing, possession, selling, delivering, mailing, or sending of a hoax bomb is a second degree felony. Whoever possesses, displays, or threatens to use a hoax bomb while committing or attempting to commit a felony is guilty of a second degree felony and is not eligible for gain-time prior to serving a three year minimum mandatory sentence. Adjudication may not be withheld.

Commercial Crime Prevention

Requires development of model crime prevention training materials for localities by the Department of Legal Affairs, illustrating how to reduce commercial crime exposure through environmental design; appropriates $30,000 from the G.R. Fund for that purpose.

Criminal Appeals

Authorizes the state, in a criminal proceeding, to appeal a ruling granting a motion for judgment of acquittal after a jury verdict. Requires an appellate court to rule on the state's cross-appeal, once instituted, regardless of its disposition of the defendant's appeal.

Entrapment

Clarifies that entrapment is an affirmative defense that would be available to a defendant who established to the trier of fact by a preponderance of the evidence that he was not predisposed to commit the offense charged.

Attempted Burglary

Amends the burglary statute to provide that in a trial for attempted burglary, proof of the attempt to enter a structure or conveyance stealthily and without the owner's or occupant's consent is prima facie evidence of attempting to enter with the intent to commit an offense.

Robbery

Redefines the common law crime of robbery by expanding the current requirement that the force used in the robbery must precede or be contemporaneous with the taking to include force occurring subsequent to the taking as long as both the force and the taking constituted "a continuous series of acts."

APPENDIX C

Senate Amendment	House CS/HB 1467	Compromise Amendments

DRUGS - CS/SB 22, 51, 89, 137, 158, 169, 303, 376, 429, 555, 634, & 788
SB 284 - SB 112 - CS/SB 630 - SB 539 - CS/SB 601

Rescheduling Cocaine

Senate Amendment	House CS/HB 1467	Compromise Amendments
1. Moves cocaine from Schedule II to Schedule I controlled substance; allows for prescription.	No comparable provision.	Adopts no provision.

Scheduling Steroids

Senate Amendment	House CS/HB 1467	Compromise Amendments
1. Adds anabolic steroids, human chorionic and other gonadotropins, and human growth hormone to Schedule III controlled substances.	Similar provision.	Adopts no provision.

Purchasing Controlled Substances (Non-Trafficking Offenses)

Senate Amendment	House CS/HB 1467	Compromise Amendments
1. Adds act of purchasing to certain prohibited drug offenses: - selling, purchasing, delivering or possessing with intent to sell, purchase or deliver controlled substances; - selling, purchasing, delivering or possessing more than 10 grams of a Schedule I substance.	No comparable provision.	Adopts Senate provision.

Use of Minors In Drug Offenses

Senate Amendment	House CS/HB 1467	Compromise Amendments
1. Adds language rendering it unlawful to use or hire a person under 18 to (1) sell or deliver drugs, or (2) to assist in avoiding detection or apprehension for drug offenses.	Changes age requirement for an offender to 18 years or older; adds language making it unlawful to involve or use a person under 18 in drug sale or delivery.	Adopts Senate provision in its entirety; adopts portion of House provision changing the age requirement of an offender to 18 years or older.
2. No comparable provision.	Enhances penalty for use of methaqualone in this offense to first degree felony.	Adopts House provision.
3. No comparable provision.	Minimum mandatory sentence of 5 or 3 years imposed, depending on controlled substance involved.	Adopts no provision.

Senate Amendment	House CS/HB 1467	Compromise Amendments
ENTRAPMENT		
1. Clarifies that entrapment is an affirmative defense that is available to a defendant who establishes to the trier of fact by a preponderance of the evidence that he is not predisposed to commit the offense charged.	No comparable provision.	Adopts Senate provision.
ROBBERY		
1. Redefines the common law crime of robbery by expanding the current requirement that the force used in robbery must precede or be contemporaneous with the taking to include force occurring subsequent to the taking as long as both the force and taking constitute "a continuous series of acts."	No comparable provision.	Adopts Senate provision.
WITNESS RETALIATION		
1. Clarifies that threatening or attempting to retaliate against a witness regardless of whether any bodily injury or property damage results is a third degree felony.	No comparable provision.	Adopts Senate provision.
BOOKMAKING		
1. No comparable provision.	Expands and clarifies the definition of bookmaking in response to a recent district court case holding the statute unconstitutional.	Adopts House provision.