IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARVIN V. TAYLOR,

Appellant,

vs.

DOCKET # 81,446

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

JAMES R. THIES, SR., ESQUIRE
Florida Bar #340111
Post Office Box 815
Orange Park, FL 32067-0815
(904) 264-8602
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Appellant was the Defendant in the Trial Court and will hereafter be referred to as "Appellant". Appellee will hereinafter be referred to as "State". The Record on Appeal is contained in three (3) volumes. Volumes one through three will be referred to by the symbol "R". All references will include appropriate page number designations. The opinion of the First District Court of Appeal is attached as an appendix and will be referred to with the symbol "A" followed by the appropriate page number.

STATEMENT OF CASE AND FACTS

This is an Appeal by Writ of Certiorari from the First District Court of Appeal based upon a prosecution and trial from the Circuit Court, Fourth Judicial Circuit, Clay County, Florida, wherein the Defendant, MARVIN V. TAYLOR (hereinafter referred to as "Appellant"), was convicted of one count of Sale or Delivery of Cocaine in violation of Florida Statute, §893.13(1)(a)(1).

The Appellant was arrested on July 11, 1991 pursuant to an arrest warrant. (R2) This conviction by jury trial was based upon a two count information filed by the State against Appellant for Sale or Delivery of Cocaine. Count I of the information alleged a drug transaction in Clay County, Florida, on June 7, 1991. Count II alleged a drug transaction on June 21, 1991. (R5) The jury found the Appellant guilty in Count I and not guilty in Count II at trial on November 5, 1991. (R32-33)

The Appellant filed a Demand for Discovery on July 26, 1991, (R7-10), to which the State of Florida responded on August 2, 1991. (R13-14) Prior to trial and after discovery depositions on October 9, 1991 of the State's key witnesses, the Appellant filed a Motion for Production of Favorable Evidence on October 29, 1991. (R18) In this Motion for Production of Favorable Evidence, the Appellant was very specific as to requesting documents within the State's control as to drug purchases made by the State's confidential informant, Gerald Jefferson, who later became the State's key witness (only

eyewitness) against Appellant. Said request asked for documents pertaining to monies paid to the informant to effectuate buys for the Clay County Sheriff's Office. (R18)

The State took the position they did not have to respond to the Motion for Favorable Evidence. In response, the Appellant filed a Motion to Compel Discovery with the Trial Court on November 4, 1991, the day of jury selection in the Appellant's trial. (R19-23) On the same date Appellant filed a Motion to Issue Subpoena Duces Tecum, (R24-26), asking for the same documents to be produced at trial by the Clay County Sheriff's Office as requested in the Motion for Favorable Evidence. In response, the State filed a Motion to Quash Subpoena Duces Tecum on November 4, 1991. (R27-28) The Court subsequently entered an order on November 4, 1991, ordering the disclosure of the State's key witness' criminal record, but denying the Motion to Compel Discovery in all other respects. The Court denied the Appellant's Motion to Issue Subpoena Duces Tecum and granted the State's Motion to Quash Subpoena Duces Tecum. (R29)

At trial, the State had two witnesses testify as to the actual drug transactions of June 7, 1991 and June 21, 1991. The first witness to testify was Detective Cecil J. Jett who hired and supervised the confidential informant. Following Detective Jett, the informant, Gerald Jefferson, testified.

As it relates to the issues before this Court, Detective Jett testified:

1) The informant had come to him wanting to do drug buys for money. Detective Jett did not seek the informant out. (R131)

2) In discussing the financial arrangements with the informant, Detective Jett stated;

> Q At that time, did you make any financial arrangements with Mr. Jefferson?
> A He was told he would be paid for them, yes, sir.
> Q Did you tell him how much?
> A It depended on how big the case was and depended on how involved he wanted to get.
> Q Okay. So what you told him in this initial conversation, if I understand you right, "Listen, it will be up to us. The bigger the case, the more money we'll pay you."
> A Yes, sir.
> Q You didn't tell him a price per transaction?
> A No, sir.
> Q And you didn't tell him what a limit would be, is that correct?
> A No, sir. (R131-132)

3) It was possible the informant had been paid approximately $2,000.00 for between 40-60 drug deals. (R132-133)

4) The informant was still working for him and had been paid money the week before. (R134)

5) The informant was told beforehand that he would be paid to testify in court and that he was being paid for his testimony that day. (R134)

6) He knew the informant was a convicted felon. (R135)

7) The informant had told him (Detective Jett) that he (informant) was a drug user, but that he felt there was no reason to have the informant checked to see if he continued to use drugs. (R135)

8) As to his (Detective Jett's) monitoring of the June 7th drug transaction;

a. he did not witness the drug transaction, (R139)

b. in testifying as to what he heard of the drug transaction,

> Q Okay. So you didn't see him pull up there. What I'm after is what is it that you heard on the tape?
> A Just what's been on the tape. He get's out of the car and asked --
> Q Who's he?
> A Gerald Jefferson get's out of the car and asked Mr. Taylor for sixty. Mr. Taylor said, "Sixty"? He said, yeah, sixty. And that's all I heard on the tape.
> Q You didn't hear anything else?
> A Nothing else.
> Q Although Mr. Jefferson's wearing a body bug, you didn't hear any other conversation?
> A No,sir.
> Q That's the end of it?
> A That's the end of it. (R139)

c. The informant did at least six buys that day and made approximately $120.00, but it could have been more or less. (R143)

9) The Sheriff's Office keeps records that would tell how many drug deals were made by this informant and how much he was paid. (R144)

10) He did not review his records as to the number of drug transactions made or money paid to the informant because he felt it was not relevant. (R149)

11) He did not know how many drug transactions the informant had conducted with the co-defendant, Robert Tisdale; totally, before June 7th or after June 21st. All of this information was available, but he (Detective Jett) did not feel it was relevant. (R149)

The next witness to testify was the informant, Gerald Jefferson. During Mr. Jefferson's testimony he stated:

1) He began working for Detective Jett he thinks in June, but, he couldn't remember. He approached Detective Jett to ask for the work. (R176)

2) He would make deals for Detective Jett if he was paid. (176)

3) He denied continuing to work for Detective Jett as recently as the week before trial. (R176)

4) He had been paid forty dollars the week before for attending a deposition. (R177)

5) When questioned as to how much he was being paid to testify in Court that day;

> **Q ... How much is he paying you for coming in here and testifying today?**
> **A I don't know, but I'm sure he'll probably treat me right.**
> **Q You two haven't discussed that?**
> **A No, we haven't.**

6) He could not say how much he had been paid or how many deals he had conducted for Detective Jett. (R178)

7) He had been paid up to $200-$250 in a day. (R179)

8) He denied discussing with Detective Jett his drug usage, stated it was none of the Defense attorney's business and that he would not be screen tested for drug usage. He admitted he had never been tested for drugs since working for the Sheriff's Office. (R206)

9) He couldn't recall if he and Detective Jett had gone over what his testimony would be in court that day answering, "I don't Know", but did acknowledge he, Detective Jett and Assistant State Attorney Stacey Myers had reviewed the video tape. (R174)

10) When discussing the October 9,1991 deposition concerning the June 7th transaction, he testified;

> Q On October 9th when I was questioning you as I am today, I asked you the date when the first transaction took place. Do you recall what you said?
> A I could have said anything at that time because I hadn't reviewed the video.
> Q It's not on the video Mr. Jefferson, you had to review something else.
> A I just told you, the video and the reports.
> Q Okay. So now you've had a chance to refresh your memory with the reports.
> A Right.
> Q Mr. Jefferson, On October 9, 1991 at the time I questioned you about the June 7th incident, did you not say you wanted a $20 hit or a twenty--

A Well, at that time I had. Like I said, I hadn't reviewed the videos and the report. I had made a buy prior to that to Robert Tisdale for a twenty.
Q Uh'huh.
A And that's probably where I got mixed up.
Q And also, didn't you say that Robert came back to you and sold you one rock for twenty dollars...
Q Do you remember saying that Mr. Jefferson?
A I could have said it, I don't remember. But I know that--
Q Well, there's page twenty-six, staring on line 14. You said, "What I saw was, he went to Marvin, come back to me with dope. Sold me twenty dollars worth of dope and I left." Do you recall saying that?
A I don't recall, but I could have said it.
Q Mr. Jefferson, how is it you don't recall what you said on October 9, 1991 as we speak today?
A October 9th?
Q Yeah, that's a month ago. It's not even a month ago.
A It's been a month ago.
Q And you can't recall what you said on that day?
A No I don't. (R187-191)

11) His trial testimony on November 5, 1991 as to what occurred during the alleged drug transaction on June 7, 1991 was as follows;

Q Now, you said someone else came along at this point?
A Yes they did.
Q Who would that be?
A Robert Tisdale.
Q And what happened then?
A Then all three of us walked behind the car and I saw him give Robert something out of his pocket and Robert turned around and it was rock. Robert sold me three $20 rocks.

Q And what did you do when Robert gave you those rocks?
A Then I told him thank you man and we turned to the car and then I called his name out.
Q Did you give him the money for the rocks?
A Sixty dollars.
Q Now you said the defendant pulled something out of his pocket.
A His right hand pocket.
Q And what makes you think that what the defendant pulled out of his pocket was the rocks that you bought?
A Well, they was all right there. Him and Robert together and he turned straight around and handed him what he gave him.
Q And they were --
A Rocks. (R157-158)

12) He made no type of report (written or recorded) of what he did on June 7, 1991, but did review others' reports of the incident. (R172, 173, 174)

13) He could not get the June 7, 1991 drug transaction on video, he did get audio, and he got the Appellant on tape getting out of his car. (R163-164)

The Appellant filed a Motion for New Trial on November 15, 1991. (R37-39) The Motion was based upon the above discovery issues, a due process violation for the State's paying an informant for his testimony at trial, and the State's failure to disclose to Appellant they had taken a sworn statement on November 1, 1991, (Friday before trial) of the co-defendant, Robert Tisdale, who was present at both drug transactions. The co-defendant, Robert Tisdale, was never listed on the State's Response to Demand for

Discovery, nor was his sworn statement. (R13 & R15) The Trial Court denied Defendant's Motion for New Trial on November 25, 1991. (R40) The Appellant was sentenced on November 27, 1991, to one year in the county jail and was adjudicated guilty of the crime.

The Appellant filed a timely Notice of Appeal on November 27, 1991. (R50) Appellant raised three issues on Appeal stating: 1) The Trial Court erred in denying Appellant's Motion to Dismiss based upon the competency of the informant to testify, or alternatively, in denying Appellant's Motion to Dismiss on the issue of a Due Process Violation; 2) The Trial Court erred in denying various Discovery Motions before and at Trial committed at trial; and 3) The Trial Court erred in not finding a Brady Violation for the State's failure to disclose they had taken a sworn statement of the Co-defendant, Robert Tisdale, before trial and had failed to list it in their Response to Discovery or to notify Appellant.

The First District Court of Appeal filed its opinion in this case on January 11, 1993. Appellant filed a Motion for rehearing or for clarification of the First District Court of Appeal's Decision on January 19, 1993. Said Motion was denied on February 19, 1993, and the First District Court of Appeal entered its Mandate on March 9, 1993. The Notice for this Court to invoke its discretionary jurisdiction was filed March 17, 1993, and a Writ of Certiorari was granted on July 15, 1993.

The First District Court of Appeal ruled the government paying a confidential informant for his court testimony as demonstrated in

the instant case was not a Due Process Violation. The First District Court of Appeal reasoned that confidential informants could be paid for their court testimony because in State v. Glosson, 462 So.2d 1082 (Fla. 1985), the Florida Supreme Court; a) was dealing with a case where the testimony in a criminal trial by a confidential informant would result in a financial gain to the confidential informant through civil forfeitures, b) held that the proper method for raising a due process violation was before trial, not during a motion for a new trial, and c) held that in Glosson, each defendant asserted an entrapment defense where there was an enormous financial incentive for the informants to testify falsely in order for there to be a successful prosecution.

The First District Court of Appeal further stated the Trial Court was correct in denying Appellant's Motion to Compel Discovery, since the requested information would not support a Due Process Violation. The Appellate Court also stated the requested information was not required in order to impeach the testimony of the State's two witnesses to the transactions - the confidential informant, Gerald Jefferson, or Detective Jett. (See Opinion of First District Court of Appeals - Case No.: 91-3962 as appendix "A")

SUMMARY OF ARGUMENT

I. THE APPELLATE COURT ERRED IN FINDING THERE WAS NO DUE PROCESS VIOLATION COMMITTED BY THE STATE IN PAYING ITS INFORMANT TO TESTIFY AT TRIAL.

At trial, the State had to rely totally upon its only eyewitness to the drug transactions of June 7, 1991 and June 21, 1991 (who was a paid confidential informant of the Clay County Sheriff's Office) in order to prosecute the cases against Appellant. This confidential informant sought out Detective Jett for the purpose of making money by doing undercover drug buys. It is clear from the trial testimony of Detective Jett that a contingency fee arrangement was struck between him and the confidential informant who was told he would be paid based upon how big the case was and how involved the confidential informant wanted to become with the drug operation. (R131-132) Not only was the confidential informant paid various amounts for each drug transaction (usually $20.00), but he was paid for testifying at deposition (R178) and at trial against the Appellant. The only thing the confidential informant knew about how much he would be paid for his trial testimony was that Detective Jett would "probably treat me right". (R177)

The state action of paying a confidential informant for making drug cases and paying him to testify in subsequent court proceedings is clearly contrary to the holdings of the Florida Supreme Court in State v. Glosson, 462 So.2d 1082 (Fla.1985) and State v. Hunter, 586 So.2d 319 (Fla.1991).

The First District Court of Appeal in its opinion in the case at bar cited several cases to demonstrate exceptions to the Florida Supreme Court's holding in Glosson, supra. Appellant agrees the cited cases are distinguishable from Glosson, but argues the instant case does not fit within the four corners or reasoning of the First District Court of Appeal's cited cases. The instant case fits squarely within the four corners of Glosson and requires the reversal of Appellant's conviction.

II. THE APPELLATE COURT ERRED IN FINDING THERE WAS NO DISCOVERY VIOLATION COMMITTED BY THE STATE AND TRIAL COURT UNDER FLORIDA DISCOVERY RULES.

Based upon the First District Court of Appeal's finding there was no Due Process Violation, the Appellate Court held the Trial Court was correct in denying Appellant's Motion to Compel Discovery. Appellant argues the issue of a Discovery Violation in the instant case is more complex than the First District Court of Appeal suggests in its opinion.

At the trial level, Appellant made every attempt through various methods of discovery to gain documentation as to the drug transactions completed by the State's confidential informant especially those involving the Appellant and his Co-Defendant, Robert Tisdale. The requested information was material and extremely relevant to clear up discrepancies which became known at the depositions of Detective Jett and the confidential informant. The requested information was to learn the amounts of money paid to the informant throughout his employment with the Sheriff's Office,

especially on the dates of the charged offenses and to gain information as to drug transactions involving the Co-defendant, Robert Tisdale.

It was clear to Appellant after taking the depositions of the State's witnesses that the critical information sought would not be forthcoming from the State Attorney's Office, the State's confidential informant or from the Clay County Sheriff's Office without the Court ordering it. At trial, the Appellant's defense continued to suffer as neither Detective Jett nor the informant would or could give this same requested information in order to clear up the numerous inconsistencies in their testimony. Detective Jett even went so far as to say that although this information was available, it was not relevant. (R149)

The Appellant made an attempt to gain this documented evidence through the filing of a Motion for Production of Favorable Evidence on October 29, 1991, (R18); the filing of a Motion to Compel Discovery on November 4, 1991, (R19-23); and finally through filing a Motion to have a Subpoena Duces Tecum issued for trial on November 4, 1991. (R24-26) Appellant argued to the Trial Court this information was necessary to adequately prepare a defense for the Appellant and for the purposes of impeaching the State's witnesses. Appellant argued this documentary evidence was material to Appellant's case and should have been made available to Appellant under Florida Rules of Criminal Procedure on the various discovery motions filed under Rule 3.220 and under Brady v. Maryland, 373 U.S. 83 (1963).

In addition to the above described discovery issues, a new discovery violation was discovered at the court hearing for Appellant's Motion for New Trial on November 21, 1991. The State conceded a discovery violation had potentially occurred by their failure to disclose to Appellant that Robert Tisdale, the co-defendant to Appellant, had given a sworn statement to the State the Friday before trial. (R299-300) At the hearing, the State agreed that Robert Tisdale had not been listed on their response to Appellant's Demand for Discovery, but, felt this violation was excusable because Robert Tisdale was known to the Appellant and that the co-defendant's name had come up through the discovery process. (R299) The State further argued this discovery violation was moot because the appropriate remedy would have been to exclude the co-defendant's statement from trial.

Appellant argues before this Supreme Court it is the lack of information that should have been given to Appellant that created prejudice to the Appellant. Not gaining this evidence prevented Appellant from preparing an adequate defense for and at trial. Appellant argues the First District Court of Appeal was overly restrictive by only addressing the issue of the Motion to Compel Discovery in its opinion.

The First District Court of Appeal ruled the Trial Court was correct in its ruling because: 1) There was no Due Process Violation; 2) Such information was not required by Rule 3.220, Florida Rules of Criminal Procedure; and, 3) that the Trial Court felt impeachment could adequately be accomplished by pointing out

the inconsistencies of the witnesses' testimony. Appellant's other arguments as to the total discovery issue were dismissed as being without merit.

Appellant argues that the volume of material requested and denied along with the failure to disclose the Co-defendant's statement is so prejudicial that Appellant did not receive a fair trial and the conviction must be reversed and a new trial ordered.

ARGUMENT

I. THE APPELLATE COURT ERRED IN FINDING THERE WAS NO DUE PROCESS VIOLATION COMMITTED BY THE STATE IN PAYING ITS INFORMANT TO TESTIFY AT TRIAL.

The Florida Supreme Court has made very clear in its decisions that an agreement to pay a confidential informant a contingent fee to make drug cases and follow through on prosecution violates the Appellant's constitutional right to due process under Article I, Section 9 of the Florida Constitution. The Florida Supreme Court first discussed this issue in State v. Glosson, 462 So.2d 1082 (Fla. 1985). The Glosson Court explained the elements necessary for this due process violation to take place when it stated:

> "A trial court may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution." at pg. 1085.

The Florida Supreme Court has recently reaffirmed its position in State v. Hunter, 586 So.2d 319 (Fla. 1991). The Hunter Court emphasized:

> "We reiterate that an agreement giving someone a direct financial stake in a successful criminal prosecution and requiring the person to testify in order to produce a successful prosecution is so fraught with the danger of corrupting the criminal justice system through perjured testimony that it can not be tolerated." (at pg. 588)

Appellant's case now before this Court falls clearly within the holdings of the Florida Supreme Court. Appellant argues that the Supreme Court in Glosson and Hunter, supra, when discussing the public policy behind a due process violation committed by the State when paying a confidential informant to testify in order to prosecute, was concerned with the motivation of the informant in testifying against a defendant. If the financial arrangement between the government and its paid informants is such that the informant is going to benefit in the form of compensation or reward for giving or potentially giving testimony that is subject to perjury at any stage of the required prosecutorial process, a due process violation has occurred.

The First District Court of Appeal agrees with this approach to a due process violation when they wrote in their opinion in this case:

> "It is generally held that an informant receives a contingent fee if a financial benefit will flow to him or her depending upon a particular contingency, such as an arrest or a conviction, **or financial compensation is in some way contingent upon a future event such as testimony at trial or a conviction, rather than a set fee."** (at pg. A8)

Using the above criteria for determining a contingency fee arrangement as established by the Florida Supreme Court and the First District Court of Appeal, a contingency fee arrangement existed from the very beginning in the governmental relationship between Detective Jett and the informant. Looking at the fee

arrangement from the perspective of Detective Jett; at trial Detective Cecil J. Jett testified:

> Q At that time, did you make any financial arrangements with Mr. Jefferson?
> A He was told he would be paid for them, yes, sir.
> Q Did you tell him how much?
> A It depended on how big the case was and depended on how involved he wanted to get.
> Q Okay. So what you told him in this initial conversation, if I understand you right, "Listen, it will be up to us. The bigger the case, the more money we'll pay you."
> A Yes, sir.
> Q You didn't tell him a price per transaction?
> A No, sir.
> Q And you didn't tell him what a limit would be, is that correct?
> A No, sir. (R131-132)

Detective Jett also told the informant that he was going to be paid for his court testimony and that he was to get paid for testifying that day in court. Detective Jett testified:

> Q Okay. Was he given money for testifying, coming into court, making court appearances?
> A He's given -- if he appears for court, yeah, he's paid for it.
> Q And you told him that: We'll pay you for going to court and testifying if you're needed in court.
> A He was told beforehand.
> Q Okay. So he's getting paid for coming in and testifying today?
> A Yes, sir. (R134)

Neither Detective Jett's testimony nor any other evidence supports or demonstrates any type of pay schedule for the work done by the informant. There simply was no wage schedule or set fee

schedule for the various acts to be completed by the informant, including testifying in court. The very best Detective Jett could say about paying the informant was: a) the informant was working strictly for money and the informant would be paid $20.00 a purchase every time he made a purchase of crack cocaine, or an average of $20.00, (R124, 128); b) The most the informant was ever paid in one day was $200 to $250, but, he had not made that amount often, (R179); c) The informant had been paid more or less $120.00 on June 7, 1991, the date of the offense for which the Appellant was convicted, (R143); and, d) It was possible the informant had been paid over two thousand dollars for approximately 40 to 60 cases. (R134) Detective Jett also testified that the informant continued to work for him at the time of trial, (R134) and was thus still gaining financial benefits from the Sheriff's Office. Clearly, the testimony from the perspective of the Clay County Sheriff's Office demonstrates that if the informant made drug buys, and testified in court proceedings when needed, the informant would be paid and it was the government who was to decide how much the informant would be paid.

Appellant argues it is more important to look at what motivated the informant in doing this work for the government and whether he understood the contingency aspect of the fee arrangement. In the case at bar it is very clear the informant knew exactly how he could earn money from the government and who would decide how much he would be paid.

This informant was not the best of character and not unlike many drug informants. This informant was a convicted felon, (R135), and a drug user, (R135) who refused to be tested for drugs, although he denied the continued use of drugs, (R206). The informant admitted he had asked Detective Jett if he could work for money (131, R176), that being his sole purpose for making these "drug deals".

At trial, the State's informant testified that he did not know how much money he had made working for the Clay County Sheriff's Office nor did he have any idea how many deals he had made for Detective Jett, (R178). He admitted that he had made as much as approximately $200 - $250 per day, but, he could not recall how many times he had been paid that amount. (R179) He had always been paid in cash. (R179) Mr. Jefferson stated that he had been paid $40 for a deposition the previous week and when discussing how much he would be paid for testifying at trial, Mr. Jefferson answered:

Q: "How much is he paying you for coming in here and testifying today?"
A: **"I don't know, but I'm sure he'll probably treat me right."**

Q: "You two haven't discussed that?"
A: **"No we haven't."** (R178)

Appellant argues that the lack of memory by the informant as to how much he had been paid over the previous five months by the government showed a lack of candor and trustworthiness. More importantly, it shows he clearly knew and understood who was going to pay him for coming into court and testifying. And, although it

had not been discussed, he was certain he was going to be "treated right". The motivation for this informant to testify favorably for the State was not only present, but required in light of his October 9, 1991 deposition, and how much compensation he would receive was contingent upon that testimony.

The Glosson Court's concern for the potential of the confidential informant to color his testimony, or even commit perjury, in pursuit of his fee is well demonstrated in Appellant's case now before the bar.

In order for the State to even prosecute the charges against Appellant, the informant had to testify, both at deposition and trial. The state had no witness or evidence that the Appellant had committed any crime on June 7, 1991 or June 21, 1991, other than the informant. The informant was listed as a State witness on September 15, 1991. (R15) At trial, the informant testified as to the following events occurring on June 7, 1991:

Q Now, you said someone else came along at this point?
A Yes they did.
Q Who would that be?
A Robert Tisdale.
Q And what happened then?
A Then all three of us walked behind the car and I saw him give Robert something out of his pocket and Robert turned around and it was rock. Robert sold me three $20 rocks.
Q And what did you do when Robert gave you those rocks?
A Then I told him thank you man and we turned to the car and then I called his name out.
Q Did you give him the money for the rocks?
A Sixty dollars.

Q Now you said the defendant pulled something out of his pocket.
A His right hand pocket.
Q And what makes you think that what the defendant pulled out of his pocket was the rocks that you bought?
A Well, they was all right there. Him and Robert together and he turned straight around and handed him what he gave him.
Q And they were --
A Rocks.

The deposition of the State's informant, Gerald Jefferson, had been taken on October 9, 1991, less than one month prior to trial. The assistant state attorney who tried the case, Stacey Myers, was present at the deposition of this informant. On October 9, 1991, during deposition, Mr. Jefferson stated that he had made a $20 buy from Robert Tisdale on this first encounter when and where the Appellant was present. Mr. Jefferson did not know the date of this transaction. When questioned at trial as to this conflict in his testimony, Mr. Jefferson stated "Well, at that time, like I said, I hadn't reviewed the videos and the report, I had made a prior buy to Robert Tisdale for a twenty and that's probably where I got mixed up." (R188)

Mr. Jefferson also testified on October 9, 1991 that Robert Tisdale had gotten a pill bottle from the Appellant on June 7th that contained the suspect rock cocaine pieces in it (R204). When questioned at trial as to the discrepancy in this testimony, Mr. Jefferson testified:

Q "Mr. Jefferson, all I am asking you is if you want to, I don't care which one. I'm just asking you -- you said these things on October 9, 1991 and today you are coming in and saying something else."

A "I could have. I could have said them. I believe I did."

Q "But you don't recall whether you said them or not?"

A "I believe if I said it, it was to the best of my knowledge at that time--at that time. But now that I have reviewed the video tapes--reviewed the video, I know it clearly."

Florida Statute, §837.021, defines perjury as:

> "(1) Whoever, in one or more official proceedings, willfully makes two or more material statements under oath when in fact two or more of the statements contradict each other" ... is guilty of perjury.

The State's trial attorney, Stacey Myers, was present at the October 9, 1991 deposition. She was well aware of the testimony given by the State's informant, Mr. Jefferson, at the deposition. The question arises why Mrs. Myers didn't correct the testimony of the informant at deposition, especially in light of the serious discrepancies.

The informant at trial testified he had gone over his testimony with Stacey Myers and Detective Jett before testifying the day of trial. (R174) The State was painfully aware of the testimony that was needed at trial for a conviction and knew the informant had to radically and materially change his testimony within a month in order for the state to gain its conviction.

Appellant argues the informant did commit perjury at trial, with the State's knowledge and his motivation for doing it was the money he was going to be paid for testifying by the Clay County Sheriff's Office. The very concern of the Florida Supreme Court of testimony being colored for financial gain is a reality in the case at bar.

The Florida Supreme Court has addressed the issue of due process violation in accordance with Article I, Section 9 of the Florida Constitution by the use of perjured testimony in Anderson v. State, 574 So.2d 87 (Fla. 1991) when it stated:

> "The Florida Constitution provides that "No person shall be deprived of life, liberty, or property without due process of law. The State violates that section when it requires a person to stand trial and defend himself/herself against charges they know is based upon perjured material evidence. Governmental misconduct that violates a Defendant's due process rights under the Florida Constitution requires dismissal of criminal charges." (at pg. 92)

The First District Court of Appeal cited a number of cases that Appellant agrees are distinguishable from Glosson and Hunter, supra. But these cases are also distinguishable from the case at bar. The First District Court Appeal first cited Moore v. State, 498 So.2d 612 (Fla. 5th DCA 1986). Moore is distinguishable because in Moore the informant was paid a salary plus a set fee for each drug transaction and was not paid for testifying at trial. Additionally, the Fifth District Court of Appeal felt that additional safeguards (evidence) to enhance the credibility of the informant's testimony were introduced at trial. The movements of the informant during the transaction were observed at all times and

an audio tape recording of the drug transaction was introduced at trial. In the case at bar these safeguards and evidence are not present. There is only the word of the informant, Gerald Jefferson, who stated the Appellant handed something to the co-defendant, Robert Tisdale, which in turn was handed to him. The informant testified that item turned out to be rock cocaine. The informant did not say he saw Appellant hand the co-defendant, Robert Tisdale, rock cocaine.

Lee v. State, 490 So.2d 80 (Fla. 1st DCA 1986) is distinguishable in that it was a pretrial Motion to Dismiss case. There was not a due process violation at trial since there was no trial. The informant was not paid to testify, nor was this prosecution based upon his testimony. Prieto v. State, 479 So.2d 320 (3rd DCA 1985) is distinguishable because the payment to the informant was based upon the quantity of drugs seized and not on cooperation and trial testimony in the resulting criminal prosection. Dodd v. State, 475 So.2d 310 (Fla. 2nd DCA 1985) is distinguishable because the informant was paid on the type of transaction and the risk involved. Also, the Court found the defendant could have been convicted without the testimony of the informant. Yolman v. State, 473 So.2d 716 (Fla. 2nd DCA 1985) is distinguishable in that the informant was not paid for his trial testimony, but on the size of the drug transactions.

The element that is missing in each of these cited cases by the First District Court of Appeal which is present in the case at bar is simple; the informant was paid to testify at trial in this

case and that was on a contingency basis. Additionally, it is abundantly clear that the trial testimony of the informant in the case at bar was inconsistent with sworn testimony given at deposition less than one month before in the presence of the Assistant State Attorney who tried the case. The safeguards against perjured testimony as pointed out by previous courts are not present in this case.

The First District Court of Appeal stated in their opinion there were two other reasons for finding there was no due process violation. The first was that in Glosson, supra, the issue of a due process violation was addressed in a pre-trial Motion to Dismiss (at pg. A7). Appellant would point out that Dodd, supra, Yolman, supra, Moore, supra and Hunter, supra, all raised the question of a due process violation on appeal after jury trial. Appellant argues that it was not known until trial that the informant was being paid a contingency fee for testifying at trial. Regardless, the Florida Supreme Court in Glosson, supra, did not say a due process violation could not be committed during the course of trial. In fact, Appellant argues it is at trial that such a violation occurs.

The second point the First District Court of Appeal raised in its opinion was that in Glosson, the defendant asserted an entrapment defense and that the testimony of the informant ... was necessary in order for there to be a successful prosecution" (at pg. A8). Appellate argues the defense of entrapment does not have to be raised by the Appellant to raise a due process violation.

The Glosson Court, supra, held that:

> "Based upon the due process provision of Article I, Section 9 of the Florida Constitution, we agree ... that governmental misconduct which violates the constitutional due process right of a Defendant, **regardless of that Defendant's predisposition**, requires the dismissal of criminal charges." at pg. 1085.

It is clear that without the testimony of the informant in the case at bar, there would have been no successful prosecution. Clearly, the fee arrangement of the Clay County Sheriff's Office with their informant fell within the contingency fee concept. Clearly, the due process rights of Appellant as found in the Florida Constitution, Article I, Section 9, have been violated and the conviction must be reversed.

II. THE APPELLATE COURT ERRED IN FINDING THERE WAS NO DISCOVERY VIOLATION COMMITTED BY THE STATE AND TRIAL COURT UNDER FLORIDA DISCOVERY RULES.

The First District Court of Appeal in their opinion in the case at bar took a unique approach to addressing the issues of the various discovery motions at trial by Appellant. The Court stated that since there was no due process violation by the government's paying the informant for his court testimony, which was the only legitimate reason for granting the requested materials to Appellant, the trial court was proper in denying the various Motions for Discovery.

Appellant first argues the First District Court of Appeal's summarily dismissing without explanation Appellant's arguments for the Issuing of a Subpoena Duces Tecum by the Trial Court was wrong and contrary to the laws of Florida. Appellant argues that his attempt to have the Subpoena Duces Tecum issued was an alternative method of gaining the same information as was requested in the Motion to Compel and the same issues of materiality and relevancy apply to both.

Appellant argues the First District Court of Appeal should have reversed this conviction and ordered a new trial on the Trial Court's failure to issue the Subpoena Duces Tecum. It is simply written in the law that a criminal defendant is entitled to have a Subpoena Duces Tecum *issued for the purpose of* trial. Florida Statute, §914.04, dealing with witnesses' testimony states:

> "No person who has been duly served with a subpoena or **subpoena duces tecum** shall be excused from attending and testifying or producing any book, paper or other document before any court having felony trial jurisdiction..."

Coney v. State, 272 So.2d 550 (1st DCA 1973), affirmed through denial of Writ of Certiorari, State v. Coney, 294 So.2d 82 (Fla.1974), recognized the defendant's right and obligation to have issued a subpoena duces tecum when they wrote:

> "The entire purpose of pretrial discovery in criminal cases is to assure a defendant charged with crime the right to a fair trial. Certainly a defendant should not be permitted to so employ the pretrial procedures as to require the state attorney to investigate or prepare his case for him, or to disclose to him information or documents which, by the exercise of due diligence, are readily **available to him by subpoena** or deposition." at pg. 553.

Appellant concedes the case law and a local rule states a subpoena duces tecum can not be issued at the discovery level, but there is no case law Appellant can find that says that a subpoena duces tecum can not be issued at the trial level. At trial when the defendant is confronted with the evidentiary problems as was Appellant in the case at bar, which included evasive answers from witnesses who for whatever reason did not want to answer or did not have an answer, the requested materials became material and they should have been available for the Court to rule upon for evidentiary purposes. The Third District Court of Appeal correctly states the procedure for the trial court to use when this issue

arises when they wrote in Green v. State, 377 So.2d 193 (3rd DCA 1979), a case decided after the Florida Supreme Court case of Heath v. Beckwell, 327 So.2d 3 (Fla. 1976):

> "The law is well-settled that the defendant in a criminal case is constitutionally entitled to compulsory process to have brought into the trial court any material evidence shown to be available and capable of being used by him in aid of his defense, including the beneficial enjoyment of the compulsory process of a subpoena duces tecum for that purpose. -- Whenever the state objects, as here, to the production of documents under a subpoena duces tecum, the proper practice is for the trial court to examine the subpoenaed documents to determine their relevancy resolving any doubts in favor of their production. Vann v. State, 85 So.2d 133, 136 (Fla.1956)" (at pg. 202)

This is the same argument Appellant's counsel made at trial for the issuance of the subpoena duces tecum. (R82-83) The court rejected this argument and closed the Appellant out of gaining this evidence through compulsory process when after a lengthy discussion between the attorneys and the Court, the Court ruled:

> I'm denying the Motion for Subpoena Duces Tecum but I'm going to tell you that on cross-examination when he gets Gerald Jefferson on the stand he's sure able to ask him questions concerning not only his transactions with this defendant but other transactions that he may have been involved in. It goes to his credibility as to what the jury believes that he is -- really is a paid informant out there that's just there for the money or if he truly took part in transactions that this defendant was involved in, okay?" (R88)

After reviewing the testimony of the State's two witnesses in the case at bar, it becomes clear that the requested information and documents sought through both the subpoena duces tecum and the Motion to Compel were material and relevant for its substantive value as to what occurred during the drug transactions on June 7, 1991 and June 21, 1991 and, other drug transactions that involved the co-defendant, Robert Tisdale. This same information was also valuable for impeachment purposes. Appellant argues that the only way to impeach answers that are "I don't know" is to confront the witness with the documents that state clearly the true and correct answer.

For the same reasons stated above, the First District Court of Appeal in the case at bar should have reversed the trial court's order denying the Appellant's Motion to Compel. The evidence that Appellant's Motion to Compel sought to gain in order to help in his defense was never gained through the course of the trial or through the testimony of the state's witnesses. Upon questioning Detective Cecil Jett at trial about the matters of concern, Detective Jett testified:

Q Do you know how many deals Mr. Jefferson did on June 21st, 1991.
A It's -- there's four deals on this tape.
Q Could it have been more?
A Could have been more.
Q Do you have records that would reflect that?
A Yes, sir.
Q Do you have records that would reflect how much Mr. Jefferson was paid on June 21st?
A Yes, sir.

Q Can I ask why you didn't review those records in preparation for trial today?
A It's irrelevant, I thought, as to how much he was paid or how many cases he made prior to the case of Mr. Taylor.
Q So you didn't review all the information that you have as it relates to this case; would that be fair to say?
A Yeah, that would be fair.
Q Okay. Now let me ask you this. As to Robert Tisdale, how many cases has Mr. Jefferson made against Robert Tisdale?
A He's made -- its hard to say.
Q Well, how many would you say?
A Six, seven, eight. Somewhere around in there.
Q How many did he make before June 7th?
A I don't know.
Q How many after June 21st?
A I don't know.
Q How many between June 7th and June 21st?
A I don't know.
Q Is this again not relevant? You didn't think it was relevant so you didn't review that either?
A No. (R149-150)

Detective Jett could do no better when asked how much the informant, Gerald Jefferson had been paid. Detective Jett testified that although he kept records on the amount Mr. Jefferson had been paid, he didn't know how much it was nor could he even get into the ball park. (R132-133)

The State's entire case as to the actual drug transactions rested upon the testimony of the informant, Gerald Jefferson. Yet, Mr. Jefferson could do no better with the questions by Appellant's trial attorney concerning the various drug transactions and the

amount of money he had been paid. This informant, Mr. Jefferson, testified at trial:

> Q "Since you began working for Detective Jett, how much have you made?"
> A "I can not tell you, I don't know."
> Q "How many deals have you made?"
> A "I don't know."
> Q "You don't know? Don't you have any idea?"
> A "I don't have any idea."
> Q "How much is the most you ever made in one day?"
> A "Approximately right about $200 - $250."
> Q "Between $200 - $250? How many days have you done that on?"
> A "I done that on -- not often." (R178-179).

At the end of the State's testimony, Appellant's attorney renewed his pre-trial Motion for Favorable Evidence and moved for a mistrial for not having it available. The Court denied the Motion (R226).

The sections of the Florida Rules of Criminal Procedure as they relate to discovery important to this argument are:

Rule 3.220(a)(2):

> As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

Rule 3.220(a)(5):

> Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

Appellant argues the holding of the First District Court of Appeal is contrary to the weight of the case law in the State of Florida. The discovery rules are intended to disclose to the defendant information within the possession of the state that contributes to the defendant's ability to properly prepare a defense for trial and which negates the defendant's guilt in accordance with Brady v. Maryland, 373 U.S. 83 (1963); which meets the materiality standards of United States v. Agurs, 427 U.S. 97 (1976). Even the First District Court of Appeal has clearly stated the intent of pretrial discovery as far back as Coney v. State, 272 So.2d 550 (1st DCA 1973), affirmed through denial of Writ of Certiorari, State v. Coney, 294 So.2d 82 (Fla.1974), when they wrote:

> "The entire purpose of pretrial discovery in criminal cases is to assure a defendant charged with crime the right to a fair trial. Certainly a defendant should not be permitted to so employ the pretrial procedures as to require the state attorney to investigate or prepare his case for him, or to disclose to him information or documents which, by the exercise of due diligence, are readily available to him by subpoena or deposition." at pg. 553.

There are two important points of law in Coney; 1) pretrial discovery is to ensure the defendant a fair trial, and 2) the defendant has the right to gain information and documents by subpoena and/or deposition. To deny full disclosure of discovery evidence within the State's possession is a Brady, supra, violation.

The Florida Supreme Court has repeatedly stated and recently restated in Hegwood v .State, 575 So.2d 170 (Fla. 1991), that to establish a Brady violation, a defendant must prove the following:

> "(1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." (pg.172)

Throughout the record at the trial level and the Appellate Court level, Appellant has argued that each of the above steps required of Hegwood, supra, has been met by Appellant. The jury verdict itself even raises a question as to the reasonable probability the outcome of the proceeding would have been different in that the jury returned a split verdict on the two counts. Clearly, any evidence that would have questioned the testimony of the informant, Gerald Jefferson, could have changed the outcome of the proceeding.

The proper remedy for this Brady violation was stated in Antone v. State, 382 So.2d 1205 (Fla. 1980):

> "The second situation occurs when a pretrial request for specific evidence is made. If the requested evidence is withheld by the prosecution following a specific request and the evidence is material - meaning that it might have affected the outcome of the trial - then a new trial must be ordered. The Agurs Court succinctly stated: "When the prosecutor receives a specific and

> relevant request, the failure to make any response is seldom, if ever, excusable. 427 U.S. at 106." (at pg. 1215)

The Florida Supreme Court also addressed this type of Brady, supra, issue in Arango v. State, 467 So.2d 692 (Fla. 1985), where the Court held:

> "Although the prosecutor did not personally suppress the evidence, the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor... In Brady the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to **guilt or to punishment**, irrespective of the good faith or bad faith of the prosection" The elements of a Brady violation that deny an accused a fair trial are "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

Appellant argues the First District Court of Appeal's position that this information was not required to be provided to Appellant is wrong and that the Motion to Compel should have been granted and the Subpoena Duces Tecum issued. The Trial Court's failure to grant these Motions require reversal of the conviction and the granting of a new trial.

CONCLUSION

In summation, it is respectfully submitted that the First District Court of Appeal should have found that the paying of an informant to testify at trial when such payment for such testimony is a contingent fee and within the control of the government was a due process violation and requires reversal of the conviction with instructions to the Lower Trial Court to dismiss the charge for prosecutorial misconduct.

Additionally, Appellant argues the trial Court committed reversible error when it failed to issue the requested Subpoena Duces Tecum or in the alternative, failed to grant the Appellant's Motion to compel and that the First District Court of Appeal's position on these issues is contrary to the laws and rules of discovery for the State of Florida.

Appellant asks this Court to reverse his conviction with directions to the trial court to dismiss the remaining count against him. In the alternative, Appellant asks that his conviction be reversed and remanded to the trial court for a new trial.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and seven copies of the foregoing INITIAL BRIEF OF APPELLANT has been furnished by U.S. MAIL DELIVERY to the FLORIDA SUPREME COURT, Tallahassee, Florida and a true and correct copy of same has been furnished by U.S. MAIL to JAMES ROGERS, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, Appeals Division, The Capitol Building, Tallahassee, Florida 32301 on this 5th day of August, 1993.

James R. Thies, Sr.