IN THE SUPREME COURT OF FLORIDA

CASE NO. . . . 86,789

THE STATE OF FLORIDA,

Petitioner,

-vs-

JACKIE FORCHIN,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner was the Appellee in the Third District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Respondent was the Appellant in the District Court and the Defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court. The symbol "App." will be used to designate the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Respondent, Jackie Forchin was placed on probation in 1993 following a conviction for possession of a controlled substance. As a special condition of probation, the court ordered that he receive drug treatment on an outpatient basis. (App. 1, p. 2). On November 10, 1994, during the time he was serving his probation, several police officers observed Forchin exchange money for a small plastic bag containing a white substance while he stood in an enclosed bus bench. As Forchin walked away from the bus bench toward a grassy median in the street, two officers got out of unmarked cars and identified themselves as police to Forchin. Forchin then swallowed the plastic bag containing the white substance. (App. 1, p. 2-3). After a brief struggle wherein the officers were unsuccessful in their attempts to get Forchin to expel the plastic bag, Forchin was arrested for tampering with physical evidence and resisting arrest without violence. (App. 1, p. 3).

Forchin was tried by a jury on both charges. The jury acquitted Forchin on the resisting without violence charge, but the jury failed to reach a verdict on the tampering charge. (App. 1, p. 3). Thereafter, the trial court held a hearing on Forchin's violation of probation in the 1993 case

and revoked his probation based on his commission of the substantive crime of tampering with physical evidence and failure to report to his probation officer as directed. (App. 1, p. 1-2).

On appeal, Respondent argued that the evidence was legally insufficient to establish that he committed the offense of tampering with evidence where he was neither under arrest nor did he know that a law enforcement officer was about to instigate an investigatin at the time he swallowed the plastic bag containing an unkown white substance. (App. 1, p. 3).

The State argued that the purpose of a revocation hearing is to satisfy the conscience of the court about whether the conditions of probation have been violated and to afford the accused an opportunity to be heard, and that moreover, it is irrelevant in such a proceeding that a defendant is acquitted of the criminal charge, Recio v. State, 605 So. 2d 553, 554 (Fla. 3d DCA 1992), nor is a formal conviction of a crime essential to enable the trial court to revoke an order of probation where the proof is established by a preponderance of the evidence. Adams v. State, 559 So. 2d 436, 438 (Fla. 1st DCA 1990); Bernhardt v. State, 288 So. 2d 490, 501 (Fla. 1974).

The Third District Court of Appeal found as a matter of law that the tampering with evidence charge could not serve as a basis for the revocation of Forchin's probation, although the district court sustained the trial court's revocation of probation on grounds that Forchin's conduct in failing to present himself to his probation officer on the designated date was willful and substantial by the greater weight of the evidence. (App. 1, p. 3-4).

In a petition for rehearing and/or certification, the State argued that the Third District had improperly relied on its holding in State v. Jennings, 647 So. 2d 294 (Fla. 3d DCA 1994) to determine that Forchin was neither under arrest nor did he know that the officers were investigating him when he swallowed the plastic bag containing the white substance, thus, misapplying the higher

standard of proof beyond a reasonable doubt to obtain a conviction to the issue in the present case which was proof by a preponderance of the evidence or the greater weight of the evidence to support revocation of probation. (App. 2, p. 1-2). The State asked that the Third District Court of Appeal certify the question:

> WHETHER SWALLOWING SUSPECTED COCAINE ROCKS IN THE PRESENCE OF THE ARRESTING OFFICERS AFTER THE DEFENDANT HAS BEEN ADVISED THAT THEY ARE IN FACT POLICE OFFICERS BUT BEFORE THE OFFICERS ARE ABLE TO EXECUTE AN ARREST, CONSTITUTES TAMPERING WITH PHYSICAL EVIDENCE?

(App. 2, p. 2-3). Rehearing/Certification was denied on October 11, 1995). (App. 3).

Notice to invoke the jurisdiction of this Honorable Court was filed on October 26, 1995.

QUESTION PRESENTED

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THIS COURT I N STATE v. JENNINGS, 20 FLA. L. WEEKLY S540 (FLA. OCTOBER 19, 1995).

SUMMARY OF THE ARGUMENT

The instant opinion is in express and direct conflict with State v. Jennings, 20 Fla. L. Weekly S540 (Fla. October 19, 1995). Discretionary review should be exercised to resolve this conflict and ensure uniformity among the districts.

ARGUMENT

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN STATE v.JENNINGS, 20 FLA. L. WEEKLY S540 (FLA. OCTOBER 19, 1995).

In State v. Jennings, 20 Fla. L. Weekly S540 (Fla. October 19, 1995), this Court held that the trial court erred in granting the defendant's motion to dismiss on grounds that he was not under arrest and did not know an investigation was about to be instigated, where swallowing an object clearly constitutes altering, destroying, concealing, or removing a "thing" within the meaning of section 918.13 and where the officers announced their presence by shouting "police" the trier of fact should not be precluded as a matter of law from finding that Jennings knew an investigation was about to be commenced when he swallowed the alleged contraband. (App. 4).

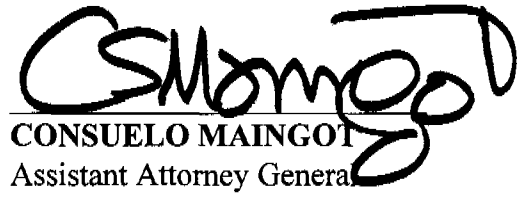
The Third District Court of Appeal in the instant case found as a matter of law that since Forchin was neither under arrest nor did he know that the officers were investigating him when he swallowed the plastic bag containing the white substance, as a matter of law, the tampering with evidence charge could not serve as a basis for the revocation of his probation. (App. 1, p. 3). This ruling expressly and directly conflicts with this Court's decision in State v. Jennings.

Petitioner submits that express and direct conflict exists on the face of the opinion. Therefore discretionary review jurisdiction should be exercised by this Honorable Court to settle the conflict.

CONCLUSION

WHEREFORE, based upon the foregoing, Petitioner respectfully requests that this Court grant discretionary review in this cause.

ROBERT A BUTTERWORTH
Attorney General
Tallahassee, Florida



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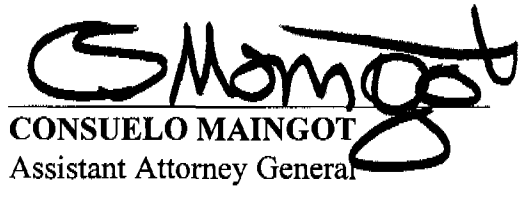
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON JURISDICTION** was furnished by mail to **HOWARD K. BLUMBERG,** Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit, 1320 N.W. 14th Street, Miami, Florida 33125 on this 6 day of November 1995.



CONSUELO MAINGOT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. . . . . .

THE STATE OF FLORIDA,

Petitioner,

-vs-

JACKIE FORCHIN,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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CS Maingot

CONSUELO MAINGOT
Assistant Attorney General

APPENDIX 1

95-13338-W

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

JACKIE FORCHIN, **

Appellant, **

vs. ** CASE NO. 95-480

THE STATE OF FLORIDA, **

Appellee. **

#93-11763-B

Opinion filed September 6, 1995.

An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and LEVY and GREEN, JJ.

PER CURIAM.

Jackie Forchin appeals an order revoking his probation based upon his alleged commission of tampering with physical evidence

while on probation and failure to report to his probation officer as directed. Based upon this court's decision of State v. Jennings, 647 So. 2d 294 (Fla. 3d DCA 1994), rev. granted, No. 84, 909 (Fla. May 23, 1995), we find that the tampering charge could not legally serve as a basis for the revocation but Forchin's willful failure to report as directed could. Accordingly, we affirm.

Forchin was placed on probation in 1993 following a conviction for possession of a controlled substance.[1] As a special condition of probation, the court ordered that he receive drug treatment on an outpatient basis. While Forchin was still on probation, the State filed an affidavit alleging that Forchin had committed the criminal offense of tampering with physical evidence on or about November 10, 1994 and that Forchin failed to report to his probation officer two days earlier on November 8, 1994 for a referral to an outpatient drug program.

The State's evidence in support of the tampering charge was essentially that several police officers observed Forchin exchange money for a small plastic bag containing a white substance while Forchin stood in an enclosed bus bench. As Forchin walked away from the bus bench toward a grassy median in the street, two officers got out of unmarked cars and identified themselves as police to Forchin. Forchin then swallowed the plastic bag

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1 Forchin was also sentenced to serve 364 days in jail.

containing the white substance. After a brief struggle wherein the officers were unsuccessful in their attempts to get Forchin to expel the plastic bag, Forchin was arrested for tampering with physical evidence and resisting arrest without violence.[2]

Under virtually indistinguishable facts, this court in State v. Jennings, held that a criminal defendant had not tampered with evidence when he swallowed cocaine rocks after an officer shouted "police" where the defendant was neither under arrest at the time nor did he know that a law enforcement officer was about to instigate an investigation. As in Jennings, Forchin was neither under arrest nor did he know that the officers were investigating him when he swallowed the plastic bag containing the white substance. Thus, as a matter of law, we find that the tampering charge could not serve as a basis for the revocation of Forchin's probation.

As to Forchin's failure to present himself to his probation officer on November 8, we do find that the greater weight of the evidence supported the trial court's determination that Forchin's conduct was willful and substantial in nature to support the revocation. Green v. State, 620 So. 2d 1126, 1129 (Fla. 1st DCA 1993); Steiner v. State, 604 So. 2d 1265, 1267 (Fla. 4th DCA 1992).

---

[2] Prior to the probation violation hearing, Forchin was tried by a jury both on the tampering charge and on a charge of resisting an officer without violence. The jury failed to reached a verdict on the tampering charge but acquitted Forchin on the resisting charge.

The probation officer had given Forchin the opportunity to appear on any date from November 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th. Although Forchin testified below that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected this contention when it noted that the weather had not precluded the probation officer from being present in the office on that date. Since there is ample evidence in the record to support these findings, the trial court's resolution of the evidence will not be disturbed on appeal. See Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982); State v. Guerra, 455 So. 2d 1046, 1048 (Fla. 3d DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985); State v. Garcia, 431 So. 2d 651 (Fla. 3d DCA 1983).

Affirmed.

APPENDIX 2

95-130318-W

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

DCA CASE NO. 95-480

JACKIE FORCHIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CERTIFICATION

APPELLEE, The State of Florida, by and through its undersigned counsel, respectfully moves this Court for a rehearing and/or certification in the above-styled case, and as grounds therefor submits the following:

1. On September 6, 1995, this Court in a *per curiam* decision affirmed the judgment of the lower court revoking Appellant's probation on grounds that his failure to present himself to his probation officer supported the trial court's determination that his conduct was willful and substantial in nature, supporting revocation. Forchin v. State, No. 95-480 (Fla. 3d DCA September 6, 1995).

2. This Court in the same opinion, declined to affirm the trial court's revocation of Appellant's probation on grounds that he had failed to remain at liberty without violating the law by tampering with physical evidence by swallowing suspected rock cocaine. This Court cited as controlling authority, State v. Jennings, 647 So. 2d 294 (Fla. 3d DCA 1994), *rev. granted*, No. 84,909 (Fla. May 23, 1995), holding that the Appellant here, as

in Jennings was neither under arrest nor did he know that the officers were investigating him when he swallowed the plastic bag containing the white substance.

3. The State respectfully submits that a decision on the issue of whether a defendant may be charged with and convicted of tampering with evidence for swallowing suspected evidence in the presence of police officers is still pending in the Florida Supreme Court, oral argument having been heard on August 30, 1995 in State v. Jennings, Case No. 84-909. In that case this Court affirmed the dismissal of the tampering with evidence charge, but certified any conflict with Hayes v. State, 634 So. 2d 1153 (Fla. 4th DCA 1991).

4. Because of the continuing problem in this district and other districts regarding the threshhold showing that the State must meet in order to charge a defendant who has attempted to or has successfully swallowed suspected evidence under Section 918.13, Florida Statutes, tampering with physical evidence, the State urges this Court to certify the following question:

> WHETHER SWALLOWING SUSPECTED COCAINE ROCKS IN THE PRESENCE OF THE ARRESTING OFFICERS AFTER THE DEFENDANT HAS BEEN ADVISED THAT THEY ARE IN FACT POLICE OFFICERS BUT BEFORE THE OFFICERS ARE ABLE TO EXECUTE AN ARREST, CONSTITUTES TAMPERING WITH PHYSICAL EVIDENCE?

WHEREFORE, Appellee, The State of Florida, by and through undersigned counsel, respectfully requests this Court to certify the question as stated above to insure uniformity of decisions among the district courts of appeal on this issue.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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CONSUELO MAINGOT
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Department of Legal Affairs
Post Office Box 013241
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(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **MOTION FOR REHEARING AND/OR CERTIFICATION** was furnished by mail to **LOUIS CAMPBELL**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 18 day of September 1995.

CONSUELO MAINGOT
Assistant Attorney General

APPENDIX 3

95-130318-U

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

WEDNESDAY, OCTOBER 11, 1995

JACKIE FORCHIN, **

Appellant, **

vs. ** CASE NO. 95-480

THE STATE OF FLORIDA, **

Appellee. **

Upon consideration, appellee's motion for rehearing and/or certification and appellant's motion for rehearing are hereby denied. SCHWARTZ, C.J., and LEVY and GREEN, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By _____
Deputy Clerk

cc: Consuelo Maingot
Howard K. Blumberg

/NB

DOCKETED
OCT 12 1995
H. R.
ATTORNEY GENERAL

RECEIVED
OCT 12 1995
ATTORNEY GENERAL
MIAMI OFFICE

APPENDIX 4

3. Furthermore, Judge Graziano acknowledges that on other occasions she failed to be patient, dignified and courteous to litigants, lawyers and others with whom she dealt in an official capacity as required by Canon 3B(4).

4. Judge Graziano will not contest the recommendation the Commission has set forth below charging her with violations of Canon 2A and Canon 3B(4) of the Code of Judicial Conduct and will not contest that she violated those provisions.

5. The Commission and Judge Graziano waive oral argument before the Florida Supreme Court.

Recommendation

After full and deliberate consideration, the Commission by a vote of at least nine (9) members, finds that the conduct of Judge Graziano violated the provisions of Canons 2A and 3B(4) of the Code of Judicial Conduct and recommends to the Supreme Court of Florida that Judge Gayle S. Graziano be publicly reprimanded for her conduct and her violation of Canons 2A and 3B(4).

Given the foregoing stipulation, which is self-explanatory, we hereby reprimand Judge Gayle S. Graziano for the improper judicial conduct set out in the stipulation.

It is so ordered. (GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.)

* * *

Criminal law—Sentencing—Consecutive county jail sentences for misdemeanors which total more than one year are permitted

RICKY J. GOODLOE, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 85,535. October 19, 1995. Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. 5th District - Case No. 94-1738 (Orange County). Counsel: James B. Gibson, Public Defender and Kenneth Witts, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, for Petitioner. Robert A. Butterworth, Attorney General and Ann M. Childs, Assistant Attorney General, Daytona Beach, for Respondent.

(PER CURIAM.) We have for review *Goodloe v. State*, 652 So. 2d 981 (Fla. 5th DCA 1995), which expressly and directly conflicts with the opinion in *McGauley v. State*, 632 So. 2d 1154 (Fla. 4th DCA 1994). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

This Court recently disapproved the decision in *McGauley* and held that consecutive county jail sentences for misdemeanors which total more than one year are permitted. *Armstrong v. State*, 656 So. 2d 455 (Fla. 1995). Accordingly, we approve the decision below.

It is so ordered. (GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.)

* * *

Criminal law—Tampering with evidence—Defendant's act of swallowing cocaine rocks after officers approached and shouted "police"—Swallowing of object constitutes altering, destroying, concealing, or removing a thing within meaning of statutory prohibition—Fact that officer shouted "police" may be sufficient to establish that defendant knew that an investigation was about to be instituted and swallowed alleged rock cocaine in order to impair its availability for a criminal investigation, proceeding, or trial—Error to grant motion to dismiss

STATE OF FLORIDA, Petitioner, v. DARREL JENNINGS, Respondent. Supreme Court of Florida. Case No. 84,909. October 19, 1995. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Third District - Case No. 94-617 (Dade County). Counsel: Robert A. Butterworth, Attorney General and Consuelo Maingot, Assistant Attorney General, Miami, for Petitioner. Bennett H. Brummer, Public Defender and Louis Campbell, Assistant Public Defender, Eleventh Judicial Circuit, Miami, for Respondent.

(GRIMES, C.J.) We have for review *State v. Jennings*, 647 So. 2d 294, 295 (Fla. 3d DCA 1994), wherein the district court of appeal certified conflict with *Hayes v. State*, 634 So. 2d 1153 (Fla. 4th DCA), *review denied*, 645 So. 2d 452 (Fla. 1994). We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

Jennings was charged with tampering with physical evidence in violation of section 918.13, Florida Statutes (1993).[1] Section 918.13 provides, in pertinent part:

> (1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:
>
> (a) Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such proceedings or investigation[.]

Jennings filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(d)(4). In that motion, Jennings asserted the following facts. With the aid of binoculars, law enforcement officers observed Jennings holding what they believed was a marijuana cigarette. As one of the officers approached Jennings, he also observed what he believed to be loose cocaine rocks in one of Jennings' hands. The officer shouted "police!" At that point, Jennings tossed the alleged cocaine rocks into his mouth and swallowed them. Jennings began to choke and the officer took hold of the rear of Jennings' pants. Jennings broke away and took several steps before he was arrested. The objects Jennings swallowed were never recovered.

The State did not file a traverse contesting the facts alleged by Jennings. Consequently, the facts as alleged were deemed admitted. *See* Fla. R. Crim. P. 3.190(d). The trial court granted Jennings' motion, concluding that "the act of swallowing suspect cocaine rocks, does not rise to the level of conduct which constitutes concealment, removal, destruction, or alteration of something for the purpose of impairing it's [sic] availability for trial under Florida Statute 918.13."

The district court of appeal affirmed on different grounds, concluding that Jennings "did not tamper with evidence because he was neither under arrest nor did he know that a law enforcement officer was about to instigate an investigation." *Jennings*, 647 So. 2d at 295. The court concluded that Jennings was not under arrest because the arresting officer had not even reached Jennings before Jennings put the alleged cocaine rocks into his mouth. Moreover, the court found that shouting "police," without more, was insufficient to establish that Jennings knew an investigation was about to be instituted.

Relying on *Boice v. State*, 560 So. 2d 1383 (Fla. 2d DCA 1990), and its progeny, the trial court concluded that swallowing alleged contraband in the presence of officers does not constitute altering, destroying, concealing, or removing a "thing" within the meaning of section 918.13. In *Boice*, the court concluded that

> [t]he defendant's act of tossing the small bag of cocaine away from his person while in the presence of the arresting officers at the scene of the purchase does not rise to the level of conduct which constitutes a concealment or removal of something for the purpose of impairing its availability for the criminal trial. In this case, the defendant did not conceal the cocaine. Although he removed the cocaine from his hand, he did not remove the cocaine from the immediate area of his interest. Mr. Boice merely abandoned the evidence.

Id. at 1384. In *Munroe v. State*, 629 So. 2d 263, 264 (Fla. 2d DCA 1993), *Jones v. State*, 590 So. 2d 982, 983 (Fla. 1st DCA 1991), and *Thomas v. State*, 581 So. 2d 993, 994 (Fla. 2d DCA 1991), the courts relied on *Boice* for the proposition that tossing evidence away in the presence of a law enforcement officer does not constitute tampering under section 918.13. *But see Hayes v. State*, 634 So. 2d 1153, 1154 (Fla. 4th DCA) (affirming tampering conviction where defendant dropped bag of rock cocaine into drainage outlet while being pursued by law enforcement officer), *review denied*, 645 So. 2d 452 (Fla. 1994).

We disagree with *Boice* to the extent it can be read to mean that tossing evidence away in the presence of a law enforcement officer does not, as a matter of law, constitute a violation of the statute. Depending upon the circumstances, such an act could amount to tampering or concealing evidence. An affirmative act of throwing evidence away constitutes more than mere abandonment. We conclude that the trial court's ruling is rooted in an overly broad reading of *Boice* and find that swallowing an object clearly constitutes altering, destroying, concealing, or removing a "thing" within the meaning of section 918.13. *See McKinney v. State*, 640 So. 2d 1183, 1186 (Fla. 2d DCA 1994) (concluding that if jury found defendant tried to swallow cocaine to impair its availability for criminal investigation, proceeding, or trial, jury

could find defendant guilty of attempted tampering); *McKenzie v. State*, 632 So. 2d 276, 277 (Fla. 4th DCA 1994) (concluding that "[s]wallowing a substance such as this surely constitutes an intent to 'alter, destroy, conceal, or remove' as clear as any act could, including flushing it down a toilet").

We must next consider whether the fact that the officer shouted "police" was sufficient to establish that Jennings knew an investigation was about to be instituted and swallowed the alleged rock cocaine in order to impair its availability for a criminal investigation, proceeding, or trial.[2] The district court of appeal concluded that shouting "police" was insufficient, as a matter of law, to put Jennings on notice that he was about to be investigated for the possession of illegal drugs. We disagree.

Jennings was observed holding what appeared to be rock cocaine. As soon as a law enforcement officer shouted "police," Jennings swallowed the alleged rock cocaine.[3] In *State v. Book*, 523 So. 2d 636 (Fla. 3d DCA), *review denied*, 534 So. 2d 398 (Fla. 1988), the court recognized that

> "[t]he motion to dismiss in criminal practice is similar in many respects to the summary judgment in civil proceedings. The motion should be granted only where the most favorable construction of the facts to the state does not establish a prima facie case of guilt. If there is any evidence upon which a jury of reasonable men could convict, the court should deny the motion."

Id. at 637 (quoting *State v. McCray*, 387 So. 2d 559, 561 (Fla. 2d DCA 1980)) (citations and footnote omitted). Reasonable persons could differ as to whether Jennings possessed the requisite knowledge under section 918.13. Consequently, we cannot say that the evidence is such that a trier of fact would be precluded, as a matter of law, from finding that Jennings knew an investigation was about to be commenced when he swallowed the alleged contraband.

Accordingly, we quash the decision below and remand for further proceedings. Additionally, we disapprove of *Munroe v. State*, 629 So. 2d 263 (Fla. 2d DCA 1993); *Jones v. State*, 590 So. 2d 982 (Fla. 1st DCA 1991); *Thomas v. State*, 581 So. 2d 993 (Fla. 2d DCA 1991); and *Boice v. State*, 560 So. 2d 1383 (Fla. 2d DCA 1990), to the extent those decisions conflict with our decision herein. We approve of *Hayes v. State*, 634 So. 2d 1153 (Fla. 4th DCA), *review denied*, 645 So. 2d 452 (Fla. 1994), to the extent it is consistent with our decision herein.

It is so ordered. (OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.)

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[1]Jennings was charged with two additional counts which are not the subject of this review.

[2]We agree with the district court of appeal that Jennings was not under arrest at the time he swallowed the alleged cocaine rocks.

[3]The objects Jennings swallowed were never recovered. Consequently, aside from the officer's observations, there is no proof that the objects Jennings swallowed were cocaine rocks. However, it is immaterial whether the objects he swallowed were, in fact, contraband. Section 918.13 proscribes the altering, destroying, concealing or removing of "any record, document, or *thing*." (Emphasis added.) Jennings can be found guilty of tampering under section 918.13 if a trier of fact finds that Jennings knew an investigation was about to begin and destroyed objects which he knew were the focus of the impending investigation.

* * *

Criminal law—Prisoners—Gain time—Department of Corrections may implement pro rata conversion of incentive gain time earned to work and extra gain time

HARRY K. SINGLETARY, JR., Petitioner, v. HENRY HAMILTON, Respondent. Supreme Court of Florida. Case No. 84,945. October 19, 1995. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. First District - Case No. 93-288 (Leon County). Counsel: Judy Bone, Assistant General Counsel, Department of Corrections, Tallahassee, for Petitioner. No appearance for Respondent.

(HARDING, J.) We have for review *Hamilton v. Singletary*, 646 So. 2d 734, 737 (Fla. 1st DCA 1994), in which the First District Court of Appeal certified the following question to be of great public importance:

> MAY THE DEPARTMENT OF CORRECTIONS, CONSISTENT WITH THE DECISION OF THE FLORIDA SUPREME COURT IN *WALDRUP v. DUGGER*, 562 So.2d 687 (Fla.1990), IMPLEMENT ITS PRO RATA CONVERSION OF INCENTIVE GAIN-TIME EARNED UNDER CHAPTER 83-131, § 8, LAWS OF FLORIDA, TO WORK AND EXTRA GAIN-TIME AVAILABLE UNDER SECTION 944.275, FLORIDA STATUTES (1979)?

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. We answer the certified question in the affirmative because we find the pro-rata conversion to be consistent with our decision in *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990).

Henry Hamilton was received by the Department of Corrections (DOC) on December 1, 1988. Two of Hamilton's offenses were of a continuing nature, one occurring between July 1979 and June 1987 and the other between February 1983 and June 1987. Hamilton filed a petition for a writ of mandamus challenging the DOC's awards of basic and incentive gain-time. The trial court denied the petition as to both issues. *Hamilton*, 646 So. 2d at 734.

On appeal, Hamilton abandoned the issue relating to basic gain-time, but claimed that the DOC abused its discretion in the award of incentive gain-time by improperly converting the incentive gain-time earned under the statute declared unconstitutional in *Waldrup*.[1] At the district court, Hamilton raised two issues relating to the DOC's conversion of incentive gain-time to work and extra gain-time: 1) whether the percentage conversion violated the ex post facto prohibition or deprived him of equal protection or due process of law; and 2) whether the DOC abused its discretion by failing to award the maximum amount of work and extra gain-time available to him. *Hamilton*, 646 So. 2d at 735.

The district court affirmed in part and reversed in part the trial court's order denying Hamilton's petition for writ of mandamus. The district court determined that the DOC's conversion was "tantamount to the drafting and implementation of a new statute by the DOC, thus circumventing the legislative process." *Id.* at 736. The DOC converted the incentive gain-time awarded under the 1983 statute to work and extra gain-time under the applicable 1979 statute on a percentage basis.[2] The district court reasoned that the 1983 amendments imposed more stringent criteria for the award of incentive gain-time than the work gain-time authorized under the 1979 statute, and thus the percentage of available gain-time actually awarded under the 1983 incentive gain-time statute may not correlate directly or approximately with the percentage of available gain-time actually awarded under the 1979 statute for the same conduct. *Id.* The court also concluded that the "conversion" deprived Hamilton of due process of law as it was implemented in lieu of the applicable statute and without regard for this Court's decision in *Waldrup*. *Id.* at 736-37. The court further concluded that the DOC abused its discretion in the award of work and extra gain-time because it had no discretion or authority to implement such a conversion. *Id.* at 737.

As to the second issue, the district court concluded that the mere fact that Hamilton was not awarded the maximum amount of work and extra gain-time available did not evidence an abuse of discretion by the DOC. Thus, the court did not find that Hamilton was entitled to an award of the maximum amount of incentive gain-time under the 1979 statute. *Id.* However, on the State's motion for rehearing and certification, the district court certified the question regarding the DOC's pro-rata conversion formula. *Id.*

The legislature amended the gain-time statute in 1983 and provided that "[o]n the effective date of the act, all incentive and meritorious gain-time shall be granted according to the provisions of this act." Ch. 83-131, § 8, at 443, Laws of Fla. After the act took effect in June 1983, the only documentation that the DOC routinely maintained in inmate files were the incentive gain-time ratings and awards. These records reflected whether an inmate had worked, the level of involvement, and how well the