IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,109

STATE OF FLORIDA,

Petitioner,

vs.

DAVID DUGAN, et al.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Bureau Chief
Senior Assistant Attorney General

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Blvd., Ste 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Petitioner

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STATEMENT OF THE CASE AND FACTS

Respondent Dugan was charged with one count of possession of cocaine by information filed May 7, 1993 (R 347-348); in June, Dugan's case was transferred to Judge Fogan's drug court. (R 349-350). Dugan entered a no contest plea and agreed to attend and complete the drug program; adjudication of guilt was withheld, and he was placed on probation on the condition he attend drug treatment for a period of one year. (R 351-356). On June 27, 1994, Dugan came before the trial court, with a number of other defendants who participated in Drug Court, and orally moved to withdraw his plea and have the charges dismissed because he had successfully completed drug treatment. (T 22-26).

Dugan testified that when he entered his no contest plea in June 1993, the judge and his counsel told him he could withdraw his plea if he successfully completed the drug program, which he did. (T 93-94). Phil Madan, program supervisor of the BARC drug court treatment program testified that BARC had been licensed and approved by HRS since 1991; and the license/ certificate was admitted into evidence. (T 63-65).

On August 15, 1994, the State filed its response to Dugan's motion to withdraw his plea and its response in opposition to Dugan's motion to dismiss. (R 363-370). On October 3, 1994, the

trial court entered its order granting Dugan's motion to for post conviction relief, allowing him to withdraw his plea and dismissing the charges over the State's objections. (R 372-376).

Respondent Burroughs was charged with possession of cocaine and driving with a suspended license by information filed March 9, 1993. (R 13). Apparently he filed a motion to suppress, which was heard and denied on May 13, 1993. (R 14). Burroughs did not enter a plea, but on May 13, 1993, at the Court's suggestion, he agreed to attend the drug treatment program. (R 4, 7-8).

Burroughs did not file a written motion for dismissal, but the State filed a written response to Burroughs' motion to dismiss on August 29, 1993. (R 16-20). At a hearing on October 3, 1994, Burroughs presented a discharge summary prepared by Ed Daker; the State stipulated to the contents of the summary which indicated that the A.S.A.S. program was licensed and approved by HRS, but did not stipulate that Burroughs had successfully completed the program. (R 4-5). Burroughs testified that he entered the A.S.A.S. program on April 21, 1993 and completed the program on August 9, 1994, that he guessed he had a drug problem before he entered the program, and that he no longer had a drug problem. (R 7-9).

The trial court orally announced that it was dismissing the

drug charge against Burroughs (R 9-10), and on October 14, 1994, the trial court entered its order granting Burroughs' motion to dismiss the charge. (R 22-23).

On appeal, the Fourth District affirmed the trial court's dismissal of charges and found that the *'may be instead of or in addition to final adjudication, imposition of penalty or sentence, or other action'* language of F.S. 397.705(1), as well as the *'in addition to, or in lieu of, any penalty or probation otherwise prescribed by law'* language of F.S. 893.13(f) and 1(g), authorize a trial court to dismiss charges against a defendant who has been required to participate in a substance abuse program. State v. Dugan, 20 Fla. L. Weekly D2334-D2335 (Fla. 4th DCA October 18, 1995). In rejecting the State's argument that the statutes only provided for sentencing alternatives, the Court found that the language of the statutes was broader than the State's interpretation and questioned what disposition other than dismissal existed for defendants, who like Burroughs, had only been charged with a crime and had not entered a plea prior to being required to attend a substance abuse program. Id. at D2335. Additionally the Court noted that even if the statutes could be interpreted as urged by the State, it meant that the statutes are susceptible of differing interpretations, and pursuant to the

statute of lenity, the statutes in question here were required to be interpreted in a manner most favorable to Respondents. Id. at D2335. The Court also rejected the State's argument that the sole authority to dismiss cases rests with the prosecution, finding that F.S. 397 did authorize dismissal. Id. at D2335. On motion for rehearing and for certification of question, the Court denied the State's motion for rehearing, but certified to this Court the following as a question of great public importance:

> DOES CHAPTER 397.705, FLORIDA STATUTES, AUTHORIZE A TRIAL COURT TO DISMISS CHARGES AGAINST A DEFENDANT UPON HIS COMPLETION OF A SUBSTANCE ABUSE PROGRAM OVER OBJECTION BY THE STATE?

State v. Dugan, 20 Fla. L. Weekly D2657 (Fla. 4th DCA December 6, 1995).

SUMMARY OF THE ARGUMENT

Florida Statute 397.705 neither expressly not impliedly authorizes dismissal of charges by a trial court, rather the statute was intended to provide **sentencing and/or adjudicatory** alternatives in circumstances where a defendant successfully completes substance abuse treatment. By comparison, F.S. 948.08 does expressly provide for the dismissal of charges but only under specific circumstances where a defendant had been shown to meet certain statutory qualifying criteria, criteria which were not considered in this case. Moreover, the Fourth District's interpretation of F.S. 397.705 as allowing a trial court to unilaterally dismiss charges has the effect of usurping prosecutorial function and discretion in the absence of an express statutory grant of authority to do so. The opinion of the Fourth District must be quashed and the trial court's order of dismissal must be reversed.

ARGUMENT

CHAPTER 397.705, FLORIDA STATUTES, DOES NOT AUTHORIZE A TRIAL COURT TO DISMISS CHARGES AGAINST A DEFENDANT UPON HIS COMPLETION OF A SUBSTANCE ABUSE PROGRAM OVER OBJECTION BY THE STATE.

The State submits the Fourth District erred in finding that Chapter 397[1] authorizes a trial court to dismiss charges over objection by the State.

Section 397.705 provides that a trial court may refer any person who is charged with or convicted of a crime and who has a substance abuse problem, to receive services from a provider which is licensed by HRS. The statute further provides that if a person has been so referred, the referral may be instead of or in addition to "final adjudication, imposition of penalty or sentence, or other action." **Nowhere** does the language of F.S. 397.705, either expressly or impliedly, authorize a trial court

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[1] It should be noted that the crime with which Appellee was charged was committed on April 17, 1993; F.S. 397.705 did not take effect until October 1, 1993. As the statute in effect at the time of the commission of the crime controls, the former provisions of F.S. 397.10 (1977), et seq. apply in this case. See: Heath v. State, 532 So. 2d 9 (Fla. 1st DCA 1988), rev. denied, 541 So. 2d 1173 (Fla. 1989); State v. Lacey, 553 So. 2d 391 (Fla. 4th DCA 1989). However, as the repeal of the former sections and enactment of the current section did little more than consolidate the several sections into a single section, and did not include substantive changes to the statute it may be argued that F.S. 397.705 can be retroactively applied. See: Justus v. State, 438 So. 2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052, 104 S. Ct. 1332, 79 L. Ed. 2d 726 (1984). Further, as is argued above, under neither version of the statute is the trial court authorized to dismiss the charges, thus, for purposes of this case it does not matter which version of the statute is applied.

to dismiss the charges against a defendant. Indeed, the word 'dismiss' does not appear anywhere in F.S. 397.705(1).

It is well established that the Legislature is presumed to know the meaning of its words and to have expressed its intent by the use of the words found in the statute. State v. Jett, 626 So. 2d 691 (Fla. 1993). The primary guide to statutory interpretation is to determine and give effect to the purpose and intent of the Legislature, and the mention of one thing implies the exclusion of the other. Devin v. City of Hollywood, 351 So. 2d 1022 (Fla. 4th DCA 1976). Where the enumeration of specific things is followed by more general words, the general phrase is construed to refer to the thing of the same kind. Green v. State, 604 So. 2d 471 (Fla. 1992).

Applying these principles of statutory construction to Section 397.075, it is clear that through the language employed the Legislature did not authorize trial courts to dismiss prosecutions under this statute. Rather, the statute provides **adjudicatory and/or sentencing** alternatives to imprisonment or probation as the penalty for commission of the crimes charged. That the statute is intended as an **adjudicatory and/or sentencing alternative** is evinced both by the express legislative intent set forth in Section 397.301(7), and in the language of F.S. 397.705

itself.

Section 397.301(7) states that it is the intent of the Legislature to provide substance abuse offenders an alternative to imprisonment instead of or in addition to other criminal penalties. Section 397.705(2)(a) provides that the order of referral must specify the duration of the offender's **sentence**, and that the total amount of time the defendant can be required to receive treatment may not exceed the maximum length of **sentence** possible for the crime charged. The "or other action" language contained in F.S. 397.705(1) follows, and thus must be interpreted by reference to the words it follows, i.e. "adjudication, imposition of penalty or sentence".

Clearly the statute contemplates **alternatives** to traditional punishment for the crimes charged when a defendant has a substance abuse problem. Obviously one alternative granted to the trial court by the statute is to withhold adjudication for the crime charged after referring a defendant to treatment. However, withholding adjudication for the crime charged is far, far, different from **dismissing** the charges. The State's position is that while the statute grants a trial court discretion to withhold adjudication or to withhold sentence, nothing in the language of the statute indicates that the legislature intended

to authorize a trial court to **unilaterally** dismiss the prosecution of violations of the law.

Moreover, statutes relating to the same subject should be construed together and compared to each other, particularly when enacted at the same time. Florida Police v. Dept. of Agriculture, 557 So. 2d 146 (Fla. 1st DCA 1990), quashed (on other grounds), 574 So. 2d 120 (Fla. 1991); Ferguson v. State, 377 So. 2d 709 (Fla. 1979); See also: Scates v. State, 603 So. 2d 504 (Fla. 1992). Section 948.08 governs pretrial intervention programs which are similar, but not identical to, treatment programs contemplated by F.S. 397.705. Thus the State submits that a review of F.S. 948.08 is instructive in determining the meaning of F.S. 397.705. Former section 948.08 (1991) provided that any person charged with a nonviolent third degree felony was eligible for release into the pretrial intervention program on the approval of the state attorney; if a person was admitted to the program, the charges against him were continued for up to 180 days, and if he satisfactorily participated in the program, the charges against him could be dismissed. However, the statute expressly provided that the final determination as to whether the prosecution would continue rested with the state attorney. Section 948.08 was amended in 1993, the same year that the former

provisions of F.S. 397.10 et seq. were repealed and reenacted as F.S. 397.705.

The amendments to F.S. 948.08 provide that any person who is charged with a second or third degree felony for purchase or possession of a controlled substance under chapter 893, **and** who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for admission into a pretrial substance abuse treatment intervention program for a period of not less than one year. The requirement that the state attorney approve the defendant's admission into the program was removed (although, if the state can establish that the defendant was involved in the dealing and selling of controlled substances, the court is required to deny the defendant admission into the program), as was the state attorney's authority to make the final determination as to whether the prosecution would continue. The amended statute provides that the trial court **shall** dismiss the charges upon a finding that the defendant has successfully completed the intervention program. Florida Statute 948.08(6) (1993).

Obviously sections 397.705 and 948.08 govern **different** types of treatment programs for defendants with substance abuse problems. Section 948.08 is intended to insure that a defendant

who has a substance abuse problem receives treatment; however, this section applies only to certain specified defendants whose crimes are nonviolent and specifically related to their drug usage, who are not involved in the distribution of drugs, who have never previously been convicted of a felony, and who have not previously participated in a court ordered treatment program. As an incentive for these specifically situated, nonviolent, first offenders the Legislature has expressly provided that defendants who successfully complete a year of treatment will be rewarded by dismissal of the charges[2].

While section 397.705 is likewise intended to insure that a defendant who has a substance abuse problem receives treatment, this section applies to **any offender regardless of the type or seriousness of the crime committed,** and its applicability is in no way restricted to substance abuse crimes. Indeed, under the Fourth District's interpretation of the statute, a person who

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[2] As Respondents' crimes were committed prior to the amendment of F.S. 948.08, and as the changes to section 948.08 were substantive, the amendments to section 948.08 do not apply to them. Heath v. State, supra; State v. Lacey, supra. Further, as the state attorney opposed the dismissal of the charges below, the trial court's actions are contrary to F.S. 948.08 (1991), and as there were no findings that Respondents had not previously been convicted of any felonies, that they had not previously participated in pretrial court-ordered drug treatment, and that they were not involved in the sale or distribution of drugs, they were not qualified for treatment under F.S. 948.08 (1993). State v. Turner, 636 So. 2d 815 (Fla. 3rd DCA 1994); State v. Rubel, 647 So. 2d 995 (Fla. 2nd DCA 1994).

commits murder or armed robbery, or any serious, violent crime is eligible for dismissal of charges upon completion of a court ordered drug treatment program. Surely the Legislature did not intend to allow such action. Further, this section does not take into account the seriousness of a defendant's criminal act, his prior criminal record, and/or his prior admission into treatment programs. Section 397.705 provides that treatment may be ordered by the trial court instead of or in addition to, other adjudication or sentence; clearly it does **not** authorize dismissal of the charges. Particularly since both statutes were amended in the same year, it is clear that if the Legislature had intended to authorize the dismissal of charges as an incentive for successful completion of drug treatment under F.S. 397.705, it would expressly have said so. As it did not, section 397.705 cannot be interpreted as allowing trial judges to dismiss charges over the objections of the State Attorney's Office.

Finally, the Fourth District's interpretation of F.S. 397 represents an unjustified judicial interference with the state attorney's function and discretion in the prosecution of cases. It is well established that in the absence of a statute, the sole authority to determine whether to prosecute rests with the state attorney, and the trial court may not dismiss or nolle prosse

charges without the agreement of the state. State v. Turner, 636 So. 2d 815 (Fla. 3rd DCA 1994); State v. Bryant, 549 So. 2d 1155 (Fla. 3rd DCA 1989); State v. McClain, 509 So. 2d 1360 (Fla. 2nd DCA 1987); State v. Daise, 508 So. 2d 560 (Fla. 4th DCA 1987); State v. Brown, 416 So. 2d 1258 (Fla. 4th DCA 1982); In re the Interest S.R.P., 397 So. 2d 1052 (Fla. 4th DCA 1981); State v. Jogan, 388 So. 2d 322 (Fla. 3rd DCA 1980). The authority for the state attorney to make a determination as to whether a prosecution will continue derives from common law. Brown supra at 1259).

> The decision to file or not to file criminal charges is a function of the State Attorney acting in his capacity as a member of the executive branch of the government. The decision is not given to the judiciary to dismiss criminal charges merely because a trial judge may disagree with the State Attorney's charging discretion in a particular case...

State v. Serra, 529 So. 2d 1262 (Fla. 3rd DCA 1988);*See also:* State v. Lamb, 638 So. 2d 1060 (Fla. 1st DCA 1994). While the trial court's goal (of encouraging rehabilitation) in dismissing these cases may be laudable, such action may not be sustained if it does not conform to the law. Here, as in Jogan, supra, the goal of rehabilitation is not a recognized ground for dismissal of criminal charges and thus cannot be sustained. Below, the

lower court entered into plea bargains with defendants, allowed defendants who had entered pleas to withdraw them without any legal basis therefor and then dismissed the prosecutions, all over the State's objections. In effect, the trial court has taken all control over the prosecution of these cases. The trial court in this case appeared to be concerned that some 'deserving' defendants would, notwithstanding their rehabilitation, still have the burden of having a criminal record. This concern not only presupposes that the State will not agree to nolle prosse any of these cases, but overlooks other relief which a trial court may properly grant, such as sealing or expungement of the records. Simply because a trial court is concerned about the ultimate effect of a criminal prosecution on a defendant's life, does not render the prosecution dismissable, nor empower a trial court to usurp the clear and well established function of the state attorney. In the absence of statutory or rule authority, the control of the prosecution of a case clearly rests with the State and the State alone. Here, there is no **express** grant of the power of dismissal under the statute, thus it is clear that the Fourth District's interpretation of F.S. 397.705 is incorrect; as the trial court's order of dismissal below is not authorized by the provisions of F.S. 397.705, it must be

reversed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court QUASH the decision of the Fourth District, and REVERSE the trial court's order of dismissal below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

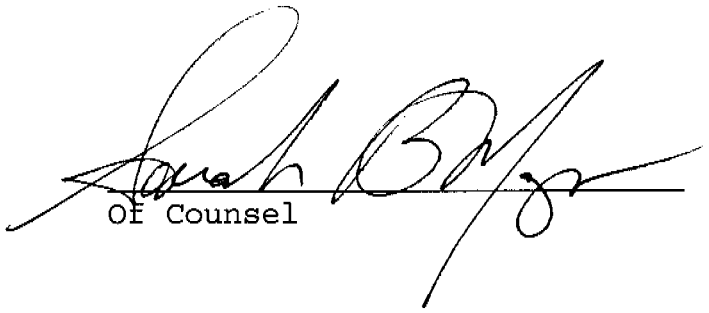
GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Petitioner" has been furnished by Courier to: CHERRY GRANT, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 14th day of February, 1996.



Of Counsel

APPENDIX

we conclude that trafficking in cocaine which is destined for a location outside this jurisdiction may be a violation of this statute so long as the requirements for prosecution set forth in section 910.005 are met.

The charge against the appellant was not trafficking but conspiracy to traffic. Only offenses committed partly in Florida can be punished under Florida law. Section 910.005(2) states:

> An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element occurs within the state.

In the case of a conspiracy, the agreement between the co-conspirators is an essential element of the crime. *King v. State,* 104 So. 2d 730 (Fla. 1957); *Herrera v. State*, 532 So. 2d 54, 58 (Fla. 3d DCA 1988). In this case that agreement was reached at a meeting in Fort Lauderdale. Therefore, we hold that the act of holding a meeting at which the conspiratorial agreement is formed constitutes conduct within this state which is an essential element of the crime. As such, Florida had jurisdiction to prosecute as to the second series of drug transactions.

We reach the opposite conclusion as to the third series of transactions. The state did not prove any act occurring in Florida in furtherance of *The Finesse* drug smuggling operation. The entire operation occurred outside the territorial jurisdiction of the United States. While *The Finesse's* home port was Miami, there was no testimony that *The Finesse* had sailed from Miami to pick up drugs in Colombia. There was no evidence that the conspiratorial agreement was entered into in Florida.

We also agree with the appellant that the three drug transactions were not simply part of one overall conspiracy. While each was related to the appellant, each involved different participants, different locations, and different purposes. One was to import cocaine from Florida to Canada in 1985, using Quitoni and Allardyce. The second was to import cocaine from Colombia to Tennessee and into Canada, using Gordon and Brothers. The conspiratorial agreement was arrived in Fort Lauderdale in 1987. The third was to import cocaine from Colombia to Europe in 1987-88 using other conspirators. The state cites *United States v. Gonzalez,* 940 F.2d 1413 (11th Cir. 1991), for the proposition that a single conspiracy may be found where there is a "key man" involved who directs various other combinations of persons. However, in *Gonzalez,* the modus operandi of the smuggling operation was the same, and each transaction was the importation of cocaine into Florida. In the instant case each transaction was entirely different, as was the conspiratorial agreement. *See May v. State,* 600 So. 2d 1266, 1268 (Fla. 5th DCA 1992); *Donovan v. State*, 572 So. 2d 522, 528 (Fla. 5th DCA 1990); *Griffin v. State*, 611 So. 2d 20 (Fla. 1st DCA 1992); *Aiello v. State*, 390 So. 2d 1205, 1207 (Fla. 4th DCA 1980).

Since the state relied heavily on the trio of conspiracies to convict the appellant of trafficking in cocaine, one of which did not constitute a crime punishable under Florida law, we cannot conclude that the presentation of the other conspiracies did not hopelessly taint the trial as to the offenses punishable by Florida law. It was not harmless error and requires reversal for a new trial.

With respect to Count III, the indictment alleged multi-county activity and specifically alleged that the conspiracy to murder David Singer included the planning of the murder, its perpetration, and the plan of escape from the murder scene. As the state alleged multi-county activity, namely escape, as part of the conspiracy, we hold that it did allege sufficient multi-county activity to show jurisdiction in the statewide grand jury. We can find no authority that the planned escape from the murder scene is not part of a continuing conspiracy to commit murder.

We do agree, however, that it was error for the court to deny severance of the cocaine trafficking charge from the murder conspiracy charge. While Florida Rule of Criminal Procedure 3.150(a) permits the joinder of two or more offenses when the offenses are based on the same act or transaction or two or more connected acts or transactions, the supreme court has set forth rules regarding proper joinder of offenses for trial:

> First, for joinder to be appropriate the crimes in question must be linked in some significant way. This can include the fact that they occurred during a "spree" interrupted by no significant period of respite, *Bundy*, or the fact that one crime is causally related to the other, even though there may have been a significant lapse of time. *Fotopoulos.* But the mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder except to the extent that it helps prove a proper and significant link between the crimes. *Crossley.*

Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993). The instant case provides no justification for joinder. The crimes were entirely separate. While the West End Gang in Canada was involved in general drug smuggling operations, there was no connection between any of the drug smuggling operations which formed the basis for the charges in the trafficking count and the murder of David Singer. Singer was in no way related to any of the drug smuggling transactions. Moreover, the Tennessee drug operation and the *Finesse* operation both occurred after the murder and therefore could not possibly have figured into the murder conspiracy. There was no causal relation between the offenses, nor were they part of a crime "spree." The state's theory was that Singer was killed because he could be a witness to Ross's involvement in murders in Montreal, not because of involvement in any drug smuggling operations.

The joinder of these offenses for trial was not harmless. As the court in *Crossley v. State*, 596 So. 2d 447 (Fla. 1992), pointed out:

> The danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales.

Id. at 450. We find that that reasoning certainly applies in this case where almost all of the witnesses to each offense were convicted drug smugglers who were testifying for leniency on their own sentences and whose credibility was substantially attacked by the defense. The testimony as to the one crime bolstered the suggestion of guilt as to the other.

As to the remaining points on appeal, we find no reversible error. The evidentiary points were either not preserved or were harmless, and we affirm as to the statute of limitations defense.

We therefore reverse the convictions and sentences and remand for new trials consistent with this opinion, severing the drug charges from the murder charge. (FARMER and KLEIN, JJ., concur.)

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[1]Appellant was convicted in federal court of drug trafficking, for which he is currently serving three life sentences without possibility for parole. *See Ross v. United States*, 33 F.3d 1507 (11th Cir. 1994).

* * *

Criminal law—Trial court has authority to dismiss drug charges after defendant has completed a drug program pursuant to Chapter 397

STATE OF FLORIDA, Appellant, v. DAVID DUGAN and NOYES GREEN BURROUGHS, Appellees. 4th District. Case Nos. 94-3066 and 95-0039. L.T. Case Nos. 93-2903CF and 93-6684CF. Opinion filed October 18, 1995. Consolidated appeals from the Circuit Court for Broward County; Robert J. Fogan, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellees.

(KLEIN, J.) In these consolidated appeals the issue is whether the trial judge had the authority to dismiss drug charges after appellees completed a drug program pursuant to chapter 397, Florida Statutes. We conclude that he did and affirm.

Appellee Dugan entered a no contest plea to possession of

cocaine and agreed to complete a drug program. He was placed on probation on the condition that he attend drug treatment for a period of one year and adjudication of guilt was withheld. Appellee Burroughs, who was also charged with possession of cocaine, did not enter a plea, but at the court's suggestion agreed to complete a drug treatment program. Both appellees, after successfully completing the programs, moved the court to dismiss the charges, and the court did so over the state's objection.

Section 893.15, Florida Statutes (1993), the Florida Comprehensive Drug Abuse Prevention and Control Act, provides:

> Any person who violates s.893.13(1)(f) or 1(g) relating to possession may, in the discretion of the trial judge, be required to participate in a substance abuse services program approved or regulated by the Department of Health and Rehabilitative Services pursuant to the provisions of chapter 397, provided the director of such program approves the placement of the defendant in such program. *Such required participation may be imposed in addition to, or in lieu of, any penalty or probation otherwise prescribed by law.* However, the total time of such penalty, probation, and program participation shall not exceed the maximum length of sentence possible for the offense. (Footnote omitted.) (Emphasis added.)

Section 397.705(1), Florida Statutes (1993), which is part of the chapter entitled "Substance Abuse Services," provides in part:

> AUTHORITY TO REFER.—If any offender, including but not limited to any minor, is *charged with or convicted* of a crime, the court or criminal justice authority with jurisdiction over that offender may require the offender to receive services from a service provider licensed under this chapter. *If referred by the court, the referral may be instead of or in addition to final adjudication, imposition of penalty or sentence, or other action.* (Emphasis added.)

The state argues that these two statutes do not authorize dismissal; however, we do not agree.

Section 893.15 authorizes the court to order participation in a treatment program "in lieu of, any penalty or probation" and section 397.705(1) similarly authorizes referral for treatment by the court "instead of . . . other action." This language is clearly broader than the interpretation which the state urges on us, which is that these statutes only provide for sentencing alternatives to imprisonment or probation, but do not authorize dismissal. Moreover, section 397.705(1) authorizes the court to require people who are only "charged" with a crime to get treatment, which is precisely what happened with appellee Burroughs. The state has not explained what must happen to Burroughs after his completion of treatment, if the court cannot dismiss the charges against him.

Even if the statutes could somehow be interpreted in the manner urged by the state, it would mean that the statutes are susceptible of different interpretations. Under those circumstances our lenity statute, section 775.021(1), Florida Statues (1993), would require the construction most favorable to appellees.

The state's reliance on *State v. Turner*, 636 So. 2d 815 (Fla. 3d DCA 1994), and the cases cited therein, for the proposition that the sole authority as to whether to prosecute rests with the state attorney is misplaced, since in those cases there was no statute which authorized dismissal. Our interpretation of this statute, which is that it does authorize dismissal, makes *Turner* distinguishable.

Affirmed. (DELL and STEVENSON, JJ., concur.)

* * *

Criminal law—Private citizen who provided police with tip concerning ongoing drug activity which led police to conduct controlled buy and ultimately to arrest defendant may be afforded protections of confidential informant status—Trial court departed from essential requirements of law by ordering state to disclose citizen's identity without balancing state's right to protect identity against defendant's need to have this information

STATE OF FLORIDA, Petitioner, v. ROBERT NATSON, Respondent. 4th District. Case No. 95-2479. L.T. Case No. 94-15266 CF10. Opinion filed October 18, 1995. Petition for writ of certiorari to the Circuit Court for Broward County; Sheldon M. Schapiro, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for petitioner. James O. Walker, III, Pompano Beach, for respondent.

(STEVENSON, J.) The state petitions for certiorari review of an order of the circuit court requiring disclosure of the name and address of a private citizen who provided the police with a crime tip. The crime tip, concerning possible illegal drug activity, led the police to conduct a controlled buy which, in turn, led to the respondent's arrest. The trial court refused to determine whether the citizen should be afforded the general protections of anonymity regularly given to confidential informants based on the court's view that "there is no anonymous citizen privilege." Because we hold that a private citizen may be afforded the protections of confidential informant status under the above-described circumstances, we grant certiorari and quash the order.

Under Florida Rule of Criminal Procedure 3.220(g)(2), disclosure of the identity of a "confidential informant" is generally not required unless the state plans to call the informant as a witness, or if the failure to disclose the informant's identity will infringe upon the constitutional rights of the accused. In the instant case, although the state did not intend to call the citizen providing the confidential information as a witness, the trial court ordered the disclosure of the citizen's identity without balancing the state's right to protect the witness's identity against the defendant's need to have the information. In failing to conduct the balancing test, the trial court departed from the essential requirements of the law.

For the purposes of rule 3.220(g)(2), we see no distinction between a citizen who gives the police information concerning possible criminal activity, with a request that their identity remain confidential, (a so-called "anonymous tipster") and a person who supplies information to the police on a regular or contracted basis or because they no longer wish to continue their own involvement in a particular criminal enterprise (the commonly-thought-of "confidential informant"). There is no indication that the use of the term "confidential informant" in the rule was intended to have the restricted meaning which the trial court has suggested. In *State v. Johnson*, 285 So. 2d 53, 55 (Fla. 2d DCA 1973), *cert. dismissed*, 289 So. 2d 9 (Fla. 1974), the second district commented that despite "the commonly-thought-of definition of a confidential informant who, in exchange for remuneration, tips off a law enforcement agency that a suspect has committed or is likely to commit a crime," the phrase "confidential informant... has no independent meaning of its own and takes substance only from the factual and legal context in which it is to be applied."

In the context of the instant case, it is clear that the anonymous tipster in question, a person who gave the police information of potential on-going illegal drug sales activity and requested that his (or her) identity not be disclosed, which then led the police to conduct their own independent investigation, is a confidential informant. In *Hinson v. State*, 595 So. 2d 301 (Fla. 3d DCA 1992), a private citizen, seeking a reward, called a "Crimestoppers" program and identified the defendant as the perpetrator of a robbery. Acting on that tip, the police obtained a search warrant and searched the defendant's home where they found fruits of the crime. The third district, without discussion, equated the anonymous tipster with a confidential informant and found no error in the trial court's denial of the defendant's motion to disclose the tipster's identity.

Respondent's reliance on *Featherstone v. State*, 440 So. 2d 457 (Fla. 4th DCA 1983) for his position that anonymous tipsters are not confidential informers within the scope of the privilege is misplaced. In *Featherstone*, this court held that the state's mere

law enforcement cases? Does it mean that much that they would do that? Would they have taken it this far, what is their incentive to lie?

In *Clark*, while reversing on other grounds, we explained the reason such arguments are inappropriate:

> Although the comments were not an affirmative statement of the prosecutor's belief in the veracity of the police officer witnesses, *compare State v. Ramos*, 579 So. 2d 360 (Fla. 4th DCA 1991), *Buckhann v. State*, 356 So. 2d 1327 (Fla. 4th DCA 1978), the prosecutor's argument constitutes an inappropriate attempt to persuade the jury that the police officer's testimony should be believed simply because he or she is a police officer. *Garrette v. State*, 501 So. 2d 1376, 1379 (Fla. 1st DCA 1987); *Houston v. State*, 394 So. 2d 557 (Fla. 3d DCA 1981). In no uncertain terms, the prosecutor's argument was that police officers would not testify falsely because they have too much at stake and would not risk their jobs.
>
> In addition, the argument makes reference to matters outside the record and constituted impermissible bolstering of the police officer's testimony. *See Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993) (query as to why the police officers would risk all their years and their unblemished records improperly constituted impermissible bolstering of officers' testimony by matters not supported by the record); *Valdez v. State*, 613 So. 2d 916 (Fla. 4th DCA 1993) (comment that police officers stand between us and "anarchy" improperly focused jury's attention on matters outside the record).

In *Landry v. State*, 620 So. 2d 1099, 1101 (Fla. 4th DCA 1993), this court held that the prosecutor's repeated reference to the police officer's "unblemished record," which was not supported by evidence in the record, constituted impermissible bolstering of the police witness and warranted reversal:

> [A]ppellant was correct that the claim regarding the unblemished records was not adequately supported by the record and constituted impermissible bolstering of the officers' testimony. *E.g.*, *Blackburn v. State*, 447 So. 2d 424 (Fla. 5th DCA 1984); *Richmond v. State*, 387 So. 2d 493 (Fla. 5th DCA 1980); *Francis v. State*, 384 So. 2d 967 (Fla. 3d DCA 1980). Because this case came down to a swearing match between the officers and appellant's witness, the error cannot be considered harmless.

In this case, the comments were nearly identical to those made in *Clark* and similar to those condemned in *Landry*. The mere fact that the prosecutor in this case did not expressly mention the police officers' unblemished records does not sufficiently distinguish the remarks from *Landry* or make this type of argument any less offensive. The essence of the impropriety is that the state is asking the jury to believe a police officer over an ordinary citizen because police officers place their careers in jeopardy by not telling the truth. The credibility of police officer witnesses cannot be bolstered by arguing that they would put their careers in jeopardy by lying. *Compare State v. Ramos*, 356 So. 2d 1327, 1328 (Fla. 1978).

The only remaining question is whether the error can be deemed harmless or whether it requires reversal for a new trial. Here, the state's case hinged upon the believability of its witnesses, Officers Kahir and Hadden. Accordingly, as stated in *Landry*, "[b]ecause this case came down to a swearing match between the officers and appellant's witness, the error cannot be considered harmless." 620 So. 2d at 1101. We cannot say beyond a reasonable doubt that this impermissible argument did not contribute to the verdict of guilt. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Thus, we reverse defendant's conviction and remand for a new trial. Therefore we do not reach the issues related to sentencing defendant as a habitual offender. (WARNER and SHAHOOD, JJ., concur.)

* * *

Criminal law—Question certified: Does Chapter 397.705, Florida Statutes, authorize a trial court to dismiss charges against a defendant upon his completion of a substance abuse program over objection by the state?

STATE OF FLORIDA, Appellant, v. DAVID DUGAN and NOYES GREEN BURROUGHS, Appellees. 4th District. Case Nos. 94-3066 and 95-0039. L.T. Case Nos. 93-2903CF and 93-6684CF. Opinion filed December 6, 1995. Consolidated appeals from the Circuit Court for Broward County; Robert J. Fogan, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellees.

ON MOTION FOR REHEARING AND MOTION FOR CERTIFICATION OF QUESTION
[Original Opinion at 20 Fla. L. Weekly D2334a]

(KLEIN, J.) We deny the state's motion for rehearing, but grant its motion for certification and certify the following question as one of great public importance:

> DOES CHAPTER 397.705, FLORIDA STATUTES, AUTHORIZE A TRIAL COURT TO DISMISS CHARGES AGAINST A DEFENDANT UPON HIS COMPLETION OF A SUBSTANCE ABUSE PROGRAM OVER OBJECTION BY THE STATE?

(DELL, and STEVENSON, JJ., concur.)

* * *

Civil procedure—Summary judgment reversed where motion did not provide requisite notice that opposing party's affirmative defense regarding misrepresentation would be addressed

GULF INSURANCE COMPANY, Appellant, v. HARRY C. STOFMAN, JEANNE STOFMAN and WORLD MARINE UNDERWRITERS, INC., Appellees. 4th District. Case No. 94-2720. L.T. Case No. 92-18655 (09). Opinion filed December 6, 1995. Appeal from the Circuit Court for Broward County; C. Lavon Ward, Judge. Counsel: Raoul G. Cantero, III and David Lawrence, III of Adorno & Zeder, P.A., Miami, for appellant. Robert L. Jennings of Jennings, Valancy & Edwards, P.A., Fort Lauderdale, for Appellees-Henry C. Stofman and Jeanne Stofman. Steven J. Chackman of Bernstein & Chackman, P.A., Hollywood, for Appellee-World Marine Underwriters, Inc.

ON MOTION FOR REHEARING
[Original Opinion at 20 Fla. L. Weekly D2283a]

[Editor's note: Substituted opinion contains slight rewording; ruling not changed]

(PER CURIAM.) We deny appellees' motion for rehearing, but we withdraw the opinion of the court filed October 11, 1995 and substitute the following opinion for purposes of clarification only.

We affirm the partial summary judgment holding the policy endorsements invalid. We reverse, however, the partial summary judgment as to liability; appellee's motion did not provide the requisite notice that appellant's affirmative defense regarding misrepresentation would be addressed. *See* Fla. R. Civ. P. 1.510(c) (1994). This reversal is without prejudice to either party to seek summary judgment on the issue of liability. Accordingly, we remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART and REMANDED. (DELL, KLEIN and STEVENSON, JJ., concur.)

* * *

Declaratory judgment—Dismissal of complaint for declaratory relief based on pending criminal action affirmed—Dismissal to be without prejudice to enable plaintiffs to refile action in the event information is not dismissed or set aside, but process on such information is not executed without unreasonable delay

HAROLD C. MARIDON and KATHRYN A. ELLIOTT, Appellants, v. BARRY KRISCHER, as State Attorney for the 15th Judicial Circuit, and ROBERT BUTTERWORTH, as Attorney General for the State of Florida, Appellees. 4th District. Case No. 95-0797. L.T. Case No. CL 94-9178 AO. Opinion filed December 6, 1995. Appeal from the Circuit Court for Palm Beach County; Roger B. Colton, Judge. Counsel: Robin Corwin Campbell and Wayne H. Schwartz, of Atlas, Pearlman, Trop & Borkson, P.A., Fort Lauderdale, and Benedict P. Kuhne, of Sale & Kuehne, P.A., Miami, for appellants. Robert A. Butterworth, Attorney General, and Susan P. Stephens, Assistant Attorney General, Tallahassee, for appellees.

(PER CURIAM.) In this appeal we affirm the decision of the trial