IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TONY A. CARWISE,

Respondent.

Case No. SC02-1670
5th DCA No. 5D00-2828

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State filed an information against Respondent, charging him with one count of conspiracy to commit armed robbery with a firearm and one count of carrying a concealed firearm. (R 41).

Respondent's trial was conducted on July 11, 2000. At the opening of the trial, counsel for Respondent made a motion in limine. He argued that the State should be required to establish the corpus delicti of the case prior to being allowed to introduce admissions made by Respondent. The State countered that the existence of a conspiracy must be proven by a preponderance of the evidence before the co-conspirator's hearsay statements are admissible. The trial court denied Respondent's motion, but stated it could be readdressed in any motions for judgment of acquittal. (T 5-9).

Prior to any of the Respondent's statements being allowed into evidence, the State presented testimony from Officer Mark Eisner of the Daytona Beach Police Department. (T 32-52). On December 2, 1999, during routine patrol, Officer Eisner went through the parking lot of the Host Inn located on the corner of Bellevue and Ridgewood Avenue. Officer Eisner would run tags of vehicles located in that parking lot to determine whether they were stolen due to the fact that stolen vehicles had been found at that location in the past months. (T 33-35). Officer Eisner pulled into the hotel parking lot and observed a vehicle (Lincoln Town Car) parked along a retention wall (not in a marked parking area) with a temporary tag that looked extremely worn. (T 36-38). Initially when Officer Eisner came around the corner, he believed the vehicle to be unoccupied. (T 38). Officer Eisner came back and positioned his vehicle behind the vehicle. (T 38-39). Officer Eisner testified: "Basically, what I was going to do is get out. We can't run to check for if it's a stolen vehicle from a temporary tag. So what I was going to do was get out and get the VIN number off of

the Towne Car and see if it was stolen. When I pulled up, I saw somebody pop up in the front seat, at that point, as I was exiting my police car." (T 39). Once Officer Eisner saw that the vehicle was occupied, he radioed for the back-up vehicle to "step it up" because he was unsure of the situation he now had. (T 40-41).

The following colloquy occurred between the prosecutor and Officer Eisner:

> [Prosecutor:] What did you see next?
>
> [Officer Eisner:] At that point the passenger door opened up.
>
> [Prosecutor:] Could you tell if it was the front passenger or back passenger door?
>
> [Eisner:] It was the front passenger door. So at that point, I took a couple steps in between the space between my patrol car and the Towne Car and I left the gap there, and when the door opened up, I looked over. I wanted to see what was going on, and told the occupant I said, “Shut the door of the vehicle."
>
> Okay. At that point what I saw was a hand go down and I saw the person in the front, which eventually is going to be the defendant, discard a handgun underneath the -- underneath the vehicle.
>
> [Prosecutor:] Were you able to readily identify it as a handgun at that point?
>
> [Eisner:] Yes.
>
> [Prosecutor:] Could you tell the size, the caliber, or whether it was a revolver or automatic at that point?
>
> [Eisner:] I knew it was going to be a revolver, but I couldn't tell the caliber or anything else.
>
> [Prosecutor:] Okay. So what happened after you saw the hand with the gun go underneath the car?
>
> [Eisner:] Well, at that point, obviously, it took me for a little bit of a surprise. I went around to the other side after he did comply and shut the door. As I got a little closer, I saw a second occupant in the backseat. So I've got somebody in front now and somebody in the back.
>
> [Prosecutor:] What was that second occupant doing?

[Eisner:] They were laying down in the car.

[Prosecutor:] Were you able to see that second person while you were parking your car?

[Eisner:] No.

[Prosecutor:] And how about as you were initially walking up to the car?

[Eisner:] No. I didn't see it until I got probably near the trunk of the Lincoln.

[Prosecutor:] And he was how laying in the car? Was he on the seat? On the floor?

[Eisner:] On the seat -- in the backseat.

[Prosecutor:] And what happened next?

[Eisner:] At that point, like I said, I -- I figured that if they were going to get out and start shooting at that point, you know, then it probably already would have happened. So I felt that if they discarded the handgun, then I felt that it was somewhat safe to approach the vehicle, rather than draw my weapon and order them out.

I didn't want them jumping over the wall, or backing the car up into mine, or what have you. So I went up and I engaged in some general conversation and made the defendant and the other subject in the vehicle believe that I hadn't seen the handgun.

[Prosecutor:] Now, could you see at that point what anybody in the car was doing?

[Eisner:] The defendant was -- they both, you know, sat up, but the person in the backseat put his hand a couple of times underneath a leather jacket.

[Prosecutor:] Could you see what he was doing when he put his hand under that jacket?

[Eisner:] No, I couldn't, and I told him, I think once, maybe twice, I said, "Could you do me a favor. Just keep your hands where I can see them, please." I told him to keep his hands out from underneath that jacket.

[Prosecutor:] What did you say to dispel any fears that they may have that you saw this particular gun?

[Eisner:] Well, I just asked them, I said, "Hey what are you

guys doing?"
I said, "You're in a hotel parking lot." I said, "What are you up to?"
And they said they were sleeping.
I said, "Well, why didn't you check into a room?" You're in a hotel."
And they said, Well, we're just --

(T 41-44).

It was at this point the defense objected based on any statements made by the Respondent and co-defendant in reference to its earlier argument regarding corpus delicti. (T 44). The trial court overruled the objection, and Officer Eisner testified about the arrival of Officer Naughton and the arrest of the Respondent and co-defendant. (T 44-45). The Respondent was first taken out of the vehicle, and then the co-defendant. (T 45). Thereafter, Officer Eisner lifted the leather jacket on the backseat and found a handgun, i.e., a loaded revolver with six bullets in it, and black winter hat (ski mask-type) underneath the jacket. (T 45,46). Officer Eisner further testified that he retrieved the gun that he saw pushed underneath the car, and that it was loaded with four bullets. (T 48-50). After the guns and the mask were recovered from the Lincoln, the Respondent and co-defendant were read their *Miranda* rights. (T 52-53). The prosecutor attempted to ask Officer Eisner whether co-defendant Turner told him why the two men were in the hotel parking lot. The defense objected, which resulted in discussions outside the presence of the jury pertaining to the admission of the co-defendant's statements. (T 53-62). The trial court sustained the defense's objection regarding the co-defendant's statements to the police officers. (T 62).

In the presence of the jury, the prosecutor continued direct examination of Officer Eisner, who testified that he searched the Respondent and recovered from his pocket a piece of fabric with a hole in it. (T 68). It appears from the transcript that Officer Eisner demonstrated how it would be used, and testified that the winter weather conditions were normal for Florida. (T 69). The following colloquy occurred

between the prosecutor and Officer Eisner in reference to the Respondent's statements:

> [Prosecutor:] Now, did you talk to -- after the defendant in this case was Mirandized, did you talk to him?
>
> [Eisner:] Yes.
>
> [Prosecutor:] Did he tell you why he was there at the hotel?
>
> [Defense Counsel (Powers):] Your Honor, just for the record, I'll renew my objection made earlier.
>
> [The Court:] All right. Again, overruled.
>
> [Eisner:] Yes. He said that they were -- they were waiting on a third individual to arrive. Well, we had prefaced it by, basically, asking him saying, Look, we've got -- you know, you're basically, under arrest for the firearm charge. The guy in the backseat's got a mask and a gun.
>
> Now, at this point, we didn't see the hole in the teal fabric. We thought it was just a piece of clothing. So at that point we were thinking, myself and Officer Naughton, that the person in the backseat was the one that maybe that Mr. Carwise was just maybe the driver.
>
> So we really didn't put it together quite yet that he also was --
>
> [Defense Counsel:] Objection, Your Honor, he's speculating here.
>
> [The Court:] It will be sustained.
>
> [Prosecutor:] Once you --
>
> [Defense Counsel:] Move to strike his response.
>
> [The Court:] The jury is to disregard.
>
> [Prosecutor:] Once -- did he tell you why he was with Mr. Turner?
>
> [Eisner:] Yes. He said they were going to jack somebody.
>
> [Prosecutor:] And did he say where they were going to jack somebody?
>
> [Eisner:] No. They were waiting on this third person that Mr. Turner -- excuse me, Mr. -- the guy in the backseat knew, and that third individual that had yet to arrive, was

going to orchestrate the robbery.

[Prosecutor:] And did you confront him with the fact that he had the gun and the, what appears from the way you put it on, to be a mask?

[Eisner:] Not yet.

[Prosecutor:] Okay. And did he tell you that he was involved at that point?

[Eisner:] He made a statement that he had been picked up by the gentleman in the backseat and was, basically, trying to get a ride and was along for the ride.

[Prosecutor:] And did he -- did you, then, confront him with the gun and the mask once you realized that, in fact, it did have a hole in it?

[Eisner:] Yes.

[Prosecutor:] And was his story consistent at that point?

[Eisner:] No.

[Prosecutor:] What did he say at this point?

[Defense Counsel:] I'm going to continue my objection for the record, just so it's clear.

[The Court:] All right. Go ahead. Again overruled.

[Eisner:] Again, at that point he -- he really had no comment after that.

[Prosecutor:] Well, did he admit to you that he was, in fact, going with Mr. Turner, the person in the backseat, and this third person to rob somebody?

[Eisner:] Yes, he did.

[Prosecutor:] And did he use the word "rob?"

[Eisner:] He used the word "rob" and then "jack."

* * *

(T 69-72).

Upon cross-examination, Eisner stated that the vehicle was parked in plain sight.

Once Respondent came into the officer's sight, he never left it. Respondent did not furnish Eisner with any details of the robbery, and told Eisner that they were waiting on an unnamed third person to arrive. (T 74-78). Eisner testified that Respondent stated he was "along for the ride" and that the other two men were going to see to the details. (T 77-80).

Officer Raymond Naughton testified that he provided back-up to Eisner on the morning in question. Officer Naughton received the call to provide back-up at approximately 8:45 a.m.. (R 85-86). Naughton placed Respondent into the rear seat of Officer Eisner's vehicle, read him his *Miranda* rights, and then spoke with him. (T 89-90). Upon patting Respondent down, the officers found a teal piece of fabric which turned out to be a ski mask. (T 90, 94). Respondent first stated that he had just happened upon the vehicle, that he knew Turner, and was just catching a ride with him. (T 93). Upon being confronted with the mask and gun, Respondent informed Naughton that he had traveled to the hotel with Turner and that they were at the hotel to rob someone or someplace. The two men were waiting for the arrival of a third person before committing the robbery. (T 94-95). While Naughton had not seen Respondent place a gun under the car, Respondent told Naughton he had done so; Eisner also informed Naughton about the gun. (T 87, 97, 98, 102).

The State rested its case after the officers testified. The defense moved to strike the testimony regarding Respondent's statements, moved for a directed verdict on the conspiracy count and a judgment of acquittal on the count of carrying a concealed firearm. (T 104, 109). The trial court denied each motion. (T 115).

Respondent testified in his own behalf. He testified that his cousin, Earl Turner, picked Respondent up in Turner's car that day around 6:30 a.m.. Turner was giving Respondent a ride to his job at "Greg's roofing company." The other person in the car was a friend of Turner's whose name was unknown to Respondent. Turner

dropped this third person off to pick something up at the Host Inn. While they were waiting for this person to return to the car, the police arrived. (T 122-124, 137). Respondent denied being armed. (T 125). He testified that he used the mask during his work to cover his face and nose so he would not get burned. (T 125-126). Respondent also denied telling the police they were going to rob someone. (T 129). Respondent testified he had to be at work at 7:30 a.m.. (T 132).

On rebuttal, Officer Eisner testified he first called this incident in at 8:43 a.m.. (T 140). Officer Naughton testified that Respondent stated he was working for Wayne's roofing company. (T 143).

The jury found Respondent guilty as charged on both counts of the information. (R 60; T 209).

A motion for new trial was filed on July 20, 2000. (R 61-62). A hearing was held on the motion on September 6, 2000. Respondent argued that the State had not presented sufficient evidence at trial to establish a corpus delicti for the crime of conspiracy to commit murder prior to admitting Respondent's statements. (R 3-9). The motion was denied on September 13, 2000. (R 95).

Respondent was sentenced to 39.3 months in prison on both counts; the sentences were ordered to run concurrently. (R 83-94).

Respondent filed a timely notice of appeal. (R 96-97). Through the Office of the Public Defender, Respondent asserted that the trial court erred in allowing his extra-judicial statements to be admitted into evidence prior to the State establishing the corpus delicti for the charge of conspiracy to commit armed robbery.

The Fifth District Court of Appeal issued an opinion on March 1, 2002, reversing Respondent's conspiracy conviction based upon the State's failure to present sufficient evidence to establish the corpus delicti prior to admitting his confession. *See Carwise v. State*, 27 Fla. L. Weekly D508 (Fla. 5th DCA March 1,

2002). Judge Harris wrote a specially concurring opinion in which agreed that there was insufficient evidence to establish the corpus delicti, but urged this Court "to reconsider the applicability of the ancient corpus delicti rule under modern conditions and particularly as it may relate to attempts and conspiracies." *Id.* Judge Sharp dissented, concluding the State presented sufficient evidence to establish the corpus delicti. Like Judge Harris, she also wrote in favor of replacing the corpus delicti rule with the trustworthiness doctrine, at least in cases involving an attempt or conspiracy crime. *Id.*

The State filed a timely motion for rehearing and motion for certification. On July 19, 2002, the Fifth District Court of Appeal granted the State's motion for certification and certified the following questions as one of great public importance:

> SHOULD FLORIDA REPLACE THE CORPUS DELICTI RULE WITH THE TRUSTWORTHINESS APPROACH PROMULGATED BY THE UNITED STATES SUPREME COURT IN OPPER V. UNITED STATES, 348 U.S. 84 (1954)?

Id.

The State filed a timely notice to invoke the discretionary jurisdiction of this Court based upon the certified question. On August 1, 2002, this Court postponed its decision on jurisdiction and set the briefing schedule. Petitioner's brief on the merits follows.

SUMMARY OF THE ARGUMENT

This court should answer the certified question in the affirmative and replace the corpus delicti rule with the "trustworthiness" standard set forth by the United States Supreme Court in *Opper v. United States*, 348 U.S. 84 (1954). Under the "trustworthiness" standard, a defendant's confession is sufficiently corroborated if the State introduces independent proof of such facts and circumstances as would tend to generate a belief that the confession is true. Adoption of this standard would provide a more workable standard for the admission of a defendant's statements. It would allow the use of a defendant's confession where it is clear he is telling the truth and avoid exclusion of otherwise valid confessions if the state is unable to prove an element of the corpus delicti. Use of the trustworthiness standard would provide greater assurance against the use of an unreliable confession than the corpus delicti rule since the trustworthiness standard will serve to ensure the confessor is the guilty party.

Additionally, strict application of the corpus delicti rule is nearly impossible to apply to offenses that prohibit conduct, but that do not encompass a specific harm, loss, or injury - such as certain "attempt" crimes, conspiracy and income tax evasion. The trustworthiness standard is adaptable to any crime and still serves the same purpose as the corpus delicti rule of protecting accused persons against conviction for offenses out of derangement, mistake or official fabrication.

In any event, the appellate court erred in finding that the State did not present adequate evidence at trial to demonstrate the corpus delicti of conspiracy to commit armed robbery. Taken in the light most favorable to the State, the evidence shows that two men were hiding together in a car, both armed with handguns and both in possession of ski-type masks. These facts demonstrate an agreement between the men to commit a crime. Respondent's conviction should be affirmed.

ARGUMENT

ISSUE

THIS COURT SHOULD REPLACE THE CORPUS DELICTI RULE WITH THE TRUSTWORTHINESS APPROACH PROMULGATED BY THE UNITED STATES SUPREME COURT.

The State contends that this Court should answer the certified question in the affirmative and replace the corpus delicti rule with the "trustworthiness" standard set forth by the United States Supreme Court in *Opper v. United States*, 348 U.S. 84 (1954). Proof of the corpus delicti *aliunde* a defendant's confession should no longer be necessary so long as there exist sufficient facts and circumstances which corroborate the defendant's confession and generate a belief in its trustworthiness.

Under the "trustworthiness" doctrine, "the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti." *Opper v. United States*, 348 U.S. at 93. Although independent evidence is not necessary to establish the whole of the corpus delicti, the State is required "to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." *Id.* In other words, the adequacy of the corroborative evidence is measured not by its tendency to establish the corpus delicti, but by the extent to which it supports the trustworthiness of the defendant's statement. *United States v. Johnson*, 589 F.2d 716, 718-19 (D.C.Cir. 1978). Once the State presents evidence which supports the truth of the confession or tends to prove facts embraced in the confession, the confession may be considered trustworthy and the State may use the confession. *Opper v. United States*, 348 U.S. at 92. In this manner, both the corpus delicti and "trustworthiness" doctrines serve the same purpose by requiring the State to introduce evidence to corroborate a defendant's confession. The trustworthiness approach, however, would avoid the injustice which occurs when a reliable,

corroborated confession is excluded simply because the prosecution did not have additional evidence on a specific element.

The trustworthiness standard requires the State to produce evidence corroborative of the confession's reliability. While this evidence need not directly tend to prove the corpus delicti, the corroboration must directly relate to the trustworthiness of the important facts contained in the defendant's statement. Alternatively, the corpus delicti version is more concerned with the elements of the offense. Since the driving force behind the corpus delicti rule was the protection of individuals, rather than the protection of the criminal justice system itself, it now makes more sense to apply the "trustworthiness" standard to criminal cases. In this way, the focus is on the defendant and the facts within his statement, rather than on the offense itself. Moreover, the trustworthiness doctrine better promotes the overall goal of the judicial quest for a truthful confession by utilizing the corroborative evidence to prove or disprove the defendant's statement, rather than the corpus delicti of the statutory offense.

In contrast and in accordance with the common law, Florida has traditionally required prosecutors to establish the corpus delicti before a defendant's extra-judicial confession can be admitted in a criminal case. *Franqui v. State*, 699 So. 2d 1312 (Fla. 1997). This requires the prosecution to show: 1) that a crime of the type charged was committed; and 2) that the crime was committed through the criminal agency of another. *Id*. "This standard does not require proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime." *Burks v. State*, 613 So. 2d 441, 443 (Fla. 1993)(quoting *State v. Allen*, 335 So. 2d 823, 824 (Fla. 1976)).

This Court explained the policy reasons for the corpus delicti rule: "The judicial quest for truth requires that no person be convicted out of derangement, mistake or

official fabrication."[1] *See J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998); *see also Smith v. United States*, 348 U.S. 147, 152-153 (1954). The State posits that this same quest for truth can be accomplished more efficiently by utilizing the "trustworthiness" standard enunciated in *Opper*. By its arbitrary insistence on evidence of each element of the offense, *see. e.g. State v. Allen*, 335 So. 2d at 825, the corpus delicti rule can result in the exclusion of a confession even in cases where the corroborating evidence demonstrates the reliability of the confession. That is precisely what happened in the instant case. In such situations, the corpus rule does not facilitate the search for truth, but instead frustrates it. *See Burks v. State*, 613 So. 2d at 445-446 (corpus delicti rule is a technicality that impedes rather than foster the search for truth)(Justice Shaw's concurring and dissenting opinion).

Since the "trustworthiness" approach to corroboration was enunciated by the U.S. Supreme Court nearly fifty years ago, it has gained favor with a significant number of federal and state courts. *United States v. Lopez-Alvarez*, 970 F.2d 583, 592 (9th Cir.), *cert. denied*, 506 U.S. 989 (1992); *United States v. Johnson*, 589 F.2d 716, 718 (D.C.Cir. 1978); *United States v. Wilson*, 436 F. 2d 122, 124 (3rd Cir.), *cert. denied*, 402 U.S. 912 (1971); *Landsdown v. United States*, 348 F.2d 405 (5th Cir. 1965); *Jacinth v. State*, 593 P.2d 263, 266 (Ala. 1979); *State v. Yoshida*, 354 P.2d 986, 990 (Haw. 1960); *People v. Brechon*, 390 N.E.2d 626 (Ill. App. 3 Dist. 1979); *State v. Parker*, 337 S.E.2d 487, 495 (N.C. 1985)(non-capital cases); *State v. George*, 257 A.2d 19 (N.H. 1969); *State v. Ervin*, 731 S.W.2d 70, 72 (Tenn. Crim. App. 1986); *Schultz v. State*, 264 N.W.2d 245, 253 (Wis. 1978); *State v. Lucas*, 152 A.2d 50, 57-60 (N.J. 1959); *State v. Paris*, 414 P.2d 512, 514-515 (N.M. 1966); *State v.*

[1]It is important to note that corpus delicti is a common law, rather than a Constitutional doctrine. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. Rev. 385 (1993).

Hafford, 746 A.2d 150, 173 (Conn.), *cert. denied*, 531 U.S. 855 (2000).

In choosing the "trustworthiness" standard, the New Jersey Supreme Court in *State v. Lucas, supra*, said:

> Confessions, like other admissions against interest, stand high in the probative hierarchy of proof. It is for this reason that the law imposes various safeguards designed to assure that the confession is true. But safeguards for the accused should not be turned into obstacles whereby the guilty can escape just punishment. No greater burden should be required of the State than independent corroborative proof tending to establish that when the defendant confessed he was telling the truth, plus independent proof of the loss or injury.

State v. Lucas, 152 A.2d at 58. Other courts have adopted the "trustworthiness" standard finding it to be "uncomplicated and workable." *See e.g. State v. Harris*, 575 A.2d 223 (Conn. 1990). Adoption of the trustworthiness standard will eliminate the "complexities and difficulties attendant upon the application of the corpus delicti rule requiring independent corroborating evidence of all the elements of a crime before an accused's statements may be admitted into evidence...It is also adaptable to any conduct crime and is more in harmony with the spirit of [the historic reasons for the rule] than the traditional corpus delicti rule.....Yet, at the same time, it will fulfill the 'avowed purpose and reason' for the existence of the corpus delicti rule and protect accused persons against conviction of offenses that have not in fact occurred ... and prevent 'errors in convictions based upon untrue confessions alone.'" *Id.*

As stated by the Supreme Court of Hawaii:

> Whatever the difference in the quantum and the quality of proof required under the particular rules adopted in the various jurisdictions, the basic purpose of each in requiring corroboration of the confession by independent evidence before it may be admitted or used is to meet the possibility that the confession may have been falsely given through misunderstanding, confusion, psychopathic aberration or other mistake. (citations omitted) We are disposed to believe that the protection of the accused can be as well assured by the proper application of the flexible rule, above

> stated, as by the rigid rule which requires independent proof of all elements of the corpus delicti before the confession may be resorted to. With the additional safeguard requiring the voluntariness of a confession to be shown, preliminarily to the satisfaction of the court and ultimately to the satisfaction of the jury, before it may be considered, and the protection afforded by the fundamental requirement that the guilt of the accused be proven beyond all reasonable doubt, it appears to us that the possibility of misuse of a defendant's confession under the rule we favor is too remote to justify the additional restrictions of a more rigid rule.

State v. Yoshida, 354 P.2d 986, 990 (Haw. 1960).

Recently, in *State v. Dionne*, 814 So. 2d 1087 (Fla. 5th DCA)(*jurisdiction pending*), the Fifth District Court of Appeal found that the trustworthiness doctrine under section 92.565 served the same purpose as the corpus delicti rule. The district court further pointed out that the difference between the corpus delicti and trustworthiness doctrines is that "the corroboration aspect of corpus delicti is more concerned with the elements of the offense whereas the trustworthiness doctrine is concerned with the trustworthiness of the statements contained in the confession." *Id.* Even if a defendant's confession is admitted into evidence under the trustworthiness standard, the confession still may not form the sole basis for a defendant's conviction. "Therefore, regardless of whether the corpus delicti or the trustworthiness standard is utilized as the predicate to admit a confession, the state is obligated to prove each element of the offense charged beyond and to the exclusion of every reasonable doubt." *Id.*

In the instant case, Respondent, Tony Carwise (Carwise), was charged with, *inter alia*, conspiracy to commit armed robbery with a firearm. An officer on routine patrol spotted a vehicle parked in a hotel lot which he knew to be one in which stolen cars were occasionally abandoned. The vehicle was not parked in a regular parking spot and had a mangled, very worn temporary license tag. It first appeared that no one

was in the vehicle. As the officer approached, however, to look at the vehicle's identification number, Carwise's head "popped up" in the front seat. As the officer watched, Carwise opened the car door and deposited a handgun underneath the vehicle and shut the door. The officer then noticed another person crouched down in the backseat of the vehicle. Another firearm and a ski mask were found under the backseat occupant. A piece of fabric which could be used as a mask was found in Appellant's pocket. After Carwise was advised the other occupant of the vehicle, Turner, had told the officers the two were planning to commit a robbery once a third person arrived, Carwise, after receiving *Miranda* warnings, admitted that they had planned a robbery.

Here, there is no question of official fabrication, nor is there any concern that Carwise was deranged. All the evidence presented is consistent with Carwise's confession. In attempting to prevent the use of improper confessions, is not the better practice to compare the facts to the confession itself, rather than comparing them the elements of the crime itself, irrespective of what the confession may provide? A comparison of the facts to the confession in this case demonstrates the trustworthiness of Carwise's confession, rather than assuming fabrication as does the corpus delicti doctrine. *Carwise v. State*, 27 Fla. L. Weekly D508 at n.3 (Judge Harris' specially concurring opinion).

Even if this Court should decline to discard the corpus delicti rule as applied to all crimes, the State contends that the "trustworthiness" standard should be adopted for application in those instances where a defendant has been charged with a crime that does not involve a tangible corpus delicti, such as in the instant case. The difficulty in analyzing the corpus delicti in inchoate crimes such as conspiracy, attempt, and solicitation is that there is no tangible injury which can be isolated as the corpus delicti. *See Smith v. United States*, 348 U.S. 147 (1954). A more appropriate analysis in these

circumstances is to determine whether there is evidence independent of the confession or admissions which would tend to establish the truthfulness of the defendant's statements. *See State v. Parker,* 315 N.C. 222, 337 S.E.2d 487 (1985); *McCormick on Evidence,* § 145 (E. Cleary 4th ed. 1992).

The Supreme Court encountered the present type of scenario in *Smith v. United States, supra.* In the context of a tax evasion prosecution--a crime in which the identity of the accused is an inseparable element in proving the existence of the crime--the court applied the corroboration rule to the issue of the admissibility of the defendant's extrajudicial statement. The prosecution was not required to demonstrate that the crime had been committed through evidence completely extrinsic to the defendant's extrajudicial statement. The court wrote:

> The corroboration rule, at its inception, served an extremely limited function. In order to convict of serious crimes of violence, then capital offenses, independent proof was required that *someone* had indeed inflicted the violence, the so-called *corpus delicti*. Once the existence of the crime was established, however, the guilt of the accused could be based on his own otherwise uncorroborated confession. But in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delicti*. As to this crime, it cannot be shown that the crime has been committed without identifying the accused. Thus, we are faced with the choice either of applying the corroboration rule to this offense and affording the accused even greater protection than the rule affords to a defendant in a homicide prosecution or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We choose to apply the [corroboration] rule, with its broader guarantee, to crimes in which there is no tangible *corpus delicti,* [and] where the corroborative evidence must implicate the accused in order to show that a crime has been committed.

Smith v. United States, 348 U.S. at 153-54 (emphasis in original) (citations omitted) (bracketed language added).

Strict adherence to the corpus delicti rule, particularly in cases of inchoate

crimes, could lead to absurd results. For example, a police officer on routine patrol comes across a car idling outside a bank. Upon looking in the car, the officer sees that it contains several men holding ski masks and guns. Prior to anyone exiting the vehicle, the officer stops and questions the men regarding their presence outside the bank. They confess to a plan to rob the bank in mere moments. Based upon these facts, the current state of the law would apparently find that no corpus of the crime of conspiracy to commit armed robbery exists. The men, assuming they did not put their plan to paper or otherwise memorialize their plan, could possibly be found guilty of only open carrying of a weapon, - a first degree misdemeanor. Should the officer be forced to wait until the men make their move and go into the bank to provide a corpus when meanwhile, the men's presence together, armed with weapons and carrying masks, bears out their confession to conspiring to rob the bank? Good police work will hopefully prevent crimes from becoming *a fait accompli*. In these instances, there will usually be no corpus. This fact should not prevent the State from charging them with the attempt to commit the crime or conspiracy to commit the crime.

In a conspiracy case, such as is presented herein, the corpus requires a showing that the defendant and a co-conspirator agreed to commit a crime and that the defendant intended to commit the offense. *Baxter v. State*, 586 So. 2d at 1199. There is, however, no specific harm, loss or injury encompassed in this corpus. Therefore, a different approach to the corpus delicti rule is necessary. The most reasonable approach, Petitioner contends, is that of the "trustworthiness" doctrine. The trustworthiness rule would "eliminate the complexities and difficulties attendant upon the application of the corpus delicti rule ... [y]et, at the same time, it [would] fulfill the 'avowed purpose and reason' for the existence of the corpus delicti rule and protect accused persons against conviction of offenses that have not in fact occurred; ... and prevent 'errors in convictions based upon untrue confessions alone.'" *State v.*

Harris, 575 A.2d 223 (Conn. 1990)(citations omitted).

The fact that Carwise was found with Turner, hiding in a car, both armed with guns, both with masks, certainly lends credence to Carwise's statement that he and his coconspirator were getting ready to commit an armed robbery. This independent evidence sufficiently corroborates Carwise's statement and attests to its credibility, thereby making Carwise's confession admissible.

In any event, Petitioner asserts that the State presented sufficient evidence to establish the corpus delicti in the instant case to permit the admission of Respondent's confession. In order to establish the corpus delicti of conspiracy, the state must present substantial evidence that the defendant and a coconspirator agreed to commit a crime and that the defendant intended to commit the offense. The corpus delicti for a crime may be established by circumstantial evidence. *Baxter v. State*, 586 So. 2d at 1199.

The presence of an agreement between Carwise and his coconspirator Turner can be inferred from the following facts: 1) they were found sitting together in a parked car; 2) both men had guns and masks; 3) both men concealed their presence inside the car by either lying down or slouching down, so the officer was unable to see them until he approached. As to the intent element, again the evidence that both men were in possession of a gun and a mask and appeared to be lying in wait supports the conclusion that Carwise intended to commit an armed robbery.

As Judge Sharp stated in her dissenting opinion,

> It is apparent that, based on common sense, and general knowledge of the world, two individuals do not hide out in a car in a hotel parking lot, with loaded handguns and masks, in the dark, without a common plan. Coincidence or serendipitous behavior cannot explain this behavior. Nor does an individual discard a loaded weapon, upon being spotted by the police, unless he has something bad to hide. Further handguns and masks unfortunately have become too common tools of the trade for armed robberies. Those

> circumstances alone presented grave danger for any unsuspecting hotel patron who might have walked through that parking lot just prior to Carwise's and Turner's discovery by the police, and also, in my view, create a compelling corpus delicti for conspiracy to commit armed robbery.

Carwise v. State, *supra*.

The State has met its burden when the evidence of the corpus delicti is sufficient to remove the danger of the defendant being convicted out of derangement, mistake, or official fabrication. *See Burks v. State*, 613 So. 2d at 443 ("These facts were sufficient to remove the danger of Burks being 'convicted out of derangement, mistake, or official fabrication.'"). It is sufficient if the corroborating evidence "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Baxter v. State*, 586 So. 2d at 2000 (quoting *Opper v. United States*, 348 U.S. at 93). The State's evidence in this case justified a jury inference in the truth of Carwise's confession. The evidence presented through the testimony of the officers paralleled Carwise's own confession. Thus, any danger of convicting Carwise due to derangement, mistake, or official fabrication was removed. Accordingly, Petitioner requests this Court reverse the decision of the district court and affirm the jury's finding of guilt on the count of conspiracy to commit armed robbery.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable Court adopt the "trustworthiness" standard in lieu of the corpus delicti standard for all criminal offenses, or at least in cases of attempt crimes, conspiracy crimes or other inchoate crimes. In the alternative, Petitioner requests this court reverse the ruling of the Fifth District Court of Appeal finding the State did not present sufficient evidence of the corpus delicti prior to admitting Respondent's confession.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Petitioner has been furnished by delivery to James B. Gibson, Public Defender, Seventh Judicial Circuit, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 26th day of August, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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