IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

_____

APPEAL NUMBER 1D01-4625

_____

REYNELDON J. DAVIS

Appellant-Petitioner

v.

STATE OF FLORIDA

Appellee-Respondent.

_____

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA

_____

BRIEF OF APPELLANT
(ORIGINAL)

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STATEMENT OF THE CASE AND OF THE FACTS

Procedural History

On February 26, 2001 an arrest warrant was issued for Reyneldon Davis on a charge of trafficking in cocaine in violation of Florida Statutes, § 893.135. [R1-3] Probable cause for the arrest was based on a traffic stop of Mr. Davis in a rented Chrysler minivan that had taken place late in the evening of February 11 and continuing into the early morning hours of February 12, 2001. [R1-1; R1-6]

The State filed a three count information on March 21, 2001 against George Michael Durrance, Reyneldon J. Davis and Larry Williams, charging (1) Mr. Davis and Mr. Durrance in count one with conspiracy to sell, purchase, manufacture, deliver, bring into the State, or to be knowingly in actual or constructive possession of 28 grams or more of cocaine, to wit: 400 grams or more, contrary to the provisions of Section 893.135(5), Florida Statutes, (2) charging Mr. Davis alone in count two with possession of 400 grams or more of cocaine in violation of § 893.135(1)(b)(1)(c). Mr. Davis was not charged in the third count. [R1-10] The State later filed an amended information that enlarged the time period of the conspiracy to a period from January 1, 1998 to February 27, 2001. [R1-50]

Davis filed a demand for discovery under Rule 3.220 of the Florida Rules of Criminal Procedure on March 29, 2001. This

discovery demand expressly requested whether there had been any electronic surveillance and if so, any documents relating thereto. [R1-19] The state responded April 9, 2001 in part by disclosing only "wire intercept documents." [R1-24]

On August 6, 2001 Mr. Davis filed a motion to suppress the cocaine that was seized from his rental vehicle that had been stopped and searched on February 11 and 12, 2001 and from which the police seized about 2.213 kilograms of cocaine. [R1-36] [R5-463-464] The motion alleged that the vehicle was searched without a warrant and without consent. It also alleged that the defendant was held in custody in the back of a locked police car for approximately three hours during which he was moved to another location. The motion argued that the stop was a pretext stop for speeding. After the rental vehicle was stopped and the defendant was locked in the back of the police car, the police searched the rental vehicle. The search of the defendant's rental vehicle turned up nothing of evidentiary value. Only after the initial search turned up nothing did the police then call for a K-9 unit to come to the scene. The defendant continued to be held during this entire time. At some point the rental van and the defendant separately in the locked police cruiser were moved to another location. About three hours later the defendant was released and allowed to leave in the vehicle. Apparently the cocaine was found during the second search after the van was moved. [R1-36-41]

The motion argued, among other matters, that under *Florida v. Royer*, 460 U.S. 491 (1983), the police had violated the defendant's constitutional rights by conducting a search without probable cause and that the detention ripened into an arrest before probable cause was ever established. [R1-36-42]

This motion was denied, initially without an evidentiary hearing, by written order dated September 5, 2001. [R1-44] The court conducted an evidentiary hearing on the motion to suppress immediately prior to trial. [R3-104]

The state filed a notice of intent to classify Davis as a habitual offender pursuant to Florida Statutes, § 775.084 on September 4, 2001. [R1-61]

Trial by jury commenced on September 4, 2001, continued September 5, 2001, was recessed September 6, 2001 and concluded by guilty verdict on September 7, 2001.[1] [R3-1; R4-1; R5-1; R6-1; R1-65; R6-762]

The defense filed a motion for new trial October 8, 2001 arguing *inter alia* that the court had erred in denying the defense motion for mistrial based on the state's discovery violation and that the court erred in denying the defense motion to suppress. [R1-69-70] The motion for new trial was denied following an

[1] The trial transcript shows that the jury returned guilty verdicts as to both counts one and two, however the record on appeal only contains the verdict form as to count one. [R6-762; R1-65]

evidentiary hearing on October 29, 2001. [R1-71]

The court sentenced Davis as a habitual felony offender to concurrent terms of twenty-two (22) years on counts one and two, plus a $250,000 fine "pursuant to section 775.083, Florida Statutes. [R1-72-78] A guideline scoresheet was prepared and filed which scored Davis for trafficking in cocaine as the primary offense at 92 points and conspiracy to traffic in cocaine as an additional offense for 46 more points, plus a total of 15.2 points for prior record, ending up with a lowest permissible sentence of 93.9 months. [R1-79-80]

A timely notice of appeal was filed. Thereafter a motion to correct sentence and first amended motion to correct sentence pursuant to Rule 3.800 (b)(2), Florida Rules of Criminal Procedure, were filed with the trial court on April 14 and May 24, 2002, respectively, which were denied by order entered June 14, 2002. [Supplemental Record 1; 8; and 11] The supplemental record was filed on June 17, 2002 and this brief followed in a timely manner.

Evidence at Trial

The state presented six witnesses: Jacksonville Sheriff's Office ("JSO") Detective Charles Doe, JSO Detective Avelino Elegino, JSO Canine Officer John Williams, Florida Department of Law Enforcement ("FDLE") Agent Mark Brutnell, FDLE Chemist Glen Abate, and Clay County Sheriff's Officer Michael Brown. [R4-203; R5-403-404] In January 2001 the state had obtained a wire tap on

Michael Durrance in Jacksonville, who was suspected of purchasing kilogram quantities of cocaine from a man named Brian Mair in Miami. [R4-248] They later got a wire tap on a "salesman" for Durrance, named Rennie Malinit. [R4-249] While this was ongoing the state began surveillance of the people involved and through this they saw a rental van come and go from Durrance's garage on January 14, 2001. [R4-250] The defendant, Reyneldon Davis, was driving the rental van. [R4-250]

The state then got a cell site monitor order on a cellular telephone used by defendant Davis. [R4-250] This allowed the state to track the movement of the cell phone while it was turned on. [R4-250] During the week of February 9, 2001 the state determined from this cell site monitor order that Davis (or his cell phone) was in the Miami area and had come back to his home in Orlando. [R4-251] On February 11, 2001 the state determined that Davis was in the Miami area and based on an intercepted wire tap call between Durrance and Davis on February 11, 2001, the state learned that defendant Davis told Durrance he was coming to Jacksonville. [R4-251] At approximately 7:00 p.m. on February 11, 2001, Davis called Durrance's number and spoke to a woman named Chantel, they chatted, and he told her he was coming to Jacksonville and to have Durrance call him. Chantel called Durrance, then Durrance called Davis and Davis told Durrance he would be arriving in Jacksonville around 11:20 p.m. [R4-251-252]

Detective Doe and FDLE Agent Brutnell set up a plan to have Davis's rental van stopped on I-295. [R4-252] They had two detectives dressed as ordinary patrol officers use a marked patrol car to do this. [R4-252]

In order to find the drugs that they believed Davis would be bringing, but keep up the secret wire tap, they planned to have the detectives find the drugs and pretend to be bad cops, pretend to steal the drugs, but let Davis go. [R4-252-253] This would, they hoped, generate some incriminating conversation on the wire tap. [R4-253]

Davis was stopped the night of February 11, 2001 by Detectives Harvey Baker and Avelino Elegino. They pretended to be stopping Davis for speeding, put him in the locked rear of their patrol car *and immediately began searching his van*. [R5-405-406] But they were unable to find any drugs. [R4-253] This went on for about fifteen or twenty minutes according to Detective Elegino's estimate. [R3-170]

Only after being unable to find any drugs after searching defendant Davis's vehicle did the officers then call for the K-9 unit that had been prearranged to be on stand-by for this stop. [R3-170] The K-9 unit came and the dog was put around the vehicle and alerted. [R4-253] The officers searched again and still were unable to find anything. [R4-253]

While this was going on Davis had called Durrance on Davis's

cell phone and Durrance drove by the scene of the traffic stop without himself stopping. [R4-254]

The officers had the van moved and Davis moved to a hidden location where the van was searched more thoroughly and this time a little over 2 kilograms of cocaine was found hidden in the van. [R4-254] Davis was then released and his van given back to him - but without the cocaine. [R4-254]

A number of calls were intercepted between Davis and Durrance and Durrance and Mair. [R4-254] Davis made no incriminating statements in these monitored calls.

Davis was ultimately arrested on February 27, 2001 and taken to the FDLE office in Orlando for an interview. Detective Doe, Agent Brutnell and Officer Williams testified that Davis orally confessed to knowingly transporting this cocaine and other cocaine for Durrance and Mair. [R4-254]

Defendant Davis was the sole defense witness. He denied any knowledge of the cocaine that was found in the van and denied making any confession when he was arrested. [R6-623-626]

STANDARDS OF REVIEW

Denial of Motion to Suppress

For the same underlying policy reasons enunciated in *Ornelas v. United States*, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), appellate courts should accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, Article I, section 9 of the Florida Constitution. *Connor v. State*, 803 So.2d 598 (Fla. 2001).

Assuming error is found in the denial of the motion to suppress based on constitutional grounds, constitutional errors, with rare exceptions, are subject to harmless error analysis. The harmless error test, as set forth in *Chapman v. California*, 386 U.S. 18 (1991), and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See *Chapman*, 386 U.S. at 24. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately

relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991), the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Florida Supreme Court has explained that this means:

> the [reviewing] court must still be able to conclude beyond a reasonable doubt, after evaluation of the impact of the error in light of the overall strength of the case and the defenses asserted, that the verdict could not have been affected by the error. *Goodwin v. State*, 751 So.2d 537, 545 (Fla. 1999) (emphasis supplied).

Discovery - *Brady* Violation

State v. Schopp, 653 So. 2d 1016, 1021 (Fla. 1995) ("Only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.") See also, *State v. Evans*, 770 So.2d 1174, at 1210 (Fla. 2000).

Sentencing Errors

The sentencing errors are subject to *de novo* review.

SUMMARY OF ARGUMENTS

I. AN INITIAL *TERRY* STOP IMMEDIATELY RIPENED INTO A FULL-SCALE SEARCH WITHOUT ANY INTERVENING PROBABLE CAUSE, AND SUCH CONDUCT BY THE POLICE, GIVEN THAT A CANINE UNIT HAD BEEN PREARRANGED TO BE ON STAND-BY AND WAS AVAILABLE WITHIN FIVE MINUTES OF BEING REQUESTED BUT WAS NOT CALLED UNTIL AFTER TWENTY MINUTES OF ILLEGAL SEARCH, EXCEEDED THE PERMISSIBLE BOUNDS OF A *TERRY* INVESTIGATIVE DETENTION.

Assuming arguendo that there was an articulable reasonable suspicion for the initial stop of Reyneldon Davis's vehicle under *Terry v. Ohio*, 392 U.S. 1 (1968), the question then is whether the detention of Davis and his vehicle exceeded the limitations applicable to Terry investigative detentions. In this case the police locked Davis in the back of the patrol car and proceeded to conduct a full-scale search of Davis's vehicle, including searching the vehicle's contents, its glove compartment, under its seats, inside a bag contained in the vehicle and even removed the rear seats from the vehicle. This full-scale search continued for fifteen or twenty minutes before the police gave up and then for the first time called the canine unit that had been prearranged as a back-up for this stop. Because the police conduct clearly exceeded that permitted by a *Terry* stop, the continued detention of Davis and his vehicle once the police commenced an illegal search rather than calling in the canine unit or having it at the scene at the time of the initial stop, was not authorized by *Terry* and violated the Fourth Amendment's prohibition against unreasonable

searches. Because the subsequent "dog sniff" occurred after the right to continue to detain the vehicle had terminated due to the wrongful conduct of the police, the dog alert could not be used to support a probable cause finding to uphold the subsequent search and seizure of the cocaine. The conviction in this case rested on the introduction of the cocaine into evidence. Therefore the admission of this evidence was not harmless error, and the conviction must be reversed.

II. THE TRIAL COURT ERRED IN DENYING DAVIS' MOTION FOR MISTRIAL BASED ON THE STATE'S INTENTIONAL AND PREJUDICIAL DISCOVERY VIOLATION OF NOT DISCLOSING TO THE DEFENSE THE PERTINENT CELL SITE LOCATION RECORDS, WHICH WERE NOT DISCLOSED UNTIL THE TRIAL WAS IN PROCESS, AND THE BELATED DISCLOSURE OF WHICH PREVENTED THE DEFENSE FROM EFFECTIVELY CROSS-EXAMINING THE STATE'S KEY WITNESS

The state conceded that it failed to disclose or turn over to the defense prior to trial any of the cellular telephone cell site order records by which the state had purported to track defendant Davis virtually to the doorway of the alleged drug source in Miami, Brian Mair. In the middle of trial, key state witness and case agent Detective Charles Doe, when questioned how he could be so specific in his claims that the agents had tracked Davis to the home of the alleged drug source, Brian Mair, in Miami, stated that there were cell site records from Cingular Wireless that substantiated his claims - and he further stated, falsely it turned out as he well knew, that the defense had been provided these records.

A *Richardson* hearing was conducted even before the records were ever produced and without the court examining the records in question. Although no explanation was given for the failure to produce the records or the false claim made to the jury that the defense had had the records provided to them, the trial judge found the discovery violation inadvertent.

Although the court conceded that the records were in effect in a cipher form and would required someone to sit down with defense counsel to explain them, the court's only remedy was to suggest that the defense counsel meet with the case agent and let the case agent explain the code system of the records to the defense and then the defense could cross-examine on that basis. The defense argued that it would need an opportunity to confer with an employee of Cingular Wireless to have the encoded records explained, but that request was denied.

The court improperly placed the burden on the defense to establish how it was prejudiced by the belated discovery. Although the defense clearly showed how it was prejudiced - it would be unable to make heads or tails of the records without consulting with a telephone company employee and without that knowledge could not use the records to effectively cross-examine Detective Doe - the court failed to find any prejudice.

The court suggested that if the defense later, after the trial, consulted with a telephone company employee and determined

that the records did not corroborate Detective Doe's testimony, it could then file a motion for new trial. The defense did so, and in the hearing on the motion for new trial was able to establish that Doe had lied about key parts of his testimony about the use of the cell site records. Although it was clear from the court's comments during the evidentiary hearing on the motion for new trial that it understood the import of Doe's deception, the court nevertheless denied the motion for new trial. This was error and fatally infected the validity of the jury verdict.

III. SENTENCING ISSUES

Davis argues that the trial court failed to comply with the statutory requirement for a "separate proceeding" in habitualizing Davis and also failed to make adequate fact findings to support the habitualization order.

Davis also argues that the court erred in imposing a trafficking fine of $250,000 when Davis was sentenced as a habitual offender and the written judgement and sentence states that the fine was being imposed under Florida Statutes, § 775.083, under which the fine was limited to $10,000.

Davis also submits that his guideline scoresheet was improperly scored in violation of Fifth Amendment Double Jeopardy principles.

Finally, Davis makes a number of arguments solely for the purpose of preserving them for further federal appellate or habeas

review, *viz*. that his habitual offender sentence offends *Apprendi*, that the court lacked the authority to impose a habitual offender sentence for a drug trafficking offense, and that the drug trafficking statute could not be applied in light of *Taylor's* holding that the methamphetamine amendment to the trafficking statute violated the single subject rule.

ARGUMENTS

I. AN INITIAL *TERRY* STOP IMMEDIATELY RIPENED INTO A FULL-SCALE SEARCH WITHOUT ANY INTERVENING PROBABLE CAUSE, AND SUCH CONDUCT BY THE POLICE, GIVEN THAT A CANINE UNIT HAD BEEN PREARRANGED TO BE ON STAND-BY AND WAS AVAILABLE WITHIN FIVE MINUTES OF BEING REQUESTED BUT WAS NOT CALLED UNTIL AFTER TWENTY MINUTES OF ILLEGAL SEARCH, EXCEEDED THE PERMISSIBLE BOUNDS OF A *TERRY* INVESTIGATIVE DETENTION.

At the suppression hearing Detective Alevino Elegino of the Jacksonville Sheriff's Office testified that there had been a plan in place upon which Detective Doe advised Elegino and Detective Harvey Baker to stop Davis's vehicle on Interstate 295. [R3-166-167] Detective Elegino and Detective Baker fell in behind Davis's vehicle as it drove past and used the blue lights of the patrol vehicle they were driving to stop Davis. [R3-167-168] Detective Elegino approached Davis, told him he was speeding, and that they had a problem with people stealing leased vehicles [a made up story], asked for and received his driver's license and escorted him to the back of the patrol car where Davis was locked in the back of the patrol car. [R3-169-170]

Detectives Elegino and Barker then began searching Davis's vehicle. They thoroughly searched Davis's vehicle. They searched Davis's vehicle for about 20 minutes.[2] [R3-170] Detective Elegino

[2] Q [Assistant State Attorney Laura Starrett] Approximately how much time did you spend searching the vehicle?

A [Detective Elegino] About 15, 20 minutes. [R3-170]

testified that they:

> looked under the seats, in compartments. I believe there was a bag in the back. We looked inside of a bag. Just checked any type of a compartments and whatever was in plain view under the seats.
> Q [Assistant State Attorney Laura Starrett] Now when you say compartments, are you talking about like the glove box, or are you talking about actually removing parts of the vehicle?
> A [Detective Elegino] It was the glove box area. We didn't remove anything other than the rear seat.
> Q When you say the rear seat, this is a van that the seat comes out of?
> A Right, there was no bolts or nothing, there was just like a latch. [R5-406-407]

The officers did not have a search warrant, did not have probable cause for this search, and did not even ask for permission to search. [R3-178] The state has never argued that this first search was reasonable under the Fourth Amendment.[3]

A *Terry* stop cannot be used as the basis of a "full search" that would normally be warranted only by the existence of probable cause, consent, or a valid arrest. *United States v. Hardy*, 855 F.2d 753, 759 (11th Cir. 1988).

Only after locking Davis in the back of the patrol car for

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[3] The state has never argued that the officers had probable cause to conduct this search. Indeed, the state seems to have planned that this illegal search would result in finding and seizing the cocaine. In her closing argument Assistant State Attorney Laura Starrett argued:

> Now, the original plan was not to have to move the defendant. They expected to find the drugs earlier, and they knew once the drug dog scented that they were there, but because they were so deeply hidden they had to move him. [R6-728]

twenty minutes and only after conducting a completely illegal and thorough search of Davis's vehicle for twenty minutes, which included taking the rear seat out of the vehicle and searching the compartments, glove box and inside a bag in the vehicle, did the police call the canine unit - a canine unit that had been on standby the entire time. [R3-170]

It was possible to have the canine unit on standby because the officers had, in lead Detective Doe own words "a lot of advance notice," "plenty of notice" - enough time in fact to assemble a team of eight to ten officers, to drive from Jacksonville to Daytona and commence tailing Davis in Daytona, approximately 80 miles away from Jacksonville and follow him all the way to Jacksonville, where the officers had Detectives Elegino and Barker waiting on I-295 and a canine unit on standby. [R3-152] It only took the canine unit five minutes to get to the scene once it was finally called after twenty minutes of illegal search.[4] [R3-170-171]

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[4] The record is not clear how long it then took until the canine alerted. Detective Elegino testified that the initial search took about 20 minutes [R3-170]. Florida Department of Law Enforcement ("FDLE") Special Agent Mark Brutnell testified that Davis's van was kept at the scene of the stop for "approximately 40 minutes." [R5-430] Detective Elegino testified that they searched "about ten minutes" after the dog alerted until they moved the van from the scene of the stop. [R5-409] By putting these times together, it would appear that the van was stopped and illegally searched for about 20 minutes, then the canine unit was called, it took 5 minutes for the canine unit to arrive, and the use of the dog took about 5 more minutes before the alert, for a total of about 30 minutes detention before the dog alerted.

The State cited one case in support of its argument that the stop and search was constitutionally permitted, *Saturnino-Boudet v. State*, 682 So.2d 188 (Fla. 3rd DCA 1996). *Saturnino* is simply not on point. There was no illegal search in *Saturnino*, the canine unit was immediately called to the scene, the officers proceeded as diligently as possible in as minimally intrusive a manner as possible to resolve the suspicion. The issue as framed by the appellant in *Saturnino* was:

> On this appeal, [Saturnino-]Boudet argues that the trial court erred in denying his motion where Boudet was effectively arrested without probable cause when the police ordered him into Daniels' home to await the arrival of the police canine unit. He further asserts that the subsequent dog search of his car was not supported by probable cause and the state offered no exigent circumstances to justify the warrantless search. *Saturnino-Boudet v. State*, 682 So.2d 188, 190-191 (Fla. 3rd DCA 1996).

The District Court of Appeal resolved the issue:

> Based upon our de novo review of the evidence presented below, we conclude that the police had founded suspicion to believe that Boudet was involved in the narcotics trade based upon the information received from Daniels and their personal observation . . . Therefore, we find Boudet's temporary detention to await the arrival of the canine unit to be nothing more than a Terry stop utilized to dispel the police officers' reasonable suspicion that Boudet was involved in the sale of illegal narcotics. *Saturnino-Boudet v. State*, 682 So.2d 188, 192 (Fla. 3rd DCA 1996) [emphasis supplied]

Obviously *Saturnino* is not instructive for the facts and issue presented in Davis's case, except by negative inference - if the police officers had acted in Davis's case in the manner the officers acted in *Saturnino*, then the Davis search would have been

legal (assuming there was reasonable suspicion in the first place). But they didn't. Detectives Elegino and Barker did not simply detain Davis to await the arrival of the canine unit. From all that appears they never would have called the canine unit at all had their illegal search been successful as they assumed it would. These officers acted in complete disregard of any sense of a reasonable search under the Fourth Amendment. They simply started taking Davis's van apart, removed the rear seat from the van, went into the glove compartment, looked under the seats, searched inside a bag inside the van, all without any pretense or even claim of probable cause. No effort was made to call for the canine unit until the illegal search failed.

At oral argument on the motion to suppress, after the evidentiary hearing, the state argued its position as follows:

> What the state is arguing is that based on the information that the police had, we would submit that they actually had probable cause to search the vehicle, but we don't even need to reach that point, because what we're - - what clearly there is no question is that at the time the police stopped the vehicle and did the initial search before the dog was called, we would argue that they certainly had founded suspicion, or enough for a *Terry* stop, and I'll get into the case law in just a moment. . . . So based on that information Mr. Davis' vehicle was stopped and that's when the initial search was conducted. When the police, after that - - and I believe they said 15 minutes was the initial search on the side of the road, that is when the drug dog was called. And once the drug dog scented on the vehicle, your Honor, there is case law which I also will cite to the court, but there is ample case law that says that a drug dog sighting, or scenting on a vehicle establishes probable cause to search that vehicle. That right there is enough for probable cause to search. . . . I would

> cite for the court several cases. The first one is Saturnino-Boudet, S-a-t-u-r-n-i-n-o- - B-o-u-d-e-t, vs. State, at 682 So.2d 188, which is a Third DCA, 1986 [sic] case. . . . So our argument would be that we don't even need to prove that we had probable cause of Mr. Davis's drug dealing and the fact he was bringing drugs to Jacksonville, all we have, based on all the information the court has, is at the very minimum enough for a Terry stop and the time for the dog to be brought.

The state went on to cite *State v. Moore*, 791 So.2d 1246 (Fla. 1st DCA 2001) and *Davis v. State*, 788 So.2d 308 (Fla. 5th DCA 2001). Neither *Moore* nor *Davis* are anywhere on point - both have to do with stops for tinted windows and whether the stops were illegal pretext stops or not.

Then the Court asked the State:

> THE COURT: So let me just make sure I understand. You can clarify something for me. After the initial search based upon the reasonable suspicion and there is nothing found, you still think there was still sufficient reasonable suspicion for them to get the drug dog?
> MS. STARRETT [Assistant State Attorney]: Yes, your Honor, based on all the information they had, and looking at the search, which was not into panels or any portion of hidden parts of the vehicle, that is really more of a cursory, and I think it took about 15 minutes, and some seats were removed. But based on all the information they had, we would submit that they clearly had justification. And we're not talking about a very long time. I think they said once they called the dog, it was about five minutes. The dog was on alert to come. So we are not talking holding the defendant an unreasonable time. [R4-216-225]

Davis's search and seizure cannot be upheld under *Saturnino*, yet it was the primary case cited by the state [R4-225] and the only case cited by the court below in denying the motion to suppress. [R4-242]

The trial court announced its ruling and its supporting reasoning orally, as follows:

> [L]et me state on the record my ruling on the defendant's motion to suppress physical evidence, statements and any evidence derived from the fruits of an illegal search, which was is the hearing we heard yesterday.
>
> I read the cases that you-all provided me last night and considered the testimony and evidence. I find from the totality of the circumstances that the officers had more than reasonable suspicion or well founded suspicion to detain Mr. Davis in his vehicle based on the information that they had from the wiretaps, the phone conversation with a relative that he had it tonight, the cell cite information indicating that he was traveling back from Miami on I-95, and the information that he was - - Mr. Durrance was getting his drugs from Miami formed a sufficient basis to initiate the stop, and that the detention was not unreasonable for the purposes of carrying out a determination whether or not that suspicion was well founded.[5]

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[5] We dispute that there was reasonable suspicion for this stop. At the hearing on the motion to suppress, Detective Doe testified as follows as to the basis for his suspicion that Reyneldon Davis was transporting cocaine in the rental van that Detective Doe ordered to be stopped:

> Q [Defense Counsel]: Now in the conversation you had with - - that you monitored between Reyneldon Davis and Michael Durrance, was there any mention of cocaine?
> A [Detective Doe]: The particular word cocaine, no, sir. That is, again, something you don't hear.
> Q: Was there any code word that you can think of that was used during that conversation that had an amount or cocaine intent, other than telling Michael Durrance that Reyneldon Davis was coming into town?
> A: An amount, no, sir, but that he was coming. *It's the tone of voice, Durrance was excited. He said he was doing a lot better that he heard from him.* Again, it's the whole sequence. We knew they were out of cocaine. We knew people were looking for cocaine. And the totality of everything that led us to believe that he was bringing cocaine to Jacksonville.
> Q: Now, you said the totality of everything. And you

> The length of the detention was not longer than necessary. Once they couldn't physically find it without an initial fairly short search, they called in the K-9 dog, and that was apparently arranged so that it wouldn't be delayed by having the officer standing by if needed. So I think they did what they could to try to minimize the detention to accomplish the goal that they had for stopping in the first place, and that thereafter when the dog alerted for the presence of narcotics, there was probable cause for the remainder of the search activities.
>
> And I think this *Saturnino* case, *Saturnino-Boudet vs. State*, 682 So.2d 188, explains a very similar rationale that I'm using in reaching my decision on this case.
>
> And so that will be the ruling on the motion to suppress. [R4-241-242]

The trial court clearly failed to consider or simply misapplied the controlling law. The correct analysis depends upon application of the reasonable suspicion detention limitations set forth in *Terry v. Ohio*, *United States v. Place*,462 U.S. 696 (1983), *United States v. Sharpe*, 470 U.S. 675 (1985), and *Florida v. Royer*, 460 U.S. 491 (1983). The Eleventh Circuit Court of Appeals

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> are saying it's based on inflection in voices, but there is no set deal, there is no set amount, there is nothing that you can say for sure that it was going to be in that car, *you just guessed that there was going to be cocaine that could be in that car; is that correct?*
> A: *I believe there was cocaine in that car. That was what my belief was due to my experience. . .* [R3-150-151] This is not reasonable suspicion. Without reasonable suspicion the stop could last no longer than its legitimate purpose - to issue a speeding ticket. No ticket for speeding was ever issued, however, because that was a mere pretext for the stop. The detention continued longer than would have been necessary to write a speeding ticket and was hence illegal on that basis alone.

summarized the analysis in *United States v. Hardy*, 855 F.2d 753, 759, 760 (11th Cir. 1988), as follows:

> We consider finally whether the investigative detention of appellants was sufficiently limited in scope and duration to remain within the bounds permitted by *Terry v. Ohio* and not ripen into a full-scale arrest unsupported by probable cause. Consideration of this issue requires reference to a line of Supreme Court cases culminating in *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985), and to our own decision in *United States v. Espinosa-Guerra*, 805 F.2d 1502 (11th Cir.1986).
>
> *Sharpe* teaches that in distinguishing a true investigative stop from a de facto arrest, we must not adhere to "rigid time limitations" or "bright line rules," 470 U.S. at 685, 105 S. Ct. at 1575, but must use "common sense and ordinary human experience." Id.; accord *United States v. Place*, 462 U.S. 696, 709, 103 S. Ct. 2637, 2645, 77 L. Ed. 2d 110 (1983) (declining to adopt "outside time limitation" for permissible *Terry* stop). Several issues and circumstances are deemed relevant to the analysis, including the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention. See *Sharpe*, 470 U.S. at 685-86, 105 S. Ct. at 1575; *Espinosa-Guerra*, 805 F.2d at 1510; see also *United States v. Alpert*, 816 F.2d 958, 964 (4th Cir.1987) (relying on similar list of factors). *United States v. Hardy*, 855 F.2d 753, 759, 760 (11th Cir. 1988).

Judge Pearson set forth the proper mode of analysis in *Zukor v. State*, 488 So.2d 601 (Fla. 3rd DCA 1986), as follows:

> While the Supreme Court of the United States has declined on more than one occasion to place a brightline time limit on investigative detentions of persons or luggage, *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605, 615 (1985), it is clear that the detention should "last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229, 238 (1983). An examination of the decided cases

> reveals that **the actual time of the detention is less significant than other factors in determining whether the detention will be deemed reasonable or unreasonable**. Thus, a ninety-minute detention of the suspect's luggage was held unreasonable where, even though the agents knew in advance the scheduled time and place of the suspect's arrival and had ample time to bring the dog to the destination airport, they nevertheless took the bags from the destination airport to another in order to effect a dog sniff. *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110. **A fifteen-minute detention of the suspect in a police room was held unreasonable where the police detained him while they brought his luggage to him instead of using a narcotics dog to resolve their suspicions more quickly**. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229. Yet, a twenty-minute detention of the driver of a pick-up truck on suspicion of transportation of marijuana was found reasonable where the time was used by police in pursuing a second, related vehicle necessary to the investigation and where the suspect's own actions contributed to the delay. *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605.
>
> As *Sharpe* tells us, a critical factor in determining reasonableness of the detention is whether the authorities "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." Id. at , 106 S. Ct. at , 84 L. Ed. 2d at 616. See also *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110; *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229. *Zukor v. State*, 488 So.2d 601, 603-604 (Fla. 3rd DCA 1986) [Emphasis supplied, footnotes omitted].

Justice Marshall, in his concurring opinion in *Sharpe*, stated:

> Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in duration, scope or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause. *United States v. Sharpe*, 470 U.S. 675, 690 (1985)(Marshall, J., concurring in the judgment)[Emphasis supplied].

Justice Marshall further explained:

> [O]fficials in one community may act with due diligence in holding an individual at an airport for 35 minutes while waiting for the sole narcotics detection dog they possess, while *officials who have several dogs readily available may be dilatory in prolonging an airport stop to even 10 minutes*. *United States v. Sharpe*, 470 U.S. 675, 694 (1985) [Emphasis supplied].

In *United States v. Place* the Court stated:

> The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 U.S., at 20. We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause. . . .
>
> The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner. Moreover, the police may confine their investigation to an on-the-spot inquiry -- for example, immediate exposure of the luggage to a trained narcotics detection dog -- or transport the property to another location. Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime. . . .
>
> *As we observed in Terry, "[the] manner in which the seizure ... [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at*

all." 392 U.S., at 28. We therefore examine whether the agents' conduct in this case was such as to place the seizure within the general rule requiring probable cause for a seizure or within Terry's exception to that rule. . . .

The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return. n8 Therefore, when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage [read "vehicle" in Davis's case] on less than probable cause. *Under this standard, it is clear that the police conduct here exceeded the permissible limits of a Terry-type investigative stop. . . .*

[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. *Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.* We note that here the New York agents knew the time of Place's scheduled arrival at La Guardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests. Thus, although we decline to adopt any outside time limitation for a permissible Terry stop, n10 we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case. . . .

[Footnote 9] Cf. *Florida v. Royer*, 460 U.S., at 506 (plurality opinion) ("If [trained narcotics detection dogs] had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out"). This course of conduct also would have avoided the further substantial intrusion on respondent's possessory interests caused by the removal

> of his luggage to another location. . . .
>
> Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics. . . .
>
> We conclude that, under all of the circumstances of this case, the seizure of respondent's luggage was unreasonable under the Fourth Amendment. Consequently, the evidence obtained from the subsequent search of his luggage was inadmissible, and Place's conviction must be reversed. *United States v. Place*, 462 U.S. 696, 705-710 (1983). [emphasis supplied]

After the second roadside search at the scene for an additional ten minutes, it was decided to move the van and Davis off the highway to conduct a more thorough search in which the van was partially disassembled. [R5-409-410; 417] The van was moved about one and a half, maybe two miles and Davis was moved maybe a mile away. [R5-410] This third search took "a couple of hours." [R5-418] Eventually more than one package of cocaine[6] was found hidden in the van in a location that the dog never alerted on. [R5-420]

Mr. Davis was kept locked in the back of the patrol vehicle

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[6] FDLE Chemist Glen Abate testified that he examine four packages of cocaine that contained 495 grams, 458 grams, 331 grams and 929 grams, respectively (totaling 2.213 kilograms). [R5-463-464]

from the first moments of the pretext stop, was moved to the scene of the third search, and detained a total of about two hours before he was released. At no time was he told he was free to leave, and the entire time he was locked in the back of the patrol car. [R3-181] This factor alone is sufficient to support a finding that the Terry stop exceeded permissible bounds.

In *Goss v. State*, 744 So.2d 1167 (Fla. 2nd DCA 1999), the Court explained that placing the defendant in the back of a locked patrol car during a *Terry* stop was more intrusive than permitted by the circumstances and converted the *Terry* detention into an illegal arrest, invalidating the subsequent search:

> In the present case, placing Goss in the patrol car increased the intrusive nature of the stop. Furthermore, the State introduced no testimony or evidence showing a reasonable necessity for this action, either for officer safety or to prevent Goss from fleeing. We note that the officer was not investigating a particularly violent or serious crime and the individual who reported Goss did not report any threats or violent actions by him. The cases recognizing a de facto arrest generally involve physical removal from the scene and transportation, not just temporary placement, in a patrol car. See *Saturnino-Boudet*, 682 So. 2d [188] at 193 [Fla. 3rd DCA 1996] and cases quoted therein. However, "it is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983) (holding that Royer was under arrest as a practical matter when the officers' conduct was more intrusive than necessary to accomplish an investigatory detention; Royer was placed in a small room with two officers who had retrieved his checked baggage and held his ticket and identification). *Goss v. State*, 744 So.2d 1167, 1168,1169 (Fla. 2nd DCA 1999) [footnote omitted; emphasis supplied]

This Court has not hesitated in past cases to reverse convictions when *Terry* stops exceeded permissible bounds. In *Aderhold v. State*, 593 So.2d 1081 (Fla. 1st DCA 1992), this Court was called upon to analyze a similar fact pattern. In *Aderhold* a JSO officer was told by DEA agents that two men arriving at the Jacksonville Airport fit a drug courier profile based on specific facts communicated to the JSO officer. The JSO officer spotted a man who appeared to fit the description given by the DEA who then met up with a second man after the first man retrieved luggage from the luggage carousel. The JSO officer approached and started questioning the two for about ten minutes after which he told them he felt he had reasonable suspicion to conclude that their luggage contained narcotics. He requested consent to search, which Aderhold refused to give. The JSO officer told Aderhold that he was going to detain the luggage to get a warrant. He gave Aderhold a receipt and Aderhold said he was going to get a coke, but instead he left and never returned. The JSO officer then summoned a drug detection dog which alerted on the luggage. Thereafter a search warrant was obtained based on the dog alert, the luggage was searched and drugs found inside. Aderhold was later arrested and charged with possession of the drugs.

On appeal, this Court cited *United States v. Place* for the proposition that the *nature of a detention* may demonstrate that a full seizure has taken place and the action in that case must be

based on *probable cause*. In holding that the motion to suppress should have been granted, this Court stated:

> It is unnecessary for us to reach the question of the lapse of time, as the police had already seized the luggage prior to conducting the sniff test. . . . Under all of the circumstances of this case, the seizure of the appellant's luggage was unreasonable under the fourth amendment, and that the trial court erred in denying appellant's motion to suppress.

Similarly, the Third District Court of Appeal concluded in *State v. Mosier*, 392 So.2d 602 (Fla. 3rd DCA 1981), that if a bag would have become inaccessible for the purpose of a dog alert in the absence of state action restraining the bag without probable cause, then any subsequent alert would inevitably be tainted by the prior illegal seizure. In Davis' case the officers' initial actions constituted an illegal search and seizure of Davis's van prior to the subsequent alert by the canine. That initial illegal search was not supported by probable cause. Therefore the initial illegal seizure inevitably tainted the subsequent alert by the canine under the reasoning of *Aderhold* and *Mosier* as well as the federal authorities cited above.[7]

Based on the foregoing arguments, defendant Davis's motion to suppress should have been granted, the error in denying the motion

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[7] Holding Davis after any reasonable suspicion should have been dispelled as a result of the fruitless initial illegal search made any further detention of the van and Mr. Davis illegal. See *Satterfield v. State*, 609 So. 2d 157 (Fla. 2d DCA 1992); *Castillo v. State*, 536 So. 2d 1134, 1136-37 (Fla. 2d DCA 1988); *Cooper v. State*, 654 So.2d 229 (Fla. 1st DCA 1995).

was clearly not harmless, accordingly the convictions on both counts must be reversed.

II. THE TRIAL COURT ERRED IN DENYING DAVIS' MOTION FOR MISTRIAL BASED ON THE STATE'S INTENTIONAL AND PREJUDICIAL DISCOVERY VIOLATION OF NOT DISCLOSING TO THE DEFENSE THE PERTINENT CELL SITE LOCATION RECORDS, WHICH WERE NOT DISCLOSED UNTIL THE TRIAL WAS IN PROCESS, AND THE BELATED DISCLOSURE OF WHICH PREVENTED THE DEFENSE FROM EFFECTIVELY CROSS-EXAMINING THE STATE'S KEY WITNESS

The state presented at trial Detective Doe testimony explaining what was meant by a cell site monitor:

> A cell phone actually emits a signal. You see the towers all over the place, the cellular towers. With a cell site monitor, through that we could actually track your location or close to where you are at. Your cellular phone, if it's turned on, is emitting a signal that goes to the closest tower. Through the telephone company they can give us a general vicinity, usually within a mile, of where you are located at. [R4-277]

Detective Doe testified that that was done on Defendant Davis in this case. [R4-277] Det. Doe testified:

> Detective Doe: Very early the morning of the 11th, through the cell site we were able to track that phone call from Orlando down the Florida Turnpike to the south end of Miami, in the Kendall, Homestead area back to Orlando, and then on to Jacksonville . . . [a]s that phone travels, you can actually track someone's progress on the highway.
> Q [Assistant State Attorney] Through your investigation in this case, have you determined person involved in this investigation that lives in the Homestead area?
> A [Detective Doe] Yes, ma'am, we have . . . An individual by the name of Brian Mair. [R4-288]

Later in the trial Detective Doe testified:

> Detective Doe: Immediately after that phone call Michael Durrance makes contact with the actual supplier in Miami, Brian Mair.
> State: And you mentioned before that the defendant's cell

phone had been used in an area that morning. Whose house was that near?
Detective Doe: Mr. Davis' cell phone was hitting a cell site *right near Brian Mair's residence*, which is - - *I believe it's 215 Southwest in Homestead, Florida*. [R4-337; emphasis supplied]

Later in the trial Detective Doe testified as follows:

Q [Defense Counsel]: Now, so - - and you can't even tell if Reyneldon actually - - Reyneldon actually went to Brian Mair's house; can you?
A [Detective Doe]: We picked him up in Miami. No, we know the phone traveled to Miami.
Q: You can't say that phone went into that house; could you?
A: No, sir.
Q: You could say that phone was in the Miami area, all the way from I guess Pompano Beach down the Homestead; right?
A: *No, sir, it was hitting on a cell site - - that particular area is pretty congested.* ***It was hitting a cell site right by Brian Mair's house. It ties it down to a very tight area. . . . This is information from the phone company.***
Q: What address did the phone company give you, the closest address they were picking up? How do you determine this?
A: What they do is, when we get a cell site order, they send us what's called a cell site map, and it's a book that's got every cell tower in the State of Florida. Every cell tower is a number. As they relay to us a number, we look in this book for a cell site tower.
Q: Why didn't you present that evidence, what number was on what street and what area? *Where is that information?*
A: ***We have that information.***
Q: Does the information list a street number that the tower is on?
A: ***Yes, sir, it gives an exact address where the tower is. I believe it was 220-7th Avenue, in Homestead, Florida.***
. . .
Q: Is it fair to say that that phone was bouncing all over the Miami area at that time, too, just different spots around Miami?
A: No sir . . .
Q: So you are telling me that phone hit the turnpike cell

site, and hit the cell site *that's right by Brian Mair's house*, and it didn't stop anywhere else in the City of Miami?
A: The turnpike sort of loops around Miami, the route in travel proceeding as you go up the turnpike. ***The actual cell site by Brian Mair's house is right off the turnpike.. . . That particular area we can probably get a half mile radius, but it won't tell you an exact location***. [R4-371-373; emphasis supplied][8]

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[8] A separate discovery issue related to a key taped call from which Detective Doe opined the defendant was telling Chantel to tell Durrance he was bring the drugs. The state prepared a transcript of certain telephone calls that were monitored under its wiretap order. The transcripts were combined into a single booklet and provided to the jury but not admitted into evidence. [R4-286; The court instructed that it should be marked for the appellate record for review as the State's next consecutive lettered exhibit, which should be Exhibit H; R4-295] Defense counsel objected that the transcript of the first call only lasted two minutes and clearly started in the middle of a conversation. He requested the state to either play the whole conversation or at least to acknowledge to the jury that this was not the entire conversation that was on the tape and on the transcript. [R4-292-293] The court overruled the objection. [R4-293]

The state published Exhibit C to the jury, which started with the February 11, 2001 disputed phone call:

Davis: [. . .] But, ah, when they get there, ah, tell my buddy to hit me up. I've been trying to reach him to see if he was free, cause I hate to intrude upon working people's lives.
Chantel: No, you don't have to intrude. You don't have to feel like you're intruding on working people's lives. You really don't.
Davis: Oh.
Chantel: You really don't. But, no, whenever you get the chance, though, for real, let me know so I can tell Niki what's going on, because she - - she said that - -
Davis: Girl, I got that this night.
Chantel: Are you for real coming tonight? Because first you said you're not because there's nothing to eat.
Davis: I was playing. You-all are going to feed me regardless. Yeah, I'm coming man . . . [R4-300-301]

The defense attempted to have Detective Doe admit on cross-

Then the state asked Detective Doe if the cell site information had been available to defense counsel, and Detective Doe answered that it had been available to defense counsel. At that point counsel for Davis objected to the discovery violation [R4-392] and ultimately moved for a mistrial. [R5-503] Defense counsel told the Court that he had just received the cell site order itself only the week before trial [R4-392] and had not received anything else that the Detective had referred to. [R4-392-292] The state admitted that it had not provided this material over to the defense. [R4-393] The trial judge set the matter for a hearing after the jury was excused that day in trial. [R4-393]

In the discovery violation hearing Assistant State Attorney Starrett admitted that she did not specifically list the pertinent cell site records in the state's discovery response. [R5-476] On cross-examination in the discovery violation hearing Detective Doe admitted that he had had the pertinent cell site records since about February 11 or February 12, 2001. [R5-483]

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examination that this was not the entire conversation, but all Doe would concede was that he failed to transcribe the initial "Hello" and the response "yes." [R4-387-389] On redirect Detective Doe was asked by the state:

> Q: Is there something that you were trying to hide on that call?
> A: *We listened to the call in its entirety, and I believe that's the only thing that was missing, are the words, "Hello," and he answered, "Yes."*
> Q: *But what was played for the jury was the entire call?*
> A: *Yes, ma'am*. . . [R4-389]

The state asked Detective Doe during the discovery violation hearing:

> Q: Was there anything exculpatory about those records; anything to tended to show that Mr. Davis did not go to Miami *to that area that we talked about near Mr. Mair's house?*
> A: ***No, ma'am.*** [R5-484][9]

The defense counsel pointed out that as important as these records were it could not be said to be inadvertent on the state's part to have not turned them over. Defense counsel also argued that he was prejudiced in his trial preparation to be confronted with these records mid-trial. [R5-488] The Court ordered Detective Doe to turn the records over to the state attorney the next morning and suggested that the assistant state attorney, the detective and the defense counsel sit down together so the detective could try to decipher the records for the defense. [R5-491] The trial judge decided to defer ruling until the defense had more of an opportunity to argue what prejudice it suffered from the belated receipt of the documents. [R5-491]

The court reconvened after a one day delay. [R5-494] Defense counsel stated that the hard copy of the records indicated that they had been provided to the Jacksonville Sheriff's Office "somewhere around February 14th of 2001." [R5-497] Defense counsel

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[9] Note that the State still had not turned over the pertinent cell site records even while the discovery violation hearing was taking place but only offered to provide the records to the defense the next day in trial! [R5-485; 490]

objected that in order to understand the records he needed to be able to talk to someone from Cingular Wireless, otherwise he would only be guessing as to the meaning of the records. [R5-497] The defense argued that in order to cross-examine Detective Doe on the cell site records it would first need a chance to talk to someone from Cingular Wireless and analyze the records with them. [R5-498] The records were "pretty much set out in a code." [R5-498] Defense counsel proffered that he did not have the requisite background or knowledge to fully comprehend the cell site records just from looking at them. [R5-499]

The state admitted that the records had been received *February 14, 2001*. [R5-499] The state proffered that it had offered to explain the code to defense counsel and did not know that talking to anyone from the phone company could add anything. [R5-499]

The defense counsel pointed out that there was nothing in the record to establish that Detective Doe had any expertise in interpreting these coded records and the defense would want to rely only on someone from Cingular Wireless for that purpose. [R5-501]

The defense pointed out that it had specifically requested the phone records that were referred to in the state's discovery response, had gotten phone records from the state in response to the specific request, but that the state had not turned over any of the pertinent cell site records. [R5-502]

Detective Doe had had these records in his possession since

February 14, 2001 and the trial was taking place seven months later, in September 2001. The defense could not meaningfully cross-examine Detective Doe given the complexity of the records and could not impeach his interpretation of the records without a witness from Cingular Wireless. [R5-503] Based on these arguments the defense moved for a mistrial. [R5-503]

The trial court made a finding based on no evidence that the failure to turn over these crucial records was inadvertent and further concluded that the defense had not been prejudiced. [R5-505] The court's only remedy for the discovery violation was to suggest that the defense could follow up with Cingular *after the trial* and if it found any discrepancies could make a motion for new trial. [R5-505-506]

The defense followed the court's advice using the only opportunity the court provided after the trial the defense contacted Cingular Wireless and had the cell site records explained. [R2-230] Based on what the defense learned from Cingular Wireless, it filed a motion for new trial. [R1-69; R2-230]

The Defendant filed a motion for new trial [R1-69] that argued among other matters that the trial court erred in denying the Defendant's motion for mistrial based on the state's failure to comply with discovery requests. The specific claim was that the state had failed to surrender cell site location logs that would have impeached Detective Charles Doe testimony regarding the

Defendant's location in reference to Brian Mair's home in the Miami, Florida area on or about February 10 and February 11, 2001. The testimony of Detective Doe relating to the cell site locations was a basis for the trial court's denial of the Defendant's motion to suppress. The trial court found that the disclosure omission was unintentional and denied the Defendant's motion for mistrial.

A post-trial review of the cell-site logs revealed that the Defendant's cell phone in fact did not use a cell site within a mile of Brian Mair's house, contrary to Detective Doe'ss testimony at trial. Instead, the cellular telephone company records showed that the closest cell site the Defendant's telephone accessed was over three miles from Mr. Mair's home.

Detective Doe testified that he had had the logs since February 2001 and the trial was not until August 2001, yet the logs were not disclosed to the defense until **September 6, 2001 in the middle of the trial.**

The trial court conducted an evidentiary hearing on the motion for new trial October 29, 2001. Defendant Davis called Vaughn Ford, an employee of the defense counsel, as a witness. [R2-227] Ford testified that during the trial the state presented evidence to show that the residence address of Brian Mair was 1511 Southwest 112th Place, Miami, Florida. [R2-229-230] Mr. Ford also obtained a copy of the transcript of Detective Doe'ss trial testimony. [R2-228] Mr. Ford also had available copies of the cell phone records

that Detective Doe turned over to the defense during trial. [R2-229; hereinafter referred to as the "Doe Cell Records"] Detective Doe had testified that he used these records, the Doe Cell Records, to analyze the phone calls made by Defendant Davis on February 11, 2001. The Doe Cell Records showed the calls made by Davis and the cell site locations in the Miami area that handled particular calls. [R2-229]

Mr. Ford testified that the defense had been unable to fully cross-examine Detective Doe about the cell site locations from the material handed over in the middle of trial, so Ford had been assigned to get a complete copy of the cell site records from Cingular [the telephone company] and to talk to the person at Cingular who had provided Doe with the Doe Cell Records. [R2-230] Mr. Ford testified that he spoke with Alicia Brown of the Cingular Wireless Court Records Bureau who took him step by step through the records and explained them to him. [R2-230]

Mr. Ford testified that at trial Detective Doe had testified that the cellular telephone site closest to Mr Mair's home was 220-7th Avenue, in Homestead, Florida. [R2-231] Also, according to Mr. Ford, there was a discrepancy in the state's evidence as to Mr. Mair's address. Detective Doe testified that it was "215 Southwest in Homestead." [R2-231] There is no such address in Homestead, according to Mr. Ford. [R2-231] According to court records, Mr. Mair's address is actually 15211 Southwest 112th Place, in the

Kendall subdivision. According to Mr. Ford, Kendall and Homestead are two different places. [R2-231] There are approximately 160 city blocks distance between Kendall and Homestead. [R2-231]

The cellular phone number in question used during the trial as Defendant Davis's phone number was 407-376-0614. [R2-233] According to Mr. Ford's post-trial review of the cell site records and a map of the cell site locations, the closest this cell phone ever came to Brian Mair's house was **three miles**. [R2-233] The cell phone hit within three miles of Mair's address two times and five times it hit within three and a half miles. [R2-233] But at trial Detective Doe testified that Defendant Davis's phone hit within a half mile of the Mair address and that claim, which was false, was in turn based on Detective Doe's testimony that this cell phone tower, that was within a half mile of Mair's address, was located at 220 7th Avenue, but according to the records from Cingular, there was no such tower at all. [R2-234][10]

On cross-examination Ford testified further that Detective Doe

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[10] On a separate issue, Mr. Ford testified that he had examined the cell phone records concerning a call between Defendant Davis and a lady by the name of Chantel, who lived at Mr. Durrance's house. [Durrance was the person the state argued the cocaine was to be delivered to.] [R2-234-235] According to Ford, at trial Detective Doe testified that the tape recording of this call lasted only three to five minutes. [R2-235] According to counsel for Davis, the state's position was that the tape itself was only two and a half minutes and only a few moments of the conversation had not been recorded. [R2-235] Yet according to Ford the Cingular records show that the conversation lasted just over thirty (30) minutes. [R2-236]

had also testified that he had relied upon this same "evidence" as the rationale for the stop and search of Defendant Davis's vehicle on February 11. [R2-244]

The state presented Detective Doe at the hearing on the motion for new trial. Detective Doe testified that he received the hard copy of the cell phone records and cell site location records "two or three days" after February 10th and February 11th. [R2-252] The day of the stop of Davis's vehicle he was basing his information on a telephone call from a technician who told him where the cell phone sites were located. [R2-253] Detective Doe "estimated" the mileage based on the "blocks" between the sites - "just a pure estimate." [R2-253] He testified that it was Brian Mair's father who "was at I believe 220 Southwest . . ." [R2-254] Then his estimate of the distance "[was] a guess." [R2-254] He repeated that his determination of the milage between the cell phone site and *where the father of Brian Mair was at* "That's just a guess." [R2-255] He "wasn't concerned with the exact milage." [R2-255] He "knew he [Davis] was hitting *an area near* - - this *is the southwest part where Brian Mair resided. He actually - - in Kendall and in Homestead.*" [R2-255] Detective Doe claimed that he couched his testimony with the qualifier "I believe" and he never tried "to get an exact location - - an exact mileage." [R2-256] When the Court asked Detective Doe in the hearing on the motion for new trial what Brian Mair's address was, first the Assistant State Attorney, Laura

Starrett, then Detective Doe answered the Court:

> Starrett [Assistant State Attorney]: I don't think he has an exact address.
> Witness [Detective Doe]: I didn't testify to it, Your Honor. *I didn't know it exactly at the time, and I don't think I ever testified to an exact address*.
> The Court: And what was address - -
> Detective Doe: It sounded correct what he said. 15211, I believe that sounded correct.
> The Court: Southwest 112th Place?
> Detective Doe: Yes, sir.
> The Court: That's what you believe to be the *father's address*?
> Detective Doe: *No, sir, that was* - -
> The Court: Mr. Mair's?
> Detective Doe: *Yes, sir*. [R2-257; emphasis supplied]

The trial judge himself remarked, however:

> The Court: Well, when you testified that it was within a half mile distance between the cell site and Mr. Mair's house, *you did that with the purpose of trying to convince the jury that there was some accuracy and that that's where he was because he was making the phone call at that location; correct?*
> Detective Doe: I would have to look at my - - the exact what I said that day, I don't know the sequence of questions. [R2-259]

The State then attempted to offer testimony from Detective Doe on the discrepancy concerning the length of the crucial telephone call between Chantel and Defendant Davis - 30 minutes according to Cingular's records versus only 2.5 minutes presented to the jury. Detective Doe said he did not know why there was a discrepancy. [R2-257-258]

In the 2.5 minute tape the state played to the jury of this conversation, Defendant Davis says to Chantel, "I've got that." The state offered Detective Doe's testimony that in his opinion

Defendant Davis's remark "I've got that" in the entire context of the conversation referred to narcotics. [R4-391]

On cross-examination Detective Doe admitted that during the trial he never testified that it was the *father's address* that he was using to guess the distances - but in his trial testimony described it as *Brian Mair's house*. [R2-260] Detective Doe also admitted on cross-examination at the hearing on the motion for new trial that he never testified at trial that there were *two residences* for Brian Mair. [R2-261]

When confronted on cross-examination in the new trial motion hearing with his trial testimony that the tape recording represented the *entire* phone conversation, the best Detective Doe could do was say he did not recall that answer. [R2-262] Detective Doe later suggested that the taping of the call may have been "minimalized." [R2-265] The trial judge then asked wouldn't the wiretap log show that if that were the case. Detective Doe said it should. [R2-265] The state did not offer the wiretap log into evidence at the hearing. In fact, at trial, Detective Doe was asked on redirect by the state:

Q But what was played for the jury was the entire call?

A Yes, ma'am. [R4-389]

On recross when Detective Doe was asked again to explain his false trial testimony concerning the location of the cell sites and the location of Mair's house, and the distance between the cell

sites hit by Davis's calls and Mair's house, his explanation was that "I was going off my recollection from talking to a technician in West Palm Beach." [R2-268]

The trial judge immediately interrupted Detective Doe's answer with the judge's own observation discrediting this explanation:

> The Court: When you testified at trial at the suppression hearing *you had those records*.
> Detective Doe: Yes, sir.
> The Court: *So you could have referred to the record and given the exact location, or someone could have asked you the exact location.*
> Detective Doe: Yes, sir, I believe it came up during the hearing where we ordered them from that day, and we got them after the suppression, I didn't have them at that time [that is, at the time of the suppression hearing, but he did have them at the time of the trial, because that is when they were first turned over to the defense triggering the defense motion for mistrial]. [R2-269]

In his argument on the motion for new trial, Defendant Davis's trial counsel argued that (1) the court had relied upon Detective Doe'ss false testimony from the suppression hearing to deny the motion to suppress, (2) the defense had not been able to effectively cross-examine Detective Doe at trial because of the state's having withheld the cell site and cell phone records, and (3) the state had a duty under *Brady* to turn over the records as soon as they got them after the suppression hearing and saw that Detective Doe suppression hearing testimony was contradicted by the records. [R2-275] Turning these records over in the middle of trial did not allow the defense time for analysis - analysis which was required to make sense of the records and to be able to use them to

cross-examine Detective Doe in the way he was cross-examined in the hearing. [R2-276]

The trial court denied the motion for new trial finding:

> With regard to paragraph three [of the motion for new trial], I am still not of the opinion that there has been evidence to show that there was any substantial difference in what the detective's testimony was and what the facts really are regarding the location of Brian Mair and the phone calls made to him by Mr. Davis on February 10th and 11th. . . . I will deny the motion for new trial on the basis that the Court erred in denying the motion for mistrial based on the State's failure to comply with discovery requests. . . . [and] concerning the supposed difference of time between recording and the telephone -- Cingular Wireless records, I should say, on the phone call from Mr. Davis to Chantel or Shawntel . . . I think the defense had sufficient information to develop any proof of that discrepancy prior to or during the trial, and so I will deny the motion for new trial as to that . . . as well. [R2-289-290]

At the eleventh hour, after the defense had given its opening statement and the State had presented its key witness, Detective Doe, on cross-examination had disclosed what the State should have disclosed months earlier in response to the defense demand for discovery - that there were cell site records from Cingular Wireless that would prove or disprove Detective Doe damning testimony about the defendant's itinerary the day of the fateful trip.

The defense immediately brought the discovery violation to the attention of the court and moved for a mistrial. The court conducted a *Richardson*[11] hearing in response.

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[11] *Richardson v. State*, 246 So.2d 771 (1971).

In that hearing it was determined that Detective Doe had had the cell site records for almost seven months prior to trial and despite specific demands for telephone records by the defense, these crucial cell records had never been disclosed, much less turned over.

This previously undisclosed information was clearly exculpatory and clearly material to the defense theory. It was information in the hands of a law enforcement agent who was the case agent in charge of the task force who arrested the defendant, and therefore chargeable as known to the State. *Gorham v. State*, 597 So.2d 782 (Fla. 1992)(the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers), *State v. Coney* 294 So. 2d 82 (Fla. 1973); see also *State v. Del Gaudio*, 445 So. 2d 605 (Fla. 3d DCA), review denied, 453 So. 2d 45 (Fla. 1984).

In addition, by referring to the records in trial and claiming that they confirmed Detective Doe testimony - when in fact they showed that Detective Doe was lying - his testimony was given an patina of credibility beyond what it would normally have had. Where were these records? They were not turned over to the court or defense even during the *Richardson* hearing.

In fact, had the defense been provided the records in advance of trial in sufficient time to confer with a knowledgeable person from Cingular Wireless to decipher them, the defense would have

been able to make two crucial points (1) that Detective Doe testimony about tracking the cell phone to Brian Mair's house the day the drugs were supposedly picked up was not true, and perhaps even more importantly (2) that Detective Doe was a liar.[12] Had the jury been confronted with Doe deception and outright lies about the cell site evidence, no court could have any confidence that the jury would have credited anything else Doe had to say in the case. The linchpin of this circumstantial evidence case was Doe's claim that Defendant Davis orally confessed. [R4-255; R5-532-533][13] Davis took the witness stand and denied the confession. [R6-625] If the defense had been able to impeach Detective Doe credibility as they were able to do at the hearing on the motion for new trial once they had had an opportunity to study the cell site records and confer with Cingular Wireless for assistance in interpreting the records, then there can be no confidence that the jury would have accepted anything Detective Doe had to say or anything he was

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[12] Proverbs 17:27 says "A man of knowledge uses words with restraint." Unfortunately, the record of Doe's testimony at trial and on the motion for new trial leaves no other choice of words to fairly describe the character of his testimony in this case.

[13] It is true that FDLE Agent Mark Brutnell [R5-438] and Clay County Sheriff's Deputy Michael Brown [R5-522] corroborated Doe on the confession - but this corroboration is like the proverbial roach in the pot of stew - once you find the roach in the stew you don't pick it out and keep eating the stew. Detective Doe was the roach in this stew and if the defense had been able to show the jury that there can be no confidence that the outcome of this trial would have been the same.

associated with.

It was shown in the hearing on the motion for new trial that there was no cell phone tower at the location Doe said he tracked Davis to closest to where Mair lived. Detective Doe was forced to admit in the hearing on the motion for new trial that he did not even know where Mair lived. At trial Doe had made it seem that he tracked Davis to within a one half mile radius of Mair's home. This was simply a lie. He also claimed at trial that the phone company records corroborated his testimony on these points. Of course they didn't corroborate his testimony - instead they showed he was lying. He also told the jury that the defense had had these records available to them - cleverly suggesting by implication to the jury that the defense counsel knew that the Detective was telling the truth and that the defense counsel could not be trusted. Instead, it was the other way around. The jury never got to hear the truth about any of this and instead were left with a pack of lies from the case agent.

Clearly these cell site records should have been produced seven months earlier - not in the middle of the trial. Clearly there was no excuse for the state's failure to produce the records and the non-disclosure was not inadvertent. Clearly the defense was prejudiced by the state's failure to comply with its discovery obligations.

There was no way for the defense to properly analyze the cell

site records in the middle of the trial or seek assistance from Cingular Wireless to do so. Nor did the court even consider adjourning or recessing the trial to allow the defense time to do so. Instead, the court suggested the defense confer during a break with Detective Doe and let him explain the records to the defense! That would have been not have been helpful and it is hard to imagine it as a serious response to a discovery violation by the very same witness. The court was asking the defense to take Doe's own explanation as Gospel and at face value. This would offer no way to cross-examine him.

In the *Richardson* hearing the court shifted the burden to the defense to argue and show how it was prejudiced by the state's discovery violation. The court erred in shifting the burden in the *Richardson* hearing to the defense to show that it was prejudiced. The burden is on the State to prove that the defendant was not prejudiced by the State's violation of the discovery and *Brady* rules. *State v. Schopp*, 653 So.2d 1016 (1995). The State did not prove the defense was not prejudiced.

The court erred in finding the violation inadvertent. The court seemed to think that the appropriate level of review was whether the prosecutor personally had willfully violated the rule. The court completely discounted and ignored the appropriate legal standard which makes the State accountable for the actions of its own law enforcement officers. *Gorham v. State*, 597 So.2d 782 (Fla.

1992), *State v. Coney* 294 So. 2d 82 (Fla. 1973); *State v. Del Gaudio*, 445 So. 2d 605 (Fla. 3d DCA), review denied, 453 So. 2d 45 (Fla. 1984).

On this point the court conducted no inquiry whatsoever. No questions were posed by the court to determine why the supervisory case agent or anyone else on the state's side, had not disclosed any of this information to the defense. Without making any inquiry it was impossible to make a finding whether the violation was willful or not. The burden was on the State to show that the violation was not willful. By not offering any evidence on this point, the State has defaulted and should be held accountable for a willful violation, absent any better record to explain this violation.

Clearly the failure to timely turn over the cell site records was prejudicial to the preparation of the defense.

Any one of these matters standing alone would be sufficient to find that the non-disclosed evidence was substantial and was prejudicial to the defense. *Pender v. State*, 700 So.2d 664, 666 (Fla. 1997).

We respectfully submit that the trial court erred in not granting the defense motion for mistrial when confronted with this situation - a situation caused solely by the State's failure to comply with its constitutionally mandated discovery obligations.

In *Schopp*, the Florida Supreme Court explained the application

of the standard to determine if a discovery error was reversible:

> In determining whether a *Richardson* violation is harmless, the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. *As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred*. Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

State v. Schopp, 653 So.2d 1016, 1020,1021 (1995) [emphasis supplied]. See also *State v. Evans*, 770 So.2d 1174, 1210 (Fla. 2000) ("Only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.")

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197 (1963), held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See *Moore v. Illinois*, 408 U.S. 786, 794-795, 92 S.Ct. 2562, 2567- 2568, 33 L.Ed.2d 706 433 (1972). The standard for a *Brady* violation is: Where there has been a suppression of favorable evidence in

violation of *Brady v. Maryland* the non-disclosed evidence is material: "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985), *United States v. Alzate*, 47 F.3d 1103, 1109, 1110 (11th Cir. 1995).

A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). Id., at 682, 105 S.Ct., at 3383-3384 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)); *Bagley, supra*, 473 U.S., at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment) (same); see 473 U.S., at 680, 105 S.Ct., at 3382-3383 (opinion of Blackmun, J.) (*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal").

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a

trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.

Bagley materiality is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

The defense submits that it has met the standard for reversal in this case - or put in the corollary fashion - the State failed to meet its burden of proving beyond a reasonable doubt that the defense was not procedurally prejudiced by the State's admitted discovery-*Brady* violation.

III. SENTENCING ISSUES

1. HABITUAL OFFENDER SENTENCES IMPROPERLY IMPOSED

A. COURT LACKED AUTHORITY TO IMPOSED HABITUAL OFFENDER SENTENCE FOR DRUG TRAFFICKING OFFENSES

It is Davis's position that the minimum mandatory sentence required under Florida Statutes § 893.135(1)(b)(1)(c) is just that - a mandatory sentence that trumps the more general provision of the habitual offender statute, § 775.084. The Court had no discretion to impose any sentence but the minimum mandatory sentence of fifteen years. *But see Woods v. State*, 807 So.2d 727 (Fla. 1st DCA 2002) (in *dicta* stating that defendant convicted of drug trafficking offense committed after October 1, 2000 subject to habitualization). *Dicta* in *Cotton v. State*, 769 So.2d 345 (Fla. 2000) suggests that a court may impose a higher habitual offender sentence upon a drug trafficking offense, but the authority for this proposition, cited by the court, was Florida Statutes § 775.082(9)(c). That citation of authority was apt for the issue under consideration by the Court - the Prison Releasee Reoffender Act - but was not authority for the *dicta* that the habitual offender classification could trump the drug offender *mandatory* classification.

B. UNDER *APPRENDI V. NEW JERSEY* COURT LACKED AUTHORITY TO IMPOSE HABITUAL OFFENDER SENTENCE

We argue that the findings required to habitualize, other than the mere fact of the predicate prior convictions, are facts that

must be alleged in the charging document as an element of the offense and proved to the jury beyond a reasonable doubt as elements of the offense in a bifurcated trial proceeding. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *But compare Jones v. State*, 781 So.2d 580 (Fla. 1st DCA 2001) (that Apprendi does not apply to the enhancement of a penalty based on proof *of prior criminal convictions*); *But see Grant v. State*, 2002 Fla. App. Lexis 3727 (Fla. 2nd DCA March 22, 2002); *Saldo v. State*, 789 So. 2d 1150 (Fla. 3d DCA 2001); *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001); *Wright v. State*, 780 So. 2d 216 (Fla. 5th DCA 2001); see also *McDowell v. State*, 789 So. 2d 956 (Fla. 2001).

C. THE COURT'S FACT FINDINGS WERE INADEQUATE TO JUSTIFY IMPOSITION OF AN HABITUAL FELONY OFFENDER SENTENCE

The court did not enter a written order setting forth its reasons for sentencing the defendant as a habitual felony offender, and made only the following fact findings orally on the record to support its decision that the habitual offender sentence was necessary for the protection of the public:

> THE COURT: Okay. Mr. Davis, you just continued to be arrested for violating the law most of your life as an adult. And there is no question in my mind that you should be considered as an habitual offender. I mean, you have had many many times more number of convictions than you are required to obtain that infamous status. [R2-307-308]

In terms of the fact findings relied upon to impose the enhancement, Davis's case is close to being on all fours with *Adams*

v. State, 376 So.2d 47 (Fla. 1st DCA 1979).

> The second-stage finding, that extended imprisonment is necessary to protect the public from Adams' future criminal activity, was based on stated findings, liberally construed, to the effect that Adams' prior offense, armed robbery, was dangerous irrespective of his alleged use of a sawed-off shotgun; (2) Adams violated probation by drug use after he had an opportunity to participate in a drug withdrawal program; (3) Adams possessed heroin and drug paraphernalia as charged in this case; and (4) Adams was arrested for "another violent crime, assault to murder." . . .
> The trial court made no finding that Adams was at sentencing addicted to heroin, so we do not consider whether heroin addiction would add to weight to the trial court's findings under Section 775.084. For the same reason we also disregard the presentence report's reference to Adams' use of a sawed-off shotgun in committing the 1971 armed robbery. For the same reason we disregard any charge or implication in the presentence report that Adams attempted to murder two acquaintances and intimidated them from testifying against him. *Thus we are left with supported findings that Adams was convicted of armed robbery in 1971, violated his parole from prison by using heroin, possessed heroin and paraphernalia as charged on this occasion, and was arrested but not prosecuted for two other crimes.*
> . . .
> *The findings by the sentencing court in this instance are insufficient on their face to show that the public requires Adams' extended imprisonment for its protection against his further criminal activity.* The sentences are therefore vacated and the case is remanded for resentencing, conventionally or in accordance with Section 775.084. [emphasis supplied]

See also Mangram v. State, 392 So.2d 596 (Fla. 1st DCA 1981); *Eutsey v. State*, 383 So.2d 219 (Fla.1980). We submit that in Davis's case only a conventional, non-habitual offender sentence may be imposed.

D. THE COURT FAILED TO CONDUCT THE REQUIRED "SEPARATE PROCEEDING" TO HABITUALIZE

Florida Statutes, § 775.084 requires a "separate proceeding"

to determination the qualification for and determination of the habitual offender classification - separate from the sentencing proceeding itself. No such separate proceeding was held in Davis's case, nor was it knowingly and intelligently waived by Davis. Immediately upon rendition of the verdict the Court scheduled sentencing for October 8, 2001. [R6-764] On October 8, 2001 the Defense filed a motion for new trial in open court and sentencing was deferred until October 29, 2001. [R1-Docket] At the October 29, 2001 hearing it seems to have been anticipated that the court would first hold a hearing on the motion for new trial, because the state asks if they may proceed out of order and put on a fingerprint witness they have present and it is agreed that they may put this witness on out of order. The state then put on a fingerprint expert and introduced prior judgments and commitment orders. No findings or other determinations relative to the habitual offender status were made after this witness testified. She was excused, then the court turned to hearing testimony and argument on the motion for new trial. This testimony and argument went on for an extended period of time, and when finished the court stated that it was taking a recess and would reconvene later in the afternoon. Again, no findings had been made either on the habitual offender status or on the motion for new trial. When the court resumed the hearing later that afternoon it announced its ruling on the motion for new trial, which it denied, then asked defense

counsel if it had any witnesses for sentencing. The defense then put on witnesses in mitigation of sentence. The state had no further witnesses. The court then heard argument from counsel and proceeded to determine that Davis was a habitual offender and imposed sentence - all in the same proceeding without any waiver of a separate proceeding from Davis or his counsel. [R2-215 *ff*.] This procedure fails to comply with the requirement of a separate sentencing proceeding under § 775.084.

2. FINE WRONGLY IMPOSED

The Court imposed a $250,000 fine while sentencing the defendant not under the drug trafficking statute provisions, but under the habitual offender provisions of § 775.084. The judgement and commitment written order correctly states that the fine was *not* imposed as a drug trafficking fine but was imposed under authority of § 775.083. The judgment and sentence written order is correct in that the fine must be imposed under § 775.083 (at least if the sentence remains a habitual offender sentence - if the sentence is corrected to be a drug trafficking minimum mandatory sentence then the $250,000 fine could be imposed). Section 775.083 limits fines for first degree felonies to $10,000.

3. THE SENTENCING GUIDELINES SCORESHEET WAS INCORRECTLY SCORED

The scoresheet improperly scores an additional 46 points for count two, when count two is a predicate act for count one and is part of the same conduct punished in count one. It was improper to

add additional points for this offense.

In addition, the scoresheet states that the maximum penalty is 60 years, however the two offenses could not be sentenced consecutively due to Double Jeopardy considerations, therefore the maximum sentence is the maximum penalty for a single count. *Hale v. State*, 603 So.2d 521 (Fla. 1994). We further submit that the maximum penalty for a minimum mandatory fifteen year drug trafficking offense is fifteen years despite the fact that it is classified as a first degree felony.

4. TRAFFICKING CONVICTION UNLAWFUL UNDER *TAYLOR*

The Second District Court of Appeal decided *Taylor v. State*, 27 Fla. Law Weekly D. 250 (Fla. 2nd DCA 2002) on January 23, 2002, holding that Chapter 99-188, which amended Florida Statutes § 893.135, was unconstitutional because it violated the single subject rule of Art. III, § 6, of the Florida Constitution. Although the *Taylor* case addressed that portion of the statute that added a minimum mandatory provision for methamphetamine, arguably the unconstitutional amendment rendered the entire statute void. If that is so, there is no sentence that may be imposed. *But cf. McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974).

CONCLUSION

Appellant Reyneldon Davis requests this Honorable Court reverse and vacate his convictions and sentences and remand the case to the circuit court for further proceedings consistent therewith.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Davis certifies that the size and style of type used in this brief is 12 point Courier or Courier New.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Attorney General Robert Butterworth, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, by hand delivery via courier, this June 27, 2002.

_____
William Mallory Kent