

IN THE SUPREME COURT OF FLORIDA

JOE EDWARD LEE,  
Petitioner,

CASE NO: 68,306

vs.

STATE OF FLORIDA,  
Respondent.

---

FILED  
JUN 10 1968  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

PETITIONER'S REPLY BRIEF

TERRY N. SILVERMAN, ESQUIRE  
SILVERMAN & SILVERMAN, P.A.  
605 Northeast First Street  
Suite G  
Gainesville, Florida 32601  
(904) 377-0770  
Attorneys for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Citations	ii
Argument	
I.    THE FIRST DISTRICT ERRED AS A MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO WITHDRAW PLEA OF NOLO CONTENDERE BECAUSE THE PLEA AGREEMENT WAS BREACHED BY THE STATE	1
II.   THE CONTINGENT FEE AGREEMENT WITH THE INFORMANT TO PRODUCE EVIDENCE AGAINST THE APPELLANT VIOLATED THE APPELLANT'S DUE PROCESS RIGHT	4
Conclusion	6
Certificate of Service	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
Brown v. State, 357 So. 2d 41, 45 (Fla. 1971)	3
Cruz v. State, 465 So. 2d 515 (Fla. 1985)	5
Marrero v. State, So. 2d _____, 10 F.L.W. 2317 (Fla. 2d DCA Oct. 8, 1985) adhered to on motion for reh'g, 11 F.L.W. 59 (Fla. 3d DCA Dec. 24, 1985)	5
State v. Glosson, 462 So. 2d 1082 (Fla. 1985)	5
United States v. Joseph, 533 F. 2d 282 (5th Cir. 1976)	5
Williamson v. United States, 311 F. 2d 441 (5th Cir. 1962)	4
Wood v. State, 346 So. 2d 143 (1st DCA 1977) (Wood I)	2
Wood v. State, 357 So. 2d 1060 (Fla. 1st DCA 1978) (Wood II)	2

## ISSUE I

- I. THE FIRST DISTRICT ERRED AS A MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO WITHDRAW PLEA OF NOLO CONTENDERE BECAUSE THE PLEA AGREEMENT WAS BREACHED BY THE STATE.

### ARGUMENT

The State, in its brief, attempts to justify the breach of the plea agreement by its agent under the pretense that the sentencing court was entitled to receive 'the fullest information possible...'. While the Petitioner does not dispute the general principle that a sentencing judge should be fully informed prior to imposing sentence, that principle cannot justify the State's departure from its plea agreement under the facts presented in this appeal.

The plea bargain constituted a contract between the State and the Petitioner. The Petitioner agreed to plead nolo contendere to the criminal charge and, in exchange, the State of Florida agreed to recommend probation. The Petitioner fulfilled his part of the contract while the State broke its promise when an agent of the State recommended incarceration contrary to the plain terms of the agreement. The written plea agreement unequivocally provided that the State would affirmatively recommend probation; it did not provide that the prosecutor only would recommend probation

as suggested by the State. As noted by Judge Ervin in his dissenting opinion below:

"The State should not be permitted to disregard the mutual promises and obligations made between the representative of the State who controls the prosecution, and the Defendant, particularly when the Defendant, in reliance upon such promises, agrees to forego certain rights vouchsafed to him by the Constitution...".

The State relies on Wood v. State, 346 So. 2d 143 (1st DCA 1977) (Wood I), in support of its position. In Wood I, the State Attorney agreed to remain mute at sentencing; he would not recommend probation nor would he oppose it. In the case at bar, the State agreed to affirmatively recommend probation and not to remain mute. The affirmative recommendation was undermined by an independent contradictory recommendation by another State law enforcement officer. In another breached plea agreement case considered by the First District, Wood v. State, 357 So. 2d 1060 (Fla. 1st DCA 1978) (Wood II), the appellate court apparently did not consider Wood I controlling in this fact situation. It stated in dicta in Wood II:

"...[W]e need not consider in this, and we do not consider, whether an independent recommendation of another State law enforcement office for more punitive action should be held to vitiate an Assistant State Attorney's recommendation and his tacit agreement not to undermine any persuasiveness his recommendation in court may have had."

Id. 1065. In Brown v. State, 245 So. 2d 41, 45 (Fla. 1971), this court noted that "...[A]s to allowing withdrawal of a plea of guilty, a judge should be liberal in the exercise of his discretion and allow withdrawal of a plea of guilty where it is shown...that the plea was based on a failure of communication or misunderstanding of the facts." Obviously, there was a misunderstanding of the facts or a failure of communication between the State and Petitioner at the time of the plea agreement. The Petitioner assumed the State would recommend probation under the clear terms of the agreement. He had no reason to believe otherwise as the Petitioner had deposed the law enforcement officers and the prosecutor's recommendation appeared supported by the arresting officers.

Since the Petitioner moved to withdraw his plea before sentencing it cannot be argued that the Petitioner is merely dissatisfied because he did not receive the anticipated sentence. Nor can the State claim it would be prejudiced in the prosecution if the Petitioner were allowed to withdraw the plea as only a short period of time had elapsed from change of plea to the filing of the motion to withdraw. The case merely had to be placed on the next trial docket and proceed to trial on the merits.

## ISSUE II

THE CONTINGENT FEE AGREEMENT WITH THE  
INFORMANT TO PRODUCE EVIDENCE AGAINST  
THE APPELLANT VIOLATED THE APPELLANT'S  
DUE PROCESS RIGHT.

### ARGUMENT

Although the State received an extension of time to respond because of the length of the Amicus Curiae brief, the only reference to it in the State's argument was the remark that the amicus was "requesting this court to issue a dissertation on police interrelationships with so-called prospective defendants in a federal due process setting". The Petitioner disagrees with the State's appraisal of the amicus brief. The amicus brief offers a thorough review of the Florida "due process" defense and the confusion that surrounds the factors to be applied in evaluating the various due process claims of defendants. The Petitioner hopes that the amicus brief will provide assistance to this court in rendering an opinion that will help clarify the "objective" due process defense and provide guidance to bench and bar.

The Petitioner submits that the pertinent facts in the case sub judice fit within the due process factors set out in the Williamson/Joseph line of cases. Those factors are (1) the informant receives a contingent fee (2) for producing evidence (3) against a preselected target of law enforcement (4) to interrupt specific ongoing criminal activity. Williamson v. United States, 311 F. 2d 441 (5th Cir. 1962) as modified by

United States v. Joseph, 533 F. 2d 282 (5th Cir. 1976). As noted in the amicus brief, the concern of the courts in upholding this defense is the threat to a fair trial and the integrity of the judicial process.

A separate due process claim was presented in the Glosson case. As in the Williamson/Joseph setting, the concern of the courts in upholding the defense is the threat to a fair trial and the integrity of the judicial process. The relevant factors are (1) the informant receives a contingent fee and (2) the informant is a vital State witness. State v. Glosson, 462 So. 2d 1082 (Fla. 1985). The Petitioner submits that the facts in his case fit into that due process scenario as well. The informant, Ronald Carn, received a contingent fee for his efforts and the informant, in the Petitioner's opinion, was a vital State witness. After all, Mr. Carn arranged the buys, paid for the drugs, received the drugs, and was outfitted with an electronic bodybug during the transactions. The State believed the informant was a key witness as it stipulated to it at the hearing on the motion to dismiss.

The Third District in Marrero v. State, \_\_\_\_ So. 2d \_\_\_\_, 10 F.L.W. 2317 (Fla. 3d DCA Oct. 8, 1985) adhered to on motion for reh'g, 11 F.L.W. 59 (Fla. 3d DCA Dec. 24, 1985), considered the due process defense under facts similar to the case at bar. Citing Cruz v. State, 465 So. 2d 515 (Fla. 1985), the appellate court applied the bifurcated test of the entrapment defense and ruled that Marrero was entitled to a judgment of acquittal.

As in the Lee case, the detectives had no information about any prior involvement by Marrero nor did they inquire as to how long the informant had persisted in setting up Marrero. The Third District held that the police activity failed to meet either of the two parts of the threshold tests for entrapment; it did not "have as its end the interruption of a specific ongoing criminal activity", nor did it "utilize means reasonably tailored to apprehend those involved in the ongoing criminal activity". Cruz v. State, 465 So. 2d at 522. The same pertinent facts are present in the case at bar making Cruz controlling and requiring dismissal of the charges.

Thus, it is clear that under at least three of the four due process scenarios discussed in the amicus apply to this case. The lower courts erred in failing to dismiss the charges.

#### CONCLUSION

Based on the foregoing, Lee requests this court to remand this cause with instructions to grant the motion to dismiss based on improper government conduct, or alternatively, instruct the trial court to allow the Petitioner to withdraw his nolo contendere plea and proceed to trial.

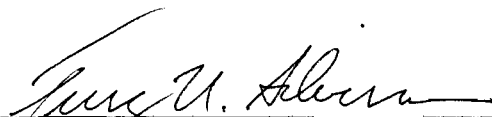
Respectfully submitted,

By: 

TERRY N. SILVERMAN  
Silverman & Silverman, P.A.  
605 Northeast First Street, Suite G  
Gainesville, Florida 32601  
(904) 377-0770  
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to John M. Koenig, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and Thomas W. Kurrus, Esquire, Post Office Box 508, Gainesville, Florida 32602, this 30 day of May, 1986.

  
\_\_\_\_\_  
TERRY N. SILVERMAN, Esquire