

IN THE SUPREME COURT OF FLORIDA

DEEPAK BIST,

PETITIONER,

CASE NO: 5D09-121
Lower Trib. Case No: 06-1139-CFFA
SC10-1129

vs.

STATE OF FLORIDA,

RESPONDENT.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

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Argument

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STATEMENT OF THE CASE AND FACTS

The petitioner was charged by Information with attempted lewd or lascivious battery, and computer pornography and child exploitation. (R-12) The charges arose from an online sting conducted between the dates of 12-08-06 and 12-10-06. The Flagler Beach Police department, working with a group calling itself Perverted Justice and NBC News via news correspondent Chris Hansen, lure persons after online conversations, to a location where they would be questioned, and subsequently arrested for soliciting a minor over the internet, and other related charges. The show is aired on national television through NBC. (R-14-15, 113-114; T5-17, 19, 30-33, 39-40)

On March 11, 2008, the parties entered into a stipulation of facts. First, that Flagler Beach police department engaged the services of Perverted Justice, to assist them in setting up a sting operation within the city of Flagler Beach, Florida. Prior to Perverted Justices' involvement, the police department had not developed any specific suspects, nor had the petitioner been developed as a suspect. Prior to Perverted Justice having knowledge of the petitioner or other suspects, Perverted Justice advised the Flagler Beach

police department that NBC, through its television show “To Catch a Predator”, wanted to cover and film the activities of Perverted Justice at the “sting house” in Flagler Beach, during the operation. The Flagler Beach police department granted approval for NBC to work with Perverted Justice during the sting. Other than being periodically advised of the status of the operation and suspects, Flagler Beach police department did not directly supervise, monitor, or otherwise participate in the online chat conversations or phone calls conducted by Perverted Justice. Perverted Justice received \$75,000 per network hour of news programming aired from NBC, which amounted to a fee of \$150,000, for the Flagler Beach operation. The persons working for Perverted Justice were not paid. R-113-114 By separate sworn affidavit, Dennis Kerr, assistant director of operations for Perverted Justice (Foundation, Inc.), affirmed that Perverted Justice received a total of \$150,000 for the Flagler Beach operation. R-113; T2-7, 23)

Petitioner filed a motion to dismiss the Information, pleading that the actions in this case on the part of Perverted Justice, in conjunction with the Flagler Beach police department, amounted to a violation of the appellant’s

due process rights, sufficient to warrant dismissal. R-94-108 A hearing was held on the motion to dismiss on March 11, 2008. Along with the incorporated affidavit and stipulation of facts, Allison Shea, aka “Del Harvey”, whose jobs with Perverted Justice range from records custodian, media relations, to training for the stings, testified at the hearing. Shea testified that Perverted Justice began receiving payments from NBC in 2006, and had done free work for them prior to that date. She described Perverted Justice as a “nonprofit organization” that goes into online chat rooms with underage profiles, where adults then solicit the profiles for sex “and use that to prosecute to convict them.” (T5-16-21)

Shea testified that she teaches law enforcement, that she had not graduated from college, and that during college she did not study anything regarding law enforcement. Related to the Flagler Beach operation, Shea testified that a police officer from the Flagler Beach police department was not with the Perverted Justice workers while they chatted online, nor was she sure if officers were reviewing logs as the chats to place online. Related to the main web site of Perverted Justice, Shea affirmed that Perverted Justice posts

arrests made from their cases, and that they advertised that they “accepted donations”. Shea also testified that Chris Hansen, the reporter who interrogates the suspects in the sting houses, does not interact with law enforcement, and that the “criteria” for determining if Perverted Justice believes that a suspect meets criteria for an arrest and subsequent prosecution is determined by Perverted Justice. Shea also testified that the representatives of Perverted Justice are not law enforcement, and are not sworn in as officers for the operations. (T5-26-32, 33-36, 39-41)

On April 23, 2008, the trial court entered a written Order denying the petitioner’s motion to dismiss. In denying the motion, the trial court noted, “The repugnancy of adults preying on minors should not change how legal investigations are conducted. What we have here is questionable law enforcement. Policing is best left to the police.” The trial court held though that based upon the totality of the circumstances, the canons of decency and fairness had not been breached to “such a level as to violate due process.” (R-116-118)

On April 9, 2010, the Fifth District Court of Appeal issued its opinion in Bist v. State, 2010 WL 1404065 (Fla.App. 5 Dist. 2010), See appendix. The appellate court, in affirming the petitioner's conviction related to the instant motion to dismiss, held that the petitioner's argument do not demonstrate a due process violation. On April 15, 2010, the petitioner filed a motion for rehearing and for certification of questions of great public importance. On May 10, 2010, the Fourth District Court of Appeal issued an order denying the petitioner's motion. Timely Notice to Invoke Discretionary Review was filed by the petitioner on June 9, 2010.

SUMMARY OF ARGUMENT

Petitioner has properly invoked the conflict jurisdiction of this Honorable Court. The opinion in Bist v. State, --- So.3d ----, 2010 WL 1404065 (Fla. 5th DCA 2010), expressly and directly conflicts with the decisions of this Honorable Court in Munoz v. State, 629 So.2d 90 (Fla. 1993); State v. Glosson, 462 So.2d 1082 (Fla. 1985). The action of law enforcement, in conjunction with their agent, Perverted Justice, violated the due process of

rights of petitioner Bist, under both the Florida and United States Constitutions, to the extent that the trial court was erred in failing to grant the petitioner's motion to dismiss. See, U.S.C.A. Const.Amend. 14; Florida Constitution, Article I, Section 9.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT

To properly invoke the conflict jurisdiction of this Honorable Court, Petitioner must demonstrate that there is express and direct conflict between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article V, Section 3(b)(3), Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv). In The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), this Court explained that it had

jurisdiction “over

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any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests.” Id. 288.

In holding the actions of law enforcement, in conjunction with the vigilante – for profit group – known as Perverted Justice, did not violate petitioner’s due process rights sufficient to require dismissal of the instant charges, the Fifth District Court of Appeal rendered an opinion which expressly and directly conflicts with this Honorable Court’s opinions in Munoz v. State, 629 So.2d 90 (Fla. 1993); State v. Glosson, 462 So.2d 1082 (Fla. 1985). Both cases stand for the proposition that (1) in determining whether a “due process” violation is sufficient to warrant dismissal of a defendant’s charges based upon government misconduct, the trial court is to ***focus on the conduct of law enforcement, and not that of the defendant.*** .

Additionally, the Bist opinion conflicts directly with this Court’s holdings related to contingent fee arrangements between a government agent, and law

enforcement. Here, although denying the petitioner's motion to dismiss, the trial court specifically

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found that Perverted Justice *“operated on a contingent fee basis because they were paid \$75,000 per programmable network hour, thereby creating an incentive to entrap as many persons as possible in order to increase their paycheck from NBC. ... ‘Perverted Justice did in fact have a financial incentive that was contingent upon the amount of persons they could get to the sting house, thereby increasing their billable hours.’”*

(Order denying motion to dismiss – page 2)

In finding that the petitioner's due process rights were not violated by the behavior of law enforcement, in conjunction with Perverted Justice, acting as its agent, the lower court's opinion conflicts with this court's holdings in both Munoz v. State, 629 So.2d 90 (Fla. 1993); State v. Glosson, 462 So.2d 1082 (Fla. 1985). The government's behavior, in conjunction with Perverted Justice, rose to the level of outrageous conduct, and violated the petitioner's due process rights pursuant to U.S.C.A. Const.Amend. 14, and the Florida

Constitution, Article I, Section 9, to the extent that the trial court erred in failing to grant the petitioner's motion to dismiss.

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CONCLUSION

WHEREFORE, petitioner has validly invoked the conflict jurisdiction of this Honorable Court in the instant case. The petitioner respectfully requests that this Honorable Court grant his petition for review and reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE RE: FONT SIZE

COMES NOW, Jack A. Fleischman, attorney for the petitioner, and certifies that he has used Times New Roman, 14 Point Font, for this brief.

Respectfully submitted,

Jack A. Fleischman

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing was Mailed this 14 day of June, 2010, to: Attorney General's Office - Criminal Appeals Division, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118

By _____
Jack A. Fleischman

cc: Client

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PETITIONER'S APPENDIX TO BRIEF ON JURISDICTION