

FLORIDA SUPREME COURT

JAMES KING,

Appellant,

CASE NO. : SC01-1883

v.

STATE OF FLORIDA,

Appellee.

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APPELLANT'S INITIAL BRIEF ON THE MERITS

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On appeal from a question certified by  
the Fifth District Court of Appeals  
in Case No. 5D00-1518

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NEAL T. MCSHANE, ESQUIRE  
Florida Bar No. 273740  
836 North Highland Avenue  
Orlando, Florida 32803  
(407) 648-1500  
Fax (407) 648-2027  
E-mail [MCSHANELAW@aol.com](mailto:MCSHANELAW@aol.com)  
Attorney for Appellant/Defendant  
James King

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## **STATEMENT OF THE CASE AND FACTS**

On February 15-17, 2000, defendant/appellant JAMES KING stood trial on a nine-count Second Amended Information filed against him by the Office of the Statewide Prosecutor [OSP]. The information charged that King was guilty of burglary of a structure, multiple counts of grand theft auto, one count of possession of a motor vehicle from which the identification number has been removed, one count of attempted first degree murder, and one count of solicitation to commit murder in the first degree. Each of the crimes allegedly occurred in Orange County, Florida. In order to support the Statewide Prosecutor's exercise of jurisdiction, the information generally alleged:

AND SAID OFFENSES OCCURRED IN TWO OR MORE JUDICIAL  
CIRCUITS IN THE STATE OF FLORIDA AS PART OF A  
RELATED TRANSACTION OR SAID OFFENSES WERE  
CONNECTED WITH AN ORGANIZED CRIMINAL CONSPIRACY  
AFFECTING TWO OR MORE JUDICIAL CIRCUITS IN THE  
STATE OF FLORIDA.

Defense counsel repeatedly challenged the jurisdiction of the OSP to prosecute the case against King at trial. The information failed to specifically identify any other Florida judicial circuit in which King's alleged crimes occurred. The OSP offered no evidence to the jury to demonstrate the multi-jurisdictional nature of the charges but,

instead, only proffered inadmissible hearsay testimony that King was once overheard talking about stealing motorcycles in Daytona to the trial judge. When King was convicted, he again challenged the OSP's jurisdiction on appeal to the Fifth District, asserting that the OSP failed to properly allege and prove the jurisdictional facts requisite to the OSP's exercise of jurisdiction of his case. In upholding King's conviction, the Fifth District stated:

[t]he policy behind the creation of the Office of the Statewide Prosecutor demands that we broadly construe the prosecutorial authority of the statewide prosecutor. Here, it was alleged generally in the information that although the charged offenses were themselves committed in Orange County, that they "occurred in two or more judicial circuits ... as part of a related transaction." *Proof was submitted to the trial judge which convinced him of the truth of this allegation.* We believe the constitutional provision, further developed in the statute, contemplates that even a local offense committed as part of a multi-district criminal activity, because of this relation, "legally occurred" in two of more judicial districts. [Emphasis added.]

In King's motion for rehearing, he challenged the Fifth District's analysis and specifically sought resolution of two legal questions, to-wit:

A. Where a defendant challenges the factual basis for the OSP's claim of jurisdiction to prosecute a crime based on a general allegation that the crimes charged occurred in more than one judicial circuit, must the OSP prove the facts asserted as the basis for the OSP's exercise of its limited statutory jurisdiction to the jury beyond a reasonable doubt by

competent, admissible evidence?

B. Where a defendant challenges the factual basis for the OSP's claim of jurisdiction to prosecute a crime by motions for judgmental of acquittal made after the close of the State's case, is it sufficient for the OSP to proffer inadmissible hearsay evidence of uncharged crimes to the trial judge to demonstrate a factual basis for the exercise of the OSP's jurisdiction not proved to the jury by the OSP in its case in chief?

In granting King's motion for rehearing, the Fifth District recognized its possible conflict with the First District Court of Appeal's decision in *Winter v. State*, 781 So.2d 1111 (Fla. 1<sup>st</sup> DCA 2001), and certified the conflict and the following question to this Court for resolution, to-wit:

**DOES THE OFFICE OF THE STATEWIDE PROSECUTOR HAVE JURISDICTION TO PROSECUTE A BURGLARY IN THE COUNTY IN WHICH IT WAS COMMITTED IF IT IS ALLEGED THAT THE BURGLARY WAS PART OF A BUSINESS ENTERPRISE IN MULTI-CIRCUIT CRIMES?**

The Supreme Court has jurisdiction of the question certified pursuant to Rule 9.030(a)(2)(v) and/or (vi), Florida Rules of Appellate Procedure, because the question sought to be resolved is of exceptional statewide importance and, the Fifth District's June 8, 2001 opinion is in conflict with the First District's decision in *Winter v. State*, 781 So.2d 1111 (Fla. 1<sup>st</sup> DCA 2001) and *Apprendi v. New Jersey*, 530 U.S. 466, 120

S.Ct. 2348, 147 L.Ed.2d 435 (2000).

## SUMMARY OF ARGUMENT

Both the Fifth and First District Courts of Appeal erroneously found that the OSP need not plead and prove to a jury beyond a reasonable doubt the jurisdictional facts requisite to the OSP's exercise of its statutorily-limited jurisdiction.

## ARGUMENT

The Fifth District avoided reversing King's conviction in this case by analyzing a public policy issue concerning the OSP's jurisdiction that was not even before the court. Notwithstanding the Fifth District's misdirected analysis, King did not challenge the OSP's jurisdiction to prosecute "a purely local crime." In fact, as a general proposition, King agrees with the Fifth District's conclusion that the OSP can prosecute "*a purely local crime, such as burglary*" if that crime is ***both alleged and proved*** to be "part of a related transaction" that occurred in another judicial circuit, or when it "is connected with an organized criminal conspiracy affecting two or more judicial circuits."

The Office of the Statewide Prosecutor is a creature of the Florida Constitution and of specific Florida Statutes. See Art. IV, § 4(c), Fla. Const.; § 16.56(1)(a), Fla.Stat.; *Zanger v. State*, 548 So.2d 746 (Fla. 4th DCA 1989). Under the applicable

constitutional provision, the statewide prosecutor has “concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law.” Art. IV, § 4(c), Fla. Const. Additionally, § 16.56(1)(a), Florida Statutes, provides that the OSP “may ... [i]nvestigate and prosecute” several enumerated crimes, but “[t]he office shall have such power *only* when such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits.”

The issues in King’s case are:

**~ did the OSP sufficiently allege the requisite jurisdictional facts in the information filed against King; and,**

**~ did the OSP prove the requisite jurisdictional facts necessary to support the OSP’s exercise of jurisdiction of King’s case at trial?**

In affirming King’s conviction, the Fifth District clearly ignored the fact that none of the three informations filed against King identified any other judicial circuit that was supposedly effected by the Orange County crimes charged. None of the

informations identified the “organized criminal conspiracy affecting two or more judicial circuits” with which the alleged Orange County crimes were supposedly connected. Moreover, the Fifth District’s conclusion that “it was shown that King had for some time before the events alleged in this information operated a motorcycle chop shop in Orange County (Ninth Circuit) which depended in part on stolen motorcycles from Volusia County (Seventh Circuit),” is premised on testimony King’s jury never heard.

The OSP only proffered Robert Shaefer’s testimony that he overheard King talking about stealing motorcycles in Volusia County to the trial judge, outside the presence of the jury. Thus, the jury never heard the evidence upon which the Fifth District decided the OSP’s jurisdiction was properly founded. Obviously, both the trial judge and the Fifth District simply presumed that the OSP could prove the requisite jurisdictional facts without considering the admissibility of the proffered evidence. Consequently, without any pre-trial notice of the OSP’s intent to rely on evidence of other, uncharged crimes and, without any foundation laid for its admission, King had no opportunity to prepare or to defend himself when he was ambushed by the OSP’s proffer of Shaefer’s inadmissible hearsay testimony at trial. Therefore, just as the First District did in *Winter v. State*, 781 So.2d 1111 (Fla. 1<sup>st</sup> DCA 2001), the Fifth District should have recognized that the OSP’s failure to

sufficiently allege and prove the jurisdictional facts requisite to its prosecution of the case against King mandates reversal of King's conviction. In *Winter*, the First District rejected the same kinds of arguments advanced by the OSP in King's case.

In *Winter*, for example, the State also argued that when the OSP generally alleges that the crimes charged affected two or more judicial circuits, the only way to challenge the jurisdiction of the OSP is by *quo warranto*. The First District rejected that argument and specifically recognized that “[t]he OSP need not allege in particular counts that the crimes occurred in or affected two or more judicial circuits.... The general jurisdictional allegation ... is therefore sufficient. *Nevertheless, a defendant facing prosecution by the OSP must have some means to argue that the facts do not support jurisdiction.*” *Id.* at 1116. Thus, the First District held that a defendant can challenge the factual basis for the OSP's jurisdiction by a motion to dismiss.

The First District also specifically recognized that the connection between the crimes charged and the uncharged, but argued consequences purportedly flowing from those crimes does not fulfill “the statutory requirement of ‘affecting two or more circuits,’” “absent actual impact in other judicial circuits.” The First District concluded that the OSP did not have authority to prosecute a defendant charged with 14 criminal counts arising out of his employment at Unisys, the former administrator

of the Florida State Employees' Health Self Insurance Fund. The defendant was a supervisor at Unisys, who with two other Unisys employees hatched an idea to process health claims through a false provider using a real doctor's license, receive and cash the benefit checks themselves, and then split the money amongst the three of them. The State argued at least three different theories under the OSP statute as the bases of its jurisdiction similar to the arguments made in King's case.

On appeal in *Winter*, the State primarily relied on the argument that since the defendant and his co-conspirators stole from a trust fund contributed to by state employees statewide, the crimes alleged to have occurred solely in Leon County had a statewide impact, as generally alleged in the same kind of catch-all jurisdictional allegation set forth in the first and second amended informations filed against King by the OSP in this case. In reversing Winter's conviction, the First District held that:

[a]ssuming arguendo that the conspiracies here involved a fund to which employees in various judicial circuits may have contributed, such falls short of the showing required to invoke an OSP prosecution.... **Absent clear proof of an actual impact in other judicial circuits, the statutory requirement of "affecting two or more circuits" is not satisfied....** The legislative grant of OSP authority applies "only" when an offense enumerated in the statute has occurred in two or more judicial circuits as part of a related transaction or, as is relevant here, when "connected with an organized criminal conspiracy affecting two or more judicial circuits." §16.56(1)(a), Fla.Stat. We find that the Legislature has purposefully limited OSP jurisdiction, and we therefore decline to give

the expansive reading advanced by the State. *Id.* at 1116. [Emphasis added.]

The First District's reasoning in reversing Winter's conviction is clearly applicable in King's case. King repeatedly challenged the factual basis of the OSP's jurisdiction to prosecute him; King did not challenge the authority of the specific Assistant Statewide Prosecutor assigned to his case. The OSP failed to offer any competent, admissible evidence to demonstrate its jurisdiction. The OSP failed to give King any pre-trial notice of its intent to rely on the *Williams Rule* evidence it proffered to demonstrate the generally-alleged jurisdictional facts. The OSP laid no foundation for the inadmissible, hearsay testimony it proffered to demonstrate the OSP's jurisdiction to the judge, outside the jury's presence. Obviously, the Fifth District should have addressed the issues King actually raised in his case, in the same manner as the First District addressed the issues raised in Winter's case. Instead, the Fifth District avoided the issues by reexamining a question of public policy it essentially answered years ago. *See, Nuckolls v. State*, 677 So.2d 12 (Fla. 5<sup>th</sup> DCA 1996); *Snyder v. State*, 715 So.2d 367 (Fla. 5<sup>th</sup> DCA 1998).

However, similar to the Fifth District's conclusion that the OSP's proffer of inadmissible hearsay evidence of uncharged crimes to the trial judge was sufficient to demonstrate the OSP's jurisdiction in King's case, in *Winter*, on the State's motion

for clarification and certification, the First District held that “[t]he jurisdiction of the OSP will be determined by the court and will not be submitted to the jury as a question of fact.” *Id.* at 1117. Thus, both the First and the Fifth District have created an unconstitutional exception to the basic rules of due process reiterated by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Apprendi*, the Supreme Court expressly held:

... [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)]: “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” 526 U.S. at 252-253, 119 S.Ct. 1215.... [Emphasis added.]

The Supreme Court found that the New Jersey hate crime statute violated fundamental concepts of due process because it permitted the state to seek enhancement of Apprendi’s sentence by submitting proof by a preponderance of the evidence to the trial court at sentencing that the crimes Apprendi was convicted of were motivated by racial hatred. The Supreme Court held that, consistent with the fundamental concepts of due process it reexamined, the factual basis for the

classification of a crime as a “hate crime” had to be alleged in the charging document and proved to a jury beyond a reasonable doubt.

Because jurisdiction to prosecute a crime is fundamental to the legality of a criminal conviction, alleged jurisdictional facts must be proved to a jury beyond a reasonable doubt, as must every other element of a crime charged. As noted by the court in *Zanger, supra* at 748,

Rule 3.140(o), Florida Rules of Criminal Procedure, ... has been relied on by the supreme court in holding that absent a showing of prejudice to the defendant, a failure to allege *venue* in an indictment or information is not a defect which will render the charging instrument void. *Tucker v. State*, 459 So.2d 306 (Fla. 1984). The court in *Tucker* took care to distinguish jurisdiction from venue, however, noting that there the issue was “solely one of venue, not affecting the *power* of the court to hear the case but rather addressing the *propriety* of that particular trial court to hear that particular case.” *Id.* at 308. It appears that an inquiry into prejudice or embarrassment or whether the defendant may have been misled is not appropriate in a case involving an information with a jurisdictional defect as opposed to one merely incorrect as to venue. The general rule, then, is that jurisdiction is to be determined from the face of an indictment or information and any conviction based on an information which does not properly allege jurisdiction is void.

Contrary to *Apprendi*, both the Fifth and First Districts would unconstitutionally relieve the OPS of its burden to prove all the allegations of any information or indictment it files beyond a reasonable doubt to the jury. Both

Districts would unconstitutionally authorize the OSP to prove a general jurisdictional allegation to the trial court by some lesser, unidentified standard of proof, without examination of the admissibility of the evidence proffered. Thus, both the Fifth District's decision in this case and the First District's decision in *Winter* clearly run afoul of the very due process protections the United States Supreme Court found to be so compelling in *Apprendi* as to justify its decision that the New Jersey hate crime statute was unconstitutional.

### CONCLUSION

This Court must examine the issues presented in King's case in light of the applicability of both *Winter* and *Apprendi* and reject the Fifth District's public policy analysis. This Court must recognize and apply the basic due process concepts reiterated in *Apprendi* and reject both the First and the Fifth Districts' determination that it is sufficient for the OSP to demonstrate its jurisdiction to prosecute a case by a proffer of incompetent, inadmissible evidence to the trial judge, outside the presence of a jury. This Court must find that the facts necessary to confer jurisdiction on the OSP to prosecute any case are an essential element of any offense prosecuted by the OSP and, therefore, must be alleged in an indictment or information and, when challenged, proved to a jury beyond a reasonable doubt by competent, admissible evidence. Just as the First District did in *Winter*, this Court must reverse

appellant James King's conviction because the OSP did not sufficiently allege or prove the facts necessary to demonstrate its jurisdiction to prosecute King for the Orange County crimes charged. THEREFORE, JAMES KING respectfully requests that the Court reverse and vacate his conviction.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief on the Merits was provided to AGA Carmen F. Corrente, Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118 this \_\_\_\_\_ day of September, 2001.

### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief has been produced in compliance with the requirements of Rule 9.210(a)(2), Fla.R. App.P., in 14 pt. Times New Roman font. In accordance with the Court's February 5, 1999 Administrative Order, a copy of Appellant's Initial Brief on the Merits is contained on the 3 1/2" computer disk, in WordPerfect 9 format, that was filed together with this brief.

**LAW OFFICES OF NEAL T. MCSHANE, P.A.**

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By: NEAL T. MCSHANE, ESQUIRE

Fax Florida Bar No. 273740  
836 North Highland Avenue  
Orlando, Florida 32803  
(407) 648-1500  
(407) 648-2027  
Attorney for Appellant/Defendant  
James King