

IN THE CIRCUIT COURT IN THE 17th
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 16006683CF10A

STATE OF FLORIDA,

Plaintiff,

vs.

SHARRIE THELWELL-JAMES,

Defendant.

**MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT OR IN THE
ALTERNATIVE FOR SANCTIONS**

PLEASE TAKE NOTICE that the Defendant SHARRIE THELWELL-JAMES (“THELWELL”), by and through undersigned counsel, pursuant to Fla. R. Crim. P 3.190 (B) and Fla. R. Crim. P. 3.220 and respectfully requests this Honorable Court enter an Order to Dismiss the Information in this case, or alternatively to sanction the State of Florida and states as follows:

1. On June 13, 2016, the State of Florida (“STATE”) filed its Information in the above case.
2. On September 26, 2022, the STATE filed its Second Amended Information.
3. On May 12, 2022, the court entered an order cutting off discovery on September 30th, 2022.
4. At all times relevant, Former DEA Agent Steven Gilbert (“GILBERT”) was listed as a Witness in Discovery as an employee of the DEA and was never listed as an Expert Witness.

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5. In January 2022, the jury trial commenced.
6. Upon review of the STATE's discovery submission, GILBERT was the supervising agent and signed off on the reports as such. He was not listed as an expert in the field of Money Laundering.
7. Notably, THELWELL is charged with, inter alia, Money Laundering
8. On March 13, 2023, the STATE called Former Supervising Agent Gilbert ("GILBERT") to testify.
9. During the initial course of testimony GILBERT was not asked by the STATE about his current employment or additional education.
10. Due to scheduling issues, the prosecutor who started the initial questioning took leave, another prosecutor commenced questioning on March 14, 2023, and the initial questioning prosecutor then recommenced questioning on March 15, 2023.
11. After a recess, the STATE continued to question GILBERT and inquired into his background regarding money laundering. On March 15, 2023, the State elicited testimony inquiring about GILBERT's training in money laundering, which did not occur until at the very least four (4) years after his retirement from the DEA.
12. Whereupon an objection was raised as GILBERT was never listed as an expert witness in any field, let alone money laundering.
13. It should be noted that the STATE in its initial discovery of August 31, 2016, disclosure listed one John Carbonaro ("CARBONARO") as an "A" witness.
14. During the course of the defense investigation, it was learned that CARBONARO was a Senior Financial Investigator.

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15. Further throughout the defense investigation, and during the testimony of GILBERT outside the presence of the jury, that material defects were apparent in CARBONARO's financial data compilations. Further, and germane to this motion, that GILBERT did not use the initial data to compile reports he produced for the case. He used a second set of data.
16. It was advised that before the trial began that CARBONARO was not going to testify.
17. During the course of the STATE's proffer on March 15, 2023 it was learned that GILBERT was tasked by the STATE to review the bank records, and make calculations. Pursuant to this request, reports were produced in January 2023. Well after the discovery cutoff.
18. These calculations and reports were willfully never turned over to the defense.
19. The willfulness rises to the level of prosecutorial misconduct as defense counsel for the codefendant attempted to depose the author/creator of the corrupt data (CARBONARO) and provided the state and witness with specific questions regarding the data. The state announced that they would not to call CARBONARO and was led to believe he was the only witness that could testify to the money trail.
20. The Court has the inherent authority under Florida Rule of Criminal Procedure 3.220(3) to sanction the State for discovery violations.
21. By having GILBERT do calculations and compile reports, the STATE is trying to bring in expert testimony from a person who was not listed as an expert.

There is simply no other rational explanation,

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22. The state intentionally attempted to introduce inadmissible evidence by hiring an “expert” to analyze raw, unverified data after the discovery deadline without turning over the spreadsheets/raw data and hid the ball by not listing him as an expert witness. GILBERT further testified to the court that he was being paid his salary by his new company FIVE STONES who was a Department of Justice contractor. So, by proxy, his new company would like to keep their source of funding satisfied by allowing him to work on this DEA matter privately.
23. “The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.”
24. “If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances”.
25. “Willful violation by counsel or a party not represented by counsel of an applicable discovery rule, or an order issued pursuant thereto, shall subject counsel or the unrepresented party to appropriate sanctions by the court. The sanctions may include, but are not limited to, contempt proceedings against the attorney or unrepresented party, as well as the assessment of costs incurred by the opposing party, when appropriate.”

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LEGAL ARGUMENT

The STATE engaged in a coverup. As CARBONARO was not testifying, they employed a retired Agent who received subsequent training on money laundering after the arrests to recreate CARBONARO's work, but willfully chose not to disclose this to the defense. Florida Rule of Criminal Procedure 3.220(b)(1)(A)(i) requires the State to disclose, as Category A witnesses, "expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify."

Thomas v. State, 63 So. 3d 55 (Fla. 4th DCA 2011) is directly on point. The Fourth District Court of Appeal found a discovery violation where a witness who was listed as a Category A witness, but who had not been designated as an expert, was permitted to testify at trial as an expert. Id. at 59.

Florida Rule of Criminal Procedure 3.220(j) provides that "[i]f subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material"

This never happened.

In fact, the STATE, having their hand caught in the cookie jar, sheepishly attempted to argue that all GILBERT did was do "simple arithmetic". That is a red herring. The issue is that GILBERT made "notes", created reports, and did calculations after the discovery cutoff, which was never disclosed. Then the state poisoned the jury by asking GILBERT's background in money laundering training.

Florida courts have interpreted Rule 3.220(b)(1)(A)(i) to require that when a witness is going to testify as an expert, the witness list provided in discovery must specifically designate that person as an expert witness. E.g., Kipp v. State, 128 So. 3d

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879, 881 (Fla. 4th DCA 2013). The state never listed GILBERT as an expert, and never disclosed to the defense that he was tasked with more work, and that he compiled reports. As the Fourth District Court of Appeal stated in Kipp, "It is not enough to list such witnesses as Category A witnesses. Instead, the state is also required to indicate that the witness will testify as an expert." Id.

In Luis v. State, the Second District Court of Appeal found the State's attempt to qualify an officer as an expert witness at trial to be a discovery violation because the officer was only designated as a Category A witness during discovery. 851 So. 2d 773, 776 (Fla. 2d DCA 2003). Therefore, the State commits a discovery violation when it attempts to elicit expert testimony from a witness not previously designated as an expert on its witness list.

For these reasons, if the State fails to designate the agency inspector as an expert witness on its Witness List, then that failure constitutes a discovery violation if the State attempts to elicit expert witness testimony of the witness at trial.

If the defense objects to that discovery violation, then the trial court is obligated to conduct a Richardson hearing, and its failure to do so was error. Curry, 1 So. 3d at 398; Thomas, 63 So. 3d at 60.

CONCLUSION

The state's conduct is outrageous. They played hide the ball and then tried to coverup their deceit by claiming the reports were simple arithmetic. It doesn't matter if it is simple arithmetic, or DNA, the state has a duty to disclose the reports. "[P]rosecutors, like all lawyers, have ethical responsibilities. Most significant among these is a duty to seek justice." Lewis v. State, 711 So. 2d 205, 208 (Fla. 3d DCA 1998) (emphasis added) (citing [344 So.3d 394]..." Ritchie v. State, 344 So.3d 369 (Fla. 2022).

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The court should dismiss this matter with prejudice due to the state's willful and intolerable behavior. Otherwise, the court should bar GILBERT from testifying any further.

WHEREFORE, SHARRIE THELWELL-JAMES respectfully requests this Honorable Court enter an Order either dismissing this case or sanctioning the State of Florida, together with such other and further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed via e-filing with the Clerk of Court and copies furnished via email to Office of the Assistant Statewide Prosecutor Cynthia Honick (Cynthia.honick@myfloridalegal.com) on this 17th day of March 2023.

Respectfully submitted,

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