FILED
SID J. WHITE
JUN 5 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT, STATE OF FLORIDA

CASE NO. 65,188

MICHAEL WILBER SNEERINGER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
DOCKET NO. AR-123

INITIAL BRIEF OF APPELLANT

William N. Avera
AVERA, BERNSTEIN & PERRY
Post Office Drawer G
Gainesville, Florida 32602
904 372-9999
Attorneys for Appellant

TABLE OF CONTENTS

CITATIONS OF AUTHORITY

CONSTITUTIONS:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

The Appellant, Michael Wilber Sneeringer, will be referred to in this brief as he appeared in the trial court (Defendant) or by proper name (Sneeringer). The Appellee, the State of Florida, will be referred to in this brief as the State.

References to the Record on Appeal will be made with the symbol "R- " followed by the appropriate page number.

References to the Transcript of Trial Proceedings will be made by the symbol "T- " followed by the appropriate page number.

STATEMENT OF THE CASE

On August 11, 1982, a two count Information was rendered charging the Defendant and a Co-Defendant with trafficking in cannabis and a conspiracy to trafficking in cannabis. (R-1) The Defendants entered Pleas of Not Guilty. (R-3)

The Defendant filed a Motion to Dismiss pursuant to Rule 1.1, Fla. R.C.P., upon which an evidentiary hearing was held. (R-18) The basis of said motion was that the Defendant was entrapped into committing the offense as a matter of law. The State filed a traverse, and hence, Defendant's Motion to Dismiss was denied. (R-42, 45, and 53)

This case proceeded to trial on December 12, 1982 before The Honorable Wallace Jopling, Circuit Judge. Pursuant to motions of the Defendant, the trial court entered a Judgment of Acquittal as to Count Two, the conspiracy to trafficking in cannabis. (T-308) Count I, Trafficking Cannabis, was also dismissed (T-305), and this case proceeded to trial upon the charge of attempted trafficking in cannabis. After a two-day trial, the jury deliberated fifteen (15) minutes and found the Defendants guilty of attempted trafficking in cannabis (R-78, 79). The Defendant was adjudicated guilty and sentenced on January 28, 1983.

By corrected opinion, this cause was affirmed by the First District Court of Appeal on March 30, 1984. In said opinion, the First District Court of Appeal certified a question to the Supreme Court of Florida as being of great public importance. Notice of Appeal was filed in this Court on April 13, 1984.

STATEMENT OF FACTS

This case originates with the arrest of one Ed Follis in May of 1982 by officers Bud DuBose and David Turner of the Gilchrist County Sheriff's Department. Follis was arrested for growing marijuana in the home and yard where he resided with his wife, Barbara Follis. (T-166) Ed Follis had previously been arrested by Deputy DuBose in May of 1981 for planting marijuana.

Seeking help with his second felony drug arrest, Ed Follis informed Deputy DuBose that he would attempt to involve other people in drug activity. (T-316) As payment for Follis' efforts, Deputy DuBose agreed to talk to the State Attorney and help with Follis' sentence. (T-318) Ed Follis died on July 11, 1982, before he could report back to Deputy DuBose regarding his efforts. (T-167, 318)

Ed Follis knew the Defendant, Michael Wilber Sneeringer, through his employment at the Gainesville Airport in 1970. Follis began working for Sneeringer and one James Lambert gassing airplanes in their crop dusting business until 1976. (T-323) After being arrested and agreeing to work with Deputy DuBose, Ed Follis contacted Michael Sneeringer the first week in June of 1982. Follis came to Sneeringer's home on three separate occasions and related that he was growing marijuana in Sumter County and had inadvertently found approximately five

hundred pounds of marijuana there. (T-325, 326) Sneeringer refused Follis' invitation to purchase the marijuana on all three occasions. (T-326) In actuality, the alleged five hundred pound of marijuana in Sumter County did not exist and was created by Follis and law enforcement personnel soley for the purpose of future prosecution. (T-158)

At the time of Ed Follis' death, Barbara Follis contacted and conversed with Deputy DuBose regarding her husband's charges. (T-167) Barbara Follis was present in the home when Ed Follis was arrested for growing marijuana and has been told that she too could have been arrested (T-173, 194) Mrs. Follis was informed as to her husband's status as an undercover operative and Deputy DuBose wanted her as to carry on with what Ed Follis had started. (T-189, 179) Mrs. Follis agreed to continue with the effort started by Ed Follis to involve other persons in drug related activity. (T-318, 319) The F.D.L.E. has set procedures for using non-law enforcement persons as undercover agents to ensure they do not entrap innocent persons. (T-152) No such procedures or training was used with Barbara Follis.

On the same day of Ed Follis' dealth, Barbara Follis approached one Herbert Langford and attempted to sell him marijuana. (T-363) Offers to sell marijuana and cocaine were

made on repeated occasions, with the claim that Ed Follis had found five hundred pounds of marijuana which Barbara now possessed. (T-364, 365) Her offers continuously rejected, Barbara Follis quit approaching Herbert Langford approximately three weeks after Ed Follis' death. Herbert Langford was originally arrested with Ed Follis in May of 1981 for growing marijuana, a fact well know to Barbara Follis for she potted some of the plants which resulted in the arrest. (T-367) Barbara and Ed Follis had previously been asked to leave the home of Elliot Gossett which they rented because of growing marijuana in the home and involving the Gossett's minor son in watering the plants. (T-370)

The Defendants, Sneeringer and Timmons, eventually met with Barbara Follis on the highway between Trenton and Bell, Florida. Mr. Timmons had left a note at Mrs. Follis' residence requesting that she call him regarding Ed Follis' "body and fender" tools. Ronald Timmons was also in the auto repair business. (T-329, 353) Follis related to the Defendants that she had six thousand dollars in debts and was completely destitute financially. She inquired as to whether they would be interested in buying marijuana which Ed had worth fifteen hundred dollars per pound. Both Defendants refused. (T-330)

Mr.Sneeringer was recontacted on several occasions,

each time with a reduction in price and a description of the financial problems of Barbara Follis. (T-331) The Co-Defendant Timmons was contacted the following day, and the price lowered also. Timmons rejected the offer. (T-356) Follis subsequently contacted Timmons at his body shop further relating a desperate financial situation and offered five hundred pounds of marijuana for twenty thousand dollars. (T-356) She recontacted Timmons the next day and offered two hundred pounds for ten thousand dollars. (T-357) Timmons and Sneeringer finally consented to the deal. (T-334, 335)

A meeting was subsequently arranged by law enforcement personnel whereby Barbara Follis would introduce agent Robin McDaniel of the Florida Department of Law Enforcement to the Defendants as her brother. This meeting occurred at Barbara Follis' real estate office in Trenton, Florida and the money was exchanged, two hundred pounds for ten thousand dollars. Agent McDaniel then entered an automobile with the Defendants and crossed the Santa Fe River from Gilchrist County to the shores of Suwannee County for the culmination of the transaction. (T-160)

The marijuana for use in this transaction was supplied by Sheriff Robert Leonard of Suwannee County. The "transfer site" was chosen by Agent McDaniel and Sheriff Leonard and was

surrounded by numerous law enforcement officers. Upon arriving at the scene, each Defendant was handed one bale of marijuana and the arrest ensued. The law enforcement officers did not intend to let either Defendant leave the scene of the transfer with the marijuana. (T-160)

All law enforcement officers involved in this operation agree that there was in fact no illegal marijuana located in Sumter County as alleged. (T-158) The only illegal drug involved in the operation was furnished by law enforcement personnel. Further, the Defendants, Michel Sneeringer and Ronald Timmons, were not under investigation by any law enforcement agencies for suspected drug involvement at the time of this operation. (T-157, 222, 223, 225) Third, according to Sheriff Leonard, the transaction was designed to occur in Suwannee County due to the high conviction rate in that county for drug offenses. (T-251)

Five years prior to this incident, Michael Sneeringer had knowledge of a drug operation involving two veterinarians in Gainesville, Florida. Mr. Sneeringer participated in that operation on two occasions and voluntarily withdrew. He subsequently approached the State Attorney of the Eighth Judicial Circuit and told of his entire involvement in the operation and all facts known to him and fully agreed to

cooperate and appear as a State witness should the need arise. Mr. Sneeringer was never charged nor arrested for any offense as a result of this prior situation in 1977. (T-340) There is absolutely no evidence nor suspicion of Michael Sneeringer having been involved in drug activity since 1977 and until the present. Ronald Timmons has never been arrested nor suspected of any illegal drug involvement.

Extensive deposition testimony obtained prior to trial was presented to the Court in support of Defendants' Motion to Dismiss. Defendants' Memorandum concerning the depositions and law relating to Defendants' Motion to Dismiss (R-56-77) recites the relevant portions of each of these depositions and would be of great assistance to this Court in determining the propriety of the trial Court's denial of Defendants' Motion.

In instructing the jury, the trial Court misread Florida Standard Jury Instruction 3.04(c) and charged the jury that the Defendants <u>weren't</u> entrapped if "they had no prior intention to commit the crime of attempted trafficking in marijuana, but were persuaded, induced, or lured into commiting the offense, and the person who persuaded, induced, or lured them into commiting the offense was a law enforcement officer or someone acting for the officer." (T-457)

By corrected opinion dated March 30, 1984, the First

District Court of Appeal certified the following question to be one of great public importance:

> "If the state has the burden to prove beyond a reasonable doubt that a defendant was not entrapped when that defense has been raised, it is the giving of the present entrapment instruction as set forth in Standard Jury Instruction 3.04(c) along with a general reasonable doubt instruction sufficient, notwithstanding the defendant having specifically requested the court to instruct the jury that the state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officer."

ISSUES ON APPEAL

I. WHETHER FLORIDA STANDARD JURY INSTRUCTION 3.04(C) ACCURATELY AND ADEQUATELY STATES THE LAW AND BURDEN OF PROOF REGARDING THE DEFENSE OF ENTRAPMENT.

II. WHETHER THE MISREADING OF FLORIDA STANDARD JURY INSTRUCTION 3.04(C) BY THE TRIAL COURT CONSTITUTES FUNDAMENTAL ERROR REQUIRING REVERSAL.

ARGUMENT

I. FLORIDA STANDARD JURY INSTRUCTION 3.04(C) DOES NOT ACCURATELY AND ADEQUATELY STATE THE LAW AND BURDEN OF PROOF REGARDING THE DEFENSE OF ENTRAPMENT.

As a first point on appeal, the Defendant addresses a question which has been certified to this Court in the recent cases of Rottenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983) and McCray v. State, 433 So.2d 5 (Fla. 4th DCA 1983). In each case and the case at bar, the District Courts have certified to the Supreme Court as a question of great public importance the adequacy of Florida Standard Jury Instruction 3.04(c).

The Defendants' precise objection to Florida Standard Jury Instruction 3.04(c) concerns the burden of proof on the entrapment defense. Instruction 3.04(c) provides in its final paragraph:

> "If you find from the evidence that the Defendant was entrapped, or if the evidence raises a reasonable doubt about the Defendant's guilt, you should find him not guilty." Florida Standard Jury Instruction 3.04(c) (1981).

The controversy concerning this instruction is brought into sharp focus by an examination of the 1976 Standard Jury Instruction regarding entrapment. The final paragraph of Florida Standard Jury Instruction 2.11(e) states:

> "The State must prove beyond a reasonable doubt that the Defendant was not the victim of entrapment by law enforcement officers, and unless it is done so, you should find the Defendant not guilty." Florida Standard Jury Instruction 2.11(e) (1976).

It is important to note at the outset that the change in the burden of proof instruction concerning entrapment is functional and not merely semantic. The 1976 instruction, quoted above, clearly defines two legal concepts: (1) With whom the burden of proof lies; and (2) The actual burden of proof regarding this issue. The 1981 edition of this instruction is silent as to the first premise, and misleading as to the second. Defendants respectfully submit that Florida Standard Jury Instruction 3.04(c) does not inform the jury as to the State's burden of disproving entrapment beyond a reasonable doubt. The jury may believe the burden lies with the Defendant since it is he who raises the defense. This wording occurs despite the Supreme Court's mandate in 1977 for the Jury Instruction Committee to revise and modify the criminal instructions to make them more easily understood by citizen jurors. In the matter of the use by the trial Courts of the Standard Jury Instructions in Criminal Cases, Vol. VI, No. 17, P. 305.

Standard Jury Instructions are formulated by the Committee and approved by the Supreme Court in an attempt to

codify and make uniform the existing law in areas often reoccurring in jury trials. A case or controversy is required for an espousement or clarification of the law by the Supreme Court, for to change or initiate new law by way of jury instructions would be a function legislative in nature. An examination of the decisions occurring subsequent to the 1976 edition of the Standard Instructions must be conducted to see if a change in the law has occurred warranting the modification of the entrapment instruction of 1976.

There has been two cases of importance decided subsequent to the adoption of the 1976 Standard Jury Instructions and prior to the 1981 Instructions. In Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978), the Fourth District Court of Appeal stated:

> "Once the evidence is introduced which suggests the possibility of entrapment, the State must prove the Defendant was predisposed to commit the offense charged." 355 So.2d at 1215.

This concept is based upon prior decisions of the State of Florida and the Federal Judiciary. Dupuy v. State, 141 So.2d 825 (Fla. 3d DCA 1962); United States v. Sherman, 200 F.2d 880 (2d Cir. 1952); Gorrin v. United States, 313 F.2d 641 (1st Cir 1963), Cert. Denied 374 U.S. 829, 83 Sup. Ct. 1870, 10 L.Ed. 2d 1052.

This premise, and the decisions cited above, are based upon the uncontrovertible rule of law that the State bears the burden of proof upon every material issue in a criminal proceeding. A defendant is required to prove nothing. The Defendant recognizes that an accused does have the initial burden of adducing some evidence suggesting entrapment before the State must fulfill its burden. Story, supra. The Defendant in this case produced considerable evidence concerning entrapment and properly notified the State of his intention to use this defense at the earliest possible time.

Following Story, the Fourth District Court of Appeal was faced with an issue very similar to the case at bar. In Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978), the trial court refused to instruct the jury as to the last paragraph of Florida Standard Jury Instruction 2.11(e) (1976), quoted hereinabove. The appellate court reversed for a new trial and adopted the federal view of the entrapment defense, holding:

> "(1) The defendant has the burden of adducing any evidence of entrapment; (2) The trial court determines the sufficiency of the evidence of entrapment; (3) If the evidence of entrapment is sufficient, the jury must be instructed that the State has the burden of disproving entrapment beyond a reasonable doubt; and (4) The jury should never be instructed on the defendant's burden of adducing evidence." 359 So.2d at 560.

The failure to instruct the jury on the State's burden to disprove the entrapment defense was held to be error.

As in the case at bar, the jury in Moody was clearly instructed that each essential element of the crime must be proven beyond a reasonable doubt. Further, the standard instruction regarding the presumption of innocense and reasonable doubt was given. This was not sufficient:

> "In effect, the jury was told that the State must prove the essential elements of the crime beyond a reasonable doubt, but the appellant must prove entrapment. Such is not the law." Moody, supra, at 561.

A literal reading of Florida Standard Jury Instruction 3.04(c) connotes the same thought. It may easily be interpreted by layman jurors that the defense must prove entrapment. When such an interpretation is clearly contra to the law, it should not be encouraged by the wording of the instruction. Moody requires that the jury be explicity instructed as to the State's burden of disproving entrapment. A general burden of proof instruction does not sufficiently explain or instruct on the law concerning this complicated defense.

Prior to conducting the voir dire examination, counsel for the Defendants requested the adoption of a jury instruction reflecting the Moody standard so that questions could be asked of the potential jurors regarding their understanding of the burden

of proof on this issue. (T-12) The State objected to any instruction other than Florida Standard Instruction 3.04(c). (T-14) The Defendants renewed their request for an additional instruction at the close of the evidence. (T-403) The trial Court denied this request as he had the request prior to voir dire. (T-15, 403)

The Defendant recognizes that although this question has been certified to the Supreme Court in this and other cases, the District Courts have found Standard Jury Instruction 3.04(c), in conjunction with the general instructions regarding the burden of proof, to be sufficient. However, the case at bar has a glaring difference to Rottenberry and McCray. In each of the above cases, the District Court reviewed the jury instructions as a whole rather than determine the adequacy of Instruction 3.04(c) individually. In each of these cases, the instructions regarding reasonable doubt and burden of proof were read in conjunction with a properly read version of the 1981 entrapment instruction.

In the case at bar, the trial court misread Standard Jury Instruction 3.04(c), and instructed the jury that the Defendants weren't entrapped if: (1) they had no prior intention to commit the crime of attempted trafficking in marijuana, but were persuaded, induced or lured into committing the offense, and the

person who persuaded, induced or lured them into committing the offense was a law enforcement officer or someone acting for the officer. (T-457) As such, the jury was never instructed as to the defense of entrapment in this case. Even when the instructions are viewed as a whole, as in Rottenberry and McCray, they are utterly deficient with regard to the properly raised defense of entrapment. (The misreading of Florida Standard Jury Instruction 3.04(c) is alleged by the Defendant to be a fundamental error, a point more particularly discussed in Point II of this brief.)

The Defendant respectfully requests that this Court answer the certified question in the negative, and hold that when the defense of entrapment has been properly raised and proof introduced that a trial court must instruct the jury in unequivocal terms that the State has the burden of disproving this defense to the exclusion of every reasonable doubt. Additionally, Defendant respectfully requests that the case at bar does not fall within the holdings or rationale announced in Rottenberry and McCray in that the Standard Instruction was misread and hence the jury instructions as a whole were inadequate.

For the above reasons, the Defendant respectfully requests a reversal of this cause for a new trial under the proper jury instructions.

II. THE MISREADING OF FLORIDA STANDARD JURY INSTRUCTION 3.04(C) BY THE TRIAL COURT CONSTITUTES FUNDAMENTAL ERROR REQUIRING REVERSAL.

The Defendant additionally seeks to invoke the discretionary jurisdiction of the Supreme Court of Florida pursuant to Rule 9.030(a)(2)(a)(iv), Fla. R. App. P., such jurisdiction being authorized by Article V, Section 3(b)(3), Constitution of the State of Florida. Defendant respectfully submits that the decision of the First District Court of Appeal, dated March 30, 1984, expressly and directly conflicts with decisions of the Supreme Court on the same question of law.

Under the authority of Rottenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983), this case was affirmed by the First District. In Rottenberry, a defendant questioned the adequacy of Florida Standard Jury Instruction 3.04(c) and it was held that the totality of the jury instructions were sufficient to satisfy prior case law requiring that the State disprove entrapment beyond a reasonable doubt. This decision was expressly predicated upon the jury being properly instructed as to reasonable doubt and entrapment.

In the case at bar, the trial Court, while intending to instruct the jury upon the law of entrapment, inadvertently substituted the word "weren't" for "were." (T-457) As such,

the effect of this misinstruction was to inform the jury that the Defendants weren't entrapped even if they had no prior intention to commit the crime and were persuaded or induced into committing the offense by law enforcement. This misinstruction has the practical effect of directing a verdict for the State on the issue of entrapment. The First District further held that this misinstruction did not constitute fundamental error citing Ray v. State, 403 So.2d 956 (Fla. 1981).

The Defendant respectfully submits that this decision directly conflicts with the following decisions of the Supreme Court of Florida: Motley v. State, 20 So.2d 798 (Fla. 1945); Henderson v. State, 20 So.2d 649 (Fla. 1945); Ray v. State, supra.

Neither the Defendant nor the State explicitly objected to the manner in which Florida Jury Instruction 3.04(c) was read to the jury by the trial Court. The Defendant did, however, object to the entire instruction by requesting a jury instruction pursuant to Moody v. State, supra. It was submitted and argued to the trial Court that Florida Standard Jury Instruction 3.04(c) was inadequate and that the jury must be explicitly instructed that the State must prove beyond a reasonable doubt that the Defendants were not entrapped. Despite objecting to the entire instruction regarding

entrapment, the District Court held that this instruction was not properly objected to and that it was not error of a fundamental nature. The District Court acknowledged but declined to invoke the exception recognized in Ray v. State, supra, whereby an objection is not necessary if the error complained of is fundamental, i.e. error which goes to the foundation of the case or goes to the merits of the cause of action. Id. at 960. To hold that this error was not fundamental directly conflicts with the above-listed decisions of the Supreme Court.

In Motley v. State, supra, the defendant questioned the sufficiency of the charge to the jury on the law of self-defense. The trial court failed to give the statutory definition relative to the defendant's theory of self-defense. 20 So.2d at 800. The court held:

> "The law is settled that a defendant is entitled to have the jury instructed on the law applicable to his theory of defense where there is evidence introduced in support thereof. In this case the only defense was self-defense." Id. at 800.

The court refused to dispose of this case under the harmless error statute in holding that the right of trial by jury contemplates trial by due course of law. This court held that a misinstruction on the law is necessarily fundamental error.

The court held:

> "We have said that where the court attempts to define the crime for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading." See Croft v. State, 117 Fla. 832. The same would necessarily be true when the same character of error is committed while charging of the law relative to the defense. . . This is not a case where the court failed or neglected to charge on some phase of the evidence which placed the burden on the defendant to request a more complete charge. This goes to the essence and entirety of the defense." Id. at 800.

The case at bar is virtually identical. The Defendant testified at trial that he had in fact possessed cannabis. The only issue requiring jury consideration was whether the Defendant was entrapped into possessing the cannabis. As such, this is error which clearly goes to the foundation of the case or goes to the merits of the cause of action. Ray v. State, supra, at 960.

The decision of Henderson v. State, supra, is also in direct conflict with the Opinion of the District Court in this case. In Henderson, the jury was instructed pursuant to a prosecution for assault with intent to have unlawful carnal intercourse, that the only issue for jury consideration was the defendant's intent to commit a felony. Id. at 651. The court held that this instruction invaded the province of the jury to

the extent of taking from it the determination of every element of the offense charged except that of the intent of the accused. It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence. Id. at 651.

It was contended by the State that while the charge was erroneous, the error was waived by failure to timely object. The court held:

> "We cannot agree with this view. We must bear in mind the due process clause of both our State and Federal Constitutions. We are convinced that due process of law contemplates trial in a criminal case by a fair jury, with full evidence and correct charges or instructions to the jury as to the law. Of these elements of fundamental safeguard, an accused may not be deprived either by statute or rule of court." 20 So.2d at 651.

By misreading the Florida Standard Jury Instruction regarding entrapment, the trial Court in essence directed a verdict against the Defendant on the only issue of importance to the jury. As stated above, the Defendant testified as to having possessed cannabis and sought jury consideration as to his properly raised defense of entrapment. By misreading the entrapment instruction, the trial Court instructed the jury that despite the elements of entrapment being present, the Defendant was not entrapped. As such, the jury returned a verdict in

approximately twelve minutes.

In a recent decision, Morton v. State, reported at 9 F.L.W. 605, the Third District Court of Appeal reaffirmed the above pronouncements of law by the Supreme Court. In Morton, the defendant was charged with three counts of robbery, and the trial court by inadvertence failed to instruct on any elements of robbery. The jury was instructed on the lesser included offenses of the crime charged. No objection was made as to the instructions, and the jury convicted the defendant of robbery. The Third District Court of Appeal held that where the court fails to give any instruction as to the charged offense, the defendant's right to a fair and impartial trial has been abridged. 9 F.L.W. at 605. This case was distinguished from Williams v. State, 400 So.2d 542 (Fla. 3rd DCA 1981), wherein the Third District Court of Appeal held that failure to instruct on one element of the crime is not fundamental error where there is an absence of dispute on that element.

If the court fails to give an instruction as to the charged offense, and this constitutes an impairment of the defendant's right to a fair and impartial trial, then a failure to give an instruction as to the applicable defense is also a deprivation of a fair and impartial trial. The effect of a misinstruction is even more prejudicial than a non-instruction.

By misinstructing the jury, the trial Court directed that even if the elements of entrapment were present, the Defendant was not entrapped. Such error clearly goes to the foundation of the case and the merits of the cause of action when the defendant has admitted possession and seeks to rely upon the defense of entrapment. The entrapment defense was truly the only issue for jury resolution in this cause and the misinstruction by the trial Court precluded a proper evaluation of this defense by the jury.

The Defendant respectfully submits that the decision of the First District Court of Appeal directly conflicts with the rule of law expressed in Henderson, Motley, and Ray. As such, the Defendant respectfully requests that this Court exercise its discretionary authority to accept jurisdiction of this issue based upon the direct conflict of law presented. The error committed by the trial Court in misreading the Standard Jury Instruction is clearly one of a fundamental nature going to the merits and foundation of the case. As such, this cause must be reversed and remanded for a new trial under the proper jury instructions.

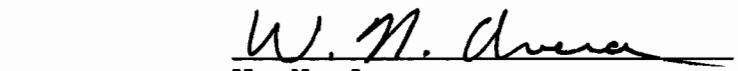
CONCLUSION

The Defendant respectfully submits that Florida Standard Jury Instruction 3.04(c) does not conform to the existing case law in the State of Florida by explicitly instructing the jury that the State must prove beyond a reasonable doubt that a defendant was not entrapped.

Should this Court find the Standard Jury Instruction regarding entrapment to be sufficient, the Defendant respectfully submits that the trial Court committed fundamental error by misreading the instruction. This mistake had the practical effect of directing a verdict for the State on the only issue of consequence to the jury.

For these reasons, the Defendant respectfully requests that this cause be remanded for a new trial under the proper jury instruction.

Respectfully Submitted,



W. N. Avera
AVERA, BERNSTEIN & PERRY
Post Office Drawer G
Gainesville, Florida 32602
904 372-9999
Attorney Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Greg Costas, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, by United States Mail, this 4th day of June, 1984

W. N. Avera
AVERA, BERNSTEIN & PERRY
Post Office Drawer G
Gainesville, Florida 32602
904 372-9999
Attorneys for Defendant