O/A 9-11-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,120

EUGENE EDWARD MORRIS,
a/k/a MERCURY MORRIS,
a/k/a EUGENE MORRIS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* * * * * * * * * * * * * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * * * * * * * * * * * * *

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner was the defendant at trial and the appellant in the district court of appeal. Respondent was the prosecution at trial and the appellee in the district court of appeal. Parties will be referred to in this brief as "Defendant" and "the State." The symbol "R" will constitute a reference to the record on appeal. The symbol "T" will constitute a reference to the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

The State rejects Defendant's version of the facts as being biased and misleading. In its opinion in this case, Morris v. State, 456 So.2d 471 (Fla. 3d DCA 1984), the Third District Court of Appeal set forth the following recitation of the facts:

> Defendant Eugene Edward ("Mercury") Morris was convicted of conspiracy to traffic in cocaine, trafficking in cocaine, and two counts of possession of cocaine in violation of sections 777.04, 893.135, and 893.13(1), Florida Statutes (1981). He was sentenced to a term of twenty years imprisonment with a mandatory fifteen year period of incarceration pursuant to section 893.135(1)(b)(3)....
>
> The events leading to this appeal began to unfold in the summer of 1982 when Fred Donaldson, a friend who turned confidential informant, did some gardening for Morris at his home. At that time Donaldson was on probation for the commission of aggravated battery and had been ordered to pay restitution in the amount of $2,500. In an alleged effort to make the restitution, Donaldson tried unsuccessfully to collect the money Morris owed him for gardening services. Believing that Morris intentionally failed to pay his debt in order to have Donaldson sent back to jail, Donaldson called the police to report that he had information concerning Morris's involvement with the use and sale of cocaine. After Donaldson's first call, chief investigator Havens conducted a preliminary investigation of Morris. The investigation disclosed no record of cocaine use or sale in any local, state or federal law enforcement agency. A few days later, Donaldson contacted Havens again to advise him that Morris was expecting a shipment of cocaine and that Morris was willing to meet

Donaldson's friend "Joe" to "set up a deal." In two subsequent telephone calls, Donaldson told Havens that Morris had received a large quantity of cocaine.

To verify this information, Havens arranged to have Donaldson make a recorded "controlled call" from the state attorney's office to Morris at his home on August 16, 1982. In this first recorded telephone conversation, admitted into evidence at trial, Morris demonstrated a willingness to enter into a drug deal with Donaldson's purported friend Joe.[1]

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[1]The recorded telephone conversation disclosed, in pertinent part, the following exchange between Morris and Donaldson:

> DEFENDANT MORRIS: "Hello."
> MR. DONALDSON: "Gene?"
> DEFENDANT MORRIS: "Yeah."
> MR. DONALDSON: "What's up?"
> DEFENDANT MORRIS: "Nothing. What's the scoop?"
> MR. DONALDSON: "All right, he's gonna do it like this here--he said he'll show you the money. He said it's fine."
> DEFENDANT MORRIS: "All right."
> MR. DONALDSON: "He go--you only see half unless you wanna bring the stuff. He said you can see the whole thing and we can do it there, but you can see the money as long as you want to see it in the parking lot where no one can get ripped--he go because--he wanna do it in the parking lot is it's quite normal for people to come out of the parking lot and open and close trunks and he'll have the money in the trunk and what happens, he'll open it up. He'll let you see the money. You can either--if you want, bring it. He said you can bring it in your car and park somewhere and meet us in his car or you can come see it, see the money and--"
> DEFENDANT MORRIS: "Come see me--"
>
> . . . . .
>
> DEFENDANT MORRIS: "All right. Okay, man, you better make sure this ain't no f_____ set-up, boy."
> MR. DONALDSON: "Okay."
> DEFENDANT MORRIS: "Did you hear me?"
> MR. DONALDSON: "Huh?"
> DEFENDANT MORRIS: "Did you hear what I said?"
> MR. DONALDSON: "Yeah."
> DEFENDANT MORRIS: "All right. Now, you're

absolutely positive of these people?"
MR. DONALDSON: "Yeah. I'm positive. It's only gonna be and Joe, anyhow, so--"
DEFENDANT MORRIS: "All right. You know the guy?"
MR. DONALDSON: "Yeah. I met him one time but, you know--I meet him--"
DEFENDANT MORRIS: "Wait a minute. Wait a minute. All right. Fine."
MR. DONALDSON: "Well, look, I'll meet you at 4:00, okay?"
DEFENDANT MORRIS: "Four o'clock."
MR. DONALDSON: "I'll call you before I come."
DEFENDANT MORRIS: "All right."
MR. DONALDSON: "All right."

They arranged to meet at Dadeland Mall parking lot. During several ensuing meetings, Donaldson introduced undercover agent Joe Brinson to Morris as Donaldson's drug dealer friend Joe from New York, and Brinson negotiated with Morris to purchase a quantity of cocaine. The monitored conversations of these meetings, transmitted through a body bug worn by agent Brinson, were admitted into evidence at trial. The tapes of these encounters reveal that Brinson and Morris negotiated the price, quantity and manner of delivery of the cocaine, and on one occasion, Morris gave Brinson a small quantity of cocaine as a sample. Negotiations between Brinson and Morris continued the following day and evening of August 17, during which time Brinson and Morris spoke together both in person and over the telephone. Three of these conversations were monitored and tape recorded, but the tapes of only two telephone conversations were admitted into evidence. The trial court suppressed the third tape recording of a face-to-face conversation between Morris and Brinson because it was made illegally inside Morris's home. A final monitored tape recorded conversation between Morris and Brinson took place the morning of August 18, During this conversation, admitted into evidence at trial, Morris and Brinson agreed to meet at Morris's house later that day. This conversation served as the basis for the issuance of a warrant to search Morris's home and for a court order authorizing the agent to monitor and record conversations inside Morris's home in accordance with State v. Sarmiento, 397 So.2d 643 (Fla. 1981). Although the Sarmiento order specifically provided that the body bug which would record the conversations inside Morris's home was to be placed on agent Brinson, the monitoring device was placed on Donaldson. As a result, these recorded conversations were suppressed by the trial court. The court ruled that the police acted improperly in transferring the body bug to Donaldson.

> The search produced a scale which was introduced at trial. The half-kilogram of cocaine, which formed the basis for the trafficking charge, was delivered to Morris's home by dealer and co-defendant Vincent Cord. In the scenario culminating in Morris's arrest, Cord arrived at Morris's home and gave Morris a package of cocaine. Morris then weighed the contents and handed the cocaine to agent Brinson, who carried the bag outside and placed it in the trunk of his own car. When Morris heard police sirens, he retrieved the package from Brinson's car and threw it into the canal behind his house. Agent Havens subsequently recovered the cocaine from the water, and Morris and co-defendants Vincent Cord and Edgar Kulins were placed under arrest.
>
> Co-defendant Cord pled guilty prior to trial. The case proceeded to trial against Morris and Kulins. Kulins pled guilty during trial, leaving only the case against Morris. Morris pled not guilty to all charges: conspiracy to traffic in cocaine, trafficking in cocaine, two counts of sale or delivery of cocaine, and two counts of possession of cocaine. He asserted the affirmative defense of entrapment. The jury acquitted Morris of sale or delivery of cocaine, but found him guilty of the remaining counts.
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> 456 So.2d at 472-474.

Additionally, the district court noted that "[t]he record indicates that far from being badgered, Morris even invited participation" in the criminal activity. 456 So.2d at 476, n. 5. In support of this statement, the court quoted the following:

> AGENT BRINSON: "Is it coming in?"
> DEFENDANT MORRIS: "--listen, let me tell you something first. Let me tell you something first. If I wanted to rip you, I could have done that. I got no f------ rip--first of all, you know, if you want me to trust you, you got to trust me somewhere along the line. These people are saying the same thing."
>
> . . . . .
>
> AGENT BRINSON: "--if I have a change in plans, you know, it's causing me headaches--"
> DEFENDANT MORRIS: "... I assure you, man, there's no pressure, there's no worry. I got as much to lose as you....
> AGENT BRINSON: "No. Who I'm dealing with?"

. . . . .

DEFENDANT MORRIS: "You ever heard of a m-----f----- who used to play for the Dolphins?" .... "Named Mercury Morris?" .... "You ever heard of that m-----f-----? Well, this is me." .... "... I won't f--- with nobody who doesn't have as much to lose as me. If the deal can go off, fine, everything is set and the place is on 97th....
DEFENDANT MORRIS: "You look at your product, that the f------ way you're suppose to do it."
AGENT BRINSON: "I know how you're supposed to do it, but I thought I was dealing with you."
DEFENDANT MORRIS: "You are dealing with me--you are dealing with me--you are dealing with me straight up and you'll see how it goes off, it will be smooth, just like it--hey, man, listen."

. . . . .

DEFENDANT MORRIS: "... somewhere along the line somebody's got to trust somebody."
AGENT BRINSON: "That's true."
DEFENDANT MORRIS: "Now, if I wanted you--I could--hey, that's right there, but I don't want that. I want you to come back again and again and again.

. . . . .

DEFENDANT MORRIS: "Exactly--I'm telling you right now, you know, you'll be satisfied with this situation and you'll want to do it this way every f------ time."

. . . . .

DEFENDANT MORRIS: "Street--I'm not looking to rip you and you are not looking to rip me, you don't know that and I don't know--the only way--you can--me prove it to you, you prove it to me, everybody is going like this here, you know--"

. . . . .

AGENT BRINSON: "Okay. Well, you know, if I can't square--I'll try to do, you know, something else tomorrow. If I can't do that, then we'll work it that way for now."
DEFENDANT MORRIS: "What's the matter, you scared?"
AGENT BRINSON: "I'm not scared."
DEFENDANT MORRIS: "Are you leery?"

. . . . .

AGENT BRINSON: "I need to make some connections out here."

. . . . .

DEFENDANT MORRIS: "You see, man--"
AGENT BRINSON: "You know, I don't know where you stand, where I am coming from. See, when you are in my type of business you don't trust too many people--you can't trust your own mother--brother."

. . . . .

DEFENDANT MORRIS: "I understand it, man, but, you know, what you do is just like you're saying, you look--the kind of connection you're looking for is the kind of connection you're talking to."

. . . . .

AGENT BRINSON: "Like I said, I must follow my conscience now."
DEFENDANT MORRIS: "Let me just tell you this, though, man: Here's the kind if situation where you come down, you got the money and they got the shit. Get the shit, you got the money, pick it up, you look at it, you see if you like it, and you take it. Nobody questions you.... So, you see from a vantage point of somebody who is here--they're established and hey, man, we want to meet you in the parking lot and do it, you know--by the same token to establish the kind of connections that you're looking for, that you want on a regular basis, of a quality material--"
AGENT BRINSON: "Yeah."
DEFENDANT MORRIS: "I have that connection." (emphasis supplied) (expletives deleted)

456 So.2d at 476-477, n. 5.

During trial, Defendant sought to introduce the testimony of Eugene Gotbaum, whose testimony, it was proffered, would have been that Donaldson had told Gotbaum several months earlier that Donaldson was going to set up Defendant (T 1750). Prior to attempting to call Gotbaum, the defense had never informed the State of Gotbaum's existence, despite the fact that Defendant's attorney had been speaking with Gotbaum for a week prior to the trial (T 1748). The State objected to Gotbaum being allowed

to testify because of the discovery violation (T 1748-1749) and because his testimony would constitute hearsay. The trial court excluded the testimony on the basis of hearsay (T 1751).

The State additionally relies upon such facts as are set forth in the argument portion of this brief.

POINTS INVOLVED

POINT ONE

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE HEARSAY TESTIMONY OF EUGENE GOTBAUM?

POINT TWO

WHETHER DEFENDANT IS ENTITLED TO RELIEF ON HIS CLAIM OF INCONSISTENT VERDICTS?

POINT THREE

WHETHER THIS COURT HAS JURISDICTION TO CONSIDER THIS CAUSE?

SUMMARY OF ARGUMENT

The State contends that for each of several reasons, Eugene Gotbaum's testimony was properly excluded by the trial court.

In the first place, despite the fact that Defendant's counsel had been speaking with Gotbaum for a week prior to trial, the defense did not even inform the State of Gotbaum's existence until the attempt was made to call Gotbaum as a witness at trial. The State was clearly prejudiced by the defense's failure to comply with the discovery requirements and asserted that prejudice at trial. The defense did not dispute either the fact of the discovery violation or the prejudice to the State. Under these facts, the State submits that the failure to provide Gotbaum's name to the State provided a proper basis for Gotbaum's exclusion as a witness.

The only contention set forth by Defendant in support of his claim that Gotbaum's testimony should have been admitted is that the testimony was relevant. This ignores the fact that the testimony was excluded on the ground of hearsay, not relevancy. Since Defendant does not dispute the trial court's conclusion that the testimony was inadmissible hearsay, this court should not concern itself with Defendant's contention.

Moreover, it is clear that the trial court correctly concluded that Gotbaum's testimony was inadmissible hearsay. It was testimony of an out of court statement other than one made by a declarant who testified at trial that was offered to prove the truth of the matter contained in the statement. It was not admissible under the state of mind exception to the hearsay rule because that exception, as codified by Florida Statutes §90.803(3)(a), requires that the state of mind demonstrated by the statement be an issue in the case. Here, Donaldson's state of mind was not an issue. There was never any dispute as to Donaldson's state of mind or as to his conduct. Further, Donaldson's state of mind could not have been at issue in any event, under either the subjective or objective tests for entrapment, since the subjective test focuses on the predisposiion of the defendant, not the content or intent of the government agents, and the objective test focuses on the conduct of the government agents, not their intent. These factors also demonstrate the lack of relevancy of Gotbaum's testimony.

As to the contention that Gotbaum's testimony was admissible under the objective test, the State raises several additional arguments. The State maintains even if testimony is admissible with regard to the question of whether entrapment has occurred as a matter of law under the objective test, it cannot be admitted at trial. This is because it is only the subjective test that is at issue at trial. This court has made it

clear that only the subjective test is a question for determination by the jury. The objective test is a matter of law to be determined by the trial court. Thus, testimony admissible as to the objective test can only be considered in a hearing before the court on an appropriate motion.

The State also submits that this court should reconsider its decision to adopt the objective test in light of its adoption of the principle that governmental misconduct can preclude prosecution under a due process analysis. Given the broad interpretation of due process approved by this court, prosecution is barred under that principle whenever a defendant's due process rights are violated. To the extent that governmental misconduct that violates the objective test also violates a defendant's rights, the objective test duplicates the due process analysis. To the extent that governmental misconduct violates the objective test, but does not impinge upon a defendant's rights, the interests of society are not well served by precluding prosecution. To do so is to substitute the opinion of the judiciary as to what is acceptable governmental conduct for the consitutional and legislative guidelines and restrictions in this area.

The State additionally contends that if the objective test is to be applied, it should be applied only to governmental conduct occurring after the date of this court's adoption of the objective test. This argument is based upon the fact that the purpose of the objective test is to discourage governmental misconduct and that can only be done in a prospective manner. Applying the test to conduct, such as that in the present case, that occurred before the test was adopted cannot further the goal of the test.

Finally, with regard to the issue relating to Gotbaum's testimony, the State submits that in light of the previously noted fact that neither Gotbaum's intent nor his conduct was ever in dispute,

Gotbaum's testimony would not have told the jury anything they did not already know. Thus, any error in not allowing the testimony to be admitted was plainly harmless.

Defendant has additionally asked this court to find that he was entrapped as a matter of law. This claim should not be considered because it was not raised in the district court and because jurisdiction was not granted to consider this issue. The State also reasserts with regard to this claim its arguments that this court should abandon the objective test and that the objective test should be applied prospectively only.

Should this court reach the merits of the claim, the decision would be compelled that the record reflects that entrapment as a matter of law did not occur. The government authorities were informed by Donaldson that Defendant was involved in the use and sale of cocaine and that he had in his possession a large quantity that he was willing to sell. A controlled call was made and recorded and that call corroborrated Donaldson's information and demonstrated Defendant's involvement in ongoing criminal activity. The authorities proceeded with normal investigative techniques. Meetings with Defendant were had and recorded by means of a body bug. At those meetings, Defendant engaged in negotiations as to the price, quantity and manner of delivery of the cocaine and provided an agent with cocaine. Throughout the conversations, Defendant urged that a deal be made. Ultimately, a meeting was set up at which Defendant provided the agent with the cocaine that formed the basis for the trafficking charge.

Plainly, the government activity had as its end the interruption of specific criminal activity and utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity. Indeed, to conclude otherwise is essentially to outlaw undercover activity, as the procedures utilized here are typical ones that are accepted in the courts

of this country and have become essential to the investigation of narcotics offenses.

The State's final argument to the claim that entrapment as a matter of law occurred is that this if court should conclude that the facts contained in the record do not rebut Defendant's claim, the appropriate remedy under the unique factual situation here would be remand for a hearing on the issue. This is because at the time of Defendant's trial, the objective test was not recognized in Florida and therefore, the State had no reason to put into the record all the facts relevant to that test. Certainly, the State should be given the opportunity to do that before it can be said that Defendant is entitled to relief on this question.

As to Defendant's claim regarding inconsistent verdicts, the State initially contends that Defendant should be estopped from raising the issue because of his agreement to giving of a jury instruction telling the jury that it must consider each count of the information separately and that its verdict as to one crime must not affect its verdict as to any other crime charged.

Further, the State maintains that Defendant's contention should not be considered because of his failure to comply with Florida's contemporaneous objection rule by objecting to the alleged inconsistency before the jury was discharged, at a time when any inconsistency could still be reconciled.

The State also submits that in light of Florida law recognizing the jury pardon concept, the legal inconsistency of verdicts should not be considered to be a basis for relief. Given that concept, inconsistent verdicts are a benefit to which a defendant has no right, but which is given him by the grace of the jury. He should not be heard to complain that the jury did not give him an even greater benefit.

In any event, the verdicts here are not legally inconsistent. Defendant's argument is directed wholly to the facts of the case and not to the elements of the crimes involved. Consideration of those elements demonstrates that the counts of which Defendant was acquitted contain elements different from or in addition to the elements of the counts of which Defendant was convicted. The offenses therefore were not interlocking and the verdicts were not legally inconsistent. Further, under the facts of this case, the verdicts are not even factually inconsistent.

In the third point, the State's position is simply that the conflict necessary for this court's jurisdiction does not exist and that this court therefore does not possess jurisdiction in this cause. In support of this position, the State reasserts the arguments made in its brief on jurisdiction and relies upon the distinctions set forth in the argument portion of this brief.

ARGUMENT

POINT ONE

THE TRIAL COURT DID NOT ERR IN EXCLUDING THE HEARSAY TESTIMONY OF EUGENE GOTBAUM

In considering this issue, it is important to initially take into account the historical background that formulated and shaped the concept of entrapment.

A

THE DEVELOPMENT OF THE ENTRAPMENT DEFENSE

1

UNITED STATES SUPREME COURT OPINIONS

The defense of entrapment, as it has been defined by the United States Supreme Court, has been developed in a series of cases, Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) and Sorrells v. United States, 287 U.S. 435, 58 S.Ct. 210, 77 L.Ed. 413 (1932). A general discussion of this development is set forth in United States v. Jannotti, 673 F.2d 578, 596-597 (3d Cir. 1982), cert. denied, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982).

> In Sorrells v. United States, where the Court first recognized the defense of entrapment, the Court held the defendant was entitled to have the jury consider whether his acts of possession and selling one-half gallon of whiskey in violation of the National Prohibition Act were instigated by the prohibition agent who implanted in the "mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that [Government officials] may prosecute." 287 U.S. at 442, 53 S.Ct. at 212. The nature of the defense was outlined more fully when the Court next considered the defense a quarter of a century later in Sherman v. United States. Chief Justice Warren, writing for the majority of the Court, stated that [t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. at 372, 78 C.Ct. at 820. In concluding that entrapment had been established as a matter of law, the Court determined from the undisputed testimony of the prosecution's witnesses that the defendant was induced to sell narcotics by the government informer and that he was not predisposed, i.e., that he engaged in conduct he would not otherwise have attempted. The Court noted, "Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials." Id. (emphasis in original).
>
> In United States v. Russell, the Court expressly disapproved of the decisions of the lower federal courts which had expanded the entrapment defense beyond the Court's opinions in Sorrells and Sherman. Instead, the Court reiterated that the defense was not of constitutional dimension, and reaffirmed its prior opinions that established that entrapment is a "relatively limited defense", 411 U.S. at 435, 93 S.Ct.

> at 1644, which cannot be used by a predisposed defendant. Most recently, in Hampton v. United States, a majority of the Court, in two separate opinions, upheld defendant's conviction arising from his sales of heroin which had allegedly been procured from a government informant, reaffirming once again the unavailability of the entrapment defense to a predisposed defendant.

This line of cases, therefore, makes it clear that the test to apply when a defense of entrapment is claimed is a subjective one, focusing on the predisposition of a defendant.

In United States v. Russell, however, the Court suggested the possibility that the government's conduct, independent of a defendant's predisposition, although not establishing entrapment, could preclude a conviction. There, despite limiting the scope of the entrapment defense, the Court stated:

> ... [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction...
>
> 411 U.S. at 431-432; 93 S.Ct. at 1643, 36 L.Ed.2d at 373.

In making the above statement, the Court cited to Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), in which the Court found that the conduct of the police in pumping a defendant's stomach to recover swallowed contraband so shocked the judicial conscience as to violate the defendant's right to due process.

It is clear that the Court in United States v. Russell conceived of the due process issue as being a question independent of that of entrapment. This is apparent from the fact that the Court stated that the due process claim could arise from the misconduct of government agents,

even though review of the entrapment decisions makes it clear that despite the fact that a minority of the Court has consistently felt to the contrary, such a consideration is not material to entrapment.

The seed for the minority point of view regarding entrapment was sown in the opinion of Justice Roberts, dissenting in part from the majority opinion in Sorrells v. United States. Justice Roberts expressed the belief that entrapment should turn on the question of whether a crime was instigated and induced by a government agent, rather than on a defendant's predisposition. Subsequently, in a concurring opinion in Sherman v. United States, which agreed with the majority opinion insofar as it concluded that entrapment had occurred, but which employed different reasoning to reach that result, Justice Frankfurter expressed the belief that an objective test for entrapment, focusing on the reasonableness of the police conduct, should be employed to determine whether entrapment has occurred.

After Sherman v. United States, the next case in which the Court considered the question of entrapment was United States v. Russell. As pointed out previously, that case first raised the possibility that a due process claim might lie in the face of governmental misconduct. Any doubt that such a claim would be a question independent of the objective test for entrapment favored by a minority of the Court was put to rest by the subsequent decision in Hampton v. United States.

In that case, the plurality opinion authored by Justice Rehnquist cast severe doubt on the possibility noted in United States v. Russell that a due process claim might lie as a result of governmental misconduct.

> The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment....
>
> * * *

> The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another. If the result of the governmental activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission..," Sorrells, supra, 287 U.S., at 442, 53 S.Ct. at 212, 77 L.Ed., at 417, the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. See O'Shea v. Littleton, 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674, 687 (1974); Imbler v. Pachtman, 424 U.S. 409, pp. 428-429, 96 S.Ct. 984, 994, 47 L.Ed.2d 128, 142-143 (1976)....
>
> 425 U.S. at 490,
> 96 S.Ct. at 1650,
> 48 L.Ed.2d at 118-119.

The Court in Hampton v. United States split into three distinct camps.[1] Justice Rehnquist's plurality opinion was joined in by Chief Justice Burger and Justice White. The opposite sentiments were expressed in a dissenting opinion authored by Justice Brennan, who had previously joined with Justice Frankfurther in his concurring opinion in Sherman v. United States. Not surprisingly, the dissent, which was joined in by Justices Stewart and Marshall, urged the objective analysis championed by Justice Frankfurter. Justice Powell, in an opinion joined in by Justice Blackman, concurred in the judgment, but did not embrace the language of the plurality opinion that indicated that governmental misconduct cannot preclude the prosecution of a predisposed defendant. Justice Powell stated that he was not able to join in that portion of the plurality opinion "as it would unnecessarily reach and decide difficult questions not before" the Court. 425 U.S. at 491, 96 S.Ct. at 1650, 48 L.Ed.2d at 119. Although expressing the belief that the question was not properly before the Court,

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(1) Only eight justices considered the case. Justice Stevens did not participate in either the determination or decision of the case.

the concurring opinion reflects a clear reluctance to adopt the per se rule favored in the plurality opinion. The concurring opinion does agree with the plurality opinion, however, insofar as it holds that the defense of entrapment focuses on the question of predisposition, not on the conduct of the government agents. 425 U.S. at 492, n. 2, 96 S.Ct. at 1651, n. 2, 48 L.Ed.2d at 120, n. 2. It goes on to note that the defense of entrapment is not necessarily the only doctrine relevant to cases involving claims of governmental misconduct, Id., thus leaving open the possibility that a due process analysis might be appropriate, independent of the question of entrapment. A concluding footnote, however, makes it clear that Justices Powell and Blackman believe that if a due process analysis can properly be applied when a defendant was predisposed, it would only be in extraordinary cases that a claim of a due process violation should be successful.

> I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction.
>
> 425 U.S. at 495, n. 7,
> 96 S.Ct. at 1653, n. 7,
> 48 L.Ed.2d at 122, n. 7.

Therefore, one conclusion can clearly be drawn from Hampton v. United States. That is that a majority of the court, the justices joining in the plurality and concurring opinions, reject the objective test for entrapment. Rather, the majority of the Court, as has been true each time the issue has arisen, believes that entrapment must focus solely on predisposition.(2)

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(2) In Sorrells v. United States, the only justices to agree with Justice Roberts were Justices Brandeis and Stone. By the time Sherman v. United States was decided, the number of justices favoring the objective test had grown, Justice Frankfurter's opinion being joined in by Justices Douglas, Harlan and Brennan, but not sufficiently to constitute a majority.

Other conclusions from Hampton v. United States are less clear. It would appear, however, that a majority of the Court, the justices joining in the dissenting and the concurring opinions, believe that independent of the issue of entrapment, a due process analysis can preclude the prosecution of even a predisposed defendant, as the result of governmental misconduct, but only in the most egregious situtions.(3)

Drawing conclusions as to the feelings of the present Court in even more difficult, as the views of Justice Stevens, who did not participate in Hampton v. United States, and Justice O'Connor, who replaced Justice Stewart, have not been expressed. Nonetheless, since the five justices who constituted the majority that believe that entrapment must focus on predisposition remain on the Court, it can be said that the present Court embraces that principle. No assumptions can be made as to the present Court's feeling on the due process question, since, even if it is assumed that the majority of the justices deciding Hampton v. United States felt that a due process analysis was appropriate, the fact that one of those justices is no longer on the Court would mean that only four present justices have expressed such a view. The manner in which Justices O'Connor and Stevens view the question would therefore determine the present view of the Court.

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(3) This conclusion is less clear than the one noted in the preceding paragraph because the concurring opinion, while implying the belief that a due process analysis can preclude prosecutions when outrageous governmental misconduct occurs, does not foreclose the possibility that such an analysis might not be appropriate. For instance, as quoted previously, the concluding footnote states that the cases, "if any," in which predisposition will not be dispositive will be rare. 425 U.S. at 495, n. 7, 96 S.Ct. at 1653, n. 7, 48 L.Ed.2d at 122, n. 7 (emphasis added).

FLORIDA OPINIONS

Until recently, this court recognized that when predisposition exists, the defense of entrapment is not available to a defendant. Bell v. State, 369 So.2d 932 (Fla. 1979); Lashley v. State, 67 So.2d 648 (Fla. 1953). Indeed, in State v. Dickinson, 370 So.2d 762 (Fla. 1979), this court not only found that entrapment focuses on predisposition, but it rejected that objective test for entrapment.

In State v. Glossen, ___ So.2d ___ (Fla. 1985), case no. 64,688, opinion filed January 17, 1985 [10 F.L.W. 56], this court noted the fact that United States v. Russell suggested that a prosecution can be barred on due process grounds as the result of governmental misconduct. This court went on to hold that it is in fact appropriate to employ such a due process analysis.

Subsequent to the decision in State v. Glossen, this court in Cruz v. State, ___ So.2d ___ (Fla. 1985), case no. 63,451, opinion filed March 7, 1985 [10 F.L.W. 161], concluded that both the subjective and the objective tests for entrapment would be employed in Florida. This court stated that the subjective test, the traditional entrapment analysis, is normally a jury question, while the objective test is a matter of law for the trial court to decide. ___ So.2d at ___, 10 F.L.W. at 163. The opinion in Cruz v. State goes onto propound a threshhold test to be employed in applying the objective test to determine whether entrapment has occurred as a matter of law.

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity: and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.
>
> ___So.2d at___, 10 F.L.W. at 163.

B

THE INADMISSABILITY OF EUGENE GOTBAUM'S TESTIMONY

Defendant asserts that the testimony of Eugene Gotbaum was relevant to both the objective and subjective tests for entrapment and that it therefore should have been admitted. This claim need not be reached by this court.

1

DISCOVERY VIOLATION

In the first place, Gotbaum's testimony was inadmissible because of the defense's failure to comply with the discovery requirements. Although Defendant's counsel had been speaking with Gotbaum for a week prior to the trial (T 1748), the defense, contrary to the requirements of Florida Rule of Criminal Procedure 3.220 never informed the State of Gotbaum's existence until the attempt was made to call Gotbaum as a witness at trial (T 1744). A break was taken to allow the prosecutor to speak with Gotbaum (T 1748). After that conversation, the prosecutor informed the court that he could not be prepared to deal with Gotbaum's testimony from such a short conversation (T 1748-1749). Upon this objection being made to Gotbaum being allowed to testify, the court began to conduct the inquiry required by Richardson v. State, 246 So.2d 771 (Fla. 1971) into the circumstances of the discovery violation. The court began its inquiry by requesting a proffer as to Gotbaum's proposed testimony (T 1749). Defendant's attorney responded that Gotbaum would testify that Fred Donaldson told Gotbaum that Donaldson was going to be setting up Defendant (T 1750).[4] Finding that this testimony would constitute inadmissible hearsay, the trial court excluded Gotbaum on that basis (T 1751), thereby rendering it unnecessary to reach the question of whether Gotbaum's

testimony should have been excluded, as requested by the prosecutor, because of the discovery violation.

Plainly, a trial court, after an inquiry with the circumstances, can refuse to allow a defense witness to testify if his name has not been provided to the State in sufficient time to prevent the State from being prejudiced. See Morgan v. State, 405 So.2d 1005 (Fla. 2d DCA 1981); Rolle v. State, 355 So.2d 491 (Fla. 3d DCA 1978). Clearly, that is what happened here. In fact, Defendant's attorney did not even dispute the prosecutor's claim of prejudice. The fact that the trial court did not rely on this ground to exclude Gotbaum's testimony is immaterial, since it is well settled that a trial court's judgment should be upheld when it is supportable under any theory, regardless of whether the trial court relied upon that theory. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); In re Yohn's Estate, 238 So.2d 290 (Fla. 1970); Escarra v. Winn Dixie Stores, Inc., 131 So.2d 483 (Fla. 1961). Inasmuch as this reasoning supports the trial court's conclusion, this court's inquiry should cease at this point.

2

HEARSAY

a

DEFENDANT'S FAILURE TO DISPUTE THAT THE TESTIMONY WAS INADMISSIBLE HEARSAY

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(4) Defendant's attorney also proffered that Gotbaum would testify as to other matters relating to Donaldson's background (T 1749-1752). Defendant does not claim, and did not claim in the district court, that any of these matters were relevant, so they are of no concern at this time. In any event, it is beyond dispute that since Donaldson did not testify at the trial, testimony of this nature, relating to Donaldson's credibility, was not admissible.

A second reason also exists why Defendant's assertion that Gotbaum's testimony was relevant should not be reached by this court, the fact that the testimony was excluded on the grounds of hearsay, not relevancy. Inexplicably, Defendant has not argued in his brief that the trial court was incorrect in its conclusion that the testimony here was inadmissible hearsay. Rather, Defendant merely argues that the testimony was relevant (See Defendant's brief, pp. 22-27 and 36-39). Regardless of whether testimony is relevant, it may be excluded as hearsay. Even the dissenting opinion in the district court in the present case recognized this fact.

> Hearsay and relevancy, although sometimes overlapping and frequently confused... are two distinct evidentiary concepts. Evidence is relevant if it applies to the matter in question, even though it may be inadmissible as hearsay. Hearsay evidence comes from a second-hand source, competency and credibility of which cannot be tested and so it may not be admissible even though relevant.
>
> 456 So.2d at 484.

Since the trial court excluded the testimony here on hearsay grounds, and since Defendant does not even allege that the testimony was not inadmissible hearsay, this court's inquiry in this regard need proceed no further.

b

THE TESTIMONY WAS HEARSAY

Should this court nonetheless determine that it will consider the question of whether Gotbaum's testimony was properly excluded as hearsay, the conclusion would be compelled that the trial court acted correctly.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Florida Statutes § 90.801(1)(c). There can be no question that Gotbaum's testimony constituted hearsay. The

statement by Donaldson was made out of court, Donaldson did not testify at the trial and the statement was offered to prove the truth of the matter contained in the statement, that Donaldson intended to set up Defendant. The testimony was therefore inadmissible unless one of the exceptions to the hearsay rule was applicable.

c

THE INAPPLICABILITY OF
THE STATE OF MIND EXCEPTION

The only argument that could conceivably be made that an exception to the hearsay rule might apply would be that the state of mind exception should be employed. This exception, which is set forth in Florida Statutes §90.803(3)(a), and which allows for the admission of extrajudicial statements to show the declarant's state of mind at the time the statement was made when such state of mind is an issue in the case or to show the declarant's intention to perform a future act when the occurrence or performance of that act is an issue in the case. See Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980); Van Zant v. State, 372 So.2d 502 (Fla. 1st DCA 1979). Insofar as it relates to the present case, the significant aspect of the state of mind exception is the fact that the state of mind or the future occurrence or performance must be at issue in the case.(5) This is because neither of these matters were at issue during Defendant's trial and therefore the state of mind exception is inapplicable.

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(5) This fact distinguishes the present case from Spears v. State, 264 Ark. 83, 568 S.W.2d 492 (1978), upon which Defendant relies. Defendant, on page 38 of his brief quotes extensively from Spears v. State, but omits from the quotation the court's citation to Ark. Stat. Ann. §28-1001, Rule 803, as authority for its conclusion. A look to that provision reflects that the state of mind exception, as codified in Arkansas, does not require, as it does here in Florida, that the state of mind be at issue. The Arkansas statute provides for the admissibility of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

THE SUBJECTIVE TEST

These matters were not at issue at the trial because the only issue at that point was Defendant's predisposition, that is to say whether the subjective test for entrapment was met. As this court pointed out in Cruz v. State, only the subjective test is a question for the jury. The objective test is a matter of law to be determined by the court. Thus, it is clear that only testimony that relates to the subjective test may properly be presented to the jury.(6)

The district court correctly noted that under the subjective test "[t]he state of mind at issue in this case is that of the defendant and not that of the police agent." 456 So.2d at 477. Thus, as the district court stated, "Donaldson's declaration of intent to 'set up' Morris does not fall within the ambit of the [state of mind] hearsay exception provided by section 90.803 because Donaldson's state of mind is not at issue and because it was not disputed, his subsequent conduct requires neither proof nor explanation." 456 So.2d at 475.

Indeed, at no time during the trial was either Donaldson's intent or his conduct in any way disputed. Thus, there was nothing "at issue" that could be shown by Donaldson's state of mind and the state of mind exception was therefore plainly inapplicable.

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(6) Although Cruz v. State seems to be quite clear on the subject, any doubt that a jury in a trial in which entrapment is asserted by the defense is to be concerned with only the subjective test is put to rest by this court's decision in Rotenberry v. State, ___ So.2d ___ (Fla. 1985), case number 63,720, opinion filed April 25, 1985 [10 F.L.W. 237]. That case, decided subsequent to the decision in Cruz v. State, approved the standard jury instruction on entrapment, which sets forth the subjective test.

ii

THE OBJECTIVE TEST

The fact that this court, subsequent to the district court opinion in the present case, adopted in Cruz v. State the objective test for entrapment does not change the above conclusion.

aa

TESTIMONY RELATING TO THE OBJECTIVE TEST IS NOT ADMISSIBLE AT TRIAL

As noted previously in this argument, only evidence relating to the subjective test is admissible in a trial.(7) Since the objective test is a matter to be determined by the court, testimony relating to that test would be admissible only in a hearing before the court on an appropriate motion.

There can be no question that a claim that entrapment has occurred as a matter of law under the objective test should be litigated by way of a pretrial motion, rather than during trial. This is so for several reasons.

First, evidence or testimony relating to the objective test may very well be inadmissible at trial, as not being relevant to the issue at trial, that being the subjective test(8) Thus, if the objective test is litigated during trial, either inadmissible evidence, which, depending on the facts of the case, could be greatly damaging to either side, would become known to the jury or one or both parties would be forced to forego the presentation of evidence that should properly be considered.

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(7) See Section B(2)(c)(i) of this argument.

(8) As this court stated in Cruz v. State, "the considerations inherent in our threshhold [objective] test are not properly addressed in the context of the predisposition element of the second, subjective test." ___ So.2d at ___, 10 F.L.W. at 163.

Second, it is important to remember a major distinction between the subjective and objective tests is that when the subjective test is met, a defendant is entitled to an acquittal, as he is not guilty of a crime. When the objective test is met, however, there is no finding that a defendant is not guilty; rather, the prosecution is barred as punishment for the improper conduct of the governmental authorities. Thus, a finding that the objective test has been met is a conclusion of law that would require dismissal. The dismissal of a cause is a matter that the State has a right to have reviewed on appeal. Florida Statutes §924.07. To allow the question to be litigated at trial, after jeopardy has attached, would bring into play serious double jeopardy implications if the State was able to reverse the trial court's order of dismissal.

Third, it will often occur that a defendant will desire to present evidence or testimony, or even testify himself, in support of a claim that entrapment has occurred as a matter of law under the objective test, but, as a matter of trial strategy, not present a case or not testify himself at trial. If the objective test is to be litigated during trial, such defendants will be placed in the untenable position of having to choose between litigating their claim under the objective test in the manner they deem most appropriate at the expense of the trial strategy they prefer, or vice versa.

The problem noted in the preceding paragraph is aggravated by the fact that while the State has the burden of proving a defendant guilty at a trial, the burden on a motion alleging police misconduct lies with the party making the motion.(9)

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(9) See People v. D'Angelo, 401 Mich. 167, 257 N.W.2d 655 (1977), in which the court engaged in an analysis of how the burden of proof is upon the State under the subjective test, but is on the defendant, who assumes "an accusatorial posture upon an issue which . . . is irrelevant to his guilt or innocence," 257 N.W.2d at 661, under the objective test.

It can thus be said that to allow the objective test to be litigated at trial, rather than on a pretrial motion, would create the potential for serious prejudice to both the State and the defense and that it would greatly increase the possibility that either the question of whether the subjective test has been met or the question of whether the objective test has been met or both will be considered either in light of inadmissible evidence or with the absence of evidence that should properly be considered. It can therefore only be concluded that the objective test is a matter to be considered solely by way of pretrial motion to dismiss.(10)

Given this fact, it is clear that regardless of whether Gotbaum's testimony about Donaldson's statement was an appropriate matter to consider with regard to the objective test, the trial court properly excluded it at trial.(11)

bb

THE PROPOSED TESTIMONY WAS NOT
AN APPROPRIATE MATTER TO CONSIDER
IN APPLYING THE OBJECTIVE TEST

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(10) Such a procedure was of course exactly the procedure utilized in Cruz v. State.

(11) Defendant did move to dismiss prior to trial on the grounds of entrapment (R 99-104). Moreover, at the pretrial hearing on Defendant's motion to suppress, Defendant presented his evidence in support of his claim of entrapment and then asked the court to grant his motion to dismiss on that basis (T 625). At no time prior to trial, not in the motion to dismiss, not at the hearing at which Defendant presented the evidence he claimed supported his claim of entrapment and not in any other manner, did Defendant seek to support his claim with Donaldson's statement. To the contrary, the defense did not even inform the State of Gotbaum's existence until trial. See Section B(1) of this argument. Clearly, if Donaldson's statement was an appropriate matter to consider under the objective test, it was when Defendant was litigating his pretrial contention that the matter should have been brought out.

Even if defendant had sought to present Gotbaum's testimony in support of his pretrial motion, the trial court would have been correct if it had excluded the testimony at that time.(12)

The objective test adopted by this court in Cruz v. State, focuses on the conduct of the government agents, not on their intent. Such a focus is only logical. If the conduct of government agents is so egregious as to warrant the preclusion of the possibility of prosecuting even a predisposed defendant, the fact that the agents did not have an evil intent should not matter. Conversely, even if the agents' intent is an improper one, there is no reason to preclude prosecution if the agents do not engage in improper conduct.

Even the portions of the cases relied upon by this court in Cruz v. State reflect that the objective test must focus on conduct, not intent. This court quoted a statement from Justice Frankfurter's opinion in Sherman v. United States that called for a determination of whether "police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." 356 U.S. at 382, 78 S.Ct. at 825, 2 L.Ed.2d at 856 (emphasis added). Likewise, this court quoted the following portion of the New Jersey Supreme Court's opinion in State v. Molnar, 81 N.J. 475, 484, 410 A.2d 37, 41 (1980).

> In recent years, this Court has fashioned a second, independent standard for assessing entrapment. It recognizes that when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of a defendant becomes irrelevant . . . . This court recently explained in [State v.] Talbot [71 N.J. 160, 167-168, 364 A.2d 9, 13 (1976)]:

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(12) The reasons that will be set forth in support of this statement also demonstrate that in the unlikely event that this court feels that the trial court here should have considered during trial the question of whether the objective test was met (See the State's position in this respect in Section B(2)(c)(ii)(aa) of this argument), the trial court nonetheless did not err in excluding the testimony.

> [A]s the part played by the State in the criminal activity increases, the importance of the factor of defendant's criminal intent decreases, until finally a point may be reached where the methods [employed] by the state to obtain a conviction cannot be countenanced, even though a defendant's predisposition is shown. Whether the police activity has overstepped the bounds of permissible conduct is a question to be decided by the trial court rather than the jury.
>
> (emphasis added)

Perhaps the most basic indication that the objective test focuses on the conduct and not the intent of the government agents is the fact that the test is termed "objective." If the intent of the government agents was to be a proper consideration under the test, it would not be an objective one, it would be just as subjective as the subjective test; the only difference between the two would be whose intent the test focuses upon. Obviously, as the name implies, the objective test must focus on objective facts, the conduct of the government agents.

Thus, given the nature of the objective test, Donaldson's intent was of no import in determining whether the test was met.

In addition, as pointed out previously, neither Donaldson's intent nor his conduct was in any way disputed during the trial. Thus, Donaldson's state of mind was simply not at issue even under the objective test regardless of whether it was relevant under that test.

It is therefore clear that even when the objective test is taken into account, Gotbaum's testimony was inadmissible hearsay.

cc

THIS COURT SHOULD ABANDON THE OBJECTIVE TEST

Although it appears clear from the foregoing argument that no error occurred in this case without regard to the question of whether this court should recognize the objective test for entrapment, the State does additionally submit that this court should abandon that test.

The dissenting opinion of Justice Alderman in Cruz v. State reflects that this court was not asked by the parties to that case to adopt a new standard for entrapment. ___ So.2d at ___, 10 F.L.W. at 164. Given that fact, the State respectfully suggests that this court may not have fully considered the implications of adopting the objective test and requests that this court reexamine its position on the question.

In considering this matter, the first factor that should be taken into account is the relationship between the objective test and this court's acceptance in State v. Glossen of the fact that governmental misconduct can constitute a due process violation such as to preclude prosecution, particularly in light of the broad interpretation of due process adopted by this court.

In State v. Glossen, this court noted that the federal appellate courts have employed a very restrictive approach in considering when a due process violation can preclude a prosecution. This court pointed out that it appears that since the decision in Hampton v. United States, the due process defense has been raised successfully in only one federal circuit court, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), and that another federal circuit court has stated that nothing short of "the infliction of pain or physical or psychological coercion" will establish the due process defense. United States v. Kelly, 707 F.2d 1460, 1477 (D.C. Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 264, 78 L.Ed.2d 247 (1983). This court, however, rejected the narrow application of due process found in the federal cases and instead utilized a broader approach based upon the decisions in State v. Hohensee, 650 S.W.2d 268 (Mo.Ct.App. 1982) and People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978), concluding that "governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges." ___ So.2d at ___, 10 F.L.W. at 57.

Thus, whenever a defendant's due process right is violated, prosecution is precluded under the due process analysis of State v.

Glossen. Given this fact, the rights of defendants are clearly protected without regard to the objective test.

Thus, to the extent that police conduct that runs afoul of the objective test also violates due process, the test is merely duplicitous. If however, police conduct is considered improper under the objective test, but it does not violate any right of the defendant, society's interests are not best served by precluding prosecution. If a predisposed defendant commits a crime and no right of his is violated, it would be an injustice for prosecution to be deemed improper. There is no reason why a defendant under such circumstances should be set free when the police misconduct has affected his rights in no way. To do so is to adopt a remedy that is much more stringent than the wrong that caused its application and which carries with it tremendous harm in that it leaves unpunished and returns to society clearly guilty criminals. It is truly the giving to the judiciary of "a 'chancellor's foot' veto over law enforcement practices of which it did not approve," United States v. Russell, supra, 411 U.S. at 435, 93 S.Ct. at 1644, 36 L.Ed.2d at 375, an inappropriate usurpation of power and certainly not the purpose of any theory of entrapment.

It should therefore be concluded that since the rights of defendants are fully protected under the due process analysis adopted by this court in State v. Glossen and since society's interests are not well served by precluding prosecution when no right of a defendant has been violated, the adoption of the objective test would be ill advised, would be detrimental to the well being of the people of this state and would expand the concept of entrapment to include the inappropriate substitution of the philosophy of the judiciary as to what is acceptable law enforcement procedures for the constitutional and statutory limitations on those practices.

Practical considerations also support the conclusion that this court should reconsider the adoption of the objective test. For instance,

the burden this test will impose upon the trial courts of this state will be tremendous. In every case arising from an undercover operation, the trial courts will have to put the police on trial before determining whether the defendant can be tried, even when no assertion is made that the defendant's rights were violated. Such hearings in many cases will be as extensive as the trial itself. Morever, given the amount of undercover activity in this state, primarily due to Florida's dubious distinction as the capital of drug related crime in this country, the number of cases in which hearings will be required will be great.

An additional factor arises from the fact that most drug cases, the cases in which claims of entrapment are most likely to arise, can be prosecuted in either state or federal court. Since the United States Supreme Court has repeatedly refused to adopt the objective test for use in the federal courts,(13) the use of the test in the courts of this state will create situations in which the question of whether prosecutions can be maintained will be dependent upon which sovereign instituted the proceeding, hardly a reasonable or equitable basis for determining such an issue.

Consideration of the foregoing factors leads to the conclusion that the objective test for entrapment should not be utilized in the state courts of Florida. The State therefore asks that this court reconsider and recede from its adoption in Cruz v. State of that test. If such an approach is taken, of course, it would not be necessary to deal with the question of whether Gotbaum's testimony was admissible as being an appropriate factor to consider under the objective test.

dd

THE OBJECTIVE TEST SHOULD BE APPLIED PROSPECTIVELY ONLY

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(13) See Section A(1) of this argument.

There is also an additional reason why the admissibility of Gotbaum's testimony under the objective test need not be dealt with here and that is that the objective test should be applied in a prospective manner only.

Such an approach was employed by the Michigan Supreme Court which adopted the objective test in People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973). That decision was applied, however, "only to police conduct arising after the decisional date of Turner." People v. Schwartz, 62 Mich.App. 188, 233 N.W.2d 517, 518 (1975). The reasoning underlying this conclusion was set forth in People v. Auer, 393 Mich. 667, 227 N.W.2d 528, 533 (1975).

> The purpose of the "objective" test for entrapment adopted in Turner is to focus upon and discourage as a matter of policy "actions of the people [which are] reprehensible under the circumstances", Turner, supra, 390 Mich. 22, 210 N.W.2d 342. It is at once apparent that retrospective application of the rule of Turner would not serve to implement the purpose of the rule because the rule can only have a prospective effect upon police conduct. The justifiable reliance of law enforcement officials argues for prospective application. The ends of the administration of justice as well are best served by prospective application, for retrospective application would require in many cases new trials with the tremendous obstacle of reassembling now stale evidence. The salutary effects of the new rule in Turner are not of such nature as to require retrospective application. We conclude that the rule of Turner shall apply prospectively.

The State submits that this reasoning should also be adopted by this court.

3

RELEVANCY

As noted previously, Defendant's contention that Gotbaum's testimony was relevant to both the objective and subjective tests for

entrapment is not a matter that must be reached in light of the fact that the testimony was inadmissible as hearsay.[14] Nonetheless, it should be pointed out that the same reasons urged by the State in support of its contention that Gotbaum's testimony was not concerned with a matter at issue, such as to bring it within the state of mind exception to the hearsay rule,[15] particularly the fact that under the subjective test, the focus is on a defendant's predisposition and the fact that under the objective test, the focus is on the conduct of the government agents, also demonstrate the lack of relevancy of the testimony.

4

HARMLESS ERROR

As has been noted throughout this brief, at no time during the trial was there any dispute as to Donaldson's intent or his conduct. Under these circumstances, Gotbaum's testimony would not have told the jury anything they did not know anyway or anything that the State did not freely concede. Accordingly, if it is found that the exclusion of the testimony was in any way erroneous, the conclusion would be compelled that any such error was plainly harmless and thus not a basis for reversal. Florida Statutes §924.33.

C

DEFENDANT'S CLAIM OF ENTRAPMENT
AS A MATTER OF LAW

In addition to asserting error in the exclusion of Gotbaum's testimony, Defendant maintains that he was entrapped as a matter of law. This claim is not a proper matter for consideration at this time and is, in any event, without merit.

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(14) See Section B(2)(a) of this argument.

(15) See Section B(2)(c) of this argument.

1

FAILURE TO RAISE IN DISTRICT COURT

One reason why this matter may not be considered at this time is the fact that Defendant did not raise it as an issue in the district court. In its opinion, the district court set forth the only issues raised by Defendant.

> In the several grounds raised on appeal, Morris argues as grounds for reversal: (1) the court's refusal to suppress evidence and statements obtained by unlawful electronic surveillance; (2) legally inconsistent verdicts; (3) the exclusion of a defense witness who would have testified that a police agent intended to set Morris up; (4) inflammatory remarks by the prosecutor during closing argument; and (5) the imposition of a mandatory sentence.
>
> 456 So.2d at 474.

It is thus clear that Defendant did not raise as an issue on direct appeal any claim of entrapment as a matter of law.[16] Given that fact, it is plainly inappropriate to make the assertion at this time and it therefore should not be considered by the court. See Trushin v. State, 425 So.2d 1126 (Fla. 1982); Simmons v. State, 305 So.2d 178 (Fla. 1974).

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(16) Defendant's assertion that this issue was raised in the district court because he made one reference in a footnote in his reply brief to the facts establishing entrapment as a matter of law is an absurd contention. Defendant never set forth the claim as an issue on appeal. Moreover, it is obvious from the portion of the district court's opinion quoted above that the court did not consider the issue to be raised. Further, it would be plainly improper to raise an issue for the first time in a reply brief when the State would have no opportunity to respond. Clearly, the issue cannot be said to have been raised in the appellate court. See Silver v. State, 188 So.2d 300 (Fla. 1966).

2

FAILURE TO RAISE CLAIM OF CONFLICT
WITH REGARD TO THE ISSUE
OF ENTRAPMENT AS A MATTER OF LAW

A second reason also compels the conclusion that the question of whether entrapment as a matter of law occurred here should not be reached by this court. A look to Defendant's brief on jurisdiction reflects that the only asserted grounds for jurisdiction were conflict with cases relating to the question of whether Eugene Gotbaum's testimony was admissible and conflict with cases relating to the claim of inconsistent verdicts. Under such circumstances, this court should not consider Defendant's claim. Trushin v. State, supra. In fact, since this court no longer reviews cases by certiorari, a method by which the entire record was subject to review, but does so by discretionary review, which limits jurisdiction to particular issues, the State would submit that this court now lacks the authority to review this issue. See England, Hunter and Williams, An Analysis of the 1980 Jurisdictional Amendment, 54 Fla.B.J. 406 (1980).

3

APPLICABILITY OF PRIOR ASSERTIONS
TO THE CLAIM OF ENTRAPMENT
AS A MATTER OF LAW

The State has asserted previously that this court should abandon the objective test[17] and that the objective test, if it is to be employed, should be applied prospectively only.[18] These arguments are hereby incorporated and reasserted in response to Defendant's claim of entrapment as a matter of law. Obviously, if either of these arguments is accepted, there would be no need to consider Defendant's claim.

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(17) See Section B(2)(c)(ii)(cc) of this argument.

(18) See Section B(2)(c)(ii)(dd) of this argument.

ENTRAPMENT AS A MATTER OF LAW DID NOT OCCUR

Should this court determine that it will consider the question of whether entrapment as a matter of law occurred, the conclusion would be compelled that the facts contained in the record demonstrate that such entrapment did not occur.

The facts must be viewed in terms of the two prong test established by this court in Cruz v. State, which makes it clear that entrapment has not occurred as a matter of law when police activity has as its end the interruption of specific criminal activity and utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. There can be no question that the two prongs of this test were met here.

The police were initially contacted by Donaldson who informed them of Defendant's involvement with the use and sale of cocaine. Shortly thereafter, Donaldson informed chief investigator Ray Havens that Defendant was expecting a shipment of cocaine and that Defendant was willing to meet with Donaldson's friend "Joe" to set up a deal. In subsequent calls, Donaldson told Havens that Defendant had received a large quantity of cocaine.

Clearly, the governmental action that was taken in response to this information had as its end the interruption of a specific ongoing criminal activity.

Havens then arranged for Donaldson to make a recorded, controlled call from the State Attorney's office to Defendant, during which Defendant expessed a clear willingness to enter into a deal. That action was unquestionably one reasonably tailored to apprehend those involved in the ongoing criminal activity. Moreover, the conversation that occurred provided additional reason to believe in the existence of the ongoing criminal activity. Subsequently, at trial, the testimony of co-defendant

Vincent Cord made it clear that Defendant's previous involvement in the sale of cocaine was extensive.

The means utilized by the government agents subsequent to the controlled call were also plainly appropriate under the test set forth by Cruz v. State. Meetings were had with Defendant and were recorded by means of a body bug. At these meetings, Defendant engaged in negotiations as to the price, quantity and manner of delivery of the cocaine and provided agent Joe Brinson with cocaine. Throughout the conversations, Defendant, in the words of the district court, "far from being badgered, . . . even invited participation." 456 So.2d at 476, n. 5. After some delays resulting from Defendant's insistence that the transaction occur at his home, a meeting was set up at which Defendant provided Brinson with the cocaine that formed the basis for the trafficking charge.

Thus, each step taken by the governmental agents was justified not only by the initial information provided by Donaldson, but also by the corroborating information obtained from the investigation, information which plainly demonstrated Defendant's involvement in ongoing criminal activity. The activity of the government agents was clearly reasonable and properly geared toward apprehending those involved in the ongoing criminal activity. Indeed, it is difficult to imagine of any other approach that could have been taken. Surely, the government agents would have been derelict in their duties if they had ignored the information brought to them by Donaldson. Likewise, as the investigation made it more and more clear that Donaldson's information was accurate, the government authorities had the duty and obligation to proceed with the matter.

In arguing that entrapment as a matter of law did occur, Defendant really does not point to any particular conduct as being improper. Rather, be simply engages in broad generalizations of enticement, inducement and entrapment. It appears that Defendant's primary

argument is that while the government agents had reason to believe that Defendant was a user of cocaine, they did not have reason to believe that he was a dealer. In the first place, this claim is not supported by the record. Clearly, there was reason to believe that Defendant dealt in cocaine. Second, even if what Defendant assests in this regard is accepted as true, entrapment did not occur.

Defendant's argument amounts to a claim that the police can investigate only the specific crime that they have reason to believe is ongoing. That is not the case. This court in Cruz v. State merely refers to specific criminal activity, not specific crimes. Obviously, investigations of particular crimes often uncover evidence of other crimes. The "ongoing criminal activity" prong of Cruz v. State is simply a triggering mechanism, a requirement that a reasonable basis exist before police activity can be directed in a particular manner. It is meant to preclude random police conduct, such as that in Cruz v. State itself.

Indeed, in other jurisdictions that recognize the objective test, claims of entrapment as a matter of law have been rejected in situations in which the police had much less reason to suspect that the eventual defendant was involved in criminal activity then did the government agents here.

For instance, in People v. Edwards, 107 Mich.App. 767, 309 N.W.2d 607 (1981), the investigation was begun because the defendant's name was found in the phone book of a man that had been arrested for a narcotics violation. In other cases, government agents merely engaged in the general investigation of narcotics offenses made contact with persons and informed those persons of their desire to purchase narcotics. People v. Cancino, 70 Mich.App. 90, 245 N.W.2d 414 (1976); People v. Henley, 54 Mich.App. 463, 221 N.W.2d 218 (1974). In State v. Rockholt, 186 N.J.Super. 539, 453 A.2d 258 (1982), undercover detectives first approached the defendant because the defendant was a police officer and was drinking in a bar. In Ervin v.

State, 431 So.2d 130 (Miss. 1983), the police had information very similar to that known to the authorities here, statements of an individual.

Additionally, the investigations in the cases cited in the preceding paragraph proceeded in manners quite similar to the investigation here and were, in each case, deemed appropriate under the objective test.

To accept the claim that entrapment occurred as a matter of law in the present case would be to essentially conclude that undercover operations are not proper. This is because putting aside the media attention given to the present case in light of Defendant's background as a well known professional football player, this case is a typical narcotics case. The procedures used were the same procedures used in many narcotics investigations. They are procedures that have become accepted in the courts of this country and they are procedures that are essential to the investigation of narcotics offenses. As noted by Justice Powell, in his concurring opinion in Hampton v. United States:

> Police overinvolvement in crime... would be especially difficult to show with respect to contraband offenses which are so difficult to detect in the absence of undercover Government activity. One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic, cf. United States v. Russell, supra, 411 U.S., at 432, 93 S.Ct., at 1643, 36 L.Ed.2d, at 373; L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 263-264 (1967), which is one of the major contributing causes of escalating crime in our cities. See President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society 221-222 (1967). Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.
>
> 425 U.S. at 495, n. 7;
> 96 S.Ct. at 1653, n. 7;
> 48 L.Ed.2d at 122, n. 7.

Likewise, in United States v. Russell, the Court stated:

> [I]n drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation...
>
> 411 U.S. at 432,
> 93 S.Ct. at 1643,
> 36 L.Ed.2d at 373-374.

Even Justice Brennan, in his dissent in Hampton v. United States, recognized the propriety of the sort of procedures used here.

> If the police believe an individual is a distributor of narcotics, all that is required is to set up a "buy"; the putative pusher is worth the investigative effort only if he has ready access to a supply....
>
> 425 U.S. at 499, n. 3,
> 96 S.Ct. at 1655, n. 3,
> 48 L.Ed.2d at 124, n. 3.

Based upon the foregoing, it is apparent that entrapment as a matter of law did not occur in the present case. Defendant's claim that is did is thus without merit.

5

REMEDY

In the event that this court disagrees with the State's argument that this claim should not be considered and with the State's position that the record demonstrates that entrapment as a matter of law did not occur here, the State submits that the appropriate remedy would not be, as Defendant suggests, discharge or a new trial. Rather, the State would maintain that under the unique facts of this case, the proper remedy would be remand for a hearing on the question of whether entrapment as a matter of law did occur. The present case is in an unusual posture because this court's decision in Cruz v. State, adopting for the first time in Florida

the objective test for entrapment, was not decided until after Defendant's conviction. Thus, at the time this case was pending in the trial court, there was no reason for the State to put into the record all the facts relevant to the objective test. It would be manifestly unfair to base a conclusion that entrapment has occurred under the objective test on a record that is not complete as to the relevant facts, when the State was not on notice of the need to put those facts in the record. It is only reasonable to give the State an opportunity to present the additional evidence it has in this regard. Therefore, if any remedy is deemed appropriate, it should be remand for a hearing that would afford such an opportunity.

POINT TWO

DEFENDANT IS NOT ENTITLED TO RELIEF ON HIS CLAIM OF INCONSISTENT VERDICTS

A

ESTOPPEL

The State initially claims that Defendant should be estopped from raising this issue. The facts relevant to the question of estoppel are in all material respects identical to those in McKee v. State, 450 So.2d 563 (Fla. 3d DCA 1984). In each case, the court gave without objection Florida Standard Jury Instruction (Criminal) 2.08(a). In accordance with that instruction, the trial court charged the jury as follows:

> A separate crime is charged in each count of the Information and while they have been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to any other crime charged.
>
> (T 2115)

As in McKee v. State, the defense agreed to the giving of this instruction (T 1924).

Under these circumstances, the court in McKee v. State recognized that the doctrine of estoppel precludes a defendant from complaining that the verdicts reached by the jury are inconsistent.

> Having fully received the benefits of the jury considering and weighing the evidence against the defendant on each count as if it were contained in a separate information, the defendant now complains that the jury erred in returning a verdict of guilt on one charge and not guilty on another. It is axiomatic that a party will not be allowed to maintain inconsistent positions in the course of litigation. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). Since the defendant not only failed to object to the instructions, but also expressed his agreement to its submission, we find that he is estopped to complain now that the jury has followed the isntruction. Perry v. State, 362 So.2d 460 (Fla. 1st DCA 1978) (where defendant not only failed to object to defective verdict form at trial, but also agreed to its submission, any error was invited).
>
> 450 So.2d at 564 (footnote omitted).

This reasoning should also be adopted by this court and should preclude consideration of Defendant's contention.

B

FAILURE TO OBJECT BEFORE THE JURY WAS DISCHARGED

A second reason also exists demonstrating that the merits of Defendant's contention should not be reached. That reason is the fact that Defendant did not raise his claim prior to the discharge of the jury, at a time when, if the trial court felt the verdicts were legally inconsistent, the jury could have been instructed to resume deliberations and reach consistent verdicts.

It is important that such an objection be required, because if it is not, defendants will be able to simply allow juries to be discharged, secure in the knowledge that the inconsistency will be resolved in their favor on appeal. In essence, inconsistent verdicts will become automatic

acquittals, even though the inconsistency is just as likely to reflect a mistake by the jury as to the count it acquitted on as it is a mistake as to the count it convicted on. Thus, if a defendant has a complaint regarding inconsistency of verdicts, he should be required to raise it at a time when it can be remedied, not allowed to accept it as a windfall acquittal.[19] Such a policy would certainly be in accord with Florida's contemporaneous objection rule, Clark v. State, 363 So.2d 331 (Fla. 1978), and should apply here to mandate the conclusion that Defendant's present claim should not be reviewed.

C

THE LEGAL INCONSISTENCY OF VERDICTS SHOULD NOT CONSTITUTE A BASIS FOR RELIEF

Florida is one of a small minority of jurisdictions that do not permit a jury to return legally inconsistent verdicts pursuant to the rule of Dunn v. United States, 284 U.S. 390, 52 S.Ct. 186, 76 L.Ed. 356 (1932). See Annot. Inconsistency of Criminal Verdict As Between Different Counts of Indictment or Information, 18 A.L.R.3d 259.

Although this court has recognized that claims that verdicts are legally inconsistent can properly be brought, Redondo v. State, 403 So.2d 954 (Fla. 1981); Mahaun v. State, 377 So.2d 1158 (Fla. 1979), it does not appear from those opinions that this court has considered the applicability of the jury pardon concept to the issue of inconsistent verdicts.

Florida has long embraced the principle that juries may properly grant jury pardons.[20] Given this fact, it cannot logically be said that

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(19) It is of course likely that in many situations, inconsistent verdicts are the result of the jury, although believing the evidence to be sufficient, granting a jury pardon. See State v. Thomas, 362 So.2d 1348 (Fla. 1978); Barley v. State, 224 So.2d 296 (Fla. 1969); Henderson v. State, 370 So.2d 435 (Fla. 1st DCA 1979); Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976). Under such circumstances, it should be left to the jury to determine whether their desire to pardon a defendant is of such a magnitude that they wish to acquit entirely. Only when an objection is made will the jury be given the opportunity to make such a determination.

(20) See the cases cited in n. 19.

relief is appropriate when verdicts are legally inconsistent.

When a jury exercises its right to pardon a defendant by acquitting him on one count in a situation in which that acquittal is inconsistent with a conviction on another count, the defendant is receiving a benefit to which he has no right, but which he is receiving by the grace of the jury. He is therefore in no position to complain that, having been charitably given "the appetizer and main course, he is legally entitled to dessert and coffee." McCray v. State, 397 So.2d 1229, 1331, n.4 (Fla. 3d DCA 1981), approved, 425 So.2d 1 (Fla. 1983). See also McCloud v. State, 335 So.2d 258, 259 (Fla. 1976); Silvestri v. State, supra, 332 So.2d at 353; Frazier v. State, 294 So.2d 691, 692 (Fla. 1st DCA 1974).

When the jury pardon concept is take into account, the conclusion that legally inconsistent verdicts should not be a basis for relief is warranted. Since it does not appear that this concept was considered by this court in deciding Redondo v. State and Mahaun v. State, the State respectfully requests that this court re-examine its position in this regard in light of the jury pardon concept and conclude that Defendant cannot raise this issue.

D

THE VERDICTS ARE NOT LEGALLY INCONSISTENT

Should this court reach the merits of Defendant's claim, it should conclude that the verdicts here are not legally inconsistent. Although terming it legal inconsistency, Defendant's entire argument is based upon a claim that the verdicts are factually inconsistent. Indeed, his entire argument is predicated upon the facts of this case, not the legal elements of the offenses charged.

Florida law is very clear that only when legal inconsistencies exist can a defendant be entitled to relief. See

Redondo v. State, supra; Mahaun v. State, supra. Mere factual inconsistency of verdicts does not call for relief. In order for verdicts to be legally inconsistent, it is necesarry that an acquittal on one count must negate a specific element necessary for conviction on another count. See Pitts v. State, 425 So.2d 542 (Fla. 1983); Gonzalez v. State, 440 So.2d 514 (Fla. 4th DCA 1983); Streeter v. State 416 So.2d 1203 (Fla. 3d DCA 1982). The jury is required to return consistent verdicts only on "interlocking charges." Eaton v. State, 438 So.2d 822, 823 (Fla. 1983). Reversible inconsistency will not be held to result if the offense of which a defendant is acquitted requires proof of elements different from or in addition to those of the offense of which he was convicted. See Pitts v. State, supra; McCray v. State, supra. This is the same test used to determine whether one offense is a necessarily lesser included offense of another for double jeopardy purposes. See Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Smith v. State, 430 So.2d 448 (Fla. 1983). Applying these principles to the present case makes it clear that the verdicts are not legally inconsistent.

1

CONSPIRACY (COUNT I)

In Florida, it is not essential that the State allege or prove an overt act in order to convict a defendant of conspiracy. Etheridge v. State, 415 So.2d 864 (Fla. 2d DCA 1982); State v. Burkett, 344 So.2d 868 (Fla. 2d DCA 1977). Thus, even had the jury acquitted Defendant of every substantive charge, the conviction for conspiracy to traffic in cocaine would still stand. State v. Trafficante, 136 So.2d 264 (Fla. 3d DCA 1961). Here, since Defendant was convicted of the substantive offense of trafficking, the verdicts are completely legally consistent.

2

TRAFFICKING IN COCAINE (COUNT II)

In the case at bar, the State took heed of the "red flag warning" reaised by the court in Hicks v. State, 414 So.2d 1137, 1141 (Fla. 3d DCA 1982), and refiled a second information which eliminated the multiplicitous counts contained in the original information (R 1-8A) by charging Defendant with only a single count of trafficking in cocaine on August 18th (R 9-17A). The jury was charged on all lesser included offenses of trafficking and convicted Defendant of the highest charge (R 1670). This procedure and result is in complete accord with Bell v. State, 437 So.2d 1057 (Fla 1983) and as a matter of both fact and law, this verdict cannot be inconsistent with the verdicts rendered with regard to the charged criminal offenses occurring on August 16th and 17th.

3

POSSESSION OF COCAINE (COUNTS IV AND VI)

In Smith v. State, this court held that the offense of possession of a controlled substance in violation of Florida Statutes §893.13(1)(e) is not an offense included in the sale of a controlled substance, proscribed by Florida Statutes §893.13(1)(a) because each of these offenses requires proof of element that the other does not. Based upon this holding, it is clear that Defendant's acquittals on Counts III and V, charging sale or delivery of cocaine on August 16th and 17th, cannot, as a matter of law, be legally inconsistent with his convictions for possession of cocaine on those dates.

E

THE VERDICTS ARE NOT FACTUALLY INCONSISTENT

Although not a basis for relief in any event, it should also be pointed out that Defendant's claim that the verdicts are factually inconsistent (albeit disguised as a claim of legal inconsistency) is without merit.

During the course of this trial, Defendant, while testifying on this own behalf, freely admitted that he had frequently possessed and used cocaine, while at the same time, he denied that he had ever previously sold or delivered cocaine to others. Based upon Defendant's own testimony, the jury quite easily could have found that Defendant was predisposed to commit the crimes of possession of cocaine and trafficking in cocaine (under the alternative theory that he was in actual or constructive possession of more than 400 grams), but that he was not predisposed to commit the crime of sale or delivery of cocaine. Inasmuch as lack of predisposition constitutes the principal element of the defense of entrapment, here, as in Pitts v. State, the jury verdicts are both logical and plausible based on the evidence before them. Therefore, "no further inquiry into the thought of process of the jury is necessary or permissible." Id., 425 So.2d at 543.

POINT THREE

THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THIS CAUSE

The State incorporates and reasserts the arguments set forth in its brief on jurisidction and contends that the decision of the district court in this case is not in conflict with the decisions in the cases cited by Defendant. Moreover, consideration of the distinctions between the opinion in the present case and that in Cruz v. State, as discussed in the argument to the first point of this brief, makes it clear that those two opinions are not in conflict. Accordingly, the State submits that this court lacks jurisdiction in this cause.

CONCLUSION

Based upon the foregoing, the State submits that this court is without jurisidction in this cause, and alternatively, that the decision of the district court of appeal should be upheld.

Respectfully submitted,

JIM SMITH
Attorney General

JANET RENO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to N. Joseph Durant, Gelber, Glass, Durant, Canal & Piniero, P.A., 1250 Northwest 7th Street, Miami, Florida 33125 and to Ronald I. Strauss and Philip Glatzer, Highsmith, Strauss & Glatzer, P.A., 3370 Mary Street, Coconut Grove, Florida 33133, on this the 29th day of May, 1985.

Anthony C Musto

ANTHONY C. MUSTO
Assistant State Attorney