THE SUPREME COURT OF FLORIDA

CASE NO.

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

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL,
CASE NO. 83-198

BRIEF ON JURISDICTION OF PETITIONER, EUGENE "MERCURY" MORRIS

BENNETT H. BRUMMER, PUBLIC DEFENDER
N. JOSEPH DURANT, ESQUIRE
GELBER, GLASS, DURANT, CANAL & PINEIRO, P. A.
Special Assistant Public Defender
Co-Counsel for Petitioner
1250 N. W. 7th Street
Miami, FL 33125
TELEPHONE: 305/326-0090

BENNETT H. BRUMMER, PUBLIC DEFENDER
PHILIP GLATZER, ESQUIRE
RONALD I. STRAUSS, ESQUIRE
HIGHSMITH, STRAUSS & GLATZER, P. A.
Special Assistant Public Defender
Counsel for Petitioner
3370 Mary Street
Coconut Grove, FL 33133
TELEPHONE: 305/443-4040

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

Eugene "Mercury" Morris, a cocaine user, was prosecuted on a six count Information; conspiracy to traffic in cocaine, trafficking in cocaine, 2 counts of possession of cocaine and 2 counts of sale of cocaine, arising out of introducing a state agent and confidential informant, to his cocaine supplier, Vincent Cord. Co-defendant Cord, the supplier, pled guilty prior to trial, and Cord received a waiver of the mandatory sentence provision of F.S. 893. Morris pled not guilty to all charges, and asserted only the affirmative defense of entrapment. Morris v. State, 1240, supra. Morris was found not guilty of two counts; guilty of four counts, and was sentenced to 20 years incarceration, 15 years mandatory. At trial, witness Eugene Gotbaum, a long time acquaintance of Donaldson (confidential informant and state agent) was prepared to testify that several months prior to Morris' arrest, Donaldson had informed him of his intent to "set-up" Morris in a drug deal. However, the trial judge excluded Gotbaum's proffered testimony as inadmissible hearsay. Morris argued at trial and on appeal that the testimony of Gotbaum was highly relevant to the defense of entrapment and, therefore, admissible [state of mind exception -- Sec. 90.803(3)(a)(1), Fla.Stat. (1981)], notwithstanding that Donaldson did not testify. Morris also argued to the Third District that the verdict was legally inconsistent and repugnant. The jury, on a multi-count information, found the defendant, Morris, **not guilty** of Count III (Sale/Transfer of cocaine on 8/16/82 - first meeting

with state undercover agent) and further found Morris **not guilty** of Count V (Sale/Transfer of cocaine on 8/17/82 to state undercover agent -- second meeting). The jury returned guilty verdicts on the other counts, notwithstanding the sole asserted defense of entrapment.

Morris' convictions were affirmed on June 5, 1984 and petitions for rehearing were denied on October 9, 1984, each with a dissenting opinion by Judge Ferguson, and this appeal followed. (See Appendix.)

> THE DECISION OF THE THIRD DISTRICT IN MORRIS v. STATE, 9 F.L.W. 1239 (Fla. 3d DCA June 5, 1984) EXPRESSLY AND DIRECTLY CONFLICTS WITH BROWN v. STATE, 299 So.2d 37 (Fla. 4th DCA 1974); JENKINS v. STATE, 422 So.2d 1007 (Fla. 1st DCA 1982); SAVIANO v. STATE, 287 So.2d 102 (Fla. 1973) and STATE v. LIPTAK, 277 So.2d 19 (Fla. 1973) ON THE SAME QUESTION OF LAW.

In Brown v. State, 299 So.2d 37 (Fla. 4th DCA 1974), the appellant, Brown, raised the defense of entrapment to charges of delivery of heroin. As part of his entrapment defense at trial, Brown sought to testify about conversations he had with the State's confidential informant **who did not testify**, but the trial judge excluded the conversations as hearsay. In reversing Brown's conviction, the Fourth District Court of Appeal clearly stated that any testimony concerning utterances of a confidential informant offered not for their truth but rather to show the informant's **inducement** of the defendant, is relevant to the defense of entrapment and is **not** hearsay.

> "Clearly, the conversations were relevant to the defense of **entrapment.** It is indeed basic that "one who is instigated, **induced** or lured by an officer of the law or other person, for the purpose of prosecution, into

> the commission of a crime which he otherwise had no intention of committing may avail himself of the defense of entrapment;..."
>
> (2) **As to hearsay** the statements of the confidential informant were offered, not to prove the truth of the matter asserted, but rather to show the appellant's state of mind **and the inducement of the confidential informant.**
>
> * * *
>
> **Without laboring the matter further, the defendant was incorrectly deprived of his opportunity to present before the jury the facts going to make up his defense of entrapment..."**
>
> Brown v.State, supra, at 38 (Bold Emphasis supplied)

In Jenkins, the defendant was prosecuted for aggravated battery and relied on the defense of self-defense. The trial court excluded as hearsay the statement of a witness who heard the victim say that he was going to "straighten up" the defendant. In reversing the defendant's conviction, the First District ruled that the excluded testimony fell within the exception provided by Sec. 90.803(3)(a)(1) Fla.Stat. (1981) to show a statement of intent which was probative of the victim's conduct. See Jenkins, supra, at 1008. See also Spears v. State, 264 Ark. 83, 568 S.W.2d 492 (1978), holding that the conduct of a confidential informant **who does not testify at trial** is relevant to the defense of entrapment and United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366, 373 (1973), holding that the activities of State representatives vis-a-vis the accused are highly relevant to the defense of entrapment.

In Saviano v. State, 287 So.2d 102, 104 (Fla. 1973), this Court held that testimony of a witness which would show that a

police agent induced a defendant to sell narcotics is relevant to the defense of entrapment and is **not** inadmissible hearsay.

That evidence of inducement is a crucial part of proving the defense of entrapment is made clear by this Court's decision in State v. Liptak, 277 So.2d 19, 22 (Fla. 1973):

> **"...an essential element of the offense of entrapment is inducement by police leading to the commission of the crime by one who otherwise had no intention of committing the crime."** (Bold emphasis supplied.)

Morris raised the defense of entrapment to the charges against him and in connection with this defense, Morris attempted to call as a witness at trial Eugene Gotbaum, to testify relative to a conversation he had with the State's confidential informant, Donaldson, several months prior to the first meeting with the undercover agent regarding his intent to set-up Morris in a criminal activity involving drugs. The State admitted that Donaldson was their agent. The trial court excluded Gotbaum's testimony as hearsay and on appeal Morris argued that Donaldson's intent to **induce** Morris to commit the offenses was relevant to the defense of entrapment and was not hearsay under the state of mind exception to the hearsay rule. See Morris v. State, supra, at 1240. However, in affirming the trial court's exclusion of Gotbaum's testimony and in stressing the fact that Donaldson did not testify, the Third District erroneously ruled that Donaldson's intent to induce Morris was not at issue and that Gotbaum's testimony about his conversations with Donaldson did not fall within the state of mind exception to the hearsay rule. The following language of the Third District is critical to this Court's consideration of the jurisdictional basis for this appeal:

"When defense counsel sought to present Gene Gotbaum's representation of the absent Donaldson's motives, the court excluded Gotbaum's testimony on the ground that the proffered remarks constituted inadmissible hearsay. Morris contends that Gotbaum's testimony was admissible through the so-called state-of-mind exception to the hearsay rule to inform the jury of Donaldson's stated intent to induce or entice Morris to commit the criminal acts charged. Morris maintains that Donaldson's statement was relevant to his entrapment defense and that he should have been permitted to present Donaldson's comments through Gotbaum's testimony **even though Donaldson was not called as a witness.**

* * *

...the material issues raised by an entrapment defense are solely the predisposition of the defendant and the conduct of the police. The state of mind at issue in this case is that of the defendant and not that of the police agent...

Gotbaum's testimony was offered to prove Donaldson's intent to set up Morris. **It constituted inadmissible hearsay because Donaldson's intent was not at issue** and thus, did not become admissible under the aegis of the statutory exception. In addition, because there was no question that Donaldson notified the police of Morris' activities Donaldson's conduct was not disputed and, accordingly, **his statement was not relevant.** Although his motive might have been relevant had it been necessary to prove whether

Donaldson informed police, under the posture of the evidence presented at trial, the trial court properly excluded Gotbaum's testimony."

Morris v. State, supra, at 1240-1241 (Bold Emphasis supplied)

The decision of the Third District in Morris, supra, holding that the excluded testimony of Gotbaum was irrelevant and inadmissible hearsay is in direct and express conflict with Brown, Saviano, and Liptak, supra, and, therefore, this Court has jurisdiction to review the opinion of the Third District.

THE DECISION OF THE THIRD DISTRICT IN MORRIS v. STATE, SUPRA, EXPRESSLY AND DIRECTLY CONFLICTS WITH EATON v. STATE, 438 So.2d 822 (Fla. 1983) and STATE v. CASPER, 417 So.2d 263 (Fla. 1st DCA 1982); and LASHLEY v. STATE, 67 So.2d 648 (Fla. 1983); BELL v. STATE, 369 So.2d 932 (Fla. 1979) ON THE SAME QUESTION OF LAW.

The foregoing cases of this Court, the First and Fourth Districts define inconsistent verdicts in cases where the jury acquittal on one count appears to negate a specific element necessary for conviction on the other count. The Third District, in its opinion (Morris, supra, 1241) acknowledged that the only defense asserted to all charges was entrapment, which is consistent with the defendant, Morris, at trial admitting all facts of **each count** in order to assert his defense of entrapment. Since Morris admitted having committed the acts alleged in the information, it is the only logical and plausible inference that the jury accepted the defense of entrapment as to two counts, which were interlocking with the remaining counts involving factually three days of meetings (Aug. 16, 17, 18, 1982). It is obvious the charges were "interlocking" as incorporated in Count I, Conspiracy to Traffic in Cocaine from 8/10-18/82. The sale and transfer of "samples" on 8/16/82 and 8/17/82 (Count III and Count V - wherein the jury found Morris not guilty on his defense of entrapment) is necessarily in conflict with verdict of guilty of possession of the same cocaine on the same dates (Count IV and Count VI) and necessarily in conflict with conspiracy to traffic cocaine from 8/10-18/82 (Count I). A "sample" of the quantity which was ultimately delivered on 8/18/82 (Count II - trafficking) is therefore an "interlocking" charge. Indeed, the Third District, in Morris, supra, at 1239-40, acknowledged the

factual testimony that the state initiated the investigation because it believed that "...Morris had received a large quantity of cocaine". Thereupon, to "verify this information", the state initiated telephone calls and arranged, on 8/16/82,:

> "... to meet at Dadeland parking lot...negotiated with Morris to purchase a quantity of cocaine...**Morris gave Brinson a small quantity of cocaine as a sample.** Negotiations between Brinson and Morris continued the following day and evening of 8/17/82...the morning of 8/18/82...Morris and Brinson agreed to meet at Morris' house later that day. ...The half kilogram of cocaine, which formed the basis of the trafficking charge, was delivered to the Morris home by dealer and co-defendant, Vincent Cord. ...and gave Morris a package of cocaine, Morris then weighed the contents and handed the cocaine to Agent Brinson..." (Morris, supra, 1240.)

It cannot be seriously suggested that the state initiated a massive investigation of Morris for a one-half gram "sample of cocaine". From the inception to the conclusion, the state was seeking a "large quantity of cocaine" and in its step-by-step investigation, obtained and received samples (of a large quantity) to establish the interlocking conspiracy from 8/10-18/82, which ultimately led to the trafficking charge (day 3). The following excised pertinent portions of the affidavit of the State Attorney's Office investigator, Gilbert (Morris, p. 1243, fn. 6, supra), establishes with certainty the interlocking acts from which the charges emanated.

> "6. On Aug. 16, 1982...Agent Brinson...to meet with...Morris to purchase suspected cocaine. * * *
>
> 7. On Aug. 16, 1982...Brinson meet with a black male...at Dadeland... * * *
>
> 9. On Aug. 16, 1982...Gene offered to sell...two (2) kilograms of cocaine for

> $58,000 per...Gene delivered...a small tin foil packet of suspected cocaine as a sample... * * *
>
> 10. On Aug. 16, 1982...the meetings with Eugene Morris...occurred in order to discuss the sale and delivery of two (2) kilograms of cocaine. * * *
>
> 11. On Aug. 17, 1982...Agent Brinson was instructed by Morris to proceed to 6200 S.W. 64 Ct. and pick up a one (1) ounce sample of cocaine... * * *
>
> 12. On Aug. 17, 1982...Agent Brinson took a small quantity of cocaine from the one ounce package from...Morris... * * *
>
> 13. On Aug. 17, 1982...the purpose of the meeting was to deliver one (1) kilogram of suspected cocaine..."

This Court clarified the inconsistent verdict exception in Eaton v. State, supra, 823:

> "In the cited cases the underlying felony was part of the crime charged -- without the underlying felony the charge could not stand. The jury is, in all cases, required to return consistent verdicts as to the guilt of an individual on interlocking charges."

Thus, once the jury, on day one (the first face to face meeting of 8/16/82), found Morris not guilty by reason of entrapment (his only defense) and, thereafter, on day two found Morris not guilty by reason of entrapment of an additional charge, it is legally inconsistent therefore to also find Morris guilty of other charges on day one, day two and day three, in that the jury has determined that Morris was, indeed, entrapped. It makes no difference that the other sales and/or possessions with which Morris was charged occurred thereafter, where those sales and/or possessions are not independent acts subsequent to the inducement, but part of a course of conduct which was a product of the original inducement. Thus, the guilty verdicts in this case are

not merely legally inconsistent with the not guilty verdicts, but they are repugnant and self contradictory to the definition of entrapment as set forth in Lashley, supra; Casper, supra; and Bell, supra. In Sherman v. U.S., 356 U.S. 369, 78 S.Ct. 819, 2 L. Ed. 2d 848 (1958), the Supreme Court held that where in a prosecution for unlawful sales of narcotics the defense of entrapment has been established as to the first sale made by the defendant to a government informer, it makes no difference that other sales with which the defendant was charged occurred thereafter where those sales are not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement. The Sherman definition of entrapment has been carved into Florida law by this Court in Bell, supra, at 934.

Therefore, the jury, by rendering on interlocking charges not guilty verdicts, determined that Morris was not predisposed to commit the type of crimes charged and that Morris was induced by a government agent to commit the crimes charged. Thus, the verdicts are inconsistent and cannot stand.

Also, see People v. Brown, App.Div. 437 N.Y. S.2d 701 (1981):

> "In our view, the verdict was repugnant. The only basis for the jury's not guilty verdict on the charge of criminal possession of a controlled substance in the third degree would be acceptance of defendant's agency and/or entrapment defenses. Having accepted one of those defenses, the jury could not properly have found the defendant guilty of the crime of criminal sale of a controlled substances in the third degree."

The Third District's opinion is in direct conflict with the cases set forth above, vesting this court with jurisdiction.

FUNDAMENTAL REASONS WHY THIS COURT SHOULD ACCEPT JURISDICTION

The Third District held in Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d DCA 1982) as follows:

> " Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission." (Emphasis supplied)

Therefore, by excluding the testimony of Gotbaum, the Third District not only violated its own cardinal rule of admissibility of evidence in a criminal case, but ruled contrary to the cases aforecited on the same question of law.

In Bell, supra, this Court cited with approval, Sherman, supra. Thus, where interlocking acts (Eaton, supra) produce multiple count charges and the jury has acquitted Morris on day one activity, the verdicts are repugnant to one another and inconsistent to this Court's legal definition of entrapment. Factually, the cocaine dealer (Cord) testified against the user/introducer, Morris, and avoided the mandatory sentence of 15 years. Morris was sentenced to mandatory incarceration as a result of his defense and trial, as compared to punishment for the act committed. Public confidence in fairness, justice and the rule of law are indeed at stake since this case has had and will have high visibility. (See extensive dissenting opinion.)

CONCLUSION

Therefore, this Court should accept jurisdiction and review the decision of the Third District.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction of Petitioner, Eugene "Mercury" Morris, was delivered, by mail, to the Office of Attorney General, 401 Northwest 2nd Avenue, Miami, FL 33131 and to the Office of the State Attorney, 1351 Northwest 12th Street, Miami, FL 33125 this 8th day of November, 1984.

HIGHSMITH, STRAUSS & GLATZER, P.A.
Attorneys for Petitioner
3370 Mary Street
Coconut Grove, FL 33133
TELEPHONE: 305/443-4040

By _____
RONALD I. STRAUSS

_____
PHILIP GLATZER

and

GELBER, GLASS, DURANT, CANAL & PINEIRO, P. A.
Co-Counsel for Petitioner
1250 Northwest 7th Street
Miami, FL 33125
TELEPHONE: 305/326-0090

By _____
N. JOSEPH DURANT