O/A 9-11-85

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

INITIAL BRIEF ON THE MERITS OF PETITIONER, EUGENE "MERCURY" MORRIS

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EXPLANATION OF SYMBOLS

The record on Appeal will be referred to by the letter "R"; the transcripts of the trial court proceedings will be referred to by the letters "Tr."; Pre-Trial and Trial Exhibits will be referred to by the letters "Ex." and the Appendix to this Brief will be referred to by the letters "App."

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from the decision (dated June 5, 1984) of the Third District Court of Appeal, affirming the trial court's judgment of conviction (dated January 20, 1983) of the Defendant/Petitioner, EUGENE "MERCURY" MORRIS. In this appeal, the Petitioner asks this Court to quash the decision of the District Court on the ground that it conflicts with decisions of this Court and of other District Courts of Appeal. This Court entered its Order Accepting Jurisdiction on March 19, 1985.

On October 21, 1982, the State of Florida filed an Amended Information against Defendants, Morris, Kulins and Cord, alleging in Count I thereof that all defendants conspired to traffic in cocaine in Dade County, Florida, from August 10, 1982 through August 18, 1982; in Count II that all defendants actually trafficked in cocaine on August 18, 1982; in Count III that Morris and Kulins unlawfully sold cocaine to a State agent on August 16, 1982; in Count IV that Morris and Kulins unlawfully possessed on August 16, 1982; in Count V that Morris and Kulins unlawfully sold cocaine on August 17, 1982; and in Count VI that Morris and Kulins unlawfully possessed cocaine on August 17, 1982 [R. 9-17a] After jury selection, counsel for defendant, Morris, in opening statement, informed the jury that the defendant, Morris, would admit the acts charged, and rely on the sole defense of entrapment. [Tr. 1013-14] After opening

statement on behalf of Morris, an overnight recess took place and, on the following morning, the State Attorney's Office announced, in exchange for a guilty plea to the trafficking charge and an agreement to testify against Morris, the State would waive the mandatory sentence requirement regarding co-defendant Cord, the admitted cocaine supplier. [Tr. 1046-51] Over objection/ Motion for Mistrial/Proffer by trial counsel, Mr. Strauss [Tr. 1052-55] the case then proceeded to jury trial against Morris and Kulins, wherein Morris took the stand and admitted having committed each of the acts alleged in Counts I-VI of the Amended Information [Tr. 1610-1723] but raised the defense of entrapment. [R. 99-104A] In connection with his entrapment defense, Morris called as a witness Eugene Gotbaum, to whose testimony the State objected. Morris' counsel then was required by the trial judge to proffer the testimony of witness Gotbaum outside of the presence of the jury [Tr. 1748-1752] and in connection therewith, counsel for Morris filed an Affidavit [Ex. 1177-79] [App. 1-2] signed by Gotbaum. Additionally, outside the presence of the jury, after the Court declined to allow the testimony of Gotbaum, counsel for Morris called Gotbaum to the stand to confirm and ratify the proffer and Affidavit. [Tr. 1818-1820] Mr. Gotbaum's proffered testimony included, inter alia, that the State's confidential informant, Donaldson, informed him of his plan (prior to the actual commencement of the investigation) to set up Morris in a

drug deal. [Tr. 1750] The trial judge then excluded this testimony as hearsay. [Tr. 1750-1752]

Prior to the charge conference, after an overnight recess, co-defendant, Kulins, pled guilty [Tr. 1902-03], leaving only the State's case against Morris to go to the jury. The Assistant State Attorney likewise waived the mandatory sentence requirement in exchange for the guilty plea, but without any other requirement of cooperation/ testimony by Kulins. [Tr. 1903] Again, counsel for Morris moved for a mistrial, which was denied. [Tr. 1912-14] After deliberation, the jury convicted Morris on Counts I, II, IV and VI, but acquitted him on charges of sale of cocaine as to Counts III and V of the Amended Information [Tr. 1658-1666]

On November 5, 1982, the lower court filed its judgment, adjudicating Morris guilty pursuant to the verdict [R. 1656-57] and on January 20, 1983, Morris was sentenced to a term of five years on Count I and twenty years on Count II of the Amended Information, with a mandatory 15 year period of incarceration. Sentence on Counts IV and VI (possession of cocaine) of the Amended Information was suspended. [R. 794-798] Morris' appeal to the Third District Court of Appeal then followed and the Third District affirmed his conviction in Morris v. State, 9 FLW 1239, Third District, Case No. 83-198, June 5, 1984, in a 2-1 decision with a dissenting opinion by Judge Wilkie Ferguson.

FACTS

A. (Pre-Trial Facts Adduced at Suppression Hearing)

Confidential informant, Frederick Donaldson, a gardener, had performed certain "yard work" at the home of Eugene Morris and billed Morris $1,300.00 for the services. [Ex. 179-182] At the time he performed the gardening work, Donaldson had a pending charge of sale of marijuana [Ex. 137,140] and was on probation after having spent several months in jail on a conviction for aggravated battery. [Ex. 243-244] This conviction resulted from Donaldson's having bitten off the ear of a man who was in the process of stealing his cockatoo bird, [Ex. 230-231] which Donaldson claimed to have been delivered to him by God. [Ex. 218-219] Donaldson was ordered, as a specific requirement of probation, to pay restitution (for a plastic ear) in the amount of $2,500.00 to the victim of the ear bite [Ex. 248] and it was for this reason that Donaldson allegedly performed yard work for Morris. [Ex. 249] After several unsuccessful attempts to collect the balance of the money Morris owed him, and believing that Morris was intentionally withholding payment so that he would go back to jail [Ex. 249-251], Donaldson called the office of the State Attorney of Dade County, Florida on 8/6/82 to report that he had information Morris was involved in using a handful of cocaine [Ex. 241-242] and selling cocaine [Ex. 246; Tr. 102, 139], and on August 10, 1982, called Havens to advise that Morris had a large amount of cocaine at his residence. [Tr. 249]

(See Paragraph 5 of Agent Gilbert's Affidavit [Ex. 5-26, App. 3-8])

During that initial contact with the State Attorney's Office, Donaldson spoke with George Ray Havens, Chief Investigator for the Eleventh Judicial Circuit of Florida. [Tr. 120] After speaking with Donaldson, Havens called every local, state and federal law enforcement agency to discover if there was any information on file relative to the use or sale of cocaine by Morris. All responses were negative. [Tr. 121-122, 132] Havens also caused an investigation to be made on Donaldson by Investigator Frank Gilbert, who discovered that Donaldson had been arrested on various charges including loitering and prowling, sale and possession of marijuana, stabbing a man with a screwdriver and biting off a man's ear. [Tr. 122] Havens was also advised that Donaldson frequently used marijuana. [Tr. 127] Havens did not believe Donaldson when Donaldson told him he had not used cocaine in the past. [Tr. 129] Donaldson additionally attended a drug rehabilitation program. [Ex. 40]

Donaldson called Havens again on 8/10/82 to tell him that Morris did not have any cocaine yet but that he was expecting a shipment soon and that Morris would agree to meet with Donaldson's friend, who supposedly was from New York, to negotiate the sale of cocaine. Donaldson subsequently called Havens on 8/13/82 and 8/16/82 to tell him that Morris had actually received a large quantity of

cocaine. [Tr. 130] Havens testified he would not have initiated the extensive investigation effort of Morris, but for the information supplied by Donaldson that Morris had received a large amount of cocaine. [Tr. 249, 141]

After receiving the above information and learning what he did about Donaldson's background, Havens considered Donaldson to be an unreliable source of information. [Tr. 123] Nevertheless, Havens did not instruct Investigator Gilbert to continue to investigate the background of Donaldson [Tr. 122-123] and did "absolutely nothing" in the way of routine police investigation prior to deciding to have Donaldson place a controlled (taped) telephone call to Morris at his residence on 8/16/82 in an effort to purchase two kilos of cocaine from Morris. [Tr. 132-133] Chief Investigator Havens believed that the same unreliable uncorroborated information supplied by Donaldson, if it related to the Governor of the State of Florida, would have licensed the investigators to monitor or bug the telephone of the Governor without a warrant (Court authorization). [Tr. 631]

Prior to the first controlled and taped telephone conversation to Morris on August 16, 1982, Donaldson, while acting as an agent for the State, arranged with Morris the amount of money for the purchase, as well as the amount of cocaine, but the State did not place that information in any investigative report. [Tr. 136] In preparing Donaldson for his controlled telephone call, Havens instructed Donaldson

to advise Morris that he (Donaldson) had spoken to "Joe" from New York, that Joe had the money to purchase cocaine and that if Morris wanted to meet with him to discuss the sale of cocaine, the meeting would be held at the Dadeland Shopping Center. [Tr. 133-134] Donaldson[1] had previously advised Morris, pursuant to instructions from Havens, that when he was ready to sell, "his man" was ready to buy. According to information previously supplied by Donaldson, Morris had previously said to him that he could deliver two "keys," i.e., kilos of cocaine. [Ex. 298-301, 308-310] Chief Havens then made arrangements for Joe Brinson, Special Agent with the Florida Department of Law Enforcement (FDLE) to join the investigation [Tr. 140-141, 374-376] on loan to the State Attorney's investigators, [Tr. 378, 142] because Agent Brinson was black. [Tr. 141]

As a result of the first monitored (taped) conversation, Donaldson's supposed friend "Joe" (Brinson) from New York wished to purchase cocaine from Morris, where Donaldson arranged a meeting with Morris for the first time at Dadeland Shopping Center during the afternoon of 8/16/82. [Tr. 143-144, 381] The state agents, relying on information supplied by Donaldson [Tr. 136], were expecting to purchase two kilos of cocaine from Morris at that time and location

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[1] The government stipulated that Donaldson was acting as a government agent. [Tr. 511] Donaldson was never sworn in as an investigator or bonded by the State of Florida. [Tr. 513]

and brought with them cash in the sum of $120,000.00. [Tr. 135, 144-145] The meeting took place at 5:29 p.m. on August 16, 1982 [Tr. 152] but the expected cocaine was not delivered by Morris, although Brinson showed Morris the $120,000 cash, located in the trunk of Brinson's vehicle. [Tr. 382] However, when the meeting was concluded and Morris was walking away, Donaldson requested that Morris give Brinson a sample of the cocaine. Morris then walked back from his car and handed a small packet of cocaine (a user's amount) to Brinson. [Tr. 145, 383, 427]

A second meeting, later that same date (6:15-6:30 p.m.) was then scheduled in the Dadeland Shopping Center parking lot between Morris and Brinson. [Tr. 153] Once again, relying on the information supplied by Donaldson that Morris had received a large quantity of cocaine, Brinson had $120,000.00 in cash to purchase two kilos of cocaine from Morris but Morris did not deliver any cocaine. [Tr. 153] At 9:15 p.m., Brinson again met with Morris and brought the $120,000 cash to buy two kilos of cocaine, but Morris did not have the cocaine. [Tr. 153] The scenario was repeated with additional meetings at 9:40 p.m., and another at 10:15 p.m. [Tr. 153, 154] On each occasion, Brinson had the cash and was "willing, ready and able" to buy two kilos of cocaine from Morris, but Morris did not deliver any cocaine. [Tr. 154] Brinson was instructed to buy the cocaine from Morris and, therefore, decline to deal with anyone else.

[Tr. 385] Thus, when Morris, a cocaine user, upon further prodding by the agents when he could not locate the cocaine, offered to introduce the agents to his supplier, "a chic" (Ruth), so the State could deal directly with the source, Brinson declined, stating "I ain't dealing with no whore. I am only dealing with you." Havens instructed Brinson not to deal with anyone unless Morris was present. [Tr. 385] Brinson then advised Chief Havens on 8/16/82 that, at the conclusion of five monitored face to face meetings with Morris, he believed Morris did not have any cocaine at all [Tr. 157] and did not have access to two kilos. [R. 434-435] At the suppression hearing, the trial court sustained objections of the State to inquiry of Brinson concerning Brinson's intent to encourage/entice Morris to commit the crime of trafficking. [Tr. 386-392]

> "Mr. Strauss:
> Q. Was your statement made to Donaldson for purpose of evidencing your belief that Gene Morris did not have any cocaine in his possession?
>
> Mr. Yoss:
> Objection. It's irrelevant.
>
> Mr. Strauss:
> It's relevant to the Motion to Suppress. I have to go to the state of mind. I cannot present it any other way.
>
> * * *
>
> Court:
> ...Go to something else."
>
> [Tr. 388]

Trial counsel for Morris then proffered the deposition testimony of Agent Brinson.[2] [Tr. 388, 392] Havens, therefore, concluded there was no probable cause to obtain a search warrant for Morris' house at that point. [Tr. 158]

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"BY MR. STRAUSS:
"Q. Did there come a time when Gene Morris said to you during the meetings of the 16th that he couldn't get it to you, whatever reason, and your conclusion was in speaking to Fred Donaldson, still being monitored, 'I don't believe the m-f has the shit. I think he's bullshitting,' words to that effect?
A. Yes.
Q. How many meetings went by when you finally reached that verbal conclusion?
A. Let me go through the transcript. That was the third meeting.
Q. You were becoming a little bit discouraged. You were there to buy two kilos of cocaine, having three meetings and all you had was a very small half-a- teaspoon sample for your efforts. Weren't you becoming basically discouraged at that point?
A. Correct.
Q. That was the reason for your statement at the end that you didn't believe he even had it?
A. At that time, yes.
[R. 434-35]

* * *

Q. Didn't you also believe and have reason to believe that he didn't have it, he didn't have the two kilos?
A. When that meeting terminated, yes.
Q. Did you also have reason to believe what Gene was trying to do was to locate it for you?
A. Correct.
Q. Did you encourage Gene to continue his efforts to locate the cocaine for you to sell it?
A. What is your question.
Q. In other words, you reached the conclusion at the end of the third meeting that he didn't have the cocaine, but he was trying to locate it.
My question to you is: Did you continue, by conversations with Gene, to encourage him to continue his quest to locate the cocaine for you?
MR. YOSS: Objection to the form of the question. You can go ahead and answer it, though.
THE WITNESS: Yes. At the direction of Chief Havens.
[R. 436]

The state agents, nevertheless, continued their quest to have Morris locate cocaine on the morning of 8/17/82, by having Donaldson place a telephone call to Morris at his home to advise him that "Joe" would like to speak with him. [Tr. 165-166] Morris and Brinson (Joe) did speak to each other and agreed to meet at Dadeland at 3:00 p.m. that day so that Brinson could examine the cocaine he was trying to purchase. [Tr. 166] Brinson went to Dadeland at the appointed hour to inspect the cocaine along with a team of government agents prepared to arrest Morris but the scheduled meeting never took place, since Morris did not appear. [Tr. 168-169]

Additional telephone conversations were initiated by the State Attorney's agents/investigators to the Morris home [Tr. 165-166] which ultimately concluded by arrangements for yet another meeting between Morris and state agents on 8/17/82 in a park in South Miami to exchange the $120,000 cash for two kilos of cocaine. State Attorney investigators observing the meeting were prepared to arrest Morris as soon as he delivered cocaine to Brinson. Morris arrived at the scene but had no cocaine and left after a few

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[2] cont'd

* * *

Q. When I say you go get the cocaine, we are referring to Gene Morris, go out and get the cocaine for you?

A. Correct."

[R. 437]

seconds. [Tr. 233-236] Pursuant to telephone conversations initiated by the state agents [Ex. 4] at approximately 6:50 p.m. on August 17, 1982, State agent Brinson and informant Donaldson proceeded to the Morris residence to obtain an additional sample of cocaine. [Tr. 402, 403, 428] (The trial court suppressed the tape recording in the Morris residence in that it was obtained without court authorization [Tr. 539], but Agent Brinson was allowed to testify at time of trial regarding the meeting. [Tr. 1174-1176]) Later that evening, the State Attorney's agents, Brinson and Donaldson, continually attempted to contact Morris at home by telephone but were unable to do so. The government then concluded its investigation for August 17, 1982. [Tr. 237-238]

On the morning of 8/18/82, the State pursued its goal of having Morris locate and sell cocaine to its investigators by having Donaldson initiate a taped telephone conversation to Morris at his residence to tell him that "Joe" wanted to speak to him. [Tr. 407] As a result of that call, yet another meeting was scheduled, this time at the Morris residence at 3:00 p.m. that afternoon. [Tr. 241]

At this juncture, on the morning of August 18, 1982, Chief Investigator Havens decided to seek a warrant to search Morris' home and a "Sarmiento Order" to monitor/tape conversations within the Morris home. In applying for these court authorized searches, Havens had Investigator Gilbert swear out an Affidavit which was presented to Circuit Court

Judge Gerald Kogan in the state's application for a "Sarmiento" order and Search Warrant. (Agent Brinson swore out an affidavit for the "Sarmiento Order" which merely incorporated Gilbert's Affidavit for Search Warrant.) [Tr. 241-242, 255- 256, 262-263; Ex. 5-26] The information contained in Gilbert's affidavit, which was submitted to Judge Kogan on the morning of 8/18/82, was supplied by Chief Havens, Agent Brinson and Investigator Gilbert [Tr. 242-243; App. 3-8]

Paragraphs 3 and 4 of Gilbert's affidavit are based upon the information supplied by the (admittedly unreliable) confidential informant Donaldson on 8/6/82 that he (Donaldson) had observed Morris "sniffing and cutting" cocaine in June and July of 1982. [Ex. 12-13] At the suppression hearing, Havens acknowledged that on 8/6/82 he considered this information both uncorroborated and unreliable. [Tr. 245] There is no mention in the affidavit, however, that the information was unreliable[3].

In paragraph 5, Investigator Gilbert swears that Chief Havens advised him that confidential informant Donaldson had informed Havens on 8/10/82 that Morris had received a large quantity of cocaine. [Ex. 13] At the suppression hearing, Havens testified that on 8/10/82, when he received that information from Donaldson, he had no reason to believe it. Havens further testified, at the

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[3] Donaldson himself testified that he never told Chief Havens on 8/6/82 that Morris was sniffing and cutting cocaine. [Ex. 280]

pre-trial suppression hearing, that the information in Paragraph 5 of the affidavit was not accurate, since Donaldson did not tell him on 8/10/82 that Morris had received a large quantity of cocaine, but rather the unreliable confidential informant stated that Morris was expecting a large shipment of cocaine. According to the post arrest testimony of Havens, it was not until 8/16/82 that Donaldson told Havens Morris had received a large quantity of cocaine. [Tr. 247-249] The affidavit of Brinson failed to disclose that prior to the submission of the Affidavit to Judge Kogan, Brinson did not believe Morris had any cocaine, and that Morris did not have access to the cocaine, that he was trying to locate it and it was probable that he might not be able to get it, and that he so advised Chief Havens. [R. 434-435] The Affidavits of Brinson and Gilbert failed to advise Judge Kogan that prior to the application for the Sarmiento warrant the State had continually taped and monitored conversations with Morris, including one occasion at Morris' home. [Tr. 256-257]

Judge Kogan issued a search warrant on 8/18/82 based upon the affidavit of Investigator Gilbert, which incorporated known false and inaccurate material facts and thereupon authorized government agents to search the home of Morris and utilize a body bug (transmitter) to be worn only by Agent Brinson. [Ex. 17-19]

State agents Brinson and Donaldson then proceeded to the Morris home on 8/18/82 for the scheduled 3:00 p.m.

meeting. Prior to submitting the Affidavits to Judge Kogan, the State knew that Confidential Informant Donaldson was going to wear the body bug in the Morris residence but failed to advise Judge Kogan [Tr. 460-465]. Chief Havens and Brinson made the decision to violate Judge Kogan's Sarmiento Order by placing the body bug on Donaldson rather than Brinson[4]. [Tr. 417-18; R. 342- 347] Morris was then arrested outside his home, after he had given Brinson a bag of cocaine [Tr. 277-278, 425], delivered to his house, by Cord. [Ex. 56-59; Tr. 144]

B. (Facts Adduced at Trial)

Joe Brinson, special agent for the Florida Department of Law Enforcement (FDLE) was requested by Chief Havens to participate, "on loan" from his agency, in the investigation of Morris, and Brinson was advised/knew that Mercury Morris was a famous former all pro football player and that any trial would be well publicized. [Tr. 1222,23]

On August 16, 1982, Morris gave Agent Brinson a small amount of cocaine as a sample of more to come [Tr. 1101], which sample had been delivered to Morris the night prior by Donaldson. [Tr. 1566] Then, on August 17, 1982, Morris gave Brinson additional cocaine as a further sample of what Morris could allegedly produce [Tr. 1175-1181], which sample had been delivered to Morris by Cord. [Tr. 1443] Then, on August 18, 1982, Brinson assisted in

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[4] This unauthorized act caused Judge Gable to suppress the taped conversations in the Morris house. [Tr. 622]

arresting Morris who had then produced the larger amount of cocaine sought by State agents, [Tr. 1195-1211], which amount had been delivered to Morris by Cord. [Tr. 1444]

During the trial, the jury heard tape recordings of the interaction between confidential informant Donaldson, undercover agent Brinson and Morris, while reading prepared transcripts of the tapes[5]. [Tr. 1082-1089, 1119-1124, 1128-1161, 1163-1169, 1180-1181, 1188-1194; Ex. 562-593, 852-1022] The inventory (chronology) of taped conversations is included in the Appendix. [Ex. 4; App.9]

At the time, Fred Donaldson had allegedly done extensive yard work for Morris and threatened to take him to court for not paying the bill. [Tr. 1553-1557] Morris was broke; his mortgage payments were in arrears; he had lost all of his investments and monies from professional football and, therefore, Morris could not pay Donaldson's bill. [Tr. 1545, 1556, 1629-30] Donaldson knew Morris used drugs. [Ex. 53]

In the summer of 1982, Donaldson said to Morris, "I'm going to get even with you." [Tr. 1558] On cross examination during trial, Agent Brinson admitted that during his conversations with Morris, he continued to encourage Morris to locate cocaine for him [Tr. 1256] after becoming

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[5] The facts regarding the interaction between confidential informant Donaldson, undercover agent Brinson and Morris, which were adduced at the evidentiary hearing on the Motion to Suppress, were presented to the jury through the testimony of Agent Brinson and the tape recordings of the various meetings and conversations.

disappointed that Morris did not have a large quantity of cocaine as represented by Donaldson. [Tr. 1258-1259, 1267-1270] Morris admitted to having used cocaine in the past, but denied ever having sold any cocaine. [Tr. 1569-1570]

SUMMARY OF ARGUMENT

I. The Exclusion of Eugene Gotbaum's Testimony was Reversible Error.

On hearsay grounds, the trial court precluded Eugene Gotbaum from testifying in Morris' defense that confidential informant, Donaldson, told Gotbaum about his plan to "set up" Morris in a drug deal, prior to Morris' arrest. The Third District then affirmed the trial court's exclusion of this testimony on the ground that it constituted irrelevant hearsay, holding that, in Florida, under the "subjective view," evidence of the intent of a state agent to entrap a defendant is not at issue where the defense of entrapment is raised.

Both the trial court and the Third District erroneously found Gotbaum's testimony inadmissible because Florida does consider the conduct of state agents in connection with an entrapment defense under the "objective view" of entrapment. Moreover, Gotbaum's testimony about Donaldson's plan to induce Morris to involve himself criminally in a drug deal was admissible, even under the subjective view of entrapment.

The Third District's affirmance of the lower court's exclusion of Gotbaum's testimony is in direct conflict on the law with decisions of other District Courts of Appeal and of this Court. Furthermore, the exclusion of the testimony was reversible error, because the testimony,

together with other testimony of record, would establish police activity to create a crime of trafficking, whereby no such crime existed and would have permitted the trial judge to rule, as a matter of law, that Morris was entrapped. The testimony of record (or proffered but excluded) clearly established that the investigation did not interrupt a specific ongoing crime of trafficking by Morris, but rather, the investigation was based upon the false information of Donaldson, who desired to set up Morris for an arrest and vocalized his intent to Gotbaum prior to the arrest.

In the alternative, the testimony of Gotbaum was for the jury to evaluate in determining whether Morris was induced to commit a crime he otherwise would not have committed.

Therefore, the decision of the District Court should be quashed.

II. The Verdicts Returned by the Jury Were Inconsistent and Cannot Stand.

The State of Florida sought to purchase a large amount of cocaine from Morris and, in order to do so, State agents, based upon false information from an unreliable informant, induced Morris over a three day period to locate and produce the cocaine at the request of State agents.

The evidence at trial established that all of the information supplied by Donaldson (confidential informant) regarding Morris having received a large amount

of cocaine prior to the investigation commencing was false and, therefore, deliberately supplied by Donaldson to "set up" Morris. Cord, the cocaine supplier, after pleading guilty, testified that Morris did not ever have any cocaine (or two kilos of cocaine) and that he (Cord) supplied the cocaine involved in this case [Tr. 1443-1444], and Cord waited at the Morris residence for the payment for his cocaine. [Tr. 1444] Cord knew prior to being contacted by Morris to supply the cocaine in this transaction that Morris was unable to locate the cocaine requested by the State agents, as a result of a conversation with "Ruth" [Tr. 1442-1447], who supplied Morris user's amounts of cocaine. [Tr. 1569]

During this three day period, Morris transferred two samples of cocaine to State agents, and was charged with two separate counts of sale or transfer of cocaine on account of these transfers. Morris then transferred a larger amount of cocaine to State agents. During trial, Morris took the stand and admitted transferring all of this cocaine to the State agents, which he obtained after the State agents had relentlessly requested that he locate cocaine for them, which would lead to cocaine trafficking charges.

The jury acquitted Morris of selling or transferring the two small samples of cocaine (trial evidence established the samples were not his), while convicting him on charges of trafficking in the larger

amount of cocaine and conspiracy to traffic in the larger amount of cocaine (obtained from Cord).

The only explanation for the jury's acquittal of Morris on charges of sale or transfer of cocaine is that the jury accepted Morris' defense of entrapment -- his only defense, recognizing that Morris acted as the State's "agent" to locate cocaine. Moreover, by the State's own admission during trial testimony and closing argument, all of the criminal acts for which Morris was charged were the product of the same inducement throughout the State's three day shopping expedition for cocaine. Therefore, all acts were clearly interlocking/interrelated and the jury's acquittal of Morris on two of these charges is obviously inconsistent with the jury's guilty verdicts as to the other charges. Therefore, the guilty verdicts must fail.

I.

THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT, IN FLORIDA, EVIDENCE OF THE STATE'S INTENT TO INDUCE OR ENTICE A DEFENDANT TO COMMIT ILLEGAL ACTS IS IRRELEVANT TO AN ENTRAPMENT DEFENSE AND SINCE THE DISTRICT COURT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER DISTRICT COURTS OF APPEAL, THE DISTRICT COURT'S DECISION SHOULD BE QUASHED.

A. Under The "Objective Test" For Entrapment, Testimony From Eugene Gotbaum that State Agent Donaldson Informed Him of His Plan to Set Up Eugene Morris in a Drug Deal was Highly Relevant to Morris' Defense of Entrapment.

In Cruz v. State, 10 FLW 161, Case No. 63,451, 3/7/85, this Court recognized that in criminal cases involving the defense of entrapment, Florida has long utilized the "subjective view" of entrapment which focuses on the predisposition of the defendant to commit the crime alleged and ignores the conduct of the police in apprehending the defendant. However, in Cruz, this Court also recognized a need for the courts to carefully consider police conduct in connection with an entrapment defense and a moral as well as a legal obligation for the judiciary not to rely solely on the "subjective view" because, as Justice Frankfurter said, in Sherman v. U.S., 356 US 369 (1958):

> "...[A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter

> what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society..."
>
> Cruz, supra, at 162.

Accordingly, this Court then adopted the so-called objective view of entrapment, designed to redress "impermissible techniques" on the part of the police, stating that the "objective view is a statement of judicially cognizable considerations worthy of being given as much weight as the subjective view." Id. at 163. Moreover, the Court then found, like the New Jersey Supreme Court before it, that the objective and subjective views of entrapment can "coexist" and will come into play in the same trial, while carefully explaining the mechanics of these two aspects of an entrapment defense.

> "We find, like the New Jersey court, that the subjective and objective entrapment doctrines can coexist. The subjective test is normally a jury question. The objective test is a matter of law for the trial court to decide.
>
> The effect of a threshold objective test is to require the state to establish initially whether 'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.' Sherman, 356 U.S. at 382 (Frankfurter, J.. concurring in the result). Once the state has established the validity of the police activity, the question remains whether 'the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the

alleged offense and induce its commission in order that they may prosecute.' Sorrells, 287 U.S. at 442 (1932). This question is answered by deciding whether the defendant was predisposed, and is properly for the jury to decide. In other words, the court must first decide whether the police have cast their nets in permissible waters, and, if so, the jury must decide whether the particular defendant was one of the guilty the police may permissibly ensnare.

To guide the trial courts, we propound the following threshold test of an entrapment defense: 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.

The first prong of this test addresses the problem of police 'virtue testing,' that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote in his separate opinion in Sorrells, 'Society is at war with the criminal classes,' 287 U.S. at 453-54. Police must fight this war, not engage in the manufacture of new hostilities.

The second prong of the threshold test addresses the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include whether a government agent 'induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.' Model Penal Code Sec. 2.13 (1962)."

Cruz, supra, at 163.

In the instant case, Morris called Eugene Gotbaum as a witness in connection with his defense of entrapment to whose testimony the State objected on grounds of prejudice [Tr. 1747-48]. Counsel for Morris then proffered to the court that Gotbaum would testify that, inter alia, he was advised by Fred Donaldson (Freddie), prior to the investigation of Morris, that Donaldson was going to set up Morris in a drug deal. [Tr. 1750] Subsequently, Gotbaum's affidavit, in connection with the proffer, was made part of the record. [Ex. 1177-79] The trial judge ruled such testimony would be hearsay [Tr. 1750] and excluded it [Tr. 1752], (notwithstanding that the State stipulated that Donaldson was the State's agent. [Tr. 511])

After Morris' conviction, the Third District Court of Appeal, in Morris v. State, 9 FLW 1239 (Fla. 3d DCA June 5, 1984) ruled (in a 2-1 decision), in affirming the trial judge's exclusion of Gotbaum's testimony and Morris' conviction, that the intent of State agent Donaldson to induce or entice Morris to commit the criminal acts charged and the agent's intent to "set up" Morris were not at issue and were irrelevant.

> "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.
>
> * * *
>
> 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..."

Morris, supra, at 1240-1241.

In so ruling, the District Court quoted, with approval, from Sherman v. U.S., supra, which clearly holds that police conduct is relevant to an entrapment defense. The District Court then, surprisingly, stated that ..."the material issues raised by an entrapment defense are solely the predisposition of the defendant and the conduct of the police." Morris, supra, at 1241, emphasis supplied. Thus, even while recognizing that police conduct is a factor to be considered in connection with an entrapment defense, the District Court still ruled that evidence of the State's plan to induce, entice and "set up" Morris was properly excluded. The District Court's decision is in obvious and direct conflict with this Court's decision in Cruz, supra, and also with the decisions of the Fourth District in Brown v. State, 299 So.2d 37 (Fla. 4th DCA 1974), the First District in State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) and the prior decision of this Court in State v. Liptak, 277 So.2d 19,22 (Fla. 1973) holding that:

> **"...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.)

Therefore, the District Court's decision should be quashed. It now remains to be demonstrated that the exclusion of Gotbaum's testimony was prejudicial error.

B. Under the "Objective Test," Morris Was Entrapped As a Matter of Law.

The record in this cause reveals the following facts which show that Morris was entrapped, as a matter of law, through police conduct:

1. Morris is the famous former football player "Mercury Morris" of Miami Dolphins fame. [Tr. 1533-1538]

2. Donaldson (a sometimes gardener) was a friend of Morris and Morris' children [Tr. 1553-1554] who also was a frequent user of marijuana. [Ex. 101] Donaldson's use of drugs caused him to hallucinate and lie. [App. 1-2] Donaldson had a pending charge of sale of marijuana. [Ex. 137, 140] Donaldson had previously attended a drug rehabilitation program. [Ex. 40]

3. Donaldson was angry at Morris because Morris owed Donaldson money and did not pay him back. Donaldson needed the money from Morris to make required restitution ordered under a sentence of probation incident to a conviction for aggravated battery. He believed that Morris did not pay him because he wanted Donaldson to go to jail. [Ex. 179-182, 243-44, 248-251]

4. Yearning for revenge, Donaldson told Morris, "I'm going to get even with you." [Tr. 1558; Ex. 341]

5. Donaldson then, on August 6, 1982, contacted the office of the State Attorney of Dade County to report to Chief Investigator Ray Havens that Morris was involved in selling a large quantity of cocaine [Tr. 120-139] and, on August 10, 1982, reported Morris had received a large quantity of cocaine. [Tr. 130]

6. Havens contacted every local, state and federal law enforcement agency and learned that there was no official information on file that Morris had ever used or sold cocaine. [Tr. 118-122]

7. Havens then learned that Donaldson had an extensive and sordid criminal background [Tr. 122] and considered him to be unreliable. [Tr. 123] Nevertheless, the State of Florida appointed Donaldson its agent and its reliable confidential informant. [Tr. 511]

8. On August 15, 1982, Donaldson gave Morris a sample of cocaine [Tr. 1566] which was ultimately delivered to Agent Brinson on the first meeting as a sample. [Tr. 1101, 1618]

9. Donaldson told Morris that he (Donaldson) had a friend from New York who could be trusted and who needed Morris to introduce him to people who would sell him cocaine. Donaldson also told Morris that this would be a way for Morris to pay him back, so that he

(Donaldson) could make restitution and would not have to go to jail. [Tr. 1563-67]

10. On August 10, 1982 and on August 16, 1982, Donaldson told Havens that Morris had received a large quantity of cocaine [Tr. 130] and further told Havens that Morris could deliver two kilos of cocaine. [Ex. 298-301, 308-310] Donaldson, however, set the price per kilo and the amount of cocaine to be delivered, prior to the first telephone call to Morris. [Tr. 1576, 1577; Ex. 332]

11. Havens then instructed Donaldson to call Morris on the telephone and advise him that he (Donaldson) had spoken to a certain "Joe" from New York who would purchase the two kilos of cocaine from Morris at a meeting at the Dadeland Shopping Center. [Tr. 133-34] Donaldson then called Morris as per Havens' instructions. [Tr. 1082-1089]

12. After this first conversation, a meeting was held at the shopping center at which time State agent Brinson (Joe) showed Morris $120,000 which he would pay for Morris' supposed two kilos of cocaine, but Morris did not have two kilos of cocaine. [Tr. 135, 144-45, 382, 1091-1099] The State was advised by Donaldson that Morris did have the two kilos of cocaine in his possession and the State agents expected to purchase same at the first meeting. [Tr. 144, 1512] However, Morris gave Brinson a sample of cocaine, at Donaldson's request. [Tr. 145, 383, 427, 1100-1101]

13. During another meeting at the shopping center on the same day, Brinson again showed Morris $120,000 he would pay for two kilos of cocaine, but Morris did not deliver any. [Tr. 153, 1104-1106]

14. Three more meetings were scheduled that same day, but Morris did not deliver any cocaine (total of five meetings). [Tr. 153-54]

15. When Morris did not deliver any cocaine, Brinson became "disappointed" [Tr. 1258-59] and discouraged [R. 434] and, in fact, Brinson did not believe that Morris had any cocaine at all. [Tr. 1259-60]

16. Notwithstanding his belief that Morris had no cocaine, State agent Brinson continued, through words and conduct, to encourage Morris to sell him cocaine, at the direction of Chief Havens [Tr. 1266-67], and in effect commenced the additional police activity to create a crime where none had existed, in that it is not disputed that Morris never had the two kilos of cocaine in his possession. [Tr. 1443, 1447, 1573] Brinson admitted he had then sent Morris out into the field to locate cocaine for him. [Tr. 267] Brinson refused to deal with the cocaine supplier, but rather insisted on dealing only with Morris. [Tr. 1576]

17. The following day, August 17, 1982, confidential informant Donaldson called Morris again from the State Attorney's Office to tell him that Brinson (Joe) would like to arrange another meeting with him. That meeting was scheduled, but Morris never appeared. [Tr.

165-69, 1161-1169] Subsequently, Brinson called Morris and asked him if he could supply him with an ounce of cocaine. Brinson then went to Morris' house at which time Morris gave him approximately one or two grams of cocaine as a sample [Tr. 1171-76] which was delivered to Morris by Cord. [Tr. 1443]

18. Later that day, another meeting was scheduled, as a result of telephone calls made from State agents to the Morris home and, although Morris appeared, he had no cocaine. [Tr. 233-36, 1182-1187]

19. The following day, August 18, 1982, Donaldson called Morris to advise him that "Joe" would like to speak with him at the Morris residence. A meeting was then arranged. [Tr. 241, 1187-1194]

20. In their over-zealousness to arrest Morris, State investigators and the prosecutor sought a search warrant from Circuit Judge Gerald Kogan, which was based on averments of information which the investigators themselves knew to be false or unreliable when submitted on August 18, 1982. In particular, in Paragraphs 3-4 of one of the affidavits in support of the search warrant, a State investigator advised Judge Kogan that Donaldson had advised him that he had observed Morris sniffing and cutting cocaine [Ex. 12-13], whereas Chief Havens later admitted that he considered this information both uncorroborated and unreliable. In Paragraph 5 of that same affidavit, an investigator swears that Chief Havens advised him that

Donaldson had advised Havens that Morris had already received a large quantity of cocaine on August 10, 1982 [Ex. 13], even though Havens later admitted that he had no reason to believe this information when he received it [Tr. 247-249] -- and that the information was, in fact, false. [Tr. 1443, 1447, 1573]

21. As a result of the State's prodding, Morris contacted the person from whom he purchased his user amounts a street supplier named "Ruth", who could not acquire the amount of cocaine requested by the State. [Tr. 1447, 1572-73] Co-defendant, Cord, a drug supplier, refused to talk to Morris [Tr. 1438-39], because Morris owed him money for personal use of cocaine. [Tr. 1569, 1438, 1440]

22. Another co-defendant, Kulins, then went to Cord's residence, on August 17, 1982, to tell him that Morris had a friend from New York who wanted two kilos of cocaine [Tr. 1389], and to persuade Cord to talk with Morris. [Tr. 1798]

23. Cord took a sample of cocaine to Morris' house on August 17, 1982 for Brinson to inspect. [Tr. 1396, 1407] Brinson said he liked the sample and then Kulins advised Cord that Brinson wanted two kilos as soon as possible. [Tr. 1398]

24. The following day, August 18, 1982, Cord brought approximately one half kilo of cocaine to Morris' residence. [Tr. 1407] Cord never had in his possession two kilos of cocaine, as requested by the State. [Tr. 1443]

25. State agents, armed with their warrant, then arrested Morris after he gave the bag of cocaine to Brinson [Tr. 425] which was brought to Morris' residence by Cord.

26. During the appeal by Morris of his conviction to the Third District Court of Appeal, the State of Florida admitted that it was always Donaldson's intent to "set up" Morris. [See p. 33 of State's Answer Brief]

It becomes immediately apparent, after considering the above recited facts, why the excluded testimony of Gotbaum about Donaldson's plan to set up Morris was so crucial to Morris' defense. This testimony, if considered by the trial judge, would have shown that the entire scenario of events from Donaldson's first contact with the State Attorney's Office until Morris' arrest was, in fact, nothing more or less than a complete "set up" by the police, in that when the State knew that Morris, a user, did not have two kilos of cocaine, the agents sent him shopping his "sources" to locate cocaine for the State. Here, the State had no reason to believe that Morris was involved in the criminal activity of trafficking or being in possession of two kilos of cocaine. Nevertheless, it fabricated and created the crime of sale or transfer of two kilos of cocaine, presented the <u>crime</u> (not the opportunity) to Morris through Morris' "friend," whom the State appointed as its agent, and relentlessly continued to pursue, entice and induce Morris, over a period of three days, to locate cocaine dealers for

the State and to sell cocaine to State agents, even though the agents did not believe Morris ever had two kilos of cocaine (and, in fact, he did not). Thereupon, the State used false averments of "fact" in affidavits to obtain a search warrant to find cocaine at Morris' house and arrest Morris.

Applying this Court's two prong threshold objective test to the above facts, we see that the State's arrest of Morris was accomplished through what Judge Wilkie Ferguson called in his dissenting opinion below, "a textbook case of entrapment." In the first place, the police were not attempting to halt any specific targeted ongoing criminal activity, specifically drug trafficking by Morris, because the police discovered, ab initio, that Morris was not previously involved in any such criminal activity and the information from Donaldson that he (Morris) was involved in sale or possession of two kilos of cocaine was deemed unreliable. Instead of permissibly targeting a particular criminal activity to be halted, the police impermissibly targeted a famous former football player for the sake of entrapping and prosecuting him for a crime the State created. Secondly, the techniques employed by the police to cause Morris to commit the subject crimes also do not pass muster. Knowing that Morris only had cocaine for personal use and that he did not have a large amount of cocaine to sell, the State made Morris' friend, Donaldson, its agent to gain Morris' confidence and induce Morris, a user, to commit

serious crimes carrying a minimum mandatory sentence. Thus, although the State could have arrested Morris on the first day (possession and transfer of a sample), the State decided to continue to prod and entice Morris and to deal only through Morris, so as to elevate the activity to a crime of the State's choosing -- trafficking. Further, the State admitted that it was always its plan to "set up" Morris through Donaldson and admitted, through Brinson's testimony, that in furtherance of this plan, Brinson, at the direction of the chief investigator of Dade County, continued to encourage Morris for three days to procure a large amount of cocaine so that State agents could arrest and prosecute him. This is a classic example of how the police set a trap for the "unwary" to test and tempt, rather than intervene into ongoing criminal activity and thus, creating a "textbook case of entrapment" as a matter of law. Sherman v. U.S., supra.

Prior to trial, Morris made a Motion to Dismiss the State's Information on the ground that he was entrapped, as a matter of law, through police conduct [R. 99-104a], as well as a Motion to Suppress on the ground of entrapment. [R. 97-98a] These motions were denied. [Tr. 625] Prior to, during and at the conclusion of the evidentiary hearing on the Motion to Suppress, trial counsel for Morris re-argued and re-asserted the Motions to Dismiss and Suppress the evidence as a matter of law, and same were denied. [Tr.

386-387, 542-543][4] At the conclusion of all of the evidence, Morris renewed the entrapment motions. [Tr. 1943] Once again, these motions were denied. [Tr. 1943] Finally, Morris argued, in Paragraph W of his Motion for New Trial, that the lower court erred by not granting his Motion to Dismiss on the ground of entrapment. [R. 1709]

On appeal to the Third District, Morris then argued that he had been entrapped, as a matter of law, since the State conceded that its agent intended to set him up and since there was no evidence of predisposition on his part to traffic in cocaine [See p. 13, n.9 of Morris' Reply Brief] Accordingly, Morris has properly preserved his right to argue to this Court that the record reveals he was entrapped, as a matter of law, and he now asks this Court to so rule, while quashing the District Court's decision.

C. Under the "Subjective View" of Entrapment, Morris is Entitled to a New Trial.

This Court has recently held in Cruz, supra, that

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[4] "MR. STRAUSS: Yes, Your Honor.
Although I may anticipate Your Honor's ruling, we filed a Motion to Suppress on the grounds of entrapment. I realize there's been a number of motions ---
THE COURT: I think, under the law, that's an affirmative defense. I don't think that's grounds for a Motion to Suppress in the first place.
MR. STRAUSS: We cited the case law. I know it is unique.
The Court may rule as a matter of law. The Court may reserve that or deny it.
We also filed a Motion to Dismiss on the grounds of entrapment.
THE COURT: Once again, it's an affirmative defense. Both motions denied."
[Tr. 542-43]

the issue of predisposition of the defendant to commit a crime will always be a question of fact for the jury. Obviously then, due process requirements dictate that a defendant must be able to present to the jury all of the elements of an entrapment defense, including the element of inducement by the State to cause the defendant to commit the crime alleged. State v. Liptak, supra; Brown v. State, supra.

As previously argued, supra, the trial court and the District Court erroneously believed that Gotbaum's testimony relative to Donaldson's statement of intent to "set up" Morris was irrelevant hearsay. However, if this Court finds that Morris did not make out a case of entrapment as a matter of law, then this Court should also find that Morris was entitled to have the jury consider and weigh the excluded evidence that the State's confidential informant, throughout all of his conversations with Morris relative to the sale of cocaine by Morris to the informant's "friend," intended to entrap Morris into trafficking. This evidence bore directly on the issue of Morris' predisposition or lack thereof, because it showed that Donaldson was not merely offering Morris the opportunity to commit a crime, a permissible police activity, but rather was doing his very best, by lying to State agents regarding Morris being in possession of two kilos of cocaine, to create a crime of trafficking, where none existed.

Perhaps the best explanation of why Gotbaum's

testimony concerning Donaldson's plan to entrap Morris was so highly relevant and was not inadmissible hearsay, is to be found in a case decided by our sister State of Arkansas. Spears v. State, 568 S.W. 2d 492 (Ark. 1978). In Spears, the defendant was convicted of dealing in narcotics. His defense was that he was entrapped by an informant named Caldwell. At trial, Spears was precluded from calling as a witness one Bruce Sellers, who was prepared to testify concerning Spears that the undercover police officer had promised to pay Caldwell $1,000 "for setting everybody up and making a bust to get his record erased." In holding that the exclusion of this testimony was reversible error, the Arkansas court reasoned, in pertinent part, as follows:

> "Any evidence having any tendency to make the existence of entrapment more probable is admissible...Showing that Caldwell was addicted to drugs and had dealt in them was relevant. Statements made by him pertaining to his motivation to induce an acquaintance to deliver controlled substances would be relevant. The state contends that this testimony was properly excluded as hearsay. A declaration by Caldwell of his intent, plan, motive or design was not excluded by the hearsay rule...The conduct of a government informant in connection with the transaction, and the purposes of his conduct and communications are proper matters for examination and inquiry at trial. Sherman v. U.S., 356 US 369."

Since so much of the State's case was based upon the "conduct and communications" of confidential informant, Donaldson, who was acting as the State's agent throughout the entire time the State pursued Morris and induced him to

procure and transfer cocaine to undercover agents, it is obvious that the state of mind of Donaldson was highly relevant to Morris' defense of entrapment, and that, therefore, the jury should have been allowed to consider Gotbaum's testimony and give it what weight it thought appropriate.

Since the exclusion of Gotbaum's testimony was reversible error and since the District Court's decision conflicts with decisions of this Court and other District Courts of Appeal, the decision of the Third District should be quashed and a new trial should be granted, but only in the event that this Court does not find there was entrapment as a matter of law.

II

THE JURY RETURNED INCONSISTENT GUILTY AND NOT GUILTY VERDICTS AND, THEREFORE, THE GUILTY VERDICTS CANNOT STAND.

It is a well settled principle of law in Florida that where a jury, in deliberating a multi-count Information, returns a guilty verdict on one count, which is legally inconsistent with a not guilty verdict on other counts, the guilty verdict cannot stand. Mahaun v. State, 377 So.2d 1158 (Fla. 1979); Redondo v. State, 403 So.2d 954 (Fla. 1981); and Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Eaton v. State, 438 So.2d 263 (Fla. 1983).

Here, the State had one plan only in pursuing Morris. That plan was to cause Morris to procure and transfer to undercover agents two kilos of cocaine. Therefore, from August 6, 1982 until August 18, 1982, the State pursued Morris and induced him to commit a series of patently related illegal acts, deliberately elevating him to the State's choice of a trafficker, when no such criminal activity existed when the investigation started. These illegal acts resulted in six separate counts against Morris in the State's Information: Count I (Conspiracy to Traffic in Cocaine); Count II (Trafficking in Cocaine); Count III (Sale or Transfer of Cocaine on August 16, 1982); Count IV (Possession of Cocaine on August 16, 1982); Count V (Sale or Transfer of Cocaine on August 17, 1982); and Count VI (Possession of Cocaine on August 17, 1982). The charge for sale or transfer of cocaine on August 16, 1982 resulted from

Morris having given Brinson a small amount of cocaine as a sample of the larger amount sought by Brinson [Tr. 1098, 1100] and similarly, the charge for sale or transfer of cocaine on August 17, 1982 resulted from Morris having given Brinson another small amount of cocaine as another sample of the larger amount [Tr. 1176] which the State did obtain on August 18, 1982. It must be noted that the State did not arrest Morris upon the transfer by Morris of cocaine to Brinson on August 16 and 17, 1982 and the reason why Morris was not arrested is clearly and unequivocally because these transfers were smaller transactions within the State's overall plan to entrap Morris into locating and, thereupon, transferring an amount of cocaine which would lead to charges of trafficking in cocaine. It cannot be seriously argued that the "acts" described in the various counts were separate independent acts. This is made clear through the trial testimony of Agent Brinson.

> "Q. As a law enforcement agent vested with arrest authority in the State of Florida, when Gene Morris handed you a sample of cocaine, did he violate the laws of the State of Florida by handing you that sample?
>
> A. Yes, sir.
>
> Q. Did you arrest him and say, 'Gene Morris, you are under arrest, come with me'?
>
> A. No, sir.
>
> Q. Why not.
>
> A. Because it was a pending investigation.

> Q. You wanted to continue until **Mercury Morris** went out and located for you from his source, a greater amount for greater felony charges; is that correct?
>
> A. I was going to continue until **Mercury Morris** selled me two kilos of cocaine; make a sale of two kilos of cocaine."
>
> [Tr. 1270-1271; Bold Emphasis Supplied]

It is also made clear, through the closing argument of the prosecutor, which demonstrates the continuum of events from August 16 until August 18, 1982.

> "We knew at that point--**whether or not there was any predisposition** we knew at that point that Eugene Mercury Morris had a source of cocaine and as law enforcement officers, we're going to find out whether or not he has it, whether he can get it and whether or not we can get it from him.
>
> And let me tell you what we wanted to do, not only did we want to get this cocaine for a number of reasons which I'm going to get into, but we wanted the cocaine, we wanted the people who brought it here. We want to go as far as up that ladder as we could get. See who brought it here and what they're going to do with it.
>
> So, let me tell you, Mr. Strauss, why we didn't arrest Gene Morris in the parking lot when he got the sample from Joe Brinson. If we arrested Gene Morris, where would Edgar Kulins be today? He would be out of Gene Morris' house, probably using cocaine. Where would Vincent Cord be today? Vincent Cord would probably be in his house dealing cocaine. We wouldn't have known about either one of those people.
>
> So, that's what he wants us to do. He wants us to arrest Gene Morris for a sample of less than one gram of cocaine

> and forget about where all the cocaine is coming from. That's what he wants us to do. Well, that's what we didn't want to do. We want to find out who's involved. Is it a conspiracy? Are there other people involved? Can he really get that much cocaine? Where did it come from?"
>
> [Tr. 2071-2072; Bold Emphasis Supplied]

In other words, by the State's own admission, the inducement which State agents exercised upon Morris at the time he transferred small amounts of cocaine to State agents on August 16, 1982 and August 17, 1982 was the very same inducement exercised on August 18, 1982 when the State finally caused Morris to procure a large amount of cocaine. This fact is of crucial importance because Morris took the stand and admitted having committed <u>all</u> criminal acts alleged against him, while raising only one defense -- entrapment. [Tr. 1924-1931, 2059-2061] Then, the jury acquitted Morris on charges of selling or transferring the two samples of cocaine on August 16, 1982 and August 17, 1982. There is only one explanation for this acquittal and that is that the jury found Morris was entrapped on August 16 and August 17, 1982 when he transferred small samples of cocaine to State agents. Accordingly, since the inducement by the State leading to these transfers was the same inducement which lead to the transfer of the greater amount on August 18, 1982, it necessarily follows that Morris was also entrapped into selling the greater amount which lead to the trafficking charges. Therefore, the jury's guilty

verdicts on these latter charges are inconsistent with the not guilty verdicts on the former.

This reasoning forms the basis for two decisions from the State of New York. People v. Brown, App.Div. 437 NYS 2d 201 (1981) and People v. Rodriguez, 425 NYS 2d 373 (1980 Aff. 424 N.E. 2d 559)

In People v. Brown, supra, the defendant was charged with the crimes of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. After trial, the jury returned a verdict of not guilty on the possession charge and guilty on the charge of sale. In reversing the conviction for possession, the court reasoned as follows:

> "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 substance in the third degree."

In People v. Rodriguez, supra, the defendant was found not guilty of sale of a controlled substance and guilty of possession of that same substance. On appeal, the defendant raised the issue of inconsistency of the verdicts. In reversing, the court said:

> "Defendant's involvement in the transaction was so clearly established that he could only have been acquitted of criminal sale of cocaine if he was categorized as an agent of the

> undercover police officer who purchased the narcotics. Having accepted the defense of agency, the jury could not properly have found defendant guilty of criminal possession of a controlled substance with intent to sell."

Finally, in Sherman v. U.S., 356 US 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 case law in Bell v. State, 369 So.2d 932 (Fla. 1979). Also, please see Casper, supra, Lashley v. State, 67 So.2d 648 (Fla. 1983), and Cruz, supra..

Based on the foregoing argument, the guilty verdicts in this case are not merely legally inconsistent with the not guilty verdicts. They are repugnant and self-contradictory and contrary to the definition of entrapment as set forth in the foregoing cases. Once the jury found Morris not guilty with regard to his activity on the very first meeting (August 16, 1982), and his only asserted defense was that of entrapment and, thereupon, accepted the defense of entrapment as to day two activity (August 17, 1982), the jury could not properly have found the defendant guilty of

day three (August 18, 1982) activity, based upon the continuity of the inducement by the State.

Therefore, it is respectfully submitted that the guilty verdicts should be set aside with directions to the trial court to acquit the defendant, Morris, on all counts.

CONCLUSION

For the above mentioned reasons, the decision of the District Court should be quashed and this cause remanded with instructions to acquit the Petitioner, Eugene Edward Morris. In the alternative, this cause should be remanded for a new trial.

> "We are confronted here with a case in equity where the doctrine of clean hands is the counterpart of entrapment in criminal procedure, but the rule in either case springs from decency, good faith, fairness and justice. Equity not only contemplates, it requires fair dealing in all who seek relief at its hands. He that hath committed iniquity shall not have equity, is a well known maxim of equity. ..."
>
> Peters v. Brown, 55 So.2d 334,336 (Fla. 1951)

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on Merits of Petitioner, Eugene "Mercury" Morris, was delivered, by hand, to the Office of the 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 April, 1985.

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