IN THE FLORIDA SUPREME COURT

CASE NO. 70,327

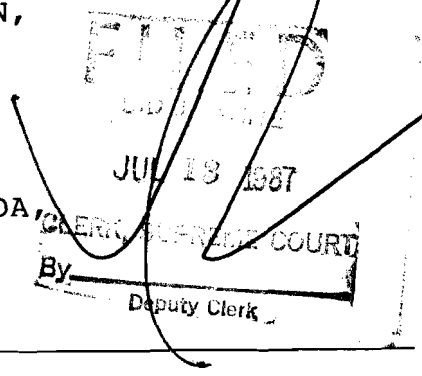
PAUL L. MADSEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.



PETITION TO REVIEW DECISION OF
DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON MERITS WITH ATTACHED APPENDIX

SUBMITTED BY:

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PRELIMINARY STATEMENT

In this brief, the Petitioner, PAUL L. MADSEN, will be referred to as "Mr. Madsen", and the Respondent, the STATE OF FLORIDA, will be referred to as "the State". Mr. Madsen was the accused in the trial court and the Appellant in the lower tribunal. The State was the accuser in the trial court and the Appellee in the lower tribunal.

The record on appeal, as supplemented, consists of ten (10) volumes. The original record on appeal consists of seven (7) volumes, designated by Roman numerals I-VII. These volumes are consecutively paginated in the bottom right-hand corner. Volumes I-VI contain transcripts of the trial. Volume VII contains trial court pleadings and orders. In addition to the original record, three (3) volumes of a supplemental record on appeal have been filed. This supplemental record is also designated by Roman numerals I-III. The pages are consecutively paginated in the bottom right-hand corner. Volumes I and II of the supplemental record contain transcripts of pretrial hearings, voir dire, and a post-trial hearing. Volume III of the supplemental record contains additional trial court pleadings and orders.

The original exhibits utilized at trial, except for the alleged drug, have been submitted with the record on

appeal to the lower tribunal (SR/III/Clerk's certificate). No copies of exhibits were furnished to counsel on appeal.

The record on appeal was supplemented in the lower tribunal. Portions are contained in the appendix attached to this brief.

In this brief, all references to the initial record on appeal will be by the letter "R", followed by the Roman numeral of the volume, followed by the appropriate page number. All references to the supplemental record on appeal will be by the letters "SR", followed by the Roman numeral of the volume, followed by the appropriate page number. All references to the exhibits will be by the letters "Exh.", preceded by the abbreviation of the party introducing the exhibit, followed by the identification number or letter utilized by the trial court clerk. All references to the attached appendix will be by the letters "App.", followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

A. PROCEEDINGS BELOW

This is a petition to review the decision of the District Court of Appeal, Fourth District of Florida ("lower tribunal"), styled Madsen v. State, 502 So.2d 948 (Fla. 4th DCA 1987) (App. 53-55). This appellate decision affirmed the judgment and sentence imposed upon

Mr. Madsen following a jury trial in the Broward County, Florida, Circuit Court ("trial court").

On June 6, 1984, Mr. Madsen and Kim DeGregory were arrested for trafficking in heroin and conspiracy to traffic in heroin (R/I/34, 154; SR/III/388-89). On June 22, 1984, Mr. Madsen and Mr. DeGregory were charged in a criminal information with delivery of heroin in an amount of twenty-eight grams or more (Count One) and conspiracy to traffic in cocaine in an amount of twenty-eight grams or more (Count Two)(R/VII/1075).

Subsequently, Mr. Madsen filed a number of pretrial motions, including a motion to suppress an audio cassette tape recording due to an illegal search (R/VII/1076-77). On October 15, 1984, the trial court held a hearing on this suppression motion (SR/I/32-51). It was subsequently denied (R/VII/1078).

On February 28, 1985, the trial began (SR/I/116). During the course of the seven (7) day trial, sixteen witnesses testified (one by deposition) and eleven exhibits were received into evidence (R/VII/1083; SR/III/435). At both the close of the State's case (R/II/267) and at the close of all the testimony (R/V/915-17), Mr. Madsen's counsel moved for judgments of acquittal. Both motions were denied (R/II/267; V/917).

On March 8, 1985, the jury returned verdicts of guilty on both counts as to Mr. Madsen (R/VI/1067-68; VII/1080-81), and verdicts of not guilty on both counts as to Mr. DeGregory (R/VI/1067-68). The trial court then directed entry of a judgment of acquittal on the conspiracy count (Count Two) as to Mr. Madsen (R/VI/1072; VII/1088). The trial court entered a judgment of conviction on Count One (R/VI/1070; VII/1087), and immediately sentenced Mr. Madsen to a mandatory minimum term of twenty-five (25) years imprisonment, a mandatory minimum fine of $500,000, plus a $25,000 surcharge (R/VI/1072-73; VII/1082).

Mr. Madsen's motion for new trial (R/VII/1084-86) was heard and denied (SR/II/381). After affirmance, and denial of post-decision motions (App. 56), a timely notice was filed in the lower tribunal and Petitioner's Brief On Jurisdiction was filed in this Court. An order of this Court accepting jurisdiction and dispensing with oral argument was entered on June 25, 1987.

B. FACTS

This case really began in April, 1983, with the arrest of David Ball on a charge of violating the Florida trafficking statute by selling two kilograms of cocaine (R/I/73, 165). In November, 1983, Ball entered into an oral "substantial assistance" agreement with the arresting policeman, Deputy Dennis Gavalier, and with

the State Attorney (R/II/211, 306-07). This agreement was reduced to a formal legal document signed by Ball, his attorney, and the Broward County Assistant State Attorney on February 13, 1984 (App. 64-65). One (1) year after his arrest, Ball pled guilty to the trafficking count in April, 1984 (R/I/166-67). By this plea, Ball faced a maximum of thirty (30) years imprisonment and a mandatory minimum of fifteen (15) years imprisonment, and a mandatory fine of $250,000 (R/II/308).

In his November, 1983, side agreement with the police and prosecutor, Ball agreed to procure arrests in drug cases in which there was contraband totaling five times that for which he was arrested, i.e., ten kilograms of cocaine (R/I/167; II/307). For this, Ball hoped and expected to get the support of the police and prosecutor to have his unimposed sentence reduced by 80% to only a three (3) year mandatory minimum (1/5 of the sentence mandated by law) (R/II/317). Ball had not yet been sentenced at the time he testified against Mr. Madsen, sixteen (16) months after the making of his deal, almost two (2) years after he had committed a most serious violation of Florida drug laws, and almost one (1) year after his plea of guilty (R/II/317).

For several months after his entry into this "substantial assistance" agreement, Ball did nothing

(R/II/308). Eventually, in the late spring of 1984, he was contacted by the police about his lack of compliance with the deal (R/II/308). Ball then traveled to Freeport, Grand Bahamas, for the purpose of fulfilling his part of the "substantial assistance" agreement (R/II/314). There, in May, 1984, he sought out Orville (O.J.) Holden, whom he knew to be a source of drugs (R/II/320, 325; III/571). Ball told Holden if he had anyone who wanted to do a drug deal to contact him, because he was eager and had good buyers (R/II/310-11). Holden testified that in late May, 1984, he was then approached by Paul Madsen who asked Holden if he knew anyone interested in buying some heroin (R/III/554). Holden then arranged for a meeting among Paul Madsen, Ball, and himself (R/III/594). The meeting took place on May 30, 1984, at a hotel in Freeport (R/II/354). Ball testified that he had not done a drug deal with Mr. Madsen previously (R/II/304). Ball stated that his buyer required that the transaction must occur in the United States, not in the Bahamas (R/II/353). Thereafter, a number of telephone calls took place between Paul Madsen and Ball (R/II/331). An agreement was finally reached whereby Paul Madsen would deliver a pound of heroin to Ball and Ball's buyer (the police) in Ft. Lauderdale (R/II/355).

On the morning of June 6, 1984, Ball met Paul Madsen at a Days Inn in Ft. Lauderdale (R/II/356). Final arrangements were made for the transfer of heroin later that afternoon. About 4:40 p.m., Ball and Deputy Gavalier went to the residence of Janet Madsen, Paul's mother, where Paul was staying (R/I/86). Deputy Gavalier was acting in an undercover capacity as the prospective buyer of the heroin. While Ball remained outside, Mr. Madsen and Deputy Gavalier went inside the residence to Mr. Madsen's bedroom (R/I/89). There, Mr. Madsen and Deputy Gavalier discussed a heroin transaction (St. Exh. 8). Midway through the discussion, Mr. Madsen left the bedroom, went into another part of the house, and returned with co-defendant Kim DeGregory, who was holding a black flight bag (St. Exh. 9; R/I/90-93). From this bag, Mr. DeGregory took out two packets of a brown powder that was represented to be heroin (R/I/93). Deputy Gavalier field tested the substance (R/I/94). Satisfied with the results, he then exited the home for the announced purpose of getting the money (R/I/152-53). Surveilling police agents were signaled by him. After Deputy Gavalier returned to the residence, Mr. Madsen and Mr. DeGregory were arrested (R/I/1036, 154).

The contents of both packets were later tested by a state chemist. He testified both packets contained heroin (R/II/254).

The conversation which occurred in Mr. Madsen's bedroom was intercepted by means of a body-bug worn by the police agent, acting without either a search or arrest warrant (R/I/22-25, 84). It was transmitted to and recorded by additional agents parked near the Madsen residence (R/I/22-25). Over defense objection, an audio cassette tape recording of the conversation was admitted into evidence and was played to the jury (St. Exh. 8; R/I/100-21).

Paul Madsen's defense was that of entrapment. He testified that he was a fisherman in the Bahamas (R/III/426). One day while fishing in the Bahamas, he saw what appeared to him to be a drug drop (R/II/294-96; III/433). That evening he went to several bars and told various people what he had seen (R/III/434-35). The following day he was contacted by O.J. Holden about the subject of drugs missing from the drop that Mr. Madsen had witnessed and reported (R/III/437). Mr. Madsen was told by Holden that drugs were missing, and that he was responsible. Mr. Madsen testified that Holden insisted that, to satisfy the people who had lost the drugs in the drug drop, Mr. Madsen must take part in a heroin drug deal (R/III/445). Because he feared for the lives and safety of both himself and his mother, Paul Madsen went along with Holden's proposal (R/III/446-47, 479).

He was then introduced to Ball by Holden, who told him what to do in the transfer of drugs (R/III/452-54).

At trial, defense counsel attempted to show that the original audio cassette tape recording of the June 6, 1984, conversation had been tampered with. A defense expert, Charles Shultz, testified there was one time when the tape had clearly stopped, and there were several times where the tape may have been edited (R/IV/053, 655, 673, 685). Before Mr. Shultz testified, Mr. Madsen's attorney stated he had an additional witness whose name had not been disclosed on any prior defense reciprocal discovery lists. The expert witness, Brian Clepper, had listened to the tape that very morning and made findings that the integrity of the tape had indeed been tampered with (R/IV/607). Defense counsel proffered that Mr. Clepper had more expertise in the field of audio enhancement than Mr. Shultz, and that his testimony was not cumulative (R/IV/608). The State argued the witness should not be allowed to testify due to prejudice to the State arising from the late notice and inability to prepare cross-examination (R/IV/613). The trial court ruled that Mr. Clepper could not testify (R/IV/619).

At the charge conference, defense counsel submitted proposed written jury instructions on entrapment

(R/V/918-20; SR/III).[1] He argued that the trial court must include in its entrapment instruction language to the effect that the State had the burden of proving beyond a reasonable doubt that Mr. Madsen was not entrapped (R/V/918-21). The trial court refused to do so and gave the standard instructions on reasonable doubt and entrapment (R/VI/1049-53). Later, in response to a jury question concerning the definition of entrapment (R/VII/1079), the trial court, again over defense objection, failed to provide any instruction on the State's burden of proof as to entrapment (R/VI/1065-66).

SUMMARY OF THE ARGUMENT

I. ERRONEOUS INSTRUCTION AND INCOMPLETE AND INACCURATE REINSTRUCTION ON ENTRAPMENT DENIED MR. MADSEN HIS RIGHT TO A FAIR TRIAL.

At the charge conference, defense counsel unsuccessfully argued that the trial court must include in its entrapment instruction language to the effect that the State had the burden of proving beyond a reasonable doubt that Mr. Madsen was not entrapped (R/V/918-21; SR/III). The trial court refused to do so and gave the standard instructions on reasonable doubt and entrapment (R/VI/1049-53). Later, in response to a jury question

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1/ These instructions are filed as part of the supplemental record on appeal. However, they are not paginated.

concerning the definition of entrapment (R/VII/1079), the trial court, again over defense objection, failed to provide any instruction on the State's burden of proof as to entrapment (R/VI/1065-66). Since the trial court's instruction and reinstruction on entrapment were incomplete and inadequate, reversal of Mr. Madsen's conviction is required.

II. CONTINGENT AGREEMENT AND OUTRAGEOUS MISCONDUCT ON PART OF STATE AGENTS REQUIRES REVERSAL AND DISMISSAL.

This prosecution was orchestrated and created by a police informant, David Ball. Ball, having pled guilty to trafficking in cocaine, had a contingent agreement with the police and prosecutor whereby he would provide "substantial assistance" by engaging in drug transactions and cooperating with the prosecution in exchange for the State's assistance in reducing his mandatory minimum sentence from fifteen (15) years to three (3) years (R/II/307-08) (App. 64-65). To meet his part of this deal, Ball engaged Mr. Madsen in a drug transaction, after actively pursuing him. There was no evidence that Mr. Madsen was then involved in any ongoing criminal drug activity of any kind. This contingent agreement and outrageous conduct of Ball and the police violated the Florida and federal constitutional guaran-

tees of due process of law, and mandate reversal of Mr. Madsen's judgment and sentence, and dismissal of the information with prejudice.

III. ADMISSION OF TAPE RECORDING OF CONVERSATION IN DEFENDANT'S HOME VIOLATED MR. MADSEN'S RIGHT OF PRIVACY.

A key piece of the State's evidence was an audio cassette tape recording of the conversation which occurred in Mr. Madsen's bedroom in the home of his mother on June 6, 1984, the date of the alleged heroin transfer (St. Exh. 8). Since the surreptitious recording of this conversation occurred in Mr. Madsen's home, its admission into evidence violated his rights of privacy under the Florida Constitution. The trial court erred in failing to suppress this evidence. Mr. Madsen is therefore entitled to a new trial in which this evidence must be excluded.

IV. EXCLUSION OF DEFENSE WITNESS DENIED MR. MADSEN HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS.

In support of his defense of entrapment, Mr. Madsen's attorney attempted to show that the key piece of prosecution evidence, the tape of the conversation surrounding the actual transfer, had been tampered with. To this point, he attempted to call Brian Clepper, a tape expert, to testify as to tampering with the tape (R/IV/607). Mr. Clepper was a newly discovered witness and his name had not been provided to the State as a

potential defense witness. The State objected to Mr. Clepper being used as a witness, and Mr. Clepper was excluded (R/IV/612-19). This exclusion denied Mr. Madsen his fundamental rights to compulsory process, to present a defense, and to a fair trial.

ARGUMENT

I. ERRONEOUS INSTRUCTION AND INCOMPLETE AND INACCURATE REINSTRUCTION ON ENTRAPMENT DENIED MR. MADSEN HIS RIGHT TO A FAIR TRIAL.

The right to a fair trial is guaranteed by both state and federal constitutions. Art. I, §9, Fla. Const.; Sixth and Fourteenth Amendments, United States Constitution. Encompassed within the concepts of "fair trial" and "due process" is the principle that the trial judge must accurately and completely instruct the jury on all applicable law.

The trial court committed reversible error by twice giving the jury an inaccurate, incomplete instruction and reinstruction on the law of entrapment. These instruction errors on Mr. Madsen's theory of defense denied him his fundamental right to a fair trial.

A jury in a criminal case is told, as was Mr. Madsen's jury, that it must rely on the instructions of the trial court, and only those instructions, as the legal principles to be applied in the case at issue

(R/VI/1060). In order to allow the jury to perform its duty, it is therefore critically imperative that the trial court give the jury complete and accurate instructions. For example, see State v. Dominguez, 12 FLW 298 (Fla. 6/18/87). Without complete and accurate instructions, the defendant's rights to trial by jury and due process of law are rendered meaningless, since it is only upon complete and accurate instructions that a defendant can obtain a fair trial.

A. Initial Entrapment Instruction

As defense counsel announced during voir dire (SR/I/161-62), as he stated in his opening statement (R/II/279-80), and as he stressed in his closing argument (R/V/968), Mr. Madsen's defense was entrapment. At the charge conference, defense counsel submitted proposed written jury instructions on entrapment (SR/III). He argued that the instruction given by the trial court must contain language from the Fourth District's decision in Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978), that the State has the burden of disproving entrapment beyond a reasonable doubt (R/V/918-20). This written instruction was denied on the trial court's ruling that the 1981 Florida standard instruction on entrapment combined with the 1981 Florida standard instruction on the burden of proof was sufficient (R/VI/1049-53).

This Court subsequently considered the issue of the adequacy of the 1981 Florida standard jury instruction on entrapment. In Rotenberry v. State, 468 So.2d 971 (Fla. 1985), this Court affirmed a ruling of the First District Court of Appeal and held that the standard instruction on entrapment ". . . is adequate in combination with the general reasonable doubt instruction". Id. at 973. Accord, Sneeringer v. State, 469 So.2d 125, 126 (Fla. 1985). Rotenberry did not discuss Moody.

In State v. Wheeler, 468 So.2d 978 (Fla. 1985), a case decided the same day as Rotenberry, this Court considered the burden of proceeding with the burden of proof in an entrapment case. This Court reiterated that the State has the burden of disproving entrapment beyond a reasonable doubt. It reversed a defendant's conviction on the basis of the trial court's erroneous statement to the jury [in interrupting the defendant's closing argument] that the trial court's jury instructions did not include any instruction to the effect that the State was required to prove the defendant was not entrapped. In Wheeler, at 468 So.2d 980, this Court stated:

> [a]s we held in our recent examination of entrapment, "[t]he essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense." State v. Dickinson, 370 So.2d 762, 763 (Fla. 1979). The burden with respect to predisposition lies

> with the state. "Once the evidence is introduced which suggests the possibility of entrapment, the State must prove that the defendant was predisposed to commit the offense charged." Story v. State, 355 So.2d 1213, 1215 (Fla. 4th DCA 1978).

See also Morris v. State, 487 So.2d 291, 293-94 (Fla. 1986).

This Court did not explain how the opinions in Rotenberry, supra, and Wheeler, supra, can be logically read together. Despite the critical "absence of a predisposition of the defendant to commit the offense", Rotenberry does not require that the jury be specifically instructed that this essential must be proved by the State beyond all reasonable doubt. The general instruction on the State's burden of proof, which is given at an earlier and unrelated point in the entire jury instructions, will suffice. Rotenberry, supra.

Rotenberry indicates that the trial court's initial instruction to the jury defining entrapment, in combination with its instruction on the burden of proof, was adequate. However, after Rotenberry this Court addressed a similar issue in Yohn v. State, 476 So.2d 123 (Fla. 1985). In Yohn, this Court ruled that the 1981 Florida standard jury instruction on insanity, even when considered in combination with the 1981 Florida

standard jury instruction on reasonable doubt, did not adequately and correctly charge the jury on the law of insanity. This Court ruled these combined instructions failed to properly instruct the jury that, once a reasonable doubt is created in its mind as to the defendant's insanity, the State must prove beyond a reasonable doubt that the defendant was sane. 476 So.2d at 128.

On May 28, 1987, this Court also adopted an amendment to the 1981 Florida Standard Jury Instruction 3.04(c) on the subject of ENTRAPMENT, deleting the last paragraph of the instruction and substituting the following: "[O]n the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped". The Florida Bar re Standard Jury Instructions -- Criminal, 12 FLW 259 (Fla. 5/28/87). This Supreme Court action adopts the recommendation of the Committee on Standard Jury Instructions (Criminal) which had been earlier submitted to the Court. Id.

The Rotenberry general jury instructions (as asserted by the State in the trial court and the lower tribunal) were effectively overruled by this Court in: (1) the subsequent Yohn decision, 476 So.2d 123 (Fla. 1985); and (2) the subsequent amendment to Standard Jury Instruction 3.04(c).

The quoted analysis of the standard jury instruction on insanity in Yohn, 476 So.2d at 127-28, taken from Judge Anstead's dissenting opinion in Reese v. State, 452 So.2d 1079 (Fla. 4th DCA 1984), clearly presents the argument in support of the contention that the 1981 standard jury instruction on entrapment is legally insufficient because it does not clearly and directly tell the jury that the State has the burden of proving beyond all reasonable doubt the essential element of "lack of predisposition". Paraphrasing Yohn, 476 So.2d at 128:

> [t]he jury is never told that the state must prove anything in regard to the [lack of predisposition] issue. This is not the law in Florida.

Applying the Yohn majority analysis to 1981 Florida Standard Jury Instruction (Criminal) 3.04(c), taken together with Wheeler, Morris, and the 1987 Florida Jury Instruction (Criminal) 3.04(c), leads to the inescapable conclusion that this Court must recede from Rotenberry.

* * *

Additionally, the Madsen trial court's initial instruction on entrapment is not adequate as a matter of federal due process. A number of federal courts have considered this identical issue. See United States v. Wolffs, 594 F.2d 77, 83 (5th Cir. 1977). The Wolffs court specifically rejected the government's claim that

the general charge on the burden of proof plus the entrapment instruction was adequate. See also Notaro v. United States, 363 F.2d 169 (9th Cir. 1966), appeal after remand, 388 F.2d 680 (9th Cir. 1967).

B. Reinstruction

After the jury had been deliberating for some time, it sent a note which read "What is Entrapment?" (R/VI/1064; R/VII/1079). Without asking counsel for comments, the trial court brought the jury in and read them only the standard entrapment instruction again (R/VI/1065-66). The reasonable doubt instruction was not read again. The jury was sent out and Mr. Madsen's counsel immediately entered an objection to the instruction on the basis that it did not properly instruct the jury on the State's burden of proof (R/VI/1066). About thirty minutes after receiving the reinstruction on entrapment, the jury returned its guilty verdicts as to Mr. Madsen (R/VI/1064-67). Defense counsel made this same argument after the verdict was returned (R/VI/1071), and in his motion for new trial (R/VII/1084-85).

Although neither Rotenberry nor Sneeringer discuss what instruction is required when the trial court reinstructs a jury on entrapment, the law requires a trial court to provide complete instructions on the subject involved when reinstructing the jury. Engle v. State, 438 So.2d 803, 809-11 (Fla. 1983), cert. denied, 104 S.Ct. 1430 (1984). A supplemental charge must not

be misleading. Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946). As Bollenbach held, when a jury expresses confusion and difficulty over an issue the trial court has an obligation to "clear them away with concrete accuracy". 66 S.Ct. at 405. As the Court in Bollenbach stressed:

> Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.

66 S.Ct. at 405. In situations where the jury requests to be instructed on a specific matter,

> . . . a trial judge must be acutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest and will rely more heavily on such instructions than on any single portion of the original charge. Thus, the court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial.

United States v. Carter, 491 F.2d 625, 633 (5th Cir. 1974). See also Henry v. State, 359 So.2d 864, 868 n. 3 (Fla. 1978); Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986).

The trial court's reinstruction on entrapment, which omitted any reference whatsoever to the state's burden of proof, was neither adequate nor correct. As Rotenberry dictates, the 1981 standard instruction on entrapment, which is the only instruction the trial

court gave the jury on reinstruction, is adequate only in combination with the general reasonable doubt instruction. From this, it is clear that Rotenberry held that the 1981 standard instruction on entrapment, standing alone, is inadequate to instruct a jury on entrapment. This position is fortified by the Court's adoption of the 1987 amendment to instruction 3.04(c) which specifically contains the language which the trial court failed and refused to give. Therefore, the trial court's reinstruction on entrapment was inadequate since it contained no language as to the State's burden of proof. It is clear that the jury was confused about what constituted entrapment. Given this jury confusion and the fact that Mr. Madsen's entire defense rested upon the entrapment issue, the trial court's incomplete and inadequate reinstruction resulted in reversible error when the trial court failed to reinstruct the jury on the state's burden of proof.

* * *

While research does not disclose any cases involving reinstruction on the law of entrapment, other analogous situations demonstrate that reversal is required.

In Hedges v. State, 172 So.2d 824 (Fla. 1965), the Supreme Court ruled that reinstruction on homicide required inclusion of justifiable and excusable homicide

instructions. Reversal was required where reinstruction failed to include those instructions and was therefore incomplete on the subject of the jury question.

In Cole v. State, 353 So.2d 952 (Fla. 2d DCA 1978), the trial court, in its initial instructions on a possession of marijuana charge, included a "knowledge" element. It failed to do so on reinstruction. The Second District ruled that failure to reinstruct on the "knowledge" element of a possession charge was reversible error.

In Reynolds v. State, 332 So.2d 27 (Fla. 1st DCA 1976), the jury requested reinstruction on, among other things, the burden of proof. The First District ruled that reinstruction on the burden of proof without reinstruction on the presumption of innocense was reversible error. See also United States v. Carter, 491 F.2d 625, 634 (5th Cir. 1974)(circumstantial evidence reinstruction).

The omission of any language as to the State's burden of proof beyond a reasonable doubt in the trial court's reinstruction on entrapment gave a powerful, but devastatingly erroneous, legal instruction to Mr. Madsen's jurors.

Each of these four situations -- justifiable and excusable homicide, "knowledge" element, presumption of innocence, and circumstantial evidence -- are analogous to the error in Mr. Madsen's case since each concerns

the reinstruction on a relied upon defense to the charge at issue. As in Hedges, Cole, Reynolds, Carter, and Bollenbach, reversal is therefore required.

II. CONTINGENT AGREEMENT AND OUTRAGEOUS MISCONDUCT ON PART OF STATE AGENTS REQUIRES REVERSAL AND DISMISSAL.

Mr. Madsen's conviction and sentence must be reversed, and the criminal information dismissed with prejudice, because of the State's illegal contingent agreement with the police informant, David Ball, and because of the outrageous misconduct of state agents in this case.

A. Contingent Agreement

The "contingent agreement" factor is an aspect of the broader concept of "due process entrapment", both of which have been recently condemned by this Court in State v. Glosson, 462 So.2d 1082 (Fla. 1985), and Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

The testimony presented at trial shows a travesty of justice. The testimony reveals that the State and David Ball, the police informant, had entered into a "substantial assistance" agreement whereby Ball would avoid 80% of his mandatory minimum sentence by helping to obtain convictions of people he would lure into crime for the police (R/II/304-07). Ball was originally

charged with trafficking in cocaine by selling two kilos of cocaine (R/II/315). For this offense, he faced a mandatory minimum of fifteen (15) years in jail, a mandatory minimum fine of $250,000, and a maximum penalty of thirty (30) years in jail (R/II/307-08). He had entered a plea of guilty to the charge in April, 1984. However, contrary to the explicit requirement of §893.135(2), Fla. Stat. (1983), which mandates that sentencing on a trafficking charge cannot be deferred, sentencing was postponed for more than fifteen (15) months to enable Ball to provide "assistance" to the police and prosecutors. At Mr. Madsen's trial in March, 1985, Ball testified his sentencing was to occur in May, 1985, some fifteen (15) months after he entered his plea of guilty (R/II/317). Facing such prohibitive penalties, Ball agreed to help the police by procuring arrests in drug cases in which there was contraband totaling <u>five times</u> that for which he was arrested; <u>i.e.</u>, ten kilograms of cocaine (R/I/167, II/307). If successful, he was to get the "assistance" of the State Attorney and the Sheriff's Department in reducing his sentence by 80% to a minimum mandatory sentence of only three (3) years. By the spring of 1984, Ball had still not done anything to satisfy his part of the agreement (R/II/308). He was receiving pressure from Deputy Gavalier to do something. In response to these police and legal pressures, he

pursued a campaign in the Bahamas to engage people in criminal activity. He initiated the contacts which led to this criminal offense. The evidence does not show that Mr. Madsen was engaged in any criminal activity when he was targeted by Ball.

The record, as supplemented in the lower tribunal through strenuous legal effort to ascertain the truth, reveals that the written agreement between the police and informant testified about at trial by the deputy (R/I/164-74) and the informant (R/II/306-09) does in fact exist (App. 57-65). Actually, it is a written agreement between the informant and the State Attorney for Broward County, Florida. It is signed and dated February 13, 1984 (App. 64-65).

Keeping in mind the teachings of Glosson, the informant falsely testified during the trial that he was not required as part of his agreement to give testimony in order to perform the agreement (R/II/316-17, 358-59). Under cross-examination by the trial prosecutor from the same State Attorney's Office, the informant was allowed to commit perjury before the trial judge and jury without correction by the State.

> Q. (By Mr. LaPorte) Has anyone ever told you from the police department, either myself or anyone from the State Attorney's Office or the Broward Sheriff's Department told you that you had to come in here in this case and testify in order to perform your substantial assistance?

* * *

THE WITNESS: No sir.

Q. (By Mr. LaPorte) No?

A. No, sir, quite to the contrary (R/II/358-59).

While this was going on in the courtroom, the same State Attorney's Office had in its files this written "substantial assistance" agreement which provides in pertinent part:

> [I] [DAVID MICHAEL BALL] shall thereafter provide "substantial assistance" to the Office of the State Attorney and any and all law enforcement agencies in the identification, arrest or conviction of any accomplices, co-conspirators or principals as required by Florida Statute 893.135(3), or any other "substantial assistance" that the Office of the State Attorney deems appropriate (App. 64; emphasis added).

Cf. Lee v. State, 490 So.2d 80 (Fla. 1st DCA 1986), rev'd on other grounds, 501 So.2d 591 (Fla. 1987).

In State v. Glosson, 462 So.2d 1082 (Fla. 1985), this Court condemned contingent agreements between police and their informants, and affirmed a trial court's dismissal of a two count information charging drug offenses. The trial court found that an informant, acting as an agent for the police, set up sales of marijuana which led to the arrest and prosecution of several drug brokers and buyers. This agent was acting pursuant to a contingent agreement with the Sheriff's Department.

The agreement was being supervised by the State Attorney's Office. The key to the agreement was that this agent would receive 10% of all civil forfeiture proceeds resulting from the criminal investigation. In return, the informant must testify and cooperate in the prosecution. In condemning this practice, this Court held:

> The informant here had a enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions.
>
> Accordingly, we hold that a trial court may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution.

Id. at 1085.

Unlike the informants in State v. Prieto, 479 So.2d 320 (Fla. 3d DCA 1985), Yolman v. State, 473 So.2d 716 (Fla. 2d DCA 1985), rev. denied, 475 So.2d 696 (Fla. 1985), and Owen v. State, 443 So.2d 173 (Fla. 1st DCA 1983), informant Ball (like the Glosson informant) agreed with the police and state attorney to assist in obtaining convictions and to do anything else which the "State Attorney deems appropriate", including aiding the

prosecutor in the development of his case pretrial and the proving of his case during trial. Although the State opted not to call informant Ball as a trial witness, Ball was as important a prosecution witness as was the Glosson informant (who also never testified for the State) by virtue of his many contacts with Mr. Madsen, both before and on the day of the drug transaction. As in Glosson, informant Ball

> . . . stands to gain [a sentence reduction] conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution. 462 So.2d at 1085.

This Court must reverse Mr. Madsen's conviction and dismiss the information in this case to uphold the integrity of our judicial system. As in Glosson, the informant was used by the State to directly set up alleged criminal transactions. Based on the success of these transactions, the informant was to be paid off with fivefold benefits on his pending sentence. That he would receive this tremendous sentencing reduction only by engaging persons in criminal activities, and thereafter testifying, is clearly the type of "payment to make cases against criminal defendants" which offends society's and our legal system's sense of justice and which violates due process. In order to receive his twelve (12) year bonus, the informant was required to induce people to commit criminal drug offenses

where the amounts of drugs involved totaled at least ten kilograms. The State cannot, consistent with the fundamental fairness guarantee of due process, offer favorable treatment to a state informant contingent upon engaging others in criminal activity. Judicial approval of such an agreement encouraging and rewarding criminal misconduct is nothing more than an invitation to perjury [which, in fact, did occur at trial (pp. 25-26, supra)] and to lawlessness, and has no place in our constitutional system of justice. This type of official misconduct has been condemned by Florida courts as alien to our judicial process, and must be again condemned by this Court.

B. Entrapment As A Matter Of Law

Additionally, the testimony presented at trial shows the total involvement of state police agents and prosecutors in the creation, initiation, direction, and control of the offense for which Mr. Madsen was convicted, to the outrageous degree so as to violate the due process clause of the United States and Florida Constitutions and mandate dismissal of this information.

The evidence shows that the police and prosecutor made an unholy alliance with the informant. To further the despicable goal of creating crimes and their procuring arrests, the police sent Ball out into the world

(beyond the jurisdiction of the laws and courts of Florida and the United States) to engage in criminal conduct with no controls. Other than telling Ball he could not carry a gun, use drugs, or use sex to make a case (R/I/169), the police had no control over him. Ball traveled back and forth to a foreign country -- the Bahamas -- a number of times, trying to engage anyone in a drug transaction (R/II/314). Ball approached O.J. Holden and put out the word that Ball had buyers eager to do a deal. Holden knew of Ball's involvement with law enforcement and sought to help him (R/III/565). Holden arranged the introduction of Mr. Madsen to Ball. Once the introduction was made, Ball made numerous telephone calls to push the Madsen transaction through (R/III/450). Finally, fearing for the safety of his mother and himself, Mr. Madsen entered into the transaction on June 6, 1984. Based on these facts, Mr. Madsen moved for a judgment of acquittal at the close of all the evidence on the ground that the conduct of the police agents violated due process (R/V/915-17). This motion, and a similar post-trial argument (R/VII/1085), were denied (R/V/917; SR/II/381).

It is significant to note that the prosecutor did not choose to call either Ball or Holden to prove Mr. Madsen's statements and conduct which occurred prior to

the drug transaction in his residence on June 6, 1984. Consequently, it was left to Mr. Madsen's trial lawyer to call them as his witnesses in support of his defense of entrapment; and thereby submit them to the warm, friendly, seductive cross-examination of the prosecutor, conducted for the most part by leading questions. These two witnesses had everything to gain from the prosecutor and the police; they had nothing to lose in damning Mr. Madsen.

Reading the testimony of Ball (R/II/305-75), Holden (R/III/548-IV/606), and the deputy (R/I/82-89, 164-76, 195; II/204-12, 222-24) in the true realities of this trial, the following fact pattern emerges:

1. Ball and Holden -- both mature men in their forties -- are career drug dealers in the Bahamas and in the United States (R/II/210, 222-23, 316, 318-25, 333-36, 350, 357, 365). They are friends of long-standing (R/I/176; II/305; III/553, 573-76).
2. Ball is arrested in Broward County trying to sell approximately 4½ pounds of cocaine (R/I/165). Facing extreme criminal penalties, he negotiates a deal with the Broward County State Attorney and police (R/I/167; II/306-08). When he drags his feet in per-

forming, the police put the squeeze on him (R/I/173-74; II/308-09).

3. Ball then goes to the Bahamas where he looks up his old friend Holden, tells him that he has been busted and is cooperating with the police in order to alleviate his legal problems. Holden agrees to help out his old friend in delivering up some warm bodies to the police in Broward County (R/II/325-26, 348; III/556-58, 564-65, 569-73).

4. During the months of April and May, 1984, Ball spends a great deal of time with Holden discussing drug deals (R/II/336-44). Holden comes up with a specific sales price of $150,000 which Ball transmits to the police (R/II/348-50, 360-61, 370). All this occurs prior to Ball ever being introduced to Mr. Madsen (R/II/314).

5. When the time is ripe, the old-timer Holden presents the young, virginal Madsen into the hands of Ball, who within a week delivers Madsen and a pound of heroin to the police (R/II/310-13, 327-31, 344-45). During the same time period, Holden is in direct and personal contact with the same police (R/III/554-57, 571-72).

* * *

In Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), this Court engaged in a lengthy analysis of the entrapment defense. This Court recognized that, in some cases, the conduct of the police is so egregious as to constitute entrapment as a matter of law, which requires dismissal of a case before it is ever submitted to a trier of fact. This Court formulated the following threshold test for entrapment 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.

Id. at 522.

The Cruz Court for the first time specifically discussed and defined the objective test for entrapment, i.e., "a matter of law for the trial court to decide". 465 So.2d at 521. Paraphrasing the Cruz objective test, entrapment occurs as a matter of law where the police activity (1) does not have as its end the interruption of a specific ongoing criminal activity; and (2) does not utilize means reasonably tailored to apprehend those involved in the specific ongoing criminal activity. 465 So.2d at 522.

The first prong of this test addresses the problem of ". . . police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime." Id. Police must investigate existing criminal activity, but they must not engage in the manufacture of new crimes. The second prong focuses on whether the police employed inappropriate law enforcement techniques which create a substantial risk that an offense will be committed by persons other than those ready to commit it. Id. In order to meet this test, the police must know of a particular ongoing criminal activity before trying to stop it and must construct their operations so as to go after an individual engaged in ongoing criminal activity.

For examples of applications of the Cruz test by lower tribunals, see Jones v. State, 483 So.2d 119 (Fla. 2d DCA 1986), rev. denied, 492 So.2d 1335 (Fla. 1986); Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985), rev. denied, 488 So.2d 831 (Fla. 1986); Myers v. State, 494 So.2d 517 (Fla. 4th DCA 1986); State v. Banks, 499 So.2d 894 (Fla. 5th DCA 1986); State v. Socarras, 502 So.2d 31 (Fla. 3d DCA 1987).

Both prongs of Cruz are satisfied in Mr. Madsen's case. First, there is no evidence that Mr. Madsen was currently engaged in any ongoing heroin trafficking

activity. There is no evidence whatsoever that Mr. Madsen had been engaged in such activity in the past. Instead, the police conduct in this case actively engendered new crime. Second, the tactics of Holden, in concert with Ball, in threatening Mr. Madsen's life if he did not participate in this drug transaction to make up for the drugs lost in the drop Mr. Madsen had witnessed, constituted methods of persuasion and inducement which created a substantial risk that an offense would be committed by someone not ready to commit it. As Mr. Madsen testified, it was the threats and his fear of the safety of himself and his mother which led him to become involved in this offense. As recognized in Cruz, it is fundamentally unfair and inimical to our system of justice for the State to send a police informant out on his own to initiate criminal offenses in a foreign country for the purpose of satisfying his "substantial assistance" agreement. To do so, the informant created and initiated this crime. When he met Mr. Madsen, Ball dictated that the offense must take place in the United States, thereby creating an offense in the State of Florida where none would have otherwise occurred. See e.g., United States v. Archer, 486 F.2d 670 (2d Cir. 1973). As such, police misconduct in this case amounts to entrapment as a matter of law under Cruz, and dismissal is mandated.

* * *

When the State manufactures crime and creates criminals, it exceeds its bounds. As Justice Brandeis wrote in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928)(emphasis added):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Society and its court system cannot sanction the illegal agreement and conduct present in this case. It is fundamentally unfair to allow a convicted drug trafficker's sentencing to be put off for more than a year while he is allowed to roam free, seeking to manufacture criminal offenses. The Florida Legislature, by the enactment of the mandatory provisions of §893.135(2), has made this practice illegal. The criminal justice system in this case was allowed to be manipulated and

turned on its head. If the 10% financial incentive in Glosson is enough to violate the due process rights of all citizens, surely Ball's twelve (12) years of prison incentive constitutes a clear cut, fundamental violation of Mr. Madsen's due process right, as well as that of all citizens. Florida courts cannot countenance sending felons, as agents of the police and prosecution (with the ratification and tacit approval of a trial court), out into the world to engage in crimes five times as serious as the one they committed and then testify about them in court. The integrity of our judicial system is at stake when such actions occur. It is a perversion of our system of justice for Mr. Madsen to sit in jail for twenty-five (25) years while Ball creates crime to get his sentence reduced to three (3) years. To ensure the integrity of our judicial process, this Court must heed Justice Brandeis' warning by reversing Mr. Madsen's conviction and ordering this criminal prosecution dismissed.

III. ADMISSION OF TAPE RECORDING OF CONVERSATION IN DEFENDANT'S HOME VIOLATED MR. MADSEN'S RIGHT OF PRIVACY.

Mr. Madsen filed a pretrial motion to suppress an audio cassette tape (obtained without judicial authorization) which contained a recording of the conversation which occurred on June 6, 1984, in Ft. Lauderdale

(R/VI/1076-77). This conversation, among Mr. Madsen, Deputy Gavalier, and Mr. DeGregory, took place in Mr. Madsen's bedroom in his mother's home. At a hearing on the motion (SR/I/32-51), the State stipulated that Deputy Gavalier wore a body-bug into this private residence (SR/I/38). The State further stipulated that Mr. Madsen did have standing, since he was staying at this home (SR/I/38). No testimony was taken. After hearing legal argument from both sides, the trial court deferred ruling. Later, the trial court entered an order denying Mr. Madsen's motion to suppress (R/VII/1078). The order did not state any reason for the denial. At trial, when the tape was offered, defense counsel renewed his objection to the tape (R/I/99).

In State v. Sarmiento, 397 So.2d 643 (Fla. 1981), this Court ruled that the warrantless, electronic interception by state agents of a conversation between the defendant and undercover police agents in the defendant's home was an unreasonable interception of defendant's private communications in violation of Art. I, §12, of the Florida Constitution.

At the hearing on Mr. Madsen's motion to suppress, the State did not argue that the recording was admissible under Sarmiento, but rather argued that Sarmiento was no longer good law. The State argued that Sarmiento and its progeny had been overruled by the

amendment to Art. I, §12, Fla. Const., which took effect January 3, 1983 (SR/I/37-50). State v. Lavazzoli, 434 So.2d 321 (Fla. 1983)(amendment to be given prospective effect only).[2] This amendment provides that the privacy right guaranteed in Art. I, §12, shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Three District Courts of Appeal have squarely held that the Sarmiento decision has not survived this constitutional amendment to Art. I, §12, after January 3, 1983. See e.g., State v. Hume, 463 So.2d 499 (Fla. 1st DCA 1985), review granted, Florida Supreme Court Case Numbers 66,691 and 66,704; State v. Ridenour, 453 So.2d 193 (Fla. 3d DCA 1984); Madsen v. State, 502 So.2d 948 (Fla. 4th DCA 1987).

However, in Winfield v. Divisions of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985), this Court subsequent to this constitutional amendment cited Sarmiento with approval. In a decision construing the right to

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2/ Since this 1983 amendment erodes the power of the Florida Supreme Court, and transfers its authority to the United States Supreme Court [this power and authority being granted by Art. V, §3, Fla. Const.], the constitutionality of the 1983 amendment is questioned and challenged in this brief.

privacy under Art. I, §23, of the Florida Constitution, this Court stated:

> However, as previously noted, the United States Supreme Court has made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of a person's general right to privacy - his right to be let alone by other people - is, like the protection of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350-51 (1967). This Court accepted that responsibility of protecting the privacy interest of Florida citizens when we stated that "the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution." State v. Sarmiento, 397 So.2d 643, 645 (1981).

477 So.2d at 547-48. Sarmiento therefore has not been overruled by this Court. In fact, in light of the approving citation of Sarmiento in Winfield, it is clear that Sarmiento retains its vitality. See also Rasmussen v. South Florida Blood Service, 500 So.2d 533, 535 (Fla. 1987). Reading Winfield in the context that Sarmiento has never been overruled by the Florida Supreme Court, the lower tribunal and the trial court were bound by the Sarmiento ruling. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973).

As Winfield demonstrates, Florida has another constitutional privacy provision which impacts on this

issue. Article I, §23, of the Florida Constitution creates a right of privacy:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life . . . .

This provision not only serves to illustrate an attempt to tether unbridled governmental intrusion, but also serves to reinforce the need to recognize and acknowledge the wisdom and reasoning of the Sarmiento opinion. It cannot be disputed that this privacy amendment operates to provide more protection than the penumbral right of privacy inferred from the United States Constitution.

Although there is little illuminating case law other than Winfield interpreting Florida's right of privacy, assistance in ascertaining some purposes may be obtained from analogy to similar provisions recently enacted in other states. Especially instructive is State v. Glass, 583 P.2d 872 (Alaska 1978). Glass not only deals with an identical factual situation, but also turns on that state's independent privacy right and considers case law from across the country. See also State v. Butterworth, 41 Cr.L. 2226 (Wash. Ct. App. 1987) and cases cited therein.

In Glass, members of the area-wide narcotics team fitted a police informant with a radio transmitting

device. Once the informant gained consensual entry into the defendant's home to consummate a narcotics transaction, the narcotics team, surveilling from outside the home, intercepted and recorded every word. No warrant was sought or obtained. The Glass court ruled that the trial court did not err in granting a motion to suppress the recordings. It is noteworthy to observe that, while the court could have ruled on Fourth Amendment grounds, it did not, and instead chose to interpret the propriety of the police conduct under Alaska's privacy amendment, which states, in part:

> The right of the people to privacy is recognized and shall not be infringed.

The court stated:

> In its petition, the state relies primarily upon federal decisions dealing with the fourth amendment to the United States Constitution. The authority is questionable . . . . In any event, those authorities should not be regarded as determinative of the scope of Alaska's right to privacy amendment, since no such express right is contained in the United States Constitution.

583 P.2d at 874-75. In interpreting this privacy amendment, Glass ruled that where a conversation between a defendant and an informant in a defendant's home was electronically recorded by police officers standing outside the home, without benefit of a search warrant, the monitoring and recording of the conversation violated the defendant's privacy rights under the state constitu-

tional right of privacy. See also State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978).

The question remains "Was this illegally obtained evidence admissible?" in view of the "exclusionary rule" provision of the 1982 version of §12. From this we know that the audio tape would be inadmissible if the police conduct was condemned by the United States Supreme Court in interpreting the Fourth Amendment. However, beyond this 1982 limited constitutional exclusionary rule (which appeared without limitations for the first time in the Florida Constitution in the 1968 version of §12), the Florida courts recognized, approved, and applied a court-made exclusionary rule for nearly forty (40) years before the United States Supreme Court decision in Mapp v. Ohio, 367 U.S. 495, 81 S.Ct. 1684, 6 L.Ed.2d 1983 (1961). In the 1922 decision of Atz v. Andrews, 84 Fla. 43, 94 So. 329, 331-32 (1922), the Florida Supreme Court adopted a Florida exclusionary rule:

> . . . there can now be no questioning the doctrine that property seized in a search by government agents without warrant of any kind [in violation of the privacy protections of the state and federal constitutions, as interpreted] shall not be used in a criminal prosecution against him.

In the ensuing sixty-five (65) years of prohibition, depression, wars, hurricanes, social upheaval, drugs, and unprecedented growth within Florida, the Florida Supreme Court has never receded from Atz. See Blatch

v. State, 389 So.2d 669, 675 note 6 (Fla. 3d DCA 1980). Consequently, even if the audio tape was admissible under the 1982 version of §12 (which is not conceded), it is still inadmissible -- through the application of the Atz court-made exclusionary rule -- as evidence obtained in violation of Mr. Madsen's §23 constitutional right to privacy.

As Sarmiento and Winfield dictate, and as Glass exemplifies, the Florida constitutional right of privacy confers broader protection than the federal constitution. This Court must apply the Sarmiento and the Winfield rationale by holding this police misconduct to be unconstitutional under Florida law, and by reversing and remanding this case for a new trial in which the tape recording is not admitted into evidence.

IV. EXCLUSION OF DEFENSE WITNESS DENIED MR. MADSEN HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The exclusion of the prospective defense witness, Brian Clepper, violated Mr. Madsen's constitutional rights to compulsory process, to present a defense on his own behalf, and to a fair trial. Amend. VI, XIV, U.S. Const.; Art. I, §§9, 16, Fla. Const.

These constitutional provisions guarantee Mr. Madsen due process and "compulsory process for obtaining witnesses in his favor". United States v. Valenzuela-

Bernal, 458 U.S. 858, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982)(emphasis in original). The United States Supreme Court, in Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), ruled that a defendant's Sixth Amendment right to compulsory process for obtaining witnesses to defend himself is binding upon the states. In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Supreme Court reversed a conviction where the trial court excluded testimony of three defense witnesses. The Court ruled that exclusion of this crucial defense evidence denied the defendant due process:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.

93 S.Ct. at 1049.

On March 6, the fifth day of trial, Mr. Madsen's attorney stated that he wished to call an additional defense witness, Brian Clepper (R/IV/607). He proffered to the trial court that Mr. Clepper was an expert in audio tape analysis; that he had examined the tape in question and would testify that the integrity of the tape was highly compromised in that there were clear indications of electronic edits (R/IV/607-08). Mr. Clepper's name had not been previously provided to the State (SR/III/409, 423). Instead, the defense had been relying on Charles Shultz as its defense expert on the

tape. Mr. Shultz' name had been provided to the State and the State had deposed him (R/IV/609-10; SR/III/423). However, as Mr. Madsen's counsel pointed out to the court, Mr. Clepper had more expertise and would provide more definite findings as to the tampering with the tape (R/IV/608-09). The State objected to this late notice, arguing that it was greatly prejudiced due to its inability to prepare for this expert (R/IV/60918). The trial court ruled that Mr. Clepper could not be called as a defense witness, apparently because his name was not provided to the State (R/IV/618-19). Mr. Shultz did testify for the defense (R/IV/621-718).

Several things should be noted in conjunction with this issue. On the morning of March 5, 1985, defense counsel informed the trial court that he had not been able to reach Mr. Shultz in recent days and that he was going to try to obtain the services of another tape expert (R/II/394-402; III/403-05). While not ruling that the defense counsel could call this new expert, the trial court indicated as such, telling defense counsel he could have another expert examine the original tape at the court (R/III/405).

Additionally, it is clear that the State had its own expert from the FBI laboratory in Washington, D.C., to counter <u>any</u> defense expert as to the integrity of the tape. Such a State expert did testify on rebuttal

(R/V/816). He disputed that there were electronic edits (R/V/842, 850). This rebuttal testimony was adequate to rebut even Mr. Clepper's proffered testimony; therefore, the State's claim of prejudice was wrong. Also, the trial court had before it alternative remedies. The defense had made the request that Mr. Clepper be allowed as a witness on the morning of March 6. The defense rested its case on the afternoon of March 6. The trial court then granted the State a one (1) day recess to enable it to bring its FBI tape witness to Florida for rebuttal (R/IV/787-88). The trial recommenced on March 8. It is clear that the trial court, since there was an intervening day on which the trial was not held, could have allowed the State to depose Mr. Clepper on March 7 if it wished to do so.

The trial court's overly harsh sanction is erroneous because it fails to consider Mr. Madsen's overriding constitutional rights to compulsory process, to present a defense, and to a fair trial. In United States v. Davis, 639 F.2d 239 (5th Cir. 1981), the court considered exclusion of defense witnesses who were not provided to the government pursuant to a pretrial discovery order. The court noted that the "exclusion of relevant, probative, and otherwise admissible evidence is an extreme sanction" that is not justified because of a discovery rule violation by the defense, and is

unconstitutional. Id. at 243. Accord United States v. Wolff, 529 F.Supp. 713 (N.D.Ill. 1981)(state procedural rule; exclusion of defense alibi witnesses, as sanction for noncompliance with the notice of alibi rule, violates the Sixth Amendment), rev'd on other grounds, 593 F.2d 642 (7th Cir. 1982).

This Court has ruled that the mere failure of a defendant to list a witness is insufficient grounds to exclude that witness. Bradford v. State, 278 So.2d 624, 626 (Fla. 1973). See also Morgan v. State, 453 So.2d 394 (Fla. 1984)(exclusion of defense insanity witnesses due to failure to provide notice was reversible error). Other Florida courts have held that exclusion of defense witnesses for discovery rule violations is reversible error. See e.g., O'Brien v. State, 454 So.2d 675 (Fla. 5th DCA), rev. denied, 461 So.2d 116 (Fla. 1984); Patterson v. State, 419 So.2d 1120 (Fla. 4th DCA 1982), rev. denied, 430 So.2d 452 (Fla. 1983); Dorry v. State, 389 So.2d 1184 (Fla. 4th DCA 1980); Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Hotchkiss v. State, 367 So.2d 727 (Fla. 4th DCA 1979). In O'Brien, the Fifth District stated that the exclusion of defense witnesses should never be imposed except in the most extreme circumstances, such as when the violation was purposeful, prejudicial, and with the intent to thwart justice. 454 So.2d at 677. In Patterson, the Fourth

District (the lower tribunal) made clear that, if the trial court does find procedural prejudice, it can tailor a just remedial order -- but relevant evidence must not be excluded from the jury unless no other remedy suffices.

Mr. Madsen was tried for a most serious offense which provided severe mandatory minimum penalties. It was vital to his defense of entrapment to show government misconduct, one part of which was the police tampering with this unique audio cassette tape recording of the conversation surrounding the transfer of the alleged heroin. The trial court's arbitrary decision to exclude Mr. Clepper's testimony, when it had reasonable and just alternatives available which would have preserved Mr. Madsen's fundamental rights while allowing the State an opportunity to prepare, eviscerated Mr. Madsen's fundamental constitutional right to present witnesses in his favor at trial. See Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984). Based on the cases cited above, this Court must therefore reverse Mr. Madsen's conviction.

CONCLUSION

The prosecution of this case was misbegotten from the outset. First, this case was orchestrated and created by egregious police and prosecution misconduct preceding Mr. Madsen's arrest. The entire case rests

upon the criminal actions of a convicted felon who bargained for a reduced sentence in return for luring Paul Madsen into a criminal drug transaction; and then lied to the trial court and jury concerning his agreement with the State Attorney. This Court cannot sanction this criminal, immoral, and uncivilized behavior by the executive branch of state government under the rubric of "effective police work". This is "crime creation", and not "law enforcement".

Second, at trial, the trial court committed numerous errors of constitutional proportion which violated Mr. Madsen's fundamental constitutional rights to due process and a fair trial. These included the admission into evidence of an audio cassette tape of an illegally recorded conversation, the exclusion of a crucial defense witness, and the inaccurate and incomplete instruction and reinstruction on Mr. Madsen's theory of defense -- entrapment. These errors rendered Mr. Madsen's trial fundamentally unfair, unjust, and unconstitutional.

Based on the arguments and authorities set forth above, this Court must reverse Mr. Madsen's conviction and sentence, and order Mr. Madsen released from prison and discharged.