IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 72,402

DCA CASE NO. 87-926

CITY OF ORLANDO,

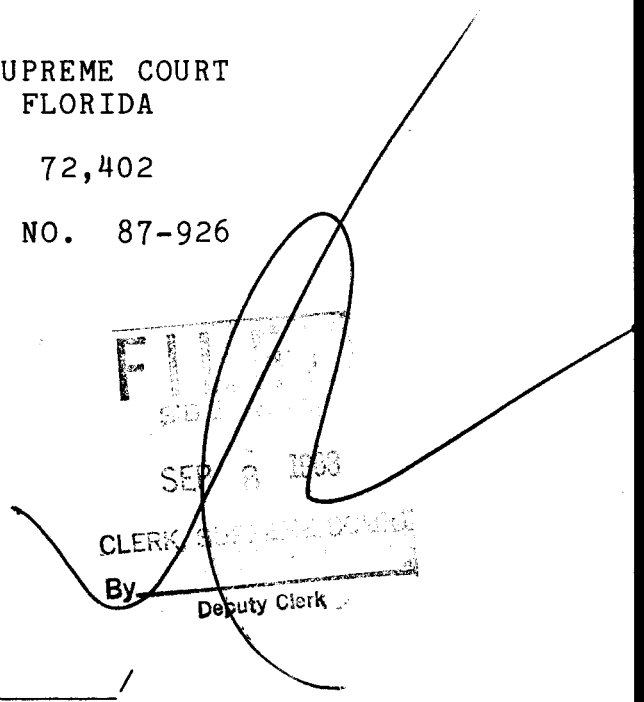
Petitioner,

vs.

ALAN L. BIRMINGHAM,

Respondent.

_____/



RESPONDENT'S REPLY BRIEF ON THE MERITS

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I N D E X

TABLE OF AUTHORITIES

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Continuation:

STATEMENT OF THE CASE

Petitioner adequately states the case in its brief on the merits.

STATEMENT OF THE FACTS

The Fifth District Court of Appeal reversed the judgment in favor of the CITY OF ORLANDO because "to do otherwise would result in manifest injustice to the appellant." Birmingham v. City of Orlando, 5th D.C.A., Case No. 87-926 (March 10, 1988). "He (Birmingham) was not given a fair trial because the jury instructions were plainly wrong and misleading. Had the jury been given proper instructions it is likely a different result would have occurred." Id.

Twice, an instruction was read by the trial court explaining the primary affirmative defense of CITY OF ORLANDO. (R-541-545) Twice, the instruction was absolutely wrong; so much so, that the jury could not use the instruction given the facts and law of this case. The only choice the jury had, given the instructions, was to find that probable cause existed; and thus, judgment for CITY OF ORLANDO.

In addition, as a defense to false arrest; unlawful assault; and false imprisonment, the CITY OF ORLANDO was permitted a jury instruction on civil disobedience which read:

> Five, the next issue of defense is whether the plaintiff, ALAN BIRMINGHAM, participated in civil disobedience. (R-542)
>
> ...
>
> If you find that ALAN BIRMINGHAM unlawfully participated in civil disobedience, then your verdict should be for the CITY OF ORLANDO. (R-543)
>
> ...
>
> Civil disobedience is refusal to obey governmental demands or commands. (R-546)

This "civil disobedience" is not statutory, is not founded in Florida case law, nor was BIRMINGHAM ever charged criminally with this "legal fiction." The definition was derived, over objection by counsel for BIRMINGHAM, from the Webster Dictionary. (R-546; 632; 468; 474-475)

The Fifth District Court of Appeal in its opinion stated that its reversal was based on error in "instructing the jury in regard to the legal definition of probable cause, 'civil disobedience' and in other matters." Birmingham, supra. (emphasis added) The other matters will be discussed more fully in argument, and include:

A) Misstatement of law with respect to the resistance to arrest a person is allowed use. (R-54; objection by BIRMINGHAM R-470-471)

B) Refusal by trial judge to read standard jury instruction on false imprisonment, over objection by counsel for BIRMINGHAM. (R-457-458; 539-540)

C) The evidence is void of testimony by CITY OF ORLANDO that probable cause existed, because the arresting officer did not testify in trial and the other officers could not fill in the evidentiary gap required. i.e., that the arresting officer see a misdemeanor being committed in order to arrest without a warrant.

The facts of this case are compelling, and warrant repeating. On March 25, 1984, Todd Birmingham was 17 years old. (R-133) Todd had lived with his father, ALAN BIRMINGHAM and Todd's twin brother for approximately five years. (R-134-135) Todd had had his Florida operator's license for four days,

although he had previously had his learner's license for one year. (R-134)

On this day at approximately 7:00 p.m., Todd and his friend, Gene Pitrowski, were coming back to Todd's house on Pelican Lane in the Audubon Park Subdivision in Orlando. (R-139,140,432) The boys had been at the movie theatre on Bumby Avenue and had driven down Park Avenue in Winter Park, prior to driving home to Todd's house. (R-139-140)

Todd was driving and hit a parked car in his neighborhood on Chelsea Street. (R-141) Todd had been trying to get a tape out of his cassette deck and was not watching where he was going. (R-140)

Todd stopped for a second and could see that he was bleeding very badly. (R-141) Gene was screaming that blood was all over him and that he had wrecked his new car. (R-142) Todd, frightened, went around the corner to his home. (R-142)

Todd rushed into the house, told his father he had hit a car on Chelsea Street, and ran to call 911 (emergency). (R-142) The Orlando Fire Department responded to the emergency and rendered medical attention to Todd. (R-353)

ALAN BIRMINGHAM looked up from the television to see his son bleeding, with a gash in his head. (R-284) Todd said he would call the emergency number, and BIRMINGHAM jumped in his car and drove to the site of the car Todd had hit. (R-284) A police officer was on the scene and ALAN BIRMINGHAM told the officer his son had hit the car; his son was hurt badly; and that if the

officer would follow BIRMINGHAM, he would take the officer to his son. (R-285)

The officer who followed BIRMINGHAM was Barbara Bergin, a patrol officer for six months with ORLANDO POLICE DEPARTMENT. (R-399) When she arrived the paramedics were treating Todd. (R-400) At no time on the night of this incident did Officer Bergin inquire of medical personnel the status of Todd's condition. (R-414-415)

Within fifteen to twenty minutes of Officer Bergin being present at the BIRMINGHAM residence, Officer Brook Sims of ORLANDO POLICE DEPARTMENT arrived. (R-403) He was the officer in charge because he was the first to arrive at the scene of the accident on Chelsea Street. (R-402) He therefore took over the investigation of Todd. (R-402) At this point, it was the duty of Officer Bergin, and the newly arrived Officer Hackney, to get witness statements from the many neighbors who were now present in the area of the BIRMINGHAM residence. (R-402-404)

Prior to Officer Sims arrival, Earl Noble of the Orlando Fire Department instructed Todd and ALAN BIRMINGHAM that Todd should go to the hospital. (R-143-144) The Fire Department does not transport, and a second emergency vehicle is called if needed. (R-354) ALAN BIRMINGHAM was told by the EMT that ALAN could take Todd to the hospital himself and save the cost of the ambulance; which is what ALAN BIRMINGHAM and Todd chose to do. (R-144)

Prior to being able to leave for the hospital, Officer Sims arrived and wanted to conduct an investigation into Todd's driving. (R-402; 433-434) Todd agreed to answer some questions, and Officer Sims learned that Todd was the driver of the car that hit the vehicle on Chelsea Street; Todd denied having had alcoholic beverages; Todd had a valid operator's license; and Todd showed the officer his own car and its damage. (R-432-434) The officer had already observed the damage to the parked car on Chelsea and said the damage was serious. (R-434) Most, if not all, of the questions were asked by both Officer Sims and Officer Hackney. (R-146)

Todd, as part of his sobriety test, had answered some preliminary questions correctly. (R-435-436) The field sobriety tests were performed without interruption by ALAN BIRMINGHAM. (R-435-436) Todd testified that he performed the tests that the officer requested. (R-145-147; 436) ALAN BIRMINGHAM testified that he never even knew that field sobriety tests were performed and that BIRMINGHAM had only really understood that aspect as he sat through this civil trial. (R-288-310)

Not everything that Officer Sims did in the course of his investigation went perfectly smoothly. Neighbors, many of whom had gathered, were milling about and expressing concern for Todd who had obvious signs of serious injury -- bandaged head; presence of an emergency vehicle, blood on Todd; and a worried father.

So, too, was BIRMINGHAM milling around. He wanted to take his son to the hospital and made that known to the police officers. (R-288) When told to "butt out" by Officer Hackney, BIRMINGHAM went over and stood with a neighbor woman. (R-147; 225) It was this neighbor who then advised that BIRMINGHAM again go over and indicate that they had had Todd long enough and he needed medical attention. (R-225) Another neighbor, Mrs. Vicky Crum, had heard the paramedics tell BIRMINGHAM to take Todd to the hospital and she was worried for Todd. (R-190)

Vicky Crum, the next door neighbor of BIRMINGHAM, testified that she did not hear BIRMINGHAM make threats to the officers. (R-192) Danny Crum who came out of his house as BIRMINGHAM had driven back to the house with the officer following and who observed the entire incident, stated he never heard BIRMINGHAM swearing. (R-172) Officer Bergin testified she never hear BIRMINGHAM make threats to any of the officers. (R-425) While Officer Sims testified that BIRMINGHAM yelled about taking his son to the hospital, there was no testimony concerning swearing or threats of any kind. (R-444-445)

Officer Sims does testify that finally BIRMINGHAM came down to where Sims and Todd had been and took Todd by the arm and said he was going to take his son to the hospital. (R-437) At some point (this is unclear) Hackney comes up and asks Sims if BIRMINGHAM is interfering; Sims replies yes; and Hackney orders BIRMINGHAM to leave or else he will be arrested. (R-438) After that point, Sims has his back to Hackney and BIRMINGHAM; he hears

some yelling; but sees nothing and does not testify to what BIRMINGHAM did to prompt his arrest by Hackney. (R-447)

There was ample testimony by the plaintiff's BIRMINGHAM witnesses as to the alleged unlawful arrest that was carried out by Hackney. Danny Crum said Hackney threw BIRMINGHAM to the ground and had his knee in BIRMINGHAM'S back. (R-170) Crum told the officer that BIRMINGHAM had a bad back; the officer shined the light on BIRMINGHAM; and then stood BIRMINGHAM up on his feet. (R-171)

Vicky Crum testified that her father was threatened by Hackney with arrest for his comments on how Todd had been pushed down by Officer Sims while BIRMINGHAM was on the ground. (R-192) She testified that the whole incident was handled by CITY OF ORLANDO inappropriately; stating that all BIRMINGHAM wanted to do was take Todd to the hospital. (R-199)

William Satterthwaite, a former neighbor who now lives in Ormond Beach, Florida, testified that he saw the bandaging of Todd's head. (R-212) He saw BIRMINGHAM being thrown to the ground. (R-214-216) In his opinion, BIRMINGHAM was completely manhandled. (R-217)

Sandra Satterthwaite, the woman who had urged BIRMINGHAM to go over and try to get Todd to the hospital, testified that Hackney threw BIRMINGHAM against the car; threw BIRMINGHAM on the ground; placed his knee in Al's back; and only after shining a light on Al's back got off him. (R-226-228) The noise of hitting the car and going to the ground was horrendous.

(R-226) "It was a thud, it was just a sound that the whole neighborhood I am surprised didn't come out." (R-226)

A rough idea of the total time from accident to the end of the investigation can be made. Officer Sims stated he arrived at the parked vehicle hit by Todd at approximately 7:00 p.m. (R-400) Todd said he and Gene left the Park Avenue area around 7:00 or 7:15 p.m. (R-139) ALAN BIRMINGHAM stated it was about 7:45 p.m. (R-284) The paramedics arrived at approximately 8:16 p.m. (R-353) Barbara Bergin arrived at 8:13 p.m. and was with Todd and BIRMINGHAM for almost twenty minutes before Officer Sims arrived. (R-413; 403) Even after BIRMINGHAM was taken from the scene, Officer Sims continued to try to question Todd for ten or fifteen minutes, but he was too upset. (R-448) The hospital records show that Todd arrived at the emergency room at approximately 9:15 p.m. (R-154; exhibits, R-666)

The issue of damages will be treated lightly here because the jury returned a verdict finding no unlawful arrest and no assault. There was the testimony of Doctor Henry B. VanTwyver, a clinical phychologist, to whom BIRMINGHAM had been referred by Doctor Thomas Stanford of the Jewett Orthopaedic Clinic. (R-65) Doctor VanTwyver testified that BIRMINGHAM suffered from mixed neuroses, severe, with primary features of somatization disorder, dysphemia and general anxiety reaction. (R-70) The physical manifestations are racing heart, shakiness, a feeling that something bad was going to happen, headaches, insomnia, and sexual dysfunction. (R-71) Doctor VanTwyver

testified that within a reasonable degree of medical probability these injuries were as a direct result of this incident. (R-73)

Doctor Thomas Stanford had previously treated BIRMINGHAM in 1972 for a herniated disc and had performed a laminectomy. (R-234) BIRMINGHAM had recovered from the surgery and was working full time and raising his family. (R-234) BIRMINGHAM subsequently in 1975 and 1977 had two more back injuries from which he had recovered and was working full time. (R-279)

While Doctor Stanford testified that the incident of March 25, 1984 did not do damage to the fusion which had been performed on BIRMINGHAM, nonetheless as a direct result of the incident and within a reasonable degree of medical probability, Doctor Thomas Stanford of the Jewett Orthopaedic Clinic stated BIRMINGHAM suffered from traumatic neurosis and psychiatric trauma rendering BIRMINGHAM unable to work. (R-238-240) Doctor Stanford testified that BIRMINGHAM was not a malingerer nor was he faking his illness. (R-254)

On cross-examination by Attorney Lengauer, Doctor Stanford stated that if BIRMINGHAM had not done all he could or "should" have done in physical therapy, that only reinforced the doctor's expert opinion that BIRMINGHAM suffered from neurosis caused by this incident. (R-255-266)

BIRMINGHAM testified to his work history which had just prior to this incident found him as a superintendent for a large firm, Aagaard-Juergensen, for twelve to thirteen years, earning

at least $25,000.00 per year. (R-650-665) As a result of this incident, BIRMINGHAM was unable to work; enjoy the activities he used to enjoy with his boys; and suffered severe financial hardships. (R-301-303; 281; 283; 296-300) This area of hardship was met in court by objection relating to the order in limine preventing testimony concerning the boys having to work to help their father; the loss of the family home; and repossession of BIRMINGHAM'S car; all of which resulted in a bench conference and admonishment of the witness by his counsel. (R-301-303)

In the way of defense testimony, CITY OF ORLANDO presented a physical therapist who stated that BIRMINGHAM did not try to get better. (R-380) A neighbor from the area where the parked car was hit by Todd testified mostly to Todd's driving. (R-374) Officer Sims and Bergin testified. (R-398; 430) The arresting officer did not testify.

SUMMARY OF ARGUMENT

The BIRMINGHAM opinion by the Fifth District Court does not expressly conflict with any decisions by this court or any other Florida district court of appeal decisions. The facts of the cases cited by CITY OF ORLANDO are so disparate that the rulings rendered cannot be compared with that of BIRMINGHAM; furthermore; the axioms of those cases relied upon by CITY OF ORLANDO are adhered to by the Fifth District Court of Appeal in the BIRMINGHAM decision.

The "two-issue" rule was not argued on appeal before the Fifth District Court of Appeal, and should thus, be stricken from argument by CITY OF ORLANDO. Furthermore, the two-issue rule is not applicable in this instance. The facts of the opinions brought out in argument by CITY OF ORLANDO are not remotely similar to the facts of the case at hand.

The argument by CITY OF ORLANDO that the instructions to the jury should be taken as a whole is totally inapplicable here, where the fundamental elements of the case were erroneously explained to the jury by the trial court. Conversely, if this argument were to hold water, which it does not, the instructions taken as a whole are a complete bungling of the law which the jury should have been provided by the judge in order to apply the evidence to the elements of the theory of BIRMINGHAM'S case.

The argument that trial counsel for BIRMINGHAM strategically did not object to those instructions which were plainly error is flimsy. The argument that if this court upholds

the opinion by the Fifth District Court of Appeal it will stand for the proposition that failure to object as strategy could result in a favorable reversal for new trial is likewise flimsy. The facts of this case are special -- they were carefully considered by the Fifth District Court of Appeal.

BIRMINGHAM'S only recourse against this miscarriage of justice is not to allow him to pursue a legal negligence claim as CITY OF ORLANDO would suggest, but to afford him the opportunity as the law of this court provides, to have a fair trial, thus affirming the decision of the Fifth District Court of Appeal in this cause. To do anything else would truly amount to a miscarriage of justice.

ARGUMENT

ISSUE I

THE FUNDAMENTAL ERROR RULE WAS PROPERLY APPLIED BY THE FIFTH DISTRICT COURT OF APPEAL; THUS THERE IS NO EXPRESS CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY APPELLATE COURT OF FLORIDA

This court has long stood by the rule that decisional conflict which properly triggers this court's jurisdiction is identified in two ways: it was unanimously held that jurisdiction must exist either (1) where an announced rule of law conflicts with other appellate decisions, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case." City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fl. 1976), citing Neilson v. City of Sarasota, 117 So.2d 731 (Fl. 1960). Here, there is no announcement of a rule of law that conflicts. Looking at the unique facts of this case, this court will not find these facts substantially similar to those of the cases announcing the rule of law pertaining to fundamental error.

At the very outset, this court should reconsider its acceptance of jurisdiction on this matter. It should be noted that few of the facts of the allegedly conflicting cases is discussed by CITY OF ORLANDO because each case is so distanced from the one at hand.

In an attempt to take his seventeen year old, injured son to the hospital, after, conservatively, one hour of

questioning by police, ALAN BIRMINGHAM was arrested for resisting arrest without violence and disorderly conduct. Sections 843.02 and 877.03, Florida Statutes (1983). These are misdemeanor offenses. The law is clear in Florida: a misdemeanor must be committed in the presence of the arresting officer. Donner v. Hetherington, 399 So.2d 1011 (Fl. 3d DCA 1981); Toomey v. Tolin, 311 So.2d 678 (Fl. 4th DCA 1975); Section 901.15, Florida Statutes (1983).

Probable cause is a fiction in this case. It is irrelevant. An officer does not need probable cause to arrest a misdemeanant without a warrant - an officer must see the misdemeanor occur. It is as simple as that -- no probable cause.

Instead, the jury in this cause was twice misinformed as to the law to apply to the theory of BIRMINGHAM'S case. The instructions read in pertinent part:

> IN ORDER TO HAVE PROBABLE CAUSE TO BELIEVE THAT ANOTHER PERSON IS COMMITTED A CRIME, THE PERSON DOES NOT HAVE TO ACTUALLY SEE THE LAW BEING VIOLATED, BUT HE MUST BE CERTAIN THAT BEYOND A REASONABLE DOUBT THERE IS NO QUESTION THAT THE CRIME HAS BEEN COMMITTED. ... (R-543-544)
>
> ...
>
> PROBABLE CAUSE MEANS A REASONABLE GROUND OF SUSPICION SUPPORT BY CIRCUMSTANCES SUFFICIENTLY STRONG IN THEMSELVES TO JUSTIFY A CAUTIOUS MAN IN BELIEVING ANOTHER PERSON TO BE GUILTY OF A CRIME. ... (R-543)
>
> ...
>
> CONSIDERING WHETHER THE PLAINTIFF, ALAN BIRMINGHAM, WAS UNLAWFULLY ARRESTED, YOU SHALL CONSIDER FLORIDA STATUTE 901.15, WHICH SAYS A POLICE OFFICER MAY ARREST A PERSON

WITHOUT A WARRANT WHEN, ONE, THE PERSON HAS COMMITTED A FELONY, OR, TWO, HE VIOLATED AN ADMISSIBLE ORDINANCE IN THE PRESENCE OF THE OFFICER. (R-546)

These statements of law represent fundamental error given the facts of this case. CITY OF ORLANDO relied for their special instructions upon the Supreme Court ruling in State v. Outten, 206 So.2d 392, 397 (Fl. 1968) Outten involved the criminal trial of defendants for auto theft ... a felony, not a misdemeanor.

It may be argued and inferred from the decision by the Fifth District Court of Appeal in reviewing all of the facts of this case that no amount of objecting would have shifted the trial counsel or trial judge from the course they were sailing. It is as if an automobile negligence case was being given to the jury with maritime law instructions.

It is clear from reading the briefs filed by CITY OF ORLANDO at both appellate levels that the concept is and was difficult for any of the participants at trial to grasp. At oral argument, Judge Dausch repeatedly asked both counsel why was probable cause even an issue in this trial. Probable cause becomes an issue in the civil claim for false imprisonment as a defense to a lawful arrest. But, where, as here, the arrest is for a misdemeanor charge, the jury should be instructed that if the law enforcement officer observed the misdemeanor being committed in his presence, then the arrest is lawful. It is truly as simple as that.

To compound the misdirection, a completely irrelevant but devastating instruction was allowed to go to the jury over

objection by counsel for BIRMINGHAM. That was the instruction on civil disobedience. As a complete defense to BIRMINGHAM'S case, this instruction was derived from a definition from Webster's Dictionary without any foundation in case law or statute. The jury was charged:

> IF YOU FIND THAT ALAN BIRMINGHAM PARTICIPATED IN CIVIL DISOBEDIENCE, THEN YOUR VERDICT SHOULD BE FOR THE CITY OF ORLANDO. (R-543)
>
> ...
>
> CIVIL DISOBEDIENCE IS REFUSAL TO OBEY GOVERNMENTAL DEMANDS OR COMMANDS. (R-546)

This instruction is so vague and ambiguous, it provides no guidance to the jury. Theoretically, the jury hearing evidence that the police officer requested BIRMINGHAM stand on his head and whistle the star spangled banner, to which he refused, would be required by this instruction alone to find for CITY OF ORLANDO. This is absurd!

BIRMINGHAM had a claim for unlawful assault. The only argument which could be made by the defense was that BIRMINGHAM was aggressive and resisted arrest. All of the testimony was to the contrary, and the only two police officers who testified did not see the actual arrest. Relative to this claim, the jury was instructed:

> A PERSON IS NOT JUSTIFIED TO RESIST AN ARREST BY A LAW ENFORCEMENT OFFICER WHO HE KNOWS OR REASONABLY APPEARS TO BE A LAW ENFORCEMENT OFFICER. (R-545)

The First District Court of Appeal in Invester v. State, 398 So.2d 926 (Fl. 1st DCA 1981), held that statutes that

are part of a single act must be read in pari materia, reiterating that although an accused is prevented by statute from resisting an arrest with violence, even if the arrest is technically illegal, the second statute permits the accused to defend himself against unlawful or excessive force; even when being arrested. See, also, Holley v. State, 464 So.2d 578 (Fl. 1st DCA 1984) (to instruct that an accused could never use force to resist an arrest was error and not harmless.)

The standard jury instruction on false imprisonment was not read as written over objection by counsel for BIRMINGHAM. (R-457-458) The effect was to give CITY OF ORLANDO more bites of the apple in defining intentional restraint, causing restraint, unlawful imprisonment. Keep in mind that of twelve pages of jury instructions, seven pages of transcript deal solely with special instructions offered by CITY OF ORLANDO.

The two appellate decisions and one opinion of this court argued by CITY OF ORLANDO are not helpful or relevant to this appeal. This court's ruling in Wagner v. Nottingham Associates, 464 So.2d 166 (Fl. 1985), was based upon facts concerning the argument by appellant, defendant below, Wagner, that the facts did not support the claim that he had acted wrongly in the intentional interference of a business relationship with plaintiff below, Nottingham. Id. at p. 168. Wagner argued that the wrong jury instructions were applied. Id. at p.170. This issue was handled by this court as well as the trial court (by inference) in recognizing that all the elements

of a claim for malicious prosecution had been placed into evidence. This court concluded that even if the wrong theory had been tried, the remedy would have been for a new trial, and not judgment reversed and entered for Wagner. Id. at p.170. The rule of law was restated that the fundamental error doctrine did not apply to a situation where timely objection would cure the error. Id. In Wagner, clearly this was so, unlike the Birmingham case where a fundamental misdirection by defense counsel, plaintiff's counsel and the court prevented the law from reaching the jury.

The facts of Pinder v. State, 396 So.2d 272 (Fl. 3d DCA 1981), are grossly disparate. Defendant, Pinder, sentenced with a three-year minimum mandatory requirement presented for the first time on appeal, without objection by counsel at trial level, that the state failed to prove that a "firearm" had been used in the commission of the crime. There was testimony that Pinder carried a "revolver-type gun" or a "handgun," but no testimony it was a "firearm." Id.

This court in Smith v. State, 521 So.2d 106 (Fl. 1988), did not apply the fundamental error doctrine because in Smith there was no jurisdictional error nor did the interests of justice present a compelling demand for its application. Id. at p.108. The facts of Smith concerned the reading of the standard jury instruction on the insanity defense, as opposed to the special instruction offered by the defense more closely reflecting the applicable law as enumerated in the decision of

Yohn v. State, 476 So.2d 123 (Fl. 1985). The facts of this case do not lend themselves to comparable analysis with the facts of the case at hand.

Subsequent rulings by the Third District Court of Appeal support the proposition that error will be found to be fundamental where the charges given were not in accordance with the evidence and applicable law. See, Ashley v. Ocean Roc Motel, Inc., 518 So.2d 943 (Fl. 3d DCA 1988) (fundamental not found because the instructions given did adequately state the law and comported with the evidence.); North Miami General Hospital v. Goldberg, 520 So.2d 650 (Fl. 3d DCA 1988) (The court supported its reasoning in footnote 3, p. 651, that even if grounds had not been specifically stated in the motion for directed verdict, Wagner, supra, and Pinder, supra, would not apply because nothing plaintiff could have done would have made a difference. A claim did not exist as a matter of law, and if a judgment had been entered on such a claim, it would have constituted "fundamental error."

In Birmingham, the issue of probable cause was error as a matter of law, and so intricately infused and injected into the instructions that nothing which could have been said by counsel for BIRMINGHAM would have righted the course. This was compounded by the erroneous instruction on civil disobedience, to which counsel for BIRMINGHAM preserved the error. Under these circumstances, it can be seen why with careful attention to all the facts, the Fifth District Court of Appeal felt that not to

grant a new trial would be a miscarriage of justice to BIRMINGHAM.

This is a unique case. The Fifth District Court of Appeal carefully applied the doctrine of fundamental error, as well as taking into consideration the erroneous instruction on civil disobedience, and other matters, and the well reasoned opinion should be upheld by this court.

ARGUMENT

ISSUE II

(A) A CONSIDERATION OF THE JURY INSTRUCTIONS AS A WHOLE SUPPORTS THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL;

The argument by CITY OF ORLANDO that if the instructions were read in their entirety there would be no error is shallow and insulting. No place does an instruction on probable cause represent the correct law. The instructions on probable cause and civil disobedience each act as complete defenses to BIRMINGHAM'S claims. If the jury finds there existed civil disobedience as defined by Webster's Dictionary, they must find for CITY OF ORLANDO; and if probable cause existed, then the arrest was lawful.

Never was the jury informed that in the case of a misdemeanor, the officer must see the crime being committed. The arresting officer never testified. There was no evidence of why the arrest took place. Conjecture by other officers is insufficient. Neither of the other two officers testified as to whether Officer Hackney observed resisting arrest without violence, and disorderly conduct by BIRMINGHAM. There was an absolute absence of evidence to support the burden required of the CITY OF ORLANDO that it had justifiably retained BIRMINGHAM without a warrant. See, S. H. Kress & Co. vs. Powell, 180 So.2d 757 (Fl. 1938); Lee v. Geiger, 419 So.2d 717 (Fl. 1st DCA 1982).

The Fifth District Court of Appeal could properly review the facts of this case even in the absence of a motion for

directed verdict by BIRMINGHAM where there was insufficiency of evidence to support a verdict. See, Fee, Parker, & Lloyd, P.A. vs. Sullivan, 379 So.2d 412 (Fl. 4th DCA 1980) relying on, Pickard v. Maritime Holdings Corporation, 161 So.2d 239 (Fl. 3d DCA 1964), which quoted from Baron and Holtzoff, Federal Practice and Procedure, Vol. 2, Section 1081; while an appellate court may be powerless to review the verdict in absence of a motion for directed verdict, the exception is "where the insufficiency of the evidence constitutes plain error apparent on the fact of the record which if not noticed will result in manifest miscarriage of justice..."

ARGUMENT

ISSUE II

(B) THE TWO-ISSUE RULE DOES NOT APPLY TO THE FACTS OF THIS CASE; NOR, WAS THIS ISSUE RAISED ON APPEAL TO THE FIFTH DISTRICT COURT OF APPEAL

This issue was not raised on appeal before the Fifth District Court in argument or at the hearing. Furthermore, the argument is not dispositive to this appeal where the case law relied upon by CITY OF ORLANDO is so disparate as to be unuseful.

There were three claims by BIRMINGHAM; false imprisonment; unlawful assault; and unlawful arrest. This brief is clear in arguing that the two instructions on probable cause which grossly misstated the law, and the complete defense of civil disobedience which was inadequate, gave the jury absolutely no choice but to find for CITY OF ORLANDO. This is not a situation where a special interrogatory verdict would aid us in determining whether the jury relied on a particular instruction. It is clear in this case.

The facts of this case are no comparison to those of the medical negligence action in Gonzalez v. Leon, 511 So.2d 606 (Fl. 3d DCA 1987). The question asked in Gonzalez paraphrased is: was there negligence on the part of Gustavo Leon which was the legal cause of damage to plaintiff? The jury answered; "No." Id. at p.607. In the BIRMINGHAM case, the questions were:

> 1) WAS THE PLAINTIFF, ALAN BIRMINGHAM, UNLAWFULLY IMPRISONED WITHOUT PROBABLE CAUSE WHICH WAS THE LEGAL CAUSE OF INJURY TO HIM?

2) WAS THE PLAINTIFF, ALAN BIRMINGHAM, UNLAWFULLY ASSAULTED WHICH WAS A LEGAL CAUSE OF INJURY TO HIM? (R-555-556; 606)

In light of the absolute errors in law which were read to the jury, it is more reasonable to believe the jury did not even get to the legal cause issue. Furthermore, there was very little evidence by the defense with respect to damages. One rehabilitation nurse testified that BIRMINGHAM would not try to improve. (R-380) Dr. Thomas Stanford, orthopaedic specialist, stated that had BIRMINGHAM not done all he could in physical therapy only reinforced the doctor's expert opinion that BIRMINGHAM suffered from neurosis caused by this incident. (R-255-256)

CITY OF ORLANDO relies on the decision in Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fl. 5th DCA 1982). The facts of Middelveen were much more complicated than those at hand, and involved a multi-count complaint for real estate commissions owed plaintiff. After the jury went out for deliberations the court entered directed verdicts on two counts in favor of defendant on one and plaintiff on the other. When the jury returned with a verdict for plaintiff, the defendant argued that the jury had decided on the count that had been d.v.'d in favor of defendant. The Middelveen court ruled special interrogatories should have been used.

The facts of this case were much clearer, and the glaring error which cannot be avoided upon inspection is the reason the jury ruled for CITY OF ORLANDO. To allow that verdict

to stand based upon erroneous law would be a manifest injustice to BIRMINGHAM.

CONCLUSION

Based upon the foregoing authorities and argument, the respondent, ALAN BIRMINGHAM, requests that this honorable court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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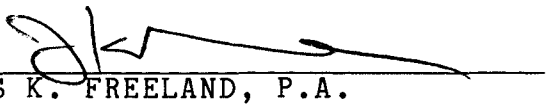
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 6th day September, 1988 to STEVEN F. LENGAUER, ESQUIRE, P.O. Box 20154, Orlando, Florida 32814.



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