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SUPREME COURT OF FLORIDA

CASE #: 79,973

ORIGINAL

CHARLES MILLS,

Petitioner,

ORIGINAL

vs

STATE OF FLORIDA,

Respondent.

[Jurisdiction Granted to Review a Decision of the Fourth District Court of Appeal Announcing Conflict With Another District Court of Appeal Rendered in Petitioner's Direct Appeal From an Adverse Jury Verdict in the Felony Circuit Court for the 17th Judicial Circuit in and for Broward County, Florida]

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner is Appellant below, and was Defendant in the trial court. He shall be referred to as 'Petitioner', 'Appellant', or 'Defendant'.

Respondent is Appellee below, and the state in the trial court. It shall be referred to as 'Appellee' or 'state', or 'prosecution'.

Petitioner's Initial Brief on Appeal filed in the District Court below is attached hereto as Appendix 'A'. Reference to it shall be made as follows: (Appx. 'A', p 1), or by express reference.

The original record in the appeal below shall be referred to as follows: (R. 1).

STATEMENT OF THE CASE

Petitioner was tried upon a felony information sounding in two counts, to wit: Trafficking in cocaine and conspiracy to so traffick (R. 419-421).

From adverse jury verdicts in the Circuit Court for the 17th Judicial Circuit in and for Broward County, Florida, Petitioner appealed to the Fourth District Court of Appeal (R. 425). The district court affirmed as to all issues raised, but rendered a written opinion positing conflict with another district court of appeal as to one of the points argued. MILLS v STATE, 596 So2d 1148 (4DCA 1992).

On or about 31 May 1992 Petitioner served and filed in the district court his 'Notice to Invoke Discretionary Jurisdiction' of this Court.

On or about 9 June 1992 Petitioner served and filed in this Court his 'Petitioner's Jurisdictional Brief'.

By order dated 30 September 1992 this Court accepted jurisdiction, scheduled oral argument, and directed that the instant brief on the merits be served by 26 October 1992.

FACTS

Petitioner in his initial brief filed in the district court set forth a detailed statement of facts (pages 1-15), and has for the Court's convenience attached that brief in its entirety as an appendix to the instant brief. [Appendix 'A', attached hereto]. An abbreviated version follows.

Petitioner in April/May of 1988 was approached by a former acquaintance named 'Tom' (R. 238). [Tom did not testify at the trial]. Petitioner was not involved nor thought to be involved in any criminal actions at that time, particularly respecting drugs or drug use (R. 93, 101, 129, 239-242, 265). However, Tom began to entice Petitioner with the prospect of 'easy money' with no risk, if Petitioner would merely introduce "a friend" of Tom's to someone with cocaine (R. 239-40, 243). Petitioner kept putting Tom off, Tom persistently prevailing upon him to do it (R. 239-240). Eventually Tom was able to get Petitioner to go with him and meet Tom's 'friend' at a local Burger King Restaurant in May (R. 240-242). The 'friend' turned out to be an undercover cop named Dan Losey (hereinafter 'Losey') (R. 21-23, 80-82, 96). Tom was Losey's paid 'informant' and was working for Losey as a police operative (R. 21-22, 80-86, 96, 133-135).

Present at the Burger King introduction were only Tom, Losey, and Petitioner (R. 95, 109, 115). Alleged discussions were had along the lines indicated earlier by Tom, Tom assuring Petitioner that all he had to do was 'find someone with cocaine' (R. 22-23, 89, 93, 95, 102-103, 241-242). No deal was struck however (R. 102, 105, 110). Between that May meeting and 15

August 1988 Petitioner was called or encountered practically everyday by at least 'Tom' urging him to find someone so they could make some money (R. 243-244). Petitioner kept putting him off, and had actually not pursued finding anyone for such a transaction (R. 244). However, on about 12 August Petitioner in the course of a conversation with a friend named Rouse mentioned the money-making prospect as advanced by Tom when Rouse alluded to needing money (R. 245-246). Rouse professed an interest therein, and Petitioner mentioned this to Tom when Tom next called (R. 247). On 16 August a meeting was arranged for Petitioner to introduce Rouse to Losey (R. 140, 250). Losey then told Rouse about the 'easy money' scheme (R. 250), Rouse at one point making a phone call to someone not known to Petitioner (R. 251). Rouse then contacted one Perkins and Perkins eventually produced the cocaine which predicated the arrest and charges (R. 53-55). Petitioner at all times believed he was operating only on behalf of and for Losey and Tom (viz the police) to find for them a seller/source of cocaine (R. 249, 253-254, 257).

Further record facts shall be referred to in the course of arguments hereinafter as pertinent.

SUMMARY OF ARGUMENTS

POINT ONE: The district court of appeal in its opinion below construes this Court's opinions to announce abandonment of the per se reversible error rule where a trial court excludes the accused (and his/her counsel) participating in the formation of the appropriate response to a jury question on a matter of law posed during the deliberation process. However, this Court has rather reaffirmed in that context the per se reversible error rule, and the motivations originating that posture remain as pertinent today. The district court erred applying 'harmless error' analysis to the violation of Rule 3.410 sub judice.

POINT TWO: The district erred respecting the merit of the sua sponte re-instruction given by the trial court. That charge was not responsive to the actual question posed by the jury; that is, as to applicable "law". In the circumstances of this case "the law" vitally involved 'entrapment' principles, inter alia.

POINT THREE: The district court affirmed without discussion the trial court's denial of Petitioner's motions for judgment of acquittal based on both objective and subjective entrapment. The record however is clear that in accord with the announcements of this Court and four of the other district courts of appeal the facts of Petitioner's case establishe objective entrapment as a matter of law. No criminal activity was ongoing when a police agent persuaded Petitioner to solicit drug sources. The police created any crime committed in this case, not Petitioner.

POINT FOUR: Cumulative other errors were affirmed without discusssion by the district court, contrary to controlling law.

POINT ONE AND ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED EXCEPTING THE VIOLATION BY THE TRIAL COURT OF FL.R.CR.PR. 3.410 FROM THE PER SE REVERSIBLE ERROR RULE ANNOUNCED BY THIS COURT IN IVORY v STATE

Petitioner argued this issue at the Point One on Appeal in his initial brief. [Appx. 'A', p 19-22].

Rule 3.410, Florida Rules of Criminal Procedure, governs 'Jury Request to Review Evidence or for Additional Instructions' and provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom * * * and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

In the trial of this cause the jury retired to deliberate (R. 404) and after a recess the parties were summoned back to court. The following colloquy occurred between the judge and defense counsel ('Mr. Morgan'):

> THE COURT: All right. Bring in the jury. They have a question.
>
> MR. MORGAN: Should we know what the question is so we can talk about it?
>
> THE COURT: We don't need to talk about it. I will show you in just a minute, Kayo.

(R. 407). The jury was conducted into the courtroom and the trial judge announced as follows:

> THE COURT: Have a seat, please. Ladies and gentlemen of the jury, I have your question:

> Judge Coker, could you please clarify or provide a copy of the law on armed trafficking.
> Unfortunately, I can do neither of those.

(R. 407). The judge did not stop there, but continued with that "However, what I can do is to reread you the law that I read you a few moments ago" (R. 407-408). The judge then, of the law originally read (R. 382-399, 403-404), reread only that portion respecting the "elements" of armed trafficking in cocaine, the definition of "delivery", and the respective quantity levels of cocaine (R. 384-386, 408-409). Asked by the judge if that answered its question, the jury responded "Yes" (R. 409). The jury retired to continue its deliberations. The following colloquy then occurred between the judge and defense counsel:

> MR. MORGAN: Judge, show my objection. We didn't get a chance to discuss that.
>
> THE COURT: Well, what's your objection?
>
> MR. MORGAN: I'd like to have entrapment read to them. It's not an offense to traffic if he was entrapped.
>
> THE COURT: I responded to their question exactly as they requested that I respond and your objection is noted.

(R. 409-410). Shortly thereafter the jury returned with a verdict of guilty on both counts (R. 410-411).

Petitioner argued this objection for reversal on appeal at Point One in his initial brief. In its opinion affirming the trial judge's ruling the Fourth District Court of Appeal wrote,

> We acknowledge that defense counsel's right to be present at reinstruction of the jury includes the right to participate, to place objections on the record, and to make full argument as to the reasons the jury's request should or should not be honored. Ivory v State, 351 So.2d 26, 28 (Fla. 1977). However, although the trial judge violated

> the rule when he failed to give defense counsel the opportunity to be heard, we find such error to be harmless.

MILLS v STATE, 596 So.2d 1148, 1149 (4DCA 1992), (emphasis supplied). The district court distinquished three of this Court's cases "that hold per se reversible error occurs when a trial judge fails to notice defense counsel or the defendant of a jury question" [BRADLEY v STATE, 513 So.2d 112 (Fla. 1987); CURTIS v STATE, 480 So.2d 1277 (Fla. 1985); and IVORY v STATE, 351 So.2d 26 (Fla. 1977)] on the basis that "[i]n this case, the trial judge notified defense counsel and the defendant that the jury had a question". 596 So.2d at 1149. The district court then invoked WILLIAMS v STATE, 488 So.2d 63, 64 (Fla. 1986), for the construction that "[c]ommunications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles". 596 So.2d at 1149. It then cited CHERRY v STATE, 572 So.2d 521, 522 (1DCA 1990), which "found reversible error because defense counsel did not have 'notice and an opportunity to be heard regarding the appropriate response' to a jury question". 596 So.2d at 1149. The district court continued to reason, however, that because the First District in CHERRY relied for its conclusion on this Court's decision in CURTIS v STATE, supra, and that CURTIS pre-dated this Court's decision in DIGUILIO v STATE, 491 So.2d 1129 (Fla. 1986),

> Therefore, in direct conflict with Cherry, we hold that the harmless error rule applies where defense counsel and the defendant have notice of a jury question but the trial judge fails to give defense counsel the opportunity to be heard as to the appropriate response.

596 So.2d at 1150. Apparently the district court reads DIGUILIO's 'harmless error' rule to represent this Court's abandonment of the 'per se error' rule in the context of jury re-instruction "reaffirmed" in CURTIS. Thus did the district court conclude as aforesaid that "although the trial judge violated the rule when he failed to give defense counsel the opportunity to be heard, we find such error to be harmless". Petitioner submits the district court erred in so concluding.

This Court in IVORY v STATE, 351 So.2d 26 (Fla. 1977), decreed, respecting enforcement of compliance with Fl.R.Cr.Pr. 3.410: "We now hold that it is prejudicial error for a trial judge to respond to a request from the jury without * * * defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request [which] right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored". 351 So.2d at 28 (emphasis supplied). In CURTIS v STATE, supra, this Court was confronted with a district court's attempt "to avoid the per se rule of Ivory by distinguishing the facts". 480 So.2d at 1277, fn 1. The Court "explained the reason for strict compliance with rule 3.410 [is to] afford counsel an opportunity to perform their respective functions [such as] advise the court, object, request additional instructions * * *, and otherwise fully participate in this facet of the proceeding". 480 So.2d at 1278. Of paramount import, recognized in CURTIS is that "the state and defendant have been

deprived of the right to discuss the action to be taken, including the right to make full argument". At 1279 (emphasis supplied). Thus the Court "reaffirm[ed] the viability of Ivory" and the rejection of a 'prejudice rule' in the context of Rule 3.410 compliance. Again in WILLIAMS v STATE, supra, the "holding that violation of rule 3.410 is per se reversible error", 488 So.2d at 64, was reaffirmed but limited to the "express notice requirements", id, of that rule. This Court in ROBERTS v STATE, 510 So.2d 885 (Fla. 1987), applied the latter limitation and held that a "request for a view", 510 So.2d at 891, was not "a request by the jury for 'additional instructions or to have any testimony read to them' within the terms of rule 3.410 [, wherefore the] per se reversible error rule set forth in Ivory [did not] appl[y]". Id. This latter case came after DIGUILIO v STATE, supra, was decided.

In BRADLEY v STATE, 513 So.2d 112 (Fla. 1987), also decided after DIGUILIO, this Court considered a jury's request during its deliberations to "read the original police report" and the judge's response that it could not because the report was not in evidence (at p 112) to be "a communication * * * covered by Florida Rule of Criminal Procedure 3.410". At p 113. Because the record did not reflect that "notice of the jury's inquiry was given to the [parties'] counsels prior to the trial judge's response" (at p 112) this Court held "that Ivory and Curtis mandate reversal". At p 113. BRADLEY thus clearly reaffirms the per se reversible error rule in this sensitive context when defense counsel is present but is deprived of "the opportunity to

participate in the discussion of the action to be taken on the jury's request". At p 112, quoting IVORY (emphasis supplied). And as is also apparent, this Court in BRADLEY reaffirmed CURTIS that "[t]he right to participate * * *. includes the right to place objections on the record as well as the right to make full argument as to why the jury request should or should not be honored [and n]otice is not dispositive[, as t]he failure to respond in open court is alone sufficient to find error". At 114.

This Court in HILDWIN v STATE, 531 So2d 124 (Fla. 1988), found 'harmless error' where the judge sent a note into the jury room to answer its question during deliberations rather than bringing the jury back into court. However, in doing so it distinquished the "circumstances" therein from those in IVORY, supra, and CURTIS, supra, because in the latter cases "both counsel were notified and given the opportunity to make their positions known to the judge" and "both counsel concurred with the response" proposed and made by the judge. At 127. Thus again this Court reaffirmed both the IVORY and CURTIS decisions to be controlling law.

The per se reversible error rule in the context of Rule 3.410 violations was again reaffirmed in COLBERT v STATE, 569 So2d 433 (Fla. 1990). In COLBERT the jury announced it was deadlocked as to some of multiple counts, and asked for testimony to be read back. The jury was advised in the latter respect that a read-back was not possible until the following Monday, and sent from the courtroom.

> After the jury was sent from the courtroom again, the judge informed counsel that she was inclined to have the jury return the verdicts it had reached and declare a mistrial as to any remaining counts.

569 So2d at 433 (emphasis supplied). The judge overruled defense counsel's objections "and informed counsel" she was taking the action indicated. At p 433-434. The jury was brought into court and informed of that intention of the court but that the jury could in the circumstances made known to it (including respecting the reading back of testimony on Monday) continue its deliberations. Defense counsel objected to the latter "option" being given because not so advised beforehand. At 434. The jury shortly came back guilty on all counts, and defense counsel declined having the jury polled as to the counts which had been decided and those undecided prior to the last charge. This Court concluded that a 'per se prejudical error' situation was not implicated, saying:

> Such a situation was clearly not present in this case. The prospective jury instructions were extensively discussed with counsel. Defense counsel fully argued the position that a mistrial on all counts was warranted and objected on the record. After the jury was given the modified instruction, defense counsel properly preserved the issue by objecting on the record. Unlike the above-listed cases [IVORY, BRADLEY, WILLIAMS, and CURTIS], the notice requirement of rule 3.410 was effectively satisfied because counsel had notice, an opportunity to argue, and to object, before and after the instructions were given.

569 So2d at 435 (emphasis supplied). Then the Court applied harmless error principles to the merits of the objection so made, but initially concluding that a modified 'Allen charge' had not been given by the trial court.

Sub judice, Petitioner's counsel had neither notice nor an opportunity to argue and object "before * * * the instructions were given". Id. Counsel (as well as the prosecution) was entirely excluded from knowing what the question was, and the judge fashioned his own response to it. The trial court in its sua sponte response initially told the jury it could neither "clarify or provide a copy of the law" (R. 407) as to the involved trafficking offense. That announcement, of course, was patently wrong in that the court can have provided the jury all of the original instructions in written form [see: Fl.R.Cr.Pr. 3.400(c); ZARATTINI v STATE, 571 So2d 553 (4DCA 1990); SIMMONS v STATE, 541 So2d 171 (4DCA 1989); BYRD v STATE, 582 So2d 640 (3DCA 1991)]; and Rule 3.410 itself provides for the court giving "additional instructions" if the jury requests [compare HENDRICKSON v STATE, 556 So2d 440 (4DCA 1990) that it is fundamental error to preliminarily instruct a jury that it cannot have testimony read back to it during the deliberation process; and BISCARDI v STATE, 511 So2d 575 (4DCA 1987) that it is error to instruct a jury that a court cannot reinstruct on the applicable law). No opportunity to so pursuade the judge to relate to these authorities was accorded counsel when the jury made the request it did. Respecting the request itself, i.e. to "clarify or provide a copy of the law on armed trafficking" (R. 407), no opportunity was given counsel to seek clarification thereof in order to fashion an appropriate response. For instance, of what "law" was the jury seeking clarification or copies? The jury clearly did not ask for merely the 'definition'

or 'elements' of an offense. And, the court had amended and clarified its original instructions just before the jury initially retired to deliberate, to wit:

> THE COURT: Let me elucidate on two things, ladies and gentlemen, which has been discussed up here [at side-bar]. When I read the law with regard to entrapment, I specifically recall that I instructed you that the defense of entrapment was being leveled at both counts, not only the trafficking, but also the conspiracy to traffic[k]. I think that I made that clear, but if I didn't, I do now make it clear.
>
> I am going to, again, give a little additional instruction which the defense has requested and filed an objection to. When I say that a person, when instructing on the law of principals, I explained that person commits no crime if they are merely present when a crime is being committed by another or others, even if that person also knows that a crime is being then and there committed by the other or other persons.

(R. 403-404). Was the jury seeking clarification or a copy of that "law" in the case? The judge assumed it was not, but without counsel's agreement to or acquiescense in such assumption. However, the judge then purported to do something else for the jury when he responded in the manner he did.

The jury was thus told that the "law" would not (or could not) be clarified or copies of it provided, as requested; but a limited re-instruction emphasizing only the elements of the trafficking charge and the definition of 'delivery' was gratuitously given by the court to that jury at a most sensitive stage of Petitioner's trial.

Petitioner submits that the line of authorities promulgated by this Court and cited hereinabove is specifically designed to embrace exactly situations such as developed at the trial below.

Had an opportunity to fully argue the response to be made or action to be taken, if any, been accorded counsel before a response to the jury's query was made, then such concerns or considerations as suggested above can have been explored or duly developed. The failure to do so resulted in the trial court emphasizing only a part of its original instructions which were not necessarily the "law" as to which the jury sought clarification or re-instruction. That unilateral action by the court effectively precluded a record being made, and the defense (as well as the prosecution) participating therein.

Petitioner further submits that the unilateral action condoned by the district court of the trial court in this cause touches upon another sensitive facet of due process of law.

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. [Citation omitted]. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or law. [Citation omitted]. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," [citation omitted] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. * * * We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. [Footnote omitted]. Indeed, "justice must satisfy the appearance of justice," [citation omitted] and this "stringent

> rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," [citations omitted].

MARSHALL v JERRICO, INC., 446 US 238, 243-44, 64 L Ed 2d 182, 188-89 (1980). It cannot be seriously contended that "participation and dialogue" by Petitioner was promoted with the trial court's rejection and preclusion of his counsel's assistance in framing a proper response to the jury in a critical regard, to wit: The "law" of the case. Avoiding the clear mandate of Rule 3.410 casts a shadow on the administration of justice and the integrity of the judiciary, and foments in (criminal) litigants a perception of bias against them emanating from the court.

In any event, the district court erred taking the position that this Court has abondoned the per se reversible error rule when a violation of the express notice requirements of Rule 3.410 is committed by a trial judge. The opinions of this Court mandate that the violation of the Rule below required reversal of the convictions which resulted based thereon. Accordingly, the decision of the district court needs be quashed, an order reversing the trial court's judgement and sentence entered, and the cause remanded for a new trial.

POINT TWO AND ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED FINDING THAT THE TRIAL COURT'S RE-INSTRUCTION WAS A CORRECT RESPONSE TO THE JURY'S QUESTION

Petitioner argued this issue also at the Point One on Appeal in his initial brief. [Appx 'A', p 19-22].

The district court in its decision perceives that "[t]he trial judge * * * correctly re-instructed the jury", 596 So2d at 1150, when it repeated the original charge respecting the "elements" of armed trafficking in cocaine, the definition of "delivery", and the respective quantity levels of cocaine (R. 384-386, 408-409). This re-instruction was given pursuant to the jury's request that the court "clarify or provide a copy of the law on armed trafficking" (R. 407)(emphasis supplied). To reach this perspective, the district court distinquished such cases as HEDGES v STATE, 172 So2d 824 (Fla. 1965) (requiring excusable and justifiable homicide instructions be given) upon the premise that "the standard jury instruction for the defense of entrapment * * * does not define any crime". 596 So2d at 1150. For support of that distinction the district court cites to GITMAN v STATE, 482 So2d 367 (4DCA 1985).

Petitioner submits the district court's rationale is erroneous and defiant of the facts in the case sub judice, and its authority inapposite for the construction it seeks of the jury's request to the trial court.

First, the jury did not ask for the definition of any crime. It simply asked for clarification or a copy of "the law".

Indeed, the trial court itself had originally instructed the jury that the "law with regard to entrapment * * * was being leveled at * * * not only the trafficking [count], but also the conspiracy to traffic[k count]" (R. 403-404). See: STATE v WELLER, 590 So2d 923 (Fla. 1992). Thus, armed trafficking was the essential basis of both counts being tried, and the jury sought clarification of "the law" with respect thereto. By limiting reinstruction as it did the trial court unduly emphasized the predicate crime charged, without restating "the law" applicable thereto including the primary defense posed.

Second, GITMAN supports Petitioner's argument that the trial judge's response was error, not the district court's position that it "correctly re-instructed the jury", at p 1150. In GITMAN the following occurred:

> After the jury had retired to consider their verdict, they returned with a request that they be given a copy of the jury instructions or that the court "read the specific laws to verify the collective recollection of the jury." The court engaged in a colloquy with the jury foreman to clarify the request. The court asked what portion of the laws the jury was referring to. The foreman answered, "The specific statutes that were included in the instructions and the wording of the statutes." To which the judge said, "You mean the laws giving * * * alleged crimes?" and the foreman answered yes. After a discussion with counsel, during which appellants requested the court to give the definition of specific intent again as well as the statutory elements of the offenses, the court reinstructed the jury on the statutory elements only.

482 So2d at 370. The appellate court on that scenario concluded that because the jury clearly sought only the definition of the offense involved and the trial court's re-instruction tracked the

elements of the applicable statute including the necessary intent, the definition of 'specific intent' being not such an element, therefore the re-instruction "answered the jury's request", at p 371, and no error was committed. But the GITMAN circumstances are entirely unlike the situation sub judice. There was no colloquy with the jury "to clarify the request"; and there was no discussion with counsel after which "the court reinstructed the jury on the statutory elements only". 482 So2d at 370. Thus there is no reason to digress to an analysis of HEDGES regarding definitions of crimes, as in GITMAN. There is no way upon the record below to deduce what the jury below sought when it wanted re-instruction on "the law of armed trafficking", other than all of "the law" as theretofore instructed it by the court including entrapment. [It is noteable that the trial court told the jury it could not answer its question, but then commenced to recharge the jury on a part of "the law" originally charged, advising the jury that that is what it "can do" (R. 407-408). In doing so, however, the trial court conveyed the impression to the jury that the limited re-instruction given was the most important portion of the applicable law when it said, "what I can do is to reread you the law that I read you a few moments ago" , id. Obviously what the court reread was not 'all' the law it had read to the jury before the request for clarification or a copy was made.]

In Petitioner's case entrapment was a part of the law applicable to trafficking in cocaine and it was supported in fact. Failure to give an instruction on that aspect of the law

is fundamental error. See: HOWARD v STATE, 561 So2d 1362 (3DCA 1990); GILBREATH v STATE, 563 So2d 1120 (4DCA 1990); and THOMAS v STATE, 547 So2d 989 (1DCA 1989). When the trial court limited re-instruction on the "the law" respecting the cocaine trafficking allegations to a definition of a substantive charged crime an undue emphasis was effected and an unfair de-emphasis of Petitioner's sole defense resulted. Petitioner duly objected to the misleading and incomplete nature of the trial judge's sua sponte re-instruction to the jury. The district court erred characterizing that re-instruction as correct.

The district court's opinion ought be quashed, and the cause ordered remanded for retrial.

POINT THREE AND ARGUMENT

THE DISTRICT COURT ERRED AFFIRMING WITHOUT DISCUSSION PETITIONER'S POINT THREE ON APPEAL RESPECTING THAT THE TRIAL COURT ERRED DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL BASED ON ENTRAPMENT AS A MATTER OF LAW UPON THE RECORD FACTS

Petitioner preserved this issue in the trial court and argued same in his point three on appeal (Appx. 'A', p 27-29); but the district court affirmed the adverse ruling without discussion. 596 So2d at 1149. This Court having accepted jurisdiction may consider all issues of record warranting relief regardless of the disposition as to the issue upon which acceptance of jurisdiction initially depended. See, DOCTOR v STATE, 596 So2d 442 (Fla. 1992).

This Court has, Petitioner submits, clearly articulated its position that objective entrapment exists as a defense in Florida.

> In Cruz[v State, 465 So2d 516 (Fla. 1985),] we stated that the state must "establish initially whether 'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'" [Citations omitted]. To guide trial courts we set out a threshold test for establishing entrapment: "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." [Cite omitted]. By focusing on police conduct, this objective standard includes due process considerations.

STATE v HUNTER and CONKLIN, 586 So2d 319, 321-22 (Fla. 1991) (emphasis supplied). Justice Kogan concurring recognized that

"the majority opinion [in HUNTER] clearly is premised entirely on the due process clause of the Florida Constitution. Art. I sec. 9, Fla. Const.". At 325. The district courts are split whether or not 'objective entrapment' has been abrogated by the 'subjective entrapment' statute, F.S. 777.201. That it has not, see: LEWIS v STATE, 597 So2d 842 (3DCA 1992) 17 FLW D793; FUTCH v STATE, 596 So2d 1150 (4DCA 1992) 17 FLW D802; KRAJEWSKI v STATE, 597 So2d 814 (4DCA 1992) 17 FLW D900 (review granted, 30 Sept 1992, case # 80,087); RICARDO v STATE, 591 So2d 1002 (4DCA 1991) 17 FLW D1; STATE v RAMOS, 17 FLW D1895 (3DCA 1992); BOWSER v STATE, 555 So2d 879 (2DCA 1989); SMITH v STATE, 575 So2d 776 (5DCA 1991). Contra: SIMMONS v STATE, 590 So2d 442 (1DCA 1991). Petitioner submits that objective entrapment vel non remains a viable defense separate and apart from the subjective entrapment statute [HERRERA v STATE, 17 FLW S84 (Fla. 1992)].

In Petitioner's case the state did not meet either prong of the Cruz test, and the undisputed facts establish objective entrapment as a matter of law. When Tom, the agent for officer Losey, met Petitioner there was no ongoing criminal activity, and no indication even that Petitioner had a history with drugs. Likewise when that agent injected 'drug talk' into his conversations with Petitioner. Tom, the police agent, persistently prevailed upon Petitioner to become involved in the drug trade for 'easy money', i.e. he only needed to 'find someone' who had drugs. There is no indication that Petitioner had ready access to drugs, and it took over three months before he happened to converse with Rouse about getting drugs, it being

Rouse (not Petitioner) who thereafter found a source. And it is noteable that that conversation between Petitioner and Rouse involved drugs only because Tom had created that topic for Petitioner as an avenue to consider for 'easy money'. Petitioner's involvement in the drug trade occurred solely as a result of the police agent's actions. Tom's baiting of Petitioner did not have "as its end the interruption of specific ongoing criminal activity". Moreover, it does not appear in fact that the police "utilize[d] means reasonably tailored to apprehend those involved in the ongoing criminal activity". Losey certainly did not keep any kind of close monitoring of his 'agent' Tom while Tom went out among the citizenry to ferret out drug offenses (R. 88), and Losey in any event professed to not care about what that police agent did in that respect so far as Petitioner's case or implicating Petitioner was concerned (R. 90-94, 99-100, 106-107, 117-118, 120-121, 124-125, 129-130, 132, 159-160). Such blind reliance on a paid informant, without any monitoring thereof, is fraught with focusing on persons not involved "in the ongoing criminal activity" but for insidious inveiglements of 'police agents' with ulterior motives. In any event, no such ongoing criminal activity existed at all with respect to Petitioner until Tom, for Losey, created it with persistent urging and promises of easy money.

In the undisputed facts of Petitioner's case the controlling case law mandated reversal of the conviction and that Petitioner be discharged. For example, this Court in HUNTER and CONKLIN, supra, said:

> Diamond had become the state's agent, and his acts must be construed as "police activity". His activities, however, meet neither part of the Cruz test, let alone both, because there was no "specific ongoing criminal activity" until Diamond created such activity in order to meet his quota. Therefore, as in Cruz, Conklin established entrapment as a matter of law, and the trial court erred in denying his motion for judgment of acquittal based on entrapment.

586 So2d at 322. The Third District Court of Appeal in LEWIS v STATE, supra, said:

> "The first prong of the Cruz test was not met because [defendant] was not involved in a specific ongoing criminal activity. In fact, there was no crime until [the police informant] created it. It was [that informant] who flashed money, and persistently pursued [defendant], attempting to bring him into the drug trade. Also, the second prong of the Cruz test was not met because the police activity was not reasonably tailored to apprehend those involved in ongoing crime. Accordingly, we reverse and remand with instructions that [defendant] be discharged."

597 So2d at 844. The Fourth District Court of Appeal in FUTCH v STATE, supra, concluding:

> "Thus, the state did not establish the first prong of the Cruz test. To the contrary, the evidence establish that at the time [the police agent] interjected 'drug talk' into the conversation with [defendant] he was not engaged in any specific ongoing criminal activity. * * * Any conversation that [defendant] had about drugs only occurred after [the police agent] cast her 'fishing expedition' to bait, hook, net, and land him for the purchase of illegal drugs. As this court stated in Lusby v state, 507 so2d 611, 612-13 (Fla. 4th DCA), review denied, 518 So2d 1276 (Fla. 1976): 'We do not condone general forays into the population at large by government agents to question at random the citizenry of this country to test their law abiding nature, i.e., virtue testing.'"

596 So2d at 1152. And again in STATE v HERNANDEZ, 587 So2d 1171 (4DCA 1991) 16 FLW D2627: "[P]olice activity conducted by the

confidential informant did not have as its end the interruption of a specific ongoing criminal activity [and] Appellant's past criminal activity had ceased by the time the confidential informant first made contact with him." At 1171. Likewise the Second District Court of Appeal in STATE v EVANS, 597 So2d 813 (2DCA 1992) 17 FLW D431: "Because the appellees were not targeted suspects in a specific ongoing criminal prosecution [or investigation], the first part of the Cruz test for entrapment is satisfied [wherefore] the defense of entrapment has been established as a matter of law." At 814.

Petitioner specifically argued the foregoing defense to the trial court (R. 218-224, 316-320) and to the district court on appeal (Appx. 'A', p 19-22). The district court merely affirmed the trial court's denial of Petitioner's motions for judgment of acquittal based thereon, without discussion. 596 So2d at 1149. Petitioner, however, ought have been granted the same relief as the defendants in the foregoing authorities and in LONDONO v STATE, 565 So2d 1365 (4DCA 1990). No material distinction of fact is apparent of record. Petitioner submits this Court ought review this issue and now grant appropriate relief to Petitioner, to wit: reverse the judgements and sentence and enter an order discharging him.

POINT FOUR AND ARGUMENTS

THE DISTRICT COURT ERRED AFFIRMING THE TRIAL COURT'S RULINGS UPON THE ISSUES PRESERVED IN THE TRIAL COURT AND ARGUED ON APPEAL AT POINTS TWO, FOUR, FIVE, SIX, SEVEN, AND EIGHT IN PETITIONER'S INITIAL BRIEF ON APPEAL, AND THIS COURT ITSELF OUGHT EXAMINE THESE ISSUES AND ORDER APPROPRIATE RELIEF BE GRANTED PETITIONER

Petitioner in his initial brief argued certain additional points on appeal preserved at trial. The district court simply affirmed the trial court's adverse rulings as to these issues without discussion in its opinion. 596 So2d at 1149. Rather than extensively reargue each of these issues to this Court Petitioner will at this point summarize same and request this Court refer essentially to the corresponding point in the initial appellate brief (Appx. 'A'). See: DOCTOR v STATE, supra.

Sub-Issue One
Erroneous Giving and Omitting of Standard Jury Instructions

At point two on appeal (Appx. 'A', p 23-26) Petitioner sought reversal for the trial court giving over objection the standard instruction '2.04(c) DEFENDANT TESTIFYING', and refusing to give standard instruction '2.04(e) DEFENDANT'S STATEMENTS' as requested. This Court restricts giving '2.04(c)' unless requested by the defendant; and Petitioner did not request it but refused it. As to '2.04(e)', the jury was not charged to carefully consider the many statements attributed to Petitioner by Losey to have been made out of court, although this Court

requires such instruction and Petitioner specifically requested it. Where the sole defense is entrapment, as it was for Petitioner, such careful consideration by the jury of 'statements' being attributed to the entrapped defendant is especially imperative.

Sub-Issue Two
Failure to Conduct Richardson Hearings for Discovery Violations

At point four on appeal (Appx. 'A', p 30-38) Petitioner argued multiple instances of the wholesale failure of the trial court to recognize and inquire into discovery violations noticed throughout the trial. It is too obvious to cavil that the trial judge totally ignored Petitioner's repeated objections to the multiple instances of discovery violations by the state. The trial court, and the district court by its silence, directly controvened this Court's mandates in RICHARDSON v STATE, 246 So2d 771 (Fla. 1971); CUMBIE v STATE, 345 So2d 1061 (Fla. 1977); SMITH v STATE, 500 So2d 125 (Fla. 1986); BROWN v STATE, 515 So2d 211 (Fla. 1987); and the many cases following these authorities to date. Cf W.D. v STATE, 17 FLW D1901 (3DCA 1992); RAINEY v STATE, 596 So2d 1295 (2DCA 1992); WHITE v STATE, 585 So2d 1050 (4DCA 1991).

Sub-Issue Three
Prosecution Witness Comment on Invocation of Right to Silence

At point five on appeal (Appx. 'A', p 39-40) Petitioner argued reversible error was committed by the trial court allowing over objection a state witness to testify that Petitioner invoked

his right to silence incident to arrest. This testimony was non-responsive to a specific question posed on cross-examination and Petitioner immediately objected thereto and moved for mistrial. The authorities cited in the initial appellate brief forbid such a comment or presentation to the jury by the state or its witnesses. See also: SMITH v STATE, 492 So2d 1063 (Fla. 1986).

Sub-Issue Four
Admission of Tapes of Illegally Intercepted Commnications

Tape recordings of alleged conversaitons between Losey and Petitioner (some unintelligible) were admitted into evidence without being played to the jury during the trial (rather only in deliberations) but were extensively testified to by Losey, over defense objections. Petitioner argued the illegality of the acquisition and the procedure for their admission in evidence at trial, and presented these issues in the district court on appeal at point six (Appx. 'A', p 41-44). [The point was also argued on appeal in another context at point eight in the initial brief, appx. 'A' p 46-49]. Petitioner submits that these tapes were not acquired by Losey consistent with F.S. 934, and ought not have been admitted in evidence nor testified to by Losey.

Sub-Issue Five
Lack of Evidence to Support Denial of JOA on Conspiracy Count

Petitioner at his point seven on appeal (Appx. 'A', p 45) argued error in the trial court's denial of motions for judgment of acquittal as to the conspiracy to traffick count. The record is devoid of evidence of any agreement by Petitioner with a non-

police officer to commit any such offense. Even the trial judge excluded tendered co-conspirator statements for the lack of such predicate; however, when Petitioner's counsel urged the court to rule as to the motion for directed verdict at close of the state's case on that count prior to Defendant testifying, the trial judge (ostensibly to punish counsel for such insistance) then merely denied the motion. Petitioner submits this Court ought reexamine the record and confirm the absence of evidence to support a prima facie case of 'conspiracy', let alone to support a reasonable jury concluding beyond a reasonable doubt guilt therefor.

Sub-Issue Six
Trial Judge's Persistent Rebuke and Demeanment of Petitioner's Trial Counsel and Interference with Cross-examination

Petitioner argued these issues at his point eight on appeal in the district court (Appx. 'A', 46-49). Counsel undersigned was also trial counsel. What occurred below was a fair trial only in the sense that it was 'two against two' - Petitioner and his counsel against the prosecution and the trial judge. The result of such an alignment is only too predictable, and the result is that appealed sub judice - Petitioner convicted on both counts as charged. The trial judge manifested his hostility to defense counsel throughout the trial, continually making 'comments' on the evidence, telling the witness how to answer, and reprimanding the lawyer always in the jury's presence. FENELON v STATE, 594 So2d 292 (Fla. 1992). And the trial judge's rulings were contrary to law, for example respecting the cavalier

admission into evidence of unplayed tapes and sans any opportunity for Petitioner's counsel to cross-examine the state's witness thereon. The trial judge well protected and elevated the state's key witness (Losey) before the jury, while ever demeaning and lowering the esteem of defense counsel in the process. Such ought not have been condoned by the district court sub judice.

For these further reasons therefore, and either of them, the decision of the district court of appeal ought be quashed, and the cause remanded for appropriate disposition.

CONCLUSION

WHEREFORE, Petitioner submits this Court ought quash the opinion below and order the discharge of Petitioner as to both counts, or either of them, or additionally or in the alternative that a new trial be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy hereof has been mailed to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL,, 33401, this 23 day of October, 1992.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

APPEAL NO. 91-905
L.T. NO. 88-15979CF-10A

CHARLES MILLS,

Appellant,

vs

STATE OF FLORIDA,

Appellee.

****

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Seventeenth Judicial Circuit In and For Broward County, Florida
Judge Thomas Coker presiding

****

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PRELIMINARY STATEMENT

Appellant is defendant below, and is referred to as Appellant herein.

Appellee is the state below, and is referred to herein as the state.

Exhibits are attached to the brief and referred to as (Exhibit 'A').

References to the record are as (R. 1).

STATEMENT OF THE CASE

An information dated 8 September 1988 was filed against Appellant alleging trafficking and conspiracy to traffick in cocaine, counts I and II (R. 419-421). Appellant plead not guilty 14 September 1988.

Trial commenced 4 March 1991 (R. 4).

The jury returned verdicts of guilty 6 March 1991 (R. 410-411, 423-424).

Appellant orally moved for a new trial (R. 414-417), which the court denied (R. 416-417).

Notice of Appeal was filed 18 March 1991 (R. 425).

Appellant was sentenced 18 April 1991, 15 years mandatory minimum and a $250,000.00 fine (R. 428-435).

FACTS

DANIEL LOSEY, undercover police narcotics detective (R. 21), testified for the state. On direct examination LOSEY says he was "introduced to [Appellant] through a confidential informant" in early May 1988 (R. 22). He testified he "negotiated" with Appellant to "purchase [] up to []12 kilos of cocaine" (id). According to LOSEY, Appellant told him he could deliver "large amounts of cocaine, but at that time, the deal never went through [and w]e didn't do a deal in May or any time at that point" (R. 23). This initial encounter occurred in Ft. Lauderdale at a Burger King restaurant (id). LOSEY posed as a "buyer for multiple kilos of cocaine * * * from up north" (id).

LOSEY's next contact with Appellant was August 15, 1988, when LOSEY was at his desk and saw a 'file' sitting there, and "said well, I will give him a call and go for a smaller amount this time" (id).

> So I called [Appellant on the phone] and I basically said that I was down here again and that my regular supplier['s] price was too expensive or he couldn't come through or whatever and I wanted to know if he could get me just one kilo and he said he would check and would get back with me.

(R. 24). LOSEY says this conversation was tape recorded (id), and was the only conversation with Appellant that date (R. 25).

The next day, 16 August, at about 2:40 p.m., Appellant allegedly 'beeped' LOSEY "and at that time [Appellant] basically [said] that he could get the * * * kilo of cocaine and that the price would be $22,000 for the kilo" (R. 25). LOSEY says this call too was recorded (R. 26). At about 5:20 p.m. that date LOSEY alleges he "received another page on [his] beeper" from Appellant

(R. 26), Appellant saying in the ensuing phone conversation "that he could get the kilo [and i]t should be there in about ten minutes" (R. 29). Another alleged call was made to Appellant by LOSEY at 5:40 (R. 30), and at about 5:50 p.m. Appellant assertedly called LOSEY "and said to come over, because his supplier had just arrived at the shop" (R. 31). LOSEY alleges these calls too were tape recorded (id).

State's exhibit 'A' was admitted in evidence as the tape recording of a conversation 15 August 1988 between LOSEY and Appellant (R. 32). LOSEY swears this tape is of "the first phone call that [LOSEY] made to initiate this case" (R. 33). LOSEY in fact seemed to remember that he negotiated "for several days, maybe several weeks" after meeting Appellant in May (R. 33-34). LOSEY sought neither consent nor warrant to record the conversations (R. 34-35).

State's exhibit 'B' was admitted in evidence as the tape of an alleged conversation on 16 August 1988 (R. 35-36). [LOSEY maintained on voir dire that "[e]very time I talked to [Appellant] on this case is on tape" (R. 37)]. LOSEY alleges of an 8:00 p.m. conversation that date that

> [Appellant] apologized to me because I had come to his shop, supposedly, to do the cocaine deal and the source had left and we didn't do the cocaine deal. So he assured me he would--he apologized. He said he would get it in his hands when he talked to me next time.

(R. 38).

State's exhibit 'C' was admitted in evidence as a tape recording of a phone conversation between LOSEY and Appellant on 17 August at about 9:00 a.m. (R. 38-39). LOSEY allegedly called

Appellant in response to a 'beep' on his pager (R. 39). This was the only conversation had that date (R. 41).

State's exhibit 'D' was admitted in evidence as a tape recording of four distinct conversations between LOSEY and Appellant on 18 August 1988 (R. 42-44). LOSEY testified of the earliest call that date (again per LOSEY receiving a 'beep') that Appellant "said he had talked to his source and that he would be able to get the kilo, if I wanted, and I said I did." (R. 42). LOSEY again called Appellant at about 2:35 p.m. to announce "ready to buy the cocaine when he was ready" (R. 42); Appellant allegedly 'beeping' back at 3:00 p.m. to say "he should have the kilo in about 30 minutes" (R. 43). LOSEY then testified to a conversation had at 4:45 p.m. (R. 43).

State's exhibit 'E' was admitted in evidence as a tape recording of a conversation had between LOSEY and Appellant at 4:55 p.m. on 18 August 1988, wherein Appellant allegedly said to LOSEY "I have got it in my hands" (R. 45-46).

State's exhibit 'N' was admitted in evidence as a tape recording of an alleged 'meeting' LOSEY had at Appellant shop on 16 August 1988 at 6:25 p.m. (R. 47, 49-50). A person named 'CARL ROUSE' was assertedly there (R. 47-48), this 'meeting' being allegedly recorded by a unitel device (R. 48-49).

State's exhibit 'F' was admitted in evidence as a tape recording of events and conversations occurring at Appellant's shop commencing about 5:50 p.m. on 18 August 1988 (R. 50-51, 64-65). LOSEY was permitted to testify that he arrived at the shop then "to complete the cocaine transaction" (R. 50-51) and that

as he arrived there he saw Appellant "in the bay area and * * * a person there later identified [] as Sterlin Perkins" (R. 51). PERKINS and LOSEY went into a small office (R. 52-53); PERKINS told Appellant to get a bag out of a car (R. 57); and a "[s]hort time after we got in there [Appellant] then entered the office carrying a bag" (R. 53, 60). Appellant "put the bag on the desk and then Mr. Perkins opened the bag and took out a package" (R. 53). LOSEY opened the "fiberglass wrapped package", took out some of the substance and tested it by rubbing it into his hand, commenting "this is good cocaine" (R. 54). He then called backup and the arrest went down (R. 54-55).

PERKINS carried with himself at all times a brown men's purse (R. 56, 61-62).

The court precluded the state eliciting co-conspirator statements per ROUSE and PERKINS (R. 53, 56-59).

The state, after introducing sundry other items in evidence, tendered the witness LOSEY for cross-examination (R. 63-71). The tape recordings aforesaid, identified and admitted upon LOSEY's testimony, were not published to the jury during the direct examination of LOSEY (R. 71, 73-75, 176-198). [Note that tapes 'N' and 'F' were never published to the jury in Appellant's presence].

On cross-examination, LOSEY testified he first met Appellant at the Burger King in May 1988, as introduced by the police agent/informant, TOM (R. 80-82, 96). No illegal act by Appellant was known to LOSEY (R. 101, 129), and LOSEY relied upon TOM's representations for an impression about Appellant (R. 93).

This 'introduction' was arranged by TOM merely "[a]n hour or two maybe at the most" before it occurred (R. 89). TOM then told LOSEY that Appellant could get cocaine (R. 93). At the Burger King, TOM presented Appellant to LOSEY as "the one that says he can get something" (R. 95). According to LOSEY, Appellant then also said he could get cocaine and that "he had people established already that could deal drugs" (R. 93, 95). According also to LOSEY, TOM was present when Appellant ever said these things (R. 109, 115), even participating in the conversation (R. 93-94) although LOSEY cannot recall the full extent of TOM's participation (R. 95). LOSEY further recalls Appellant alluding to 'a lot of cocaine'; Appellant however sometime (maybe shortly after the Burger King encounter) communicating to LOSEY that his people would not sell that much to a white person (R. 102-103). This latter alleged conversation is not recorded in any police report or otherwise, LOSEY rather 'remembering' the "gist" of what was said (R. 102-103, 110-111). LOSEY is adamant, however, that TOM was there when such was said (R. 115); LOSEY in fact testifying that it was "Tom told me his people wouldn't sell twelve [kilos]" (R. 115). In any event, "at that time the deal was never finalized" (R. 110) and LOSEY "let the case die for a few months until I picked up the phone in August" (R. 102, 105).

According to LOSEY, the informant TOM came to him about a year before per a federal agent who introduced TOM as having "information about some drug dealings" (R. 83-85). The agent allegedly told LOSEY this informant was not working off any charges (R. 85). In the course of that year TOM gave LOSEY "information

a fact he met him.

[APPELLANT]: Between the Burger King encounter early May and the conversation of August 15th, that's the period of time I am talking about. How many times did your informant have face to face encounters with [Appellant]?

[LOSEY]: Few times. * * *

[APPELLANT]: Now, these tapes that you are talking about, there is nothing in those tapes that is said by [Appellant] as to him having been at his shop face to face three times, or is there?

[LOSEY]: Certainly on the tape he says he talked to Tom. I don't know it that was face to face or over the phone. I don't know.

[APPELLANT]: Now, did you inquire of your informant, and you were interested in [Appellant's] or your informant's knowledge about [Appellant's] doings after May '88 at the Burger King, weren't you?

[LOSEY]: Not particularly, no.

(R. 96-99).

LOSEY, in Appellant's case, remained uninterested in TOM's relationship with Appellant or in whether Appellant was enlisted by TOM to do things for TOM for LOSEY (R. 94, 99-100, 120-121, 132). LOSEY assumed TOM had no role in the case and that Appellant was not working for TOM (R. 121-122, 132-133), he though had no personal knowledge thereof (R. 94, 97, 132). But LOSEY remained aware that TOM continually interacted with Appellant in the case (R. 97, 99), including at the time the 'tapings' commenced on 15 August 1988 and thereafter until arrest (R. 117, 120, 124, 132, 136-137). In fact, LOSEY even 'lied' to Appellant in the course of their alleged conversations 15 August and after that he, LOSEY, was also in touch and having communications with TOM (R. 124).

[on] about [three] drug cases" (R. 83). TOM was paid a "reward" for his services as informant, the amount of which was determined by others than LOSEY (R. 135). TOM depended on that LOSEY "said good things about his assistance" to those who determined the amount of 'reward' (R. 86). At least in Appellant's case, TOM "wasn't paid until after [it] was concluded" (R. 133).

During the year before Appellant's introduction by TOM, LOSEY had TOM report to him "on a regular basis as to what he did and such as that" (R. 88). LOSEY even recorded some conversations TOM had with other 'suspect' persons (R. 86-87). Not so in Appellant's case (R. 90-93, 99-100, 106-107, 117-118, 120-121, 124-125, 129-130, 132, 159-160).

LOSEY maintained at trial that the last time he recalled speaking to TOM was in early MAY 1988 (R. 107); that is, about the time TOM introduced Appellant to LOSEY at the Burger King. When LOSEY was prompted to call Appellant on 15 August 1988 (R. 101), he could not recall having then communicated with TOM (R. 106-107, 117-118, 120); nor on the 16th (R. 121); and indeed does not think he spoke with TOM in the month of August but cannot recall in fact (R. 124-125, 131). LOSEY, however, swears he "knew that all along" TOM was communicating with Appellant (R. 120). LOSEY also testified as follows:

> [APPELLANT]: And then * * * after that early May '88 meeting, you sta[t]ed [] you had some various other conversations with [Appellant]?
>
> [LOSEY]: I said I wasn't sure, but I think I probably did. I am not sure.
>
> * * *
>
> [APPELLANT]: All right. Of course, all those were recorded, too, weren't they?

[LOSEY]: No.

[APPELLANT]: Then after you left [the Burger King], if you didn't record your conversation, you knew that your paid informant Tom was continuing to call [Appellant]?

[LOSEY]: Absolutely not. Tom would meet [Appellant] at the body shop.

[APPELLANT]: So then [it is] your understanding that your paid informant never called [Appellant] on the phone?

[LOSEY]: I have no knowledge of my informant calling [Appellant].

[APPELLANT]: Well, did you direct your informant not to?

[LOSEY]: No. The point of the informant was to converse with the potential drug dealers, which is exactly what happened.

[APPELLANT]: So you told Tom, keep on [Appellant]?

[LOSEY]: No. Your question was; do I know for a fact that he never, my informant, never called [Appellant]. I said that I don't know that. I have no knowledge that he called him. I know that they met and talked in person. The informant is supposed to talk with the person and relay to me what they said.

[APPELLANT]: Wait a minute. Just a second. You know they met [] in person, therefore, you, Tom and [Appellant] had face to face meetings after the Burger King encounter, right?

[LOSEY]: I didn't say that.

[APPELLANT]: But you said you don't know if he ever called on the phone, but you know that he met him face to face?

[LOSEY]: Oh, yeah. Even [Appellant] says that on his tape, the tape that's in evidence on this case, sure. * * * What I said was that I wasn't present with the informant all the time. So I don't know if he called him or not. I don't. I have no knowledge that he called him, but to fit in you argument I wasn't with the informant 24 hours a day. Maybe he did call him. I certainly don't have any knowledge that he called him. I know for

a fact he met him.

[APPELLANT]: Between the Burger King encounter early May and the conversation of August 15th, that's the period of time I am talking about. How many times did your informant have face to face encounters with [Appellant]?

[LOSEY]: Few times. * * *

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LOSEY admits that his direct testimony did not quote the conversations allegedly depicted on the tape recordings he identified of 15-18 August, his testimony being rather "the gist of the tape[s]" (R. 117, 128). For instance, Appellant never used the words 'source' or 'supplier', these being LOSEY's characterizations (R. 104, 108-109, 122). Appellant did say one occasion that he is "in touch with the boy" (R. 122) without further specification of reference. LOSEY recalls "probably" having other unrecorded conversations with Appellant between May and August (R. 96-97) but that the "[f]irst time [he] talked to [Appellant] in months was August 15th of 1988" (R. 105) following TOM's May-introduction. LOSEY also testified that "[e]very time [he] talked to [Appellant] on this case is on tape" (R. 37).

Appellant on 16 August introduced one ROUSE to LOSEY, but Appellant's specific role was not apparent beyond that (R. 140). Respecting the 'tape' of that encounter LOSEY admits the recording is obscured by static but maintains he knows "who said what" and that "the great majority of the conversation is betwen [LOSEY and Appellant, and o]ccasionally, Rouse will interject things [with a]lot of them confirming what [Appellant] says" (R. 141).

At the 18 August encounter PERKINS is there and tells Appellant to "go get that thing out of the car" (R. 154). Appellant comes back in few seconds with a yellow bag (R. 154), the contents of which cannot be seen (R. 156-157). PERKINS removed a package from within the bag (id). LOSEY does not know whether ROUSE was then involved with PERKINS (R. 160). During this scenario the telephone rang in Appellant's office, Appellant answering it; LOSEY

does not know who it was (R. 158). After LOSEY checked the contents in the package within the bag, same remained on the desk near to PERKINS while LOSEY summoned back-ups for the arrest (R. 165).

The state's next witness, MARY FERGUSON, (R. 167), a forensic chemist (R. 168), testified she tested the aforesaid contents and determined therein "the presence of cocaine" (R. 173), and a weight of 995.4 grams (R. 174).

Over defense objection, the state was permitted to publish the 'tape recorded' conversations alleged by LOSEY and attributed to Appellant identified aforesaid (R. 176-198), to wit: The tape identified as exhibit 'A' (#1) consisting of a 15 August call (R. 176-178); the tape identified as exhibit 'B' (#2) consisting of calls on 16 August at 2:40 p.m. (R. 179-180), at 5:20 p.m. (R. 181-183), at 5:40 p.m. (R. 184-187), at 5:50 p.m. (R. 187-188), and at 8:00 p.m. (R. 188-189); the tape identified as exhibit 'C' (#3) consisting of a call at 9:10 a.m. on 17 August (R. 190-191); a tape identified as exhibit 'D' (#4) consisting of calls on 18 August at 12:10 p.m. (R. 192-194), at 2:35 p.m. (R. 194-195), at 3:00 p.m. (R. 195-196), and at 4:45 p.m. (R. 196); and a tape identified as exhibit 'E' (#5) consisting of a call at 4:55 p.m. on 18 August (R. 197-198).

The state's final witness was deputy MARK WICHNER (R. 200, 203) who physically arrested Appellant on 18 August 1988 (R. 205).

The state rested (R. 209).

Appellant moved for judgments of acquittal (R. 209-225), which the court denied (R. 224).

After an opening statement (R. 226-236), Appellant was called to testify on his own behalf (R. 236).

Appellant ran a mechanic shop (R. 237). In the latter part of April or early May of 1988 Appellant was contacted by an old acquaintance named 'TOM' (LOSEY's 'confidential informant') (R. 238). This first 'reunion' consisted of talk "like old friends and stuff" without allusion to drugs (R. 239). However, the "next day or two" TOM approached Appellant and "asked [him] how was [he] feeling about making some money", Appellant asking what kind of money and TOM replying with 'easy money' (id). Appellant's reaction was "I [] dont' know about that" (id).

> [APPELLANT]: He told me, he said I have got a friend coming from up New York. He said he got a lot of money to buy a lot of cocaine. He said all we have to do is find him somebody with the cocaine. You don't have to be involved. Find somebody with the cocaine. That's all he wants you to do. He said he'll pay you some good money. After of that, he didn't say how much. He said he would pay us good money, me and you, if we can do that. * * * I told him I don't know about that. I had to let him know. I had to think about that. * * * Went on about a week like that. He would call me mostly everyday wanting to know what I was going to do. Then one day he called me, asked me, say well, [LOSEY's] in town. He said I want to take you to meet. I said I can't go right now because I am very busy. So next day he called. I told him the same thing. Took him about a week and some days before I told him I will go meet [LOSEY].

(R. 239-240). About a $1\frac{1}{2}$ weeks after TOM's initial 'reunion' with Appellant aforesaid (R. 237-238), Appellant agreed with TOM to go meet TOM's alleged 'friend' (i.e. LOSEY), TOM driving Appellant to the Burger King therefor:

> [APPELLANT]: We pulled up there. He said let me see his, Losey's, car. And he said yeah, there comes [LOSEY] coming outside now. So [LOSEY] come out to [TOM's] Bronco and got in it and in the back

> seat. Then Tom introduced me to him and one another to one another. Then we went -- Tom was saying well, this is the man got the money right here. He say he can buy all the cocaine we can get him, if we can get it. * * * I never said [anything about having access to 12 kilos of cocaine]. Danny asked, I can take as much as 12 kilos at one time. I said I don't know about that. I said [I] ain't in that business and I don't know nobody got that kind of stuff. [T]hen Tom said well, we have to look around and see. I said well, it will take some good looking for that. * * * That's what I said. I said well, I will look around and see, see what we could do.

(R. 241-242). Appellant denies he suggested to them that he had somebody specifically in mind that could accomodate TOM and LOSEY (R. 242). On the way back to Appellant's shop, TOM continued to assure "easy money" and that "All [Appellant] was supposed to do is find somebody with it and introduce them" (R. 243).

After that May-Burger King meeting, TOM and/or LOSEY called Appellant virtually everyday inquiring whether he had come up with anything, Appellant always replying 'not yet' (R. 243-244). In fact, Appellant never looked for anything (R. 244).

During the week preceding 15 August, LOSEY did not call; but TOM called "everyday" asking whether anything was found, Appellant still responding "No, not yet" (R. 245).

On about 12 August (Friday) a friend of Appellant's (ROUSE) in the course of talking with Appellant as usual mentioned his need to make more money than his pay-check (R. 245-246). Appellant testified:

> I said I know something if you want to do it. I says I have got a guy here from New York. They wants to get them up some cocaine, if you can get it, so they can buy it. You can make money. He said he pay you good. [CARL ROUSE] said I don't know. I will look around. He said I used to know some guys do that. I will check them out.

(R. 246). TOM called during the weekend thereafter, and Appellant told him about ROUSE thinking he knew "a guy got some" (R. 247). When Appellant spoke to LOSEY 15 August he told LOSEY that TOM was communicating with Appellant (R. 248). When Appellant informed LOSEY that he was in touch with someone he was referring to ROUSE; however, Appellant did not know what ROUSE was able in fact to do, he expected no compensation from ROUSE, and ROUSE did not share his 'plans' with Appellant (R. 249).

On 16 August Appellant introduced ROUSE to LOSEY, LOSEY then telling ROUSE about 'making easy money' (R. 250). At one point ROUSE made a phone call, Appellant having no knowledge as to whom he called or the number dialed (R. 251). Appellant was not involved in ROUSE's conversation with LOSEY (id), and neither did he have any conversation with ROUSE about the ROUSE-LOSEY deal (R. 253). Rather, Appellant at all times felt he was working for and on behalf of LOSEY and TOM as those assured his role would be aforesaid (R. 253-254).

On 18 August Appellant told LOSEY he had spoken to ROUSE, but had no knowledge who ROUSE was depending on or relating to (R. 254). Toward the end of that day ROUSE introduced one PERKINS to Appellant (R. 254-255), Appellant coincidentally already knowing PERKINS from an acquaintance in the past but not having knowledge that PERKINS dealt in drugs (R. 255-256). The first Appellant had heard of PERKINS' role was that day when ROUSE introduced them (R. 258). At this time PERKINS possessed two bags, the contents of which were not seen by Appellant, nor explained to Appellant, as neither were the contents from either bag removed in Appellant's

presence (R. 255). PERKINS put one of the bags in a car-trunk (R. 257), and they waited for LOSEY without discussing any contemplated transaction (R. 256-257). As stated, Appellant was not taking a posture of 'working' with PERKINS or ROUSE in the LOSEY matter (R. 257).

When LOSEY arrived Appellant introduced PERKINS as "the guy you have been looking for right here" and they introduced themselves to one another (R. 257-258). Appellant opened the car trunk when told to by PERKINS (R. 300-301), Appellant thereafter leaving PERKINS and LOSEY to themselves in the small office area (R. 258-259). Appellant could not see from his posture what those two did in the room (R. 259). At one point the phone rang and Appellant answered it; it was TOM (R. 259-260).

Appellant testified he is not and was not a dope dealer and had no idea who to contact for TOM and LOSEY when those propositioned him to act for them (R. 265). Appellant denies he ever said to LOSEY that Appellant's people would not deal with a white man (R. 248-249). Appellant also testified that the phrase 'I got it in my hand' was coined by LOSEY for Appellant to say if the object person had arrived on an occasion (R. 251-252). And, when Appellant called LOSEY to 'apologize' for the anticipated 'deal' not occurring on 16 August, same was done per TOM's request and insistance (R. 252).

The defense rested (R. 310). Appellant moved for judgments of acquittal (R. 311-320, 322), which were denied (R. 322-323). The charge conference was conducted (R. 323-332). Closing arguments made (R. 334-356, 356-372, 372-382). The court

instructed the jury (R. 382-404) and it retired to deliberate (R. 404). The jury ultimately returned a verdict of guilty as to both counts (R. 410-411).

Further record facts shall be set forth at the relevant arguments hereinafter.

SUMMARY OF ARGUMENTS

POINT I: The jury asked for re-instruction on the "law" and the trial court, without noticing or consulting Appellant thereon, purported to answer the question; but responded in a too limited and confusing manner, misleading the jury and without answering its question.

POINT II: The judge omitted a critical standard jury instruction after leading Appellant to understand it would be given; and charged a standard instruction without inquiring of Appellant if he was requesting it (as required).

POINT III: Entrapment as a matter of law appeared of record, there being no specific ongoing criminal action, contrary to due process of law. Likewise, the 'confidential' police informant instigated and created criminal conduct; and the record is devoid of evidence that Appellant had a pre-disposition to commit such offense and Appellant's actions were a result of and caused by the persuasions and insistence of that police informant.

POINT IV: Various discovery violations became apparent during trial, the court ignoring same and failing to conduct any inquiry thereon.

POINT V: The key police witness unresponsively testified that Appellant invoked his right to silence incident to arrest.

POINT VI: The key police witness testified to the contents of tape-recorded conversations he had with Appellant. That witness also identified the physical tapes of those conversations, which tapes were admitted into evidence and published to the jury/ That said recordings were produced without consent or other authorization

contrary to F.S. 934.

POINT VII: No evidence supports the conspiracy verdict and judgment. The trial court even precluded co-conspirator hearsay during trial precisely because no conspiracy was established prima facially. The court, however, denied motions for judgment of acquittal.

POINT VIII: The trial court criticized, admonished, and abused Appellant's counsel in the jury's presence and otherwise interfered with that counsel's cross-examination in material regards. The court's actions were made sua sponte without movement by the state on other objections.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT REVERSIBLY ERRED WHEN IT RESPONDED TO THE JURY'S QUESTION DURING DELIBERATIONS WITHOUT NOTIFYING APPELLANT'S COUNSEL OF THE QUESTION POSED NOR GIVING COUNSEL AN OPPORTUNITY TO CONTRIBUTE TO AN APPROPRIATE RESPONSE, AND FOR MAKING AN INAPPROPRIATE, INCOMPLETE AND MISLEADING RESPONSE TO THE QUESTION ASKED

II.

WHETHER THE TRIAL COURT REVERSIBLY ERRED WHEN IT OMITTED GIVING FLORIDA STANDARD JURY INSTRUCTION 2.04(e), AND IN GIVING THE STANDARD INSTRUCTION 2.04(c) WITHOUT APPELLANT REQUESTING SAME, THE AFORESAID BEARING MATERIALLY UPON APPELLANT'S DEFENSE TO THE CHARGES AND THE EVIDENCE

III.

WHETHER THE TRIAL COURT ERRED DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL BASED ON ENTRAPMENT

IV.

WHETHER THE TRIAL COURT ERRED FAILING TO CONDUCT RICHARDSON INQUIRY UPON BEING NOTICED OF DISCOVERY VIOLATIONS BY THE STATE DURING THE TRIAL

V.

WHETHER THE COURT ERRED DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON A STATE'S WITNESS'S UNSOLICITED COMMENT ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT INCIDENT TO ARREST AND POLICE QUESTIONING

VI.

WHETHER THE COURT ERRED ADMITTING 'TAPES' OF UNAUTHORIZED INTERCEPTED COMMUNICATIONS PURSUANT TO F.S. 934

VII.

WHETHER THE RECORD EVIDENCE IS INSUFFICIENT TO SUPPORT A CRIMINAL CONSPIRACY CONVICTION

VIII.

WHETHER THE COURT'S RULINGS AND COMMENTS UNDULY INTERFERED WITH CROSS-EXAMINATION OF THE KEY STATE WITNESS AND UNFAIRLY DEMEANED COUNSEL IN THE JURY'S PRESENCE

ARGUMENT

POINT ONE ON APPEAL

THE TRIAL COURT REVERSIBLY ERRED WHEN IT RESPONDED TO THE JURY'S QUESTION DURING DELIBERATIONS WITHOUT NOTIFYING APPELLANT'S COUNSEL OF THE QUESTION POSED NOR GIVING COUNSEL AN OPPORTUNITY TO CONTRIBUTE TO AN APPROPRIATE RESPONSE, AND FOR MAKING AN INAPPROPRIATE, INCOMPLETE AND MISLEADING RESPONSE TO THE QUESTION ASKED

At the charge conference (R. 323-333) Appellant requested an entrapment instruction (R. 323), the court agreeing to give the new version for offenses occurring after 1 October 1987 (id). The state posed no objection. The court did charge the jury that "In this case, as to each of the counts charged * * * the defense of entrapment has been raised" (R. 388) and then so instructed (R. 388-390). The jury then retired to deliberate (R. 404). Eventually, the jury presented a question, whereupon court reconvened and the following ensued:

> THE COURT: All right. Bring in the jury. They have a question.
>
> [APPELLANT]: Should we know what the question is so we can talk about it?
>
> THE COURT: We don't need to talk about it. I will show you in just a minute, Kayo.

(R. 407). The jury then entered the court, seated, and the following occurred:

> THE COURT: Have a seat, please. Ladies and gentlemen of the jury, I have your question: Judge Coker, could you please clarify or provide a copy of the law on armed trafficking.
>
> Unfortunately, I can do neither of those. However, what I can do is to reread you the law that I read you a few moments ago[].

(R. 407-408). The judge then re-read almost verbatim the 'trafficking in cocaine' instruction it had earlier charged respecting the 'elements' of that offense and defining 'delivery' (R. 384-386, 408-409). The jury then retired to continue its deliberations and the following colloquy occurred:

> [APPELLANT]: Judge, show my objection. We didn't get a chance to discuss that.
>
> THE COURT: Well, what's your objection?
>
> [APPELLANT]: I'd like to have entrapment read to them. It's not an offense to traffic[k] if he was entrapped.
>
> THE COURT: I responded to their question exactly as they requested that I respond and you objection is noted.

(R. 409-410).

Appellant submits the court reversibly erred when it purported to answer the jury's 'question' to "clarify or provide a copy of the law on armed trafficking" (R. 407) without first notifying counsel of the question posed or the court's intended response and according counsel an opportunity to be heard regarding an appropriate response.

First, the court erred declaring with respect to the jury's request to "please clarify or provide a copy of the law" that it could "do neither of those" (R. 407). The trial court is empowered to have allowed the jury to take written instructions to the jury room to assist its deliberations. Fl.R.Cr.Pr. 3.400(c); SIMMONS v STATE, 541 So2d 171 (4DCA 1989) 14 F.L.W. 917; KIRKLAND v STATE, 557 So2d 130 (3DCA 1990) 15 F.L.W. D430. However, the entire written instructions must be delivered to the jury to avoid it placing "undue emphasis upon the reinstruction given". BYRD

v STATE, ___ So2d ____ (3DCA 1991) 16 F.L.W. D466. [Compare, HENDRICKSON v STATE, 556 So2d 440 (4DCA 1990) 15 F.L.W. D205(fundamental error to preliminarily instruct jury it cannot have testimony read back to it during the deliberation process)]. The court below unduly limited the applicable "law" sub judice to be the elements of the 'charges', thereby de-emphasizing the "law" of defenses against those charges. Had the court done what the jury asked (i.e. provide a copy of the law), as the court could have, then the "law" in its entirety shall have necessarily been taken back into the jury's deliberations, undue emphasis avoided, and clarification more likely facilitated.

Secondly, if the court could "do neither" of what the jury requested, then what the court did do was not responsive to the request. As aforesaid, the "law" was in fact not re-instructed on completely.

Thirdly, Appellant was entitled to, but was foreclosed, an opportunity to assist the court in formulating whatever response, if any, ought have been made to the jury's question (whatever it was). Certainly, for instance, the "law of armed trafficking" is more than the mere 'elements' of the offense of 'trafficking in cocaine'. Pointedly the jury did not ask for re-instruction on the definition of the, or any, charged offense. And, the trial judge determined to sua sponte make a limited and incomplete articulation of the "law" of trafficking in cocaine. [Note that the judge did not inquire of the jury in what respect of the "law" clarification was needed].

> The trial court erred by responding to a question submitted by the jury during deliberations without

> advising counsel of the question or the court's answer. Such action [is] reversible error.

LEDO v STATE, 557 So2d 891, ___ (3DCA 1990) 15 F.L.W. D548. Cf ALEXANDER v STATE, 575 So2d 1370 (4DCA 1991)(both presence and opportunity of counsel to be heard prior to answering jury question required); CHERRY v STATE, 572 So2d 521 (1DCA 1990)(same); LACUE v STATE, 562 So2d 388 (4DCA 1990)(same). The inconsiderate action by the court below deprived Appellant of due process of law.

Moreover, failure to instruct on the defense theory of entrapment where evidence supports it is fundamental error. HOWARD v STATE, 561 So2d 1362 (3DCA 1990); GILBERTH v STATE, 563 So2d 1120 (4DCA 1990); THOMAS v STATE, 547 So2d 989 (1DCA 1989)(entrapment instruction necessary if 'suggested' in fact). Sub judice, the defense of entrapment was as much a part of the requested "law" as was the definition of the elements of the charges. The court failed to instruct the jury completely on the "law", and for that also erred. HERNANDEZ v STATE, 575 So2d 1321 (4DCA 1991); PLUMMER v STATE, 559 So2d 693 (1DCA 1990)(error to not reinstruct on justifiable homicide). See also, BISCARDI v STATE, 511 So2d 575 (4DCA 1987)(error to tell jury court cannot reinstruct on law); MCCORMICK v STATE, 308 So2d 126 (4DCA 1975); PIECZYNSHI v STATE, 516 So2d 1048 (3DCA 1987).

A new trial ought be granted.

ZARATTINI v ST.
571 So2d 553 (4-90)
16 FLW D6

ARGUMENT

POINT TWO ON APPEAL

THE TRIAL COURT REVERSIBLY ERRED WHEN IT OMITTED GIVING FLORIDA STANDARD JURY INSTRUCTION 2.04(e), AND IN GIVING THE STANDARD INSTRUCTION 2.04(c) WITHOUT APPELLANT REQUESTING SAME, THE AFORESAID BEARING MATERIALLY UPON APPELLANT'S DEFENSE TO THE CHARGES AND THE EVIDENCE

At the charge conference the trial judge asked for any special instructions, announcing the understanding that otherwise "You all know the generals as well as I do" (R. 323). Thus was the charge conference limited by the court (R. 323-333). Appellant presented his closing argument (R. 334-356, 372-382) and the state its (R. 356-372). The trial court then instructed the jury (R. 382-399). Those instructions included Florida Standard Jury Instruction '2.04(c) DEFENDANT TESTIFYING':

> The defendant in this case has become a witness. You should apply the same rules to consideration of his testimony that you apply to the testimony of the other witnesses.

(R. 394). See Exhibit 'A', attached to this brief. The instructions, however, omitted Florida Standard Jury Instruction '2.04(e) DEFENDANT'S STATEMENTS', to wit:

> A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.
>
> Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily and freely made.
>
> In making this determination, you should consider the total circumstances, including but not limited to:
>
> 1. Whether, when the defendant made the statement, he had been threatened in order to get

him to make it, and

2. Whether anyone had promised him anything in order to get him to make it.

If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

See Exhibit 'B', attached to this brief.

The court called a side-bar for additional objections to the instructions given (R. 399), Appellant (inter alia) objected to that he had "never requested 204(c), the defendant is a witness" (R. 401), the judge responding that the accused's request therefor is not required (id); and that 204(e) respecting weighing with great care Appellant's alleged 'statements' was not charged. In the latter regard the following colloquy was had:

[APPELLANT]: And 204(E), did you read the defendant's statements are supposed to be taken--

THE COURT: He didn't give any statements.

[APPELLANT]: They're saying he's making all kinds of stuff outside--

THE COURT: Conversations. That wasn't statements. Okay. Your objection is noted. Overruled.

[APPELLANT]: Judge, it's on tape, Your Honor.

THE COURT: That doesn't matter. He didn't make statements. Made conversation.

[APPELLANT]: Judge can I make my record? There is a tape recording.

THE COURT: Go ahead make your record.

[APPELLANT]: It is a statement. It is in the form of a tape which statements came in the wake of police interrogation and intimations. So they should cautiously consider such tape-recorded statements of my client's out-of-court statements at the interrogation of a police officer, just like if it was a specific confession, Judge, in the form of the tape. You're entitled to have that instruction as to it being carefully regarded. Show my objection to that.

THE COURT: Overruled.

(R. 402-403).

It is plain that Appellant's primary defense was entrapment, involving the pervasive instigations and influences of police agent/informant, 'TOM' (as well as LOSEY). Cross-examination of LOSEY (R. 76-166), Appellant's testimony (R. 236-260, 260-310), and closing arguments by both the state and the defense (R. 334-356, 356-372, 372-382) hinged in substantial part on the 'statements' attributed to Appellant in that contrived and coerced context, and the voluntariness of same. [Appellant noticed the court of various discovery violations during trial involving 'statements' being attributed to Appellant, which the court allowed to stand without inquiry, but which importantly bore upon the charges (R. 31, 71, 73-75, 113)]. For the jury to fairly evaluate these out of court 'statements' being attributed to Appellant, as well as Appellant's trial testimony vis-a-vis same, the Florida Standard Instruction 2.04(e) was critical to the defense and verily <u>expected</u> by Appellant to have been charged the jury. Moreover, that instruction is not given subject only to the accused's 'request' therefor, as are other general 'standard' instructions (e.g. 2.04(c)). Likewise, Appellant would <u>not</u> have requested 2.04(c) (Defendant Testifying) since the 'rule' set forth in that 'standard' is <u>not</u> the "same [as the jury would] apply to the testimony of the other witnesses", thereby avoiding any possible confusion in this area of evaluating out-of-court 'statements' attibuted to Appellant. As stated, the trial court gave the latter standard without Appellant requesting same or even being inquired

his desire in that respect. Thus no special consideration of subject 'statements' were charged although the standard instructions provide therefor, Appellant expected it, and ultimately requested it. "[T]he standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on "the applicable law". STEELE v STATE, 561 So2d 638 (1DCA 1990).

> Unnecessary departures from the standard jury instructions may undermine the unquestionably beneficial effect of those forms on the Florida trial system as a whole. That system depends in large part for its fairness and effective functioning upon reasonably predictable rules and rulings in the conduct of trials. Those instructions "state as accurately as a group of experienced lawyers and judges could state the law of Florida in simple understandable lanquage."

HURTADO v STATE, 546 So2d 1176 (2DCA 1989) 14 F.L.W. 1859. See, GREEN v STATE, 546 So2d 126 (3DCA 1989)(instruction on witness credibility proper when accord with standards).

Appellant submits the court reversibly erred for its unnecessary departure from the standard instructions omitting charge 2.04(e) from the applicable "law". PIECZYNSKI v STATE, 516 So2d 1048 (3DCA 1987). That error was compounded with the unsolicited reading of charge 2.04(c). Appellant's objections in these respects ought have been sustained and cured.

A new trial is warranted.

ARGUMENT

POINT THREE ON APPEAL

THE TRIAL COURT ERRED DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL BASED ON ENTRAPMENT

STATE v HUNTER and CONKLIN, 586 So2d 319 (Fla 1991) 16 F.L.W. S588, involved an informant named 'Diamond'. Diamond 'contracted' with police to assist in "making" new drug cases. The appellant Conklin was noticed to smoke cannabis, thus Diamond approached him and "asked for assistance in obtaining drugs, but Conklin could not provide any sources for the drugs that Diamond wanted [so that] Diamond became more insistant and began telephoning Conklin almost daily." 16 F.L.W., at S588. Conklin then solicited co-defendant Hunter "who agreed to help find drugs to sell to Diamond" (id). At trial a motion for judgment of acquittal was denied. The Supreme Court, approving this Court's result in reversing the judgment of conviction, held:

> Diamond had become the state's agent, and his acts must be construed as "police activity." His activities, however, meet neither part of the Cruz[v State, 465 So2d 516 (Fla 1985)] test, let alone both, because there was no "specific ongoing criminal activity" until Diamond created such activity in order to meet his quota. Therefore, as in Cruz, Conklin established entrapment as a matter of law, and the trial court erred in denying his motion for judgment of acquittal based on entrapment.

16 F.L.W., at S589. "[T]he majority opinion clearly is premised entirely on the due process clause of the Florida Constitution. Art I, §9, Fla. Const.". 16 F.L.W., at S590 (J. KOGAN, concurring). Accord: BOWSER v STATE, 555 So2d 879 (2DCA 1989) 14 F.L.W. 2843; KRAJEWSKI v STATE, ___ So2d ____ (4DCA 1991) 16 F.L.W. D692; STATE

v BURCH, 545 So2d 279 (4DCA 1989) 14 F.L.W. 382; GONZALEZ v STATE, 571 So2d 1346 (3DCA 1990) 15 F.LW. D2576. And see: STATE v PETRO, ___ So2d ____ (2DCA 1991) 16 F.L.W. D2398, D2400 fn 1.

Appellant argued the rationale of CONKLIN upon the facts below in his motions for judgment of acquittal (R. 218-224, 316-320). No "specific ongoing criminal activity" existed when TOM and LOSEY sought to enlist Appellant's assistance in finding cocaine sources. No criminal activity by Appellant was known by LOSEY when TOM introduced him; nothing at all occurred until months later; and when TOM enlisted Appellant's 'assistance' Appellant knew no sources therefor. It was TOM's continually calling and urging Appellant about finding someone for 'good easy money' which eventuated Appellant's alleged 'criminal actions'. The informant, TOM, had a contingent fee interest in implicating persons like Appellant in a criminal drug effort, he was authorized and used by LOSEY to do so, and "the informant was free to set up transactions where and when he chose". 16 F.L.W., at D695 (KRAJEWSKI v STATE, supra). Likewise,

> appellant in this case had no prior history of drug use or trafficking, nor did he provide police with any reason to infer a familiarity with drugs. Furthermore, he did not take an active part in supplying the drugs. There was no basis for a conclusion that appellant was engaging in the ongoing sale of drugs [and] there is no evidence of a high volume of drug trade at either the place where appellant was arrested or at the [place] where he first [or ever] met the informant. [Likewise, the] police activity, especially the informant's activity, fell squarely within the second prong of the objective [entrapment, due process CRUZ] test when the informant induced, lured, and pressured the defendant by repeated phone calls. Also, the police had no evidence that the defendant had ever been involved in any unlawful drug transaction; rather, the informant was responsible for originating and instigating the idea. Such police activity

> constitute[s] entrapment as a matter of law and require[s] reversal of the judgment[s] and sentence[s].

LONDONO v STATE, 565 So2d 1365 (4DCA 1990) 15 F.L.W. D1857, D1859.

Appellant further submits that the evidence establishes subjective entrapment under F.S. 777.201. First, obviously TOM and LOSEY solicited Appellant to be involved in making a drug case without any "purpose of obtaining evidence of the commission of a crime", inasmuch as no 'crime' had been or was being committed as to which 'evidence' could be obtained of Appellant. Thus, these police agencies initiated, as well as induced and encouraged Appellant to engage in criminal conduct. As a "direct result" thereof Appellant was brought into such conduct eventually. TOM's and LOSEY's "methods of persuasion or inducement * * * create[d] a substantial risk that such crime w[ould] be committed" by Appellant; and Appellant is not shown to be one who was ready to commit same. Rather, the evidence is that Appellant was not a drug dealer and could not locate any drug sources himself. The aforesaid is established by a preponderance of the evidence below, and same is not rebutted by the state.

Appellant submits the state ought be primarily burdened to overcome such a preponderant showing of entrapment beyond a reasonable doubt (R. 327); however, where as in the record below there is no disproof of the evident defense of subjective entrapment then a judgment of acquittal ought have been granted (R. 218-224, 316-320, 322). Compare: SNEED v STATE, ___ So2d ____ (4DCA 1991) 16 F.L.W. D683.

Entrapment, objective (due process) and subjective, is established in fact and law. Appellant ought be discharged.

ARGUMENT

POINT FOUR ON APPEAL

THE TRIAL COURT ERRED FAILING TO CONDUCT RICHARDSON INQUIRY UPON BEING NOTICED OF DISCOVERY VIOLATIONS BY THE STATE DURING THE TRIAL

During LOSEY's direct examination Appellant made a series of objections to that witness synopsizing, characterizing and interpreting allegedly recorded telephone conversations between himself and Appellant, the tapes obviously being the best evidence thereof (R. 24-25, 25-26, 28-29, 31). [Over defense objection, the state did not publish these 'tapes' during LOSEY's direct testimony, but did have same admitted by that witness. The tapes were played for the jury eventually but only after that witness was excused (R. 176-198)]. At one point the following occurred:

> [STATE]: Is that the last conversation you had with [Appellant] that day?
>
> [LOSEY]: No. At about 5:00 p.m. [Appellant] called me and said to come over, because his supplier had just arrived at the shop.
>
> [APPELLANT]: Objection. Again, I have to say that the best evidence would be a tape recording, not what he would surmise was said or interpret what was said.
>
> THE COURT: Objection is noted. Overruled. Proceed.
>
> [STATE]: That telephone call was also recorded?
>
> [LOSEY]: Yes, sir.
>
> [APPELLANT]: Objection to his supplier. That's conclusory.
>
> THE COURT: He is relating the conversation.
>
> [APPELLANT]: That's what I am saying. I object to it.

THE COURT: Overruled.

[APPELLANT]: And discovery violation.

THE COURT: Proceed. Go ahead, Mr. Geisler.

(R. 30-31). The state then commenced to present the physical 'tape recordings' for admission into evidence (e.g. R. 32-35), to which Appellant objected (R. 34-35), and continued to elicit the witness's recitation of what these 'tapes' supposedly reflected, over Appellant's objections (R. 38, 42, 43).

Eventually the state, without publishing the tapes 'identified' by the witness and admitted into evidence (over objection), concluded its direct examination of the witness LOSEY, whereupon the following ensued:

> [STATE]: * * * Thank you, detective. That's all I have.
>
> THE COURT: Are you through with the direct?
>
> [STATE]: Yes, Your Honor.
>
> [APPELLANT]: Wait. I have an objection. They admitted all these tapes. We don't get to confront the tapes?
>
> THE COURT: Hold it. [A lunch recess for the jury was declared and the witness excused by the court].
>
> [APPELLANT]: What about that publishing of the tapes before I cross examine?
>
> THE COURT: Well, now, Kayo, I don't tell [the prosecutor] how to try his lawsuit. I don't tell you how to try your lawsuit. The matters are in evidence, the tapes, and the jury can hear them any time they want to. If you want to play them, you play them.
>
> [APPELLANT]: No, Judge. You misunderstand. I have a right to confront evidence against me. They have identified these tapes as the best evidence of conversations.
>
> THE COURT: You are not listening to me. Losey

is going to be up here and you are going to be cross examining him. If you want to put the tapes on and examine him, you have a right to do that.

[APPELLANT]: I am not going to put on any--

THE COURT: I don't tell Geisler how to try his case. I don't tell you how to try yours. I will see you all at 1:30. Detective Losey will be sitting here for you and he will be prepared to answer anything you care to ask him, I am sure.

[APPELLANT]: What about my discovery violation?

THE COURT: What discovery violation?

[APPELLANT]: Conversations had with my client that are unrecorded between May and August. The abuses of the officer on the stand that my client said something in a taped statement which I am not aware of any such thing being uttered by my client.

THE COURT: Well, now, these tapes are not strangers to you, are they?

[APPELLANT]: That's correct. That's why I am saying I was very surprised of his testimony.

THE COURT: Have these tapes been made available to you?

[APPELLANT]: I have listened. That's why I said he surprises me.

THE COURT: All police reports--

[APPELLANT]: I made my best evidence objections for this very reason. He was saying things I have never been told about. Secondly, he has told me conversations occurred between May and August, which I am not aware of and nothing reflects it in discovery.

THE COURT: You have got all the police reports I assume [the state] had. Isn't that so, Mr. Geisler?

[STATE]: To my knowledge, yes, sir.

[APPELLANT]: I have been affirmatively misled by those very same reports.

THE COURT: Your objection is noted. We'll wait until cross examination. See what happens.

(R. 71, 73-75). Cross-examination then commenced (R. 76).

During cross, LOSEY claimed that Appellant communicated with him after the initial Burger King meeting in May and prior to the first recorded conversation 15 August (R. 102-103). Such was never recorded in any police report (R. 102-103, 110-111). Likewise, LOSEY's characterizations of 'source' or 'supplier' on direct respecting statements made by Appellant on tape and otherwise were never words attributable to or used by Appellant (R. 104, 122, 128). The following occurred during that testimony:

> [APPELLANT]: When you were coming up here to testify today, did you review your reports?
>
> [LOSEY]: Sure.
>
> [APPELLANT]: Including the report that you just referred to?
>
> [LOSEY]: Sure.
>
> [APPELLANT]: And a lot of testimony had been essentially based herein, right?
>
> [LOSEY]: A lot of it, it's based on my memory. Some of it on tapes. Some of it on the report, sure.
>
> [APPELLANT]: And so now you remember definitely at least one conversation after the Burger King encounter?
>
> THE COURT: Asked and answered. Asked and answered. Next question.
>
> [APPELLANT]: I have a discovery violation.
>
> THE COURT: Asked and answered.
>
> [APPELLANT]: I have a discovery violation, Judge.
>
> THE COURT: We have already discussed that. Proceed. Next question. We had a hearing on that. Next question.

(R. 112-113). Cross continued, including with respect to the

activities and interests of the police agent/informant, TOM (R. 115-126, 129-137, 146-148, 158-159), whereupon the following occurred:

> [APPELLANT]: All right. Now, do you remember a telephone call happening in that office before the arrest and after you came in?
>
> [LOSEY]: The phone rang and [Appellant] answered the phone.
>
> [APPELLANT]: And that was Tom on that phone call, wasn't it?
>
> [LOSEY]: Not that I know of.
>
> [APPELLANT]: Didn't you tell Tom to call over there and get [Appellant] involved in the office?
>
> [LOSEY]: Why would I have Tom call to get him -- no.
>
> [APPELLANT]: You don't have to tell -- yes or no?
>
> [LOSEY]: No. It's ridiculous. No, I didn't do that.
>
> [APPELLANT]: Don't be ridiculous? And then the arrest went down and since then, have you spoken to Tom?
>
> [LOSEY]: Sure.
>
> [APPELLANT]: Is Tom still working for you?
>
> [LOSEY]: No.
>
> [APPELLANT]: Where is Tom?
>
> [LOSEY]: I don't know.
>
> [STATE]: Objection.
>
> THE COURT: Sustained. It's irrelevant.
>
> [APPELLANT]: Is he working for anybody as a paid informant?
>
> [LOSEY]: I don't know.
>
> [STATE]: Objection.

THE COURT: Sustained.

[APPELLANT]: Judge, I have a discovery violation. This man is a -- Tom is a --

THE COURT: It's irrelevant. I sustain the objection.

[APPELLANT]: I have a discovery violation in that respect, too.

THE COURT: Move on.

[APPELLANT]: Can I have a short recess?

THE COURT: Next question.

[APPELLANT]: Can I have a short recess, then I will have maybe two questions?

THE COURT: Next question.

(R. 158-160). A recess being denied, cross-examination shortly concluded (R. 166).

"The trial court committed reversible error in failing to conduct a Richardson inquiry after being apprised of the State's discovery violation". M.H. v STATE, ___ So2d ____ (3DCA 1991) 16 F.L.W. 2211, 2212.

> Pursuant to Richardson, 246 So2d 771 (Fla. 1971), an appellate court must reverse a conviction if noncompliance with a rule of procedure results in harm or prejudice to the defendant due to the state's failure to furnish the names of witnesses or material to be used at trial. A determination as to the possible prejudice to the defendant is a matter within the trial court's discretion. However, that discretion can be exercised only after an adequate inquiry into all of the surrounding circumstances. * * * The purpose of a Richardson inquiry is to ascertain procedural, rather than substantive, prejudice. * * * Further, "a trial court's failure to conduct a Richardson inquiry is per se reversible." []This is because a reviewing court cannot determine whether the discovery violation was harmless unless the defendant is afforded an opportunity to show prejudice or harm. * * *

BROWN v STATE, 16 F.L.W. D1141 (1DCA 1991). The trial court in

CUMBIE v STATE, 345 So2d 1061 (Fla 1977), omitted a 'full inquiry' into a noticed discovery violation, and the Court noted:

> It is clear that the trial court's investigation of the question of prejudice was not the full inquiry Richardson requires. No appellate court can be certain that errors of this type are harmless. A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules, as Richardson indicates. Especially is this so in cases such as this, where a false response is given to a request for discovery. The mere fact that alleged statements are attributed to the [defendant] cannot relieve the state of its duty to disclose; that is precisely the situation contemplated by Rule 3.220(a)(1)(iii).

Id, at 1062. In a case of such omission "prejudice must be presumed and a new trial is mandatory". MARTINEZ v STATE, 528 So2d 1334, 1336 (1DCA 1988) 13 F.L.W. 1826 (citing SMITH v STATE, 500 So2d 125 (Fla 1986)). The trial court below so omitted.

Below, Appellant objected to an alleged conversation and statement attributed to him adduced on direct examination by the state of its witness (LOSEY), and noticed the trial court that same constituted a discovery violation. The judge ignored it and overruled the objection (R. 30-31). When the state concluded its direct examination of that witness, and before cross examination commenced, Appellant again noticed the trial court of discovery violations regarding statements being attributed to Appellant, and that Appellant stood surprised thereby as well as affirmatively misled by the discovery actually provided. The judge's response was to note the objection and to "wait until cross examination". (R. 71, 73-75). During that cross-examination Appellant again noticed the court of a discovery violation, the judge merely responding "[w]e have already discussed that [and] had a hearing

on that". (R. 112-113). [In fact, the record shows that no hearing whatever was had]. Thereafter, on cross, Appellant adduced that the confidential police informant/agent, TOM, was not still working for that officer and the TOM's whereabouts was not known by that officer. The trial judge sustained a bare objection by the state, the court (in the jury's presence) gratuitously declaring that such matters were "irrelevant". Thereupon Appellant attempted to articulate a <u>further discovery violation</u> respecting TOM, but was cut off by the court because "[i]t's irrelevant". A short recess even was denied the defense (R. 158-160).

Respecting the informant TOM, his influence and presence in this case was pervasive, and it was apparent that the officer-witness could not assure the contrary and in fact testified he did not attempt to monitor that informant vis-a-vis Appellant. Appellant pre-trial noticed the court of the informant's pervasive influences as per the rationale of STATE v HUNTER, ___ So2d ____ (Fla 1991) 16 F.L.W. S588. (R. 422). Appellant attempted to address the trial court of the need to disclose TOM in the circumstances of this case as it developed, that the 'confidential' status thereof was contrived, and that his materiality as a witness required disclosure to the defense. It became apparent too that the state failed to maintain contact with that informant notwithstanding the apparent materiality of same in this case, wherein entrapment occasioned by that very police agent (with LOSEY) was the primary defense. See, STATE v JONES, 247 So2d 342 (3DCA 1971); ALDAZABAL v STATE, 471 So2d 639 (3DCA 1985). Because the trial judge deemed it 'irrelevant', the court foreclosed a

determination of relevant facts on which a decision to disclose the informant would be based or to determine whether it is an abuse of discretion to have not disclosed same at that time below. LUCERO v STATE, 564 So2d 158 (3DCA 1990) 15 F.L.W. D1633 (wherein a new trial was granted for such deficiency). Compare: STATE v KAKAS, 568 So2d 126 (4DCA 1990) 15 F.L.W. 2648 (requiring an in camera consideration as to whether a C.I.'s disclosure would be helpful to the defense). In any event, no inquiry was permitted or pursued whatsoever, nor any finding made by the court beyond 'irrelevancy'. Such is per se reversible error. BROWN v STATE, 515 So2d 211 (Fla 1987).

Respecting the undisclosed statements (taped and untaped) attributed to Appellant, same constituted discovery violations. WHITE v STATE, ___ So2d ____ (4DCA 1991) 16 F.L.W. D2291; BROWN v STATE, ___ So2d ____ (1DCA 1991) 16 F.L.W. D1141; MATHEWS v STATE, 574 So2d 1174 (4DCA 1991) 16 F.L.W. D423. The failure of the trial court to have conducted any inquiry therein upon objection by Appellant likewise requires a new trial. See, WESTLUND v STATE, 570 So2d 111 (4DCA 1990) 16 F.L.W. D83; WALKER v STATE, 573 So2d 1075 (4DCA 1991) 16 F.L.W. D481; TAYLOR v STATE, 557 So2d 138 (1DCA 1990) 15 F.L.W. D437.

Appellant submits a new trial ought be granted.

ARGUMENT

POINT FIVE ON APPEAL

THE COURT ERRED DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON A STATE'S WITNESS'S UNSOLICITED COMMENT ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT INCIDENT TO ARREST AND POLICE QUESTIONING

During the cross examination of the state's main witness, LOSEY, Appellant was inquiring as to LOSEY having spoken to Appellant (and ROUSE and PERKINS) post-arrest respecting doing 'substantial assistance' for police in return for a favorable consideration, to wit:

> [APPELLANT]: So after the arrest then, let's see, Carl [Rouse] was arrested and he was standing outside; right?
>
> [LOSEY]: Right.
>
> [APPELLANT]: So you know Carl was intimately involved with Perkins; right?
>
> [LOSEY]: I can assume that from the beeper on the 16th. Other than on the 18th, I don't know what happened on the 18th.
>
> [APPELLANT]: Tom learned all this. You were talking to Tom at this time, weren't you?
>
> [LOSEY]: I bet I have told you 40 times. I was not talking to Tom during this time.
>
> [APPELLANT]: Perkins was arrested. [Appellant] was arrested and you talked to those three people about what you call substantial assistance, didn't you?
>
> [LOSEY]: And nobody had anything to say.
>
> [APPELLANT]: No. I didn't ask you that.
>
> [LOSEY]: I don't --
>
> [APPELLANT]: I have a motion to make.

THE COURT: You can reserve it. Go ahead.

(R. 160-161). After cross-examination concluded,

THE COURT: You had a motion * * *.

[APPELLANT]: I move for mistrial, Judge. That he had nothing to say, that's a comment on his right to remain silent after arrest. I didn't ask him anything about that. I asked him did you speak to them about substantial assistance. He says yes and they had nothing to say. That's a comment on his exercise of [the right to silence].

(R. 166). The court denied it (id).

LOSEY's unresponsive answer is a comment on the right to silence.

> The Supreme Court has adopted "a very liberal rule" for determining what constitutes a comment on silence. "If the comment is 'fairly susceptible' of being interpreted by the jury as a comment on the defendant's exercise of his right to remain silent it will be treated as such".

STEPHENS v STATE, 559 So2d 687 (1DCA 1990) 15 F.L.W. D897, D898. The clear impression below is that Appellant, like the other arrestees at the time of arrest, then had no innocent explanation, such as testified to at trial. The jury was invited to infer a consciousness of guilt for his silence. Clearly, the reaction of silence resulted of police inquiry incident to arrest. The law forbids this nature of comment in order to foreclose inferences adverse to the presumption of innocence. WEST v STATE, 553 So2d 254 (4DCA 1989); STARR v STATE, 518 So2d 1389 (4DCA 1987); JORDAN v STATE, 546 So2d 48 (4DCA 1989).

For this a new trial is warranted. See: GRAHAM v STATE, 573 So2d 166 (4DCA 1991) 16 F.L.W. D192.

ARGUMENT

POINT SIX ON APPEAL

THE COURT ERRED ADMITTING 'TAPES' OF UNAUTHORIZED INTERCEPTED COMMUNICATIONS PURSUANT TO F.S. 934

"The state's authority to utilize a taped conversation arises only through chapter 934"; and, "Section 934.03(2)(c) allows a law enforcement officer to intercept a communication when one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act". STATE v JONES, 562 So2d 740 (3DCA 1990) 15 F.L.W. D1279. The contents of such interception cannot be received in evidence "in any trial" as neither may any "evidence derived therefrom". F.S. 934.06. The chapter further provides:

> The Governor, the Attorney General, the statewide prosecutor, or any state attorney may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with ss. 934.03-934.09, an order authorizing or approving the interception of wire, oral, or electronic communications by * * * any law enforcement agency * * * having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of the commission of * * * any violation of chapter 893 * * * or any conspiracy to commit any violation [there]of * * *.

F.S. 934.07. The procedure for interception of wire, oral, or electronic communications is set forth at F.S. 934.09.

Below, LOSEY called Appellant on the telephone 15 August 1988 "to initiate this case" (R. 33). This conversation, according to LOSEY, was taped (R. 32). LOSEY was permitted to testify, over objection, to the supposed contents of this intercepted communication (R. 24-25). This 'tape' was admitted in evidence,

over objection (R. 34-35), and eventually played to the jury (R. 176-178). LOSEY thereafter 'identified' further tapes of subsequent intercepted communications (to and including on 18 August) he caused to occur with Appellant (allegedly) following the 15 August recording (R. 35-50, 64-65). LOSEY was likewise permitted to testify to the supposed contents thereof (R. 25, 29-31, 37-38, 42-43). Appellant's objections were steadfastly overruled by the court (R. 26, 28-29, 31, 34-35, 38, 42-43). These recordings were eventually played to the jury, over objection (R. 179-198). [Note: the tapes were not played in the context of LOSEY's testimony, so Appellant never confronted the tapes in cross-examination].

LOSEY had neither a consent nor warrant for the aforesaid interceptions, and he never sought a consent or warrant therefor. (R. 34-35, 149-151).

LOSEY admits that as of 15 August 1988, when he initiated the case as aforestated, he was not aware of any criminal action by Appellant (R. 101, 129). See, KING v STATE, 104 So2d 730 (Fla 1957)(person cannot conspire with a police officer or police agent). LOSEY admits further that he did not know the nature or extent of his informant-agent TOM's importunings with Appellant or of TOM's role in 'arranging' Appellant's presentation to LOSEY (R. 80-81, 88-91, 94, 96-97, 99-100, 106-107, 120-121, 132).

Appellant submits that LOSEY's taped interception of the 15 August telephone conversation (allegedly with Appellant), as well as the subsequent related such communications, were accomplished contrary to F.S. 934.

Firstly, F.S. 934.03(2)(c) does not plainly authorize

LOSEY (as a law enforcement officer) to be one of the parties to a communication who gives the requisite 'prior consent' to its interception. A "person", e.g. 'TOM', acting under such officer's "direction * * * to intercept a * * * communication when such person is a party" thereto may have been permissible, as too where "one of the parties to the communication has given prior consent to such interception". But LOSEY was not empowered with carte blanche to do so and regardless of reasonable grounds therefor. F.S. 934.01, 'Legislative findings', supports this limited construction:

> On the basis of its own investigations and of published studies, the Legislature makes the following findings:
>
> * * *
>
> (2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative procedings, and to prevent the obstruction of intrastate commerce, it is necessary for the Legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.
>
> (3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communciations to obtain evidence of the commission of crimes or to prevent their commission is an indispensible aid to law enforcement and the administration of justice.
>
> (4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communciation has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

F.S. 934.01(2), (3), (4). Even assuming Appellant was an 'organized

criminal' and that "evidence of a criminal act" was LOSEY's purpose, yet LOSY circumvented the legislative design that the subject "interception * * * should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court". Therefore, the contents of these intercepted communications attributed to Appellant, including the 'tapes' thereof, ought have been excluded at trial below. F.S. 934.06.

Secondly, LOSEY's "purpose" in intercepting the alleged communcations with Appellant was <u>not</u> "to obtain evidence of a criminal act". F.S. 934.03(2)(c). Appellant had committed no criminal act whatsoever when LOSEY initiated the subject 'communications' as to which same can have been "evidence of". Likewise, nothing indicates a basis to infer that Appellant was an "organized criminal[]".

Accordingly, it appears the mandated procedures for the kind of interception made below and posited against Appellant by LOSEY were avoided below. See: DAVIS v STATE, 529 So2d 732 (4DCA 1988) 13 F.L.W. 1511, appr'd 547 So2d 628 (Fla 1989); HERNANDEZ v STATE, 540 So2d 881 (4DCA 1989) 14 F.L.W. 670; SHAKTMAN v STATE, 529 So2d 711 (3DCA 1988) 13 F.L.W. 839. The 'tapes' of the intercepted communciations ought have been excluded, and Appellant's objections thereagainst sustained. F.S. 934.06.

A new trial is warranted.

ARGUMENT

POINT SEVEN ON APPEAL

THE RECORD EVIDENCE IS INSUFFICIENT TO SUPPORT A CRIMINAL CONSPIRACY CONVICTION

Appellant moved for judgment of acquittal as to the conspiracy count, inter alia, for insufficient evidence (R. 209-215, 311-312). The court had sustained objections to co-conspirator hearsay during the state's testimonies (R. 53, 56-59). The court denied said motion for a judgment of acquittal (R. 224, 322-323).

A person cannot criminally conspire with police agencies. KING v STATE, 104 So2d 730 (Fla 1957). And "a conspiracy may not be inferred from mere aiding and abetting" a crime. DeLISI v STATE, ___ So2d ____ (2DCA 1991) 16 F.L.W. D2111. Moreover, "presence at the scene of a drug transaction alone will not supply the requisite elements to sustain trafficking and conspiracy convictions." PICKOVER v STATE, ___ So2d ___ (4DCA 1991) 16 F.L.W. D1384, D1385; JOHNSON v STATE, ___ So2d ___ (2DCA 1991) 16 F.L.W. D1526.

Below, the record is devoid of any evidence that Appellant said or did anything to establish his participation in ROUSE's and/or PERKINS' endeavors beyond introducing them to LOSEY as agreed between Appellant, TOM and LOSEY. A judgment of acquittal ought have been granted. GUIETS v STATE, ___ So2d ____ (4DCA 1990) 15 F.L.W. D2121.

ARGUMENT

POINT EIGHT ON APPEAL

THE COURT'S RULINGS AND COMMENTS UNDULY INTERFERED WITH CROSS-EXAMINATION OF THE KEY STATE WITNESS AND UNFAIRLY DEMEANED COUNSEL IN THE JURY'S PRESENCE

LOSEY was allowed to testify to the contents of alleged tape-recorded conversations had with Appellant, over best evidence objections (R. 25, 26, 28-29, 31, 38, 42, 43). LOSEY testified only to the "gist" of same (R. 117, 128). He identified the 'tapes' and same were admitted in evidence, over objection (R. 32, 35-36, 38-39, 42-44, 45-46, 47, 49-50, 50-51, 64-65). The 'tapes' were not however published during LOSEY's testimony, over objection (R. 71, 73-75, 126-127). When these 'tapes' were published to the jury in court (R. 176-198), Appellant timely objected and moved that LOSEY be recalled for further cross-examination, which the court denied (R. 175). All the admitted 'tapes' were not then published (R. 47-50, 64-65, 176-198) [LOSEY testified to significant 'static' affecting these (R. 141)]; but all the admitted 'tapes' were given to the jury to hear in its deliberations, over objection (R. 405-407).

The trial judge continually interfered, sua sponte, with cross-examination of LOSEY (R. 90-91, 106, 107, 112-113, 115-116, 119, 132, 137, 141-142, 144, 150, 153, 164, 166). Material inquiry was prohibited, including as to LOSEY's credibility, for example: Whether two or three "months" passed between May and August when LOSEY did not have contact with Appellant (R. 105-106); LOSEY's willingness to swear that TOM did not repeatedly call

Appellant in the interim (R. 98, 106); whether TOM did inform LOSEY, as was his purpose, about TOM's interactions with Appellant in that interim (R. 97-99, 107); whether or not LOSEY was sure about an undisclosed and unrecorded conversation with Appellant in that interim (R. 96, 103, 111-113); whether LOSEY's call to Appellant 15 August was related at all to TOM's having called him that date (R 117-119); and inquiry into LOSEY's basis for swearing that TOM "had no role in this drug deal" (R. 132).

During that cross-examination too the judge repeatedly rebuked and demeaned Appellant's counsel in the jury's presence, and in some instances even directing the witness how to answer questions posed by counsel, for example: When LOSEY testified that "Tom told me his people wouldn't sell twelve [kilos]", counsel attempted to inquire thereon that LOSEY had earlier attributed that advisement to Appellant when TOM was present (R. 103, 109, 115), the judge however directing the witness "Don't tell him anymore", and accusing counsel of "getting extremely argumentative" for inquiring therein and forbade same (R. 116); when counsel began a question as to a conversation 15 August, but noting that the alleged 'tape' thereof was not then known to counsel, the state barely 'objected' whereupon the court gratuitously characterized the partial question as "totally improper form", struck it, and told the jury to disregard it (R. 116-117); the judge admonished counsel to not interrupt him though counsel did not (R. 119-120), and latter re-admonished counsel therefor when it obviously was the prosecutor that interrupted the court (R. 151); the judge determined in the midst of counsel's questioning to inform the

jury it would eventually hear the 'tapes' being referred to thus inducing counsel to pose an objection, to which the judge replied "They sure as hell will hear them, sir" and suggesting that counsel can "play them right now" thus inducing counsel to object to the burden-shifting comment, to which the judge reprimanded counsel to "Don't quarrel with me" (R. 126-127); the judge characterized counsel's normal voice as 'yelling' (R. 152); the judge directed LOSEY how to answer, "For Christ sake, tell him no, he didn't tell you what it was" (R. 153); the judge deemed 'irrelevant' counsel's inquiry into TOM's whereabouts (R. 159); and the judge directed LOSEY to not repeat something, commenting that the court and jury had had "enough", the witness concurring (R. 164). The judge further chastised counsel for 'demanding' that LOSEY be recalled for cross examination when the 'tapes' were to be published to the jury (R. 175-176).

The court erred allowing LOSEY to testify to the "gist" of the contents of available 'tapes' in lieu of publishing same to the jury upon a proper predicate. F.S. 90.954. Also in permitting the jury to hear the tapes in its deliberations, all of which were never published in court and with a question of audibility existing. LACUE v STATE, 562 So2d 388 (4DCA 1990); FREEMAN v STATE, 16 F.L.W. D1104 (4DCA 1991), citing to SPRINGER v STATE, 429 So2d 808 (4DCA 1983). Further, allowing LOSEY to interpret the contents of the tapes and then later playing the actual tapes in effect 'corroborated' LOSEY's testimony, although his selected 'words' involved speculation. REYES v STATE, 16 F.L.W. D1443 (3DCA 1991); STAMPER v STATE, 16 F.L.W. D762 (4DCA 1991);

PEREZ v STATE, 371 So2d 714 (2DCA 1979).

It is submitted the court further erred by interfering with fair cross-examination of LOSEY in material respects. COCO v STATE, 62 So2d 892 (Fla 1953); KNIGHT v STATE, 97 So2d 115 (Fla 1957); KIMBLE v STATE, 537 So2d 1094 (2DCA 1989); BADA v STATE, 573 So2d 454 (3DCA 1991); SHEFFIELD v STATE, 16 F.L.W. D1222 (1DCA 1991); McCOY v STATE, 16 F.L.W. D935 (1DCA 1991); GARDNER v STATE, 530 So2d 404 (3DCA 1988); SCOTT v STATE, 552 So2d 1136 (3DCA 1989). Likewise respecting Appellant's demand to have LOSEY recalled for cross-examination when the 'tapes' were to be published to the jury. ACREE v STATE, 15 So2d 262 (Fla 1943); HALL v STATE, 381 So2d 683 (Fla 1979); DAVIS v STATE, 379 So2d 1017 (5DCA 1980).

It is too submitted that the judge's unnecessary rebuke and demeanment of Appellant's counsel in the jury's presence, as well as the judge's gratuitous comments on testimony, is reversible error. McCRAE v STATE, 549 So2d 1122 (3DCA 1989); LEE v STATE, 324 So2d 694 (1DCA 1976); ALVAREZ v STATE, 574 So2d 1119 (3DCA 1991).

A new trial is warranted.

CONCLUSION

WHEREFORE, upon the foregoing, the judgments and sentence ought be reversed, a new trial be granted or Appellant discharged.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL, 33401 this 30 September 1991.

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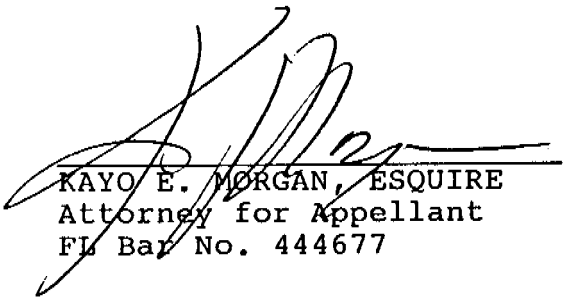

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2.04(e) DEFENDANT'S STATEMENTS

A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.

Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily and freely made.

In making this determination, you should consider the total circumstances, including but not limited to:

1. Whether, when the defendant made the statement, he had been threatened in order to get him to make it, and

2. Whether anyone had promised him anything in order to get him to make it.

If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.