APPENDIX A

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PHIL MIRANDA LUNA, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D16-4073

Opinion filed May 18, 2018.

Appeal from the Circuit Court for Polk County; John K. Stargel, Judge.

Daniel F. Daly, Gainesville, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

KELLY, KHOUZAM, and BADALAMENTI, JJ., Concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF THE STATE
OF FLORIDA IN AND FOR POLK COUNTY

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO.: 12CF-4889

PHIL MIRANDA LUNA,

Defendant. /

TRIAL HELD ON APRIL 26, 27 & 28, 2016

BEFORE THE HONORABLE JOHN K. STARGEL

VOLUME IV

REPORTER: KIMBERLY B. BIVENS

**McGill & Associates Professional
Reporting Services, Inc.
Bartow, Florida 863-533-4642**

* * *

[936] THE COURT: Well, that's the question I have for you, though.

MR. DALY: Okay. So get on the witness stand and say, this is what I believed, he's going forward with showing a lack of predisposition. If he were to deny or admit – let's say he admitted, well, I had no predisposition, not then, but somehow I was convinced, then the state could come back and use that being

convinced as evidence of predisposition, because that also is one of the things that the cases would say is that somebody just bites the hook rapidly and runs with it and makes no protestation and can't bear the burden of showing lack of predisposition or anything else. Well, they might not even get the instruction. Even if it would be easy to show predisposition. So we're caught between a rock and a hard place on the Munoz case and the predisposition, so that's just one further reason why the Seo case –

THE COURT: Can I interrupt you? Okay. What says the defense to the differentiation in the statute between Count 1 and Count 2?

You know, Seo seems to indicate on the issue of believing, it says it is believed by the defendant to be a child. That's the material [937] element of the crime. Aren't you in essence arguing that – I mean, in order to prove entrapment, there has to be a crime committed. You're arguing there was never a crime committed, because this is all just role playing, bravado or doing this. We have gone to great lengths on that through the testimony. But then you want to argue alternatively that if the jury finds that there was entrapment – that if there was a crime committed, that he was entrapped.

How do you differentiate Seo from the facts here?

MR. DALY: Well, the same way that the – it would almost be easier for me just to say, we adopt the dissent. Okay? The dissent –

THE COURT: I agree with you. I think that would be the easiest thing, if that is what you are arguing, because then the Second DCA will decide if – I mean, I am obligated to follow the law. And you are asking me to follow the dissent.

MR. DALY: Well, what I'm asking you to follow is the Florida Supreme Court, because they didn't follow the Florida Supreme Court.

THE COURT: Let me read from Wilson.

MR. DALY: Also I'd like you to follow Morgan [938] v. State, which is a different district dealing with the same thing.

THE COURT: Morgan v. State was dealing with the same general facts, but here is where I'm looking at it differently from some of my good friends that wrote this opinion, including Judge Lawson and others.

You know what they specifically say here, Morgan expressed reservations and it was equivocal in his responses. We recognize that most within our society would immediately terminate the conversation and perhaps the jury will reflect the defense. However, there is at least some evidence to suggest this.

Now, in this case here, and I think it is important for me to highlight that, because I have read that case looking at the factual distinctions. Here Morgan was expressing desire to have sex with the mother and repeatedly expressed reservations about the daughter, but did not terminate the dialogue. He indicated his

desire to be intimate with the mother and kept hedging on any involvement with the daughter, suggesting he wanted to start with the mother and see where it went from there. And at no time did Morgan agree to a sexual [939] encounter with the daughter. I think that's the critical element here.

In Morgan, at no time did Morgan agree to a sexual encounter with the daughter. Here we have a defendant who has agreed to teach oral sex, has talked about the positions of being on top with the daughter, not the mother. And then getting to the further portion where they say under footnotes – or headnotes three and four, you know, Morgan expressed reservations and was equivocal in his responses.

Here the only equivocation that I see has to do with whether they are really law enforcement and whether he would get caught, not whether he wasn't sure about that.

Now, I did note that there was one time, and I can't remember which number it was, it was towards the end about when you get here or maybe it was on the phone call, but the mother –

MR. DALY: Jessica.

THE COURT: – Jessica saying she wants to talk to Holly about it and make sure beforehand, making sure it is an enjoyable experience. But I see that as a definite distinction. And then you said we should also follow the Wilson case, the [940] Florida Supreme Court case, that states: Thus we conclude that a

request for an instruction on entrapment when there is evidence to support the defense should be refused only if the defendant has denied under oath the acts constituting the crime that is charged.

MR. DALY: Again acts. Okay. We're not denying acts. We're not denying the use of the computer. We're not denying writing the e-mails, receiving the e-mails. Not even denying the words that are used. Okay? Denying a mental – we're not denying driving. We're not denying Skittles and condoms. What is being denied is the mental state and the belief, what was going on in his mind. And, again, and that likewise with the Count 1, attempted capital sexual battery, denying intent.

Now with regard to – we may want to talk about that a little bit later, but the jury instruction as it stands can't be proven without some sort of argument, well, it is based on his belief or his intent. Then, again, he's denying his intent and entrapment.

And the entrapment from the broad perspective is that he was lured in to a scenario. And there [941] is no question it was a scenario where there were communications that were untruthful, deceitful communications, misrepresentations. And that there were lures placed that the state broke with its own rules and due process rules and instead of waiting –

THE COURT: Its own due process rules being?

MR. DALY: Well, all right, I'll withdraw due – its own rules. Well, yeah, and due process rules.

THE COURT: For the record, specifically which rules are you referring to?

MR. DALY: One of the inducements, as a matter of law, under Farley and Beatty, in this area, is an assurance of protection from law enforcement, the scrutiny of law enforcement to keep saying, no, you'll never be caught. And that has been addressed in Sorrel's (phonetic) to begin with. Sherman followed up. Those are two United State Supreme Court cases that establish the defense of entrapment.

Jacobson also recognized that, that –

THE COURT: Well, I understand and you're going far afield here from what I see as controlling authority in the state. Wilson as [942] interpreted by Morgan and the distinctions that I said I see between Morgan and the similarities that you have in Seo, and the same defense of the role playing that they use in the Seo case.

MR. DALY: Well, I would also argue that Matthews v. United States –

THE COURT: Well, Matthews was decided before Wilson and the Florida Supreme Court was interpreting the U.S. Supreme Court in its Wilson decision. So I think that has already been considered as part of what Justice Grimes wrote in his opinion in Wilson.

MR. DALY: Okay. But ultimately I think particularly in light of Munoz – Munoz –

THE COURT: Munoz.

MR. DALY: – which is Morgan v. State.

THE COURT: Right, I just referenced Morgan v. State is the Fifth DCA case, right?

MR. DALY: And I believe that also cited Matthews. In light of what was said by Munoz, the entrapment is a product of the United States Supreme Court, in a due process argument. It is a constitutional argument. And it is defined by the United States Supreme Court and that's what Munoz was saying.

[943] And then Matthews versus United States further defines a portion of the – when the defense is available. And the United States Supreme Court says, the state or the government must prove the elements of the crime, even if denied by the defendant, and the defendant may still receive an entrapment instruction, if the defendant has shown these other things.

THE COURT: Well, I guess where that leaves us – does the state have anything further?

MS. SMITH: No, Your Honor. Only that it is the state's position that the defendant's role playing defense in essence is an unequivocal denial of Counts 1 and 2 of the traveling to meet a minor charge and Counts 1 and 2, attempt to commit sexual battery.

THE COURT: Are you saying elements 1 and 2?

MS. SMITH: Elements 1 and 2, not counts. Yes, elements 1 and 2.

THE COURT: I believe that the state's position is consistent with the law as I view it in my consideration of Wilson, as it interpreted Matthews, as Wilson was interpreted by Morgan, and as I said, differentiated in the factual scenarios based on the defendant's indications in that case [944] of a willingness – not to travel to meet a minor, but to travel to meet a mother and not to have sex with a minor, but to have sex with the mother and then have that.

Obviously in reading that appeal, we're not – we don't have the benefit of all of the underlying facts of that case, but I do have the underlying facts of this case with, you know, phone conversations and other things that he's now saying he knew all along that those weren't – that that was an adult. This was just role playing.

And based on Seo and the other cases, he is – his theory of defense is that he didn't commit the crimes charged, including the material elements on both of these. So I'm granting the state's request and denying the entrapment instruction.

And I think with that, we're ready to proceed with Mr. Luna's testimony.

Anything further?

MS. SMITH: No, sir.

THE COURT: Bring in the jury.

* * *

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

August 03, 2018

CASE NO.: 2D16-4073
L.T. No.: 12-CF-4889

PHIL MIRANDA LUNA v. STATE OF FLORIDA

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motions for written opinion, certification of conflict and rehearing en banc are denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Susan D. Dunlevy, A.A.G.
Daniel F. Daly, Esq.
Stacy Butterfield, Clerk

mep

/s/ Mary Elizabeth Kuenzel [SEAL]
Mary Elizabeth Kuenzel
Clerk

APPENDIX D

COURT OF APPEAL
SECOND DISTRICT
LAKELAND, FLORIDA

PHIL MIRANDA LUNA
Defendant/Appellant

-vs-

STATE OF FLORIDA
Plaintiff/Appellee

Appeal 2D16-4073
10th Cir. 12 CF 4889

MOTION FOR WRITTEN OPINION; MOTION FOR CERTIFICATION OF CONFLICT; MOTION FOR REHEARING EN BANC

Appellant, PHIL MIRANDA LUNA, by and through undersigned counsel, by this motion, pursuant to Florida Rule Appellate Procedure § 9.330, requests a certification of conflict, a written opinion, and, pursuant to Florida Rule Appellate Procedure § 9.331, a rehearing en banc. As grounds therefor, Appellants states:

1. This Court on May 18, 2018, per curiam affirmed, without opinion, Luna's conviction following a jury trial for attempted capital sexual battery, in violation of §§ 794.011(2)(a) and 777.04(1), Fla. Stat. (2012), and traveling to meet a minor, in violation of § 847.0135, Fla. Stat., as well as the seventeen-year sentence and sexual predator and sexual offender designations.

2. Luna appealed the trial court's refusal to give Luna's requested standard jury instruction 3.6(j) on entrapment. The trial court cited as controlling precedent *Seo v. State*, 143 So.3d 1189 (Fla. 1st DCA 2014), *quashed* SC14-1803 (Apr. 28, 2016). The state defended the trial court's assertion that *Seo* was controlling, citing *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). But that is untrue because *Seo* is in direct conflict with *Morgan v. State*, 112 So. 3d 122, 123 (Fla. 5th DCA 2013), which is more factually similar to Luna's case. *Morgan* overturned a trial court's refusal to give an entrapment instruction for an accused who denied intent to engage in sex with a minor after responding to an ad for a casual encounter with a mom seeking a man "to share intimate family fun" with her underage daughter. *Id.* at 123

3. *Seo* also is in direct conflict with *State v. Wilson*, 577 So. 2d 1300 (1991), which holds that "a request for an instruction on entrapment when there is evidence to support the defense should be refused only if the defendant has denied under oath the acts constituting the crime that is charged." 577 So. 2d at 1302. Luna did not deny any of the acts alleged; he denied elemental mental states, which is permitted.

4. The trial court here rejected *Morgan*, relying instead on *Seo*, in which a fractured panel affirmed denial of an entrapment instruction, explaining in an unconvincing footnote that *Morgan* was inapposite to an accused who said he believed he "was communicating with and traveling to meet an adult who was 'role-playing,' and not a minor." Because Seo denied the

existence of an element of § 847.0135, Fla. Stat., the *Seo* court claimed *Wilson v. State,* 577 So.2d 1300, 1302 (Fla. 1991), required denial of the entrapment instruction. 143 at 1190 n.1. That is not *Wilson's* holding.

5. *Wilson* clearly states that a request for an entrapment instruction supported by evidence "should be refused only if the defendant has denied under oath the ***acts*** constituting the crime that is charged." 577 So. 2d at 1302 (emphasis added). As Judge Robert Benton argued in his *Seo* dissent, the majority ignored the Florida Supreme Court's admonition that "'[a]sserting the entrapment defense is not necessarily inconsistent with denial of the crime even when it is admitted that the requisite acts occurred, for the defendant might nonetheless claim that he lacked the requisite ***bad state of mind***.'" *Seo,* 143 So. 3d at 1194 (emphasis added), citing *Wilson*, 577 So. 2d at 1302. *Wilson* draws a distinction between a defendant who claims entrapment but denies an elemental criminal act (*actus reus*), and a defendant who claims entrapment and denies an elemental mental state (*mens rea*). *Wilson* cites *Mathews v. United States*, 485 U.S. 58, 62-63 (1988), as a "good illustration" of a defendant who admitted the act (accepting a loan), but denied criminal intent (in exchange for government favor upon the lender). 577 So. 2d at 1301-02. *Wilson* also cited with approval *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (defendant may claim entrapment while denying criminal intent, so long as he does not deny committing the acts charged).

6. Wilson also quoted at length from the respected LaFave and Israel treatise:

> In any event, where the circumstances are such that there is no inherent inconsistency between claiming entrapment and yet not admitting commission of the criminal acts, certainly the defendant must be allowed to raise the defense of entrapment without admitting the crime. Thus, the inconsistency rule does not apply when the government in its own case in chief has interjected the issue of entrapment into the case. And if a defendant testifies that a government agent encouraged him to commit a crime which he had never contemplated before that time and that he resisted the temptation nonetheless, there is nothing internally inconsistent in thereby claiming entrapment and that the crime did not occur. **Asserting the entrapment defense is not necessarily inconsistent with denial of the crime even when it is admitted that the requisite acts occurred, for the defendant might nonetheless claim that he lacked the requisite bad state of mind.**

Id. at 1302 (quoting W. LaFave and J. Israel, Criminal Procedure section 5.3, at 254-55 (1985) (emphasis added).

7. "The issues of fact in a criminal trial are usually developed by the evidence adduced and the court's instructions to the jury. A simple plea of not guilty . . . puts the prosecution to its proof as to all elements of

the crime charged, and raises the defense of entrapment." *Mathews*, 485 U.S. at 64-65. "To require a defendant to admit elements of a crime in order to claim entrapment violates the Fifth Amendment to the U.S. Constitution." *Henry*, 749 F.2d at 211; *see also* Art. I, § 9, Fla. Const.

8. Luna admitted his acts: he wrote emails, sent a picture, talked on the telephone, bought condoms and Skittles, and traveled to the arrest house. What he denied was a belief that there would be an 11-year-old girl there and having any intent to engage in sex with an 11-year-old girl. He thought he was engaging in a role-play, spun by the undercover deputy. Appellant's brief clearly shows cognizable inducement and persuasion, as well as a lack of predisposition: Luna has no prior criminal record of any sort, much less one involving sex with minors. He was lured into committing this crime while answering an innocuous Craigslist ad for adult companionship on a page closed to minors. Luna was entitled to an entrapment instruction and the trial court erred egregiously in denying his request for it.

9. This denial was in direct conflict with our Supreme Court's teaching in *Wilson* and the Fifth DCA's opinion in *Morgan v. State*, *supra*. Moreover, *Seo*, on which the trial court relied, has been quashed by the Supreme Court and thus ceases to be precedent. The trial court's ruling is thus supported by no Florida precedent—indeed by no precedent anywhere. By affirming the trial court's denial of an entrapment instruction, the panel has made a ruling with absolutely no precedential support and created a conflict with

Wilson and *Morgan*. Petitioner is entitled to a fair shot at further review by the Florida Supreme Court. But such review is effectively precluded by the panel's failure to publish an opinion explaining its reasons.

10. The Florida Supreme Court's jurisdiction is limited (in relevant part) to cases where a decision of a District Court of Appeal "expressly and directly conflict[s] with a decision of other district courts of appeal or of the supreme court on the same question of law" or is "certified to be in direct conflict with decisions of other district courts of appeal." Fla. R. App. Proc. 9.030 (a)(2)(iv), (vi); Fla. Const. Art. V §§(3),(4). The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *Dept. of Health and Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (rejecting "inherent" or "implied" conflict). The record alone cannot be used to establish jurisdiction. *Reaves*, 485 So. 2d at 830; *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) ("We here address the question whether this Court currently has jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. We answer the question in the negative.")

11. By affirming the trial court's incorrect ruling in a one-word per curiam opinion, failing to acknowledge and confront the conflict with *Wilson* and *Morgan* or the absence of any supporting authority, the panel in this case has denied Luna's right to due

process, as guaranteed to him both by the Florida Constitution, Fla. Const. Art.I, §9, and the United States Constitution, U.S. Const., Amend. V, XIV. *See Anastasoff v. United States*, 223 F.3d 898, 914 (8th Cir.) (failure to decide a case by a precedential opinion "exceeds the judicial power, which is based on reason, not fiat"), vacated as moot, 235 F.3d 1054 (8th Cir. 2000).

12. Luna, a life-long, law abiding native of California and visitor to Florida who did nothing whatsoever to raise suspicion that he had a predisposition to pedophilia, will spend 17 years in prison if his conviction and sentence stand. When he gets out, he will be subject to 10 years of probation, and for the rest of his time on earth he will stand designated as a sexual predator. This conviction was obtained only because the trial court followed a now-quashed opinion that is in direct conflict with opinions of the Florida Supreme Court and the Fifth District Court of Appeal, depriving Luna of his sole defense: that he was an innocent entrapped by overzealous police. The least this court must do is to give Luna a reasoned explanation as to why his conviction is nonetheless lawful, including an acknowledgment that the panel's ruling conflicts with *Wilson* and *Morgan*. Indeed, appellant respectfully requests that this court certify, pursuant to Fla. R. App. Proc. 9.030 (a)(2)(vi), that its decision is "in direct conflict with decisions of other district courts of appeal," *viz Morgan v. State*, 112 So. 3d 122 (Fla. 5th DCA 2013).

13. Pursuant to Florida Rule of Appellate Procedure 9.330:

> I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because this Court's per curiam affirmance is in conflict with *Wilson v. State*, 577 So.2d 1300 (Fla. 1991); *Morgan v. State*, 112 So. 3d 122 (Fla. 5th DCA 2013); *Medina v. State*, 634 So.2d 1149 (Fla. 4th DC 1994); *Terwilliger v. State*, 535 So.2d 346 (Fla. 1st DCA 1988); and *Mathews v. United States*, 485 U.S. 58 (1988).

14. Appellant, PHIL MIRANDA LUNA, also moves for rehearing en banc pursuant to Florida Rule of Appellate Procedure 9.331(d) in the above-styled cause and states:

> I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

WHEREFORE, counsel prays certification of conflict, a written opinion and a rehearing en banc.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was emailed to Susan Dunlevy, Assistant Attorney General, contemporaneously and concomitant to filing using the eDCA portal.

Respectfully submitted:

June 2, 2018

s/ *Daniel F. Daly*

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APPENDIX E

Is the Entrapment Defense Available to a Defendant who denies committing the crime?

AL	*Lambeth v. State*, 562 So.2d 575, 578 (Ala. 1990)	No
AK	*State v. Yi*, 85 P.3d 469, 471 (Alaska 2004)	Yes
AZ	*State v. Gray*, 239 Ariz. 475, 476, 372 P.3d 999, 1000 (Ariz. 2016)	No
AR	*Smoak v. State*, 2011 Ark. 529, 538-39, 385 S.W.3d 257, 263 (2011)	Yes
CA	*People v. Barraza*, 23 Cal.3d 675, 687, 591 P.2d 947, 954 (Cal. 1979)	Yes
CO	*People v. Hendrickson*, 45 P.3d 786, 790 (Colo. App. 2001)	No
CT	*State v. Wilder*, 128 Conn. App. 750, 755, 7 A.3d 1116, 1120 (Conn. App. Ct. 2011)	Yes
DE	*State v. Brown*, 287 A.2d 400, 402 (Del. 1972)	Yes
FL	*Wilson v. State*, 577 So.2d 1300, 1302 (Fla. 1991)	?
GA	*Hawkins v. State*, 255 Ga. 172, 336 S.E.2d 220 (Ga. 1985)	No
HI	*State v. Powell*, 68 Haw. 635, 637, 726 P.2d 266, 267 (Haw. 1986)	Yes
ID	*Suits v. State*, 143 Idaho 160, 164, 139 P.3d 762, 766 (Idaho Ct. App. 2006)	No

IL	*People v. Gulley*, 36 Ill.App.3d 577, 584, 344 N.E.2d 567, 573 (Ill. App. Ct. 1976)	No
IN	*Strong v. State*, 591 N.E.2d 1048, 1052 (Ind. Ct. App. 1992)	Yes
IA	*State v. Babers*, 514 N.W.2d 79, 83 (Iowa 1994)	Yes
KS	*State v. Rogers*, 234 Kan. 629, 631, 675 P.2d 71, 73 (Kan. 1984)	No
KY	*Morrow v. Comm.*, 286 S.W.3d 206, 213 (Ky. 2009)	Yes
LA	*State v. Lewis*, 01-1084 (La.App. 5 Cir. 3/13/02), 815 So.2d 166, 171	Yes
ME	*State v. Audette*, 797 A.2d 742, 745 (Me. 2002)	Yes
MD	*Sparks v. State*, 91 Md.App. 35, 66, 603 A.2d 1258, 1273 (Md. Ct. Spec. App. 1992)	Yes
MA	*Comm. v. Tracey*, 416 Mass. 528, 534, 624 N.E.2d 84, 88 (Mass. 1993)	Yes
MI	*People v. D'Angelo*, 401 Mich. 167, 178, 257 N.W.2d 655, 660 (Mich. 1977)	Yes
MN	*State v. Abraham*, 335 N.W.2d 745, 747 (Minn. 1983)	Yes
MS	*Tate v. State*, 912 So.2d 919, 925 (Miss. 2005)	Yes
MO	*State v. James*, 271 S.W.3d 638, 640 (Mo. 2008)	No

MT	*State v. Lindquist*, 390 Mont. 329, 336, 413 P.3d 455, 459 (Mont. 2018)	Yes
NE	*State v. Wilmore*, 192 Neb. 807, 816, 224 N.W.2d 756, 760 (Neb. 1975)	No
NV	*Foster v. State*, 116 Nev. 1088, 1091, 13 P.3d 61 (Nev. 2000)	Yes
NH	*State v. Larose*, 157 N.H. 38, 35, 944 A.2d 566, 572 (N.H. 2008)	Yes
NJ	*State v. Branam*, 161 N.J.Super. 53, 59, 390 A.2d 1186, 1190 (N.J. Super. Ct. App. Div. 1978)	Yes
NM	*State v. Rodriguez*, 107 N.M. 611, 616, 762 P.2d 898, 903 (N.M. Ct. App. 1988)	No
NY	*People v. Butts*, 72 N.Y.2d 746, 533 N.E.2d 660 (N.Y. 1988)	Yes
NC	*State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 375 (N.C. 1981)	No
ND	*State v. Hammeren*, 655 N.W.2d 707, 709 (N.D. 2003)	Yes
OH	*State v. Thompson*, 87 Ohio App.3d 570, 581, 622 N.E.2d 735, 742 (Ohio Ct. App. 1993)	No
OK	*Allen v. State*, 734 P.2d 1304, 1308 (Okla. Crim. App. 1987)	No
OR	*State v. Smith*, 107 Or.App. 647, 651, 813 P.2d 1086, 1088 (Or. Ct. App. 1991)	Yes

PA	*Comm. v. Weiskerger*, 520 Pa. 305, 312-13, 554 A.2d 10, 14 (Pa. 1989)	Yes
RI	*State v. Verrecchia*, 766 A.2d 377, 387 (R.I. 2001)	Yes
SC	*State v. Haulcomb*, 260 S.C. 260, 265, 195 S.E.2d 601, 603 (S.C. 1973)	No
SD	*State v. Goodroad*, 442 N.W.2d 246, 249 (S.D. 1989)	Yes
TN	*State v. Blackmon*, 787 S.W.3d 322, 329 (Tenn. Crim. App. 2001)	Yes
TX	*Moreno v. State*, 860 S.W.2d 612, 614 (Tex. Crim. App. 1993)	No
UT	*State v. Martinez*, 848 P.2d 702, 706 (Utah Ct. App. 1993)	Yes
VT	*State v. George*, 157 Vt. 580, 583, 602 A.2d 953, 955 (Vt. 1991)	Yes
VA	*Schneider v. Comm.*, 230 Va. 379, 382, 337 S.E.2d 735, 736 (Va. 1985)	Yes
WA	*State v. Matson*, 22 Wash.App. 114, 121, 587 P.2d 545 (Wash. Ct. App. 1978)	No
WV	*State v. Houston*, 197 W.Va. 215, 223, 475 S.E.2d 315 (W.Va. 1996)	No
WI	*State v. Schuman*, 226 Wis.2d 398, 402, 595 N.W.2d 86, 89 (Wis. Ct. App. 1999)	Yes
WY	*Rivera v. State*, 846 P.2d 1, 2 (Wyo. 1993)	Yes