IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

THADDEUS TYRONE HOLLIDAY,
ALVIN L. TOWNSEND,
JAMES W. JACKSON,

Respondents.

CASE NO.: 63,832

RESPONDENTS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondents accept Petitioner's preliminary statement as being substantially correct.

STATEMENT OF THE CASE AND FACTS

Respondents accept the statement of the case and facts in Petitioner's brief with the following exceptions and additions: This Court accepted jurisdiction to hear Cruz v. State, Case No. 63,451 on July 12, 1983. The Cruz case constitutes the basis of the conflict with the present cases.

Respondents take issue with Petitioner's statement of the "Point on Appeal." Respondents submit the issue for this court to decide is:

> Whether, under the facts of the instant cases, the First District Court of Appeal in these cases and State v. Casper, 417 So. 2d 263 (Fla. 1st DCA 1982), cert. denied, 418 So. 2d 1280 (Fla. 1982) correctly decided that entrapment existed as a matter of law pursuant to a Rule 3.190(c)(4) Florida Rules of Criminal Procedure motion or whether these facts presented a jury question as decided by the Second District Court of Appeal in State v. Cruz, 426 So. 2d 1308 (Fla. 2d DCA 1983).

ISSUE FOR REVIEW

WHETHER, UNDER THE FACTS OF THE INSTANT CASES, THE FIRST DISTRICT COURT OF APPEAL IN THESE CASES AND STATE V. CASPER, 417 SO. 2D 263 (FLA. 1ST DCA 1982), CERT. DENIED, 418 SO. 2D 1280 (FLA. 1982) CORRECTLY DECIDED THAT ENTRAPMENT EXISTED AS A MATTER OF LAW PURSUANT TO A RULE 3.190(c)(4) FLORIDA RULES OF CRIMINAL PROCEDURE MOTION OR WHETHER THESE FACTS PRESENTED A JURY QUESTION AS DECIDED BY THE SECOND DISTRICT COURT OF APPEAL IN STATE V. CRUZ, 426 SO. 2D 1308 (FLA. 2D DCA 1983)

The tempter or the tempted, who sins most?
Shakespeare, "Measure for Measure."
Act. ii, Sc. 2, l. 163

ARGUMENT

This appeal gives the Court the opportunity to delineate the boundaries of civilized and morally acceptable police conduct. This Court must decide whether (1) the trial court, under the facts of these cases, could find entrapment as a matter of law in Rule 3.190(c)(4) Florida Rules of Criminal Procedure (hereafter Rule 3.190(c)(4)) motion and (2) if the facts of the instant cases are clear and convincing evidence of entrapment as a matter of law.

I. ENTRAPMENT AS A MATTER OF LAW IN A RULE 3.190(c)(4) MOTION

A. A Determination of Intent or Predisposition in a Rule 3.190(c)(4) Motion

If entrapment can exist as a matter of law, then a trial judge can consider this issue in a 3.190(c)(4) motion. The exact purpose of a 3.190(c)(4) motion is to test whether certain undisputed facts constitute a prima facie case as a matter of law. State v. Davis, 243 So. 2d 587 (Fla. 1971); State v. Pettis, 397 So. 2d 1150 (Fla. 5th DCA 1981); Ellis v. State, 346 So. 2d 1044 (Fla. 1st DCA 1977). The court in State v. Cruz, 426 So. 2d 1308 (Fla. 2d DCA 1983) and Respondent readily concede that entrapment can exist as a matter

of law, State v. Casper, 417 So. 2d 263 (Fla. 1st DCA 1982), cert. denied, 418 So. 2d 1280 (Fla. 1982); State v. Rouse, 239 So. 2d 79 (Fla. 4th DCA 1970). Respondent also concedes that once the accused raises a valid claim of entrapment, the state must show predisposition by the accused, State v. Casper, supra at 265; Dupuy v. State, 141 So. 2d 825 (Fla. 3rd DCA 1962).

The state can demonstrate predisposition by (1) proof of the defendant's prior criminal activities, (2) his reputation for such activities, (3) reasonable suspicion of his involvement in such activity, or (4) his ready acquiescence in the commission of the crime. Story v. State, 355 So. 2d 1213 (Fla. 4th DCA 1978). The First District Court of Appeal in these cases and State v. Casper, supra held the facts of the instant cases presented a valid claim of entrapment. The Court then concluded the defense would prevail unless the state made some claim of predisposition by the accused. State v. Casper at 265.

The Casper court held that a 3.190(c)(4) motion was a proper vehicle to test predisposition because:

> "Upon this record, we are unable to find any evidence which would tend to show predisposition so as to defeat a motion to dismiss under Rule 3.190(c)(4), . . .There is no evidence of any prior conduct of the defendant that would have shown predisposition. There is no evidence that he was engaging in criminal activity before he took the money from the decoy. See Dupuy, supra. No ready acquiescence is shown; on the contrary, the defendant's acts, as stated in the motion, demonstrate only that he succumbed to temptation." 417 So. 2d at 265.

The Casper court only held that, under the facts of that case, the state could not make a prima facie showing of predisposition under Story v. State.

If a trial judge denied a 3.190(c)(4) motion with facts similar to the instant cases, the only fact the jury could use to determine predisposition is the commission of

the crime by the accused. The state must also make a showing of predisposition that is not mere surmise and speculation that the intent to commit the crime originated in the mind of the accused and not the police. Dupuy v. State, supra. The facts of the instant case do not unequivocally suggest that the criminal design originated in the mind of the accused. A poor and hungry man walking down the streets of Jacksonville may not have even contemplated theft until he saw the money protruding from the pocket of the drunken bum. The opportunity to obtain money to purchase some food might also have convinced the person to commit theft.

If the state could show that (1) the accused had engaged in this type of "bum rolling" before or (2) the police designed the decoy to catch a particular suspected criminal or (3) the accused had a reputation for such activities, it could make a sufficient showing of predisposition to send the case to a jury. See Drayton v. State, 292 So. 2d 395 (Fla. 3rd DCA 1974), cert. denied, 300 So. 2d 900 (Fla. 1974); Marion v. State, 287 So. 2d 419 (Fla. 4th DCA 1974) cert. denied, 294 So. 2d 91 (Fla. 1974). A jury could decide whether the accused had the predisposition to commit the crime before he viewed the drunken wino.

The Second District Court of Appeal in State v. J.T.S., 373 So. 2d 418 (Fla. 2d DCA 1979) held intent is not a proper issue for a 3.190(c)(4) motion because intent derives from the acts of the parties and the surrounding circumstances. In State v. J.T.S., supra, the state filed a traverse specifically denying facts in the motion to dismiss. The court consequently held the issues in the motion were jury questions.

The motion to dismiss alleged the accused did not willfully or maliciously commit criminal mischief by "rocking and moving" a car. The Court, in dicta, stated that because the sole basis of the motion was intent to damage the car, intent was not a proper consideration for a 3.190(c)(4) motion. The Court also noted that the trier of fact must infer intent from the acts committed and the surrounding circumstances.

The Casper court directly considered the case of State v. J.T.S., supra, and the determination of predisposition in a 3.190(c)(4) motion. The Casper court stated:

> ". . .while entrapment is normally a question for the jury, the trial judge may pass on the issue as a matter of law where the evidence is clear and convincing. See State v. Rouse, supra. Here, under no reasonable construction of the facts of record could the state establish a prima facie case for predisposition. Therefore, we conclude that the holding of State v. J.T.S., supra, is inapplicable here. 417 So. 2d at 256-66 (emphasis supplied).

The Fourth District Court of Appeal in State v. Gaines, 431 So. 2d 736 (Fla. 4th DCA 1983) held that intent, under the facts of that case, was a proper consideration for a 3.190(c)(4) motion. In Gaines, supra, the facts established that the accused talked to a "hit man" about maiming her stepson at some time in the future. The state charged her with solicitation of a crime, Section 774.04(2), Florida Statutes (1981). The facts also established that the accused would make her decision about whether the "hit man" should proceed at some time in the future.

Judge Glickstein noted for the court:

> "We recognize that intent is normally not an issue to be decided by a motion to dismiss filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). (citations omitted). . . However, in this case, the transcripts of the conversation establish, without question, that appellee would decide at a later date if she wished the "hit man" to proceed. Accordingly, the record establishes as a matter of law the absence of any present intent by appellee that another person commit a crime — today or in the future. 431 So. 2d at 737.

The Gaines case establishes the principle that certain factual contexts preclude a finding of a prima facie case of intent; a court can then determine lack of intent in a 3.190(c)(4) motion. The Casper court held that under the facts of this decoy operation, the state could not make a prima facie case on predisposition.

B. The Difference Between Criminal Intent and Predisposition

Criminal intent is significantly different from predisposition in an entrapment case. Criminal intent is the state of mind of the accused at the time of the crime. Predisposition is the state of mind of the accused before he commits the crime. There is no question that Respondents intended to take the money from the "drunken wino" decoy. The issue is whether Respondents had the desire or inclination to steal money before they saw the money protruding from the pocket of the decoy.

Criminal intent is usually not a proper issue for a 3.190(c)(4) motion because:

> . . .intent is usually inferred from the acts of the parties and the surrounding circumstances; being a state of mind, intent is a question of fact to be determined by the trier of fact, who has the opportunity to observe all of the witnesses. State v. J.T.S., 373 So. 2d 418, 419, (Fla. 2d DCA 1979).

The trier of fact must examine the acts of the parties and the attendant circumstances to the crime to determine intent. The case of State v. Evans, 394 So. 2d 1068 (Fla. 4th DCA 1981) is a good example of why intent is usually a jury question. In Evans, supra, the state charged the defendant with entering a motel bar-storeroom with the intent to commit theft. Evans filed a sworn motion to dismiss alleging, inter alia, that he was a guest of a motel, he entered the storeroom thinking it was a bathroom and there were no signs of the door to the storeroom.

The Evans court held the issue of intent was a jury question. The trier of fact did not have to believe Evans' story. The jury would have to examine Evans' story and the surrounding circumstances to determine intent. The issue of predisposition in the instant cases is quite different from the issue of intent in Evans. First, the trier of fact must find predisposition by (1) evidence of prior convictions or arrests for similar crimes (2) reputation for engaging in certain illicit activities (3) reasonable suspicion of criminal activity (4) ready acquiescence in the commission of the crime. Story v. State, supra.

Second, the First District Court of Appeal in these cases did not find that Respondents lacked predisposition to commit the crime. The Court only held that unless the state made some allegation of predisposition under Story, the defense of entrapment would prevent conviction.

The trier of fact in the instant cases would not have any objective facts from which it could infer predisposition. None of the Respondents had prior convictions for the type of crime presented by the decoy. In fact, except for Respondent Townsend, none of the Respondents or Mr. Casper had any type of criminal record. Respondents did not have reputations for engaging in such activities. The police had no suspicions that Respondents had committed any type of crimes. The facts of these cases do not establish ready acquiescence in the commission of the crime. As the court noted in State v. Casper, supra, at 265, "No ready acquiescence is shown; on the contrary, the defendant's acts, as stated in the motion, demonstrate only that he succumbed to temptation." The facts of the instant cases are virtually identical to Casper.

The only fact from which the jury could possibly infer predisposition is the commission of the crime itself. By definition, the jury cannot consider the act of the crime (except as to ready acquiescence) because predisposition refers to the state of mind before the commission of the crime. If the only proof of predisposition is the crime itself, the defense of entrapment becomes meaningless. See Peters v. Brown, 55 So. 2d 334 (Fla. 1951) Dupuy v. State, supra. (only "evidence" of predisposition was commission of crime. State could not use the commission of the crime to establish predisposition. Therefore, entrapment existed as a matter of law.)

If the state in the instant cases had made any allegation of one of the four criterion listed in Story, the issue of predisposition would have been a jury question. For example, if the state had alleged that one of the Respondents had prior convictions for "rolling drunks" or a reputation for such activity, then a jury question would have existed

on predisposition. The jury would have viewed the defendant testifying as to his predisposition. The jury would have considered the actions of the defendant, the actions of the police and any attendant circumstances. The jury could have then believed or disbelieved defendant's claim of entrapment and lack of predisposition.

The First District Court in these cases held that a jury could not, under any reasonable construction of the facts, find predisposition. See State v. Casper, supra at 265-66. The facts of the instant cases are more analogous to State v. Gaines, supra, than the cases on intent cited by Petitioner. As in Gaines, supra, a trier of fact could not reasonably infer predisposition or intent from the undisputed facts in the motions to dismiss.

The Courts of this State have recognized that criminal intent and predisposition are usually jury questions. However, if the prosecutor cannot make any allegations of predisposition or the undisputed acts of the accused do not evince the requisite intent (as in Gaines), a judge can decide the issue as a matter of law. The holding of the Second District Court of Appeal in Cruz supra on the issue of predisposition is arbitrary and inflexible. The Court appears to formulate a categorical prohibition against a consideration of predisposition in a 3.190(c)(4) motion. This ruling is inconsistent with the Court's prior cases. For example, in State v. Shorette, 404 So. 2d 816 (Fla. 2d DCA 1981) the Court found that, although intent is usually a jury question, the facts on intent in that case were a proper consideration in a 3.190(c)(4) motion.

The Cruz decision is actually not in direct conflict with the Casper case on the issue of predisposition in a 3.190(c)(4) motion. The Cruz court erroneously believed that a factual issue on predisposition existed because the police did not approach nor encourage Cruz to commit the crime. These facts are not a part of the predisposition determination listed in Story v. State, supra. These facts are evidence of the degree of the government instigation and not evidence of the accused's predisposition. Therefore, the First

District's decisions in Casper and the instant cases on predisposition are correct. The trial judge can properly consider the issue of entrapment pursuant to a 3.190(c)(4) motion if the state makes no allegation of predisposition.

The court in Cruz actually held a question of fact existed on predisposition because:

> . . .The police provided an opportunity for Cruz to commit a crime, but there is no showing that he was approached or encouraged by the police to do so. Thus there is a question of acts as to whether Cruz was predisposed to commit the offense.

These facts do not show either (1) prior criminal activity (2) reasonable suspicion of his involvement in such activity (3) reputation for such activity or (4) ready acquiescence. Story v. State, supra. The question of the police not approaching nor encouraging the commission of the crime is an issue of whether the decoy is an improper inducement. The significant point of disagreement between Cruz and Casper is not whether the cases present an issue of fact on predisposition; the courts disagreed on whether the decoy is an improper lure that illegally encourages a citizen to commit a crime. The First District Court of Appeal held that the decoy operation impermissibly encouraged innocent citizens to commit a crime. The Cruz court apparently believes such a decoy operation does not encourage the commission of a crime. Therefore, this court must consider the substantive issue of whether the facts of these cases are clear and convincing evidence of entrapment to resolve the conflict between Cruz and Casper.

C. The Effect of the State's Traverses in the Instant Cases

Petitioner's argument that because the State filed a traverse, the trial court should have automatically denied the 3.190(c)(4) motion is completely without merit. The First District found that no facts were in dispute. Respondents adopted the facts

contained in the "traverse". Consequently, no material facts were in dispute and the trial judge could decide the issue of entrapment as a matter of law. The First District below noted:

> "In this case however, with the approval of the trial court, the state stipulated to the defendant's adoption, as part of their motions to dismiss, of all evidentiary facts alleged in the state's traverse and denial. As a result, no evidentiary facts remained in dispute, and the issue left for decision was whether predisposition to commit the crime was sufficiently shown by the evidence to raise a jury question or shoud be decided against the state as a matter of law under Casper. We see nothing improper in this procedure. A traverse by the State, in order to be effective, must constitute a good faith dispute of material facts. Cf., Fox v. State, 384 So. 2d 226 (Fla. 3d DCA 1980); Ellis v. State, 346 So. 2d 1044 (Fla. 1st DCA 1977); State v. Kemp, 305 So. 2d 833 (Fla. 3d DCA 1975). In stipulating to the amendment of Defendant's motions, the State agreed it had no good faith dispute with the facts as so amended.

The state in the cases below agreed that no material facts were in dispute. The state also agreed to Respondents' adoption of the facts in the traverses. Therefore, the state cannot contend on appeal that facts were in dispute.

II. THE FACTS OF THE INSTANT CASES CONSTITUTE CLEAR AND CONVINCING EVIDENCE OF ENTRAPMENT

> How oft the sight of means to do ill deeds,
> make deeds ill done!
> Shakespeare, "King John" Act iv sc. ii l. 219-220.

The facts of the instant cases constitute clear and convincing evidence of entrapment, irrespective of the Respondents' alleged predisposition. Although the entrapment defense focuses on the predisposition of the defendant to commit a crime, State v. Brider, 386 So. 2d 818 (Fla. 2d DCA 1980); State v. Casper, supra, at 265, entrapment can exist with a predisposed defendant where the governmental activity is so

outrageous or "shocking to the conscience" it violates due process. See United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210 (1932); Spencer v. State, 263 So. 2d 282 (Fla. 1st DCA 1972); Tanford, "Entrapment: Guidelines for Counsel and the Courts," 13 Crim. L. Bull. pg 5-29 (1977). Several courts outside of Florida have found entrapment as a matter of law where the governmental conduct violated the principles of due process. In these cases, the predisposition of the defendant was irrelevant. See e.g, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) State v. McMullen, 216 N.W.2d 375, (Iowa 1974); People v. Turner, 210 N.W.2d 336 (Mich. 1973); United States v. Abbadessa, 470 F.2d 1333 (10th Cir. 1972).

This Court must consider whether the facts of the instant cases are clear and convincing evidence of entrapment even if the court finds there is a jury question on the issue of predisposition. If the Court finds the issue of predisposition does not prevent a consideration of entrapment in a 3.190(c)(4) motion, the court must also determine whether there was clear and convincing evidence of entrapment in these cases.

A. The Standard for Entrapment in Florida

This Court in Lashley v. State, 67 So. 2d 648, (Fla. 1953) established the test for entrapment in Florida. The Court defined entrapment as:

> "One who is instigated, induced or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment. Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent (emphasis in original)." 67 So. 2d at 649.

The Third District Court of Appeal in Dupuy v. State, 141 So. 2d 825 (Fla 3d DCA 1962) added to this test the factor of whether the police detected someone already engaged in

criminal activity. The police in Dupuy, supra, made "spot checks" of dental laboratories to detect unauthorized practice of denistry. A paid police investigator had Dupuy perform services that were the unauthorized practice of dentistry. The investigator later sent another undercover officer to obtain the same services. The Court found these activities to be entrapment as a matter of law:

> "Nor does there appear in the record anything upon which to base a conclusion that the Defendant was engaged in such a course of criminal activity as would indicate the likelihood that he was merely presented with the opportunity to commit a crime which originated in his mind and not in those of the Board's investigators." 141 So. 2d at 82.

The Dupuy court also held that the State must make a showing amounting to more than mere surmise and speculation that the intent to commit crime originated in the mind of the accused and not in the minds of the officers of the government. 141 So. 2d at 827. accord State v. Casper, supra at 265.

Other appellate courts have held that entrapment exists where the criminal design originates with the government and it implants the disposition to commit an offense into the mind of an innocent person. Langford v. State, 111 Fla. 506, 149 So. 570 (Fla. 1933); Roundtree v. State, 271 So. 2d 160 (Fla. 4th DCA 1972); State v. Snail, 323 So. 2d 626 (Fla. 2d DCA 1975). The State cannot use decoys to ensnare innocent and law-abiding persons in to the commission of a crime. State v. Rouse, 239 So. 2d 79 (Fla. 4th DCA 1970). However, the state may use decoys to entrap criminals and present the opportunity to one intending or willing to commit a crime. State v. Rouse, supra, Koptyra v. State, 172 So. 2d 628 (Fla. 2d DCA 1965). The defense of entrapment arises from decency, good faith, fairness and justice. Thomas v. State, 185 So. 2d 745 (Fla. 3rd DCA 1966). Consequently, the Court must consider the conduct of the state agents as well as the defendant's disposition. Id.

This Court last considered the scope of the entrapment defense in State v. Dickinson, 370 So. 2d 762 (Fla. 1979). The Dickinson court held that a high degree of law enforcement participation in the crime did not necessarily constitute entrapment, if the accused had the predisposition to commit the crime. The Court in Dickinson did not address the due process limitations of police instigation and inducement of the commission of a crime.

The defense of entrapment has evolved through the years with minor changes of the basic test delineated in Lashley v. State, supra. The following elements comprise the legal test for entrapment in Florida. A court must decide whether:

1. Police officers lure, instigate or induce a person into committing a crime which he had no prior intention of committing. (lack of predisposition)

2. The criminal design originates in the minds of the police and they implant the disposition to commit an offense into the mind of an innocent person.

3. The individual was engaging in criminal activity prior to police setting the "trap".

4. The evidence of predisposition is more than mere surmise and speculation that the intent to commit the crime originated in the mind of the accused and not in the minds of the officers.

5. The use of decoys ensnared otherwise innocent persons into committing a crime or whether the use of decoys ensnared criminals already engaged in criminal activity.

6. The level of governmental participation violated due process.

This court will have to use the above-listed criterion to determine if the facts of the instant cases are entrapment as a matter of law. Respondents will now review examples of entrapment as a matter of law so the court can see that the conduct of the police in the instant cases transcended the limits of permissible police conduct.

B. Examples of Entrapment as a Matter of Law: The Due Process Limitations on Police Conduct.

> There are no acts of treachery more deeply concealed than those which lie under the pretence of duty or under some profession of necessity.
> Cicero, "In Verrem," no i. ch. 15, sec. 39

1. Examples of Entrapment as a matter of law in Florida.

This Court found entrapment as a matter of law in Peters v. Brown, 55 So. 2d 334 (Fla. 1951), a civil injunction case. The State Board of Dental Examiners suspected, without factual support, that Peters was conducting the unauthorized practice of dentistry. An agent from the Board hired two witnesses for $100.00 to go to Peters' office to solicit dental work. Peters then performed the dental work. Justice Terrell, writing for the court noted:

> "I do not think this court should sanction such apostasy from approved procedure. It is contrary to law and public policy for an officer or member of an administrative board to induce the commission of a wrong or a crime for the purpose of securing a pretext to punish it. In Newman v. United States, 4 Cir., 299 F. 128, 131, it was held that decoys may be used to entrap criminals or present opportunity to one to commit crime, but they are not permissible to ensnare the innocent and law-abiding into the commission of a crime" 55 So. 2d at 336.

As noted earlier, the Third District Court of Appeal found entrapment as a matter of law in Dupuy v. State, supra. The Third District again found entrapment as a matter of law in Thomas v. State, 185 So. 2d 745 (Fla. 3d DCA 1966). In Thomas, supra, the police arrested Thomas and a man named Pope for violation of the State beverage laws. The state agent who arrested Thomas visited him before he got out of jail. The agent wanted to know who was financing Pope's operations. Thomas told the agent he wanted to work for him. The agent told Thomas he could do anything he wanted to as an undercover agent but he was not to engage in the "moonshine" business.

Thomas subsequently informed the agent of the location of Pope's still. The agent eventually arrested Thomas for several beverage law violations. The court held that the actions of the State agents were entrapment and noted:

> "The rule springs from decency, good faith, fairness and justice. It is thus necessary to consider the conduct of the state agents as well as considering the predisposition of the defendant." 185 So. 2d at 745.

The Thomas court concluded that the conduct of Thomas was the product of the creative activities of the State agents. The Court then quoted from Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958):

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute but because even if the guilt be admitted, the methods employed on behalf of the government to bring about conviction can not be countenanced. . .public confidence in the fair and honorable administration of justice upon which ultimately depends the rule of law, is the transcending value at stake." 185 So. 2d at 747.

The First District found entrapment as a matter of law in Spencer v. State, 263 So. 2d 282 (Fla. lst DCA 1972). A female undercover agent met Spencer at a bar. He bought her a beer and invited her to his apartment. While they were at the apartment, Spencer and the agent drank wine and discussed smoking marijuana. Spencer told the agent that a friend had left some marijuana in the apartment. He then removed the marijuana from a closet. Spencer did not have any means to smoke the marijuana so the agent volunteered to go to the store to buy cigarette papers. The agent bought the papers with money given to her by the state. She returned to the apartment with the papers and Spencer rolled two marijuana cigarettes. They smoked one cigarette and the agent took the other cigarette with her as she left the apartment. The police then arrested Spencer for possession of marijuana.

Spencer claimed the actions of the female agent were entrapment as a matter of law. The Court held:

> . . .There is an inherent inducement associated with allowing a female agent to be picked up in a bar and to accompany a man to his apartment. . .in the exercise of governmental power, law enforcement officers should keep in mind that public confidence in the honorable administration of justice is an essential element of our American system. Government detection methods must measure up to reasonably decent standards. Accardi v. United States, 257 F.2d 168; 263 So.2d at 283.

The court then discussed why the inducement constituted entrapment as a matter of law:

> "The bait used by the State's agent in the case at bar is not unknown to man or history. Beginning with the first episode when "Mother Eve snitched the apple with which she seduced Father Adam" and continuing down through the ages, winsome women, it is said have worked their wiles to weaken the will of men. . . . Society has always condemnedd such conduct and the state ought not to condone it, much less have its paid agents out trolling for unsuspecting males whose minds are otherwise occupied than with thoughts of committing heinous crimes." 263 So. 2d at 284.

The conduct of the police in the instant case is as reprehensible and unacceptable as the conduct described in Spencer, supra, Dupuy, supra; Thomas, supra and Peters, supra. The conduct of the police will erode public confidence in the honorable administration of justice. The placing of a decoy, doused with alcohol and dressed like a bum pretending to be unconscious, in a semi-prone position on the street with money protruding out of his pocket is not a decent method of detecting criminals.

The business of government is not to test its citizens to see if they are strong enough to resist temptation. The state should not literally create a crime to punish it in an apparent effort to reduce crime. Government agents can use trickery and deception to ensnare those individuals already engaged in criminal activity. However, when the State

attempts to determine if anyone will succumb to the bait, the state is merely manufacturing crime.

The order of the trial court granting the motion to dismiss in State v. Casper, succinctly states the inherent problems with the drunken wino decoy:

> . . .It is further the opinion of the court that the extreme measures taken, including dousing the decoy with alcohol, having a large quantity of bills protruding from a rear pocket, and stapling those bills together so the amount exceeded $100.00, exceed proper police techniques and in fact tends to destroy the public confidence in the police. There is something inherently distasteful about techniques as extreme as this which would lure an otherwise innocent person into committing a crime perhaps pressured by the pangs of hunger from one who had not eaten in days. (emphasis supplied) See attached Appendix I).

2. Examples of improper police inducements

> "Watch and pray, that ye enter not into temptation;
> the spirit indeed is willing, but the flesh is weak."
> Matthew 26:41

The courts of various jurisdictions have found entrapment as a matter of law where the inducement involved money, sex or appeals to loyalty or friendship. The courts have found entrapment when the inducement was sufficient enough to overcome an otherwise innocent person. For example, in Woo Wai v. United States, 223 F. 412 (9th Cir. 1915) the court held that the lure of money was an improper inducement to a violation of the national immigration laws. A government undercover agent asked Woo Wai to import illegally Chinese women from Mexico. Woo Wai told the agent he would not do that because it was against the law. The agent then told Woo Wai he could make $50.00 per person. The Ninth Circuit Court of Appeals held that this lure of money was an improper inducement.

In State v. McCornish, 201 P. 637 (Utah 1921), a "vice squad" agent checked into a hotel to discover prostitution activities. The agent bought whiskey for McCornish and induced him to procure a prostitute for him. The Utah Supreme Court held that the activities of the agent were improper inducements:

> "Policemen are conservators of the peace. It is their duty to prevent crime, not instigate and encourage its commission. Nothing can be more reprehensible than to induce the commission of a crime for the purpose of apprehending and convicting the perpetrator." 201 P. at 639.

Other appellate courts have held that appeals to friendship or family ties were improper inducements. People v. Rogers, 286 N.E.2d 365 (Ill. Ct. App. 1972) (Agent inducing wife to get drugs for her husband's drug addict friend; United States v. Cunningham, 349 F. Supp. 1116 (M.D. Fla. 1972) long time friend (undercover agent) of Defendant inducing him to provide illegally-hunted game to agent's wife); Butts v. United States, 273 F.35 (8th Cir. 1921) (friend of Defendant with long-standing disease induced Defendant to supply him with morphine).

The decoy in the instant cases is an inducement analogous to the appeals to money, sex or friendship described above. The "drunken wino" decoy pretending to be unconscious with money sticking out of his pocket is an "easy mark". The decoy is an improper inducement because the police made every effort to make stealing the money as easy as possible. The decoy is also an improper inducement because it could lure an otherwise innocent person into committing a crime. It is no coincidence that none of the defendants involved in the instant cases, State v. Casper, supra, and Cruz v. State, supra, had prior arrests or convictions for theft. A poor person, an another "wino" or a derelict who had not recently eaten a good meal may succumb to the lure of the bait because of hunger and necessity.

3. Entrapment in Larceny Cases and Entrapment as to Grand Theft in the Instant Cases.

The appellate courts of this country have held that entrapment can be a valid defense to larceny offenses. In addition to the standard considerations for a valid entrapment offense, entrapment may exist where the acts of the government vitiate the lack of consent required for a larceny conviction. This Court in Lowe v. State, 32 So. 956 (Fla. 1902), established the test for lack of consent and entrapment in a larceny case:

> "where the criminal design originates with the accused, and the owner does not, in person or by an agent or servant, suggest the design, nor actively urge the accused on to the commission of the crime, the mere fact that such owner, suspecting that the accused intends to steal his property, in person or through a servant or agent exposes the property or neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property or avail himself of the facilities furnished, will not amount to a consent in law." 32 So. at 957 (emphasis supplied).

The Lowe court apparently approved of the tactic of "lying in wait" and not actively protecting property to apprehend a known thief. This Court did not approve of suggesting the criminal design or actively urging the accused to commit a crime. The decoy in the instant cases unquestionably suggested the design of the crime. If the decoy had not been there, then the crime could have never occurred. The vulnerable position of the drunken decoy with the money clearly protruding from a pocket actively urged an individual to take the money.

Respondents have found only one case that is similiar to the facts of the instant cases. In People v. Hanselman, 18 P. 425 (Calif. 1888), a sheriff disguised himself and feigned drunkeness to detect thieves. He staggered about the street and laid down in an alley. The sheriff also pretended to be in a drunken stupor. Hanselman then took three dollars from the sheriff. The California Supreme Court reversed on other grounds and

stated, in dicta, that Defendant was guilty of larceny because he took the property without consent. However, the Hanselman court never considered a defense of entrapment.

The courts of other states have found entrapment as a matter of law in cases involving theft or larceny. In Connor v. People, 33 P. 159 (Colo. 1893), the State charged the Defendant with conspiracy to commit robbery. An undercover detective, ostensibly attempting to detect a bank robbery ring, met several individuals whom he suspected as participants in prior robberies. The detective instigated a scheme to rob a bank and planned various details of the scheme. The court found entrapment as a matter of law and noted:

> ". . .when, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime, and instigate others to take part in its commission in order to arrest them while in the act, although the purpose maybe to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked, rather than encouraged by the courts." 33 P. at 161.

The Missouri Supreme Court in State v. Perrin, 292 S.W. 54 (Mo. 1927) found entrapment as a matter of law where a businessman "laid in waiting" for a criminal to appear and take some goods. A cigar company received a telephone order for $50 worth of cigars from a particular drug store. The telephone operator checked the order and discovered that the named drug store did not place the order. The cigar company waited for a person to claim the order. Perrin arrived and claimed the order. The manager of the cigar company then handed the order to Perrin. The court found entrapment as a matter of law notwithstanding the fact that the criminal design originated with the Defendant because the manager handed over the goods merely to entrap Perrin.

The case of People v. Frank, 27 NY Supp. 2d 227 (City Ct. Utica 1941) illustrates another example of entrapment in a larceny case. The owner of a furshop

suspected that Frank was stealing some of the shop's merchandise. The owner contacted one of the employees and asked that employee to ask Frank "to get him some fur." Frank told the employee that he would get some fur for him. The owner then left the fur in a place where it was easily accessible to Frank.

The court held that the store owner had illegally entrapped Frank and the Court noted:

> "The liability of men to fall into crime by consulting their interests and passions is unfortunately great, without the stimulus of encouragement. No state therefore can safely adopt a policy by which crime is to be artifically propagated." 27 NYS 2d at 230.

The court then outlined the proper way to ensare criminals:

> "It is safer law and morals to hold, that where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act, and others to be led into and encouraged in its commission by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself. They must not aid, encourage or solicit him that they may seek to punish." Id. (emphasis supplied).

The appellate courts of other jurisdictions have similarly found entrapment as a matter of law where a police officer originated the criminal design or actively participated in the larceny with the accused. See 10 ALR 3d 1121 "Larceny - Entrapment - Consent"; See also, Commonwealth v. Hollister, 27 A. 386 (Pa. 1893) (Defendant planned theft of paymaster's office. Undercover detective agreed with the plan and did nothing to prevent the theft); McGee v. State, 66 S.W. 562 (Tex. Ct. Crim. App. 1902); (Detective posed as a cattle thief to catch suspected cattle thieves. Detective originated theft scheme); State v. Waghalter, 76 S.W. 1028 (Mo. 1903); (undercover detective disguised

himself as a "freight handler." Detective persuaded driver to ship goods illegally); State v. Neely, 300 P. 561 (Mont. 1931) (Detective posing as a cattle rustler).

The above cases establish the principle that it is improper for the police to stage a larceny solely for the purpose of ensnaring an individual for prosecution. See, Fletcher, "Rethinking Criminal Law": "The Problem of Staged Larceny", pg. 71-76 (Little, Brown and Co. 1978). The Jacksonville Sheriff's Office used the decoy solely as a pretext to ensnare individuals for prosecution. The police in Jacksonville were not looking for any particular individuals and they designed the decoy to catch whomever came along and took the bait.

Even if the police did not entrap Respondents as to any form of theft, the conduct of the police constituted entrapment as to grand theft. The police department deliberately put $150 worth of currency in the decoy's pocket. An individual who removed the money received the whole $150. If the purpose of the decoy was to detect thieves and robbers, then any amount of money or even fake money would have accomplished that goal. The business of the police is to detect and stop crime. The police placed a decoy out into the streets to catch anyone who takes the bait. They deliberately placed an amount of money larger than $100 on the decoy so they could arrest a person for grand theft instead of a misdemeanor. The police have artificially created a situation in the instant cases that will destroy the public's confidence in the police force. The public expects the police to prevent crime in a fair and even-handed manner. The public also expects the police to stop crime and not to create it.

C. An Application of the law to the Facts of the Instant Cases

The evidence of entrapment in the instant cases is clear and convincing. The evidence is clear because the facts of the decoy operation are undisputed. The evidence

is convincing under the law as ennunciated in Lashley, supra and its progeny as outlined above:

1. The decoy lured and instigated a person(s) into committing a crime which he had no prior intention of committing. The police did not use the decoy to catch any of the Respondents. None of the Respondents had prior records for theft. The state made no allegations of predisposition by any of the Respondents. The decoy was an improper inducement, especially to the poor and the hungry. For example, Respondent Holliday told the police he took the money because he was broke.

2. The criminal design unquestionably originated in the minds of the police. The police designed the decoy and supervised its operation. Respondents had no prior contact with the police. Therefore, the police did not design the decoy to uncover the criminal activities of Respondents. If the police had not used the decoy, Respondents could have never committed these crimes. The police used the decoys to catch whomever took the bait.

3. Respondents were not engaging in criminal activity when they took the bait of the decoy.

4. The evidence of predisposition in these cases is mere surmise and speculation. The only evidence of predisposition is the criminal act itself. The state has not made any allegations of predisposition pursuant to Story v. State. The police had no prior contact with Respondents. Therefore, the police did not know whether Respondents had the predisposition to commit theft.

5. The use of these decoys ensnared otherwise innocent persons. Respondents, except Alvin Townsend, had no arrests or convictions. The police did not use the decoys to catch those persons already engaged in criminal activity; the police did not use the decoys to catch particular individuals known to be engaging in criminal activity. The decoy operation was a "fishing expedition" designed to catch whomever

succumbed to the lure of the bait. The police discovered as many "criminals" as the number of individuals whom took the bait.

6. The level of the governmental participation violated due process. The decoy operation, designed to catch no one in particular, is the type of conduct that the United States v. Russell, supra, court described as "outrageous" and "shocking to the conscience." See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The exigiencies of preventing crime do not justify an abandonment of the principles of fairness and due process that our society has cherished for two centuries.

The typical use of a decoy or undercover agent by law enforcement officers involves the following factual situation: The police either through an informer, surveillance or innocuous verbal solicitation learn that a certain individual(s) is willing to commit a crime. The police then design a decoy to expose the criminal activity. By its design, the decoy operation focuses on the individual whom the police know is engaging in criminal activity. The exact purpose of the decoy is to catch a particular person.

Every reported case in the State of Florida, except the instant decoy cases and the cases where the court found entrapment as a matter of law, has such a scenario. See e.g., State v. Brider, 386 So. 2d 818 (Fla. 2d DCA 1980) (prior contact with defendant by confidential informant who arranged buy of cannabis supplied by state); Kimmons v. State, 322 So. 2d 36 (Fla. 1st DCA 1975) (police had information of prior drug sales by defendant); State v. Liptak, 277 So. 2d 19 (Fla. 1973) (defendant was known drug offender and undercover agent solicited a drug pruchase); Lashley v. State, supra (prior knowledge of prostitution, agent asked "where were all the women and what was the price" and defendant answered).

The decoy in the instant cases violates due process because the police lured and tempted both the possible criminal and the innocent citizen into committing a crime. Such a fishing expedition to catch unknown, future "criminals" is contrary to the

American system of law enforcement. The decoy operation creates a pretext for the commission of a crime so that the state may then punish the offender. This type of system is more akin to fascist police states than to American Jurisprudence. Therefore, this Court should resolutely condemn this decoy practice.

CONCLUSION

The facts of the instant cases are clear and convincing evidence of entrapment as a matter of law. The decoy operation lured innocent individuals without a predisposition to commit theft into committing a crime. The Cruz supra, court was incorrect in holding that the facts of this decoy operation present an issue of predisposition. The state has never made a proper allegation in these cases of predisposition under the dictates of Story v. State. The First District in Casper correctly held that the state could not make an allegation of predisposition and the decoy operation was entrapment as a matter of law without an allegation of predisposition. This decoy operation also violates due process even if the accused has the predisposition to commit a crime.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief submitted in State v. Holliday, Case Number 63,832, has been delivered by mail to Robert Moeller, Assistant Public Defender, Counsel for Petitioner, Hillsborough County Courthouse Annex, Third

Floor, Public Defender's Office, Appellate Division, Tampa, Florida, 33602, and to Ann Paschall, Assistant Attorney General, Counsel for Respondent, Attorney General's Office, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, as Amicus Curiae Brief in this cause, this 4th day of August, A.D., 1983.

James T Miller