IN THE SUPREME COURT OF FLORIDA

JOE EDWARD LEE,

Petitioner,

vs.

Case No.: 68,306

STATE OF FLORIDA,

Respondent.
_____/

BRIEF OF AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

This brief is written not as an advocate for or against Joe Edward Lee. It is submitted as an advocate for a reasoned approach to this important and rapidly developing area of the law: the "objective" due process defense.

While submitted under the sponsorship of the FLORIDA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION, every effort has been made to confine the foregoing to legal issues, not facts, and thus be, as the "amicus" should, a friend and aid to the Court rather than an advocate for either side of this particular case.

SUMMARY OF ARGUMENT

The Florida "due process" defense has been treated by the lower Courts as if it were a multi-faceted conglomerate of indistinguishable complaints governed by a long list of factors. Lower Courts have applied factors to reject specific due process claims when those factors may have appeared in an unrelated due process scenario for which there was some underlying logical relevance, but there exists little or no underlying logical relevance to the specific claim rejected by the Court. As a result, an attempt has been made to distinguish the several discernable due process scenarios and to identify the pertinent factors applicable to each.

The first due process scenario, identifiable from the case law, is the Rochin-Twigg problem. The essence of the complaint centers around police conduct so outrageous as to bar the use of judicial process to convict. See United States v, Twigg, 588 F.2d 373 (3rd Cir. 1978); and Rochin v. California, 342 U.S. 165 (1952). While some Courts have attempted to identify the particular factors, such as (1) whether or not there is a "pre-

existing" or "on-going criminal enterprise"; (2) "appeal to humanitarian instincts" as inducements; and (3) law enforcement motive to obtain a conviction and not to prevent further crime or protect the populace it is suggested that the cases turn on the demonstration of outrageous police misconduct with no single factor controlling.

The second due process scenario centers on the Cruz problem. This particular complaint deals with "virtue testing" the public in general. The problem does not require outrageous conduct by the police. The relevant factors are (1) interruption of "specific on-going criminal activities" by (2) "means reasonably tailored" to apprehend those involved. See Cruz v. State, 465 So.2d 516 (Fla. 1985).

The next due process scenario revolves around the Williamson-Joseph problem. The essence of the complaint is that a police-targeted defendant is pursued by an informant with incentive to produce or manufacture evidence. Unlike the two preceding due process scenarios, the threat to a fair trial and the integrity of the judicial process is the concern; not merely unacceptable police practices. The pertinent factorsrevealed by this line of cases centers

around whether or not (1) an informant is rewarded by a (2) contingent fee for (3) producing evidence (4) against a preselected target of law enforcement (5) to interrupt specific on-going criminal activity. See Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) as modified by United States v. Joseph, 533 F.2d 282 (5th Cir. 1976).

The final due process scenario was described in the Glosson case. There, the defendant, at trial, is confronted by an informant who is a vital witness with incentive to color his testimony. Again, unlike the first two process scenarios, the principle objection centers on the ability to receive a fair trial. There is no need to prove outrageous or inappropriate police behavior. The relevant factors are (1) the contingency arrangement (2) with the informant as a vital witness. See State v. Glosson, 462 So.2d 1082 (Fla. 1985).

An examination of the case under review, Lee v. State, _____So.2d_____ (Fla. 1st DCA 1986) at 11 Fla.L.Wkly. 193 (15 January 1986), illustrates that Judge Joanos, as author of the opinion at bar, garnered factors from the various discrete due process problems to reject the Lee due process claim. The underlying relevance, as well as

the applicability of each factor, should be examined to comport with a logical approach to the Florida due process defense.

ARGUMENT

It is understood and acknowledged that, in its efforts to convict those accused of crime, law enforcement on occasion employs questionable tactics to obtain evidence in pursuit of that conviction.[1] Such tactics have been condemned on those infrequent occasions, but only when a recognized constitutional right of the defendant is violated.[2]

However, it is altogether another problem when the police employ deceptive tactics not to gather evidence, but to instigate, induce or create the crime for which the defendant is ultimately charged. Such conduct, and its eventual success, typically requires befriending and baiting a target.[3] No court, to date, has suggested that any citizen enjoys a constitutional right to be free from government deception,[4]

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[1]See Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., separate opinion).

[2]E.g., Wade v. United States, 388 U.S. 218 (1967) (excluding post-indictment lineup identification made in violation of defendant's sixth amendment right to counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (excluding confession obtained in violation of defendant's fifth amendment privilege against self-incrimination); Chimel v. California, 395 U.S. 752 (1969)(excluding evidence procured in violation of defendant's fourth amendment right to be free from illegal searches and seizures.)

[3]See, e.g., Hampton v. United States, 425 U.S. 484, 485-87 (1976); United States v. Russell, 411 U.S. 423, 425-27 (1973); Sorrells, supra n.1, at 439-41; People v. Isaacson, 378 N.E. 2d 78, 79-81 (N.Y. App. 1978).

[4]See Sorrells, supra n.1, at 441-42. The Supreme Court has consistently held that government instigation of criminal conduct does not violate "any independent right secured to [the

but many have expressed a distaste for particularly contrived tactics that venture into areas of unjustified impropriety.[5]

Virtually no action has been taken by the United States Supreme Court to limit government involvement in the instigation or creation of crime except for the acceptance of the "subjective" entrapment defense--so named for its pivotal focus on the "predisposition" of the defendant to commit the criminal act. Under this analysis, of course, the inquiry is limited to the examination of government tactics solely for the potential to induce an "otherwise innocent" defendant to commit the crime.[6]

However, in recognition of the fact that suspects may be presumed "predisposed" by law enforcement, and therefore, a license might seemingly be created to authorize any investigative methods no matter how base or threatening to the judicial process, the Court has acknowledged an alternative: the "objective" entrapment or "due process" defense. That is, notwithstanding that inducement tactics are directed at a cri-

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defendant] by the United States Constitution." Hampton, supra n.3, at 490-91.

[5]See Hampton, supra n. 3, 491-95 (Powell, J. concurring); Id. at 495-500 (Brennan, J. dissenting); Russell, supra n. 3 at 436-39 (Douglas, J., dissenting); Id. at 439-50 (Stewart, J., dissenting); Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring); Sorrells, supra n. 3, at 453-59 (Roberts, J., separate opinion).

[6]See Sorrells, supra n. 3. The entrapment defense contemplates "government agents [going] beyond the mere affording of opportunities or facilities for the commission of the

minally disposed suspect, a situation may arise where the law enforcement behavior is so reprehensible it violates the defendants due process rights.[7]

In other words, predisposition doesn't matter.

Yet, the Court has, to date, refused to condemn government involvement in crime, under the "objective" due process approach, even where police involvement was extensive.[8] So far, at least under the due process clause in the United States Constitution, investigatory behavior is afforded more latitude for trickery, deception, and the like, before it reaches sufficient reprehensive depths to be considered a federal due process violation.

This is why Florida recently adopted a decidedly stronger position under our State Constitution.

A. FLORIDA DUE PROCESS: MORE PROTECTIVE THAN FEDERAL

Speaking for this Court in State v. Glosson, 462 So.2d 1082, 1085 (Fla. 1985), Mr. Justice McDonald outlined

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offense and [the] exertion, persuasion or pressure of one kind or another which induce[s] the commission of a crime by one who had no predisposition to do so." Greene v. United States, 454 F.2d 783, 786 (9th Cir. 1971).

[7]United States v. Russell, supra n. 3, at 431-32. See also, Hampton, supra n. 3, at 491-95 (Powell, J., concurring).

[8]See Hampton, supra n. 3.

Florida's more protective stand:

> "We reject the narrow application of the due process defense found in the Federal cases. Based upon the due process provision of Article I, Section 9 of the Florida Constitution, we agree with Hohensee and Isaacson that governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges."

Within a matter of weeks, two major Florida decisions appeared--Glosson[9] and Cruz[10]--defining boundaries of investigative propriety in Florida beyond which law enforcement should not venture. At least four distinct scenarios are discernable where methods employed by law enforcement "go too far" and either threaten the integrity of the judicial process or simply cannot be countenanced as investigative techniques. Note that each analysis is bottomed on factors and reasoning typically, but not always, distinct from the other three.

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[9]State v. Glosson, 462 So.2d 1082 (Fla. 1985).

[10]Cruz v. State, 465 So.2d 516 (Fla. 1985).

1. THE ROCHIN-TWIGG PROBLEM: POLICE CONDUCT SO OUTRAGEOUS TO BAR USE OF JUDICIAL PROCESS TO CONVICT EVEN WHEN NO THREAT TO A FAIR TRIAL

The first of the four "due process" scenarios was acknowledged by this Court, in Glosson at 1084, and, by the language employed in this Tribunal's opinion, appears to exemplify the most egregious of all four vignettes.[11]

See, for example, United States v. Twigg, 588 F.2d 373 (3d Cir. 1979).[12]

The sole inquiry is whether the specific investigative

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[11]"...[I]t appears that since Hampton, the due process defense has been raised successfully in only one federal circuit court. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978)... Indeed, a recent federal circuit court stated that nothing short of 'the infliction of pain or physical or psychological coercion' will establish the due process defense. United States v. Kelly, [citation omitted].... The due process defense appears to fare better when used by predisposed defendants in State court proceedings." Glosson, supra n. 9, at 1084-85.

[12]Twigg appears to best illustrate the profound depths necessarily reached by governmental misconduct before one can utilize this approach as a defense. There, two defendants were convicted of illegally manufacturing a controlled substance. However, government agents approached the defendant, Neville, who was not then engaged in any illicit drug activities and, as stated by the Court, "deceptively implanted the criminal design in [his] mind. They set him up, encouraged him, provided the essential supplies and technical expertise and when he [sic] encountered difficulties in consummating the crime, they assisted in finding solutions. This egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs." 588 F.2d at 381.

misconduct was so "outrageous" as to "shock the conscience"[13] and, thus, notions of due process and sheer decency would bar the prosecution from involving the judicial processes to obtain a conviction.

Observe, in contrast to the three other "due process" scenarios to follow, there is no confidential informant wrinkle, no problem of a "contingency" fee, and no inherent threat to the integrity of the judicial process or fair trial by one tempted to manufacture evidence or color testimony.

The lone consideration is the shocking nature of lawless tactics by police.[14]

2. THE CRUZ PROBLEM: NO OUTRAGEOUS POLICE CONDUCT, BUT "VIRTUE TESTING" OR BAITING ANYONE WHO MIGHT BITE.

This second "due process" scenario, encountered by this

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[13]The phrase "shock the conscience" was originally coined in Rochin v. California, 342 U.S. 165 (1952). While often viewed as a Fourth Amendment case, with no trappings of "subjective" entrapment, it is indeed a Fifth Amendment "Due Process" case. The Supreme Court simply refused to permit the judicial process to be used by police officers who had burst into the defendant's bedroom to seize recently-swallowed contraband capsules, and after unsuccessfully attempting to pry them from the defendant's throat, successfully recovered the evidence with a stomach pump. Rochin serves as a reminder that, under this analysis, the usual nuances of entrapment are not the pivotal concerns; the "outrageous" and "shocking" nature of police conduct is the sole consideration.

[14]Other Rochin-Twigg type cases attempt to identify specific factors for consideration, but the bottomline remains--government misconduct of such an "outrageous" nature so as to

Court in Cruz v. State, 465 So.2d 516 (Fla. 1985), while remotely similar to the Rochin-Twigg analysis, is dramatically dissimilar in its rationale. For example, there is no preselected target, and the level of police misconduct need not be excessive or "outrageous".[15]

Indeed, the absence of a justified suspicion targeting a particular suspect and investigative means "reasonably tailored" to apprehend him, are the operative considerations.

Consider, for example, the Cruz operation:

"shock the conscience" regardless of any purported compilation of factors. See, for example, State v. Hohensee, 650 S.W. 2d 268 (Mo. App. 1982), where the court referred to relevent factors, at 273, and identified several as considerations: including (1) whether or not there is a "pre-existing" or ongoing "criminal enterprise"; (2) "appeals to humanitarian instincts" as inducements; and (3) law enforcement motive to "obtain a conviction" and not "to prevent further crime or protect the populace".

In Greene v. United States, 454 F.2d 783 (9th Cir. 1971), again, the language of that court seems to identify certain factors: "[T]he Government... did not simply attach itself to an ongoing bootlegging operation....any continuing operation had been terminated. Id. at 787. "[A]lthough this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative." Id.

However, to reiterate, any attempt to compartmentalize the Rochin-Twigg line of cases should be avoided, as the final analysis ultimately turns on one ingredient--"outrageous" police misconduct:

> "The cases demonstrate that outrageous involvement turns upon the totality of the circumstance with no single factor controlling."

United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981).

[15]However, like the Rochin-Twigg analysis, but clearly different from the remaining two due process scenarios, is no

> "Tampa police undertook a decoy operation in a high crime area. An officer posed as an inebriated indigent, smelling of alcohol and pretending to drink wine from a bottle. The officer leaned against a building near an alleyway, his face to the wall. Plainly displayed from a rear pants pocket was $150 in currency, paper-clipped together, [tempting anyone who might walk by to take it]."

465 So.2d at 517.

There was no preselected individual as a target, and the modus operandi can hardly be described as "outrageous" like Rochin and Twigg. But the problem is inherent in the plan, as illustrated by this Court in its formulation of the pertinent threshhold test:

> "[A due process violation] has not occurred as a matter of law where police activity (1) has as its end the interruption of specific ongoing criminal activity and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity."

465 So.2d at 522. [Emphasis supplied].[16] The problem: "Virtue testing" anyone who might "take the bait" is just too broad a dragnet to comport with notions of fair play and decency:

> "This simply addressed the Casper court's proper recognition that [a due process

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confidential informant, no problem of a contingency fee, and no inherent threat to a fair trial by one tempted to manufacture evidence or color testimony.

[16]The pertinent factors are plain and obvious: (1) interruption of "specific ongoing criminal activity" by (2) "means reasonably tailored" to apprehend those involved. (Continued)

> violation] has occurred where 'the decoy simply provided the opportunity to commit a crime to anyone who succumbed to the lure of the bait'."

465 So.2d at 522-23. [Emphasis supplied].[17] This inherent due process rub is best stated in the words of Mr. Justice Roberts long ago: "Society is at war with the criminal classes", 287 U.S. at 453-54, and embellished by Justice Ehrlich in Cruz, "police must fight this war, not engage in the manufacture of new hostilities." 465 So.2d at 522.

Note, regarding the first factor, the failure of the record to identify the specifically targeted activity results in inability to satisfy the test. 465 So.2d at 522. And, that is true regardless of what one might surmise from the operational approach. Id.

Note also, the "means" must be tailored to the apprehension of a defined target, and an undefined dragnet approach to net a criminal class is simply too broad: "However, even if the police were seeking to catch persons who had been 'rolling' drunks in the area, the criminal scenario here with $150 (paper-clipped to ensure more than $100 was taken, making the offense a felony)...carries with it the 'substantial risk that such an offense will be committed by persons other than those who are ready to commit it'."

[17]Consider other cases further refining the Cruz two-pronge test. In Jones v. State, _____ So.2d _____ (Fla. 2d DCA 1986) at 11 FLW 425 (14 February 1986), the Tampa police set up another "drunken bum" decoy operation in the parking lot of a dog track due to "a large number of robberies" in the area. Applying the Cruz test, the "means" to apprehend the culprits were not "tailored" to the specific criminal and activity and again exemplified an impermissibly broad dragnet to ensnare anyone with a general propensity for theft--violent or non-violent: "Here, however, the record leaves no doubt that the state's conduct was motivated by a purpose to intercept persons given to violence who would commit strong-armed robberies, not to capture persons who would non-violently steal from or 'roll' a 'drunken bum'. ...Indeed, the decoy simply provided the opportunity for anyone to commit a crime who might be tempted by the bait...." Jones, supra. [Emphasis supplied]. (Footnote continued on next page)

3. THE WILLIAMSON-JOSEPH PROBLEM: A POLICE-TARGETED DEFENDANT PURSUED BY AN INFORMANT WITH INCENTIVE TO PRODUCE OR MANUFACTURE EVIDENCE.

The obvious and inescapable concern regarding this particular investigative formula, unlike the two preceding "due process" scenarios, is the threat to a fair trial and the integrity of the judicial process; not merely unacceptable police practices.

On a sliding scale, the absence of "outrageous" conduct by police is overcome by the formidable threat, albeit inadvertent, to the very concept of justice.

Another case, though involving a confidential informant, became a defacto Cruz situation due to the failure of law enforcement to properly govern the investigative scope and conduct of that informant, thus converting the informant's otherwise focused attention on one suspect into an opportunity, through the unbridled informant, for anyone to succumb to the informant's bait. See Marrero v. State, ____ So.2d ____ (Fla. 3d DCA 1985) at 10 FLW 2317 (8 October 1985): "The Florida Supreme Court has recently announced, in Cruz v. State, [citation omitted], a new bifurcated test of the entrapment defense, which we find controlling here." Id., at 2318. And, due to the failure to properly monitor the informant "setting up" the drug buy, the police conduct was unable to survive either pronge of the Cruz test: "However, because they had made no inquiry, the police were not aware of how the informant came to know Marrero wanted to participate in the drug sale.... Therefore, as a matter of law, the police activity fails to meet either of the two parts of the threshhold test for entrapment: it did not 'have as its end the interruption of specific, ongoing criminal activity, nor did it 'utilize means reasonably tailored to apprehend those involved'...." Id.

Consider the depth of the problem: not only suspect techniques for gathering evidence against an individual, but also a subtle perversion of the judicial process by reinforcing, if not guaranteeing, the likelihood of conviction with "incentive gathered" proof, by a bountyhunter with a vested interest in avoiding any possibility of acquittal.

Easily approaching the most perverse of the "due process" scenarios.

The leading example is Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) as modified by United States v. Joseph. 533 F.2d 282 (5th Cir. 1976).[18]

In Williamson, the Government's Alcohol and Tobacco Tax Division hired an informant, Harris Moye, to work undercover for a salary and advised him that they would pay a reward if he caught either of two particular acquaintances selling untaxed whiskey. The objectionable parameters were thus defined: (1) an informant, to be paid (2) a contingent fee (3) dependent on the production of evidence (4) against a preselected target of law enforcement (5) for crimes not yet

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[18]As pointed out by this Court in Glosson, describing the history of that decision: "The district court relied on Williamson v. United States [citations omitted] in holding the respondents had been denied due process because [the informant's] contingent arrangement seemed to manufacture, rather than detect, crime. The district court recognized that United States v. Joseph [citation omitted] limited Williamson to those cases where contingent fees are paid for evidence against particular persons. Nevertheless, the district court found that the pervasive informant activity in this case came

committed.[19] In the words of the court:

> "Without some justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed."

311 F.2d at 444. The obvious concern of that tribunal:

> "Such an arrangement might tend to a 'frame up', or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration."

Id. [Emphasis supplied]. It is noteworthy that, while the language employed above refers to "innocent persons", the court is not suggesting that "predisposition" of the defendant is a factor; the objection runs to the "tendency" to entrap, not the actual commission of entrapment.

The key consideration: That "tendency" to entrap is the inherent invitation of the contingent fee structure, yet "due process" according to Williamson does not condemn all con-

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closer to the facts in Williamson than to the limited informant activity approved in Joseph." 462 So.2d at 1084.

[19]The point of departure from the Cruz scenario becomes quickly apparent by contrasting the pivotal factors. The final concern in Williamson -- the making of cases against persons "for crimes not yet committed"--is reminiscent of the Cruz objection to investigative efforts or "virtue testing" not designed to interrupt "specific ongoing criminal activity." See n. 16, supra. With that, however, any similarity to Cruz ends, and the unadulterated distinctions in Williamson become readily apparent by the other four enumerated factors: An informant rewarded by contingent fee for producing evidence against a preselected target.

tingent fees -- only those that are "unjustified".[20] And, according to Williamson, the "justification" was not present; that is, what common sense should call to mind, adequate precautions by law enforcement to offset the "tendency" to entrap inherent in the contingent fee. For example, proof by the police that the informant was carefully instructed on the rules against entrapment, or better yet, the trained officer monitors the "critical" encounters with the target or personally accompanies the informant and consummates the transaction.[21] The following highlights the real concern of the Williamson Court:

> "It may possibly be that the Government investigators had certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis...to produce the legally admissible evidence against each of them. It may be also that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts were developed in the evidence, though Moye's deposition had been taken months before the trial."

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[20]Recall, the words artfully chosen: "without some justification or explanation, we cannot sanction a contingent fee agreement...." 311 F.2d at 444.

[21]Investigator Lee in Williamson did accompany Moye, the informant, and witnessed the illegal transaction including the exchange of "179 gallons of moonshine" for "$716.00," 311 F.2d at 443, but that was simply not sufficient to neutralize the potential due process problems in the earlier "set up" of the

311 F.2d at 444. [Emphasis supplied].[22] Without some justification, on the record, for the contingent fee arrangement, the concomitant and unjustified threat to the integrity of the judicial process remains.[23]

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defendants by the informant, which he failed to monitor or witness. As a result, the court focused on other possible precautions--directed not to the witnessed consummation of the illegal transaction, but specifically contemplating the "set-up" by the unmonitored informant.

[22]It is noteworthy that some lower Florida courts, grappling with the Williamson-Joseph due process scenario, have successfully avoided the sanction of dismissal by recognizing actions by law enforcement, of record, offsetting the threat of the contingent fee: See, e.g., Garbett v. State, _____ So.2d _____ (Fla. 3d D.C.A. 1986) at 11 FLW 508 (25 February 1986)(Informant merely "introduced" one suspect to the undercover officer and the other defendants were recruited by the initial suspect; State v. Eshuk, 347 So.2d 704, 705 (Fla. 3d D.C.A. 1977) ("Dennis Stout [the undercover police officer] negotiated and consummated the purchase...from the defendant in the presence of an informant, Michael Woolsey, after the officer had been introduced to the defendant by Woolsey.").

[23]Another Florida case, Marrero v. State, _____ So.2d _____ (Fla. 3d D.C.A. 1985) at FLW 2317 (18 October 1985), stands as a reverberating reminder that merely monitoring "the buy"--the consummation of the illegal transaction--is not sufficient to neutralize the contingent fee problem. In that case just like Williamson, the police officer personally witnessed, indeed participated in the "arrangements" and the actual "consummation" of the illegal transaction after preliminary inquiries by his unmonitored informant. The trained officer was not aware, however, that his eager and untrained informant had been courting the target, relentlessly, for six months without precautionary safeguards:

> "[The officer] did not know the circumstances of the informants contact with the defendant"...."[and] because [the detectives] had made no inquiry, the police were not aware of how the informant came to know Marrero wanted to participate in the drug sale, or that the informant had persisted in requesting Marrero's participation for six months."

Id., at 2318. The defendant, notwithstanding proof of predisposition, was discharged.

4. THE GLOSSON PROBLEM: A DEFENDANT, AT TRIAL, CONFRONTED BY AN INFORMANT WHO IS A VITAL WITNESS WITH INCENTIVE TO COLOR HIS TESTIMONY.

This fourth scenario is a spinoff of the last one and is equally as capable of thwarting the judicial process. While the criticisms of the Williamson-Joseph contingent fee formula are lodged against the pretrial investigatory techniques, the principal objection to this fourth scenario runs into the courtroom and to the witness stand. See State v. Glosson, 462 So.2d 1082 (Fla. 1985).

Again, on a sliding scale, the tendency to pervert the judicial truthfinding process replaces any need to demonstrate "outrageous" governmental misconduct[24] or impropitious investigatory tactics.[25] The threat to due process remains.

Glosson involved a "reverse sting" operation run by the Levy County Sheriff's Office through a paid informant, Norwood Lee Wilson. As described by this Court, 462 So.2d at 1083:

> "Wilson traveled to Dade County, where he agreed to sell several hundred pounds of cannabis to the respondents in Levy County. The respondents came to Levy County, took possession of the cannabis controlled by the Sheriff, and were arrested soon afterward. As a result of the arrests, the Sheriff seized several vehicles and over $80,000 in cash subject to civil forfeiture under sections 932.701-704, Florida Statutes (1983).

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[24]The Rochin-Twigg legacy, pp. 5-6, supra.

[25]The Cruz techniques, pp. 6-9, supra; and the Williamson-Joseph approach, pp. 10-14, supra.

> The respondents filed motions to dismiss the information because of entrapment and prosecutorial misconduct. These motions relied primarily upon the agreement between the sheriff and Wilson whereby Wilson would receive ten percent of all civil forfeitures arising out of successful criminal investigations he completed in Levy County."

Id., [emphasis supplied]. While this Court's opinion detailed the Glosson "reverse sting" and roles of its several players,[26] the "due process" hitch centered on the "potential for abuse" arising from two of the necessarily dangerous ingredients:

> "Our examination of this case convinces us that the contingent fee arrangement with the informant and a vital State witness, Wilson, violated the respondents' due process right under our state constitution .... We can imagine few situations with more potential for abuse of a defendant's due process right."

462 So.2d at 1085. [Emphasis supplied]. Like the Williamson-Joseph formula, the use of a contingent fee is not the damning feature; it is the combination of the "contingent fee" pursued by a "vital witness" that spells its condemnation. Also, in line with the Williamson-Joseph reasoning, the "actuality" of perjury by the vital witness is not necessary; it is the "temptation" to color the truth that results in the "potential for abuse" as described by this Court in the above quote, that is

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[26] See 462 So.2d at 1083: "...Wilson had [the] oral agreement with the sheriff, which agreement the state attorney's office knew about and even supervised Wilson's investigations ... [and] the contingent fee would be paid out of civil forfeitures received by the Sheriff...."

constitutionally objectionable.[27] Succinctly stated by Mr. Justice McDonald, the obvious concern is the "potential" for contamination of the truth:

> "The due process rights of all citizens requires us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions."

Id.[28] The combination of a vital witness with a significant incentive to color the truth strikes at the heart of the concept of fair trial.

B. FLORIDA DUE PROCESS: THE NEED FOR A STRUCTURED APPROACH TO AVOID INDISCRIMINATE CROSS-APPLICATION OF FACTORS.

The lower courts in this State, at both the trial and appellate levels, have been confronted with a significant number of "due process" challenges since the recent publications of Glosson and Cruz.[29] Indeed, a number of published opinions have emerged

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[27] Recall, in Williamson, it was the "tendency" to entrap, not the actual entrapment, that resulted in the condemnation of that contingent fee, as discussed on page 12, supra.

[28] Were one to reduce Glosson to pivotal factors as a blueprint for the lower courts, there would be two: (1) testimony of a vital witness with (2) a significant stake in a criminal conviction.

[29] See, e.g., Garbett v. State, ____ So.2d ____ (Fla. 3d DCA 1986) at 11 FLW 508 (7 March 1986); Lee v. State, ____ So.2d ____ (Fla. 1st DCA 1986) at 11 FLW 193 (15 January 1986); State v. Prieto, ____ So.2d ____ (Fla. 3d DCA 1985) at 11 FLW 22 (17 December 1985); Marrero v. State, ____ So.2d ____ (Fla. 3d DCA 1985) at 10 FLW 2317 (8 October 1985); Acosta v. State, 477 So.2d 9 (Fla. 3d DCA 1985); Yolman v. State, 473 So.2d 716 (Fla. 2d DCA 1985).

that seem to treat the "due process" defense as if it were a single but multifaceted conglomerate of indistinguishable complaints, and thus governed by the long list of factors that run the entire gamut from Rochin to Glosson. Many of those opinions demonstrate a need for definition; a reminder that the controlling analysis -- and relevance of specific factors -- depends upon the specific due process scenario and the underlying logic supporting the particular objection.

For example, the Third District Court of Appeal in Acosta v. State, 477 So.2d 9 (Fla. 3d DCA 1985), was recently confronted with, among other things, a Rochin-Twigg challenge whereby the government was accused of "outrageous" misconduct due to an inappropriate inducement by its agent, Yolando Padron, offering "sexual favors" to set up a deal.[30] The opinion cites Glosson, as well as Twigg, as if both govern the analysis of "due process" vis-a-vis "outrageous" governmental misconduct.[31]

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[30] It is conceded that the Acosta decision turned on the fact that Reinaldo Acosta, the Appellant, was "three steps removed" from the misconduct, but the resulting cross-application of factors remains.

[31] Compare Acosta, supra, with State v. Liptak, 277 So.2d 19 (Fla. 1973) and Spencer v. State, 263 So.2d 282 (Fla. 1st DCA 1972). All three cases involve sexual inducements by a woman agent, or informant, in an entrapment setting. Recognizing that both Spencer and Liptak predate this Court's acceptance of the "objective" due process defenses outlined supra, both cases result in diametrically antagonistic holdings. Liptak was remanded by this Tribunal to the Third District, after it directed the discharge of the defendant finding entrapment "as a matter of law", 256 So. 2d 548 (Fla. 3d DCA 1972), with instructions by Justice McCain

Simply stated: a misidentification of the sole criterion for a Twigg-Rochin challenge--outrageous governmental misconduct--with the Glosson case. To exacerbate the confusion, the Acosta opinion listed an additional reason why the appellant's due process argument was unavailing--the appellant was not "a target of the government's sting operation...," 477 So.2d at 10. The court clearly borrowed a factor pertinent only to a Williamson-Joseph equation[32] and applied it, as if relevant to a Rochin-Twigg challenge, to reject the claim of "outrageous" misconduct. Id.

A definitive statement that clarification is wanting:[33]

Lee v. State, ____ So.2d ____ (Fla. 1st DCA 1986) at 11 FLW 193 (15 January 1986), the case sub judice, provides the opportunity to issue that clarification.

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that the issue is not one of law, but fact, for the jury. The First District Court in Spencer, on the other hand, and concededly without the benefit of Justice McCain's reasoning, directed the discharge of that defendant on what appears to be an "outrageous misconduct" or Twigg theory: "Society has always condemned such conduct and the State ought not 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. Preceding the above, the Spencer author had pointedly admonished, "Government detection methods must measure up to reasonably decent standards." Id., at 283.

[32]See and compare, nn. 14 and 19, supra, and the appropriate consideration of whether or not the defendant is a "preselected target by law enforcement."

[33]See also, Prieto and Garbett, supra n. 29. The Prieto panel rejected a Williamson-Joseph challenge because the contingent fee did not contemplate testimony, a factor relevent only to Glosson,

C. THE LEE CASE: THE PARTICULAR FACTORS RELIED UPON BY THE DISTRICT COURT.

The opinion of the First District, under review, in Lee v. State, ____ So.2d ____ (Fla. 1st DCA 1986) at 11 FLW 193 (15 January 1986),[34] confronts and addresses a pure Williamson-

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with no explanation why the "tendency" to manufacture evidence, which has nothing to do with trial testimony under the Williamson rationale, dissipated and thus offset the due process objection. See p. 12, supra.

Then, to compound the need for guidance, the Garbett court, supra n.29, affirmed the trial court's rejection of that due process challenge using Acosta and Prieto as authority. Notwithstanding the Williamson-Joseph backdrop, and the stern reminder that the due process rub arises from the "tendency" to entrap and not the commission of entrapment, the Garbett decision hinged on the fact that the "informant had only had contact with [another defendant] and [not] with [the appellees];" and thus failing to acknowledge the sheer essence of Williamson, the threat to due process inherent in the contingent fee incentive to "make a case."

[34]The Lee facts: Joe Edward Lee "filed a motion to dismiss for improper governmental conduct, alleging that the Florida Department of Law Enforcement (FDLE) entered into an oral contract with a confidential informant, which agreement provided for a contingent fee to the informant for purchases of controlled substances from Lee.

In explaining the circumstances of the informant's employment, FDLE Agent Collins stated that in 1983 he was summoned to the Duval County Sheriff's Office. When he arrived at the sheriff's office, the informant was introduced to him as a person who desired work as a confidential informant. The informant contacted Agent Collins several months later, and advised Agent Collins that he (the informant) understood that Lee was in possession of drugs. Subsequently, Agent Collins supplied the informant with money to make drug purchases from Lee. Agent Collins searched the informant before each purchase, drove the informant to Lee's house where the purchases took place, and received the evidence from the informant after each purchase. On each occasion, the informant was paid $25 by FDLE. According to Agent Collins, these drug purchases were not reverse sting operations, i.e., the drugs purchased by the informant from Lee belonged to Lee and not to the FDLE.

Testimony at the hearing on Lee's motion to dismiss reflects that shortly after the two purchases from Lee, the informant was

Joseph agrument[35] and, for the most part, borrows factors from the Glosson analysis[36] to reject the due process claim. In addition to examining the applicability of the particular factors, the underlying relevance of each should be examined to see if it indeed answers the logical objections arising from the due process vignette.[37]

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placed on a weekly salary. Agent Collins was aware that the informant had a record of numerous convictions, including a conviction for perjury. The informant had at least four aliases, and his only sources of income during the time period relevant to this case were payments from FDLE and money received from the sale of items he had stolen. 11 FLW at 193.

[35]See pp. 10-14, supra.

[36]Discussed generally, pp. 15-19, supra, and particularly in nn.26 and 28.

[37]While Lee cited both Glosson and Williamson as authority, his due process complaint was a pure Williamson challenge urging that: "The State's contingent fee agreement with the confidential informant whereby the informant was to produce evidence against Lee violated Lee's right to due process." 11 FLW at 193.

Under the Williamson-Joseph rationale, of course, the relevant factors are: (1) an informant, to be paid (2) a contingent fee (3) dependent on the production of evidence (4) against a preselected target of law enforcement (5) for crimes not yet committed. See pp. 11-12, supra. The fact that the arrangement "might tend" to entrap constitutes the due process objection, 311 F.2d at 444, thus making it critical to inquire into safeguards employed by law enforcement to offset that tendency, such as monitoring not only "the buy" but also the "set up". See Marrero, n.23 supra.

The District Court, in Lee, makes no such inquiry, and simply distinguishes Lee from Glosson. 11 FLW at 193.

1. CONTINGENT FEE NOT DEPENDENT UPON SUCCESSFUL PROSECUTION.

The most glaring distinction from Glosson was the District Court's observation in Lee that:

> "[The] fee was not contingent upon a successful prosecution."

11 FLW at 193.[38]

As should be the case with any legal distinction, its logical force must be weighed in its factual setting. Taking the District Court's factual recitation in Lee as correct:

> The informant, Ronald Carn, whose sole "legitmate" source of income was from the law enforcement authorities, was hired by FDLE. The oral, but express agreement was that Carn would be paid a reward for the production of incriminatory evidence. After producing that evidence against Lee, Carn was rewarded and then put on a salary with no express contingency that it would be dependent upon his testimony or the successful prosecution of Lee.

When put in factual perspective, the above distinction--that Carn's "fee was not contingent upon a successful prosecution" of Lee--invites serious questions concerning the limits beyond which law enforcement should not wander when offering a bounty for evidence or testimony.

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[38]The author of the Lee opinion, Joanos, J., simply laid Glosson and Lee side-by-side and identified four distinctions by which Lee's due process claim was rejected: "In the instant case, however, Lee was targeted by the informant rather than being named by an agent of the State; the State Attorney's office was not involved in the operation and did not supervise the informant in any way; the drugs sold by Lee were owned by him [not a "reverse sting"]; and although the informant was paid after each purchase, his fee was not contingent upon a successful prosecution." 11 FLW at 193 [Emphasis supplied].

a. "Vital witness" or "vital evidence": Does it make a difference?

There is no question that the $25 bounty received by Carn was expressly contingent upon his successful production of incriminating proof, not testimony. Yet that proof is the evidence without which a successful prosecution, as charged, could not be had.

In addition, the due process complaint in Williamson--that such a reward invites a "tendency" to entrap and thus, if not justified, threatens the integrity of the judicial process--remains unanswered. If the informant's activities "setting up" the vital transaction are unchecked, regardless of whether or not the actual transaction was monitored, no one but that informant with reward in hand can attest to its propriety, unless of course, the defendant chooses to waive all rights against self-incrimination for a potentially wide spectrum of charges. Simply put, the distinction employed sub judice pits Lee against the seemingly irreconcilable Marrero decision. See n.23, supra.

b. Status as "vital": Must it be by stipulation or express contract?

No contractual agreement, of record, exists defining Carn as a "vital witness" hired to testify. Ignoring for the moment that the Lee prosecutor orally stipulated that Carn was one of the "chief witnesses" for the state,[39] should not the circumstances and realities of trial be considered when making that

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[39] See TRANSCRIPT of testimony and proceedings before the Honorable John J Crews on 20 February 1985, [MD at 4], where the prosecutor advised in open court: "Your Honor, to facilitate the

determination?[40] If not, a gaping hole would seem to be created for avoiding the sanction of dismissal under facts as egregious, but perhaps not as candidly conceded, as those in Glosson.[41]

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motion hearing or to expedite it as much as possible, the State would agree with what is contained in paragraph one [of the motion to dismiss] that simply on or about, January 1985, the confidential informant who is and should be one of the State's chief witnesses, Ronald Karn (assumed spelling) had an oral contract...."

[40]When due process is at stake, it would seem appropriate that the court consider the circumstances and the particular individual's inevitable evidentiary role with respect to each charge pursued by the prosecution. As to any possession count, like the initial charge against Lee, the informant as a hand-to-hand recipient of the contraband and, thus, an exclusive, albeit temporary, custodian of critical evidence, is necessary in the "chain of custody" for the contraband's ultimate identification as an illegal substance.

In addition, the failure to properly supervise or monitor the "set up" can convert an informant's otherwise "ancillary" status as a witness to "the buy" into a "material", if not essential, witness to the critical events leading up to that purchase. The following is an abbreviated sampling of Courts describing an informant, in a similar posture, as a "material" witness notwithstanding arguments to the contrary by the prosecution: Roviaro v. United States, 353 U.S. 53 (1957)(the informant was the only witness who could "explain or amplify" the operative events leading up to the monitored transaction "unless [the defendant] waived his constitutional right not to take the stand in his own defense ...." 353 U.S. at 64; Gilmore v. United States, 256 F.2d 565 (5th Cir. 1958); People v. Durazo, 340 P.2d 594 (Calif. 1959); Davenport v. State, 278 So.2d 769 (Ala. App. 1973); Sims v. State, 313 So.2d 26 (Miss. 1975); English v. State, 301 So.2d 813 (Fla. 2d DCA 1974); Smith v. State, 318 So.2d 506 (Fla. 2d DCA 1975); United States v. Ayala, 643 F.2d 244 (5 Cir. 1981).

[41]Note that the ethical prohibition against offering contingent fees to trial witnesses proscribes rewarding any witness with no requirement that the testimony be "vital" to either side of the controversy. See DR 7-109(c) and EC 7-28, Code of Professional Responsibility.

c. The "contingent" nature of the reward: must it be express by contract or stipulation?

When Judge Joanos, in Lee, described the fee as "not contingent upon a successful prosecution" he was undoubtedly referring to the $25 bounty paid to informant Carn for each successful purchase of contraband. Much was made of the fact that the oral agreement did not require the informant's testimony to collect; and, after the successful purchases, the informant was "placed on a weekly salary."[42]

Insofar as Glosson condemned the combination of a "vital witness" with a "financial stake in the criminal conviction," 462 So.2d at 1085, due to the inevitable incentive to color his testimony, it would seem appropriate to consider the circumstances surrounding that "weekly salary" and its potential for similar abuse.

Law enforcement officers are paid a salary to enforce the law as well as detect crime. They are typically bonded professionals invested with the public trust by virtue of having survived strict background investigations confirming their integrity, as well as specialized training to assure that they observe constitutional safeguards. The public confidence in law enforcement requires no less.

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[42]As described by the court: "Testimony at the hearing on Lee's motion to dismiss reflects that shortly after the two purchases from Lee, the informant was placed on a weekly salary. Agent Collins was aware that the informant had a record of numerous convictions, including a conviction for perjury. The informant

An informant, on the other hand, with a history of theft, fraud, and perjury and whose only means of putting bread on the table is selling stolen property and income from police coffers, is an entirely different breed of animal. He is not salaried for the same reasons and, by law if not common sense, cannot be. If he is to be a "chief witness," taking the prosecutor at his word, his salary necessarily depends upon his not biting the hand that feeds him as he has no enforceable contract with the government as do law enforcement officers.[43]

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had at least four aliases, and his only sources of income during the time period relevant to this case were payments from FDLE and money received from the sale of items he had stolen." 11 FLW at 193.

[43]Ronald Carn's testimony below reflects his reluctance to bite the hand of FDLE when speaking of his employment:

> INFORMANT: "... I'm only allowed to say so much, you know, concerning the Florida Department of Law Enforcement because that's their rules and regulations."
>
> * * *
>
> "...[T]hey don't discuss their business, you know. And a lot of things I can't remember because I was under a lot of pressure anyway at that time."

[MD at 29].

> * * *
>
> DEFENSE COUNSEL: "How much money did you receive in total from the Florida Department of Law Enforcement?"
>
> INFORMANT: "Quite a bit, sir."
>
> * * *
>
> "I can't, I can't give you a ballpark figure, sir, because they have give me money so many times. ...They have been real nice to me. So I can't say how much it really was."
>
> DEFENSE COUNSEL: "Are you talking thousands of dollars?"
>
> INFORMANT: "It could be, sir...."

[MD at 33].

The incentive to color his testimony, like Glosson, does not suddenly vanish simply because the tentative and contingent nature of his employment is not spelled out by contract or stipulation.

d. The nature and amount of the reward: financial or otherwise?

In evaluating the due process claim in Lee, the First District was reminded, on brief by the State, that the informant in Glosson received "an enormous financial incentive"[44] and that the informant in Lee was "merely paid $25 ..."[45]

One would think that any reward to a vital witness should be objectionable.[46] But for the sake of argument, assuming that this Court is asked to address the issue, the due process consideration is not so much the "nature" and "amount" of reward in a vacuum as it is the resulting temptation to the witness under the particular facts of each case.

For example, a $25 bounty to a destitute informant might be pursued more desperately than $1000 by a highly successful underworld character granted immunity for his testimony. The needs and desires of the recipient, and proclivity for embellishing the truth, must be factored-in if such fine distinctions are to become weighty considerations.

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[44] BRIEF OF APPELLEE to the 1st DCA, p. 5.

[45] Id., at 7.

[46] See DR 7-109(c) and EC 7-28, Code of Professional Responsibility.

In addition, any suggestion that the threat to the judicial process is confined to "financial" incentives should be rejected as contrary to common sense. The particular stimulus that successfully produces a desired response will naturally vary with the needs and desires of the subject.[47]

2. DEFENDANT NOT TARGETED BY POLICE.

Another distinction by Judge Joanos, in Lee, was that:

> "In Glosson, the defendants were targeted by law enforcement .... [whereas] in the instant case, however, Lee was targeted by the informant ..."

11 FLW at 193. [Emphasis supplied].

A fair reading of the Glosson decision is that this court's concern was the effect the fee arrangement would have on the recipient's testimony, without so much as a hint that the targetting of the defendant by a witness in search of a bounty would cure the problem:

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[47] See, e.g., money paid as a fixed fee: State v. Hohensee, 650 So.2d at 269 (weekly salary); money paid as a variable fee: Glosson, 462 So.2d at 1083 (10% of all civil forfeitures); leniency by police or prosecution: Hohensee, supra ("Bressie and Yarberry a couple of weeks earlier had made a 'deal' with the police whereby [they], in return for leniency on another burglary charge, would supply information ...);" favors to a friend in need: People v. Isaacson, 378 NE 2d at 80 ("Breniman cried and sobbed on the phone .... he was running out of friends..."); to stop brutality: Isaacson, supra, at 79 ("... an investigator [sic] struck [him] with such force as to knock him out of a chair ..."); and by deceit: Id., at 80 ("... the trial court found that [he] would not have aided the police were it not for the fact that they deceived him ...").

> "The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions."

462 So.2d at 1085. [Emphasis supplied].[48]

Nowhere in the Glosson opinion does one get the impression that the due process concerns, and the integrity of a fair trial, depend upon the individual who initiated the targeting of a defendant. Indeed, a simple study of human behavior would likely indicate that the incentive to color testimony remains, and indeed may be psychologically heightened, if a witness with a reward in mind is called upon to confirm, under oath, the criminal acts of a citizen that he alone targeted.

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[48] It is possible that Judge Joanos is in error as to whether or not the defendants, in Glosson, were targeted by law enforcement. In its brief to this Court, in Glosson, the briefwriter for the state sharply criticized the First District Court: "In its decision below, the First District essentially turned the Third District's interpretation of Williamson v. United States on its head, applying that decision to accept the due process defenses of defendants who were accused of buying drugs from a government agent even though the State had not preselected the defendants as targets and had promised to pay the agent for his services in the future only if he proved cooperative." See BRIEF OF PETITIONER ON THE MERITS, State v. Glosson, (case no.: 64,688) filed with this Court on 9 July 1984. [Emphasis supplied].

That the Glosson defendants may not have been preselected by law enforcement is also supported by the stipulated evidence in Glosson: "The parties stipulated that .... Wilson would receive ten percent of all civil forfeiture proceedings resulting from the criminal investigations initiated and participated in by him." 462 So.2d at 1083. [Emphasis supplied].

3. NO INVOLVEMENT OF STATE ATTORNEY'S OFFICE AND NO REVERSE STING.

The two final distinctions, by Judge Joanos, in Lee, were that:

> "[T]he State Attorney's office was not involved ... [and] the drugs sold by Lee were owned by him [thus no reverse sting]."

11 FLW at 193 [Emphasis supplied].

Again, a fair reading of the Glosson decision would suggest that either factor, emphasised above, was merely an observation by the Glosson author, Mr. Justice McDonald, recapitulating the factual background of that case, and both observations are ancillary to the primary concern with temptations to color testimony.[49] Without repeating the Glosson holding, the two distinctions noted above by the First District are likely distinctions that make no difference to the incentive to color testimony, or shape the truth, by a vital witness. The existence or nonexistence of either ingredient should make no difference when the formula consists of the dangerous combination of a vital witness with a stake in the outcome. The threat to the integrity of the judicial process remains.

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[49] If the non-involvement of the state attorney is a factor that gets an otherwise constitutionally objectionable fee arrangement off the due process hook, law enforcement might be encouraged to avoid a legal opinion from their legal counsel--the state attorney's office--on the propriety of a questionable investigative scheme precisely at a time when sound legal advice is most needed.

CONCLUSION

To borrow a powerful thought from the former Chief Judge of the First District, Judge Spector:

> "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."

263 So.2d at 283. It is one thing to detect crime, but quite another when tactics are employed to detect crimes not yet committed with arrangements that enhance that likelihood and also encroach upon the integrity of that solemn concept of fair trial. In order to preserve the public confidence, it is incumbent on our courts to define permissible police practices and those that are impermissible by their tendencies to threaten the very concept of justice, notwithstanding the incremental but expensive advantages in obtaining a conviction.

Respectfully submitted,

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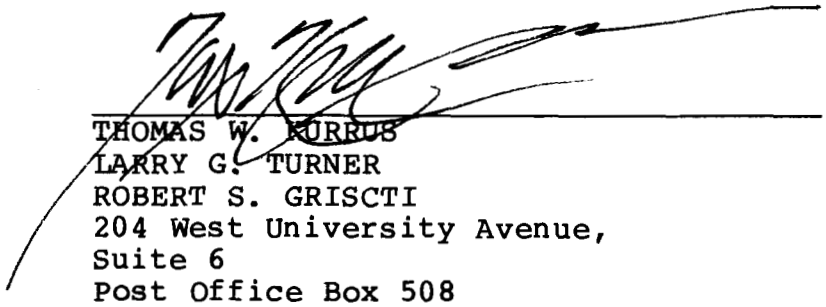
GRISCTI, P.A.



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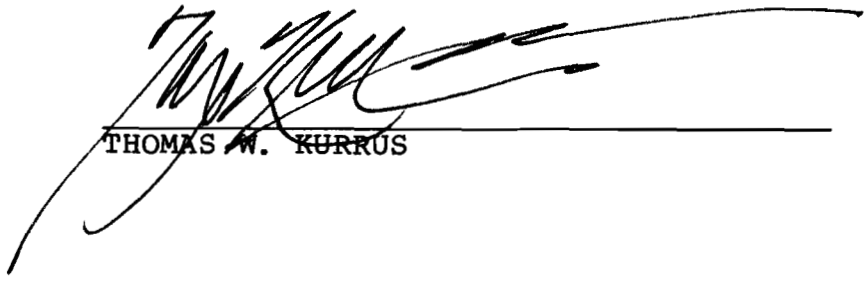
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy hereof has been furnished by U. S. Mail to Assistant Attorney General John M. Koenig, Jr., Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 this 18th day of March 1986.



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