IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DAVID WILLIAM HUNTER and
KELLY CONKLIN,

Respondents.

CASE NO. 73,230

FILED

INITIAL BRIEF OF PETITIONER
ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority and appellee in the appended Hunter v. State, 13 F.L.W. 2186 (Fla. 4th DCA September 21, 1988), review granted, Case No. 73,230 (Fla. 1988). Respondents, David Hunter and Kelly Conklin, were the criminal defendants and appellants below.

References to the six volumes of the record on appeal containing transcripts will be designated "(R:);" to the one volume containing respondent Hunter's legal documents, "(HR:);" and to the one volume containing respondent Conklin's legal documents, "(CR:)."

All emphasis, unless otherwise indicated, will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

On November 2, 1982, the State filed an information in the Broward County Circuit Court charging respondents with trafficking in 400 or more grams of cocaine the previous October 13, and with conspiring to traffic in such cocaine on October 12-13 (CR: 1116-1117). Respondent Conklin was later charged with delivering cocaine on September 21 (CR: 1202-1203). Respondents filed numerous motions to dismiss the charges, in essence averring that the State's conduct in permitting convicted drug trafficker Ronald Diamond to render "substantial assistance" to mitigate his sentence by making the cases against them was unconstitutional and barred their convictions as a matter of law because they had not been Diamond's cohorts in the case for which Diamond had been convicted (CR: 1127-1130; 1160-1169; 1188-1189; 1242-1246; HR: 1119-1124; 1146; 1164-1174).[1] The State disagreed, and traversed (CR: 1170-1176; HR: 1130-1136). The Honorable Thomas Coker denied respondents' various motions on May 4, 1984 (CR: 1177-1182; HR: 1137-1142); on February 2, 1986 (R: 232) following an evidentiary hearing (R: 39-122); on February 4, 1986

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[1] §893.135(3), Fla. Stat. (1981) at that time expressly authorized the State to seek to mitigate the sentences of only those convicted drug dealers who had rendered "substantial assistance" by turning in others involved in the particular transaction for which they were arrested. The statute, renumbered §893.135(4), Fla. Stat. (1987), now expressly provides that drug dealers may render "substantial assistance" by incriminating any other drug dealer. See Ch. 87-243, §5, Laws of Florida.

(R: 453-454) during trial (R: 122-1067); and on April 4, 1986 (R: 1082) during sentencing (R: 1068-1115).

The evidence adduced at the pretrial hearing and at trial which bore on respondents' motions to dismiss, when properly viewed in the light most favorable to Judge Coker's rulings for the State, State v. Davis, 243 So.2d 587, 591 (Fla. 1971), established that Diamond had been arrested on January 20, 1982 and charged with trafficking in 400 or more grams of cocaine and with delivering 4 pounds of marijuana (R: 667; 545). Diamond was unable to provide "substantial assistance" by turning in his cohorts, so the State offered him the opportunity to do so by making new cases, promising to certify Diamond's eligibility for a reduced sentence when his activities led to the confiscation of at least four kilograms of cocaine (R: 90-91; 76; 550; 622-614; 641-642; 678). Diamond was released and made several cases for the State before he was convicted as charged following his trial in May of 1982 before the Honorable Arthur Franza (R: 74; 679). Diamond was provisionally sentenced to fifteen years of net imprisonment and a $250,000 fine (R: 644; 547; 679). Judge Franza permitted Diamond to remain at liberty for a time certain so that Diamond would have the opportunity to fulfill his contract with the State, and subsequently extended Diamond's deadline for sixty days at the State's request in order that his then ongoing negotiations with respondents could continue (R: 591-593).

Diamond had met respondent Conklin in August of 1982 (R: 75). Conklin had not been specifically targeted by the State; the State's arrangement with Diamond was simply designed to detect as many high-volume drug suppliers as possible, and hence stem the ongoing flow of illicit narcotics into Broward County (R: 58; 77; 613-614). Conklin attracted Diamond's attention because he was openly smoking hashish and marijuana at the apartment complex where the two men lived, which gave Diamond the impression that he had contacts with drug dealers (R: 64; 646-647). Diamond casually inquired whether Conklin could procure a large quantity of cocaine, and Conklin confidently responded that he knew of several sources (R: 65-66; 646-648). Detectives Ralph Capone and John Sousa, posing as drug buyers from Michigan, accordingly met with Conklin and Diamond several times in September to purchase two kilograms of cocaine for $116,000 from one of Conklin's sources, who never appeared (R: 513-515; 649-653; 738-743). Conklin did, however, sell Sousa a one gram sample of cocaine at the meeting of September 21 (R: 743-744; 871).

In late September, Conklin mentioned for the first time that his boss, respondent Hunter, could get cocaine (R: 657-658). Diamond phoned Hunter, who casually confirmed that he always had large quantities of the drug available (R: 657-659; 71-72). Further negotiations resulted in an agreement that Hunter and Conklin, acting as brokers for an anonymous source with whom Hunter had dealt for the past year, would sell Sousa one kilogram

of cocaine at Hunter's office on October 13 (R: 750-754). Immediately after the transaction had occurred as planned, both respondents were arrested (R: 754-759). Five days later, Diamond was resentenced to one year of net imprisonment plus five years of probation, with no fine (CR: 1172; R: 83).

Contrary to the picture painted by the defense, Diamond never told respondent Conklin's father that respondent Conklin was a reluctant participant in the events leading to his arrest, and Capone and Sousa did not pose as "gangsters" (R: 699-703). Neither Diamond nor Capone nor Sousa ever threatened or forced either respondent to go through with the deal (R: 67; 72; 525; 609; 654; 698; 737-738). In fact, both respondents were at all times very willing to deal in narcotics, as they were experiencing financial difficulties and hence were anxious to make money (R: 66-67; 521-525; 648; 659-660; 719; 737-738; 753; 832; 853-854). Of course, neither respondent ever called the police (R: 869; 935).

The jury found respondents guilty as charged (R: 1062-1063), and they were sentenced by Judge Coker to net terms of fifteen years of imprisonment and $250,000 in fines (CR: 1247-1249; HR: 1175-1176). Respondents' timely consolidated appeals to the Fourth District resulted in reversals on state constitutional due process grounds[2] under State v. Glosson, 462 So.2d 1082 (Fla. 1985), with that court accepting the defense's

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[2] Article I, Section 9, Constitution of the State of Florida.

version of the facts although the State had largely disputed same ("Answer Brief of Appellee," pp. 2-4; 8-11). The Fourth District did certify the following two questions to this Court as being of great public importance:

> DOES AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATE THE HOLDING IN STATE V. GLOSSON?
>
> ASSUMING THE EXISTENCE OF A DUE PROCESS VIOLATION UNDER GLOSSON, DOES GLOSSON'S HOLDING EXTEND TO A CODEFENDANT WHO WAS NOT THE DIRECT TARGET OF THE GOVERNMENT'S AGENT?

Hunter v. State, 13 F.L.W. 2186, 2188 (Fla. 4th DCA September 21, 1988). On October 31, 1988, this Court ordered the parties to submit briefs on the merits of these certified questions. [3]

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[3] Respondents had raised five other points on direct appeal upon which the Fourth District declined to pass. Id. Should this Court answer the instant certified questions adversely to either respondent and exercise its discretion under Fla.R.App.P. 9.040(a) to review these remaining claims, the State would rely upon its "Answer Brief of Appellee" filed in the Fourth District to refute same.

SUMMARY OF ARGUMENTS

An agreement whereby a convicted drug trafficker receives a substantially reduced sentence for setting up new drug deals and testifying for the State does not violate State v. Glosson, since the informant in Glosson had a much greater incentive to testify falsely.

Assuming arguendo a Glosson violation as to respondent Conklin, respondent Hunter lacks standing to reap the benefit thereof because he did not become involved in the instant drug transaction at the instigation of a State agent.

ISSUE I

DOES AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATE THE HOLDING IN STATE V. GLOSSON?

ARGUMENT

The State respectfully contends that this Honorable Court should answer the above first-certified question in the negative.

In Hunter v. State, 13 F.L.W. 2186 (Fla. 4th DCA September 21, 1988), the instant case, the Fourth District agreed with respondents that the State's conduct in permitting convicted drug trafficker Ronald Diamond to render "substantial assistance" to mitigate his sentence by making the cases against them barred their convictions as a matter of law under the due process clause of the state constitution because they had not been Diamond's cohorts in the case for which Diamond had been convicted. Inasmuch as the basic "substantial assistance" conduct of which respondents complained has as noted now been expressly authorized by the Florida Legislature through its enactment of §893.135(4) Fla Stat. (1987), and the facts of this case when viewed in the proper light reveal that Diamond's rendition of such "substantial assistance" did not involve any misbehavior by the State, the Fourth District has in effect held that §893.135(4) is unconstitutional. The State cannot accept such a result. "A heavy burden rests on those who would attack the judgment of the representatives of the people." Gregg v. Georgia, 428 U.S. 153, 175 (1976).

In support of its holding, the Fourth District relied primarily upon this Court's decision of State v. Glosson, 462 So.2d 1082 (Fla. 1985). In Glosson, this Court condemned a scheme whereby the State had agreed to pay an informant a percentage of all civil forfeitures resulting from the criminal convictions he was to help obtain by selling those defendants drugs. The Court reasoned that the informant's enormous financial stake in ensuring the defendants' convictions carried with it an intolerable risk that the informant would commit perjury at trial. State v. Glosson, 462 So.2d 1082, 1085. The Fourth District simply failed to appreciate that the instant situation was vastly distinguishable from that in Glosson in that Diamond, unlike the Glosson informant, had little incentive to perjure himself at trial because he had already been rewarded for his efforts. Diamond's reward was not contingent upon respondents' convictions and, indeed, the State would have had little recourse against its informant had he shaded his trial testimony in favor of respondents and they been acquitted. See State v. Acosta, 506 So.2d 387 (Fla. 1987).

In State v. McQueen, 501 So.2d 631, 633 (Fla. 5th DCA 1986), review denied, 513 So.2d 1062 (Fla. 1987), the State, as it did here, allowed a previously-sentenced drug dealer to render substantial assistance by arranging narcotics transactions "with persons who were known to him or who were already in the drug business and predisposed to buy or sell illegal controlled

substances."[4] The Fifth District held that the defendants who were apprehended as a result of the informant's efforts had no standing to fruitfully contest the statutory irregularities in the prosecutorial and judicial processing of the informant, State v. McQueen, 501 So.2d 631, 633; accord, State v. Stella, 454 So.2d 780, 782 (Fla. 4th DCA 1984); compare, Campbell v. State, 453 So.2d 525, 526 (Fla. 5th DCA 1984), holding that an informant, himself, does have such standing. This holding comports with the general axiom that the government's failure to strictly comply with statutory procedures of a nonconstitutional nature should not result in a windfall to a complaining defendant via the exclusion of reliable incriminating evidence. See, e.g., State v. Castillo, 528 So.2d 1221, 1222 (Fla. 1st DCA 1988) and Rice v. State, 525 So.2d 509, 511 (Fla. 4th DCA 1988).

Even more significant than the McQueen court's holding concerning standing, upon which the State of course relies here, is its holding distinguishing Glosson:

> Appellees contend that [the informant] Bennett's inducement in having a seventeen and one-half year reduction in sentence as well as the elimination of a $250,000 fine is clearly analogous to the contingent fee conditioned on cooperation and testimony held to

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[4] In attempting to show that McQueen was factually distinguishable from the case at bar, the Fourth District inadvertently changed the underlined word in the foregoing quote from "or" to "and" and emphasized it, Hunter v. State, 13 F.L.W. 2186, 2188 note 3, which would appear to have altered the court's legal reading of McQueen's import considerably.

> be invalid in Glosson. Glosson, however, is distinguishable from the instant case in more ways than one. In Glosson, the defendants were targeted by law enforcement. The informant had an oral agreement with the sheriff's department, which agreement was carried out under the supervision of the state's attorney. Moreover, the informant's fee was contingent upon his cooperation and testimony in the criminal prosecution. The criminal activity involved a "reserve-sting" operation. The operation was conducted with the use of government controlled cannabis.
>
> Unlike Glosson, however, appellees in the instant case were targeted by the informant rather than by the state. In addition, the operation was not conducted with the use of government controlled contraband. Although the assistant state attorney was involved in the operation, he did not sign the written agreement. Moreover, Bennett was supervised by Metropolitan Bureau of Investigation agents. Finally, Bennett was not to receive a percentage of any forfeitures, proceeds or cash. Although he was required to testify, when necessary, there was no agreement that convictions must result from his testimony. His sole inducement in entering into this agreement was that the assistant state attorney would recommend a reduction of sentence to the judge. The reduction of sentence, however, remained in the discretion of the judge.

State v McQueen, 501 So.2d 631, 633-634. See also United States v. Lane, 693 F.2d 385, 387-388 (5th Cir. 1982). The Fifth

District, in other words, has in essence accepted the State's aforenoted view that Glosson should be distinguished from cases of the instant ilk because the Glosson informant's rewards, unlike the McQueen or Hunter informants' rewards, was contingent upon the successful prosecution of the defendants he had implicated in drug trafficking.

Respondents will surely contend that, even conceding that the Glosson informant had the greater incentive, Diamond still had a motive to lie at trial. Of course he did; as did the respondents. This fact, however, is insufficient to justify judicial abrogation of the State's general right in criminal cases to have the credibility of its witnesses passed upon by a jury. Indeed, this Court has established that the State may reach a jury and the jury may thereafter convict a murder defendant solely upon the uncorroborated testimony of his accomplice, see Petersen v. State, 117 So. 227 (Fla. 1928), even though the accomplice may have been induced to testify against the defendant through promises of a lesser sentence or even total immunity. See Downs v. State, 386 So.2d 788 (Fla. 1980), cert. denied, 449 U.S. 976 (1980) and Barfield v. State, 402 So.2d 377 (Fla. 1980). Are accomplices to drug dealers less reliable than accomplices to murderers? This Court's well-reasoned holding in Glosson simply should not be extended to cover the instant scenario.

Respondents may also very well argue that even if their outright discharge is not mandated on due process grounds under

State v. Glosson, it should be mandated under Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985) on grounds that they were allegedly entrapped by the State. In Cruz, this Court drew a distinction between the defense of "subjective entrapment," wherein a defendant argues to a jury that he was not predisposed to commit the charged offenses but merely succumbed to unfair police inducements and should thus be acquitted, and the defense of "objective entrapment," wherein a defendant argues to the judge that regardless of his predisposition to commit the charged offenses the attendant police conduct was so outrageous that he should be discharged.[5] Any contention that the respondents here were subjectively entrapped would be nonsense. It is well-settled that the State may prove predisposition by showing either that the defendants had previously committed illegal acts similar to those for which they were on trial, or that they readily acquiesced to committing these latter acts, State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985). As noted, by showing that both respondents had had prior experience with unlawful narcotics and readily acquiesced to the instant transaction, the State met both of these prerequisites below. Compare Taffer v. State, 504 So.2d 436 (Fla. 2nd DCA 1987), cause dismissed, 506 So.2d 1043 (Fla. 1987).

As for objective entrapment, the Cruz Court cautioned:

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[5] The defense of objective entrapment was abrogated by the Florida Legislature after the operative events of this case, §777.201, Fla Stat. (1987).

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

Cruz v. State, 465 So.2d 516, 522. In Cruz itself, this Court held that the actions of a Tampa policeman who induced the defendant to thieve $150.00 which protruded from his pocket as he portrayed a "drunken bum" in an alleyway failed both prongs of the aforestated test because the State did not establish either that other drunks had been "rolled" in the area or that the dubious means adopted to curtail any such activity would be effective. Cruz v. State, 465 So.2d 516, 522. In contrast, the instant governmental conduct involving the respondents clearly passed both prongs of the Cruz test. The first prong was satisfied by proof that the State's arrangement with Diamond was designed to stem the ongoing flow of illicit narcotics into Broward County by detecting as many high-volume drug suppliers as possible. The second prong was satisfied by proof that this arrangement had in fact already resulted in the successful making of several such cases, and was not "outrageous" as a matter of law as just demonstrated. Compare Lusby v. State, 507 So.2d 611 (Fla. 4th DCA 1987) with Marrero v. State, 493 So.2d 463 (Fla. 3rd DCA 1985).

In sum, the State's conduct below was well within permissible bounds, and cannot be used as a sword by these drug

dealing respondents to obtain legal immunity for their misbehavior. In State v. Benitez, 395 So.2d 514, 517 (Fla. 1981), this Court declared that "the elimination of illegal drug traffic is. . . a beneficial and worthwhile goal." See also Cardwell v. State, 482 So.2d 512, 515 (Fla. 1st DCA 1986) and State v. Eshuk, 347 So.2d 704, 707 (Fla. 3rd DCA 1977). The State beseeches the Court to revitalize this declaration by reversing the decision under review and approving the judgments and sentences imposed by the trial judge against respondents, thereby upholding in essence the constitutionality of §893.135(4) as written and as prospectively applied in this case, see Mack v. State, 504 So.2d 1252 (Fla. 1st DCA 1986).

ISSUE II

ASSUMING THE EXISTENCE OF A DUE PROCESS VIOLATION UNDER GLOSSON, DOES GLOSSON'S HOLDING EXTEND TO A CODEFENDANT WHO WAS NOT THE DIRECT TARGET OF THE GOVERNMENT'S AGENT?

ARGUMENT

Since the State has hopefully just shown that the conduct of its agent below did not constitute either a due process violation under Glosson or entrapment under Cruz, it would respectfully submit that the above second-certified question has become moot. Should this Court disagree, the State alternatively asserts that this question should be answered in the negative.

As noted, there is case support for the State's belief that neither respondent had standing to fruitfully contest the conduct of its agent below. State v. McQueen; State v. Stella. Even if respondent Conklin had standing to challenge the State's conduct, however, respondent Hunter certainly did not, because he became involved in the instant chain of events at the behest of his private-citizen partner rather than at the behest of a governmental operative. As a general rule, "the doctrine of entrapment is inapplicable where the inducement comes from a non-agent private citizen." State v. Perez, 438 So.2d 436, 438 (Fla. 3rd DCA 1983). There is no reason why this rule should not also pertain concerning the doctrine of due process. Compare Sarno v. State, 424 So.2d 829, 833 (Fla. 3rd DCA 1982), review denied, 434 So.2d 888 (Fla. 1983). Indeed, although neither type of

entrapment defense is of constitutional dimensions, United States v. Russell, 411 U.S. 423, 433 (1973), this Court has recognized that an objective entrapment analysis, at least, "parallels a due process analysis." Cruz v. State, 465 So.2d 516, 520 note 2.

CONCLUSION

WHEREFORE Petitioner, the State of Florida, respectfully submits that this Honorable Court should REVERSE the decision under review and APPROVE the judgments and sentences entered against respondents by the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Initial Brief on the Mertis" has been furnished, by United States Mail, to FRED HADDAD, ESQUIRE, Attorney at Law, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301 this 16th day of December, 1988.

John Tiedemann
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
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CASE NO. 73,230

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Criminal law—Evidence of sale of cocaine to undercover police supports conviction of trafficking—Conviction of conspiracy to traffic unsupported by any proof of an express or implied agreement to commit the offense

JULIAN MIRANDA, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 87-797. Opinion filed September 20, 1988. An Appeal from the Circuit Court for Dade County, Alfonso C. Sepe, Judge. John H. Lipinski and Maria Brea-Lipinski, for appellant. Robert A. Butterworth, Attorney General, and Nancy C. Wear, Assistant Attorney General, for appellee.

(Before HUBBART, NESBITT, and JORGENSON, JJ.)

(PER CURIAM.) As in *Velunza v. State*, 504 So.2d 780 (Fla. 3d DCA 1987), we conclude that the evidence of the appellant's participation in the sale of cocaine to undercover police supports his conviction of trafficking. Nonetheless, there is no proof of an express or implied agreement to commit the offense and his conviction of conspiracy to traffic must be reversed. *See Velunza*, 504 So.2d at 782; *see also Voto v. State*, 509 So.2d 1291, 1293 (Fla. 4th DCA 1987).

Affirmed in part and reversed in part.

* * *

Criminal law—Sentencing—Guidelines—Departure must be supported by written reasons—Remand for sentencing within guidelines

JESUS MONTES-OCA, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 87-2342. Opinion filed September 20, 1988. An Appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge. Bennett H. Brummer, Public Defender, and Henry H. Harnage, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Mark S. Dunn, Assistant Attorney General, for appellee.

(Before BARKDULL and NESBITT, JJ., and GOMEZ, Helio, Associate Judge.)

(PER CURIAM.) The defendant was found guilty of burglary and battery. The recommended sentence range was three years incarceration. The defendant was sentenced to three and one-half years even though the trial judge did not state written reasons for departure as required by Florida Rule of Criminal Procedure 3.701(d)(11). *See State v. Whitfield*, 487 So. 2d 1045, 1047 (Fla. 1987); *State v. Johnson*, 478 So. 2d 1054 (Fla. 1985). The state concedes the error and states it was the result of an improperly calculated guidelines scoresheet.

Accordingly, we vacate the sentence and remand with directions to impose a sentence within the guidelines.

* * *

Criminal law—Separate convictions for armed robbery and attempted first-degree felony murder not improper—Separate conviction for unlawful possession of firearm during commission of felony error

RICHARD ANDERSON, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 87-1621. Opinion filed September 20, 1988. An Appeal from the Circuit Court for Dade County, Amy Steele Donner, Judge. Bennett H. Brummer, Public Defender, and Howard E. Landau, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Michele L. Crawford and Steven T. Scott, Assistant Attorneys General, for appellee.

(Before HUBBART, NESBITT, and PEARSON, Daniel S., JJ.)

(PER CURIAM.) A jury found the defendant guilty of a) attempted first-degree felony murder, b) armed robbery, and c) unlawful possession of a firearm during the commission of a felony. He appeals both the convictions and the sentence.

We reject the claim that the conviction for the felony of armed robbery, as well as for attempted first-degree felony murder, resulted in an impermissible dual punishment. Armed robbery and attempted first-degree felony murder constitute separate statutory offenses consisting of separate and distinct elements. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Because there is a complete absence of any clear legislative intent to treat these two offenses as equivalent, it was proper to convict and sentence the defendant on both charges. *Hall v. State*, 517 So.2d 678 (Fla. 1988); *Carawan v. State*, 515 So.2d 161 (Fla. 1987).

We agree with the defendant's claim, which is conceded by the state, that it was improper to convict him for unlawful possession of a firearm in the commission of a crime in view of his other allied convictions. *Carawan; Hall.* Although the defendant's conviction must be modified, it does not affect the sentence actually imposed upon him by the trial judge.

The other points raised are without merit.

As modified, the defendant's conviction and sentence are affirmed.

* * *

Criminal law—Agreement whereby a convicted drug trafficker will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for state violates prohibition against paying informant a contingency fee for his cooperation in setting up drug transactions and aiding in subsequent criminal prosecutions—Prohibition against contingency payment of confidential informant extends to codefendant who was not the direct target of the government's agent—Questions certified—Defendant in instant case entitled to dismissal of criminal charges which stemmed from a drug transaction instigated by an informant paid by the state to initiate drug transactions and testify for state in subsequent prosecutions—Statute permitting reduction of sentence in return for substantial assistance to state does not authorize the creation of new criminal activity, but is limited to assisting in apprehending those who had already participated in a crime

DAVID WILLIAM HUNTER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4-86-0807. KELLY I. CONKLIN, Appellant, v. STATE OF FLORIDA, Appellee. Case No. 4-86-0808. Opinion filed September 21, 1988. Consolidated appeals from the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge. Fred Haddad of Sandstrom & Haddad, Fort Lauderdale, for appellants. Robert A. Butterworth, Attorney General, Tallahassee, Lee Rosenthal and Alfonso M. Saldana, Assistant Attorneys General, West Palm Beach, for appellee.

(ANSTEAD, J.) Appellants were convicted of trafficking in cocaine and conspiracy after the trial court and a jury rejected their defense of entrapment. They were sentenced to the mandatory minimum term of fifteen years in prison and ordered to pay fines of $250,000.00 each. We hold that appellants are entitled to be discharged under the Florida Supreme Court's holding in *State v. Glosson*, 462 So.2d 1082 (Fla. 1985), affirming dismissal of criminal charges stemming from a drug transaction instigated by an informant paid by the state to initiate drug transactions and testify for the state in the subsequent prosecutions.

FACTS

The drug transaction charged against the appellants came about as a result of the activities of a convicted drug trafficker and police informant, Ron Diamond, who later was the chief prosecution witness against appellants. Diamond had been convicted of trafficking in cocaine and sentenced to the same term now facing appellants: fifteen years minimum mandatory imprisonment and

a $250,000.00 fine. Under section 893.135(3), Florida Statutes (1985), a prosecutor may move the sentencing court to reduce or suspend the sentence of a defendant convicted under the drug trafficking statute if the defendant "provides substantial assistance in the identification, arrest, or conviction *of any of his accomplices, accessories, coconspirators, or principals*." (Emphasis supplied.) Diamond obtained an agreement with the state for the substantial reduction of his own sentence by entering into a section 893.135(3) agreement with the state. However, Diamond's agreement with the state and the trial court did not involve the prosecution of others involved with him, as authorized by section 893.135(3), but rather, according to the undisputed testimony of Diamond and a deputy sheriff, provided that Diamond must make new cases involving a certain amount of cocaine within a certain time frame in order to receive a reduced sentence. Diamond was actually released from prison immediately after conviction by order of a circuit judge under this arrangement with the state. Diamond testified that it was his understanding he would receive a reduction of his sentence at least down to three years and possibly less. Diamond assisted the police in making several cases, but was still one kilogram short of meeting his required quota as the time originally agreed upon was running out. The circuit judge then authorized a sixty-day extension during which Diamond was given a final opportunity to bring in one more kilo of cocaine in order to secure his reduction of sentence. If he failed in doing so, he would be required to surrender and serve the full term of his sentence. After appellants' arrests, Diamond's fifteen-year minimum mandatory sentence and $250,000.00 fine were vacated and the sentence was reduced to one year in prison and five years probation. Diamond actually served only 4-5 months before he was released from prison and his probation terminated.

At the time of the sixty-day extension Diamond was living in the apartment complex where appellant Kelly Conklin lived with his pregnant girlfriend. Conklin had no prior criminal record, was twenty-one years old, recently graduated from art school and worked for David Hunter's advertising firm. Diamond initiated contacts with Conklin and his girlfriend for the purpose of setting up a drug deal. It is undisputed that Diamond instigated the subsequent drug transaction with Conklin and Hunter that led to the convictions herein. Diamond denied threatening Conklin in any way. According to Diamond, he saw Conklin smoking marijuana and, when asked by Diamond about his ability to obtain large quantities of drugs, Conklin showed no reluctance to participate in a drug transaction. A few weeks after Diamond and Conklin met each other, Diamond set up a meeting at their apartment building with undercover agents posing as drug buyers from Detroit. Diamond told Conklin that the "buyers" were members of the Mafia. They showed Conklin a suitcase full of cash in the amount of $116,000.00. They also showed up several times at Conklin's place of employment. On at least two occasions, Conklin indicated he had a connection. Several meetings were set up, but no drugs materialized. Eventually Conklin confided in his boss, Hunter, about Diamond's efforts to obtain drugs. Hunter agreed to help Conklin set up a deal and contacted a former employee about procuring some cocaine. Approximately two months after Conklin and Diamond became acquainted, Diamond engineered the transaction whereby Conklin and his boss David Hunter attempted to sell one kilogram of cocaine to undercover agents working with Diamond. Hunter was taped during the transaction with the undercover agents telling the agents that he had purchased cocaine from this particular supplier for a year.

According to Conklin, Diamond's attitude was friendly when he first approached Conklin about obtaining drugs. Diamond suggested they could both make some easy money. Conklin repeatedly refused to participate, telling Diamond that he did not know anyone from whom he could obtain drugs. Diamond soon became more persistent and aggressive, telephoning Conklin and coming by his apartment and workplace every day, sometimes twice a day. Diamond was "in constant pursuit" of consummating a drug transaction. He became more "insistent" and "aggravated" with Conklin as time passed, and his attitude became threatening. Conklin's girlfriend testified that Conklin repeatedly refused to participate in any drug transaction and that Diamond physically threatened Conklin. Conklin's father testified that after the arrests, Diamond telephoned him and told him that he "had to go back numerous times" to Kelly before Kelly agreed to participate, and that Diamond knew Kelly was broke and needed money because his girlfriend was pregnant.

GLOSSON

In *State v. Glosson* the Supreme Court held that an agreement to pay an informant a contingency fee for his cooperation in setting up drug transactions and then aiding the subsequent criminal prosecutions violates a defendant's due process rights regardless of the existence of evidence of that defendant's willingness to participate in the offense. The court rejected the state's claim that such defenses should be restricted to instances of physical or psychological coercion:

> 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.
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> Our examination of this case convinces us that the contingent fee agreement with the informant and vital state witness, Wilson, violated the respondents' due process right under our state constitution. According to the stipulated facts, the state attorney's office knew about Wilson's contingent fee agreement and supervised his criminal investigations. Wilson had to testify and cooperate in criminal prosecutions in order to receive his contingent fee from the connected civil forfeitures, and criminal convictions could not be obtained in this case without his testimony. We can imagine few situations with more potential for abuse of a defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. *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.*

Id. at 1085 (emphasis added). In *Glosson*, the informant received a percentage of all civil forfeitures arising out of successful criminal investigations initiated by him. The court found that such an agreement violates a defendant's due process rights due to the "enormous incentive" for the informant "to color his testimony or even commit perjury." *Id.*

We believe the facts of this case are at least as compelling as those relied upon by the supreme court in *Glosson* and the agreement with Diamond is closely akin to the conduct condemned by the supreme court in *Glosson* as an abuse of governmental power. As in *Glosson*, the informant here had an invaluable stake in making new cases: his own freedom. In our view such freedom

constituted much more of an "enormous incentive" to "color his testimony" than the strictly monetary arrangement in *Glosson.*[1] It is undisputed that the informant originated the criminal plan in his own mind, and instigated the commission of the crime solely to obtain his own freedom and relief from the mandatory $250,000.00 fine. As in *Glosson,* the informant, acting under judicial, prosecutorial, and law enforcement authorization, was given free reign to instigate and create criminal activity where none before existed.[2] Subsequently he was the key witness for the state in appellants' prosecution. The state concedes, for example, that Diamond's testimony is the only evidence the state presented to rebut the appellant Conklin's defense of entrapment. Diamond actually received his agreed payoff when he was released from a fifteen-year mandatory minimum sentence and quarter-million dollar fine. In essence, a convicted cocaine trafficker was allowed to secure his own freedom by convincing someone else to traffic in cocaine.

An agreement to reduce a defendant-turned-informant's sentence is not *per se* violative of due process, and is in fact legislatively authorized to assist in the prosecution of codefendants. However, we believe the action of the law enforcement officials here, where the informant was authorized to create *new* criminal activity in order to secure his freedom, rather than merely assist in apprehending those who had already participated in a crime, crossed the line drawn by *Glosson* wherein the informant was paid "to manufacture, rather than detect, crime." *Id.* at 1084. We also do not believe the legislature intended such use of the then prevailing version of the substantial assistance statute:

> The statutory language is clear. The court may mitigate the . . . sentence only when the . . . defendant has rendered substantial assistance in the apprehension of others involved in the *very* crime for which defendant is charged (his *accomplices, accessories, co-conspirators,* or *principals*).

Campbell v. State, 453 So.2d 525, 526 (Fla. 5th DCA 1984) (emphasis added).[3] In this case it appears that Diamond was actually out of jail illegally at the time he induced Conklin to traffic in cocaine, and Diamond's subsequent sentence reduction and release was also illegal, since the only statute that authorized Diamond's release was conditioned upon a defendant's assistance in the prosecution of codefendants, and not in making new cases.

There are other substantial issues raised on appeal which we do not address because of our resolution of the *Glosson* issue. Because we believe the issues we have decided are both difficult and of importance statewide, we certify the following questions as ones of great public importance:

> DOES AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATE THE HOLDING IN *STATE V. GLOSSON*?
>
> ASSUMING THE EXISTENCE OF A DUE PROCESS VIOLATION UNDER *GLOSSON*, DOES *GLOSSON'S* HOLDING EXTEND TO A CODEFENDANT WHO WAS NOT THE DIRECT TARGET OF THE GOVERNMENT'S AGENT?

(GUNTHER, J., and OWEN, WILLIAM C., JR., (Retired), Associate Judge, concur.)

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[1]We have not overlooked the forgiving or deletion of the $250,000.00 debt to the state also provided to the informant. We assume that was a minor consideration compared to the reduced prison term.

[2]There is no evidence in the record that Conklin was ever involved in a prior drug transaction. Whether he would have ever participated in a transaction without the inducement of an informant is subject to speculation. Because we have concluded that this case is controlled by Glosson we do not decide the additional issue raised by appellants that the state failed to sustain its burden of proving they were not entrapped by the police into committing this offense.

[3]The key distinction between this case and State v. McQueen, 501 So.2d 631 (Fla. 5th DCA), *rev. denied,* 513 So.2d 1062 (Fla. 1987) is that the substantial assistance agreement there specifically provided that the informant would assist in arranging drug deals with persons *already known to him and who were already in the drug business and predisposed* to buy or sell drugs. 501 So.2d at 633. This, of course, is a major and most significant distinction between McQueen and this case, as the agreement with Diamond had no such limitation—it merely required him to "bring in" a certain quantity of drugs. The identity of the actors was unimportant; the amount of drugs was the key. Inherent in the agreement with Diamond was implied authorization for him to make new cases. That is a critical factor in the case at bar and was not even an issue in McQueen. Nevertheless, to the extent it is in conflict we disagree with McQueen.

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Criminal law—Defendant may not be convicted of both kidnapping and possession of firearm in the commission of a felony where kidnapping conviction was enhanced on basis of use of firearm

BOYD ALFRED MONSANTO, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 87-2214. Opinion filed September 20, 1988. An Appeal from the Circuit Court for Dade County, Stanley Goldstein, Judge. Bennett H. Brummer, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Margarita Muina Febres, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C. J., and NESBITT and FERGUSON, JJ.)

CORRECTED OPINION
[Original Opinion at 13 F.L.W. 1777]

(PER CURIAM.) The primary point on appeal is the challenge to defendant's conviction for the possession and the use of a firearm during the commission of a felony, here, a kidnapping. We reverse.

The defendant was convicted of kidnapping, section 787.01, Florida Statutes (1985), as well as possession of a firearm in the commission of a felony, section 790.07(2), Florida Statutes (1985). Because the evidence demonstrated that he employed a weapon in the commission of the kidnapping, that conviction was enhanced under the reclassification statute, section 775.087(1)(a), Florida Statutes (1985).

We must vacate the conviction for possession of a firearm while committing a felony based on the supreme court's decision in *Carawan v. State,* 515 So.2d 161 (Fla. 1987). *Carawan* states that when an accused is charged under two statutory provisions that manifestly address the same evil and no clear evidence of legislative intent exists, the most reasonable conclusion is that the legislature did not intend to impose multiple punishments for the same act. *Id.* at 168. In this case, even though the convictions for the two offenses charged required proof of different facts and thus met the elements of the *Blockburger* test,[1] the court's inquiry into the legislature's intent does not end there. According to *Carawan,* multiple punishments in such cases "are presumed to be authorized *in the absence of a contrary legislative intent or any reasonable basis for concluding that a contrary intent existed.*" *Id.* at 168 (emphasis in original).

In the case at hand, the defendant received an enhanced sentence on his kidnapping conviction because he used a firearm; in addition, he received a second sentence for carrying the firearm.