IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO. 73,230
DAVID WILLIAM HUNTER,)
Respondent.)
---)

RESPONDENT HUNTER'S AMENDED BRIEF UPON THE MERITS

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PRELIMINARY STATEMENT

Respondent, DAVID WILLIAM HUNTER, was the Defendant and Appellant in the matter of Hunter v. State, 531 So.2d 239 (Fla. App. 4 Dist. 1988), wherein certain questions were certified as a result of the Court's reversal of the conviction of Respondent.

The record is contained in Eight (8) volumes and references are: (R:); followed by the appropriate page number where that item may be found.

The opinion of the Fourth District Court of Appeals contains a limited statement of facts. The Petitioner, the State of Florida, has delineated its Statement of Facts in Pages Two (2) through Six (6) of its Brief, and co-respondent Conklin has also made a Statement of Facts in his Brief on pages Six (6) through (13). It is Respondent Hunter's position that the Statement of Facts as delineated by Respondent Conklin are most consistent with those facts adduced at trial. Accordingly, Respondent Hunter will only present a Statement of Facts as it implicates and expands on those facts as recited in Respondent Conklin's Brief.

The Petitioner State of Florida, in footnote Three (3) indicates that were the Court to answer the certified questions adversely to either Respondent and exercise its discretion under Florida Rules of Appellate Procedure 9.040(a), and review these remaining claims, the State would rely upon its "Answer Brief of Appellee" filed in the Fourth District to refute same. While

counsel for Respondent Hunter was not present at Oral Argument before the Fourth District, Respondent Hunter would adopt the position of Co-Respondent Conklin in asking the Court to obtain the tape of Oral Argument wherein the State confessed error as to the trial court's restrictions on Voir Dire (Point III on appeal). Should further response be permitted, counsel for Respondent Hunter would request an opportunity to brief the non-certified issues.

As with the Petitioner Conklin, all emphasis will be that of Respondent Hunter's unless otherwise noted.

It should be noted that DAVID WILLIAM HUNTER, who was represented by Fred Haddad, Attorney for the Co-Respondent Conklin at the appellate level, will now be represented by undersigned counsel.

STATEMENT OF THE CASE

DAVID WILLIAM HUNTER and KELLY CONKLIN were charged by an Information filed on November 2, 1982 with One Count of Trafficking in Cocaine in excess of Four Hundred (400) grams on October 13, 1982, and with Conspiring to Traffic in Cocaine on October 12th through the 13th, 1982. Respondent Conklin was later charged with Delivering Cocaine on September 21, 1982. (R: Vol. 7, pp. 116-119). Respondent Hunter was permitted by order of the Court, to adopt all pre-trial motions filed by Conklin.

Respondents filed numerous motions to dismiss the charges, essentially arguing that the "substantial assistance" provisions of the drug trafficking statute were violated, and accordingly, confidential informant DIAMOND'S conduct in the matter was illegal. Entrapment, as delineated in Cruz v. State 465 So.2d 516 (Fla. 1985) was also raised in Pre-trial motions. (R: Vol. 11, 1127-1159; 1160-1164; 1165-1177; 1188-1193). The State of course, opposed these various motions and Judge Thomas Coker denied all motions.

1 893.135(3) (1981) authorized the State to move the sentencing court to reduce or suspend the sentence of any person who is convicted under this statute and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. At the time of this offense there was no provision for drug dealers to seek any benefit from the State by going out and seeking others not previously involved in their criminal conduct.

As these matters had all been resolved prior to trial, the actual commencement of the case began on February 3, 1986 with jury selection. On February 12, 1986 the jury returned its verdict, finding Hunter and Conklin guilty as charged. (R: pp. 1206, 1207, 1152) After the verdict, the Defendants Hunter and Conklin were permitted to further adopt each others motions and hence post-trial motions were filed and they too were denied by the Court. On April 4, 1986 the Honorable Thomas M. Coker, Jr. sentenced the Defendants Hunter and Conklin to a Fifteen (15) year mandatory minimum sentence, and also imposed a fine of Two Hundred and Fifty Thousand ($250,000.00) Dollars. (R: pp. 1068, 1089, 1090-1114).

On September 21, 1988 the Fourth District Court of Appeals reversed the conviction of both Respondents based on State v. Glosson, 462 So.2d 1082 (Fla. 1985). Because of its resolution on the Glosson issue the Court did not address the other substantial issues that it had noted.

The Fourth District Court of Appeal did certify the following Two (2) questions to this Court as being of great public importance:

> 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?

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

Hunter v. State, 531 So. 2d 239 (Fla.App. 4 Dist. 1988)

Point II, which applies solely to Respondent Hunter, contains unfortunate phrasiology which is not consistent with the facts and testimony as adduced at trial, since there was direct contact between Respondent Hunter and Confidential Informant Diamond. Accordingly, the evidence as to those issues will be delineated when necessary.

The certified questions, when measured against prior rulings of the court mandate they both be answered in the affirmative.

STATEMENT OF FACTS

On January 20, 1982 Ron Diamond was arrested for selling a kilogram of cocaine out of a business that he operated known as "Suzie's Seafood" located on tony Los Olas Boulevard in downtown Fort Lauderdale, Florida. The sale was made to Detective Ralph Hernandez who was operating in an undercover capacity for the Broward Sheriffs Office. (R: pp. 545, 667, 670) Diamond also delivered Four (4) pounds of marijuana in that same transaction.

Apparently Diamond either chose not to, or was unable to provide "substantial assistance" by turning in his co-conspirators, accomplices, accessories, or principals; so the Broward County State Attorney's Office decided to carve out a special exception for his circumstances. Part of this unique situation was created by a penchant that the Broward County Sheriffs Office has for publicity. (R: pp. 588-589) In any event, there came a time when Diamond, through his attorney, negotiated his release and an oral substantial assistance agreement. (R: pp. 544, 549, 550). According to the testimony of Detective Capone, this agreement called for Diamond to make new cases totalling four (4) times the quantify of cocaine for which he was arrested. (Which would mean a total of Four (4) kilograms). (R: pp. 550) Diamond, however, testified that he was only required to do Three (3) times the amount. (R: pp.

681)

This uncertainty between Diamond and the Broward Sheriffs Office about what was required of him certainly led to Diamond feeling pressure to "make" more deals and hence create more new crimes.

After being released on bond Diamond began to cooperate with law enforcement authorities, but between the time of his arrest and May of 1982 he was only able to "make" two cases. (R: pp. 679)

In May of 1982, the State, apparently feeling that Diamond was not doing his best to satisfy their agreement, decided to take his case to trial, and in that month he was tried and convicted of Trafficking in Cocaine. Immediately upon verdict, Diamond was sentenced to a Fifteen (15) year mandatory minimum jail sentence, with a Two Hundred and Fifty Thousand ($250,000.00) Dollar fine; and Five (5) years prison concurrent on the Marijuana charge. (R: pp. 545, 546, 679)

Immediately after his conviction and sentence, Diamond reached out to Broward Sheriff's Office personnel and the day after his sentence he was released on a Thirty (30) day "leave" so he could continue to provide substantial assistance. (R: pp. 679, 680) After that Diamond was given a Sixty (60) day extension but by August of 1982 he had only completed Three (3)

2 (Footnote - This is no known statutory provision for this arrangement and it would appear to be a specific violation of Florida Statute 893.135(2).

deals. (R: pp. 681)

It was clear from the evidence that Diamond believed that in return for his cooperation as of August, 1982, he would receive a sentence of no greater than Three (3) years imprisonment. (R: pp. 682) However, if he failed to meet the quota, he would be required to surrender and serve the full term of his sentence. Diamond further believed that any additional cooperation beyond what he had already done would entitle him to probation. (R: pp. 692-693) This entire arrangement that was authorized by Judge Franza is not permitted under any known statute or case law, but was apparently some type of accomondation the court extended to the Broward Sheriff's Office at the request of the Broward State Attorney's Office.

In August of 1982, at about the same time that he received his last extension, Ron Diamond moved into the LaBelle Apartments, a lower middle class building located in downtown Fort Lauderdale. (R: pp. 644)

Respondent Conklin's Brief on pages 8, and 9 detail the nature of the constant contacts between Diamond and Conklin in August and September of 1982. (R: pp. 843-847, 848, 849, 859-872)

It should be pointed out however, that it was only after Two (2) unsuccessful attempts to arrange kilo-quantity drug transactions, that Respondent Conklin went to his employer and father-figure Hunter for help in satisfying Diamond's desperate need to buy cocaine.

Kelly Conklin had graduated from the Fort Lauderdale Art School in late 1981 or early 1982 and began to work for Respondent Hunter as a runner. (R: pp. 907) At that time Hunter had several employees, but at some later time in 1982, Hunter reduced his staff to the point that he only had Two (2) employees, one being his daughter and the other being Respondent Conklin. It was because of this close working relationship and the age of Respondent Conklin (which was about the same age as Hunter's son) that during this time Respondent Hunter and Co-Respondent Conklin formed a surrogate father/son relationship. (R: pp. 890, 891) In August of 1982, Respondent Hunter observed that Conklin was acting nervous and preoccupied, was coming to work late, and was always on the telephone. Accordingly he began to inquire as to what Conklin's problem was. At that time Conklin told Hunter that a neighbor of his needed to obtain large quantities of cocaine. (R: pp. 866, 909-911)

Diamond thereafter then kept the pressure on Conklin by contacting him daily both at home and at the office to the point that Conklin's problems and fears became Hunter's problems and fears. (R: pp. 892) During this period, Conklin convinced Hunter that Diamond's friends from Detroit were members of the Mafia and thereafter both became very afraid. (R: pp. 864, 865, 920, 933)

Just as this continued harrassment and pressure was making Conklin nervous and frightened, it had the same effect on Hunter. Due to this situation Hunter decided to get involved and try to

help his surrogate son. (R: pp. 865-866, 892, 912, 933, 936, 938, 941)

On September 21st Conklin delivered a gram of cocaine to undercover Agent Sousa. There has been absolutely no testimonial connection between that transaction and Respondent Hunter, nor would the testimony permit an inference to that affect. (R: pp. 743, 744, 871

Hunter's direct contact with Diamond began with a threatening telephone call approximately One and One Half (1 1/2) weeks prior to his arrest. It reached a culmination regarding Hunter's apprehensions about Diamond on October 13th when Hunter received another threatening telephone call from Diamond. (R: pp. 939) This last in a series of threats; when coupled with the other telephone calls that Hunter and Conklin had received; coupled further with the visit of undercover Agent Sousa on October 12, 1982 when he had acted and looked the part of a drug dealer from Detroit (and a member of the Mafia), left Hunter feeling he had no choice but to go ahead. (R: pp. 940, 942) Obviously if Hunter had been a source for Conklin outside this illegal conduct by the State, there would be no logical reason why Conklin wouldn't have gone to Hunter sooner, nor would there be any reason the transaction would have taken from the beginning of August until October 12th to occur.

Since Hunter was already familiar with the threats and pressure that Diamond had been exposing to Conklin, Hunter felt them directly now, as he had felt them indirectly before. On

Diamond's first telephone call to him, Hunter immediately felt threatened by Diamond as he was well familiar with Diamond's tactics from talking to Conklin. (R: pp. 913-914) Furthermore, these fears were enhanced by Diamond continuing to contact Conklin on a daily basis after Hunter attempted to intercede. (When undercover Sousa appeared in Hunter's office on October 12th acting as a drug dealer/member of organized crime (Mafia), and acted in a threatening manner, Hunter's worst fears were realized.) Everything Conklin had told him became patently and painfully obvious. (R: pp. 917, 936)

Common sense certainly dictates that Hunter and Conklin would never have expressed their concerns to Sousa or Capone under these circumstances, so it should be no surprise that both officers were unaware that any of this misconduct had taken place.

On October 13th, Dean Fouto arrived at Hunter's business a short time before the scheduled transaction was to take place. At that time he produced a kilogram of cocaine, displayed a gun and indicated the deal would go forward. (R: pp. 921-938) After delivering the cocaine in Hunter's office and giving directions as to how the transaction should develop, Fouto took Hunter's daughter to a coffee shop whereby he could observe the transaction as it developed. This fact was unknown to the police and to Diamond. Ultimately, the Defendant Hunter was arrested outside his office on the staircase and Conklin was arrested in the lobby of his office. Although the cocaine was never delivered, it was in fact seized from a drawer in Hunter's office.

Shortly thereafter Diamond reappeared in front of Judge Franza for a resentencing (subsequent to "substantial assistance"?/mitigation) and at that time his Fifteen (15) year mandatory minimum sentence was reduced to Five (5) years probation with a special condition of One (1) year in the County jail. (R: pp. 682) At the same time the fine of Two Hundred and Fifty Thousand ($250,000.00) Dollars was set aside. Diamond protested, stating that he felt that the Hunter/Conklin deal should have entitled him to straight probation without a jail term. After his complaint was rejected he requested Judge Franza give him another extension so he could set up another deal to work off the year. (R: pp. 691-692) This last request was denied.

The above facts, as well as those adopted from Co-Respondent's Brief, are essentially the facts from which the Fourth District Court of Appeal based its decision on on. Furthermore, the Appellate Court pointed out that the only rebuttal to the defense of entrapment as propounded by Hunter and Conklin was the testimony of Diamond. Hunter v. State, 531 So.2d 239 (4 DCA 1988).

SUMMARY OF ARGUMENTS

The substantial assistance agreement between the State and a convicted drug trafficker, who as a result of this illegal agreement, received a greatly reduced prison sentence and had the fine totally eliminated in return for arranging drug deals involving persons heretofore unknown to be in the drug world as defined in State v. Glosson, F.S. 893.135(1981) under the facts and circumstances of this case, is a violation of Due Process of Respondent Hunter.

Furthermore, while Respondent Hunter was not initially contacted directly by the Confidential Informant, there did come a time when he became actively and directly involved with negotiations with the Confidential Informant and the undercover police officer, and accordingly was both the direct and the indirect recipient of the illegal importuning by the Confidential Informant.

Accordingly, Respondent Hunter should be discharged under both certified questions.

POINT I

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

Our Florida Constitution provides that no person shall be deprived of life, liberty or property without Due Process of Law. Article I, Section 9. This was the basis for the ruling by the Fourth District Court of Appeals in the matter of Hunter v. State, supra, as well as in State v. Glosson, supra. The Broward Sheriff's Office and the Broward County State Attorney's Office permitted their informant Diamond to violate the Due Process rights of Respondents Hunter and Conklin by sanctioning Diamond's non compliance with F.S. 893.135(3). The informant never attempted to seek out those persons involved in his criminal network. Rather, the State directly involved themselves in permitting and authorizing Diamond to engage in creating new crimes by locating and impermissibly inducing persons such as Hunter and Conklin. (heretofore unknown to be involved in the drug business) into commiting the crimes for which they were convicted.

Petitioner has maintained in its Brief that the State was not involved in any misbehavior, despite the fact that when it was the State that originally authorized the illegal substantial assistance agreement between Diamond and themselves; and that it

was also the State that knew that Diamond would not be following the very clear direction of Glosson, supra, and 893.135(3), and would in fact, be making new cases.

There is nothing in the record to demonstrate that the State opposed or in any way protested the patently illegal release of Diamond subsequent to his conviction for Trafficking in Cocaine, and his several extensions of time whereby he was allowed to continue in his impermissible conduct. For the State to take the position that they are not in any way accountable for the misbehavior by Diamond and/or the Broward Sheriff's Office in their responsiblilty to supervise their agents defies logic and common sense.

Respondent Hunter urges this Court to carefully review the entire record, particularily the testimony of witnesses Sousa, Diamond, Hunter and Conklin, as well as the sentencing proceedings subsequent to the conviction. After such examination, Respondents are confident that this Court will adopt the unanimous holdings of the Fourth District Court of Appeal mandating discharge of Respondents.

The egregious nature of the State's conduct in Glosson, pales by comparison with the improper inducements offered to Diamond in return for his "substantial assistance".

Diamond was permitted to operate without any direct supervision by the police in this case, nor was he ever required to substantiate his claims. No independent investigation was conducted by the police that would corroborate the assertions of Diamond;

they merely relied on his word.

In Glosson this Court specifically prohibited the conduct of the confidential informant who was to receive Ten percent (10%) of all civil forfeitures arising out of successful criminal investigations he completed. The facts in that case indicated civil forfeitures were directed towards Eighty Thousand ($80,000.00) Dollars in cash and several vehicles that were seized. Without knowing the value of the vehicles, the confidential informant in that matter would have had a claim to at least Eight Thousand ($8,000.00) Dollars and perhaps some additional monies based on the value of the vehicles that were seized. The testimony in this case indicated that not only did Diamond receive as a part of his substantial assistance agreement, a total forgiveness of the Two Hundred and Fifty Thousand ($250,000.00) Dollar fine, but his prison sentence was reduced from a Fifteen (15) year mandatory minimum to the sentence he actually served of Five (5) months and probation. There is no way to overstate the incentive that Diamond had, not only to make criminal cases, but also to color his testimony, or even commit perjury in pursuit of his goals, to wit: no jail and no fine. Clearly the incentives of the informant in the Glosson don't compare. Also as in Glosson, the testimony of Diamond, the confidential informant, was critical to a successful prosecution.

The State takes the position that Diamond, unlike the confidential informant in Glosson, did not have any incentive to perjure himself since he had already received his reward prior to

his trial testimony. However, that disingenuous argument does not withstand analysis, when it is obvious that Mr. Diamond was subject to depositions under oath prior to trial, during which time he was on probation. Failure to testify truthfully in his deposition would have subjected him to a violation of probation and a lengthy jail sentence. Furthermore, once his testimony was "locked in" due to his deposition, Diamond had no choice but to follow the script of his prior testimony. Lastly, if Diamond had no incentive to color his testimony, how else can his contact with contact with Conklin's father, wherein he indicated his desire not to testify, be explained.

In its Brief, the Petitioner makes attempts to attach great significance to footnote #3 in the Fourth District's decision in State v. McQueen, 501 So.2d 631 (Fla. 5 DCA 1986) rev. den. 513 So.2d 1062 (Fla. 1987). In McQueen the State 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 substances." Regardless of whether the disjunctive "or"; or the conjunctive "and" is used; neither application would be appropriate in this case. The facts and circumstances are clear and uncontraverted that neither Respondents Hunter nor Conklin were persons who were previously known to Diamond, or who were already in the drug business and predisposed to buy or sell illegal controlled substances. Regardless of how this Court were to read McQueen, it does not provide any relief

to the State. Their dependence on this possible typographical error is not consistent with the thrust of the Court's opinion below. As stated, further in footnote #3, "the identity of the actors was unimportant, the amount of drugs was the key (referring to the case at bar) ..." That is a critical factor in the case at bar and was not even at issue in McQueen. Hunter, supra, at page 243. Clearly the Court did not rely at all on the misreading of McQueen as suggested by Petitioner.

While the holding in Glosson and the violation of Florida law should give this Court ample basis for sustaining the District Court's opinion, the Petitioner also cites those issues raised under Cruz v. State, 465 So.2d 516 (Fla. 1985). While the entrapment issues as delineated in Cruz were not specifically certified by the lower court, Respondent feels that it is appropriate to respond based on the Petitioner's somewhat lengthy discussion of Cruz. In that case, this court discussed the fact that an entrapment defense arises from a recognition that sometimes police activity will induce an otherwise innocent individual to violate the law. Cruz, supra at 517. In this court's decision at page 522 this court propounded the following threshold test of an entrapment defense:

> Entrapment has not occurred as a matter of law where police activity (1), has as its end, the interruption of a specific ongoing activity, and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity...that police must fight the war on crime but not engage in the manufacture of new hostilities.

See also Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

If the first prong of the threshold test addresses the concept of "virtue testing", the second prong test deals with the use of inappropriate techniques by the police. The decision further stated that when police activity is scrutinized under the second prong, it should include an analysis whether a government agent "induces or encourages" another person to engage in conduct constituting such offense by either:

a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or,

b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who were ready to commit it. Cruz at 522.

When analyzing the facts of Hunter under these standards, it is self evident that Cruz also mandates discharge.

As to the first prong there is absolutely no conflict; that Hunter and Conklin were not engaged in any specific ongoing criminal activity. Agents Sousa and Capone, as well as the State, knew that Diamond would not be going after his cohorts, etc., as required by the statute, but in fact would be "making" new cases. Furthermore, it is apparent that both Hunter and Diamond were experiencing financial strains at the time of this case and the impermissible inducements of Diamond were bolstered

by the flashing of in excess of One Hundred and Sixteen Thousand ($116,000.00) Dollars. Under the facts in this case, it is obvious that Hunter and Conklin did not readily acquiesce to the criminal scenario (especially in light of the time it took for a successful deal to go through) but rather succumbed to the lure of the bait. See State v. Casper, 417 So.2d (263) (Fla. 1st DCA 1982) rev. den. 418 So.2d 1280 (Fla. 1982) Therefore under a Cruz analysis, this matter must fail due to the Petitioner's inability to successfully satisfy the first prong of the threshhold test of the entrapment defense.

As to the second prong of the threshhold test, clearly the inappropriate techniques discussed in Cruz do not begin to contemplate the State's contempt for the law as occurred here in its violations of Glosson and Florida Statute 893.135. Furthermore, the testimony of Hunter, Conklin, Conklin's father, and Conklin's wife, indicate that the constant and relentless contacts by Diamond amounted to such inducement that they created the substantial risk that an offense would be committed by persons other than those who were ready to commit it. As this Court may recall, Diamond began his contacts with Conklin in early August of 1982, continuing through September with constant pressure on Conklin and then Hunter culminating in the arrest of Conklin and Hunter on October 13, 1982. The time frame alone is inconsistent to show predisposition on the part of either Defendant, particularily Hunter. The rejection of police misconduct is mandated by Cruz under the objective analysis and requires this

Court to discharge the Respondents as a matter of law.

While Cruz was directed primarily at a subjective and objective analysis of the entrapment defense, it should be pointed out that other courts have indicated that when the conduct of law enforcement becomes so outrageous that Due Process concerns may prohibit a conviction based on such conduct. See United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); and Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)

The State failed to show that Hunter had any prior experience with unlawful narcotics and that he only involved himself in this criminal activity because of fear and threats as directed at him by Diamond, as well as the actual meeting between Hunter and Detective Sousa. Cruz disallowed the actions of a Tampa policeman who induced a person to steal One Hundred and Fifty ($150.00) Dollars which protruded from his pocket as he portrayed a drunken bum in an ally way since the State was not able to show that other drunks had been robbed in such a way, or that their technique would be likely to discourage any further criminal activity. Cruz, supra, at 522.

To suggest that the illegal release of Diamond and the violation of Glosson and the Florida Statute in effect at the time of his conduct, as well as the reaching out to Hunter and Conklin, who were not known to be drug dealers nor able to put together a drug deal for all of August, September and half of October of

1982, and to suggest that such conduct resulting in the arrest of these two men is not outrageous simply defies belief. the obsession of the police to seize cocaine rather than to make arrests, is certainly exemplified by the failure to effectuate any investigation into Mr. Fouto's activities. (Who was the source of the cocaine) The facts and circumstances make it impossible to determine whether the conduct of Diamond uncovered a predisposition to commit a crime or created the crime itself. State v. Banks, 499 So. 2d 894 (Fla. 5th DCA, 1986)

The informant's conduct most closely parrallels that of the informant in Myers v. State, 494 So.2d 517 (4th DCA 1986). The evidence in that case indicated that the defendant had never been involved in the sale or use of any unlawful drug (whereas herein the defendant Conklin allegedly smoked marijuana while the Respondent Hunter did not use any drugs). The defendant in Myers had no predisposition to engage in a unlawful drug transaction, nor had previously considered doing so. That too mirrors the facts here. The defendant was selected for targeting by the informant as occurred here. The informant originated the idea for the transaction, instigated it, then induced, lured and pressured the defendant Myers by repeated phone calls to him, which again reflects the conduct of Diamond as to daily telephone contacts with Conklin and then Hunter. The defendant in Myers did not readily acquiece in the commission of the offense but resisted and attempted to avoid contacts with the informant but ultimately caved in to the pressures, which occurred here also. The police

had never heard of the defendant Myer until the informant had brought him to their attention as a potential target, and the police had no evidence that the defendant Myers had ever engaged in any unlawful drug transactions prior to this incident. That too is an exact rendition of the facts as occurred in this matter.

The Court therein held that Myers was entrapped as a matter of law, likewise as the Respondents in this matter were entrapped as a matter of law.

Unlike the situation in Campbell v. State, 453 So. 2d 525 (5th DCA 1984), the State and the police herein pursuaded the court to go along with several obvious violations of the law. To allow their misconduct and misbehavior to justify a conviction on these meager facts does not comport with minimal standards of Due Process and justice.

The Respondents submit that to sanction a conviction on the obvious and blatant misconduct and violations of the law are not warranted. Accordingly Respondent Hunter urges this court to uphold his discharge as mandated by the Fourth District Court of Appeals on this first certified question.

POINT 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

Respondent Hunter respectfully submits that this certified question imprecisely reflects the facts since Hunter did become the direct target of Diamond, beginning as early as one and a half week before the arrests. Moreover, there can be no doubt that the activity of Diamond, and the State's silent acquiessence or selected ignorance of such conduct, cannot be tolerated.

Based on the testimony and the facts and circumstances of this case, both Hunter and Conklin have standing to contest the Due Process violations under Glosson and the entrapment issue under Cruz as conducted by the State through its agent.

In an apparent avoidance of the facts and testimony of this case, the State chooses to disregard the close and special relationship between Respondents Hunter and Conklin. Certainly there can be no doubt that the misconduct of Diamond was relayed to Hunter, and while initially Hunter was not the direct recipient of the illegal importuning of Diamond, there did come a

time approximately One and One Half (1 1/2) weeks before the arrest that Diamond began direct contact with Hunter. It is furthermore, clear that up to that time Hunter was intimately familiar with all of the pressure by Diamond was putting on Conklin. Thereafter the durress felt by Conklin was communicated and felt by Hunter and conversely Hunter's fears were imported to Conklin.

The State in its Brief cites State v. Perez, 438 So.2d 436 (3rd DCA 1983) for the proposition that the defense of entrapment is inapplicable where the inducement comes from a nonagent private citizen. However this case and that citation overlook the facts and circumstance in this case, whereas there was testimony regarding several telephone calls from Diamond to Hunter of a threatening nature, as well as a visit to Hunter's office the day before the criminal transaction took place wherein undercover Detective Sousa and confidential informant Diamond appeared and acted in a threatening and forceful manner in order to compel this transaction to go forward.

Furthermore, the relationship between Hunter and Conklin is clearly distinquishable from the principles in Perez where there was no testimonial substantiation that the illegal pressures of the confidential informant as to Rosado had any impact on Perez.

Lastly, in support of its position, the Respondent would rely on the case of United States v. Valencia, 645 F.2d 1158 U.S. Court of Appeals (2nd Cir. 1980) which held that if a person is brought into a criminal scheme after being informed directly of

conduct or statements by a government agent which would amount to inducement, then that person should be able to avail himself of the defense of entrapment, just as may the person who receives the inducement directly. United States v. Valencia, supra, at page 1168. Clearly the case at bar is much stronger factually than Valencia in that while there was the indirect inducement as relied upon in Valencia, there was also the direct contact both by the confidential informant Diamond, and undercover police officer (acting Mafioso) Sousa.

The facts in this case amply support Respondent Hunter's contention that he was both the direct and indirect recipient of the illegal activity condemned by Glosson, supra, and Cruz, supra.

CONCLUSION

For all of the foregoing and the decision of the Appeals Court, based upon this Court's holding in Glosson and Cruz, it is respectfully requested that the decision of the Fourth District Court of Appeals be affirmed, that Certified Question Number One and Two be answered affirmatively, and that Respondent Hunter be discharged.