IN THE SUPREME COURT OF FLORIDA

CASE NO.: 73,230

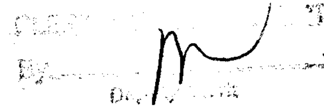
STATE OF FLORIDA,

Petitioner,

vs.

KELLY CONKLIN,

Respondent.



RESPONDENT CONKLIN'S BRIEF UPON THE MERITS

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PRELIMINARY STATEMENT

THIS MATTER is before the Court by virtue of certain certified questions that resulted from the District Court of Appeal, Fourth District's, reversal of the conviction of Respondent.

The record is contained in 8 volumes and reference thereto shall be by the letter "R" followed by the appropriate page number where that item might be found.

The Fourth District's opinion contains the facts as found by that court; the State of Florida has written an excellent brief, however, Respondent cannot accept the Statement of Case or Facts as they are presented, and therefore will present their own.

The state recites on page 6 of its brief, in footnote 3, that were the court to answer the certified questions adversely to either respondent and exercise its discretion to review the remaining claims, the state would rely on its brief. To this, the Respondent **CONKLIN** would ask the Court to obtain the tape of oral argument for it is undersigned's recollection as pointed out several times, that the state confessed error as to the trial court's restrictions on voir dire [Point Three on appeal]. Too, the state has gone beyond the issues framed by the appellate court in its certified questions, and has launched into an entrapment argument vis a vis the facts as perceived by the

Fourth District. Such being the case, the Respondent will reply to that argument.

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

It should be noted that DAVID HUNTER, who was also represented by the undersigned at the appellate level will be filing his brief through new counsel.

STATEMENT OF CASE

KELLY CONKLIN and DAVID HUNTER were charged by an Information filed 2 November 1982; Conspiracy to Traffick in Cocaine on 12 and 13 October 1982; and as to CONKLIN, Delivery of Cocaine on 7 October 1982 (R Vol.VII, pp. 1116-1119). The 7 October 1982 date was later amended, over objection, by interlineation to reflect a date of 21 September 1982 (see p. 1119). Co-defendant HUNTER, by order of the court, was allowed to adopt all pre-trial motions filed by CONKLIN.

CONKLIN filed, inter alia, pre-trial, a Motion to Dismiss (pp. 1121, 1122, 1123), a Fundamental Motion to Dismiss [Denial of Equal Protection and Due Process] (pp. 1124-1126), another Fundamental Motion to Dismiss regarding the informant and the "substantial assistance" provisions of the drug trafficking statute [F.S. 893.135] (pp. 1127-1159), together with an accompanying Memorandum of Law (pp. 1160-1164), a Fundamental and Sworn Motion to Dismiss (pp. 1165-1169), to which the state filed its response (pp. 1170, 1171). After hearing, the court on 4 May 1988 denied the motions (p. 1177). Thereafter, on the basis of several new authorities [decisions authored by the courts], CONKLIN filed a Renewal of Fundamental Motion to Dismiss, Additional Authority (pp. 1188-1191), and, for the same reasons, a Motion for Reconsideration of Sworn Motion to Dismiss (pp. 1192-1193), which was supplemented by a Notice of Additional

Authorities in support thereof (pp. 1198-1201). Also filed pre-trial was a Motion to Dismiss Charges, Prosecutorial Misconduct.

These matters were heard by the court prior to trial (R Vol.I. pp. 16, 29; 39-122), and were denied.

Jury selection began on 3 February 1986 and on 12 February 1986, the jury returned its verdicts finding CONKLIN and HUNTER guilty as charged (pp. 1206, 1207; 1152). As was the case before trial and during trial, each defendant adopted the other's motions (see p. 1241) and in this instance, numerous post-trial motions were filed (pp. 1209-1240-1246); see also, in HUNTER "Record Proper" pp. 1164-1174). The court denied all motions, including by written order the Motion for New Trial (p. 1250) and thereafter sentenced each defendant to the mandatory 15 years on each drug charge, together with the mandatory $250,000 fine.

The Fourth District Court of Appeals on 21 September 1988 issued its opinion reversing the conviction of each respondent noting that it was not addressing other substantial issues "because of our resolution of the 'Glosson' (State v. Glosson, 462 So.2d 1082 (Fla. 1985) issue."

In its opinion, the court treated the facts as it found them to exist from the evidence and how the uniqueness thereof applied to Glosson, and distinguished the same from State v. McQueen, 501 So.2d 631 (Fla. 5 DCA) cert. den. 513 So.2d 1062 (Fla. 1987). Since the undersigned was and is counsel for Mr. McQueen also and well aware of that matter, the distinctions the

court found are indeed great to the case at bar and where no conflict was created, as shall be pointed out infra.

The court certified two questions to this court and this court's prior holdings ought answer both affirmatively.

STATEMENT OF FACTS

Ronald Diamond is a mid-forties, successful salesman/ businessman, who in late 1981 early 1982 had several businesses on "ritzy" Las Olas Boulevard in Fort Lauderdale, Florida (R pp. 587, 667, 668). Diamond had previous successful businesses, was worldly, knowledgeable, articulate and had many of the other attributes of mid-forties success (R pp. 667, 668-670, 787, 788).

One of his businesses, however, was selling narcotics out of his swanky business (R pp. 668-670), and his misfortune was to deliver a kilogram of cocaine to undercover agents of the Broward Sheriff's Office.

Due to the fact that the arrest was highly publicized and televised (R pp. 588, 589), Mr. Diamond was unable to initially obtain pre-trial release (R p. 544). So situated, had contact with the police and prosecutor and entered into what the police and State Attorney denominated a "substantial assistance" agreement (R pp. 545, 549, 550, 678), and Mr. Diamond was then released on bond (p. 545).

Since Mr. Diamond could not provide any assistance within the meaning of the substantial assistance provisions of the statute (R pp. 587, 588, 589), he was advised that to assist himself [as shall be more fully discussed below], he had to go out and about on the streets as an "informant" and bring to the police <u>four times</u> the quantity of cocaine with which he was apprehended (R pp. 550, cf: 681).

He apparently only made two cases by the time of his trial date and hence was put to trial. He was promptly convicted on trafficking in cocaine and possession of marijuana charges before Judge Arthur J. Franza, sentenced to the mandatory 15 years in prison, and the $250,000 fine (R pp. 545-548, 550-551).

Proceeding directly to jail, Diamond got in touch with his benefactors, the state and the Broward Sheriff's Office, and Deputy Capone approached Judge Franza and the next day Diamond was out on the streets seeking to find more people to help fulfill his "four times" deal. This release occurred in May Of 1982 (R pp. 640-641). In early August of 1982, apparently as a result of some domestic problems, Ron Diamond moved into the LaBelle Apartments, a lower middle class efficiency type building just off Federal Highway in Fort Lauderdale (R p. 644). He was also apparently just beginning his last 60 day extension to fulfill his "substantial assistance agreement" (R pp. 587, 788, 789), which, he hoped fulfillment of would result in a sentence reduction from the mandatories to straight probation (R pp. 691, 692, 693).

Living at the LaBelle Apartments at the time Diamond moved in was the twenty-two year old **KELLY CONKLIN**, a that year graduate of the Fort Lauderdale Art Institute who was working at his first job as a graphics designer for **DAVID HUNTER** and Associates (pp. 840, 857, 858), an advertising and public relations firm.

CONKLIN lived there with his then girlfriend [now wife] who discovered she was pregnant. Donna Franklin Conklin was a student at Broward Community College and worked part-time at a local department store and had just recently learned that the Veterans Administration terminated the benefits she had been receiving (R pp. 840, 841-842). The couple lived in a $175 per month efficiency apartment and **KELLY** drove a 1971 Volkswagen, while Donna had a 1975 or 1976 Firebird (R pp. 858, 859).

Donna met Diamond as he was moving in and **KELLY** met him a few days later and became friendly with him (R pp. 841, 642, 858). According to the **CONKLINS**, shortly after this Diamond began asking **KELLY** to help find him some cocaine; as he [Diamond] was having money problems and other problems that Diamond felt he could solve by getting some cocaine (R pp. 848, 859).

Diamond persisted day after day for **CONKLIN** to get cocaine and began to make problems, as well as threats (R pp. 843-847, 859-872). Both testified he continually refused to assist or help Diamond for a period of time. However, Diamond's time clock to perform under the agreement was ticking away, and the persistence increased, coming, according to the **CONKLINS**, to not only promises but threats of violence.

None of Diamond's activities, until two days before the arrest, were monitored (R pp. 586), however, sometime in September agents of the Sheriff's Office, posing as drug dealers from Michigan, arrived at the LaBelle Apartments to a meeting arranged by Diamond, and approximately $116,000 in cash is shown

to CONKLIN (R pp. 515, 516, 520). This was after Diamond came to the police concerning CONKLIN (R pp. 513, 514).

Some time later, CONKLIN made an abortive attempt to locate cocaine at the Marriott Hotel in Fort Lauderdale, where he went alone and unsurveilled (R pp. 516, 517, 733-35), although the police purportedly thought a cocaine dealer might be there. According to CONKLIN, he did this in the hope that Diamond would see he couldn't do anything and would leave him alone (R p. 862). Diamond did not and Diamond had, more than once, daily contact with CONKLIN to obtain for him the cocaine he needed (R pp. 864, 865), now telling CONKLIN that these people from Michigan were dangerous (R p. 565).

CONKLIN, in the latter part of September (R p. 522), purportedly set up another abortive cocaine transaction, this one bordering on the preposterous, for the two men CONKLIN brought to meet the undercover police to give them the $116,000 for the cocaine would leave with the money and later return with the cocaine (R pp. 524, 525). Needless to say, as even the police agreed, no one would ever do business this way (R p. 797). CONKLIN testified these were people he knew that were again trying to help him get Diamond off his back.

However, Diamond's surrender date was rapidly approaching (R p. 587) and again persistence, promises of money, and threats, were the order of the day (R pp. 844, 864-866).

At some point in time CONKLIN acceded to Diamond's desires and went to his boss, HUNTER, for help (R pp. 866, 910-

912). HUNTER had began to notice that CONKLIN was troubled, and since he had already taken a special interest in KELLY due to his being about the same age as his children, decided to help KELLY get these people off his back by getting cocaine from a former employee (R pp. 910-913, 915).

A sample of cocaine was passed [the date of this transfer varies between witnesses], Diamond having it the day before the arrest, the police, either six days or two and one-half weeks before, depending on the pleadings and testimony one chooses to accept.

Diamond by now had also began to speak to HUNTER (R pp. 915, 916), and on 12 October a meeting was had in HUNTER's office. For the first time since this scenario began, the ubiquitous Unitel monitoring device was employed was employed. The transaction did not occur, and it was set for the next day, 13 October 1982. On that day, the police, and of course Diamond, arrived at the office, Diamond waiting in the car. Previous to this, the supplier of the cocaine arrived, displayed a gun, announcing that the deal will go as planned (R pp. 921-938), and took HUNTER's daughter-receptionist to a downstairs coffee-shop to await a successful transfer (R pp. 937-939). The transfer was less than successful and HUNTER and CONKLIN were arrested. The cocaine was never delivered, but was in fact seized from a drawer in HUNTER's office.

Several days later, Mr. Diamond was before Judge Franza and his sentence was mitigated from the 15 year mandatory

imprisonment and the $250,000 fine to five years probation with about one year incarceration (R p. 682). Diamond protested, saying that he thought he would get probation, which is what the police recommended, stating he could have had three years before the trial (R pp. 691-692). He then asked Judge Franza for a little more time out, as he would work off the year in "no-time" (R p. 692).

Diamond, of course, presents somewhat different testimony as to the occurrence. While there is little quarrel with the "substantial assistance" provisions, he presents a different version of the facts.

Diamond acknowledged becoming friendly with **CONKLIN** when he moved into the LaBelle Apartments in early August 1982 (R p. 644), and asserted that he had seen the **CONKLINS** smoke marijuana [which both **CONKLIN** and his girlfriend denied at trial (R pp. 646, 647) and he therefore asked **CONKLIN** if he could get a large amount of cocaine (R p. 647), which **CONKLIN** purportedly said wouldn't be difficult (R p. 648). He said he then called Capone [NOTE: Capone puts this call about one month after **CONKLIN** and Diamond met (R p. 513)]. Diamond testified along the same lines as the police as to the money shows and so forth, but denied having coerced, threatened, or played upon friendship to get **KELLY** involved, and that **CONKLIN** expressed no reluctance (R pp. 651-654) to go through with this cocaine deal for which he was to make $1,000.

It also came out during trial that a few days before a prior trial date, the witness Diamond, after having met the prosecutor Slater earlier that date, called **KELLY CONKLIN**'s father, **with the prosecutor's knowledge**, ostensibly looking for **KELLY**. He engaged Conklin Sr. in conversation for somewhere between one-half and one hour, and conveyed to the father a plea bargain that the state had purportedly offered the son (R pp. 663-666), partially, according to Diamond, as a good Samaritan and partially so he wouldn't have to testify (R pp. 666). He also suggested to the father, because it was a "good deal", that he seek other counsel for an opinion (R p. 666). [These offers of plea bargains and the rest were adduced during the state's case in chief and over both Respondent's objections.]

Mr. Conklin Sr. testified also at the trial [as did Donna Conklin] regarding the conversation he had with Diamond (R pp. 820-821). Diamond told the father he was sorry he got the "kid" in trouble, that he didn't want to look the boy in the eye, but that he wasn't going back to jail (R p. 822). Diamond himself acknowledged to the father that as regards **KELLY** he had to go to him several times to get him involved (R p. 822).

CONKLIN also confirmed the plea bargain offers, as well as the "self-touting" of Diamond (R pp. 823, 824); and, Diamond's generous offer to find **CONKLIN** other counsel was also made known (R p. 824).

The above are the basic facts of the case and parallel in large part what the appellate court found to be the facts,

although the court's version is more succinct. More important is that the opinion notes what the state conceded at argument, that "Diamond's testimony is the only evidence the state presented to rebut the Respondent CONKLIN's defense of entrapment" (Hunter, supra, 13 FLW at 2188).

The Respondent would also note that in reply to Petitioner's argument [Petitioner's brief, p. 9] that Diamond's reward was not contingent upon convictions, that the witness Diamond, to the undersigned's best recollection was in fact still on probation when he was deposed regarding the facts in the case. Any deviation from his initial "story" while he was still within his substantial assistance contract would have resulted in a perjury charge.

Further, since his sentence reduction was indeed illegal as the Fourth District so clearly noted, the state could have at least sought to set aside the illegal sentence and put Diamond right back in jail. The state had its further recourse, too, because Diamond had, as he testified, a contract with the state; his breach of the contract would necessarily put the parties back where they were with Diamond doing 15 years. His telephone calls to CONKLIN's family illustrate his realization of his need to continue to perform.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeals certified, as noted, two questions to this Court. Since the second question involved MR. HUNTER, whom the undersigned no longer represents, argument will be presented only on behalf of **MR. CONKLIN**.

The appellate court unanimously found that the actions of the various state agents in allowing a convicted and sentenced confidential informant named Ron Diamond, to gain what amounted to just about absolute freedom from a fifteen year sentence and remission of a $250,000 fine by leaving the jail and creating crime violated the teachings of this Court in State v. Glosson, 462 So.2d 1082 (Fla. 1985).

The argument will show that the district court was eminently correct in its ruling.

The record, when read in its entirety, not only supports the appellate court conclusion but illustrates the necessity for hpholding the ruling.

The actions of the state, as particularly set forth both hereinabove and by the appellate court in its decision did nothing less than authorize the creation of crime where none before existed. This has been and should remain condemned.

POINT INVOLVED

POINT ONE

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

POINT ONE

AN AGREEMENT FOR A CONVICTED DRUG TRAFFICKER TO SET UP AND TESTIFY ABOUT NEW DRUG DEALS WITH PREVIOUSLY UNKNOWN PERSONS AND THEN RECEIVE A SUBSTANTIALLY REDUCED SENTENCE VIOLATES THIS COURT'S HOLDING IN STATE V. GLOSSON

While the Petitioner presents the usual litany of useful purposes to be served by stiff drug trafficking statutes and suggests that the District Court has sub silencio declared Florida Statute Section 893.135(4) 1987 unconstitutional, it singularly overlooks the overreading that can occasionally result and which this Court previously condemned.

As noted in the Statement of Case and Facts, excluding depositions, discovery, reports and so forth, the record in this matter exceeds 1200 pages. Too, the Court will note when the full record is received from the appeals court, that were the undersigned to have followed the typing and margin requirements, the brief would have been close to 60 pages and not all errors were raised, but only those that the Fourth District referred to as "other substantial issues", Hunter v. State, 13 FLW 2186 at 2188.

The record at bar contains numerous pre-trial motions as well as the voluminous record; briefing was extensive and a unanimous Fourth District had the matter under advisement for a

period of time longer than usual or suggested before authoring its opinion that certified this matter.

This matter cannot be correctly or fully considered without a review of the entire record, including sentencing. After such review the Respondent is confident that the Court will adopt the language of the appellate court that found:

> "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 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 new criminal activity where none before existed. Subsequently he (informant) was the key witness for the state in appellants' prosecution. The state concedes for example that Diamond's testimony is the only evidence the

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1 We have not overlooked the forgiving or deletion of the $250,000 debt to the state also provided the informant. **We assume that was a minor consideration compared to the reduced prison term**. [Emphasis supplied]

> state presented to rebut the appellant Conklin's defense of entrapment.***."

The Court found Glosson had been violated.

Before delving into argument the Respondent would also reply to the state's arguments regarding State v. McQueen, 501 So.2d 631 (Fla. 5 DCA) rev. den. 513 So.2d 1062 (Fla. 1987). The undersigned was and is also counsel for McQueen [the matter was still pending in the Orange County Circuit Court until 28 December 1988, when it was nolle prossed], and the record in that matter and more particularly the deposition of informant Bob Bennett which ought still be with this Court illustrate the differences to the case at bar. Bennett gave the agents of MBI [according to him] the names of the people he would set up before he was released. These people included McQueen, Godby, Woldof and the rest of the individuals charged. Indeed, according to Bennett, not only had he known these people from the bar business but also from other drug deals prior to his arrest. The Fifth District concluded that such took the McQueen scenario outside the purview of Glosson. [The undersigned does not concede or suggest that the Fifth District was correct in McQueen, partially in light of the agreement, but seeks to illustrate the difference between the cases].

The state, unhappy with the factual findings of the District Court at bar seeks to have this body reinvent the wheel by its rather usually non neutral presentation of the facts. The simple fact remains that what occurred between Diamond and

the "criminal justice system" cannot be changed and that whether or not "Diamond was actually out of jail illegally and the time he induced Conklin to traffick in cocaine" is not as so overwhelming a question as the simple fact that what was allowed to occur to occasion Diamond's release, did what Glosson clearly condemns.

A tracing of the case will now be presented. **CONKLIN** filed several motions to dismiss in the trial court including a Fundamental and Sworn Motion to Dismiss (R Vol.VII, pp. 1165-1169) wherein Respondent, together with his now wife, by affidavit to the Motion, alleged and swore that **CONKLIN** was lured, badgered, harassed, and imposed upon by the much older, worldly-wise, "substantial informant" Diamond to engage in the crime charged. **CONKLIN** also swore that he had no predisposition to commit the crime charged, that Diamond set the matter into play and that **CONKLIN** did not really acquiesce but was lured and cajoled over a period of several months by Diamond to commit the crime. The Respondent also averred that he never engaged in any prior criminal conduct, and that the police never had any prior suspicions of that party. He further alleged that Diamond made continual promises of easy money to the "broke" **CONKLIN** if he would put him "in touch" with someone who could get Diamond a large amount of cocaine. This motion was filed in December of 1983, just after the filing of another Fundamental Motion to Dismiss relative to the treatment afforded the heretofore

convicted Diamond (see R Vol.VII, pp. 1127-1130, plus attachment).

The Petitioner filed a Traverse to the Sworn Motion to Dismiss, arguing that the case could not be dismissed, as entrapment need be put before a jury. This was filed on 16 February 1984 (R Vol.VI, pp 1170, 1171). Several months later after a hearing, it filed a Memorandum in Opposition to the Fundamental Motion to Dismiss and subsequently both motions were denied.

On 4 September 1984 **CONKLIN** renewed his Fundamental Motion to Dismiss regarding the substantial assistance "deal" afforded Diamond on the basis of Campbell v. State, 453 So.2d 525 (Fla. 5 DCA 1984).

Then, on 5 July 1985, the Respondent filed a Motion for Reconsideration of his Sworn Motion to Dismiss, based upon the "new view" of entrapment recognized in Florida under the Supreme Court decision in Cruz v. State, 465 So.2d 516 (Fla. 1985), and Teague v. State, 472 Do.2d 461 (Fla. 1985) (R Vol.VII, pp. 1192-1193).

A Notice of Additional Authority in Support of the Motion to Reconsider was filed on 21 October 1985 (R. Vol.VII, pp. 1198 et. seq.), and directed the Court to the decision of the Third District Court of Appeals in Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985), which adopted and explained the Cruz decision.

Hearing upon the motion was had prior to trial (R Vol.I pp. 39-122), with the state calling the informant Diamond, and **CONKLIN** calling his father.

Petitioner, admitting as to the motion that there was no showing of predisposition (p. 116), argued that Cruz was a robbery case, Marrero a reverse sting with a much longer period of time involved (pp. 114-116), and again stated the matter was for jury (p. 116), and again stated the matter was for a jury (p. 116). The court denied the motion (p. 121).

The Respondent has made mention of certain cases hereinabove, and two further cases need be cited to "round out" the introduction of this point for argument. One, singularly related to the matter is State v. Glosson, 462 So.2d 1082 (Fla. 1985). The other in Myers v. State, 11 FLW 1984 (Fla. 4 DCA 1986), which was the proverbial "case on all fours" with the instant matter. The Respondent addresses the issue since the Petitioner has seen fit over and above the Glosson issues which comprises the certified question to address the Cruz "issues" [Cruz v. State, 465 So.2d 516 (Fla. 1985)] regarding entrapment. Thus, the point need be treated.

The quoted language from Myers' "Motion to Dismiss" was in fact almost identical to that of **CONKLIN's** and **CONKLIN's** was further corroborated by his wife's affidavit that Diamond lured, pressured, persisted in coming to their home, offered large sums of money, and despite **CONKLIN's** motion stated that Diamond badgered him every day for months to get the young man who had no

prior record of any kind and Diamond acknowledged **CONKLIN** could not afford to even buy any cocaine (R Vol.VII, p. 1166), and the police had no prior suspicions of Respondent **CONKLIN** (R Vol.VII, p. 1166). Further corroborative of this matter is **CONKLIN's** father, who testified at hearing on the motion to dismiss that in his conversation with Diamond [who had called him prior to trial]. Diamond himself told **CONKLIN's** father he "had to go back numerous times to get him to do it and since **KELLY CONKLIN** was broke and his girlfriend pregnant, he provided him the opportunity to make money (p. 98).

As in Myers, supra, which adopted and embraced Cruz, supra, the Respondent urged that the conduct of the informant Diamond falls "squarely within the second prong of the objective test and constitute[d] as a matter of law". While the Fourth District did not reach the issue it clearly limited its thoughts in footnotes.

Diamond was a convicted trafficker sentenced to a fifteen (15) year mandatory minimum sentence with a $250,000 fined, and was in fact in jail, post conviction, when he was released to attempt to complete his substantial assistance agreement which, in itself, was illegal [see: Campbell, supra; and Noon v. State, 10 FLW 2682 (Fla. 4 DCA 1984)].

Diamond, as noted above, had no associates to provide substantial assistance against, so in conjunction with the state Attorneys Office and the Broward Sheriff's Office this suave, mid-40's businessman was sent out into the streets of Broward

County to bring the police four (4) times the amount of drugs with which he was caught.

He was not monitored or taped or followed as he went about setting up deals for the police, and even he testified at hearing it was he who brought up cocaine talking with **CONKLIN**.

As set forth in the Statement of Facts, by the time he met **CONKLIN**, his "time-clock" was ticking and he had to make one more deal to get a reduction of sentence as per his agreement. Thus, his meeting the young and poor **CONKLIN** provided the opportunity. Diamond, even according to the testimony and trial of the state's witnesses, knew **CONKLIN** for over one month [compare two to three weeks in Myers] before he ever mentioned **CONKLIN** to the police, thus lending further credence to the Respondent's pre-trial motion. There is no question but that the activity of Diamond as set forth in the sworn motion to dismiss ensured an "entrapment scenarios in which the innocent will succumb to temptation***." Cruz as quoted also in Myers. It was even more clearly a violation of Glosson as the appellate court so correctly found.

Within a few days after **CONKLIN** and HUNTER's arrest, Diamond received a 14 year reduction in sentence, and a waiver of a fine of $250,000 [see footnote 1, Hunter, supra] **Even then he complained**, as he thought he was **working towards probation**, and this is where, in terms of the opinions cited above, the inquiry ought begin, for due process of law is even more, it is submitted, egregiously violated than in the contingency fee

situations of Glosson, supra, and Hunter. The decision of the appellate court was eminently correct.

Only the naive would not agree that the convicted, incarcerated Diamond was given a contingency fee contract by the State Attorney and the police; however, the contingency was much more than any 10 or 15 percent of proceeds seized, it was 14 years of freedom [indeed, Diamond expected full freedom probation]. To send unguided, unwatched, and unmonitored, out and about the streets preying upon anyone, a person who has so much at stake as his enjoyment and life from age 45 to 60 and leaving his wife and children is to beg entrapment. The state created an agent provacateur parallelling on a lesser scale, the horrors of the French Revolution or Nazi Germany.

And, whom did Diamond find for his prey on this, his last chance to complete his deal? Almost the classic person to entrap, a young impressionable man, broke with a pregnant girlfriend, each living from paycheck to paycheck, in a lower middle-class apartment. Playing about the Respondent, who finally went to his boss, co-respondent HUNTER for help, Diamond got his reward, freedom, and the state put two persons in prison. It is situations such as these, rare but egregious, that compels the invocation of the due process clause as espoused in Glosson.

Respondent was an otherwise innocent person who was induced by police activity through their agent Diamond, "to commit the criminal act the police activity seeks to produce", Cruz, supra. In this case as all the evidence raised by the

motions set forth, and the appellate court found, the criminal design originated in the minds of the State Attorney, the Broward Sheriff's Office, and Diamond, by virtue of their substantial assistance agreement, and they implanted "in the mind of an innocent person the disposition to commit the alleged offense and induce[d] its commission in order that they may prosecute" [Sorrells v. United States, 287 U.S. 435 (1932), as quoted in Cruz, supra]. As did this court, Respondent must continue the quotation from Sorrells, supra, regarding the case at bar:

> "Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation***"

The Cruz court thus recognized that the effect of a threshold inquiry, which is now the established law of Florida, is to require the state to establish initially whether

> "'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power'" quoting Sherman v. United States, 356 U.S. 369 (1958).

This court then announced a threshold entrapment test. To quote,

> "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of specific ongoing activity; and (2) utilizes means reasonably tailored to apprehend those involved in ongoing criminal activity." Cruz, supra.

The State of Florida fails both prongs of this test herein. Indeed, to quote again, "the first prong of this test addresses the problem of police 'virtue testing', that is police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime". That this occurred at bar cannot be doubted; Diamond engendered the crime solely to gain his freedom. **CONKLIN** was never heard of and involved in nothing prior to this meeting Diamond. As the Cruz court noted, while society is at war with criminals, "[p]olice must fight this war not engage new hostilities."

Even more seriously offended, however, is the second prong of the test, the "problem of inappropriate techniques". Both the Fourth District Court in Myers, supra, and the Third District Court in Marrero, supra, have addressed this second prong and in each instance, the case at bar falls even more strongly within the gambit of those decisions, for the methods employed at bar did not "utilize means reasonably tailored to apprehend those involved in ongoing criminal activity" because before the appearance of Diamond, there was none. A short recitation from the opinion in Marrero, supra, to juxtapose with this court's opinion quoting Myers' sworn motion to dismiss is necessary:

> "The police activity involved here consisted of the police informant's repeated inquiries of Marrero, over a six month period [compare two to three weeks in Myers, and at least one to several months at bar], whether he would sell marijuana, despite Marrero's continued

> refusals. The detectives had no information about any prior involvement of Marrero in any such criminal activity [the same was true of Myers and Respondent]. Upon being made aware of his name, they immediately contacted Marrero to set up the drug deal. However, because they 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." [Compare the same in Myers' sworn motion to dismiss and in **CONKLIN**'s sworn motion].

The Third District held that the police activity failed both prongs of the threshold test and found that the police activity "has overstepped the bounds of permissible conduct", citing to Cruz, supra, and therefore held the same constituted "entrapment as a matter of law", Marrero, supra.

It is interesting to note that Marrero did not file a sworn motion to dismiss, rather the Third District reviewed evidence at trial pursuant to a renewed motion for judgment of acquittal at the close of all the evidence, and declined to dispose of the case on the narrowly requested ground of failure to give a jury instruction on entrapment, preferring to address the Cruz issue sua sponte. If one were to consider the entire transcript in this matter as to a "matter of law" issue, the evidence is even more compelling, respondent **HUNTER** corroborated Diamond's threats, and **CONKLIN** and his wife explained in great detail Diamond's persistence. More cogently, the lack of control by the police of their informant is quite apparent.

It need be remembered that respondent HUNTER testified [as did CONKLIN] that CONKLIN was so scared and upset by Diamond and his persistent calling, even to CONKLIN's place of business that CONKLIN asked HUNTER to take his phone calls.

HUNTER confirmed CONKLIN's fearfulness and his desire not to take calls as Diamond and his "people" were on CONKLIN's back (R p. 911). HUNTER took phone calls from Diamond (R p. 912), and Diamond indicated he was looking for drugs. After HUNTER tried to put him off, Diamond became threatening even to HUNTER in his manner about the necessity to obtain drugs (R pp. 913-914). This confirms Mrs. Conklin who also heard Diamond threaten CONKLIN (R pp. 844-847), and CONKLIN himself (R pp. 882-885). Thus, Diamond, in his urgency to bring about a drug deal so as to obtain his freedom from prison, did, as an agent of the state, and in conjunction with them, cast nets in impermissible waters. Cruz, supra. The Respondent, after his presentation of the issue above argued to the Fourth District that:

> "The methods employed by the state to bring about the crimes charged are so violative of the due process clauses of both the Constitution of the United States and the Constitution of the State of Florida, Article I 'Declaration of Rights' as to compel the discharge of both Respondents" [Respondent's initial brief in Fourth District, page 21].

The Fourth District, after what is suggested was lengthy briefing argument and deliberation, unanimously ruled that relief ought be granted.

The issue of the constitutionality of the "new" substantial assistance statute is not before this Court and that statute does not contemplate, it is suggested, what occurred vis a vis Diamond. The issues that are before this Court were bracketed by the Court of Appeals. The court found that illegality was pervasive and ordered Respondent **CONKLIN** discharged on the basis of this Court's holding in Glosson. That decision was eminently correct and Certified Question Number One ought be answered affirmatively by this Court.

The second question certified to this Court concerns a "co-defendant who was not the direct target of the government's agent" and that matter relates to co-respondent HUNTER who, as noted, is now represented by other counsel and hence that issue is more properly addressed by new counsel.

CONCLUSION

For all of the foregoing the decision of the Appeals Court, based upon this Court's holding in Glosson, that Respondent **CONKLIN** be ordered discharged ought be affirmed and Certified Question Number One answered affirmatively.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 23 day of January, 1989.

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