SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. Case No. 73,779

MARK D. EVANS and
VERNON MESSIER,

Respondents
_____/

ON DISCRETIONARY REVIEW OF QUESTIONS CERTIFIED
BY THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF ON THE MERITS OF RESPONDENT

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STATEMENT OF THE CASE

Mark D. Evans was one of three defendants charged in the criminal information giving rise to this appeal. Defendant Evans and codefendant Rebecca Peacock were charged with one count of conspiring to traffic in cocaine and one count of trafficking in cocaine. Codefendant Vernon Messier was charged with both of these offenses, as well as a third count of possessing cocaine. R 23-24.

Based on due process and the two part threshold objective entrapment test in the Florida Supreme Court's decision in Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985), Defendant Evans filed a sworn motion to dismiss under Fla. R. Crim. P. 3.190(c)(4). R 52-60. The State did not traverse the motion. Following a hearing, the motion was granted, and the charges against Defendant Evans were dismissed. R 197, 244-45. The charges were also dismissed against codefendants Messier and Peacock.[1/]

The State appealed the dismissal of the charges against Defendants Evans and Messier to the Second District Court of Appeal. After the close of the briefing but before oral argument in the Second District, the Fourth District issued its unanimous decision in Hunter v. State, 531 So. 2d 239 (Fla. 4th D.C.A. 1988). On the basis of the due process principles articulated by this Court in State v. Glosson, 462 So. 2d 1082 (Fla. 1985), the Hunter defendants' cocaine trafficking and

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1/ The State neither opposed Peacock's motion to dismiss nor appealed the trial court's order granting it.

conspiracy convictions were reversed. The Fourth District also certified two questions to this Court.[2/]

The Second District's opinion did not address the Cruz objective entrapment defense, which was the basis of the trial court's order in this case. Instead, the District Court relied entirely on Glosson's due process holding as applied in Hunter and unanimously affirmed the trial court's dismissal of the charges against Defendants Evans and Messier. State v. Evans, 537 So. 2d 639 (Fla. 2d D.C.A. 1988). The Second District certified to this Court the same two questions certified in Hunter:

> 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 co-defendant who was not the direct target of the government's agent?

Hunter, 531 So. 2d at 243. Because Defendant Evans was the direct target of the government agent, only the first certified question applies to him.

This case comes to the Florida Supreme Court in a different procedural posture from Hunter. In Hunter, the defendants were tried and convicted after their motions to dismiss on due process and entrapment grounds were denied. In contrast, the instant Defendants have prevailed over the State

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2/ Oral argument in State v. Hunter, Case No. 73,230, was held in this Court on June 8, 1989.

at every phase of this case. Unlike the Hunter defendants, they were never tried or convicted, and they did not bring this appeal. Instead, this appeal was brought by the State after Defendant Evans' untraversed sworn pretrial motion to dismiss was granted based on the objective entrapment defense in Cruz. For this reason, this brief analyzes both the Glosson due process defense addressed in Hunter and the Cruz objective entrapment defense.

STATEMENT OF THE FACTS

A. Introduction

Having filed here the same statement of facts it filed in the District Court, the State does not contend the Second District should be reversed on the ground that the instant case is factually distinguishable from Hunter. To the contrary, the State "urges the facts in this case are parallel to those in Hunter," and "that the same situation exists in this case as exists in Hunter." St. Br. pp. 6, 7. Instead, for the identical reasons relied on by the State in Hunter,[3/] the State argues only that the Fourth District's decision in that case erroneously applied Glosson. Thus, should this Court affirm the Fourth District's application of Glosson in Hunter as stated in the first certified question, there is no dispute that the instant case should be affirmed as well.

The District Court affirmed this case summarily and

3/ The State adopted the State's Brief in Hunter. St. Br. p. 6.

certified it based on Hunter without delving into the specific facts. Nevertheless, and despite the State's concession as to the similarity between this case and Hunter, a full and accurate statement of the controlling facts going to the first certified question, the Glosson due process issue, must be presented. Moreover, should this Court answer that question in the negative and hold Glosson does not apply, an additional ground for affirmance - the trial judge's presumptively correct dismissal of the charges under Cruz - will still remain for review. The Cruz issue can be examined only if the relevant facts that were before the trial court are correctly stated here.

By merely repeating in this Court the same statement of facts it used in the District Court, the State failed to present all of the relevant facts going to these two issues. More importantly, the State has perpetuated the same serious factual errors that fatally flawed its position below.

First, as in the District Court, the State has again attempted to sidestep the determinative impact of its failure to traverse Defendant Evans' Rule 3.190(c)(4) motion to dismiss. By declining to traverse the factual matters in Defendant Evans' motion in the trial court, the State admitted them as a matter of law. Fla. R. Crim. P. 3.190(d). Utterly without explanation or justification, however, the State has again ignored its default and presented a version of events differing from the facts presented in the sworn motion.

The State has never attempted to excuse or explain its failure to traverse in either the trial court or on appeal. Indeed, when the Second District specifically inquired of the State at oral argument regarding this failure, the Assistant Attorney General stated only that he was not prepared to argue the issue. Thus, even though they are largely irrelevant,[4/] to the extent they conflict with Defendant Evans', the State's facts cannot be considered as a matter of law.

Second, the State's facts should be rejected because to the extent they differ from Defendant Evans', they are based on incompetent and inadmissible hearsay. Again employing the same tactic it used in the Second District, the State has recited its version of events without disclosing its sources for many factual allegations. Review of the record reveals that at virtually every point of conflict between the State's version

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4/ For example, the State's Brief erroneously alleges Defendant Evans was involved with drugs prior to the incident giving rise to this case. St. Br. p. 2. Even if this allegation had any merit it would be of no consequence to the instant appeal. Whether a defendant was previously involved with drugs is irrelevant to the due process issue addressed by Glosson. Glosson focuses on the impropriety of the agreement between the State and its informant, not the background of the defendant. It protects the defendant's constitutional due process right regardless of his or her predisposition. Glosson, 462 So. 2d at 1085; Hunter, 531 So. 2d at 242 n. 2. Likewise, as the State conceded in the trial court, R 236-37, whether the defendant had a criminal predisposition is irrelevant under the Cruz objective entrapment test. Unlike the traditional subjective entrapment defense, the Cruz test focuses on the conduct of the police, not the "defendant's past record and present inclinations to criminality." Cruz, 465 So. 2d at 520-21. See, e.g., Pezzella v. State, 513 So. 2d 1328 (Fla. 3d D.C.A. 1987) (drug trafficking conviction reversed under Cruz despite evidence that defendant regularly abused drugs).

and Defendant Evans', the State has relied on the incompetent and inadmissible hearsay statements of Detective Lamb, the case agent. Lamb's statements were directly refuted by the first hand testimony of the State's key witness, confidential informant Kennedy.

The State's approach places it in the untenable position of relying on hearsay recollections instead of the actual first hand statements of informant Kennedy, on whom Detective Lamb relied for all of his information.[5/] Informant Kennedy was responsible for instigating and engineering all of the events on which this prosecution is based. Virtually all pre-arrest communications and contacts with Defendant Evans were made through the confidential informant, not the detective. Nevertheless, the State ignores Kennedy's first hand testimony, evidently in the belief that it is necessary to do so to support its legal position. Significantly, to the extent Detective Lamb provided first hand, non-hearsay testimony, he

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5/ For example, in furtherance of its inapt attempt to allege Defendant Evans was involved with drugs prior to the instant incident, see note 4, supra, the State used Lamb's hearsay statements and hearsay attributed to Jack Duerk, a convicted felon who never testified or appeared in any phase of this proceeding. The error in the State's allegation of prior drug involvement is revealed by the unequivocal first hand testimony in the record, which established that neither the police nor Kennedy had any information that Defendant Evans was ever involved in any previous drug transactions. R 53, 54, 70-72, 95-96, 124-25, 155, 178. The State's allegation is also rebutted by the State's own inconsistent statement in its brief that Kennedy did not have any knowledge of drug involvement by Evans until "after she agreed to cooperate with police." St. Br. p. 1. The trial judge was entitled to rely on direct testimony and disbelieve inconsistent hearsay.

corroborated the informant's testimony and supported Defendant Evans' motion to dismiss.

Third and finally, in a bald attempt to inflame this Court and color its judgment with irrelevant information not properly before it, the State has, as it did in the District Court, gratuitously included in its brief the allegation that drug paraphernalia and residue were found in Defendant Evans' car. St. Br. p. 5. Review of the record reveals the State's allegation is lifted from an affidavit prepared by a Detective Deperte, who was never deposed or cross-examined. Deperte affided he conducted an inventory search of Defendant Evans' car. R 189.

Deperte's affidavit is of no legal consequence. Even if the drug paraphernalia and residue had any arguable relevance to this appeal,[6/] it is just as likely as not that these materials belonged to Defendant Peacock or some person other

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6/ As stated at note 4, supra, under Glosson a defendant's predisposition to engage in drug transactions is irrelevant. 462 So. 2d at 1085. Likewise, the objective entrapment test in Cruz focuses on the activity of law enforcement authorities, not the predisposition of the accused. 465 So. 2d at 520-21.

Moreover, even if it had been relevant, Deperte's affidavit was untimely filed. The affidavit was attached to the State's motion to set aside the trial court's order dismissing Defendant Evans' case. R 187-89. Because the motion and affidavit were not submitted until after Defendant Evans' sworn motion to dismiss had already been granted, R 187-89, they were filed too late to be construed a traverse to Defendant Evans' motion. Fla. R. Crim. P. 3.190(d); State v. Rodriquez, 505 So. 2d 628 (Fla. 3d D.C.A. 1987) (traverse must be filed a reasonable time before hearing on motion to dismiss, and traverse not filed until after commencement of hearing is untimely), rev'd on other grounds, 523 So. 2d 1141 (Fla. 1988).

than Defendant Evans.[7/] In apparent recognition of this, the State did not attempt to make the affidavit a part of the record going to the motion, R 211-12,[8/] and, as in the Second District, does not mention it in its argument.

Because of the foregoing errors in the State's version, the following corrected statement of the facts, which includes the facts relevant to the first certified question as well as the untraversed facts in Defendant Evans' sworn motion to dismiss, is submitted. Fla. R. App. P. 9.210(c).

B. Corrected Statement of the Facts

The State's confidential informant and main witness in this case was Marcia Kennedy. Kennedy had multiple felony convictions, including convictions for grand theft and for five drug charges in a cocaine and marijuana possession and trafficking case. R 65, 106-07.

Kennedy's offense preceded and was completely unrelated to the instant prosecution of the present defendants. R 68-69, 106-07. The drug trafficking charge against her mandated a minimum three year sentence of imprisonment. R 108. Kennedy

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7/ The affidavit does not state the drug paraphernalia and residue belonged to Defendant Evans. Defendant Peacock, whose case was dismissed but not appealed by the State, was in Defendant Evans' car just before the arrest. Confidential informant Kennedy testified the cocaine that was the subject of this prosecution could have been in the possession of Defendant Peacock. R 100.

8/At the State's request, it was stipulated at the hearing on the motion to dismiss that the facts on which Defendant Evans' motion was based were contained in the depositions of confidential informant Kennedy and Detective Lamb. R 212. Neither deposition mentions any drug paraphernalia or residue.

understood, however, that under the sentencing guidelines she faced a possible total sentence of eight or nine years. R 106-07.

Shortly after she was arrested on these drug charges and while she was still in jail, Kennedy was approached by Detective Ronald J. Lamb. Detective Lamb was the case agent in Kennedy's case, and he later became the case agent in the instant prosecution. R 66-67. Lamb warned Kennedy that unless she provided "substantial assistance" by making unspecified drug cases for him, she would remain in jail for at least the three year period required under the applicable mandatory minimum drug trafficking statute. R 109. Detective Lamb told Kennedy that if she cooperated, however, he would assist her in securing a lighter sentence. R 109-10.

The agreement proposed by Detective Lamb was illegal. The Florida substantial assistance statute then in effect authorized the State Attorney to move for mitigation of a mandatory minimum sentence for drug trafficking only if the individual "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals." Fla. Stat. § 893.135(3) (1985) (emphasis supplied). Under her agreement with the State, Kennedy was not merely required to testify against those involved in her case. Instead, she was also specifically required to ensnare and testify against anyone she could find to create as many new cases as possible,

all unrelated to her own. R 109, 180-83. For this reason, the State far exceeded the bounds of the limited authority then conferred upon it by the legislature to seek reduced sentences for convicted drug traffickers.[9/]

In compliance with her promise under her illegal agreement with the State, Kennedy began creating drug cases unrelated to her own. As part of her bargain, she was required to testify, and she testified against several defendants in depositions. R 155, 157. Before the instant case, all of the cases in which she was deposed resulted in guilty pleas, so that she was not required to testify at trial. R 157.

When Detective Lamb approached Kennedy and proposed the illegal substantial assistance deal, Defendant Evans' name did not occur to her. Kennedy had absolutely no prior knowledge of Defendant Evans ever being associated with illegal drugs. She had never previously purchased cocaine from Defendant Evans and had never seen him engage in any drug activity of any kind. R

9/ Highlighting the illegality of the State's deal with Kennedy, the substantial assistance statute was amended after the events giving rise to this case to permit sentence reductions for persons convicted of mandatory minimum drug offenses for assistance in cases other than their own. Compare Fla. Stat. § 893.135(4) (1987) with § 893.135(3) (1985).

53, 54, 70, 72, 95, 96, 124, 125.[10/] Kennedy testified that she never told Detective Lamb that she had ever purchased cocaine from Defendant Evans. R 71-72.[11/] The police had no incriminating information about prior involvement by Evans in any unlawful drug activity. R 155, 178. Indeed, Detective

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10/ Kennedy testified at her deposition:

Q: Did you ever buy cocaine from [Defendant Evans]?

A: No.

Q. At no point in time you never bought cocaine from this man?

A: (Shakes negatively.)

* * *

Q: So you personally had no involvement with Mr. Evans in relation to cocaine at any time prior to the cooperation with the police?

A: No.

R 70, 96.

11/ Again employing its tactic of using Detective Lamb's second hand statements over Kennedy's direct testimony, the State's Brief alleged Kennedy stated she had previously purchased cocaine from Defendant Evans in the past. St. Br. p. 2. In direct contradiction to this assertion, Kennedy testified at her deposition:

Q: Did you tell Officer Lamb in particular that you knew Mr. Evans from the year or so prior and that he was dealing in drugs?

A: I told him I had met him previous through Jack.

Q: Did you tell him that you had bought cocaine from him a year or so prior to this?

A: No.

R 71-72

Lamb had not even heard of Defendant Evans. R 155.

When she targeted Defendant Evans, Kennedy had not yet been sentenced. R 174. With her sentencing date approaching, to gain the State's assistance in escaping her mandatory minimum three year prison sentence, Kennedy had to make one more case involving at least an ounce of cocaine. R 120-21, 131, 142-43, 180-81. Detective Lamb told Kennedy she had to arrange one more transaction involving this quantity, the threshold amount for the same three year mandatory minimum sentence she faced, or he would not assist her in reducing her own sentence. R 77, 120, 121, 159, 161-62, 181.

Like her previous cases, Kennedy's illegal bargain included the requirement that she testify against Defendant Evans. R 116-17. If she did not testify in this case, Kennedy understood that she would be in violation of her substantial assistance agreement and would go to jail. R 117-18. Naturally, Kennedy was frightened by the prospect of imprisonment. R 110-11.

Kennedy testified Defendant Evans' name was supplied to her by Jack Duerk, her boyfriend. R 71, 125. Duerk never appeared in this case or gave any testimony. Not once in any of Kennedy's prior contacts with Defendant Evans in Duerk's presence over the two years preceding this prosecution had drugs ever been present, used, discussed, or in any way involved. R 124-25. Moreover, Kennedy did not testify that Duerk or anyone else ever stated Defendant Evans was a drug

dealer. R 71, 124-25. Instead, Kennedy stated only that Duerk had simply told her "just to go up to [Evans'] house and see if I could get any cocaine." R 71.

Induced by the State's promise that she would win her freedom by trapping others in drug cases, and pressured by the need to create one more case before her sentencing hearing, Kennedy selected Evans, brought up the idea of purchasing cocaine, and negotiated the instant transaction. R 73, 110-11, 142-43. Kennedy specifically agreed that had it not been for the actions of the police and the pressure supplied by Detective Lamb and others, she would have never contacted Defendant Evans and the drug transaction "would have never occurred." R 94, 110-11.

Kennedy initiated contact by approaching Defendant Evans. When she first asked him about supplying cocaine, Evans' response was equivocal, and he did not at first give her an answer one way or the other. R 127.

Although Lamb specified a minimum amount of cocaine, Kennedy had free rein and unbridled discretion in selecting and bringing her target to him. The identity of the potential defendant was left to Kennedy alone. Nothing in the record indicates Kennedy's actions were restricted or monitored in any significant way to assure their propriety or legality. None of Kennedy's conversations or contacts with Defendant Evans preceding the day of his arrest were filmed, tape recorded, or overheard by the authorities.

Before Kennedy was sentenced but after she had brought about Defendant Evans' arrest, in keeping with the illegal agreement he had made, Detective Lamb recommended Kennedy be credited with having provided "substantial assistance." R 174, 178. As a result, Kennedy was not required to serve the three year mandatory minimum term she would have otherwise faced. In fact, she did not spend even one day in jail for her crimes. Instead, in violation of the Florida substantial assistance statute then in effect, Kennedy received a sentence of only house arrest and probation. R 109-10.[12/]

12/ Although the subject did not come up in her deposition or in Detective Lamb's, Kennedy was presumably also relieved of the mandatory $50,000.00 fine. See Fla. Stat. § 893.135(1)(b)1 (1985).

SUMMARY OF ARGUMENT

Contrary to the due process principles articulated by this Court in State v. Glosson, the convicted cocaine trafficker turned informant in this case was, in violation of the substantial assistance statute then in effect, illegally allowed to purchase her own freedom by creating the offenses for which Defendant Evans was prosecuted. That the informant fortuitously received her illegal payoff before Defendant Evans' trial does not cure the Glosson due process violation, and drawing such an artificial distinction would effectively emasculate Glosson's rule. The Second District's application of Glosson to these facts should be affirmed.

The trial court's presumptively correct order granting Defendant Evans' sworn motion to dismiss under the two part objective entrapment test of Cruz v. State presents a second ground for affirmance. Under the terms of her illegal substantial assistance agreement with the State, the confidential informant in this case instigated and created a new offense to ensnare Defendant Evans. In violation of Cruz, she did not interrupt a specific ongoing criminal activity. The State cannot carry its burden under Cruz' second prong because the illegality of the agreement between the State and its informant in this case was an inappropriate police technique that was not reasonably tailored to apprehend those involved in ongoing criminal activity.

ARGUMENT

I. 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 VIOLATES THE HOLDING IN STATE V. GLOSSON

Adopting the State's brief in Hunter, the State does not in this appeal challenge either the rule or reasoning of this Court's decision in State v. Glosson, 462 So. 2d 1082 (Fla. 1985).[13/] Likewise, the State does not urge the instant facts are in any way distinguishable from Hunter's. Instead, just as it argued in Hunter, the State contends that Glosson's due process rationale does not apply here because confidential informant Kennedy had already received the benefit of her illegal substantial assistance bargain and escaped her mandatory minimum sentence before Defendant Evans' trial. Having already secured her freedom, the State's argument runs, Kennedy would not have been pressured at trial to commit perjury to secure a conviction. St. Br. pp. 6-8. The State also claims the confidential informant's testimony was not "critical" within the meaning of Glosson. St. Br. p. 8.

In its effort to distinguish Glosson, the State both misapprehends the crux of this Court's holding in that decision and ignores the specific facts of this case. Applying Glosson to the instant facts reveals that the Second District's unanimous affirmance of the dismissal of the charges against

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13/ Indeed, the State conceded Glosson's holding is "well-reasoned." St. Hunter Br. p. 12.

Defendant Evans was, like the unanimous affirmance in Hunter, both correct and just.

Before applying Glosson's rule to this case, it is first necessary to review the relevant facts. The State correctly concedes this case parallels and involves the same situation as Hunter. All of the factors compelling the Fourth District in Hunter to hold the defendants' due process rights were violated under Glosson are also present here.

Exactly like the informants in Glosson and Hunter, 531 So. 2d at 242, confidential informant Kennedy had "an invaluable stake" in making new cases - her own freedom. Also as in Hunter, id., the freedom promised Kennedy constituted "much more of an 'enormous incentive' to 'color h[er] testimony' than the strictly monetary arrangement in Glosson." Likewise, in this case as in Hunter, "[i]t is undisputed that the informant originated the criminal plan in h[er] own mind and instigated the commission of the crime solely to obtain h[er] own freedom." Id.

Just like the informants in Glosson and Hunter, 531 So. 2d at 242, confidential informant Kennedy, acting under authorization from the State,[14/] "was given free rein to instigate and create criminal activity where none before

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14/ It is not known whether Kennedy's deal had judicial authorization as well, for the record does not indicate whether the State disclosed the illegal arrangement to the sentencing judge in Kennedy's case.

existed."[15/] Exercising her own unbridled discretion, confidential informant Kennedy sought out Defendant Evans and manufactured the offense for which he was arrested. She was, like the informant in Hunter, id., the key witness for the State in Defendant Evans' prosecution.

Just as in Hunter, id., Kennedy "actually received h[er] agreed payoff" when she was released from a three year mandatory minimum sentence and, presumably, a $50,000.00 fine. In short, exactly like Hunter, "a convicted cocaine trafficker was allowed to secure h[er] own freedom by convincing someone else to traffic in cocaine." Id. at 242-43.[16/]

A. The violation of Defendant Evans' due process right under Glosson was not cured by the State's performance of its illegal promise to reduce confidential informant Kennedy's sentence in advance of Defendant Evans' trial.

Although this case and Hunter have the above facts in common, the instant case has a procedural distinction that makes the fatal flaw in the State's "benefit of the bargain

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15/ Although under Glosson's due process defense a defendant's predisposition to engage in drug activity is irrelevant, see supra note 4, the instant facts regarding the creation of new criminal activity are even more compelling than the facts in Hunter. The record and Defendant Evans' untraversed motion show that Defendant Evans had no involvement in any prior drug transactions. Detective Lamb had never even heard of Defendant Evans. By contrast, the Hunter court reversed Defendant Hunter's conviction even though there was tape recorded evidence that he had purchased cocaine from a supplier for over a year. 531 So. 2d at 241.

16/ The instant facts are even more compelling than Hunter's in this regard. In Hunter, the informant was sentenced to one year in prison. Confidential informant Kennedy, however, received a sentence of only house arrest and probation, and never spent even a single day in prison.

before trial" argument even more apparent here. The Hunter defendants' convictions were reversed on appeal after their pretrial motions to dismiss on due process and entrapment grounds were denied. By contrast, in the instant case as in Glosson, Defendant Evans' untraversed Rule 3.190(c)(4) motion to dismiss was granted by the trial court and the case never went to trial.

The pretrial dispositions of this case and Glosson are illustrative of the reality that criminal cases in Florida are frequently resolved without a trial based on evidence adduced before trial. Guilty pleas are often forced following the taking of an informant's damaging deposition testimony, as occurred in the cases Kennedy brought to Detective Lamb before Defendant Evans'.

When deposition testimony forcing a guilty plea is compelled under an agreement between the State and the informant that violates the defendant's due process rights under Glosson, the severity of the violation is not mitigated by the fortuitous circumstance that the target of the informant's unconstitutional actions succumbs and the case never progresses to trial. Glosson is concerned with the inherent unfairness to the defendant that inevitably results whenever the State induces an informant to instigate, cooperate in, and testify in a criminal case by offering the informant what amounts to an irresistible inducement to bring about the prosecution. Glosson, 462 So. 2d at 1085; see also Hunter, 531

So. 2d at 242. It is the impropriety of the agreement struck between the State and its informant, not the sequence in which each side agrees to perform its part of the bargain, that renders contingent arrangements like the one here and in Hunter violative of Glosson's due process rule. 462 So. 2d at 1083, 1085.

Contrary to the State's assertion, Glosson is not confined to "the very narrow situation wherein the paid agent's benefit is contingent upon his testimony at trial." St. Br. p. 7. (emphasis supplied). Even the portion of Glosson quoted in the State's brief shows that the due process right is implicated any time there is a contingency arrangement "conditioned on cooperation and testimony in the criminal prosecution," not just in the trial phase. St. Br. p. 7, quoting Glosson, 462 So. 2d at 1085 (emphasis supplied).

There is therefore nothing in Glosson to support the State's suggestion that the due process deprivation it addresses will evaporate if the State is clever enough to make its illegal payoff to its informant before the beginning of trial. Glosson's rule would be emasculated if it is restricted solely to cases where the informant receives the benefit of an improper bargain after testifying at trial. Under such a construction, cases like the instant one and Hunter, where the damage is done and the due process violation is already complete by time the improperly induced informant has manufactured the offense and testified against the defendant in

a deposition,[17/] will be put beyond Glosson's reach. There is no reason in law or logic to insulate such misconduct from Glosson.[18/]

Equally illogical is the State's assertion that, having already received her illegally reduced sentence, confidential informant Kennedy will not remain under enormous pressure to color her testimony or commit perjury at Defendant Evans' trial. Review of the facts shows that for at least four reasons, the improper pressures that forced Kennedy to instigate Defendant Evans' prosecution under her illegal substantial assistance deal will persist and have the same unconstitutional influence on her long after her own sentencing

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17/ As the record vividly illustrates here, the deposition of the confidential informant is often the single most important prosecutorial weapon against a defendant whose due process right has been violated. In all of the cases preceding this one in which Kennedy gave deposition testimony under her agreement with the State, the defendants entered guilty pleas and she was never required to testify at trial. R 157.

18/ The State's attempt to distinguish this case based on the Fifth Circuit's decision in State v. McQueen, 501 So. 2d 631 (Fla. 5th D.C.A. 1986), and on the federal decision in United States v. Lane, 693 F. 2d 385 (5th Cir. 1982), St. Hunter Br., pp. 9-12, is unpersuasive. As to the latter, in Glosson this Court specifically "reject[ed] the narrow application of the due process defense found in the federal cases." 462 So. 2d at 1085. As to the former, Hunter noted that McQueen is distinguishable because unlike the instant situation and the situation in Hunter, where informants manufactured new cases against persons whose identities were irrelevant, the substantial assistance agreement in McQueen required the informant to target persons already known to him or who were in the drug business and predisposed. 531 So. 2d at 243 n. 3. Moreover, since Glosson's due process rule protects even the predisposed defendant, 462 So. 2d at 1084-85, even if this distinction did not exist, the constitutional violation in the instant case would still compel reversal.

and through the conclusion of Defendant Evans' trial.

First, the State's contention ignores the reality that Defendant Kennedy's actions in creating these charges irrevocably committed her to supporting the State's version of them. When Kennedy was first "locked in" to her role as the State's informant and pressured to instigate and manufacture the crime for which Defendant Evans was arrested, her own sentencing hearing in her separate case was hanging over her head. R 174. Even under the State's own "benefit of the bargain" approach, there was at that critical time an overwhelming motivation for Kennedy to color her testimony, perjure herself, or engage in other improper conduct while binging about the offense that would buy her freedom. It blinks reality to suggest that having been pressured by the authorities to go to these extremes, Kennedy would change her position immediately after her sentencing, or even perceive she had the freedom to do so.

Second, under Kennedy's substantial assistance agreement, she was required to testify for the State. Although she had already been sentenced, her refusal to testify at trial would constitute a violation of her agreement with the State and result in her imprisonment. R 117-18. Moreover, trial testimony inconsistent with her previous representations or unfavorable to the State could also be a breach of her substantial assistance deal, which would result in her facing the same three year mandatory minimum sentence she had

illegally sidestepped.

Third, if Kennedy made unfavorable statements at trial or gave testimony inconsistent with her deposition, she risked being charged with perjury. A perjury charge would constitute a violation of Kennedy's probation and again expose her to the three year mandatory minimum drug trafficking sentence. It would also expose her to the separate serious penalties for perjury.[19/]

Fourth and finally, if Kennedy did anything at all to displease the State at any stage of the prosecution against Defendant Evans, the State could always simply refuse to honor the substantial assistance agreement. Since the agreement was, as a matter of law, an illegal contract, Kennedy was powerless to enforce it. Campbell v. State, 453 So. 2d 525, 526 (Fla. 5th D.C.A. 1984). As she was completely at the mercy of the State, she had no choice but to support its version of events.

B. Confidential informant Kennedy's testimony was "critical" within the meaning of Glosson.

Equally unavailing is the State's attempt to distinguish Glosson by making the remarkable assertion that because there was a detective present "throughout all aspects of this case

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19/ Attempting to downplay the impact of the threat of perjury, the State suggests it would have "little recourse" against an informant who "shaded" trial testimony in favor of the defense. St. Hunter Br. p. 9. Even indulging the assumption for which there is no record support that confidential informant Kennedy possessed a sufficient understanding of the subtleties of the law of perjury to "shade" her statements with impunity, testimony inconsistent with the State's position would still expose her to liability for violating her substantial assistance agreement.

except for the initial contact," St. Br. p. 8, confidential informant Kennedy's testimony was not "critical" to the prosecution of Defendant Evans. Even the State's brief in Hunter does not make such a bold assertion. It cannot withstand scrutiny.

It is undeniably clear from the record that there would have been no crime and hence no case at all against Defendant Evans but for the actions of informant Kennedy. R 52-60, 71, 73, 94, 110. Kennedy originated the criminal plan in her own mind, targeted Defendant Evans, brought up the idea of purchasing cocaine, and manufactured the offense solely to secure her own freedom.

The State gives no record citation for its claim that "a detective was present throughout all aspects of the transaction except for the initial contact." Indeed, it does not even identify any detective by name.

Contrary to this assertion, no detectives or other law enforcement personnel were present or involved in the meeting and conversations in which Kennedy arranged the transaction for which Defendant Evans was arrested. R 73-84. The police did not conduct any independent investigation of Defendant Evans. Indeed, no law enforcement personnel were even in Defendant Evans' presence until the day of his arrest. By then, virtually all of the facts Kennedy created to support the charges of trafficking and conspiracy to traffic had already been developed. The only person present during their

development was Kennedy, whose activities, conversations, and meetings were neither recorded nor monitored.

Further, should Evans raise a traditional subjective entrapment defense at trial, there would be no State witness in a position to rebut it except for Kennedy. In short, the State could not possibly prove the trafficking and conspiracy charges without the testimony of informant Kennedy, the one person who was responsible for manufacturing the offenses in the first place.

The State's analysis of this point has yet another flaw in that it misapprehends what Glosson means by "critical" testimony. Contrary to the State's implication, Glosson does not state that a due process violation is possible only when the testimony in issue is so important that it is the only evidence of guilt. Instead, Glosson's due process rule is implicated whenever an informant's testimony is "vital" or "critical" to a successful prosecution. 462 So. 2d at 1085. An informant's testimony does not lose its "critical" or "vital" character merely because there is also other evidence of guilt. Having agreed Kennedy fulfilled her part of the illegal bargain by giving "substantial assistance," it follows almost as a matter of definition that the State cannot now be heard to dispute that her testimony was at the very least "vital" and "critical."

C. Affirmance of the application of Glosson to Defendant Evans' case will not prevent future substantial assistance agreements.

Although its brief nowhere explains the point, the State's argument is titled "Glosson should not be extended to prevent substantial assistance agreements." St. Br. p. 7. This argument heading does not resemble either of the certified issues before this Court. This is not surprising, because neither Hunter nor the instant case have anything to do with preventing substantial assistance agreements.

Presumably the State's argument heading is intended to refer to the argument in the State's brief in Hunter that "the Fourth District has in effect held § 893.135(4) is unconstitutional." St. Hunter Br. p. 8. Evidently designed to give with an air of respectability to the otherwise utterly indefensible and illegal substantial assistance agreements it made with convicted drug traffickers, the State's claim is a red herring, and has no basis in fact or law.

In Hunter, the Fourth District noted only that the State's conduct in entering into its agreement with the informant in that case violated the then prevailing version of the substantial assistance statute. 531 So. 2d at 243. It did not hold that statute or its amended version unconstitutional. Questions concerning the constitutionality of those statutes were not before the Second or Fourth Districts in this case or in Hunter. They therefore cannot possibly now be before this

Court. Indeed, here as in Hunter, 531 So. 2d at 243,[20/] the amended substantial assistance statute was not even in effect at the time of the events giving rise to this prosecution.

20/ Because the substantial assistance statute in effect in this case and in Hunter has been amended, few if any other cases involving illegal substantial assistance arrangements of this type should arise in the future.

II. AN AGREEMENT WHEREBY A CONVICTED DRUG TRAFFICKER WILL, IN VIOLATION OF THE FLORIDA SUBSTANTIAL ASSISTANCE STATUTE THEN IN EFFECT, BE ILLEGALLY ALLOWED TO ESCAPE SERVING A MANDATORY MINIMUM DRUG TRAFFICKING SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING FOR THE STATE VIOLATES THE HOLDING IN CRUZ V. STATE.

The Circuit Court dismissed the charges against Defendant Evans under the two part threshold objective entrapment test of Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985). The State does not challenge this ruling. Rather, it takes the position that this issue is not properly before this Court.

A. The Cruz objective entrapment issue is properly before this Court.

The State urges this Court cannot consider the Cruz issue because the sole basis for the Second District's affirmance was its determination under the Glosson due process defense "that the arrangement between the confidential informant and police violated due process." St. Br. pp. 6, 9.[21/] The State cites no authority for its pinched construction of this Court's broad scope of review. There is none. To the contrary, under Fla. R. App. P. 9.140(f), this Court may review "all rulings and orders appearing in the record necessary to pass upon the

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21/ One possible explanation for the State's erroneous contention that this Court cannot now consider the Cruz issue is that by focusing all attention on the Glosson/Hunter question, it can divert attention from its determinative procedural default below. It is uncontroverted that the State never traversed Defendant Evans' sworn motion to dismiss. It did not file a reply brief in the Second District or in any other way attempt to explain or defend its default. At oral argument, the Assistant Attorney General stated simply that he was not prepared to argue the issue.

grounds of an appeal," which in this case includes the trial court's presumptively correct dismissal of the charges against Defendant Evans under Cruz' objective entrapment test.[22/] Cruz is properly before this Court and, as demonstrated below, applying its test to these facts presents yet another reason for affirming the trial judge's dismissal of the charges against Defendant Evans.

B. The undisputed material facts show Defendant Evans was entrapped as a matter of law under Cruz.

In Cruz, this Court recognized that "[n]o matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." 465 So. 2d at 520, quoting Sherman v. United States, 356 U.S. 369, 382-83, 78 S. Ct. 819, 825-25, 2 L. Ed. 2d 848 (1958) (Frankfurter, J., concurring). Accordingly, this Court established in Cruz a threshold objective test 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.'" Id. at 521.

The threshold objective test articulated in Cruz involves

22/ Curiously, the State's position in this respect is contradicted by its own brief in Hunter, which the State has adopted here. In its Hunter brief the State acknowledged, as it must, that this Court has this right to review the Cruz question. St. Hunter Br., pp. 12-15.

a two-part inquiry. Entrapment has occurred as a matter of law under Cruz where police activity does not both (1) have as its end the interruption of a specific ongoing criminal activity, and (2) utilize means reasonably tailored to apprehend those involved in the ongoing criminal activity. Id. at 522. The first prong of the test inquires whether the police activity sought to prosecute crime where no such crime existed but for the police activity engendering the crime. Id. The second prong addresses the problem of inappropriate techniques. It prohibits employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. Id. As set forth below, the undisputed facts reveal that neither prong of the Cruz test was satisfied in this case, and Defendant Evans was entrapped as a matter of law.

1. Confidential informant Kennedy's illegal substantial assistance agreement did not have as its end the interruption of a specific ongoing criminal activity.

The facts pertinent to this question are simple, clear, and undisputed. Neither informant Kennedy nor Detective Lamb had any knowledge or belief, prior to Kennedy's illegal agreement, that Defendant Evans was involved in criminal activity of any kind. Indeed, Detective Lamb had never even heard of Defendant Evans.

The unplanned, unguided sequence of events through which Defendant Evans was ensnared did not have as their end the interruption of a specific ongoing criminal activity. Rather,

the facts in this case show that the instant investigation and arrest were driven solely by Kennedy's irresistible and illegal opportunity to escape an otherwise unavoidable three year mandatory minimum sentence by convincing someone else - anyone else - to traffic in cocaine. In this regard, Detective Lamb conceded Kennedy's testimony against her own codefendants was not enough to earn a reduction of her sentence. Instead, she also had to "work the streets" and make other, unrelated cases. R 152, 182-83. Naturally, Kennedy "was scared" by the prospect of spending three years in prison under her mandatory minimum sentence. R 110-11.

Thrust in this dilemma, by the time she encountered Defendant Evans, Kennedy was improperly motivated by her illegal contract and overwhelmed by desperation and fear. To earn her freedom, she had to manufacture just one more one ounce drug case against anyone she could find. Nothing in her agreement with the State required her to seek out only specific ongoing criminal activity. To the contrary, given free rein to instigate and create new crimes, her sole interest and motivation was to help herself by manufacturing any drug offense that she could. As a result, although she had no information that Defendant Evans had any previous involvement

with drugs of any kind,[23/] much less that he was then involved in any specific ongoing criminal activity, she selected him and created the offense for which he was arrested.

That the instant arrangement did not as a matter of law have as its end the requisite interruption of a specific ongoing criminal activity is illustrated by the relevant cases holding defendants entrapped under Cruz. Here as in Myers v. State, 494 So. 2d 517 (Fla. 4th D.C.A. 1986), and Pezzella v.

23/ As noted previously, the State's contention in the Second District that Defendant Evans was not entrapped as a matter of law under Cruz because confidential informant Kennedy knew he was a drug dealer is legally and factually erroneous. A confidential informant's knowledge of a defendant's prior use or sale of drugs does not preclude dismissal of the charges against the defendant under the Cruz objective entrapment test. See supra note 4. Further, the record shows irrefutably that neither Kennedy nor the police had any indication Defendant Evans was involved in selling drugs. The State's belated appellate reliance on Detective Lamb's deposition to erect a contrary contention does not alter this conclusion for at least four reasons: (1) The State's contention must be rejected because it is contrary to the untraversed facts in Defendant Evans' sworn motion to dismiss. Fla. R. Crim. P. 3.190(d). (2) Mere reliance on deposition testimony is not the requisite "specific denial" of the allegations in the motion that Rule 3.190(d) and the cases require. See State v. Teague, 452 So. 2d 72 (Fla. 1st D.C.A. 1984), aff'd on other grounds, 475 So. 2d 213 (Fla. 1985) (dismissal affirmed where traverse failed to controvert specific material allegations); see also State v. McIntyre, 303 So. 2d 675, 676 (Fla. 4th D.C.A. 1974) (motion was not traversed because merely attaching deposition is not the equivalent of alleging facts). (3) Even if the State's appellate reliance on Detective Lamb's deposition could accurately be called a "traverse," it is without legal effect because Rule 3.190(d) requires a traverse to be filed "a reasonable time before the hearing on the motion to dismiss." (emphasis supplied). (4) Even if the State had filed a timely and specific traverse, the facts on which it relies are incompetent and inadmissible hearsay statements that were rebutted by the State's own direct evidence. See State v. Lewis, 463 So. 2d 561, 563-64 (Fla. 2d D.C.A. 1985) (reversing order granting dismissal because testimony on which the State relied in its traverse was direct and nonhearsay).

State, 513 So. 2d 1328 (Fla. 3d D.C.A. 1987), where the charges against the defendants were dismissed under Cruz, the very idea of targeting Defendant Evans for prosecution originated with confidential informant Kennedy, not with the police. Likewise, as in Marrero v. State, 493 So. 2d 463 (Fla. 3d D.C.A. 1985), rev. denied, 488 So. 2d 831 (Fla. 1986), Rounsley v. State, 520 So. 2d 333, 334 (Fla. 4th D.C.A. 1988), Myers and Pezzella, which all held the defendants entrapped under Cruz, the initial idea of engaging in the drug transaction in this case was not the defendant's. Finally, as in all of these cases, neither informant Kennedy nor the police had any information indicating Defendant Evans had ever been involved in any illegal drug transactions.

The State has taken several positions in an attempt to meet its burden of demonstrating that the illegal agreement with Kennedy was designed to interrupt specific unlawful activity. Relying on State v. Stella, 454 So. 2d 780 (Fla. 4th D.C.A. 1984), in the District Court the State first took the position that the illegal agreement with Kennedy was "irrelevant vis-a-vis the defendant, and that the only entrapment defense available to the defendant was the subjective defense, which, under Cruz, is a jury question."

As in this Court, in the Second District the State confused the traditional subjective and objective entrapment defenses and, as a result, its analysis was completely off the mark. Even if, as the State urged, the illegal agreement would

have been irrelevant in the context of a subjective defense, the Circuit Court dismissed the charges against Defendant Evans on the basis of Cruz' threshold objective entrapment defense. The objective defense is a question of law for the court, and Kennedy's illegal deal was of obvious relevance to it.

The State's defective analysis below stems from its inapt reliance on the Stella decision. Although Stella discussed entrapment, it did so only in the context of the traditional, subjective, predisposition-based entrapment defense then available. Because Stella was decided in 1984, a year before this Court's decision in Cruz, it did not and could not address the as yet unannounced Cruz objective entrapment-police misconduct defense relied on by Defendant Evans in the circuit court. More particularly, it did not hold that an agreement to reduce a sentence in violation of Fla. Stat. § 893.135(3) is irrelevant to a motion to dismiss based on Cruz' two part threshold test.[24/]

The State's misreading of Stella infected its reliance on Lusby v. State, 507 So. 2d 611 (Fla. 4th D.C.A.), rev. denied, 518 So. 2d 1276 (Fla. 1987). In a footnote, Lusby makes a passing reference to Stella, noting only that a substantial assistance arrangement violating § 893.135(3) "does not compel

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24/ Stella is also distinguishable because it arose in a procedural and factual context completely different from the instant one. Unlike Defendant Evans, the defendant in Stella directly attacked Fla. Stat. § 893.135(3) on the ground that it was unconstitutionally applied, and the Fourth District held the defendant lacked standing. Stella, 454 So. 2d at 781-82. Defendant Evans' case does not involve such a contention.

a discharge of the appellant." Lusby, 507 So. 2d at 611 n.1. Lusby does not state, and it cannot be discerned from the Fourth District's opinion,[25/] whether the defendant in that case even made the specific argument involved here - that an illegal substantial assistance arrangement is a valid factor for the trial judge to take into account in analyzing a Cruz motion to dismiss. Moreover, the Lusby footnote's reliance on Stella limits its impact to the traditional, subjective predisposition entrapment test Stella discussed. As the appeal in the district court involved Cruz' objective entrapment test, neither Stella nor Lusby had any bearing on it.[26/]

Viewed in the context of the first Cruz criterion, the relevance of the illegal substantial assistance deal to the instant case is clear. An informant's improper motives are always relevant to the Cruz inquiry. See, e.g., Pezzella, 513 So. 2d at 1330 (dismissing drug trafficking conviction under Cruz because, among other reasons, paid confidential informant

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25/ Although in Hunter the Fourth District declined to reach the Cruz issue, its searing condemnation of the State's illegal agreement with its informant, coupled with its statement that the unaddressed issues were "substantial," 531 So. 2d at 243, suggests the instant facts would not survive a Cruz attack in that court.

26/ The State's reliance below on State v. Garcia, 528 So. 2d 76 (Fla. 2d D.C.A.), rev. denied, 536 So. 2d 244 (Fla. 1988) is clearly misplaced as to Defendant Evans. The Second District held only that the entrapment of a middleman in a drug transaction did not also vicariously entrap the defendants who had contact with him. Because Defendant Evans was the direct target of Kennedy's efforts, his entrapment claim is not derived vicariously. Even the prosecutor acknowledged this distinction between Defendants Evans and Messier. R 263.

"had improper motives for apprehending the defendant"). Under the terms of her agreement, Kennedy was improperly motivated to instigate and create any and all drug cases, utterly without regard to the identities of her unfortunate targets. Pressured by the promise of freedom under her illegal agreement with the State, Kennedy was encouraged not to detect crime but instead to originate and manufacture it. Without supervision or oversight, she employed an undifferentiated, random, and scattershot approach in an effort to make the one last case that would win her freedom. Nothing in Kennedy's illegal agreement with the State gave her any reason or motivation to limit her actions to target only "specific ongoing criminal activity." By her own admission in this case, she did not. As a result, she ensnared Defendant Evans, about whom neither she nor the police had any previous information of drug involvement.

After advancing the erroneous argument that the illegality of the instant agreement is irrelevant to the Cruz inquiry, the State next contended in the District Court that this case is on all fours with Lusby. Lusby's facts are so distinct from the true facts in this case that even if this Court chose to adopt Lusby's analysis, its holding would not apply here.

Lusby's conclusion that the police activity in that case satisfied Cruz' requirement of a specific ongoing criminal activity turned on the fact that the confidential informant in Lusby had direct information from the defendant himself that

the defendant was, prior to the occurrence of the offense, engaged in the ongoing sale of drugs. 507 So. 2d at 612. Indeed, the Lusby defendant actually admitted to the confidential informant that he used drugs and that he had a friend who was a drug dealer. Id. at 613.

In stark contrast, the confidential informant in this case had no prior incriminating information concerning Defendant Evans. Kennedy testified that she had neither purchased cocaine from Defendant Evans nor seen him engage in any drug activity, and that she had no knowledge of him ever being associated with illegal drugs of any kind. R 52-54, 70, 72, 95, 96, 124, 125. She also testified that in all of the contacts between Defendant Evans and Duerk of which she had knowledge, drugs were never present, discussed, or in any way involved. R 124-25. Thus, the trial judge in this case correctly concluded "the facts are different in the Lusby case." R 245.

Although easily distinguished from Lusby, this case is virtually identical in all material respects to Myers, supra. In Myers as here, neither the informant nor the police had any evidence that the defendant had previously engaged in unlawful drug transactions. Also as in this case, the Myers confidential informant originated the idea for the drug transaction and targeted the defendant. Id. at 517-18. Even though the defendant in Myers used drug terminology during the course of the transaction, that predisposition evidence had no

bearing on the Myers court's holding under Cruz that the defendant had been entrapped as a matter of law. Id. at 518-19.

Indeed, the instant facts are even more compelling than the facts that required dismissal in Myers. In Myers, the State traversed the defendant's (c)(4) motion. In this case, it did not. Defendant Evans' lack of prior involvement in illegal drug activity as stated in his untraversed sworn motion is dispositive under Cruz and its progeny. See Marrero, 493 So. 2d at 466 (there was entrapment as matter of law under both prongs of Cruz because, among other reasons, there was no information of prior involvement by the defendant in illegal drug activity); Pezzella, 513 So. 2d at 1330 (even though the State filed a traverse, dismissal was required under both prongs of Cruz because, among other reasons, police had no prior information the defendant had been involved in any illicit drug activity, and police used a paid informant who had improper motives for apprehending defendant); Rounsley, 520 So. 2d at 334 (cocaine trafficking conviction was reversed under Cruz' first prong because before confidential informant involved the defendant in the drug transaction, defendant "was not even under articulable suspicion for any narcotics violations").

A third argument urged by the State in the Second District was that the trial judge's order should have been reversed under the Third District's decision in State v. Konces, 521 So.

2d 313 (Fla. 3d D.C.A. 1988). Like Lusby, Konces is completely distinguishable from the instant case.

Konces' holding that the defendant in that case was not objectively entrapped was grounded on the fact that the confidential informant had a pre-existing relationship with Konces' codefendant, who was known to the informant as a cocaine dealer. 521 So. 2d at 314-15. Additionally, the defendant in Konces was introduced to the police by her drug dealing codefendant, who admitted he had purchased drugs in the past. The codefendant supplied information indicating Defendant Konces was a drug supplier for him. Id. at 314.

The facts in Konces in no way resemble the facts here. In this case, neither the police nor the confidential informant had any prior information that Defendant Evans was involved in drug dealing. Defendant Evans was introduced to the police by informant Kennedy, not by a known drug dealer or a codefendant. Konces has no bearing on this appeal.[27/]

Fourth and finally, in its brief in Hunter, the State contended that the substantial assistance agreement satisfied the ongoing criminal activity criterion because its goal was "to stem the ongoing flow of illicit narcotics." St. Hunter

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27/ The State also asserted below that Konces stands for the proposition that statements made during drug transactions indicating familiarity with drug terminology and dealing are relevant to the Cruz inquiry. Because there was no evidence Defendant Evans was ever involved in prior unlawful drug activity, his use of drug terminology, even if presented in a traverse, would not satisfy the State's burden under the first Cruz prong. See Myers, 494 So.2d at 518.

Br., p. 14. This assertion flies in the face of Cruz' requirement of specificity, and no authority has been cited or found to support it. Under this reasoning, any and all police methods, however distasteful and unfair, will always be approved so long as they are aimed at any type of offense ever committed within the jurisdiction of the law enforcement agency. Such an open-ended construction of Cruz' first criterion would render it meaningless.

2. Confidential Informant Kennedy's illegal substantial assistance agreement was not reasonably tailored to apprehend those involved in ongoing criminal activity.

Kennedy's illegal agreement is also dispositive of Cruz' second prong, which requires the utilization of "means reasonably tailored to apprehend those involved in ongoing criminal activity." 465 So. 2d at 522. By entering into a substantial assistance deal under which a convicted drug trafficker was, in violation of a Florida criminal statute, permitted to escape her minimum mandatory sentence, the State undeniably employed an "inappropriate" police technique. Id. The survival of our system of government and respect for its laws hinges at least in part on the core assumption that those who enforce the criminal statutes will obey them. Allowing "a convicted cocaine trafficker was allowed to secure h[er] own freedom by convincing someone else to traffic in cocaine," Hunter, 531 So. 2d at 242-43, necessarily involves a police technique that "falls below standards to which common feelings

respond for the proper use of government power." Cruz, 465 So. 2d at 521-22.

The State's assertion that the technique in this case was reasonable because it resulted in successful prosecutions, St. Hunter Br., p. 14, begs the question. No doubt inappropriate or illegal means are equally or more effective in ensnaring innocent citizens than "reasonably tailored" ones. "Reasonableness" is not, however, synonymous with effectiveness or success. Under the State's circular logic, Cruz' second prong would never be applied because it would only call for the dismissal of charges resulting from police techniques that did not result in arrest in the first place.

CONCLUSION

The State's attempt to undermine Glosson's rule by drawing an artificial distinction between pretrial and trial performance of illegal deals with convicted drug traffickers is contrary to the due process principles articulated in Glosson and blind to the realities of criminal prosecutions in Florida in general and in this case in particular. Further, the arguments advanced by the State in the District Court opposing the trial judge's presumptively correct dismissal of this case under Cruz are hamstrung by their reliance on incorrect facts, inapplicable cases, and an erroneous analysis of Cruz.

The State is not above the law, and its tortured analysis seeking approval of its illegal and unconstitutional conduct should be rejected under Glosson. This Court should also

reject the State's futile effort to rewrite the facts and misapply the law going to the Cruz question. Based on the established, controlling principles of law and on the facts actually before this Court, the decisions of the district and trial courts dismissing the charges against Defendant Evans should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the following has been furnished to David R. Gemmer, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, and Andrea Steffan, Assistant Public Defender, Tenth Judicial Circuit of Florida, P.O. Box 9000, Drawer PD, Bartow, Florida 33830 this 15th day of June, 1989.

Stuart Markman

Stuart C. Markman