IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,050

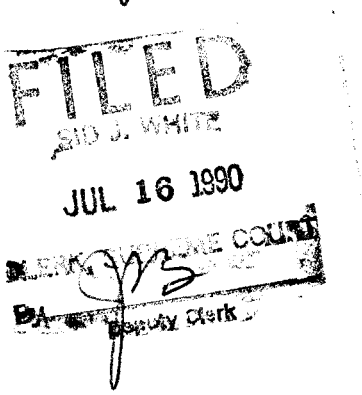
STATE OF FLORIDA,

Petitioner,

vs.

RICHARD ANDERS,

Respondent



ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent respectfully rejects the statement of facts provided by the State. The trial court, the Honorable Thomas N. Coker, after conducting a lengthy hearing in which the State stipulated to the essential correctness of the depositions[1/] that formed the basis of the hearing (R. 1-19), entered a lengthy and detailed order. (R.2 217-222). The Respondent thus relies on the court's order as the statement of facts, as they constitute the trial court's findings, which were not disputed by the State. The Respondent will recite in full the findings of fact and conclusions of law in the trial court's order since the State's statement of facts is somewhat at variance with the trial court's findings:

ORDER ON DEFENDANT'S MOTION TO DISMISS

This Order is in the Record at R.2 217-222.

* * * *

FINDINGS OF FACT

The Defendant RICHARD ANDERS as arrested on April 19, 1988. On May 5, 1988, an Information was filed in the Circuit Court of Broward County charging ANDERS with trafficking in cocaine in violation of Florida Statute 893.135(1)(b)(3) and Florida Statute 893.03(2)(a)(4). ANDERS' conviction would carry a minimum mandatory 15 years imprisonment without parole and a $250,000 fine.

[1/] The prosecuting attorney below attended the discovery deposition of Jorge Livermore, the informant in this cause, whose testimony formed the basis of Anders' motion to dismiss.

(Court Order continued...)

In all material respects ANDERS' arrest stemmed directly from the efforts of a confidential informant named Jorge Livermore. Livermore had been arrested by the Plantation Police Department and charged with trafficking in 190 pounds of marijuana and possession of a hand gun. For his crimes, Livermore faced a three year minimum mandatory sentence at the time of his arrest.

In order to avoid his minimum mandatory sentence, Livermore made an agreement with the prosecutor that he would set-up an unspecified number of persons in order to lower his sentence. The agreement never was reduced to writing. Initially, Livermore cooperated with the Drug Enforcement Administration (DEA), with the understanding that his cooperation with the DEA would be credited as part of his cooperation with the State.

Livermore's initial cooperation with the DEA resulted in the arrest of a person wholly unrelated to the instant case after Livermore purchased one kilogram of cocaine from him. After procuring this one kilogram arrest, Livermore pled guilty to attempted trafficking in front of the Honorable Patti Englander Henning. However, Judge Henning was unwilling to sentence Livermore to community control based on this one kilogram arrest. Instead Livermore was told that to avoid serving any time in prison, he would have to make additional arrests. He was given no other guidance with respect to the additional arrests he would have to make except that the State Attorney made him aware that he would

(Court Order continued...)

have to do more cooperation in order to further reduce his sentence and that he would have to make a Broward County case.

Livermore was given a performance deadline, a time limit in which he would have to procure more arrests in order to keep himself out of jail. In deposition, Livermore stated "if I didn't perform in "X" amount of time, I would be looking at 18 months [in jail]." (Deposition of Livermore at p. 20). According to Livermore, he felt pressured to provide other arrests.

Other than requiring an arrest in Broward County, Livermore was not given any guidelines or restrictions, oral or written, to guide his cooperation activities. He never was told to avoid entrapping others or, indeed, anything at all about how to deal or what to say to potential targets.[2/]

[2/] At deposition, Livermore's described his activities as follows:

> **Q: So, you simply went out in the community and went fishing; fair statement?**
>
> **Livermore: Fair Statement.**
>
> **Q: And you fished for a 10 kilo deal; correct?**
>
> **Livermore: That is what popped into my head.**

(Deposition of Livermore at p. 22)

* * *

> **Q: Did he [the prosecutor] put any other restric- tions on your future cooperation, other than it would have to be for Broward County?**

(continued...)

(Court Order continued...)

During this time, Livermore used what he dubbed "his creativity" and concocted a story that he had friends who worked at Eastern Airlines (where Livermore had, in fact, worked) who had found 20 kilograms of cocaine and were willing to sell it for Seven Thousand Dollars ($7,000) a kilogram for resale at a higher amount. He stated that he decided to conduct a reverse sting in which he would offer drugs for money rather than money for drugs, because he "just felt personally would be easier to set-up a case that way." He also chose the weight that he would offer.

Livermore first contacted Patrick Walsh, a person with whom he had worked at a Miami stock brokerage house. Livermore had seen Walsh supply small personal use amounts of cocaine to people in a

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[2/](...continued)

Livermore: (Witness shaking head)...No.

(Deposition of Livermore at p. 19-20).

* * *

Q: Were there any other restrictions put on you in terms of your performance.

Livermore: No.

Q: So you basically were told to go out there and "bring us something else?"

Livermore: Yes.

Q: And that's what you did?

Livermore: Exactly.

(Deposition of Livermore at p. 21).

few isolated instances, but admitted that he went to him with this trafficking-quantity deal as just a shot in the dark:

> Q: Is it a fair statement that in an effort to fulfill your obligation with the State of Florida, you decided, "I am going to go to Walsh and see if I can develop anything there."?
>
> Livermore: Correct. (Deposition of Livermore at p. 30-1)

Livermore then had lunch with Walsh and told him his Eastern Airlines story and offered him 20 kilograms of cocaine for Seven Thousand Dollars ($7,000) a kilogram. Walsh said that he would consider the deal and get back to him.

According to Livermore, the next thing he knew, ANDERS was "in the middle of the picture. ...All of a sudden, [ANDERS] is involved with it and [Walsh] -- I am not talking to [Walsh] anymore. I am talking to Rick." Livermore had not seen Walsh or ANDERS for seven or eight months before he approached them with the reverse sting. ANDERS told him that he knew a man from out-of-town who sometimes went to West Palm Beach who might be interested in the narcotics. This person turned out to be Defendant Hood.

Livermore had no reason to believe that ANDERS ever had engaged in drug trafficking. In fact, Livermore, stated that just as he knew that Walsh had never dealt quantity of drugs before, all that he knew about ANDERS was that ANDERS and he had "smoked a

couple of joints of marijuana" and he once bought a very small amount of marijuana from ANDERS. After several phone calls with ANDERS, Livermore felt that he had sufficiently interested ANDERS in the transaction and he contacted the DEA to tell them about the deal he had put together. However, the DEA declined to pursue the case because they had checked ANDERS and Walsh's name and found no criminal background on either and "didn't normally do cases like this." (Deposition of Livermore at p. 39).

After the DEA refused to work with Livermore, he approached Plantation Detective Paul Liccardo, the Detective with whom he had originally worked. Liccardo introduced Livermore to Detective Joe Hoffman and Detective Dennis Cracraft of the Broward County Sheriff's Department. Unlike the DEA, the detectives were interested in consummating the deal. Cracraft and Hoffman met once with Livermore and Livermore told them about the Eastern Airlines story he had used to lure Walsh and ANDERS. The detectives agreed to go along with the scenario. The detectives did not ask Livermore if ANDERS had any criminal background or if he had any reason to believe that they were involved in narcotics trafficking. In addition, Livermore was never given any guidelines with respect to how to behave with ANDERS. The detectives never told Livermore what he could or could not say or how to avoid entrapment. The detectives also never told Livermore to wear a body bug, never offered to substitute for him during the transaction, and never

took any steps to surveil Livermore as he met with the Defendants. (Court Order continued...)

As a result of Livermore's totally free reign, he is the only witness to his contacts with ANDERS; there exists no way beyond a potential swearing contest, to dispute what Livermore might say about these contacts.

As Livermore's sentencing date of April 20 was rapidly approaching, Livermore had to press the officers and Defendants to consummate the transaction so that it occurred before his sentencing. Ultimately, after one failed transaction, ANDERS and co-defendant Hood drove to a pre-arranged location in Fort Lauderdale where the cocaine was produced by the officers and the Defendants were arrested.

The very next day, Livermore was placed on community control, given a withhold of adjudication and permission to carry a firearm. He was also promised that his employer would not be informed of his arrest. At the moment that ANDERS and Hood headed to the Broward County Jail, Livermore walked away from jail forever.

CONCLUSIONS OF LAW

Florida precedent teaches that due process will not allow law enforcement officers to place informants under ultimatum and set them about the community to find other citizens to arrest. State v. Glosson, 462 So.2d 1082 (Fla. 1985); Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), cert. granted, _____ So.2d_____ (Fla. 1989). Such agreements are an invitation to perjury. Id.

Thus, due process of law will not tolerate the law enforcement techniques employed in this case. Sending an untrained informant out into the community, with no control, no supervision and not one word of guidance or limitation about whom he may approach or what he should do was an invitation to trouble. Livermore's uncontrolled activities in this case are ever more egregious than the activities in Glosson and Hunter. Here, Livermore was allowed to create a trafficking offense and offender where none previously existed, to engage in negotiations the contents of which no independent witness can verify, and, finally, to determine the potential mandatory prison term and fine the Defendant will face by selecting the amount of drugs to be sold. Due process is offended on these facts. See also, State v. Evans, 14 FLW 140 (2nd DCA January 13, 1989).

[**END TRIAL COURT FINDINGS**]

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed the charges against Anders on State constitutional due process grounds. The law enforcement efforts in this case ran afoul of even the most rudimentary concepts of fundamental due process. As the trial court found, the capricious freedom with which the informant was permitted to act and the pernicious incentive that prompted his unguided activities and resulted in this reverse sting far transcended the behavior condemned in State v. Glosson, 462 So.2d 1082 (Fla. 1980) and Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), review granted, Case No. 73,230 (Fla. 1988).

Because the focus here is on the gross misbehavior of law enforcement and not the predisposition of the Respondent, whether and in what manner the Respondent came in contact is irrelevant for purposes of a due process analysis. Moreover, in addition to being legally incorrect, the State's argument that the Respondent should not be granted relief because the record does not reveal "persistent enticement" by the informant is waived because the State failed to make that argument below and failed to make a record with respect to whether or not such "persistent enticements" occurred -- despite the fact that the State attended all pretrial hearings and key depositions.

The substantial assistance statute, Fla.Stat. §893.135(4)(1987), under which the informant was operating, requires that any person against whom substantial assistance is offered must be "engaged in drug trafficking." As the trial court found, neither the informant the DEA, nor any law enforcement agency had any reason to believe that ANDERS was "engaged in drug trafficking." As a result, the dismissal may be upheld on this ground as well.

ARGUMENT

I.

THE STATE HAS WAIVED ANY ARGUMENT THAT THE RESPONDENT SHOULD NOT BE GRANTED RELIEF BECAUSE THE RECORD DOES NOT SHOW "PERSISTENT ENTICEMENT" BY THE INFORMANT.

The petitioner argues that ANDERS should be denied relief and that Hunter should be read to require that the State practice of authorizing a convicted drug dealer to provide substantial assistance is unconstitutional "if the informant has relied upon

persistent enticements and threats to consummate a deal." (Pet. Brief at 8). As explained at p.12-15 infra., this argument is legally incorrect because the due process analysis focuses upon the activities of law enforcement, and not the activities of the informant. Nonetheless, this Court need not and should not reach the merits of this argument because it was waived below.

Specifically, and dispositively, the persistent enticement argument is a mere appellate afterthought, an argument which the State never made orally nor in writing to the court below. See Bertolotti v. Dugger, 514 So.2d 1095, 1097 (Fla. 1987)(issue which does not present a fundamental error waived if not raised below); Murray v. State, 491 So.2d 1120 (Fla. 1985)(failure to properly instruct jury not preserved for appellate review); Tillman v. State, 471 So.2d 32 (Fla. 1985)(issue of whether defendant should receive a new trial on attempted manslaughter due to lack of proof of requisite criminal intent not preserved where defendant did not raise same below; fact that Florida Supreme Court opinion on point issued after verdict irrelevant, since opinion stemmed from legal precedents); see also Junco v. State, 510 So.2d 909, 913 (Fla. 3d DCA 1987); State v. Adams, 378 So.2d 73 at n.1 (3d DCA 1979); State v. Giardino, 363 So.2d 201 (Fla. 3d DCA 1978).

Moreover, the Assistant State Attorney below attended the deposition of informant Livermore yet failed to use that opportunity to determine whether or not Livermore engaged in "persistent enticements and threats to consummate a deal." It thus waived the right to raise this argument at this late date. It

would be manifestly unfair to reject that trial court's findings that a due process violation occurred based on the State's argument that there is "no evidence that Livermore was even especially persistent in persuading the Respondent to consummate the deal," where the sole reason for the lack of such evidence is the State's failure to elicit testimony on this issue. Similarly, the State argues that principles from the "doctrine of entrapment" should "apply to limit [ANDERS'] reliance on the related doctrine of due process." (Petitioner's Brief at 9). As explained at p.12-15 infra., this attempt to piggy back an entrapment argument onto a due process argument is legally incorrect. Nevertheless, this Court need not even reach this question, because the State failed to raise such an argument and develop the pertinent record below and as such waived the ability to so urge on appeal. See Murray v. State, supra., Junco v. State, supra., State v. Adams, supra., State v. Giardino, supra.

Thus, the petitioner respectfully urges that this Court decline to reach the merits of this case given that the State's arguments in this Court were waived by the State below and are unsupported by record evidence due to the State's failure to elicit facts central to the arguments it now raises.[3/]

[3/] The Respondent respectfully requests that if this Court reaches the merits of this case and decides Hunter contrary to the Fourth District opinion, this Court permit re-briefing in this case.

II.

THE FOURTH DISTRICT PROPERLY UPHELD THE DISMISSAL IN THIS CASE SINCE THE INFORMANT, UNDER A "PERFORMANCE DEADLINE" BY LAW ENFORCEMENT TO PUT OTHERS IN JAIL "TO KEEP HIMSELF OUT OF JAIL," ACTED WITH ABSOLUTELY NO GUIDANCE OR MONITORING.

The findings of fact of the trial court arrive in this Court with the presumption of correctness and all reasonable deductions and inferences must be drawn in the light most favorable to the trial judge's ruling. See e.g., State v. Nova, 361 So.2d 411 (Fla. 1978). The State did not challenge the accuracy of the trial court's findings, since those findings were culled in large part from a deposition, attended by the State, of Jorge Livermore, the informant in this cause. Instead, the State argues that Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), review granted, Case No. 73,230 (Fla. 1988)(R. 31-211), is incorrectly decided, and that even if Hunter is upheld, that case is distinguishable from the instant case.

The State's attempt to distinguish Hunter from the instant case must fail. The State argues that Hunter differs from this case, because under the operatives statute in Hunter, Fla.Stat. §893.135(3) (1985), drug defendants were statutorily authorized to provide substantial assistance only by incriminating their cohorts in their particular transaction, while at the time of the transaction of the instant case, convicted drug defendants were statutorily authorized to render "substantial assistance by incriminating any other drug dealer." (Pet. Brief at 7). See Fla.Stat. §893.135(4) (1987).

However, as the Fourth District wrote rejecting this argument in the case sub judice, its decision in Hunter relied on State v. Glosson, 462 So.2d 1082 (Fla. 1980), and bottomed on due process grounds and not the substantial assistance statute cited by the State in it initial brief:

> While it is true that the substantial assistance statute involved in Hunter did not authorize the arrangement police made with the informant, that fact is not essential to the application of the Glosson due process test... the decision in Hunter was predicated on the State's contingency arrangement with the informant who was offered free reign to instigate and create criminal activity.

State v. Anders, 15 FLW 1008, 1010 (Fla. 4th DCA 4/18/90) rev. granted, Case No. 76,050 (Fla. 1990).[4/]

The State also argues that Hunter can and should be read to hold that "any State practice of authorizing a convicted drug dealer to provide substantial assistance by making new cases is unconstitutional vis a vis as targets if the informant has relied upon persistent enticements and threats to consummate a deal." (Pet. Brief at 8). As argued at p.9-11 supra., this Court should not consider this argument because it was waived below. This argument also fails on the merits. As the Fourth District wrote in this case, "the persistence of the informant may be relevant to an entrapment defense, but not to a due process analysis... Glosson holds that when the conduct of law enforcement officers is improper, the predisposition of the defendant is irrelevant."

[4/] As argued at p.23 infra., the charges against ANDERS did not comport with Fla.Stat. §893.135(4)(1987), since he was not "engaged in drug trafficking" prior to his arrest.

State v. Anders, 15 FLW at 1010. See also Hunter v. State, 531 So.2d at 242.[5/] Indeed, in finding the Defendant's predisposition irrelevant, the Glosson court specifically rejected the State's argument that a due process violation will not lie where the government's acts do not "involve acts or threats of violence by government agents." 462 So.2d at 1084.

The policy behind focusing on gross government misconduct and neglect rather than the predisposition of the defendant in a due process analysis is significant. The vice highlighted in Hunter and Glosson was the free reign with which the informant was permitted to act. As the Hunter court pointed out, an informant "acting under judicial prosecutorial law enforcement authorization, was given free reign to instigate and create criminal activity where none before existed." 531 So.2d at 242. The only way to avoid and deter such governmental recklessness, which by definition occurs before a target is even approached by an unguided informant, is to prohibit law enforcement from sanctioning unguided informants ab initio. Were the rule otherwise, the due process analysis and the deterrence and protection it affords, would be consumed and eviscerated by a predisposition prerequisite.

[5/] Of course, as the trial court found, one of the reasons behind finding a due process violation is that since "Livermore was allowed to create a trafficking offense and offender were none previously existed [and] engage in negotiations who no independent witness can verify," whether or not Livermore engaged in persistent enticements, though not inquired into by the State, could never be found without sole reliance of Livermore's testimony -- testimony which carries with it an "invitation to perjury" long ago condemned in State v. Glosson, 462 So.2d 1082.

Notably, this is true whether or not the informant and the defendant are in privity. As the Fourth District pointed out in the case sub judice, in Glosson, the informant set up the transaction through an acquaintance of two of Glosson's five codefendants who in turn set up the remaining codefendants. This Court dismissed the case as to all of the defendants, holding that Article I, §9 of the Florida Constitution proscribes "governmental misconduct which violates the Constitutional due process rights of a defendant, regardless of the defendant's predisposition." Glosson, 462 So.2d at 1085. The Glosson court also quoted United States v. Russell, 411 U.S. 423, 431-32 (1973), which recognized a due process defense where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Glosson, 462 So.2d at 1084.

The Glosson court was both theoretically and practically correct in finding that privity is not a prerequisite to finding a due process violation. From a practical perspective, were privity prerequisite to a due process violation, officials would have nary a disincentive to curb outrageous behavior since all of those not in privity with the informant would be subject to prosecution. From a theoretical perspective, where law enforcement conduct is so outrageous that due process bars using judicial process to obtain a conviction, it is the government misconduct that a due process dismissal seeks to address and refuses to sanction; this conduct does not become acceptable merely because the defendant was not in

privity with the informant. See Hunter v. State, 531 So.2d at 243 (upholding dismissal of charges as to defendant not a direct target of government agent). To the contrary. As Glosson implicitly recognized, one of the dangers of government misconduct is that numerous unknown persons will be ensnared by government misconduct. As the Hunter court recognized, for purposes of a due process analysis, where an agreement "between the State and informant constitutes an abuse of governmental power," see 531 So.2d at 242, all persons ensnared by the activity of the unguided informant suffer equal due process violations, whether the target directly or indirectly dealt with the informant. Indeed, the vice of manufacturing crime is only made worse (rather than better as the State suggests), when the informant's unguided acts "create new criminal activity" not merely with the person in privity with the informant, but with others drawn into this "manufactured" criminal activity as well.[6/]

The State also writes that ANDERS had "some history of involvement with illicit narcotics" and concludes that "inasmuch as it is well-settled that the State may prove a defendant's predisposition in rebuttal of a subjective entrapment defense by showing either that the defendant had previously committed illegal

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[6/] The State characterizes Walsh as a "known cocaine seller" in its statement of facts. See Pet. Brief at 3. Given Livermore's testimony that Walsh made occasional personal use sales, we respectfully reject that characterization.

acts[7] similar to that for which he is on trial or that the defendant readily acquiesced to committing the acts for which he is on trial, Respondent's contention should fail." (Pet Brief at p.8-9).

This argument must fail as a matter of law and as a matter of fact. As described above, this argument was waived since the State neither argued it nor elicited facts below to support its position that an entrapment defense may be rebutted. See p.9-11 supra. Nonetheless, as argued above, an entrapment analysis differs sharply from a due process analysis since a due process analysis focuses on unacceptable government conduct and where the conduct of law enforcement is improper, the predisposition of the defendant is irrelevant.[8] See p.14-16 supra. See Glosson v. State, 462 So.2d at 1085 ("governmental misconduct which violates the constitutional due process right of a defendant, regardless of the defendant's predisposition, requires the dismissal of criminal charges.").

Finally, as a matter of fact, the trial court found, and Livermore himself admitted, that ANDERS had no involvement with

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[7] Khelifi v. State, 15 FLW 1118, 1119 (2d DCA 1990) is inapt here. In contrast to the unfettered fishing expedition here, there, the defendant, a cocaine addict, "was interested in buying drugs" and the informant played no role in the transaction. Further, agents in Khelifi conducted and recorded the transaction.

[8] The petitioner writes that an entrapment analysis "parallels the due process analysis." Pet. Brief at 9 (citing Cruz v. State, 465 So.2d 516, 520 n.2 (Fla. 1985)). This Court should bear in mind, however, the court in Glosson, the court found the due process defense constitutionally based. 462 So.2d at 1085. In contrast, in Cruz, the court wrote that "while the objective view parallels a due process analysis, it is not founded on constitutional principles." 465 So.2d at 520 n.2. See also Anders v. State, 10 FLW at 1011 n.1.

"illegal acts similar to that for which he is on trial" and instead was involved with what the State conceded were "small" personal use amounts. The DEA corroborated this when it declined to pursue the case because they had checked ANDERS' name and found no criminal background on him. There is thus no evidence whatever that ANDERS had engaged in "similar acts"; instead there is only evidence to the contrary. Likewise, there is no evidence (and the State sought to elicit none) that ANDERS had "readily acquiesced" to the deal.[9/]

Notably, Hunter rejected the argument that prior involvement with narcotics defeats a due process defense. In Hunter, the defendant Conklin admitted to smoking marijuana and defendant Hunter admitted to agents that he had purchased cocaine from a particular supplier. These facts did not detract from the court's holding that the case should have been dismissed on due process grounds. 531 So.2d at 241. See also State v. Anders, 15 FLW at 1010 ("where conduct of law enforcement improper, defendant's predisposition irrelevant.").

In short, the informant's decision to arbitrarily use his "creativity" to engage in a "fishing expedition" and set up a reverse sting involving 20 kilograms was, as the trial court found,

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9/ In fact, as the trial court found, one of the reasons behind finding a due process violation is that since Livermore was allowed to "create a trafficking offense and offender where none previously existed [and] engaged in negotiations the contents of which no independent witness can verify," whether or not ANDERS readily acquiesced can never be found without reference to Livermore's testimony, testimony which carries with it an incentive for perjury, long ago condemned as unacceptable in State v. Glosson, 462 So.2d 1082 (Fla. 1985). In any event, the State which attended the deposition did not even elicit facts to support this "acquiescence" argument.

even "more egregious than the activities in Glosson and Hunter." As the trial judge found, "[s]ending an untrained informant out into the community, with no control, no supervision and not one word of guidance for limitation about whom he may approach or what he should do was an invitation to trouble.... Livermore was allowed to create a trafficking offense and offender where none previously existed, to engage in negotiations contents of which no independent witness can verify and, finally, to determine the potential mandatory prison term and fine the defendant will face by selecting the amount of drugs to be sold, due process is offended on the facts."

The Respondent respectfully submits that the trial judge was correct; these egregious activities culminated in a reverse sting conducted on a person with absolutely no history of similar criminal activity. This violated the most rudimentary concepts of due process. This Court should so recognize and affirm the dismissal of the trial court's order.

A. This Case Is Even More Egregious Than Hunter and Glosson; Glosson Controls This Case.

The Respondent further submits that even if Hunter did not exist or is narrowed by this Court, State v. Glosson, 462 So.2d 1082 (Fla. 1985) requires a discharge here. In Glosson, this Court held that an agreement between the State and the informant in which the informant received a percentage of all civil forfeitures arising out of successful criminal investigations initiated by him, violated the defendants' due process rights because it created and "enormous incentive" for the informant to "color his testimony or

even commit perjury." 462 So.2d at 1085. The Glosson court held that the informant's activities violated the defendant's due process rights under the Florida Constitution, particularly where the prosecutor knew about the informant's contingent fee agreement and supervised his criminal investigations. The Court concluded that the informant's arrangement with the state had tremendous, "potential for abuse of a defendant's due process right" since the informant had both an enormous financial incentive to make criminal cases and perhaps to color his testimony in pursuit of a contingent fee. Glosson, 462 So.2d at 1085. As the Fourth District wrote in the case sub judice, "the main policy concern" of Glosson and the cases cited therein was not the potential for perjury but that the contingency fee arrangement might "cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit." State v. Anders, 157 FLW at 1011 n.2 (quoting Williamson v. United States, 311 F.2d 441, 444 (5th Cir. 1962)). See also State v. Embry, 15 FLW 1500, 1501 (2nd DCA 1990)(upholding dismissal pursuant to Hunter and noting that thrust in Glosson was not incentive for perjury but manufacture of new crime; also noting that informant would be sole witness rebutting defendant's entrapment defense).

Here, as the trial court found, Livermore's activities were even more egregious than those in Glosson. Livermore was given a deadline by which he would either have to produce arrests in Broward County or go into prison. It was that simple. As the trial court found, Livermore was not told to go look out for people

who were involved in criminal activity and, "was not given any restrictions." [10/] Instead, he was allowed to fish for anyone he wanted and to use his "creativity" to jail them. Livermore abused this freedom with impunity by concocting a reverse sting that "popped into his head."[11/] As the trial court found, Livermore's scheme and his readiness to "create" the arrest of Respondent ANDERS, a person he did not believe had ever engaged in drug trafficking was so offensive that the DEA refused to go forward with ANDERS' arrest when Livermore brought it to that agency.

Moreover, even worse than in Glosson, Livermore was under a severe time constraint since his sentencing was set for the day after ANDERS' arrest. Livermore, a stockbroker (who retained his license as part of his "substantial assistance"), understandably felt pressure to consummate the deal, and gave the hardest and most important sell of his life.

The manner in which Livermore pursued his quarry also distinguishes this case from Hunter. Livermore did not set up a sting in which his targets would have to produce a quantity of drugs -- thus indicating that they had some connection to the drug business -- but instead "created" a **reverse sting** which would

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[10/] The remainder of that portion of the deposition is equally illuminating: Q: So, basically you were kind of free to do whatever you felt was necessary to get someone arrested; correct? A: I would say so. (R. 2-205).

[11/] Livermore testified that he engaged in a reverse sting because he "just felt personally it would be easier to set up a case that way." Livermore also stated that he thought if he came in with a multi-kilo case "it would look pretty substantial." (R. 2-196).

ensnare anyone, stockbrokers included, with access to money. This unsupervised, pernicious and desperate activity runs afoul of Glosson, Hunter and the Due Process Clause of the State Constitution. It simply is wrong. And, because authorities failed to monitor or record Livermore's activities, we will never really know what statements or promises Livermore made in order to ensnare ANDERS.

Livermore also had an even greater incentive than to stalk ANDERS than did the Hunter informant. Unlike the Hunter, informant, Livermore served no time in prison. Instead, he knew that he could avoid prison altogether by ensnaring the Defendants. In fact, Livermore, not only avoided prison, but he received a withhold of adjudication, a promise that his employer -- a stockbrokerage form -- would not be informed of his arrest and even permission to carry a firearm.[12/] If the Hunter informant was given a break for his efforts, it can certainly be said that Livermore was given a reward.[13/]

Finally, unlike in Hunter or Glosson, any question that the target had no drug background would have been answered when the DEA refused to pursue ANDERS after checking his name and finding no criminal background or intelligence on him. Despite being told

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[12/] Livermore was also under a more serious time pressure than the Hunter informant. Livermore admitted that he pressed police officers to obtain cocaine from the police supply room to set up the arrest on April 20th, just one day before his "sentencing" on April 21st.

[13/] At the time of the deposition, Livermore was a practicing stockbroker. (R. 2-105),

that the arrest was so offensive as to be unacceptable to the DEA, Livermore pressed on, ultimately persuading Broward police to make the arrest under his -- Livermore's -- direction.

In sum, the activity in this case was far more egregious than that in Hunter and Glosson. Here, Livermore, having been given absolutely no guidance at all, was able to set up a person he not only believed had no narcotics background, but was told had no such background when the DEA turned refused to participate in the case. In addition, unlike in Hunter where the defendants ultimately procured the cocaine, the informant here intentionally set up a reverse sting with a person he knew had access to quantities of money; that way, Livermore ensured that the fact that ANDERS apparently had no involvement or access to quantities of drugs would not prevent from accomplishing his mission, namely putting someone in jail to keep himself out of jail. In addition, unlike the informant in Hunter, Livermore was under "pressure" to rush into the arrest since his sentencing was scheduled for the day after ANDERS' arrest. Of course, the informant's "sentence" also distinguishes this case from Hunter. Livermore had an even greater incentive than the Hunter informant who served time in prison. By setting up ANDERS, Livermore was to avoid prison altogether.

This is an extreme case and should be treated as such. This Court should condemn the dangerous recklessness exhibited by law enforcement and affirm the dismissal in this case.

III.

THIS CASE MUST ALSO BE DISMISSED BECAUSE FLA.STAT. §893.135(4)(1987) ONLY PERMITS SUBSTANTIAL ASSISTANCE TO INCLUDE THE IDENTIFICATION OF PERSONS ENGAGED IN THE TRANSACTION FOR WHICH THE COOPERATING INFORMANT WAS ARRESTED OR "ANY OTHER PERSON ENGAGED IN TRAFFICKING CONTROLLED SUBSTANCES" AND MR. ANDERS WAS NOT SUCH A PERSON.

The trial court found that informant Livermore had no reason to believe that ANDERS had ever engaged in drug trafficking and that all of the drug involvement Livermore had with ANDERS was that he "smoked a couple of joints of marijuana" with ANDERS and "bought $25.00 worth of marijuana" from ANDERS. Indeed, even the DEA declined to pursue the case against ANDERS because "they ran down Anders' and Patrick Walsh's file, and they had no criminal background and they didn't normally do cases like that."

Fla.Stat. 893.135(4) (1987) states in pertinent part:

> The State attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any his accomplices, accessories, coconspirators, or principles **or of any other person engaged in trafficking in controlled substances.**

It is undisputed in this case that, as the DEA told informant Livermore and as informant Livermore well knew, ANDERS was absolutely not "engaged in trafficking in a controlled substances" as required by the statute. The Florida Legislature has made clear that the term "trafficking," see Fla.Stat. §893.135, contemplates selling, purchasing, manufacturing, delivering or bringing into this State cannabis in excess of 100 pounds and involving 28 or

more grams of cocaine. Id. These extraordinary amounts hardly compare to the small personal use amounts that Livermore used with ANDERS. In Hunter, this Court recognized that an alternative ground for dismissal exists when the informant is permitted to engage in setting up a drug sting of a person who is not within the purview of §893.135. The Hunter court held that in addition to due process grounds, the trial court could have also properly dismissed the case since the informant was released from jail for the sole purpose of doing substantial assistance in setting up two persons who were not within the purview of the substantial assistance statute, since neither had been accomplices of the informant, a statutory requirement at the time of the arrests in Hunter.[14/] 531 So.2d at 243.

In so holding, the Hunter court recognized that the legislature has made a policy decision to permit substantial assistance activity to be targeted only at persons already engaged in drug trafficking since to do otherwise would sanction the manufacture of new crimes. Here, it was undisputed, and exquisitely known to Livermore and police, that ANDERS was "not engaged in drug trafficking." This Court should thus affirm the dismissal of this cause since, at the time Livermore "created" this reverse sting, ANDERS was not "engaged in drug trafficking" within the letter or the spirit of Fla.Stat. §893.135(4).

[14/] The substantial assistance statute at the time of the arrest of the defendants in Hunter, see Fla.Stat. §893.135(3)(1985), sanctioned only the apprehension of others involved in the very crime for which the defendant was charged. See 531 So.2d at 243.

CONCLUSION

This Court should uphold the decision of the Fourth District Court of Appeal affirming the dismissal of the information in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the of the foregoing was delivered by mail this 13th day of July 1990 to: JOHN TIEDEMAN, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401; FRANK RUBINO, ESQUIRE, Counsel for Defendant Hood, 3940 Main Highway, Coconut Grove, Florida 33133.

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S:31/PIP/ANDERS.RBF