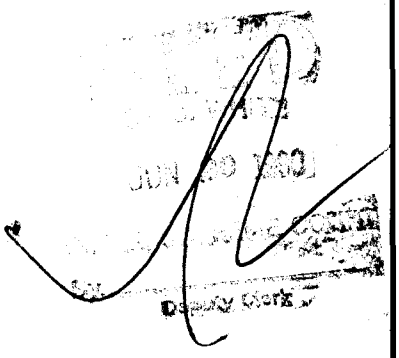
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA, Petitioner, v. RICHARD ANDERS and WILLIAM HOOD, Respondents.	)	CASE NO. 76,050

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS

FLORIDA STATUTES

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority and appellant in the appended State v. Anders, 15 FLW D1009 (Fla. 4th DCA April 18, 1990), review granted, Case No. 76,050 (Fla 1990). Respondents, Richard Anders and William Hood, were the criminal defendants and appellees below.

References to the two volume record on appeal will be designated "(R:)".

The State will discuss the two interrelated issues on certiorari conjunctively.

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

STATEMENT OF THE CASE AND FACTS

On May 4, 1988, the State filed an information in the Broward County Circuit Court charging respondents with trafficking in 400 or more grams of cocaine the previous April 19 (R 30). Both respondents filed lengthy motions to dismiss the charges on grounds that their rights to due process of law secured by Article I, Section 9 of the Constitution of the State of Florida had been violated by the State's conduct leading to their arrests under State v. Glosson, 462 So.2d 1082 (Fla. 1985) and Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), review granted, Case No. 73,230 (Fla. 1988) (R 31-211). A hearing was held on respondents' motions before Judge Thomas Coker on March 10, 1989 (R 1-29).

At this hearing, prosecuting counsel stipulated to the essential accuracy most of the relevant facts contained in the defense discovery depositions which had been attached to respondents' motions (R 19). These depositions reveal that Jorge Livermore was arrested for attempting to buy over 150 pounds of marijuana from City of Plantation Police Officer Paul Liccardo in 1986 (R 51-52; 156). Livermore pled guilty to a charge stemming from this transaction before Judge Patti Henning in November of 1987 (R 54-57; 62). Pursuant to Section 893.135(4), Fla. Stat. (1987), the State had orally offered Livermore the opportunity to render "substantial assistance" to it by making cases against drug dealers not involved in the transaction for which he had been convicted, and hence earn its recommendation that he avoid

the mandatory minimum term of imprisonment he would otherwise definitely receive for his crime (R 66; 99; 17). With very minimal guidance from law enforcement, Livermore thus approached Patrick Walsh, a known cocaine seller, with a story that an Eastern Airlines employee of his acquaintance had discovered a bag containing 20 kilograms of cocaine while on duty and desired to sell it (R 76-78). Walsh brought respondent Anders, whom Livermore had seen snorting cocaine and from whom Livermore had once bought a bag of marijuana, into the negotiations (R 75-81; 86-87; 94; 108). Eventually, Livermore and Anders reached an agreement whereby Livermore would deliver the 20 kilograms of cocaine to Anders and his associate respondent Hood, who had also dealt in drugs in the past, in exchange for at least $40,000 (R 81; 93; 99; 129). Livermore sought to interest the federal Drug Enforcement Agency, with which he had arranged one small set-up in the past, in the pending deal, but the DEA declined involvement based upon Anders' lack of a criminal record and its dislike for reverse stings (R 56-58; 66; 85-86). Livermore then approached Detective Dennis Cracraft of the Broward County Sheriff's Office, to whom he had been referred by Officer Liccardo (R 125; 159-160). Cracraft approved Livermore's scenario, and checked out 20 kilograms of cocaine from the sheriff's laboratory so that he could convincingly pose as Livermore's hypothetical airline employee (R 132-137). On April 19, respondents Anders and Hood arrived in a parking lot with a large amount of cash and were in the process of consummating the deal with Cracroft when they were arrested at his direction (R

83-84; 138-141). Very shortly thereafter, the State certified to Judge Henning that Livermore had provided "substantial assistance," and he was sentenced to two years on community control (R 62-63; 101).

On these facts, Judge Coker granted respondents' motions to dismiss, citing to State v. Glosson, Hunter v. State, and State v. Evans, 537 So.2d 638 (Fla. 2nd DCA 1988), review granted, Case No. 73,779 (Fla. 1989) (R 217-222). The State's timely appeal to the Fourth District (R 223) resulted in an affirmance and the certification to this Court of the same two questions of great public importance earlier certified in Hunter v. State:

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

State v. Anders, 15 FLW D1008, 1011 note 3. On May 29, 1990, this Court ordered the parties to submit briefs on the merits of these certified questions.

SUMMARY OF ARGUMENT

The Fourth District incorrectly decided in State v. Anders that the judge below did not reversibly err by granting respondents' motions to dismiss the drug trafficking charges against them on state constitutional due process grounds. Hunter v. State, the decision upon which the lower courts primarily relied, may well be reversed by this Court. Even if Hunter is upheld, however, that case is distinguishable from this because this informant's action in rendering "substantial assistance" to the State by making new drug cases was statutorily authorized; because it was not attended by either undue pressure or threats; because respondents had a history of involvement in narcotics; and finally because respondents were brought into the instant transaction by a third party rather than by the informant.

ISSUE (REPHRASED)

THE FOURTH DISTRICT REVERSIBLY ERRED BY UPHOLDING THE LOWER COURT'S DISMISSAL OF THE NARCOTICS CHARGES AGAINST RESPONDENTS

ARGUMENT

As noted, respondents convinced both the judge and the appellate court below that the dismissal of the cocaine trafficking charges against them was mandated under this Court's decision in State v. Glosson as interpreted by the Fourth District Hunter v. State. As also noted, this Court has accepted jurisdiction to review Hunter on the merits, and the State is of course contending there that the Fourth District decided that case incorrectly. Since the reversal of Hunter would require a reversal of the instant appeal,[1] the State respectfully submits

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[1]Any attempt by respondents to distinguish a reversed Hunter on grounds that that case involved law enforcement's facilitation of a narcotics transaction by furnishing the cash rather than the drugs would be uncompelling. In Burch v. State, 558 So.2d 1, 3 (Fla. 1990), this Court approved the decision of the Fourth District in State v. Burch, 545 So.2d 279, 283 (Fla. 4th DCA 1989) that the mere police practice of "lur[ing] drug buyers or sellers....[into consummating narcotics deals is] not outrageous as a matter of law" and hence does not constitute a due process violation. Accord, State v. McQueen, 501 So.2d 631, 633-634 (Fla. 5th DCA 1986), review denied, 513 So.2d 1062 (Fla. 1987); see also United States v. Lane, 693 F.2d 385, 387-388 (5th Cir. 1982). Furthermore, any attempt by respondents to circumvent a reversed Hunter on grounds that they were objectively entrapped as a matter of law under Cruz v. State, 465 So.2d 516, 522 (Fla. 1985), cert. denied, 473 U.S. 905 (1985) would likewise be uncompelling since the Florida Legislature abolished this defense before the date of respondents' crimes, see section 777.201, Fla. Stat. (1987); compare Gonzalez v. State, 525 So.2d 1005, 1006 note 1 (Fla. 3rd DCA 1988) with Bowser v. State, 14 FLW 2843,

that this Court should await its final disposition of Hunter before disposing of the current case.

However, the State believes that it should prevail in this case even this Court approves the Fourth District's decision in Hunter. In Hunter, the lower appellate court ruled that the State's actions in permitting a convicted narcotics peddler to render "substantial assistance" to it by persistently enticing and threatening those defendants (who had not been his cohorts in the transaction for which he himself had been convicted) into consummating a large cocaine deal, violated the defendants' state constitutional rights to due process of law. Hunter v. State, 531 So.2d 239 240-243.[2] Crucial distinctions exist between that case as it currently stands and this.

At the time of the State's contract with the informant in Hunter, convicted drug defendants were statutorily authorized to provide "substantial assistance" only by incriminating their cohorts in the particular transaction for which they had been convicted. See section 893.135(3), Fla. Stat. (1985). However, at the time of the State's contract with the informant here, convicted drug defendants were statutorily authorized to render

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2844 (Fla. 2nd DCA December 13, 1989); see generally In Re Standard Jury Instructions in Criminal Cases, 543 So.2d 1205, 1208 note *, 1209-1210 (Fla. 1989).

[2]The Court will note that the State is disputing on certiorari the Fourth District's factual finding on appeal in Hunter, upon conflicting evidence adduced at trial, that those defendants were coerced into consummating the narcotics transaction for which they were convicted ("Initial Brief of Petitioner on the Merits" in State v. Hunter, Florida Supreme Court Case No. 73,230, pages 5-6, 8, 14-15; "Reply Brief of Petitioner on the Merits," pages 2, 4).

"substantial assistance" by incriminating any other drug dealer. See section 893.135(4), Fla. Stat. (1987). The Fourth District recently held that the new statute is constitutional on its face. Heaton v. State, 543 So.2d 290 (Fla. 4th DCA 1989). Hence, Hunter cannot be read to hold that the mere State practice of authorizing convicted drug dealers to render "substantial assistance" by making new cases is per se unconstitutional.

What Hunter can and should be read to hold, however, is that any State practice of authorizing a convicted drug dealer to provide "substantial assistance" by making new cases is unconstitutional vis-a-vis his targets if the informant has relied upon persistent enticements and threats to consummate a deal. In the instant case there was no evidence that Livermore was even especially persistent in persuading the respondents to consummate the deal, let alone any evidence of threats. As such, respondents were clearly not entitled to a due process discharge under Hunter as that decision now stands. Compare Khelifi v. State, 15 FLW D1118, 1119 (Fla. 4th DCA April 25, 1990), State v. Giraldo, 15 FLW D1001, 1002 (Fla. 3rd DCA April 17, 1990); but see State v. Embry, 15 FLW D1501 (Fla. 2nd DCA June 1, 1990).

Respondents will doubtlessly protest that their due process rights were nonetheless violated by their participation in Livermore's scheme because, although there was evidence that both had some history of involvement with illicit narcotics, there was no evidence that they had engaged in such a massive drug deal in the past. Interestingly, the Fourth District rejected a similar argument in Khelifi v. State, 15 FLW D1118, 1119. Moreover,

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 acts 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, State v. Wheeler, 468 So.2d 9978, 981 (Fla. 1985), respondents' contention should fail. Compare Taffer v. State, 504 So.2d 436 (Fla. 2nd DCA 1987), cause dismissed, 506 So.2d 1043 (Fla. 1987).

Furthermore, the fact remains that respondents were not even directly brought into the instant scheme by the State's informant Livermore; as noted, respondent Hood was brought in by respondent Anders, who had been brought in by Patrick Walsh. As a general rule, "the doctrine of entrapment is inapplicable where the inducement comes from a non-agent private citizen." State v. Perez, 438 So.2d 436, 438 (Fla. 3rd DCA 1983). Although the State realizes that the Fourth District implied to the contrary in Hunter, there is no compelling reason why the foregoing rules limiting a defendant's reliance upon the doctrine of entrapment should not also apply to limit his reliance upon the related doctrine of due process. See State v. Garcia, 529 So.2d 76 (Fla. 2nd DCA 1988), review denied, 536 So.2d 244 (Fla. 1988) and State v. Scott, 546 So.2d 781 (Fla. 4th DCA 1989). Indeed, this Court has recognized that in one sense at least, an entrapment analysis "parallels a due process analysis." Cruz v. State, 465 So.2d 516, 520 note 2.

It follows that the courts below reversibly erred by ordering respondents discharged, and that this cause must consequently be remanded for trial.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court should REVERSE the decision under review and REMAND this cause for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Initial Brief" has been forwarded by mail to: **FRANK A. RUBINO**, Esquire, Counsel for respondent Hood, 3940 Main Highway, Coconut Grove, Florida 33133; and to **EDWARD R. SHOHAT**, Esquire, Counsel for respondent Anders, 175 N.W. 1st Avenue, #1730, Miami, Florida 33128, on this 18th day of June, 1990.

John Tiedemann

Of Counsel

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RICHARD ANDERS and WILLIAM HOOD, Respondents.	)	CASE NO. 76,050

A P P E N D I X

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the trial court, as opposed to the subjective predisposition question submitted in the usual entrapment defense." 462 So.2d at 1084. In Cruz v. State, 465 So.2d 516 (Fla. 1985), while not referring to the *Glosson* decision, the court discussed the objective and subjective views of entrapment:

> The subjective view recognizes that innocent, unprejudiced, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. In those cases, the subjective view allows conviction of predisposed defendants. The objective view requires that all persons so ensnared be released.[2]
>
> We do not foresee a problem in providing two independent methods of protection in entrapment cases. . . .
>
> We find, like the New Jersey court, that the subjective and objective entrapment doctrines can coexist. The subjective test is normally a jury question. The objective test is a matter of law for the trial court to decide.

Id. 520-521.

In Footnote 2, the court commented on the similarity between the "objective test" and the "due process test":

> While the objective view parallels a due process analysis, it is not founded on constitutional principles. The justices of the United States Supreme Court who have favored the objective view have found that the court must "protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter whom or at what stage of the proceedings the facts are brought to its attention." *Sorrells*, 287 U.S. at 457, 53 S.Ct. at 218 (Roberts, J., in a separate opinion). Justice Frankfurter also found that a judge's decision using the objective view would offer significant guidance for future official conduct, while a jury verdict offers no such guidance. *Sherman*, 356 U.S. at 385, 78 S.Ct. at 827 (Frankfurter, J., concurring in the result).

Id. at 520

The court defined the objective portion of the entrapment defense: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." 465 So.2d at 522.

In summary, *Glosson* holds that the due process defense is constitutionally based, whereas *Cruz*, in a footnote concerning the objective prong, states: "While the objective view parallels a due process analysis, it is not founded on constitutional principles." It appears, however, that the objective prong of the entrapment defense and the due process clause are substantively similar. Some courts have considered them together, while other courts, when the defenses were raised separately, have considered the defenses individually. In Taffer v. State, 504 So.2d 436 (Fla. 2d DCA), *cause dismissed*, 506 So.2d 1043, *rev. denied*, 511 So.2d 1000 (Fla. 1987) the defendant relied on *Glosson* and *Cruz* in his motion to dismiss. The trial court considered the two prongs of the entrapment defense (objective and subjective) separately. In State v. Garcia, 528 So. 2d 76 (Fla. 2d DCA), *rev. denied*, 536 So. 2d 244 (Fla. 1988) the defendants also argued entrapment as a defense distinct from due process. However, the court treated the objective entrapment defense as if it were the same as, or included in, the due process defense.

[2]While the opinions in *Hunter* and *Glosson* expressed concern for the potential for perjury on the part of the state's informant-witness, we believe the main policy concern of *Glosson*, *Williamson*, and the other cases cited in *Glosson* to be 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." *Williamson*, 311 F.2d at 444.

[3]We also certified the following questions of great public importance to the supreme court:

> Does an agreement whereby a convicted drug trafficker will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for the state violate the holding in *State v. Glosson?*
>
> Assuming the existence of a due process violation under *Glosson*, does *Glosson's* holding extend to a codefendant who was not the direct target of the government's agent?

531 So.2d at 243.

[4]Livermore had previously approached the Federal Drug Enforcement Agency about the deal but it was not interested. Livermore then approached the Broward County Sheriff's Office which accepted his plan to set up a deal with Anders. Livermore testified: A. Because I went to DEA with the case first. Q. With what case first? A. With this ten kilo case, okay, and they told me that they ran down Anders' file and Patrick Walsh's file, and they had no criminal background and they normally didn't do cases like that. Q. So, it wasn't enough for the DEA? A. Exactly. Q. It wasn't big enough? A. Not the term "big enough," but they just didn't like to get into these reverse cases.

[5]The informant in *Hunter*, in addition to being unsupervised, was actually allowed to set up deals in direct contravention of a mandatory sentence law and the then prevailing substantial assistance statute. This may be a relevant circumstance but not an essential one.

[6]*See* note 1.

[7]*Id.*

* * *

Criminal law—Error to reduce conviction from attempted first degree murder to attempted second degree murder where there was substantial, competent evidence of premeditation—Premeditation may be proved by circumstantial evidence—Reasonable jury may choose to disbelieve defendant's self-serving statements at trial in view of radical difference between testimony at trial and statements earlier given to police

MARY STONE, Appellant/Cross Appellee, v. STATE OF FLORIDA, Appellee/Cross Appellant. 4th District. Case No. 89-0037. Opinion filed April 18, 1990. Appeal and cross appeal from the Circuit Court for Broward County; Lawrence L. Korda, Judge. Michael D. Gelety, Fort Lauderdale, for appellant/cross appellee. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee/cross appellant.

(PER CURIAM.) By way of cross appeal, the state argues that the trial court erred in reducing the conviction from attempted first degree murder to attempted second degree murder. We reverse.

The jury was instructed that in order to find the defendant guilty as charged it must find premeditation was proved beyond a reasonable doubt. The jury did, in fact, return a verdict of guilty of attempted first degree murder with a firearm.

At a post-trial hearing, the defendant's counsel argued that there was only one version of events: the one put forth at trial by his client which version must therefore be accepted. The defendant also argued that there could be no premeditation because this was a domestic altercation occurring in the heat of passion. The trial judge thereupon reduced the conviction to one of attempted second degree murder.

Premeditation may be proved by circumstantial evidence. *McConnehead v. State*, 515 So.2d 1046, 1048 (Fla. 4th DCA 1987). The state asserts that given the radical change in the defendant's testimony at trial when compared with her earlier statements to the police, a reasonable jury could have chosen to disbelieve her self-serving statements at trial. *Walker v. State*, 495 So.2d 1240, 1241 (Fla. 5th DCA 1986). We agree. Immediately after the shooting, the defendant stated to the police that she shot the victim, that it was her fault and that she picked up the gun "to fire a warning shot or just for no apparent reason." She removed the gun from its holster, and asked the victim if she wanted to play. Three witnesses testified that the two shots were fired at least five to nine seconds apart. At trial, the defendant gave a totally different version and testified that she fired the first round "in the air," but no bullet holes were found in the ceiling or walls. A firearms expert indicated that the gun had a heavy-trigger-pull, requiring it to be squeezed each time a bullet was fired.

The state cites the very recent case of *Hampton v. State*, 549 So.2d 1059 (Fla. 4th DCA 1989), wherein this court stated:

> [T]he reasonableness of the defendant's version of the case was a question for the jury. In a conviction based on circumstantial evidence, where reasonable men might differ, and where there is substantial, competent evidence to support the verdict, the issue of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine.

We agree with the state that there was substantial, competent, evidence of premeditation sufficient to support the verdict, and that the trial court abused its discretion in reducing the crime to attempted second degree murder with a firearm.

We, therefore, reverse and remand for resentencing to first degree attempted murder. In so doing, we moot the appellant's other argument concerning enhancement by use of a firearm,

Criminal law—Trial court properly dismissed drug charges against defendants on grounds that state acted improperly in setting up drug transaction—State's use of informant who agreed to provide state with substantial assistance by setting up new drug transactions in order to avoid a minimum mandatory prison term and state's allowing informant a free hand to decide the type of deal, the quantity of drugs, the manner and method in which to arrange the sale, and the persons whom he would involve in the transaction violated defendants' due process rights—Codefendant ensnared by state's misconduct, even though not directly contacted by informant, is also entitled to discharge—Question certified as to whether 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—Question certified whether Glosson's holding extends to codefendant who was not direct target of government's agent

STATE OF FLORIDA, Appellant, v. RICHARD ANDERS and WILLIAM HOOD, Appellees. 4th District. Case No. 89-1183. Opinion filed April 18, 1990. Appeal from the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and John Tiedemann, Assistant Attorney General, West Palm Beach, for appellant. Pamela I. Perry of Bierman, Shohat & Loewy, P.A., Miami, for Appellee-Richard Anders. Frank A. Rubino, Coconut Grove, for Appellee-William Hood.

(ANSTEAD, J.) This is an appeal from an order dismissing drug charges against the appellees-defendants on the grounds that the government acted improperly in setting up the drug transaction. We affirm.

LAW

In *State v. Glosson*, 462 So.2d 1082 (Fla. 1985), the Florida Supreme Court held that the due process provisions of the Florida Constitution limited the state's use of paid informants to set up drug transactions. The drug charges against Glosson and five co-defendants resulted from a "reverse sting" operation set up by an informant who had an agreement with the police whereby he would be paid for setting up drug transactions and testifying in the subsequent criminal proceedings. When Glosson and his colleagues purchased drugs from the informant they were arrested. The trial court dismissed the charges on the ground that the utilization of an informant on a contingency fee basis deprived the defendant of his due process rights. The district court affirmed the dismissal. The supreme court affirmed and approved the district court's decision, noting:

> The district court relied on *Williamson v. United States*, 311 F.2d 441 (5th Cir.1962), in holding the respondents had been denied due process because Wilson's contingent arrangement seemed to manufacture, rather than detect, crime.

462 So.2d at 1084. In *Williamson*, the court dismissed charges against two alleged moonshiners because government agents paid an informant money to set up the purchase of illicit whiskey from the two:

> The uncontradicted and unexplained testimony as to the terms of Moye's employment make it necessary that the judgments of conviction be reversed. It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, $200.00 for Williamson and $100.00 for Lowrey, to produce the legally admissible evidence against each of them. It may be also that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts or circumstances were developed in the evidence, though Moye's deposition had been taken months before the trial.
>
> *Without some such justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up," or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.*

311 F.2d at 444 (footnote omitted; emphasis supplied).

In *Glosson*, the Florida Supreme Court noted that since *Williamson* the federal courts had narrowed the circumstances under which a due process violation could be based. The court rejected this narrow application:

> We reject the narrow application of the due process defense found in the federal cases. Based upon the due process provision of article 1, section 9 of the Florida Constitution, we agree with *Hohensee* and *Isaacson* that governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges.

462 So.2d at 1085. The court held that prosecutions based upon such contingent arrangements should be dismissed regardless of the evidence of predisposition on the part of the defendants.[1] The New York appellate decision, cited with approval in *Glosson*, threw out charges against a defendant who was lured into selling drugs by an informant who was himself under prosecution, and who set up the deal in exchange for favorable treatment by the state. *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).

This court followed the holding of *Glosson* in *Hunter v. State*, 531 So.2d 239 (Fla. 4th DCA 1988). The contingent fee arrangement with the informant in *Hunter* involved the promise of release from a minimum mandatory prison term and fine rather than the direct payment of money. *Cf. Isaacson*, 378 N.E.2d 78. The convicted drug dealer-informant in *Hunter* set up drug transactions in order to avoid a 15 year minimum mandatory sentence and $250,000.00 fine. This court noted that like in *Glosson*, the informant had an invaluable stake in making new cases, and that:

> As in *Glosson*, the informant acting under judicial, prosecution and law enforcement authorization, was given free reign to instigate and create criminal activity where none before existed. Subsequently he was the key witness for the state in appellants' prosecution....

Id. at 242 (footnote omitted).[2]

Based on the holding in *Glosson* that such government conduct barred prosecutions regardless of the defendant's prior disposition to commit the crime, this court held that both the informant's direct target and a codefendant, brought into the deal by the target, were entitled to discharge.[3]

THIS CASE

The facts of this case are a mix of the facts involved in *Glosson* and *Hunter*. Anders and Hood were charged with purchasing drugs from Jorge Livermore, a convicted drug trafficker turned government informant. To avoid a minimum mandatory prison term, Livermore agreed to provide the state with "substantial assistance" by setting up other drug transactions. He acknowledged that he felt "appropriate pressure" to avoid going to prison. He was given a performance deadline, but was otherwise left unrestricted and unguided in how he was to set up transactions and who his targets might be. He testified that he "simply went out in the community and went fishing". Livermore approached Walsh, a stockbroker whom he used to work with, and whom he had twice previously seen give small amounts of cocaine to persons at

the brokerage firm. When asked whether he was aware of whether Walsh dealt drugs, the informant said "No. Just those small quantities I was telling you about."

As noted above, Livermore was left completely free not only as to whom he approached but also as to the nature of the transaction to be set up. To entice Walsh, Livermore made up a story about a friend that he used to work with at Eastern Airlines who had come across a suitcase that had a bag with twenty kilos of cocaine in it. Livermore arbitrarily decided on the quantity of the cocaine because he thought that "it would look pretty substantial." He also decided to make the deal a "reverse sting" because he felt "it would be easier to set up the case that way". After listening to Livermore's proposal, Walsh told Livermore that he was going to make some calls and would get back to him.

Livermore testified that he was subsequently contacted by Anders, presumably at the suggestion of Walsh. Anders used to work at the same stockbrokerage firm. Livermore testified that Anders had smoked a couple of "joints" with him in the past and that on one occasion, he bought a small "baggie" of marijuana from Anders, but he was not otherwise aware of whether Anders had ever dealt in drugs. Livermore told Anders he could make a substantial profit from the purchase and subsequent sale of the suitcase drugs. When asked if Anders said what his plans were for use of the profit, the informant replied: "No. I knew that he had just bought a pretty lavish house down in the Keys. . . ." Anders said that he knew someone from West Palm Beach who would be willing to participate and that he (Anders) would like to make $40,000.00.

Livermore spoke with Anders three or four times by telephone. On the day the deal was scheduled, Livermore met with Anders and appellee Hood, the latter brought into the deal by Anders. Livermore told them that they were late meeting him and "my guys had to go to work". The deal was postponed, but took place the following day, when Anders and Hood appeared with the money and were arrested by the Broward County police.[4] For his efforts, Livermore was released on probation, having served no prison time, and adjudication was withheld on his drug trafficking charges.

The trial court gave the following reasons for dismissing the charges:

> 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. It would appear that the instant case is even more egregious than *Hunter*. Unlike *Hunter*, the defendants in this case did not have to produce illegal drugs because the transaction was a "reverse sting", with the state supplying the drugs. The instant deal was also not recorded. Moreover, it was not supervised or assisted. Livermore decided the type of deal, the quantity of drugs and the manner and method in which to arrange the sale. Livermore is not just a material witness but he is the only state witness.

ISSUES ON APPEAL

The State argues that *Glosson* and *Hunter* are not applicable to the instant case because: (1) *Hunter* dealt with a different and narrower "substantial assistance" provision; (2) Livermore did not make the kind of persistent enticements or threats engaged in by the informant in *Hunter*; (3) Walsh and Anders were previously involved with narcotics in some way; (4) Walsh, not Livermore, contacted Anders. In our view, none of these factors materially distinguishes this case from the holding of *Glosson* that forbids prosecutions predicated upon improper contingent fee arrangements with unsupervised informants. Just as this court was bound to follow *Glosson* in our decision in *Hunter*, the trial court was bound to follow the holdings in *Glosson* and *Hunter*.

While it is true that the substantial assistance statute involved in *Hunter* did not authorize the arrangement the police made with the informant, that fact was not essential to the application of the *Glosson* due process test.[5] Similarly, the amendment to the statute to include a group of targets beyond the defendant's immediate associates in crime, has no effect on the applicability of the essential reasoning of *Hunter*, *Glosson* or *Williamson*. 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 activities." 531 So.2d at 243. As noted in *Glosson*, the danger is that such arrangements "seem to manufacture, rather than detect, crime." 462 So.2d at 1084. We held in *Hunter* that the informant had "crossed the line drawn by *Glosson*." 531 So.2d at 243. The opinion noted:

> As in *Glosson*, the informant here had an invaluable stake in making new cases: his own freedom. In our view such freedom constituted much more of an "enormous incentive" to "color his testimony" than the strictly monetary arrangement in *Glosson*. It is undisputed that the informant originated the criminal plan in his own mind, and instigated the commission of the crime solely to obtain his own freedom and relief from the mandatory $250,000.00 fine.

531 So.2d at 242 (footnote omitted).

The State also suggests that the due process analysis is not applicable to the instant case because Livermore was not especially persistent and did not threaten the defendants. The decisions in *Glosson* and *Hunter* are predicated on the incentive offered to the informant to manufacture new crimes, and not on the persistence of the informant to convince the defendants to participate. These circumstances may be relevant to a traditional entrapment defense, but not to a due process analysis.[6] Our conclusion is the same with regard to the contention that Walsh and Anders had a history of involvement with narcotics, even though it was not extensive. As noted above, *Glosson* holds that when the conduct of law enforcement officers is improper, the predisposition of the defendant is irrelevant.[7]

Finally, the State contends that since Livermore did not directly contact Anders or Hood, but only Walsh, any taint associated with Walsh should not be extended to the appellees. In *Hunter*, we struggled with the same issue but held that since the focus of the due process claim is grounded on the government's misconduct, a defendant ensnared by that misconduct, even though not directly contacted by the informant, is also entitled to discharge. Of course, both defendants here did have some dealing with the informant prior to the consummation of the transaction. Our action on this issue is also controlled by the decision in *Glosson* which approved the discharge of several layers of defendants. In *Glosson*, the informant, Wilson, set up the transaction through Janet Moore, an acquaintance of two of Glosson's five codefendants. Those two in turn found the "actual" buyers (presumably the other codefendants) who purchased the drugs from Wilson. *See State v. Glosson*, 441 So.2d 1178 (Fla. 1st DCA 1983).

We affirm the decision of the trial court, but certify the same questions to the Florida Supreme Court as certified in *Hunter*, as quoted above in footnote 3. (DOWNEY J., concurs. LETTS J., dissents without opinion.)

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[5]The due process defense is similar to, but distinguishable from the traditional entrapment defense. In *Glosson*, the court ruled: "The due process defense based upon governmental misconduct is an objective question of law

the trial court, as opposed to the subjective predisposition question submitted in the usual entrapment defense." 462 So.2d at 1084. In Cruz v. State, 465 So.2d 516 (Fla. 1985), while not referring to the *Glosson* decision, the court discussed the objective and subjective views of entrapment:

> The subjective view recognizes that innocent, unprejudiced, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. In those cases, the subjective view allows conviction of predisposed defendants. The objective view requires that all persons so ensnared be released.[2]
>
> We do not foresee a problem in providing two independent methods of protection in entrapment cases. . . .
>
> We find, like the New Jersey court, that the subjective and objective entrapment doctrines can coexist. The subjective test is normally a jury question. The objective test is a matter of law for the trial court to decide.

Id. 520-521.

In Footnote 2, the court commented on the similarity between the "objective test" and the "due process test":

> While the objective view parallels a due process analysis, it is not founded on constitutional principles. The justices of the United States Supreme Court who have favored the objective view have found that the court must "protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter whom or at what stage of the proceedings the facts are brought to its attention." *Sorrells*, 287 U.S. at 457, 53 S.Ct. at 218 (Roberts, J., in a separate opinion). Justice Frankfurter also found that a judge's decision using the objective view would offer significant guidance for future official conduct, while a jury verdict offers no such guidance. *Sherman*, 356 U.S. at 385, 78 S.Ct. at 827 (Frankfurter, J., concurring in the result).

Id. at 520

The court defined the objective portion of the entrapment defense: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." 465 So.2d at 522.

In summary, *Glosson* holds that the due process defense is constitutionally based, whereas *Cruz*, in a footnote concerning the objective prong, states: "While the objective view parallels a due process analysis, it is not founded on constitutional principles." It appears, however, that the objective prong of the entrapment defense and the due process clause are substantively similar. Some courts have considered them together, while other courts, when the defenses were raised separately, have considered the defenses individually. In Taffer v. State, 504 So.2d 436 (Fla. 2d DCA), *cause dismissed*, 506 So.2d 1043, *rev. denied*, 511 So.2d 1000 (Fla. 1987) the defendant relied on *Glosson* and *Cruz* in his motion to dismiss. The trial court considered the two prongs of the entrapment defense (objective and subjective) separately. In State v. Garcia, 528 So. 2d 76 (Fla. 2d DCA), *rev. denied*, 536 So. 2d 244 (Fla. 1988) the defendants also argued entrapment as a defense distinct from due process. However, the court treated the objective entrapment defense as if it were the same as, or included in, the due process defense.

[2]While the opinions in *Hunter* and *Glosson* expressed concern for the potential for perjury on the part of the state's informant-witness, we believe the main policy concern of *Glosson*, *Williamson*, and the other cases cited in *Glosson* to be 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." *Williamson*, 311 F.2d at 444.

[3]We also certified the following questions of great public importance to the supreme court:

> Does an agreement whereby a convicted drug trafficker will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for the state violate the holding in *State v. Glosson*?
>
> Assuming the existence of a due process violation under *Glosson*, does *Glosson's* holding extend to a codefendant who was not the direct target of the government's agent?

531 So.2d at 243.

[4]Livermore had previously approached the Federal Drug Enforcement Agency about the deal but it was not interested. Livermore then approached the Broward County Sheriff's Office which accepted his plan to set up a deal with Anders. Livermore testified: A. Because I went to DEA with the case first. Q. With that case first? A. With this ten kilo case, okay, and they told me that they [illegible] Anders' file and Patrick Walsh's file, and they had no criminal background and they normally didn't do cases like that. Q. So, it wasn't enough for [illegible]. A. Exactly. Q. It wasn't big enough? A. Not the term "big enough," [illegible] didn't like to get into those reverse cases.

[5]The fact in *Hunter*, in addition to being unsupervised, was actually [illegible] set up deals in direct contravention of a mandatory sentence law and [illegible] substantial" assistance statute. This may be a relevant circumstance but not an essential one.

[6]*See* note 1.

[7]*Id.*

* * *

Criminal law—Error to reduce conviction from attempted first degree murder to attempted second degree murder where there was substantial, competent evidence of premeditation—Premeditation may be proved by circumstantial evidence—Reasonable jury may choose to disbelieve defendant's self-serving statements at trial in view of radical difference between testimony at trial and statements earlier given to police

MARY STONE, Appellant/Cross Appellee, v. STATE OF FLORIDA, Appellee/Cross Appellant. 4th District. Case No. 89-0037. Opinion filed April 18, 1990. Appeal and cross appeal from the Circuit Court for Broward County; Lawrence L. Korda, Judge. Michael D. Gelety, Fort Lauderdale, for appellant/cross appellee. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee/cross appellant.

(PER CURIAM.) By way of cross appeal, the state argues that the trial court erred in reducing the conviction from attempted first degree murder to attempted second degree murder. We reverse.

The jury was instructed that in order to find the defendant guilty as charged it must find premeditation was proved beyond a reasonable doubt. The jury did, in fact, return a verdict of guilty of attempted first degree murder with a firearm.

At a post-trial hearing, the defendant's counsel argued that there was only one version of events: the one put forth at trial by his client which version must therefore be accepted. The defendant also argued that there could be no premeditation because this was a domestic altercation occurring in the heat of passion. The trial judge thereupon reduced the conviction to one of attempted second degree murder.

Premeditation may be proved by circumstantial evidence. *McConnehead v. State*, 515 So.2d 1046, 1048 (Fla. 4th DCA 1987). The state asserts that given the radical change in the defendant's testimony at trial when compared with her earlier statements to the police, a reasonable jury could have chosen to disbelieve her self-serving statements at trial. *Walker v. State*, 495 So.2d 1240, 1241 (Fla. 5th DCA 1986). We agree. Immediately after the shooting, the defendant stated to the police that she shot the victim, that it was her fault and that she picked up the gun "to fire a warning shot or just for no apparent reason." She removed the gun from its holster, and asked the victim if she wanted to play. Three witnesses testified that the two shots were fired at least five to nine seconds apart. At trial, the defendant gave a totally different version and testified that she fired the first round "in the air," but no bullet holes were found in the ceiling or walls. A firearms expert indicated that the gun had a heavy-trigger-pull, requiring it to be squeezed each time a bullet was fired.

The state cites the very recent case of *Hampton v. State*, 549 So.2d 1059 (Fla. 4th DCA 1989), wherein this court stated:

> [T]he reasonableness of the defendant's version of the case was a question for the jury. In a conviction based on circumstantial evidence, where reasonable men might differ, and where there is substantial, competent evidence to support the verdict, the issue of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine.

We agree with the state that there was substantial, competent evidence of premeditation sufficient to support the verdict, and that the trial court abused its discretion in reducing the crime to attempted second degree murder with a firearm.

We, therefore, reverse and remand for resentencing on first degree attempted murder. In so doing, we moot the appellant's other argument concerning enhancement by use of a firearm.