IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

SUP.CT. CASE NO: 77,323

v.

MICHAEL MAUGERI,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The Petitioner/State of Florida, prosecuted the Respondent/Defendant, in the criminal division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, in the trial of State of Florida v. Michael Maugeri, Case Number: 88-17518CF-10. This cause was dismissed upon motion by Defendant. The State appealled and the cause was affirmed in the Fourth District Court of Appeal. State v. Maugeri, 570 So.2d 1153 (Fla. 4 DCA 1990). The District Court certified its question of great public importance of which this Court accepted jurisdiction.

In this brief, the parties will be referred to as they appear before the Honorable Supreme Court of Florida.

The following symbol will be used:

"R" - Record on Appeal

All emphasis added by Respondent Maugeri unless otherwise indicated.

STATEMENT OF CASE

Respondent/Defendant, accepts generally the Petitioner/State of Florida's, Statement of the Case and Facts, as set forth in their initial brief, with the following additions and clarifications.

On April 28, 1989, a hearing was held on Respondent MAUGERI's Motion to Dismiss the Information. (R. 7) At the time of the hearing, various motions filed by MAUGERI and co-defendant, JAMES HERNDON, were still pending. The State was properly noticed as to: (1) a Motion to Enforce a Plea Agreement, (2) a Motion to Suppress Statements, and; (3) a Motion to Dismiss Based on Due Process Violations. (R. 4-5).

The State Attorney was not sure which motions the court would hear; however, the Court decided to entertain the motions which required the taking of evidence. (R. 4, 5) The amount of time involved was discussed and the lower court decided to hear Respondent's Motion to Dismiss Based on Due Process Violations. (R. 7, 8) Trial counsel for the Respondent, Richard F. Rendina, Esquire, indicated approval, and the Assistant State Attorney, Marlene Wells, agreed. (R. 7)

At this point, Respondent MAUGERI maintains that a brief history of the case is necessary. The court should be aware of certain pretrial motions filed in the case, since their procedural posture and ramifications are dispositive of the issue on appeal.

On January 19, 1989, the Appellee filed two (2) motions: (1) a Motion to Compel the State to Move for a Reduction of Sentence Based

on Substantial Assistance, and (2) a Rule 3.190 (c)(4), Sworn Motion to Dismiss the Armed aspect of the Cocaine Trafficking Offense. Count I of the Information charged Appellee with Armed Trafficking in Cocaine. (R. 68) The motion demonstrated Maugeri's inability to excerise dominion and control over a firearm seized at the time of arrest. (R. 70-76, 77-82). On April 21, 1989, the State traversed this Sworn Motion to Dismiss, pursuant to Rule 3.190 (d). (R. 95, 96).

On January 27, 1989, the Respondent filed another Rule 3.190 (c)(4) Motion to Dismiss, alleging entrapment as a matter of law. (R. 98-100). The State traversed this Sworn Motion to Dismiss, pursuant to Rule 3.190 (d), on February 15, 1989. (R. 89, 90).

On April 19, 1989, the Respondent filed an unsworn Motion to Dismiss, pursuant to Rule 3.190, alleging Due Process violations and additional relevant facts. (R. 93,94). THIS WAS THE MOTION THE COURT HEARD ON APRIL 28, 1989.

The State did not traverse this motion under Rule 3.190 (d) or any other rule of procedure or law. On April 28, 1989, the court conducted an evidentiary hearing on the Motion to Dismiss Based on Due Process Violations. The Petitioner/State did file a responsive pleading, a memorandum of law, after the hearing, but not before. (R. 106-113); (Memorandum of Law filed May 8, 1989- nine (9) days after the hearing on motion). The trial court granted MAUGERI's due process motion on June 6, 1989. (R. 114-116); (See Order filed June 6, 1989, stating

MAUGERI's Constitutional Rights were violated).

The Appellee prefers to make the chronological sequence of the filing of said pleadings known, as well as the dates of filing of the State's traverses, in response to the Appellee's specific Sworn Motions to Dismiss. As the record demonstrates, no responsive peading, demurrer or traverse, pursuant to Rule 3.190(d), was filed in response to Appellee's Unsworn Motion to Dismiss Based on Due Process Violations.

STATEMENT OF FACTS

Two Hollywood police officers, Campbell and O'Connor testified at the hearing. (R. 9, 22). They stated that a confidential informant was cooperating in a substantial assistance agreement with law enforcement and the State Attorney's Office, in connection with the confidential informant's arrest for trafficking in four (4) kilos of cocaine in January of 1988. (R. 10, 23) The officers said that they met the Respondent, MAUGERI, through this informant, and the informant received a less/reduced sentence and waived the statutory fine ($250,000.00), because of MAUGERI's arrest and prosecution. (R. 11, 29).

The confidential informant's recommendation of substantial assistance was conditioned upon making prosecutable cases, those involving drug arrests and seizures. (R. 13) Testimony revealed that Appellee was arrested for one (1) kilo of cocaine, and MAUGERI was not connected to the informant's trafficking arrest (four (4) kilos) in

any way. (R. 11)

Officer Campbell testified that he saw the Appellee the night before the arrest, but did not meet him until the next day - the day of MAUGERI's arrest. (R. 10) Officer O'Connor testified that he met the Appellee the night before the arrest, September 7, 1988. (R. 23) Testimony shows that neither officer knew the Appellee or the Appellee's alleged criminal activity or involvement, at any time prior thereto. (R. 14, 26) Officer Campbell did not personally supervise the C.I.'s activities. (R. 12)

The confidential informant had not met the Respondent prior to this time. (R. 34) Rather, MAUGERI was introduced to the informant through an unidentified third party facing drug charges who was assisting the confidential informant. (R. 34) The testimony at the hearing showed that this third party assisted the informant by providing a name, phone number and previous contacts with MAUGERI. (R. 35) None of these contacts were corroborated or recorded, nor does there exist independent evidence to rebut or refute MAUGERI's well-founded defense of entrapment. (R. 36)

Campbell testified that he believed this informant had been used in the past. (R. 7) He stated that he did not recall when though, "There was an actual arrest and it could have been before or after, you know, I would have to look back at my files." (R. 18) Campbell was referring to before or after Maugeri's arrest.

O'Connor's testimony indicates the same doubt as to the informant's prior use in making drug cases. O'Connor stated, "That informant has been used before, whether this was the first one or not, I

don't remember right now. We made another arrest; whether it was before or after, I'm not sure of." (R. 27, 28) O'Connor was referring to the same time frame, either before or after MAUGERI's arrest. O'Connor testified that he had no information whatsoever concerning MAUGERI prior to the meeting and arrest. (R. 38)

After hearing the testimony of these officers, the trial court made it clear, "These are the potential issues, and it becomes a very, very thorny issue." (R. 55) The two cases in which the Court's view speaks fairly directly to these points, are the Glosson and Hunter cases. (R. 55) The court said, "The issue is a narrow one, it relates to Mr. Maugeri, whether his due process rights were violated." (R. 58) Circuit Court Judge Robert Carney said that he would defer ruling and take the motion under advisement, "[B]ecause it is one that can have a really significant impact on the substantial assistance statute and the use of the statute." (R. 63, 64) On June 16, 1989, the court granted Respondent MAUGERI's Motion to Dismiss Based on Due Process Violations. (R. 114-116).

STATEMENT OF ISSUE:

CERTIFIED QUESTION

DOES AN AGREEMENT UNDER SECTION 893.135(4) AS AMENDED, WHEREBY A CONVICTED DRUG TRAFFICKER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS, VIOLATE THE HOLDING IN STATE V. GLOSSON, 462 So.2d 1082 (Fla. 1985)?

SUMMARY OF ARGUMENT

The trial court properly granted Respondent's Motion to Dismiss based on Due Process Violations, and the Order dismissing the Information should be affirmed. The Respondent's motion was unsworn pursuant to Rule 3.190, and the State failed to traverse or file a responsive pleading in response thereto. Therefore, the evidentiary hearing held on April 28, 1989, was proper.

The lower court considered the witnesses' credibility and counsel's argument on the law and facts. Because a trial court's ruling is presumed correct as to law and fact, a reviewing court should pay great deference to its findings. The trial and district courts did not commit error, and the legal standards articulated in Glosson, Hunter and Anderson were correctly applied. This court should affirm the lower court's Order dismissing the Information, and the Respondent should be forever discharged from further prosecution in this cause.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED APPELLEE'S MOTION TO DISMISS AND THE ORDER DISMISSING THE INFORMATION SHOULD BE AFFIRMED

The trial court properly granted Respondent's Motion to Dismiss. Because the court considered the witnesses credibility and counsel's argument on the law and facts, this reviewing court should presume the lower court's judgment to be correct. Therefore, the granting of Respondent's motion should be affirmed.

A. THE TRIAL COURT DID NOT COMMIT PROCEDURAL ERROR IN GRANTING RESPONDENT'S UNSWORN MOTION TO DISMISS.

As the Respondent's Statement of the Case demonstrates, the lower court entered an Order dismissing the information because of an informant's illegal activities, or stated in the alternative, activities which violated Respondent's right to Due Process of Law. This Order was based on an unsworn motion to dismiss, filed pursuant t Rule 3.190o of the Florida Rules of Criminal Procedure. (R. 93,94). The State's argument in the District Court concerning a traverse was incorrect because no traverse or responsive pleading was filed in connection with this unsworn Motion to Dismiss.

Rule 3.190 (c)(4) of the Florida Rules of Criminal Procedure states in part:

> However, the court may at any time entertain a motion to dismiss based upon any of the following grounds....

> (4) There are no disputed material facts and the undisputed facts do not establish a prima facie case of guilt against the Defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

Rule 3.190 (D) states:

> Traverse or Demurrer. The State may traverse or demur to a motion to dismiss which alleges factual matters. Factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the State in such traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under (c)(4) of this rule shall be filed a reasonable time before the hearing on the motion to dismiss.

In reviewing an appeal from the denial of a sworn motion to dismiss, an appellate court must determine whether the undisputed facts relied upon by the State presented a prima facie case of guilt. See State v. Davis, 243 So.2d 587 (Fla. 1971); however, the State contends that its traverse, filed in response to one of defendant's sworn motions to dismiss, disclosed the existence of a material issue of fact precluding dismissal under Florida Rules of Criminal Procedure 3.190 (c)(4) and 3.190 (D).

The Respondent contends, specifically, that there were no disputed, material facts and the undisputed facts relied upon by the state did not present a prima facie case of guilt. See State v. Davis, 243 So.2d 587 (Fla. 1971). The testimony presented at the evidentary hearing bears this out. Further, the traverses filed by the state were in response to other specific sworn motions to dismiss (i.e., (c)(4) motion to dismiss gun charge and (c)(4) motion to dismiss based on entrapment as a matter of law. (R. 89, 90, 95, 96)

The court heard testimony and arguments of appellant, and carefully assessed the officers credibility and weight of the evidence. Because the Appellant had a full and fair opportunity to present a prima facie case of guilt, and to rebut Appellee's allegations, any alleged error on appeal was procedurally harmless. In fact, the court was required to conduct a hearing on appellee's unsworn motion to dismiss, and to receive evidence on any issue of fact necessary to the decision on the motion. Therefore, the trial court did not err in granting Appellee's Rule 3.190 motion to dismiss.

B. THE TRIAL COURT'S RULING IS CLOTHED WITH PRESUMPTION OF CORRECTNESS AS TO LAW AND FACT, AND THE GLOSSON AND HUNTER STANDARDS WERE PROPERLY APPLIED TO THE TESTIMONY PRESENTED

Well established principles of appellate review must be considered. A trial court's ruling comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments. A reviewing court should defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. Deconingh v. State, 433 So.2d 501 (Fla. 1983). Absent obvious showing of error, the Supreme Court should not tamper with the trial judge's determination of admissibility. Jones v. State, 440 So.2d 570 (Fla. 1983). Where evidence of all the circumstances of an act of confessing was before the trial judge, his finding as to its voluntariness comes to a District Court of Appeal clothed

with a presumption of correctness. Puccio v. State, 440 So.2d 420 (Fla. 1st DCA 1983); Williams v. State, 441 So.2d 652 (Fla. 3rd DCA 1983) (determination by trial court that a confession was freely and voluntarily made comes to a reviewing court with the same presumption of correctness which attends jury verdicts and final judgments). An appellate court must presume that, in denying a motion for discharge under rule governing speedy trial without demand, the trial court necessarily found allegations in the motion untrue. Rule 3.191(a)(1); Hall v. State, 309 So.2d 248 (Fla. 4th DCA 1975). The District Court of Appeal will not disturb an order revoking probation where it is supported by a legally sufficient basis in record. Aaron v. State, 400 So.2d 1033 (Fla. 3rd DCA 1989). A motion for directed verdict of acquittal should not be granted unless it is apparent that no legally sufficient evidence has been submitted upon which a jury could find other than not guilty. Brown v. State, 294 So.2d 128 (Fla. 3rd DCA 1974). A trial court's determination upon questions of fact in a suppression hearing will not be reversed unless clearly shown to be without basis in evidence or predicated upon an incorrect application of law. State v. Riocabo, 372 So.2d 126 (Fla. 3rd DCA 1979). It is not the province of the District Court of Appeal to substitute its judgment for that of the triers of fact; finding of the jury will not be disturbed in the absence of a clear showing that they are erroneous as a matter of law. Rodriguez v. State, 296 So.2d 89 (Fla. 4th DCA 1974).

In the present case, the lower court heard the officers'

testimony and arguments of counsel, and entered its order making finding of facts and conclusions of law. These findings are presumed correct and this court should defer to the lower court's judgment.

The trial court relied upon two (2) cases in reaching its decision, State v. Glosson, 462 So.2d 1082 (Fla. 1985), and Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988). The state concedes that a decision in these cases must turn on the facts of each case. The Glosson case stands for the proposition that:

> "Due process defense based upon govern mental misconduct is an objective question of law for the trial court, and governmental misconduct which violates constitutional due process rights of a defendant regardless of that defendant's predisposition, requires dismissal of criminal charges." Id at 1084, 1085.

In Glosson, the Florida Supreme Court rejected the narrow application of the due process defense found in the federal cases. See Williamson v. State, 311 F.2d 441 (5th Cir. 1962). Based upon the due process provision of Article I, Section 9 of the Florida Constitution., "our examination of this case convinces us that the contingent fee agreement with the informant and vital state witnesses, violated respondent's due process rights." Id at 1085.

The informant, Wilson, had to testify and cooperate in criminal prosecutions in order to receive his contingent fee from the connected civil forfeitures, and criminal convictions could not be obtained without his testimony. The court said:

> "We can imagine few situations with more potential for abuse of a defendant's due process rights. The informant here had enormous incentive not only

> only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions". Id at 1085.

The State argues Glosson is inapplicable. Apparently the State is under the impression that "financial incentives" are somehow more important than "liberty interests". Certainly, informant #1277 valued his liberty. He was facing a potential mandatory minimum sentence of fifteen (15) years. Therefore, his incentives and/or inducements for making "prosecutable cases" is obvious. (R. 13)

The State argues Glosson is inapplicable because the substantial assistance statute has changed. The statute has been changed, however, the present substantial assistance statute remains subject to due process scrutiny as applied to a particular defendant. This is a question of law and the trial court properly decided this issue, as applied to the Appellee.

The State argues Glosson is inapplicable because the confidential informant's testimony is not indispensable, so perjury is not a consideration. The informant agreed to make "prosecutable cases" involving drug arrests and seizures. If the informant was called to rebut substantial entrapment allegations, which the appellee contends would have occurred and such allegations would have remained unrebutted without the informant's testimony, then the danger cited in Glosson would

be present. The informant did have to cooperate in order to gain a recommendation of substantial assistance, and the coloring of testimony is a real possibility. Clearly, this is an enormous incentive for a vital witness. Therefore, the present situation is one of those few situations imagined by Glosson with more potential for abuse of a defendant's due process rights. Glosson at 1085; See People v. Isaacson, 44 NY 2d 511 (1978) (police misconduct and trickery used to secure drug sales by predisposed defendant within state violated defendant's due process right, requiring dismissal of case); U.S. v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973) (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". Id at 431.

The second case, Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), is instructive. The fact that it was decided under the "old" substantial assistance statute, F.S. 893.135(3)(1985), does not render the due process analysis inapplicable. Hunter cited Glosson and the court stated that, "an agreement to reduce a defendant turned informant's sentence it not per se violative of due process". Id at 243. Further, the facts of this case are at least as compelling as those relied upon by the Supreme Court in Glosson and the agreement with the informant is closely akin to conduct condemned by the Supreme Court in Glosson as an abuse of government power." Hunter at 242. Glosson recognized that government misconduct occurs in various ways, under

different factual scenerios, and the Supreme Court refused to adopt the narrow application of the due process defense found in the federal cases. Id at 1085.

The facts in Hunter involved an agreement whereby a drug trafficker would receive a substantially reduced sentence, (one (1) year instead of fiteen (15) years; and waiver of the $250,000.00 statutory fine) in exchange for setting up new drug deals and testifying for the State.

The Fourth District held that where an informant's criminal sentence would be reduced if he made new cases involving a certain amount of cocaine within a certain time frame, the defendant's due process rights were violated when an informant convinced the defendant, who had no prior criminal history, to sell cocaine to undercover police officers, The court said:

> "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." Id at 242.

The court further stated the informant, acting under judicial, prosecutorial, and law enforcement authorization, was given free reign to instigate and create criminal activity where none before existed. The key distinction between this case and State v. McQueen, 501 So.2d 631 (Fla. 5th DCA 1987) is that the assistance agreement provided that the informant would assist in arranging drug deals with persons already known to him and who were predisposed. The State conceded in Hunter,

that the informant's testimony is the only evidence presented to rebut defendant's defense of entrapment. In essence, a convicted cocaine trafficker was allowed to secure his own freedom by convincing someone else to traffic in cocaine. However, we believe the action of law enforcement officials here, where the informant was authorized to create new criminal activity in order to secure his freedom, rather than merely assist in apprehending those who had already participated in a crime, crossed the line drawn by Glosson wherein the informant was paid to manufacture, rather than detect, crime. Id at 243.

Turning to the present case, Glosson and Hunter make it clear that illegal activity will not be tolerated by our courts. Here, the informant set up a drug deal in order to receive a reduced sentence and waived fine. The actual amount of cocaine was less than the amount for which he had been arrested. The officers recalled that this informant had made arrests before, however, they were uncertain as to when - either before or after MAUGERI's arrest. (R. 18, 27-28) In this respect, the informant's time for making prosecutable cases was important. The informant had no knowledge of Maugeri's prior criminal history or involvement, and it was at law enforcement's instigation and prompting that he produced cocaine.

It is clear that this informant had an invaluable stake in making prosecutable cases: his own freedom. Liberty is a fundamental constitutional right, and the informant's "enormous incentive" in seeking out MAUGERI needs no further discussion. If the Respondent offered an

entrapment defense, which he would, such theory would go unrebutted without the informant's testimony, and the opportunity to "color testimony" is apparent. This informant's activities were renegade and unsupervised, because of the unbridled discretion and reign to instigate and create new crime, not detect it. What is more compelling about the present case, unlike Hunter and Glosson, is that an informant was allowed to accept the assistance of an unidentified third party who was facing drug charges. This third party had various contacts with MAUGERI, none of which were recorded or personally supervised by law-enforcement or the informant. (R 35, 16) Second, Officer Campbell did not supervise the informant's activities. Therefore, no independent evidence to corroborate acceptable law-enforcement practices in the utilization of a convicted drug-trafficker-turned- informant, seeking a reduced sentence in exchange for setting up new drug deals.

The Respondent maintains that the informant crossed the line drawn in Glosson and Hunter, and the trial court's order eloquently expressed this. Judge Carney specifically found that an informant with every motivation to create new crime, specifically, fifteen (15) years of his own liberty, was sent out by the authorities to do a deal at least equal to his. He chose a man unknown by the police to be involved in any criminal activity of any kind. The informant was not monitored, but was permitted as a "loose canon to slip across the decks of society." It was not until the day before the arrest that law enforcement met MAUGERI and initiated their own investigation. The court said that the lack of controls by the police coupled with the intense motivation to do a drug deal create an atmosphere that is so conducive to the creation of crime by the confidential informant that it violates the due process rights of the Defendant without regard to whether there was actual misconduct or not. (R. 116)

The third case, State v. Anders, 560 So.2d 288 (Fla. 4 DCA 1990), principally relied upon by the Fourth District Court of Appeal in reading its decision, is most instructive. In Anders, the trial court dismissed drug charges against the defendant on grounds that the government acted improperly in setting up drug transactions. The District Court of Appeal held that the use of an informant to set up drug transactions with defendants violated due process of law, where informant participated in "reverse sting" operation to avoid minimum mandatory prison term, although informant did not have direct contact with defendants and defendants had a history of involvement with narcotics. Id., at 288.

The facts in Anders bear close resemblence to MAUGERI. The informant, Livermore, testified that he "simply went out into the community and went fishing." He met a stockbroker with whom he had worked, who in turn introduced him to Anders. 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. Id., at 291. Anders later contacted Livermore and negotiations were handled. On the day of the deal, both Anders and Hood appeared with the money and were arrested by Broward County deputies.

The trial court gave the following reassons for dismissing the charge:

> "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 egregarious 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." Id., at 291, 292.

The District Court cited the United States Supreme Court case of Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210 (1932), stating:

> "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, even though not directly contacted by the informant, is also entitled to discharge. Of course, both defendants here did have some dealings with the informant prior to the consumation 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 transactions through Janet Moore, an acquaintance of two of Glosson's five co-defendants. Those two in turn found the 'actual' buyers (presumably the other co-defendants) who purchased the drugs from Wilson. See State v. Glosson, 441 So.2d 1178 (Fla. 1st DCA 1983)." Id., at 147.

The Respondent would cite other recent cases for this Court's guidance. In Embry v. State, 563 So.2d 147 (Fla. 2 DCA 1990), the Second District held that the State's use of confidential informant acting under substantial assistance agreement, under which informant would receive probation instead of imprisonment on drug charges if he

"makes cases" against two people, deprived defendant of his right to due process under the Florida Constitution. Id., at 147.

The informant in Embry had an agreement to make cases against two targeted people. He was unsucessful and told police that the would try to make a deal with the Appellee instead. Like Hunter, the informant here instigated and handled all negotiations with appellee. In both cases the targets sold cocaine to undercover agents who were working with the informants. The defendants were not known to law enforcement as drug traffickers in either case. Id., at 149.

The court said:

> "The gravamen of our concern is that the informant manufactured crime to receive a reduced sentence of probation. In the present case, the informant was unsupervised. He initiated and handled all negotiation leading up to the cocaine sale. See Anders, Glosson, which forbids prosecutions based upon improper contingent fee arrangments with unsupervised informants." Id., at 149.

Another case of concern is Bowser v. State, 555 So.2d 879 (Fla. 2 DCA 1989) where the court held that police officers entrapped defendant by picking him up as a hitchhiker, giving him money to fill a prescription for a controlled substance which had been prescribed to him because of his broken arm, and then inducing him to sell the tablets to them. Id., at 880. The court further said:

> "The objective test is utilized to prevent conduct that tends to impugn the integrity of a court. Those matters are such that they are exclusively within the power of a court to determine as a matter of law." Id., at 881. See also, Cruz v. State, 465 So.2d 516 (Fla. 1985); Londono v. State, 565 So.2d 1365 (Fla. 4 DCA 1990).

The final case, Krajewski v. State, 16 FLW 692 (Fla. 4 DCA March 13, 1991), presents additional considerations in the evolving standards and various aspects of entrapment and related defenses in Florida. In Krajewski, the Fourth District held that the informant was free to develop new drug transactions for which he was to receive a reduction in his sentence; thus, Hunter and Anders required the finding of a due process violation.

The Court's analysis began with an overview of the entrapment defense, both objective and subjective, as applied in the state and federal courts. See Cruz, supra. The common denominator as determined by the Fourth District would seem to be that the "objective test" is not concerned with the predisposition of a criminal defendant, rather, it examines only the action of law enforement or its agencies, and whether that action was permissible rather than outrageous. Id., at

The court next turned to the due process defense finding that, whether a particular practice constitutes a deprivation of due process is ordinarily a matter of law for the court to decide. See United States v. Graves, 556 F.2d 1319 (5 Cir. 1977). Of necessity, Glosson, supra, was addressed first. Hunter, supra, and Anders, supra, were then likewise considered.

The court determined tht the availability of the defense of due process results from the application of an objective test. The court stated:

> "We look only to the activity of law enforcement and, sometimes, the prosecution, to determine whether that activity is outrageous or shocking or 'uncivilized'".

At this point, the Respondent would suggest that the Florida Supreme Court has stated otherwise in Cruz, supra:

> "While the objective view parallels a due process analysis, it is not founded on constitutional principles: The objective view is a statement of judicially cognizable considerations worthy of being given as much weight as the subjective view." Id., at 520, n.z.; See also Bowser v. State, supra, at 881 (while the Cruz decision recognizes that its objective test analysis is not founded on constitutional principles, it does parallel a due process analysis).

The Krazewski court determined that the due process defense failed to yet establish a test which is purely objective only where bright line standards exist to permit an empirical evaluation of factors to be made with reasonably certain and predictable results.

The court viewed Glosson, supra, a civil forfeiture which benefitted an informer, to have two distinct elements. One, some kind of financial stake by an informant, and two, held by a vital state witness. The Supreme Court in Glosson emphasized the enormous potential for abuse which exists when a informant had a financial incentive to make criminal cases and, in the process, to commit perjury.

The court viewed Hunter, supra, as containing the the basic elements in Glosson, specifically, (1) contingent financial interest (as well as a freedom interest) held by (2) an informant acting under the aegis of state agencies (3) cooperating with those agencies to make new drug transactions and (4) whose testimony is vital to the prosecution.

The court viewed Anders, supra, as more compelling than Hunter for application of the due process defense because (1) a reverse sting was involved so the defendants did not have to produce drugs; (2) the transaction was not recorded; (3) nor was it supervised or assisted; (4) the informant had complete freedom to create any type of drug deal at any time and in any manner; and (5) he was the only State witness.

The Krajewski court felt bound to follow Glosson, although it did everything in its power to distinguish the case based upon its facts and law. Specifically, the court stated:

> "Using a contingent fee based upon civil forfeitures as a reward for making a crime where none existed before could be logically characterized as passing the outer limits of due process. Assuming, without knowing for certain, that the forfeited contraband belonged to the individual ensnared by the informant in the previously non-existent criminal activity, it would be ironic for the informant to be paid from property which the informant induced the non-criminal defendant to put at jeopardy in the first instance. This assumes, of course, State complicity."

The court further noted:

> "The same reasoning does not extend beyond Glosson to Hunter and Anders and similar cases. Nothing of monetary value has been taken from the defendants to reward an informer. The financial state, if any, that the informant has in the case does not deprive the ensnared defendant of anything. In the present case, the informer was free to develop new drug transactions for which he was to receive a reduction in his sentence. While we do not think Glosson compels a finding of a due process violation under these circumstances, Hunter and Anders obviously do."

The court certified a slightly altered question to the Supreme Court, and further stated:

> "In view of these consequences, and but for Hunter, Anders and Maugeri, which are now the law of this district, we would sugget that there is a material difference between a contingent fee arrangement based upon civil forfeitures (given the concept of civil forfeitures strains against due process concerns in the first instance) and a simple agreement for a reduced sentence for cooperation, with the added proviso that the informant be monitored to eliminate, or at least minimize, the possibility of manufatured testimony and perhaps with the additional caveat that there be a sufficient quantum of corroborating evidence."

The Respondent, MAUGERI, maintains that the Fourth District opinion in Krajewski is most instructive in guiding this Court's opinion to affirm dismissal of drug charges against Respondent. Of necessity, a lengthy analysis of its opinion will now be applied to the facts of MAUGERI.

In the present case, the Respondent was contacted by an unidentified third party who assisted a drug trafficker turned informant seeking sentence reduction of a mandatory fifteen (15) year prison sentence and mandatory penalty relief, irrespective of whether this Court terms the quarter million dollar ($250,000.00) amount as a forgiveness of fine or immunity from financial penalty. Like Glosson and Hunter, this informant clearly had both financial and liberty interests at stake. Second, like Anders, the introduction and negotiations were not monitored or recorded. Third, Officer Campbell testified that he did not

supervise the informant's activities, either with MAUGERI or his alleged fait accompli, the unidentified third party. Fourth, the informant and third party had complete freedom to create any type drug deal at any time and in any manner. Fifth, like all of the cases, including Krajewski, the informant was a material and vital State witness. Sixth, the Respondent herein disagrees with and departs from the Krajewski court, the Respondent/Defendant, MAUGERI, as an individual ensnared by the informant in the previously non-existent criminal activity, was placed in a position of being forced to provide, give up, and/or pay money to the State authorities as a mandatory penalty, the amount of $250,000.00, in connection with a potential criminal sentene. In this way, the action of this informant created an actual and substantial probability that something of monetary value, a property interest, would be forthcoming from MAUGERI and this does deprive the ensnared Respondent of something of monetary value, assuming, of course, without knowing for certain, that informants do receive monies paid by the State in connection with forfeitures and/or mandatory fines paid by criminal defendants in connection with drug trafficking convictions. Therefore, the Respondent maintains that all basic elements of Glosson, Hunter, Anders, Krajewski and progeny, in fact, exists in the present case, and application of the due process defense mandates dismissal of MAUGERI's drug charges.

C. FLORIDA STATUTE §893.135(4) (1987), AS AMENDED, IS UNCONSTITUTIONAL AS APPLIED TO RESPONDENT BASED UPON THE FACTS OF THE PRESENT CASE

At present, Florida Statute §893.135(4), (1087) raises grave constitutional concerns as applied to the facts of Respondent's case. The due process defense is of constitutional dimension and this Honorable Court should not condone law enforcement's patent violation of MAUGERI's fundamental rights. Therefore, the Respondent maintains that the present statute is unconstitutional as applied to MAUGERI and the Respondent's discharge from further prosecution is the only remedy.

1987 Amendment to Florida's Substantial Assistance Statute, 893.(4)

Th language of the present statute provides as follows:

> "(4) 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 identifiation, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals or of any other person engaged in traffickig in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance." [Underlined language indicates the present amended portion of statute.]

The cases cited herein aptly express the constitutional concerns of the appellate courts of this state with respect to the present amendment of the statute. In Embry, supra, at 149, the Second District said:

"Although the substantial assistance statute has been enlarged by 1987 amendment to allow substantial assistance for the prosecution of any other person engaged in trafficking in controlled substances, the legislature cannot authorize an informant to manufacture crime. See Article I, Section 9, Florida Constitution; Glosson, 467 So.2d at 1085 (Govermental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires dismissal of criminal charges)."

The 1990 Anders decision noted:

"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. [Footnote omitted] 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." Id., at 292.

Finally, the 1991 Krajewski decision brings home the thrust of Repondent's argument:

"As explained in Anders, the substantial assistance statute, section 893.135(4), Florida Statutes (1989), was amended after Hunter, but, given the constitutional underpinnings of the due process defense in the context of these cases, the amendment has no effect on our consideration."

The Respondent maintains that the uncorroborated, unmonitored and unsupervised action of the informant, coupled with the indispensible assistance of the unidentified third party, a fait accompli, in seeking to engage MAUGERI, a person unknown and unsuspected by law-enforcement to be engaged in drug trafficking, in order to gain a substantial reduction of sentence and waiver of $250,000.00 fine, clearly demonstrates that the application of present amended statute is unconstitutional as applied to MAUGERI in this case, given the constitutional underpinnings of the due process defense under the Florida Constitution.

Statutory Construction

Well recognized doctrines of statutory construction should assist this Court in recognizing the fact that the present substantial assistance statute has been unconstitutionally applied to MAUGERI in the present case.

Florida Statute §775.021(1) pertaining to rules of construction with respect to penal statutes provides:

> "The provisions of this code and offenses defined by other statutes shall be strictly construed; when language is susceptible of differing constructions it shall be construed most favorably to the accused."

A penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as spirit. Nothing which is not clearly and intelligently described in its very words, as well as manifestly intended by the legislature, will be read into it. It is not to be extended in its operation to persons, things, or acts not within its descriptive terms. See 40 Fla.Jur.2d §195, p. 237; Exparte Bailey, 23 So. 552 (Fla. 1987); Bradley v. State, 84 So. 677 (Fla. 1920).

The doctrines of Ejusdem Generis and Noscitur a Socii are applicable. Ejusdem Generis applies where, in a statute, general words will ordinarily be presumed to be, and will be construed as, restricted by the particular designation and to include only things or persons of the same kind, class, character or nature, as those specifically enumerated. Under this rule, where the enumeration of specific things is followed by a more general word or phrase, the general phrase is construed to refer to a thing of the same kind or species as included within the preceding limiting and more confining terms. See 49 Fla.Jur.2d 128, p. 170; State, Ex Rel. Winton v. Davie, 127 So.2d 671 (Fla. 1961).

The second doctrine is Noscitur a Sociis, that is, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute. General and specific words that are capable of an analogous meaning when associated together take color from each other. Thus, general words may be restricted to a narrower sense or less general meaning by the context in which they are used. See 49 Fla.Jur.2d 127, p. 170 Exparte Amos, 112 So.289 (Fla. 1927).

In the present case, the nature of the constitutional infirmity in the application of the statue and the amended language is easily recognized. Based upon the facts, an unmonitored informant seeking substantial sentence reduction, through the indispensible assistance of a third party to engage MAUGERI, an unknown person to law-enforcement, in an illegal act, the legislature clearly did not authorize this type of informant activity. Therefore, the present substantial assistance statute was unconstitutionally applied to Respondent.

CONCLUSION

Based upon the facts and arguments set forth herein, it is the Respondent's contention that the Circuit Court's dismissal of the Information and the Fourth District Court of Appeal's decision to affirm the dismissal by the lower court should be affirmed and upheld by this Honorable Court and the Respondent, MICHAEL MAUGERI, should be discharged from any further prosecution of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent was furnished by U.S. Mail, postage prepaid, to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401 this 13 day of May, 1991.

Respectfully submitted,

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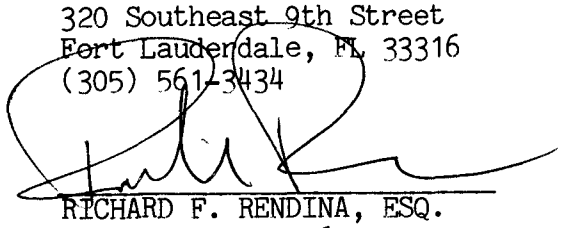

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