IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,323

STATE OF FLORIDA,

Petitioner.

vs.

MICHAEL MAUGERI,

Respondent.

**********

**********

# PETITIONER'S BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority and appellant in the appended State v. Maugeri, 16 FLW D 82 (Fla. 4th DCA Dec. 19, 1990), review granted, Case No. 77,323 (Fla. 1991). Respondent, Michael Maugeri was the criminal defendant and appellee below.

Reference to the two volume record on appeal will be designated "R".

All emphasis, unless otherwise indicated, will be supplied by Petitioner.

## STATEMENT OF THE CASE AND FACTS

On April 28, 1989, a hearing was held on a motion to dismiss in the Circuit Court of the Seventeenth Judicial Circuit. (R 1-66). Respondent had been informed against with: One count of trafficking in cocaine, contrary to Fla.Stat. 893.135(1)(b)(3), 893.03(2)(9)(4) and 775.087(1); and one count of conspiracy to traffic in cocaine, contrary to Fla.Stat. 893.135(4), 893.135(1)(b)(3) and 893.(2)(a)(4). (R 68-69). The Court granted the motion to dismiss on June 16, 1989. (R 114-116).

At the hearing, testimony was taken from two witnesses, Allen Campbell and Shawn O'Connor. (R 9-52). Both of these individuals are police officers with the City of Hollywood, and were directly involved with the arrest of Respondent.

Officer Campbell testified that through the intercession of a confidential informant, (C.I.) he met Respondent. (R 10). The C.I. was involved in a substantial assistance agreement with the police and the State Attorney's Office. (R 10) (R 41) The C.I. received a lesser sentence for his efforts in assisting in the arrest of Respondent. (R 11). Officer Campbell did not personally supervise the C.I.'s activities (R 12).

Officer O'Connor testified that he had met Respondent the night prior to the arrest, September 7, 1988 (R 23). The C.I. utilized in this case had been used before (R 27). No financial reward was paid to the C.I. (R 29). His sentence was reduced and his fine was also waived (R 29).

The C.I. also met Respondent for the first time on the same day that Officer Campbell met Respondent (R 34). There was an unidentified third party who assisted the C.I. in contacting Respondent. (R 35-36). The C.I. had a telephone conversation with Respondent during which time the drug transaction was planned. (R 50). Both parties stipulated to the substance of the testimony of Detective Lossi who would attest to the predisposition of Respondent (R 52, 53).

## SUMMARY OF ARGUMENT

The Fourth District Court of Appeal incorrectly decided in State v. Maugeri that the judge below did not reversibly err by granting Respondent's motion to dismiss the drug trafficking charges against him 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 the case sub judice 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 Respondent had a history of involvement in narcotics; and finally because Respondent was brought into the instant transaction by a third party rather than by the informant.

## ARGUMENT

### ISSUE

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

As noted, Respondent convinced both the judge and the appellate court below that the dismissal of the cocaine trafficking charges against him was mandated under this Court's decision in State v. Glosson as interpreted by the Fourth District in Hunter v. State.

In State v. Glosson, 462 So.2d 1082 (Fla. 1985), the Florida Supreme Court condemned a scheme whereby the State had agreed to pay a very sleazy informant a percentage of all civil forfeitures resulting from criminal convictions he was to help obtain by selling those defendants drugs, reasoning that the informant's enormous financial stake in ensuring the defendants' convictions carried with it an intolerable risk that the informant would commit perjury at trial, thus violating the defendants' state constitutional rights to due process of law.

Although Petitioner realizes that the Florida Legislature cannot statutorily authorize unconstitutional behavior, it would note that Glosson was decided under the former Fla.Stat. 893.135(3) (1985), which did not provide for horizontal substantial assistance. The case is more significantly inapplicable because the inducement of the Confidential Informant was clearly based on financial reward. Further, in Glosson, the Court was concerned that the C.I.'s testimony which was necessary

to the prosecution's case, might be tainted by perjury. In the instant case, the C.I.'s testimony is not indispensable, so perjury is not a danger. State v. Yolman, 473 So.2d 716 (Fla. 2d DCA 1985).

Caselaw after Glosson reveals that providing incentives to C.I. assistance in arrests is not neseccarily violative of due process. State v. Perez, 493 So.2d 547 (Fla. 3d DCA 1986); State v. Prieto, 479 So.2d 320 (Fla. 3d DCA 1985); State v. Dodd, 464 So.2d 560 (Fla. 2d DCA 1985); State v. Ruiz, 495 So.2d 256 (Fla. 3d DCA 1986); Lee v. State, 490 So.2d 80 (Fla. 1st DCA 1986). These decisions turn on the facts in each case. Since the facts in this case are clearly in dispute, it is a jury's responsibility to hear and weigh them. In order to proceed with a case to trial, the State need only "'barely' show a case against the accused'." State v. Pentacost, 397 So.2d 711, (Fla. 5th DCA 1981). "It is only when the state cannot establish even the barest bit of a prima facie case that it should be prevented from prosecution." State v. Pentacost, supra. The State has met this burden by providing evidence linking the Appellee with the crimes he is accused of committing.

As also noted, this Court has accepted jurisdiction to review Hunter on the merits, as well as State v. Anders, and the State is of course contending there that the Fourth District decided those cases incorrectly. Since the reversal of Hunter and Anders would require a reversal of the instant appeal, [1] the

[1] Any attempt by Respondent 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

State respectfully submits that this Court should await its final disposition of Hunter and Anders before disposing of the current case.

The State believes, however, that it should prevail in this case even if 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 defendant's 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 the case sub judice.

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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 narotics 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, 633-34 (Fla. 5th DCA 1986), review denied, 513 So.2d 1062 (Fla. 1987); see also, United States v. Lane, 693 F.2d 385, 387-88 (5th Cir. 1982). Furthermore, any attempt by Respondent 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 Respondent's crimes, see, section 777.201, Fla. Stat. (1987); compare Gonzalez v. State, 525 So.2d 1005, 1006 n. 1 (Fla. 3d DCA 1988) with Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989); see generally, In Re Standard Jury Instructions in Criminal Cases, 543 So.2d 1205, 1208 note *, 1209-1210 (Fla. 1989). See also, Krajewski v. State, 16 FLW D692 (Fla. 4th DCA March 13, 1991).

[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

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, as well as in Anders, convicted drug defendants were statutorily authorized to render "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 authorized 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, as in Anders, there was no evidence that the C.I. was even especially persistent in persuading the Respondent to consummate the deal, let alone any evidence of threats. As such, Respondent was clearly not entitled to a due

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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).

process discharge under Hunter as that decision now stands. Compare, Khelifi v. State, 560 So.2d 333, 334 (Fla. 4th DCA 1990), review denied, Case No. 76,058 (Fla. October 25, 1990), State v. Giraldo, 561 So.2d 1206 (Fla. 3d DCA 1990); but see, State v. Embry, 563 So.2d 147 (Fla. 2d DCA 1990).

Respondent will doubtlessly protest that his due process rights were nonetheless violated by his participation in the C.I.'s scheme because, although there was evidence that Respondent 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, supra. 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 978, 981 (Fla. 1985), Respondent's contention should fail. Compare, Taffer v. State, 504 So.2d 436 (Fla. 2d DCA 1987), cause dismissed, 506 So.2d 1043 (Fla. 1987).

Furthermore, the fact remains that Respondent was not even directly brought into the instant scheme by the C.I.; as noted, Respondent was brought in by an unidentified third party. 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. 3d 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. 2d 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.

Since there are material facts in dispute, it follows that the courts below reversibly erred by ordering Respondent discharged, and that this cause must consequently be remanded for trial.

## CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the lower court's decision be **REVERSED.**

Respectfully submitted,

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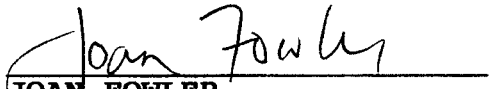

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I HEREBY CERTIFY that a true copy of the foregoing "Brief on the Merits" has been forwarded by United States Mail to: RICHARD RENDINA, ESQUIRE, 320 Southeast 9th Street, Fort Lauderdale, Florida 33316, this 27th day of March, 1991.

Of Counsel

/PAS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,323

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# APPENDIX TO

# PETITIONER'S BRIEF ON THE MERITS


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(Retired), Associate Judge, concur.)

* * *

**Torts—Municipal corporations—Minor injured in municipal park when swing chain popped and broke while minor was using swing in normal fashion—Evidence that chain was rusted and that city had no maintenance procedure for inspecting the twenty-five-year-old equipment sufficient to establish prima facie case—Error to enter directed verdict in favor of defendant**

TIFFANY BILLINGSLEE, a minor, by and through her grandmother and next friend, ANNIE LONG, and ANNIE LONG, individually, Appellants, v. CITY OF HALLANDALE, a political subdivision of the State of Florida, Appellee. 4th District. Case Nos. 89-0846 and 89-1305. Opinion filed December 19, 1990. Consolidated appeals from the Circuit Court for Broward County; Gene Fischer, Judge. Edward A. Perse and Arnold R. Ginsberg of Horton, Perse & Ginsberg, and Ratiner & Glinn, P.A., Miami, for appellants. Richard Kane, City Attorney, Hallandale, for appellee.

ON MOTION FOR REHEARING

[Original Opinion at 15 F.L.W. D2277]

(PER CURIAM.) Appellee's motion for rehearing is denied. However, we strike the word "corroded" from the fourth sentence of paragraph one of the original opinion of the court. A review of the record confirms appellee's contention that the word "corroded" appears only in the complaint while the testimony referred only to "rust." (ANSTEAD, STONE, JJ. and OWEN, WILLIAM C., JR., Associate Judge, concur.)

* * *

**Criminal law—Vehicular homicide by reckless driving—Evidence sufficient to support finding of guilt**

CRAIG MOYE, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 89-2984. Opinion filed December 19, 1990. Appeal from the Circuit Court for Broward County; Arthur J. Franza, Judge. Howard M. Zeidwig, Fort Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm appellant's conviction of vehicular homicide by reckless driving and reject his claim that the evidence was insufficient to support the jury's finding of guilt.

Moye was charged with vehicular homicide as a result of his vehicle striking and killing a young boy. In its sentencing order the trial court summarized the proof presented at trial through the testimony of numerous witnesses:

> This offense was committed in a reckless, aggressive manner. The Defendant was weaving in and out of traffic, driving at or near the speed limit and willfully disregarded the yellow traffic signal as he approached a busy intersection. All other cars slowed and stopped at the signal, however, Defendant accelerated through the red light into the intersection.
>
> This offense was committed against persons and resulted in personal injury. Fifteen year old Sean Grinde was riding his bicycle across this intersection when the Defendant ran the red light. The Defendant's car struck Sean, and knocked him off the bicycle and onto the hood of his car. Sean's head broke the windshield and he was tossed onto the roadway. Sean died from the injuries he sustained as a result of Defendant's actions.
>
> The Defendant also endangered other motorists. One witness testified that the Defendant almost struck her vehicle as he was weaving between lanes.

We have reviewed the record and find the trial court's conclusions supported by the evidence presented at trial. We agree with the state that the proof submitted here was sufficient to meet the legal standard of reckless conduct set out in *McCreary v. State*, 371 So.2d 1024 (Fla. 1979). (ANSTEAD, GLICKSTEIN, JJ., and OFTEDAL, RICHARD L., Associate Judge, concur.)

* * *

**Contempt—Civil contempt for failure to pay support arrearages—Improper to order incarceration in absence of finding of present ability to pay purge amount—Finding that contemnor has willfully divested himself of the ability to pay is not a sufficient substitute for a finding of present ability to pay as a predicate for the imposition of incarceration as a sanction**

THOMAS CAMPBELL, Appellant, v. LIZABETH CAMPBELL, Appellee. 4th District. Case No. 90-0530. Opinion filed December 19, 1990. Appeal of a non-final order from the Circuit Court for Broward County; Paul M. Marko, III, Judge. Peter J. Snyder, Boca Raton, for appellant. Evelyn M. Merchant of Becker, Poliakoff & Streitfeld, Fort Lauderdale, for appellee.

(HERSEY, C.J.) Thomas Campbell appeals an order finding him in civil contempt. He was required to make a $2500 purge payment towards the support arrearages within a time certain or face incarceration. The trial court found that appellant had willfully "reduced his ability to pay court-ordered child support and alimony. This is not a legal excuse for nonpayment."

While this is a correct statement of the law, it does not establish the necessary predicate for incarceration. As explained in *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985): "If incarceration is deemed appropriate, the court must make a separate, affirmative finding that the contemnor possesses the present ability to comply with the purge conditions set forth in the contempt order."

Appellant's evidence comes woefully short of meeting the burden imposed upon him to rebut the presumption that he has the ability to comply with the court's order. Thus we affirm the first point on appeal. However, a finding that appellant has willfully divested himself of the ability to pay is not a sufficient substitute for a finding of present ability to pay as a predicate for the imposition of incarceration as a sanction. The rationale for this rule is explained by the *Bowen* court: "Because incarceration [for civil contempt] is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply. This ability to comply is the contemnor's 'key to his cell'." *Id.* at 1277. This does not rule out the imposition of other sanctions (including criminal contempt under appropriate circumstances) or utilization of collection procedures against appellant's assets.

For the reasons stated, we reverse that portion of the order dealing with incarceration. Otherwise, we affirm and remand for further appropriate proceedings.

AFFIRMED IN PART; REVERSED IN PART; REMANDED. (LETTS and POLEN, JJ., concur.)

* * *

**Criminal law—Discovery—Failure to release taped interview of codefendant to defense counsel—Failure to conduct inquiry per se reversible error**

FREDERICK WESTLUND, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 89-2120. Opinion filed December 19, 1990. Appeal from the Circuit Court for Broward County; John G. Ferris, Judge. Richard L. Jorandby, Public Defender, and Jeffrey L. Anderson, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and John Tiedemann, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Frederick Westlund appeals his convictions for trafficking in cocaine, conspiracy to traffic in cocaine and delivery of cocaine. Appellant contends, inter alia, that the trial court erred in failing to conduct an adequate *Richardson* hearing when it discovered that a taped interview of a codefendant had not been released to defense counsel. We reverse.

The record reveals that the trial court recognized the discovery violation, but failed to conduct an inquiry pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971). The failure to conduct such an inquiry constitutes per se reversible error. *See Smith v. State*, 500 So.2d 125 (Fla. 1986). We find no merit in appellant's other points on appeal.

Accordingly, we reverse appellant's convictions and remand for a new trial consistent with this opinion.

covered under the policy.[1] The agent further advised Revitz to inform the insurance carrier about the first-floor enclosure since concealment of the true facts could cause a voidance of the policy.[2] Revitz requested a quote for flood insurance based on the information and was told that the premium would be $36,000 a year. He then brought this action against the Terrells and the real estate broker. The federal flood insurance policy was allowed to lapse.

At trial, a principal defense raised was that there was no fraud because neither the Terrells nor their agent was obligated to disclose the facts concerning the building code violations, illegal elevation, or flood insurance, because any such representations were not material. After reviewing the exhaustive findings in the final judgment, we reverse on grounds that the trial court misconstrued Florida law regarding fraudulent nondisclosure in the sale of real property.

The leading Florida case on rescission of real estate contracts based on fraud or nondisclosure is *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985). The supreme court held in that case that "where the seller of a home knows of facts materially affecting the value of a property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." *Id.* at 629.

In this case the court found that the building code violations resulting in an illegal elevation and prohibitively expensive flood insurance were not material, as a matter of law, because the contract of sale did not address that subject. That is not the test for materiality in transactions of this nature. *Johnson* provides that any fact which substantially affects the value of the property is material. The undisputed and material facts presented at the nonjury trial are that the house is located in a flood zone, that it was built in violation of local ordinances regarding elevation, and flood insurance would cost $36,000 per year because living quarters have been constructed on the ground floor. It follows that the house is actually worth less than a house identically constructed outside a flood zone, which could be insured for only $400 per year.

Although the *Johnson* court provided examples of the types of facts that a buyer has a duty to disclose, including leaking roofs, flooding, insect infestations, and cracks in walls and foundations, that list is not exclusive.[3] Courts in other jurisdictions have held that nonconformity of the property to local building ordinances and zoning laws is a material fact which must be disclosed.[4] It is also significant in this case that the purchaser, according to his testimony, would not have entered into the real estate contract if the true facts were known. *See Hauben v. Harmon*, 605 F.2d 920, 924 (5th Cir. 1979) (under Florida law a fact is material if, but for the alleged nondisclosure or misrepresentation, the aggrieved party would not have entered into the contract).

The law was settled even before *Johnson* that where there is no duty on the seller to divulge material facts, once a seller makes representations regarding a condition, he is under a duty to disclose the complete truth. *Ramel v. Chasebrook Constr. Co.*, 135 So.2d 876 (Fla. 2d DCA 1961); *see generally* W. Keeton *Prosser and Keeton on the Law of Torts* § 106, at 737 (5th ed. 1984). Assuming that the seller's agent knew, or reasonably should have known, that the $350 per annum flood insurance premium was based on a habitable elevation level of at least eleven feet, there was a duty to disclose that fact to the buyer.[5]

Appellees contend that even if the facts not disclosed were material, they were readily observable to the buyer. We hold, however, that even if the defect was apparent, Revitz's duty to exercise reasonable diligence was satisfied when he specifically inquired why other homes on the street were built on stilts.[6] Revitz was entitled to rely on the agent's representations that flood insurance would cost only $400 annually—a representation by implication that the existence of living quarters on the ground floor presented no unusual insurance coverage problem. *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980) (recipient may rely on truth of representation, even though its falsity could have been ascertained had he made investigation, unless he knows representations to be false or its falsity is obvious to him).

The trial court applied an incorrect test in concluding that certain facts were immaterial in that they were not addressed in the real estate contract. For that reason, the judgment must be reversed.[7]

Reversed and remanded for further consistent proceedings.

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[1]Whether a loss would be covered under the existing policy was a fact contested at trial.

[2]18 U.S.C. § 1001, governing FEMA, provides in part, that:

> whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies [or] conceals ... a material fact, or makes any false, fictitious or fraudulent statements or representation ... shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[3]For a discussion on the scope of the seller's duty to disclose facts, see Note *Real Property—Seller's Liability for Nondisclosure of Real Property Defects*, 14 Fla.St.U.L.Rev. 359 (1986).

[4]*See e.g.*, Britton v. Parkin, 176 Mich.App. 395, 438 N.W.2d 919 (1989) (purchasers entitled to rescind real estate contract based on vendor's incorrect representations concerning zoning). Barder v. McClung, 93 Cal.App.2d 692, 209 P.2d 808 (1949) (kitchen built in violation of local zoning ordinance is material fact entitling buyer to rescission); Curran v. Heslop, 115 Cal.App.2d 476, 252 P.2d 378 (1953) (violation of building code is material fact affecting the desirability of property).

[5]The rule on fraudulent nondisclosure as stated in *Johnson* applies to real estate brokers. Rayner v. Wise Realty Co., 504 So.2d 1361 (Fla. 1st DCA 1987). *See generally* Annotation, *Brokers Liability for Misrepresentation of Physical Defects*, 46 A.L.R. 4th 546 (1986).

[6]The trial court made no finding as to whether the real estate agent had actual knowledge that the flood insurance premium was based on a habitable space elevation level of at least eleven feet. Based on evidence in the record, there is a material fact issue as to whether she knew, or should have known, that the $350 premium was out of line: (1) the agent was very familiar with local flood zone ordinances, (2) she lived only a few houses from the Revitz house, and (3) the Revitz house was the only one on the street not built on stilts. Our reversal, however, is based on the trial court's misinterpretation of Florida law.

[7]It is unnecessary to decide whether the trial court erred in requiring the plaintiff to elect—prior to trial—between the remedies of rescission and damages as it appears from the record that the issue was not preserved for review. *See* Barbe v. Villeneuve, 505 So.2d 1331, 1333 (Fla. 1987).

* * *

**Criminal law—Question certified whether 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, violates holding in *State v. Glosson***

STATE OF FLORIDA, Appellant, v. MICHAEL MAUGERI, Appellee. 4th District. Case No. 89-1774. Opinion filed December 19, 1990. Appeal from the Circuit Court for Broward County; Robert B. Carney, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Miles Ferris, Assistant Attorney General, West Palm Beach, for appellant. Richard F. Rendina, Fort Lauderdale, for appellee.

(LETTS, J.) This cause is affirmed on the authority of *State v. Anders*, 560 So.2d 288 (Fla. 4th DCA 1990).

Notwithstanding our decision here, we are not unaware of the question we certified in *Hunter v. State*, 531 So.2d 239 (Fla. 4th DCA 1988), nearly two years ago, as yet unanswered. We, therefore, certify the question again adding the additional language which we emphasize:

> 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)?

AFFIRMED. (DOWNEY, J., and McNULTY, JOSEPH P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix" has been forwarded by United States Mail to: RICHARD RENDINA, ESQUIRE, 320 Southeast 9th Street, Fort Lauderdale, Florida 33316, this 27th day of March, 1991.

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