IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,089

**STATE OF FLORIDA,**

Petitioner.

vs.

**JAMES M. HERNDON,**

Respondent.

**********

**********

# INITIAL BRIEF OF THE STATE ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority and Appellee in the appended Herndon v. State, 16 FLW 1255 (Fla. 4th DCA May 8, 1991), review granted, case no. 78,089 (Fla. 1991). Respondent, Mario Krajewski, was the criminal defendant and Appellant below.

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

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

## STATEMENT OF THE CASE AND FACTS

This case arose from an arrest which occurred on September 9, 1988. An information was filed by the State on September 30, 1988 (R. 799, 800). This information, as amended on March 13, 1989, charged the Respondent and his Codefendant, Michael Maugeri, Jr., 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.Sta. 893.135(4), 893.135(1)(b)(3) and 893.(2)(a)(4). (R. 68-69).

The Respondent filed several motions based upon the Florida Supreme Court's decision in State v. Glosson, 462 So.2d 1082 (Fla. 1985) and the decision in Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988). These motions included a Sworn Motion to Dismiss Based on Governmental Misconduct and Incorporated Memorandum of Law (R. 876-882); Codefendant Maugeri's Motion to Dismiss Incorporating Memorandum of Law based on Due Process Violations (R. 874-875); Defendant's Motion to Adopt Codefendant Maugeri's Motions, Including Motion to Dismiss Based on Entrapment as a Matter of Law (R. 883); Defendant's Motion to Dismiss Count II of Information (R. 855-856); and Defendant's Motion to Apply Rule of Stare Decisis, with Incorporated Memorandum of Law, to Court's decision on June 12, 1989 (R. 857-860). These motions resulted in the trial court issuing three orders; one granting Codefendant Maugeri's Motion to Dismiss Based on Entrapment as a Matter of Law (R. 871-873), one denying Defendant's Motion to Dismiss Based Upon Entrapment as a Matter

of Law (R. 869-870), and a third denying Defendant's Motion to Apply the Rule of Stare Decisis, which was ruled upon without a hearing (R. 898-C, paragraph 5).

The hearing on the motion to dismiss based on State v. Glosson and Hunter v. State was heard on April 28, 1989 (R. 1-66).

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 Allen Campbell was called by the defense. He testified that he was involved in the arrest of Maugeri and the Appellant (R. 9). The CI was involved in a substantial assistance program and the CI was sentenced in accordance to the substantial assistance agreement. (R. 10-11). Officer Campbell did not participate in the arrest of the CI. He did not monitor the CI's activities because that was Det. O'Connor's responsibilities (R. 12). He knows that the CI was instructed not to make conversation with Maugeri but just to set up a meeting with Det. O'Connor who was acting as a drug buyer (R. 16). The CI had been used successfully one time before (R. 18). The CI was not paid any monies in reference to his assistance (R. 20).

Det. Shawn Joseph O'Connor was called by Maugeri. He testified that CI number 1277 was arrested by him on January, 1988 for trafficking in cocaine. The CI 1277 was facing a 15 year minimum mandatory with a 30 year maximum. CI 1277 entered

into a substantial assistance agreement (R. 23-14). The CI had been used before and another arrest was made (R. 28). No money was paid to the CI for his assistance. In fact, the agreement was that the CI would perform substantial assistance and then the terms of the agreement for substantial assistance would be worked out. So at the debriefing the CI did not really know exactly what the "agreement" was (R. 42). CI was sentenced in accordance to his substantial assistance (R. 30). The substantial assistance program is usually explained to participants that an arrest must be made (R. 31). This meant that the CI couldn't just read a paper about some drug dealer of just say that a person is a drug dealer to perform substantial assistance. His assistance must lead to arrest or a case (R. 45).

Maugeri and the Respondent was not involved in the CI's case involving trafficking (R. 26). A third party had known Maugeri and had met Maugeri. This third party knew that Maugeri was involved in drugs (R. 40). The third party called up Maugeri and told Maugeri that he had some friends coming in from out of town who were looking to purchase five kilograms of cocaine. The third party wanted to know if his friend could call up Maugeri to arrange a deal. The third party then gave the name of Maugeri to the CI but not to Det. O'Connor (R. 36,38,46-47). The third party gave no information concerning the Respondent nor did the third party know Respondent (R. 47,48). The third party was assisting the CI in this case as far as giving him a name and phone number and making a previous contact with Maugeri because the third party was a friend of the CI and wanted to help the CI (R. 36). The third party did not get paid (R. 38).

On instructions from Det. O'Connor the CI set up the first meeting with Maugeri. The first time the CI met Maugeri was at that meeting which was the first time Det. O'Connor met Maugeri. Maugeri did not know the CI nor did the CI know Maugeri until that first meeting which Det. O'Connor was present at. The CI introduced himself to Maugeri as Coo-Coo. This first meeting was at the Pizza Hut and no wires were worn by either Det. O'Connor or the CI (R. 34-35, 49-51). Prior to that fist meeting at the Pizza Hut the CI had never met or talked to Maugeri (R. 50).

The first time Det. O'Connor met Respondent was the day Respondent was arrested. Respondent was not present at the first meeting nor was his name mentioned (R. 26, 39).

After this first meeting the CI had no further contacts with Maugeri nor was he involved in the drug deal (R. 49).

The trial then said:

> ...In the Court's view the conduct that is sought to be prevented is to turn loose a confidential information on the streets and say we don't care how you find crime, we don't care if you create it or not, do whatever you have to do to get it....the possibility of entrapment is so strong that the Courts may well take the view to simply avoid that conduct. We are going to simply say that if you do it, it is a violation of due process.
>
> But the underlying reason here is basically one of entrapment and where only someone in contact with the police is able to raise entrapment it seems very difficult for me to accept that where Mr. Herndon would not have available to him any entrapment defense as far as police misconduct.
>
> Nevertheless, he could travel on a due process theory even though he couldn't raise entrapment and would never have it available to him as a

> defense and could not raise it in front of a jury. He would have a due process argument based upon an entrapment defense, which he is not entitled to and in this Court's view flies right in the teeth of what common sense actually dictates.
>
> If there is a due process violation, once again, we have to determine whose rights are actually violated. If the confidential informant has no contact with Mr. Herndon at all, never deals with him and has no connection with Mr. Herndon of any kind, it is difficult to imagine that Mr. Herndon's due process rights, because of the confidential informant's misconduct, are violated.
>
> Mr. Maugeri's rights may be, but Mr. Herndon's rights, I don't think, would be.

(R. 62-63). The trial court denied Appellant's motion to dismiss (R. 827-828).

TRIAL

Officer Allen Campbell testified that he acted as counter surveillance for Det. O'Connor when Det. O'Connor met with Maugeri at the Pizza Hut on State Road 7 at about 7:00 to 8:00 on the evening on September 8, 1988 to discuss the purchasing of five kilograms of cocaine from Maugeri (R. 184-186). Det. O'Connor was not wearing a body bug because this was the first contact (R. 186). The conversation between Maugeri and O'Connor in the parking lot lasted about 20 minutes (R. 189). Later the following day, September 9, 1988, Officer Campbell was informed that the deal with Maugeri was to take place at about 4:00 in the afternoon at the Hollywood Hills Motor Lodge (R. 189). He arrived at the Hollywood Motor Lodge in time to see a red pick-up truck arrive. Respondent was driving and Maugeri was the

passenger (R. 191). Det. O'Connor talked to Maugeri and it appeared as if the Respondent was turned toward the open door of the truck listening (R. 193). It appeared as if the Respondent was involved in the conversation (R. 193).

After about 4 to 5 minutes Det. O'Connor and Maugeri walked around the back of the truck to the driver's side. At the same time Respondent had gotten out of the truck. Appellant unlocked the tool box that was mounted to the truck. All three of them appeared to look inside the tool box. After a short time Appellant got back in the truck and Maugeri and O'Connor went into the hotel room (R. 194).

They were in the hotel room for about 4 to 5 minutes. Respondent remained in the driver seat of the trunk. Maugeri came out of the hotel room and approached the driver's side of the pick-up truck. Respondent stepped out of the truck and opened the tool box again. A brown paper bag was removed. Maugeri took the brown paper bag inside the hotel room. Respondent began to revved the truck up. A few moments later Appellant backed up the truck into the parking lot facing in a southwesterly direction (R. 195, 197) Shortly after that a take down signal was given and Maugeri was taken into custody. Respondent tried to drive away but was stopped (R. 198).

A Detective Simcox found a gun in the truck (R. 204). The gun was right on the edge of the seat where the driver could reach down and retrieve the gun (R. 205). It was a Biretta handgun (R. 206). The gun was loaded (R. 211).

On cross Officer Campbell testified that a kilo of marijuana cannot be mistaken for a kilo of cocaine. A brick of marijuana is not the same size as a kilo of cocaine (R. 226-227). While in custody Respondent stated that he had made a big mistake (R. 233).

Detective Richard Friedman testified that he was assigned to act as surveillant for Det. O'Connor in a narcotic transaction in the parking lot of the Hollywood Hills Motor Lodge. He was in a van with two other detectives: Det. Campbell and Det. Symcox (R. 242-244). He observed Det. O'Connor arrive in the parking lot and saw the red pick up truck arrive about 5 to 10 minutes later (R. 244-246). The driver was the Respondent and the passenger was Maugeri (R. 248). Det. O'Connor went over to the passenger side. The passenger got out of the car. It appeared that O'Connor was talking to both subjects (R. 247). Respondent then exited the truck and Det. O'Connor and Maugeri walked around to the driver's side. The Respondent unlocked the tool box in the back of the truck and all three appeared to look inside (R. 249). Afterward, Maugeri and O'Connor went into the hotel room and Respondent closed the tool box and returned to the driver's seat (R. 250). After five minutes Maugeri came out of the hotel room and Respondent again exited the truck. Respondent unlocked the tool box (R. 251). Both Maugeri and Respondent placed their hands in the tool box but Maugeri removed a brown paper bag from the tool box. Maugeri then walked back in the motel with the paper bag in his possession (R. 252). Respondent returned to the driver's seat after closing the tool box (R. 252). After 4 to 5

minutes Respondent backed out of the spot and parked about 20 feet from the hotel room. The signal was given. Respondent began driving away but was cut off by an unmarked police vehicle (R. 252-253). Respondent told Det. Friedman that there was a gun in the truck (R. 254).

Det. Simcox testified that he was assigned to surveillance at the hotel (R. 264). He saw the red pick-up truck arrive. The passenger exited the truck. Maugeri and O'Connor conversed for a couple of minutes (R. 266). Maugeri and O'Connor began to talk to the Respondent. Both were looking toward Respondent (R. 267). Respondent then exited the truck and Maugeri and O'Connor went to the driver's seat of the truck. Respondent unlocked the tool box and they all peered inside (R. 268). Respondent had his hands in the tool box but Det. Simcox could tell what he was doing (R. 269). Respondent closed the tool box and returned to the driver's seat. Maugeri and O'Connor went into the hotel room (R. 269). After a few minutes Maugeri exited the hotel room. Respondent got out of the car and unlocked the tool box again. They both reached into the tool box and it appeared that Respondent handed Maugeri a bag. Maugeri went back into the hotel room with a brown paper bag (R. 270, 271). Respondent later pulled the pick-up truck out of the parking space and parked facing in an easterly direction. The take down signal came. Respondent tried to leave but was stopped (R. 271, 272, 274). Det. Simcox did not hear Respondent make any statements. Det. Friedman told Det. Simcox where the gun was (R. 275). Det. Simcox found the gun underneath the driver's side (R. 276). The

gun was loaded (R. 290). The gun was readily accessible to the driver of the truck (R. 298). The key to the tool box was where the horn normally would be at --it was stuck in the steering wheel column (R. 297).

King Brown is the identification technician with the Hollywood Police Department. He identified the yellow taped parcel contained in a yellow Rose Auto bag all of which was in two brown paper bags. He photographed the truck and the handgun in the pouch of the driver's side (R. 315). The weapon was loaded (R. 321, 344).

Mary Ferguson is employed with the crime lab as a forensic chemist (R. 373). The substance found in the bag was cocaine (R. 383, 390).

Det. Edward Goldback conducted surveillance for Det. O'Connor on September 9, 1988 at the Pizza Hut on State Road 7 (R. 395). There was not enough time to set up a video (R. 395). After Det. O'Connor arrived two rather larger white males arrived in a yellow car (R. 397). All three spoke to each other for 5 to 10 minutes (R. 404).

About two hour later Det. Goldback was assigned to surveillance at the Hollywood Hills Motor Lodge. He was in charge of video taping the transaction. In was approximately five in the afternoon (R. 406). The audio is not very good because of the traffic noise and the static (R. 409). O'Connor was standing outside when the red-pick-up truck arrived (R. 410). The two individuals in the truck were the same two he observed talking to O'Connor at the Pizza Hut about two hours earlier (R.

411). The passenger exited the vehicle and began talking to O'Connor (R. 411). The audio portion of the tape is not good (R. 412). Both of them walked over to the passenger side of the truck and began talking to the Respondent through the open door (R. 413). The Respondent then exited the vehicle and O'Connor and Maugeri walked around the back of the vehicle to the driver's side. The Respondent unlocked the tool box and lifted the top up (R. 414). They all peered into the tool box (R. 414). O'Connor and Maugeri went into the hotel room and Respondent closed the tool box and returned to the driver's seat (R. 416). Maugeri came out of the hotel room. The Respondent unlocked the tool box and Maugeri took the paper bag back into the hotel room. The Respondent then backed the pick-up truck out of the parking spot and turned the car in an easterly direction. O'Connor gave the take down signal (R. 417). The Respondent saw Maugeri get arrested and tried to leave the parking lot (R. 418-419). He was stopped and arrested (R. 419). The video was shown to the jury (R. 431).

Det. O'Connor testified that he met Maugeri on September 8, 1988 with the CI named Coo-Coo at the Pizza Hut in Hollywood. Al Campbell was on surveillance. It was approximately 8:00 to 9:00 in the evening (R. 453-455). This was their first meeting and it lasted approximately 10 to 15 minutes. O'Connor made a deal to buy five kilos of cocaine for $18,500 a piece (R. 458). The type of cocaine was discussed too (R. 459). Maugeri stated that most of his clients prefer the beige type of cocaine because it cooks up better for crack cocaine. White is more for snorting (R.

459). Maugeri gave Det. O'Connor his beeper number and told O'Connor to call him the next morning. A time and place to do the deal would be decided at that time (R. 460).

About 9:10 the next morning O'Connor beeped Maugeri and Maugeri returned the call. This conversation was taped. Maugeri said that his partner was on his way over and asked if O'Connor would call back (R. 461-462).

O'Connor called back on Maugeri's beeper. Maugeri called O'Connor back (R. 462). Maugeri stated that his partner did not want to do all five kilos at once. O'Connor said that he wanted at least half or 2.5 kilos done. Maugeri said that he would try to get half and that he wanted to do it at the hotel. Maugeri said he would have to ask his partner. This conversation was at 12:55 (R. 462, 464, 465).

At 2:40 Maugeri called O'Connor and advised O'Connor that he and his partner wanted to meet O'Connor and talk in person. Maugeri said that he was ready to do the deal but that "they" wanted to talk to O'Connor. Maugeri used the word "we" in reference to talking to O'Connor. A meeting was set up at the same location (R. 466).

O'Connor knew that there would be more than one person at the meeting because Maugeri mentioned the fact that his partner would be there. The meeting at Pizza Hut was set up for 3:00 or approximately 20 minutes after the phone conversation. O'Connor asked two officers to act as surveillance: Det. Goldback and Det. McDermott (R. 467).

All of the taped phone conversations were played for the jury (R. 477-480; 481-485; 486-490; 495-496).

The meeting took place at 3 pm and there was not enough time to set up audio or video (R. 397). Maugeri and Respondent arrived together (R. 498). Respondent was the passenger. Maugeri introduced Respondent as his partner (R. 499). Maugeri advised O'Connor that they were ready to do the deal and that they had "it". Maugeri said the coke looked good. Respondent advised O'Connor that the quality was good and that O'Connor was going to "like it". O'Connor told both of them that the price was a little high (R. 500). They both said that the price was a low as they were going (R. 501). Maugeri said that he would not do all five at one time because he had informed Respondent that he had not done business with O'Connor before. Respondent then did not want to take a chance and do all five at one time (R. 502). It was decided at that meeting that the deal would be consummated at 4 pm at the hotel. One kilo would be bought by O'Connor. It would then take about one hour before Maugeri and Respondent could get back to do the other four kilos. O'Connor left the meeting saying he would call them later (R. 503).

The last phone conversation was 3:35 pm. O'Connor beeped Maugeri and Maugeri called him back. O'Connor said that he would meet them in 25 minutes. Maugeri told O'Connor to wait outside the hotel room (R. 504). The tape of that phone conversation was played for the jury (R. 507-508).

O'Connor arrived at the hotel at 4 pm and Respondent and Maugeri arrived at 4:15. Respondent was driving (R. 509, 511).

Maugeri said that he wanted to see the money and O'Connor said he wanted to see the coke (R. 513). The tape of the transaction did not turn out because of all the traffic noise (R. 513). Maugeri got out of the truck but left the door open (R. 514, 515). Maugeri spoke to the Respondent. Respondent wanted to do the transaction in the parking lot. O'Connor wanted to make sure they had the coke before he gave them the money. When O'Connor was talking to Respondent and Maugeri about seeing the coke Maugeri said that the coke was in the tool box in the back of the truck (R. 516).

After that O'Connor observed Respondent remove a key from the steering wheel cover and get out of the car. Maugeri and O'Connor walked around to the driver's side of the truck. Respondent unlocked the tool box (R. 517). After unlocking the tool box, Respondent reached into the tool box and opened the brown paper bag. He picked up the contents of the bag which was yellow shaped package which had the word TALO written across it in red (R. 518). Respondent was holding a kilo in his hand. There was a flap of material that had been cut away into the package (R. 519). The cut away portion revealed the contents of the package. As Respondent held the cocaine package in one hand he used his other hand to fold back that portion that was cut away to reveal the cocaine inside. Respondent then locked the tool box (R. 520). Maugeri and O'Connor went into the hotel room. Maugeri asked to see the money (R. 526). After seeing the money, Maugeri went out to get the coke. Maugeri returned with the brown paper bag which contained the cocaine (R. 527, 529,

530). After making the exchange, Maugeri and O'Connor talked about doing the other four kilograms of cocaine. Maugeri restated that it would be at least an hour before the other four could be done. Maugeri then asked if he could take two grams of coke for himself (R. 530). This he did (R. 531). O'Connor asked why Respondent was revving up the engine. Maugeri said that Respondent was nervous (R. 533).

The CI never heard of the Respondent before. The CI only arranged the initial meeting at the parking lot of the Pizza Hut with Maugeri, upon the request of O'Conner. (R. 543).

Respondent called two witness who confirmed that Respondent told them that he was going to drive somebody up to Broward to deliver some marijuana (R. 667, 687).

Respondent's defense at trial was that he intended to traffic in cannabis, therefore, he is not guilty of trafficking cocaine (R. 699).

The Defendant was found guilty after a jury trial and sentenced in accordance with the mandatory requirements of the trafficking statutes. The Defendant filed a Motion for New Trial (R. 923, 924) based upon the trial court's denial of the Defendant's Motion to Dismiss based on the holdings in Glosson and Hunter.

The Defendant filed a Notice of Appeal on December 19, 1989 (R. 925).

The Fourth District Court of Appeals found as follows:

> The sole issue in this appeal is whether a codefendant, who was not the informant's target and who has no entrapment defense of his own, must

> nevertheless be discharged. Our review of *Glosson, Anders, and Hunter*, reveals that in each case others who were not the targets of the government agent were similarly discharged. This issue is presently pending before the Supreme Court in the second issue certified in *Hunter*.
>
> There is no need to address the underlying facts in this appeal because we must assume that Maugeri, the codefendant-target, was properly discharged. For this reason we also need to consider *Jamarillo v. State, 576 So.2d 349 (Fla. 4th DCA 1991)*, and *Khelifi v. State, 560 So.2d 333 (Fla. 4th DCA), rev. denied, 574 So.2d 141 (Fla. 1990)*.
>
> Therefore, the judgment and sentence are reversed. Upon remand, the defendant is to be discharged. As to all other issues raised we find no error or abuse of discretion.
>
> We certify to the Supreme Court the same questions certified in *Krajewski v. State; State v. Anders,* and *Hunter v. State*.

The decision in codefendant Maugeri's case is now before this Court in State v. Maugeri, Case No. 77,323.

The State then timely invoked the discretionary certiorari jurisdiction of this Honorable Court to review the decision of the Fourth District Court of Appeal.

## SUMMARY OF ARGUMENT

The certified question should be answered as follows: Performance of an agreement under 893.135(4) as amended, whereby an informer will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying does not offend concepts of due process under Art. I, §9, Fla. Const., as that clause is interpreted in Glosson v. State, 462 So.2d 1082 (Fla. 1985); a limited holding, applicable only to its facts.

Any other answer to the question will be inconsistent with this Court's precedent, the intent of the people of Florida to stop drug trafficking, the decisions of the United States Supreme Court, the rulings of concurrent state jurisdiction on the same point of law and an encroachment on the rights and responsibilities of the executive branch of state government to enforce the criminal law.

Even if Hunter v. State is upheld, the case is distinguishable from the case sub judice because the informant never had contact with the Respondent and never knew of the existence of the Respondent. The informant's actions were statutorily authorized; no contingency fee was paid, there was no promise of a reduced fee, no undue pressure or threats were used and the informant's testimony was not needed at the trial in order to convict the Respondent. Finally, the respondent was brought into the instant transaction by his codefendant Maugeri, who was initially contacted by a third party, not the informant. In State v. Glosson, 462 So.2d 1082 (Fla. 1982): State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990); Hunter v. State, 531 So.2d 239

(Fla. 4th DCA 1988); and Krajewski v. State, 16 FLW 692 (Fla. 4th DCA March 13, 1991) the confidential informant made contact with all of the defendants and codefendants who were subsequently found guilty of the charges.

In the instant case, the informant had no contact with Respondent and he never knew of Respondent's existence.

## ISSUE

**DOES PERFORMANCE OF AN AGREEMENT UNDER SECTION 893.135(4) AS AMENDED, WHEREBY AN INFORMER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING, CONSTITUTE A PER SE VIOLATION OF THE HOLDING IN STATE V. GLOSSON, SO.2D 1082 (FLA. 1985) AS TO AN INDIVIDUAL ENSNARED BY THAT PERFORMANCE?**

The trial court in the instant case dismissed the trafficking charges against the Appellant's co-defendant, Maugeri, as mandated under State v. Glosson, 462 So.2d 1082 (Fla. 1985) as interpreted by the Fourth District Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988) which is now before the Supreme Court of Florida, Case No. 77, 323. The trial court refused to dismiss the charged against the Respondent because the Respondent had no contact with the confidential informant nor did the confidential informant know of the Respondent's existence. Furthermore, the police did not know of Respondent's existence until the day of the drug transaction when the co-defendant introduced the Respondent to the police some two hours before the transaction. The trial court particularly found that if the Respondent cannot raise the defense of entrapment before the jury that it would be illogical to allow the Respondent to ride on the shirt tail of the co-defendant on a due process theory based on an entrapment defense.

However, this is exactly what the Fourth District Court of Appeals held when it reversed the trial court's decision and set aside a jury verdict based on the holdings of State v. Glosson, Hunter v. State, and State v. Anders. The Fourth District Court

held that the Respondent was not the informant's target and Respondent had no entrapment defense of his own. Nevertheless, since the co-defendant Maugeri was, in the opinion of the Fourth District Court, entrapped as a matter of law then the Respondent's due process rights were also effected, thus, he too must be discharged.

This unwarranted extension must be put aside with a negative answer to the certified question.

**OVERVIEW**

In State v. Glosson, 462 So.2d 1082, 1085, this court condemned a scheme whereby the state had agreed to pay an informant a percentage of all civil forfeitures resulting from criminal convictions he was to help obtain by selling those defendants' drugs. The Court reasoned 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. That determination stands in stark contrast to the interpretations of due process outlined by the Fifth and Eleventh Circuit Courts of Appeal which provide that the government may utilize informants under fee agreements even if informants are to be paid large sums of money. See, e.g., United States v. Shearer, 794 F.2d 1545, 1549 (11th Cir. 1986), and the cases enumerated therein. Under the interpretation of due process in the Eleventh Circuit, the government cannot use contingent fee agreements for informant participation in drug deals if the plan is for the informant to

engage in possible criminal activity with an individual that has been preselected as a government target. As is indicated in the collected cases, Shearer points to a careful and deliberate balance between the legitimate constitutional duties given to the executive branch to carry out the enforcement of drug laws and the constitutional prohibition against oppressive police conduct so shocking that it may not stand as a matter 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. Glosson 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 was not needed or used, 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 necessarily 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 Glosson was, despite its unusual facts, couched in the broadest of terms, the Fourth District Court of Appeal has repeatedly found that its holdings demands reversal of otherwise legitimate convictions of drug dealers. For example, in Hunter v. State, 531 So.2d 239, 240-243, the Fourth District greatly extended Glosson to rule that the state's actions in permitting a loosely supervised convicted narcotics peddled to render "substantial assistance" to it and hence earn its recommendation that he receive a reduced sentence by persistently enticing and allegedly threatening those defendants into consummating a large cocaine deal, and then testifying against them at trial, likewise constitutionally precluded their convictions. In State v. Anders, 560 So.2d 288, 291-293, the Fourth District again extended Glosson and fortified Hunter to hold that the state's actions in allowing an almost totally unsupervised convicted drug trafficker, who would have been its primary witness at trial, to attempt to render substantial assistance by selling the defendants a large amount of cocaine, similarly precluded their convictions.

In Herndon v. State, 16 FLW D1255 the Fourth District Court's extending the rationale of the above cited cases to include all defendants indicted even though they are brought into the scheme by a co-defendant, never have contact with the informant nor does the informant ever know about the defendant's existence and, finally the Law Enforcement Officers never negotiate with the defendant or are aware of the defendant's existence until a few hours before the transaction. In other

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words the Fourth District is extending Glosson/Hunter/Anders rationale to all those defendants, whom the informant never knew existed, because the initial contact amounted to a due process violation - this is analogous to the "fruit of the poisonous tree."

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 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

co-defendant to consummate the deal, let alone any evidence of threats. As such, Respondent was clearly not entitled to a due 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 indirect 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). Respondent admitted at trial that he intended to traffick in contraband.

Furthermore, the fact remains that Respondent was not even directly brought into the instant scheme by the C.I.; as noted, co-defendant Maugeri was brought in by an unidentified third

party and Maugeri brought in Respondent whom Maugeri "called his partner." 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 realized 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 . 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.

The state respectfully submits that the extensions of the Glosson holding by the Fourth District in Hunter, Anders and Herndon are doctrinally unsound and that these three holdings, in practice, will handcuff acceptable law enforcement tactical efforts to stem the tide of narcotics, illegal weapons and other contraband smuggling in this state. Consequently, this court must limit Glosson to its peculiar facts (which included unethical conduct by a prosecutor), and answer the certified question in the negative.

## DUE PROCESS DEFINED

Article I, Section 9 of the Constitution of the State of Florida (1968) reads:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

The due process clause of this section, which has remained substantially unchanged since 1885, see Florida Statutes Annotated (1970 Ed.), Vol. 25A, Commentary, pages 111-112, mirrors the command of the Fourteenth Amendment to the Constitution of the United States, Section 1, that no "state...shall...deprive any person of life, liberty, or property, without due process of law."

There is a total absence of evidence that the people of Florida have ever intended that their due process clause should be construed as anything less than wholly coextensive in coverage to the federal due process clause. See Florida Canners Assoc. v State, Dept. of Citrus, 371 So.2d 503, 513 (Fla. 2nd DCA 1979), affirmed as Coca-Cola Co. v. State, 406 So.2d 1079 (Fla. 1981), dismissed, 456 U.S. 1002 (1982), holding that the deprivation of property aspect of the due process clause of Article I, Section 9 is coextensive to that of the Fourteenth Amendment to the Constitution of the United States. Moreover, in State v. Cantrell, 417 So.2d 260 (Fla. 1982), this Court held that the double jeopardy clause of Article I, Section 9 is coextensive to that contained in the Fifth Amendment, a holding it in essence reaffirmed in State v. Smith, 547 So.2d 613, 614 (Fla. 1989).

The coextensivity of the two provisions of Article I, Section 9 logically dictate the coextensivity of the entire section, including the remainder of the due process clause. Yet beginning with State v. Glosson, and continuing with Haliburton v. State, 514 So.2d 1088, 1089-1090 (Fla. 1987), and Walls v. State, 16 FLW S254, 255 (Fla. April 11, 1991) (rehearing pending), this court has, while providing progressively less analytical justification for such a distinction, gradually interpreted our state due process clause to provide greater and greater protections to the criminal members of our society.[1] In that the governmental conduct condemned in Hunter, Anders, and this case would cut due process muster in the Supreme Court of the United States, the courts of our two neighboring states, and our federal circuit court of appeals, the state due process decisions of the Florida judiciary have effectively come to provide fewer protections to the law-abiding members of our society. See e.g. Talbott v. State, 251 S.E. 2d 126 (Ga.App. 1978); Tyson v. State, 361 So.2d 1182 (Ala. App. 1978); United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984); United States v. Russell, 411 U.S. 423 (1973) and Hampton v. United States, 425 U.S. 484 (1976). This is, quite simply, intolerable.

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[1] In Walls, this Court merely stated that our due process clause mandates "fundamental....fairness" by the state towards criminal defendants, a term which the Court would surely strike down as unconstitutionally vague if found in a criminal statute, compare Warren v. State, 572 So.2d 1376 (Fla. 1991).

Former United States Supreme Court Justice Oliver Wendell Holmes, dissenting in Lochner v. New York, 198 U.S. 45, 75-76 (1904), immortally proclaimed that the federal constitution "does not enact....[the economic philosophy of] Herbert Spencer." Chief Judge George Hersey of the Fourth District, speaking for that court in the decision under review, cogently recognized that "the availability of [our state] due process defense rests upon the judicial (and personal) philosophy of the trial court, three appellate judges, and seven supreme court justices, [and consequently is] subjective," Krajewski v. State, 16 FLW D692, 695. The state respectfully submits that this honorable court must rectify this situation by adopting the sentiments of Justice Holmes. The pillars of our state constitution do not sway in the breezes of judicial activism of the right or the left. The definition of due process violations in the context of the use of informants is concisely stated in United States v. Smith, 924 F. 2d 889 (9th Cir. 1991):

> For a due process dismissal, the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983); Citro, 842 F.2d at 1152. The Government's involvement must be malum in se or amount of the engineering and direction of the criminal enterprise from start to finish. Citro, 842 F.2d at 1153. The police conduct must be "repugnant to the American system of justice." Shaw v. Winters, 796 F.2d 1124, 1125 (9th Cir. 1986). (Quoting United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), cert denied, 464 U.S. 1067, 104 S.Ct. 720, 79 L.Ed.2d 182 (1984). In short, a

defendant must meet an extremely high standard.

The Smith court then went on to catalog a number of scenarios in which the courts have upheld law enforcement techniques that may be distasteful to certain members of our society but are yet not so fundamentally shocking that they threaten to shake the very foundation of the justice system. Those activities which survive due process scrutiny included the use of false identities by undercover agents, supply of contraband to the defendant, the commission of equally serious offenses by an undercover agent as part of the government's investigation, the introduction of drugs into a prison in order to identify a distribution network, the assistance and encouragement of escape attempts in prisons, and the use of heroin-using prostitute informant who engaged in regular sexual intercourse with the defendant. This last incident is outlined in United States v. Simpson, 813 F. 2d 1462 (9th Cir. 1987).

In the Smith case, the government drug agents encouraged an 18-year-old patient who was recovering from serious problems at a drug treatment center to become engaged in a drug distribution activity by use of a fellow patient who was also a government informant. This informant had been told by agents of the government that he might receive payment for his work. As a result of this informant's activity, Smith and others were arrested and charged with federal narcotics offenses. On appeal, they argued that the government's utilization of an informant within a drug treatment environment constituted outrageous

conduct in that the informant was able to exploit the "vulnerability and emotional dependence " of the defendant. Id. at 897. The Ninth Circuit rejected the claim, find:

> Although drug agents encouraging 18-year-old patients in drug treatment centers to deal drugs is not the most constructive enforcement method, it does not rise to the level of outrageous conduct necessary to constitute a due process violation. Here, Popp showed a tendency for dealing drugs independent of any action on the part of the DEA; Popp met with Lofto and discussed drugs and drug distribution with him prior to Lofto's DEA affiliation. Moreover, thee is no evidence supporting Popp's claim that the government exploited Popp's alleged dependence on Lofto. In fact, notwithstanding Popp's testimony to the contrary, thee was evidence that Popp, not Lofto, was the driving force behind the drug discussions and transaction. Thus the district court properly denied Pop's motion to dismiss the indictment.

Id. The importance of the Smith approach to due process claims is its focus upon fact specific analysis of law enforcement technique. As the Fourth District Court of Appeal admits, the impact of an affirmative answer to the certified question would be the emasculation of the substantial assistance statute. Such a result is not supportable from a due process perspective in that a due process analysis assumes as a given the legitimate right of the Legislature to enact law governing criminal conduct and an independent coextensive right of the executive branch to administer and effectuate those laws. If the people of Florida are unhappy with the substantial assistance law, they can lobby their legislature to repeal it. This Court should not, in effect, effectuate that purpose when the only lobbyists who have

argued that point are convicted drug dealers like the Respondent. To hold differently would be to perpetrate a patent legal faction, contrary to the lofty aspiration that ours should "be a government of laws and not of [individuals]." Constitution of Massachusetts, Declaration of Rights, Article 30 (1780).

In United States v. Simpson, 813 F.2d 1462, 1464-1465 (9th Cir. 1987), the court instructively noted:

> Chief Justice Rehnquist's oft-quoted dictum in United States v. Russell, 411 U.S. 423, 431-32...(1973), that the Supreme Court "may someday be presented with a situation in which the conduct of law enforcement officers is so outrageous that [federal constitutional] due process principles would absolutely bar the government from invoking judicial process to obtain a conviction..." left the door open to a due process claim...However, we have acknowledged that "the due process channel which Russell kept open is a most narrow one." [United States v. Ryan, 548 F.2d [782], 789 [9th Cir. 1977, cert. denied, 430 U.S. 965 (1977)].

As noted above, in Simpson, the Ninth Circuit found that the government's use of a paid informant, a prostitute who acted as a close personal friend of the defendant and regularly engaged in sexual intercourse with him so that she could lure him into selling heroin to undercover FBI agents, did not amount to such outrageous conduct as to result in a federal due process violation. See also United States v. Gonzales, 927 F.2d 139 (3rd Cir. 1991) (no due process violation in the government's use of an informer who was promised up to 25 percent of any drug forfeiture proceeds).

Clearly, the governmental conduct in this case is far less questionable than that approved by the federal courts in Simpson or Gonzales. Even if this court elects to validate the extensions of Glosson undertaken by the Fourth District in Hunter and Anders, the State would submit that Herndon could be easily and dispositively distinguished from those cases by the simple fact that the instant transaction was commenced by a third party, the confidential informant had minimal contact with the co-defendant amounting to an introduction only, the informant never had contact with the Respondent nor knew of Respondent's existence, the police only learned about Respondent two hours before the transaction and Respondent admitted he was there to traffic in contraband. Respondent, himself, has no entrapment defense. Consequently, Respondent's due process right is simply not involved here. Compare State v. Fernandez, 546 So.2d 791, 793-794 (Fla. 3rd DCA 1989), State v. Perez, 438 So.2d 436, 438 (Fla. 3rd DCA 1983), State v. Garcia, 529 So.2d 76 (Fla. 2nd DCA 1988), review denied, 536 So.2d 244 (Fla. 1988); and State v. McQueen, 501 So.2d 631 (5th DCA 1986), review denied, 513 So.2d 1062 (Fla. 1986).

**ENTRAPMENT**

Just as Respondent is entitled to no relief from the adjudications and sentences entered against him by the trial court on grounds of state constitutional due process, neither is he entitled to any relief on grounds of entrapment. In Cruz v. State, 465 So.2d 516, 521-522, this court drew a distinction between the defense of "subjective entrapment," where a defendant

argues to a jury that he was not predisposed to commit the charged offenses, but merely succumbed to unfair police inducements and therefore should be acquitted, and the defense of "objective entrapment," where a defendant argues to a judge prior to trial that regardless of his predisposition to commit the charged offenses, the attendant police conduct was no outrageous that he should be discharged regardless of his predisposition.

The Fourth District has noted that various decisions of the Florida judiciary have rendered "the objective prong of the entrapment defense and the due process [defense]...substantially similar" in practice, State v. Anders, 560 So.2d 288, 290 note 1. This should not be the case insofar as, contrary to the due process defense, neither type of entrapment defense is of constitutional dimensions. United States v. Russell, 411 U.S. 423, 433. Therefore, as the Fourth District correctly concluded below, the Florida Legislature was clearly within its rights when it responded to this Court's decision in Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985), by enacting Section 777.201(2) to abolish the defense of objective entrapment. Krajewski v. State, 16 FLW D692, 693; accord, Gonzalez v. State, 571 So.2d 1346 (Fla. 3rd DCA 1990) and Gonzalez v. State, 525 So.2d 1005, 1006, note 1 (Fla. 3rd DCA 1988); contra, Bowser v. State, 555 So.2d 879, 881-882 (Fla. 2nd DCA 1989).

It should be rembered that the United States Supreme Court has never placed a defense of entrapment on any type of pedestal. Recall then Justice Rehnquist's opinion in Hampton v. United

States, supra,"...The Defense of entrapment is not intended to give the federal judiciary a 'Chancellor's foot' veto over law enforcement practices of which it did not approve..." 48 L.Ed.2d at 119. At a time when there is a clear legislative mandate to utilize informants and to allow those informants to obtain objective benefits from their cooperaton with the police, it would be mistake of major proportion for this Court to affirm the decision of the district court in this case. Plainly stated, such a decision would not bring police invesstigatory tactics of this nature to a halt. Rather, cases involving major narcartics dealers like Herndon would simply be taken to federal authorities for prosecution in the federal system where, as seen from the above discussion of case law, these practices are, as a matter of law, deemed acceptable. There in federal courts the defendants will be able to present to a jury of citizens their arguments that they were entrapped. If the juries believe those arguments, the defendants will benefit in an appropriate manner. The messagae that an affirmative answer to this question will give wil be simple. The message that an affirmative answer to this question will give will be simple. The message will be that Florida's judiciary has no faith in the jury system and no faith that trial judges can operate on a case-by-cae basis to enforce the concept of due process of law as it exists under the state and federal constitution.

Petitioners therefore urge this Court to answer the certified quetion in the negative. The district court of appeal has suggested an appropriate policy for guidance in the closing

paragaph of the instant opinion. It states that the use of a basic agreement for reduced sentence with conditions that the informant's activities be monitored to protect against untruthful testimony and the "additional caveat that some amount of corrobroating evidence exiss in the case would provide useful guideposts for a case-by-case analysis of possible due process violations." That approach merits this Court's endorsement.

## CONCLUSION

Petitioner urges this Honorable court to answer the certified question in the negative and reverse and remand this case to the district court of appeal with appropriate directions.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by United States Mail to: GUY TURNER, ESQUIRE, 800 Douglas Road, Suite 219, Coral Gables, Florida 33134, this 29th day of July, 1991.

Of Counsel

/pas

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,089

**STATE OF FLORIDA,**

Petitioner.

vs.

**JAMES M. HERNDON,**

Respondent.

**********

**********

**APPENDIX TO**

**INITIAL BRIEF OF THE STATE ON THE MERITS**

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under rule 9.140(c) as there is no jurisdictional restriction to our considering such an order, regardless of its form.

We note that the Fifth District, en banc, has recently granted rehearing and declined to follow the opinion of the initial panel in *Sauafley* (sic). *State v. Saufley*, 574 So.2d 1207 (Fla. 5th DCA 1991).

Therefore, the motion for rehearing is granted and the order of this court dismissing this appeal for lack of jurisdiction is withdrawn. (HERSEY, C.J., DOWNEY, ANSTEAD, LETTS, GLICKSTEIN, DELL, WARNER, POLEN, and GARRETT, JJ., concur. GUNTHER and FARMER, JJ., did not participate.)

* * *

**Criminal law—Question certified whether agreement whereby a convicted drug trafficker will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for state violates holding in *State v. Glosson*—Question certified whether *Glosson*'s holding extends to codefendant who was not direct target of government's agent**

JAMES M. HERNDON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 89-3265. Opinion filed May 8, 1991. Appeal from the Circuit Court for Broward County; Robert B. Carney, III, Judge. Guy W. Turner of Guy W. Turner, P.A., Coral Gables, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We reverse appellant's conviction for armed trafficking and conspiracy to traffic in cocaine. In *State v. Maugeri*, 570 So.2d 1153 (Fla. 4th DCA 1990), this court upheld the dismissal of all charges against the appellant's codefendant on the authority of *State v. Glosson*, 462 So.2d 1082 (Fla. 1985); *State v. Anders*, 560 So.2d 288 (Fla. 4th DCA 1990); and *Hunter v. State*, 531 So.2d 239 (Fla. 4th DCA 1988). We recently reviewed those cases in *Krajewski v. State*, 16 F.L.W. 692 (Fla. 4th DCA March 13, 1991). Nothing is to be gained by our repeating that analysis here.

However, the trial court in this case reasoned that *Glosson* and *Hunter* did not apply to Herndon because the target of the undercover activity was the codefendant, Maugeri, not Herndon. The court stated:

> At issue is whether *Glosson's* holding extends to a codefendant informant who was not the direct target of the government agent. The Fourth District certified this question in Hunter as one of great importance. In Hunter the Fourth District directed that the non target codefendant also be discharged, but it did so without discussion as to the reasons therefore.
>
> The basic rational of both *Glosson* and *Hunter* is that where the confidential informant has a personal stake in the outcome of case, whether it be monetary or personal liberty, and where he is, without supervision, permitted to detect crime previously unknown to the police, the likelihood that he will create new crime for personal benefit is so great (and this "loose cannon" approach to law enforcement disapproved of so much) that the courts will find the practice to violate the due process rights of anyone so ensnared.
>
> Put in even simpler terms, these cases discourage the police from turning a blind eye to entrapment by their agents who have every motivation to entrap. But it is entrapment which the court views as the heart of the matter. And entrapment is a defense which cannot be vicariously raised. Certainly, if entrapment were touted as the reason for discharge by Herndon in this case, this court would have no difficulty in finding that since the CI did not deal with Herndon, that the defense did not lie. Yet the only reason in this case or in the Hunter case that the motion to dismiss was granted as to the target defendant was because the likelihood of entrapment was so great that the conduct was disapproved as a matter of law. The police were sanctioned and the "wrong" was "righted" by discharging the target. There is no reason for the codefendant, who could not rely on the defense of entrapment in the first place, to gain a windfall.
>
> Accordingly, the Motion To Dismiss by the defendant Herndon is denied.

The sole issue in this appeal is whether a codefendant, who was not the informant's target and who has no entrapment defense of his own, must nevertheless be discharged. Our review of *Glosson, Anders*, and *Hunter*, reveals that in each case others who were not the targets of the government agent were similarly discharged. This issue is presently pending before the supreme court in the second issue certified in *Hunter*.

There is no need to address the underlying facts in this appeal because we must assume that Maugeri, the codefendant-target, was properly discharged. For this reason we also need not consider *Jamarillo v. State*, 576 So.2d 349 (Fla. 4th DCA 1991), and *Khelifi v. State*, 560 So.2d 333 (Fla. 4th DCA), *rev. denied*, 574 So.2d 141 (Fla. 1990).

Therefore, the judgment and sentence are reversed. Upon remand, the defendant is to be discharged. As to all other issues raised we find no error or abuse of discretion.

We certify to the supreme court the same questions certified in *Krajewski v. State; State v. Anders*, and *Hunter v. State*. (ANSTEAD and DELL, JJ., concur. STONE, J., concurs specially with opinion.)

---

(STONE, J., concurring specially.) Although I concur in the opinion, I would recede from *Anders* and *Hunter* to the extent that they are construed as mandating a finding of due process violation simply by virtue of the use of a government agent who is performing substantial assistance in anticipation of a resulting benefit. The use of informants under "horizontal" substantial assistance agreements is now authorized by the legislature. Under such circumstances, it can hardly be considered outrageous misconduct.

* * *

**Administrative law—Public employees—Eligibility for membership in Florida Retirement System of employees who have been employed for more than four months in positions similar to positions listed in rule as positions that are excepted from eligibility for enrollment in Florida Retirement System—Where issue was submitted to State Retirement Director upon stipulated facts, it was improper for Director to base his ruling on matters beyond the stipulated facts and to fail to rule on the stipulated issue**

PALM BEACH COMMUNITY COLLEGE, Appellant, v. STATE OF FLORIDA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT, Appellee. 4th District. Case No. 90-2377. Opinion filed May 8, 1991. Appeal from the State of Florida, Department of Administration, Division of Retirement. Katherine H. Donohue of Gibson & Adams, P.A., West Palm Beach, for appellant. Larry D. Scott, Assistant Division Attorney, Division of Retirement, Tallahassee, for appellee.

(PER CURIAM.) This is an appeal of a State Retirement Director's final order that required appellant Palm Beach Community College to enroll several of its employees in the Florida Retirement System (FRS).

Appellee, the Division of Retirement of the State of Florida, directed appellant to enroll the employees because the positions filled by these employees had existed for a period longer than four consecutive months. Appellant disagreed. After several months, appellee, in a letter signed by A. J. McMullian III, State Retirement Director, and the person who ultimately ruled on this case, notified appellant that the Division would not alter its decision and therefore it would be necessary for appellant to file a formal petition for review of the final agency action. Pursuant to this letter, appellant requested an administrative hearing. Eventually, appellee filed a motion to relinquish jurisdiction from the Division of Administrative Hearings to the Department of Administration, Division of Retirement for proceedings pursuant to section 120.57(2), Florida Statutes (1989). The reason for the request was that the parties had no dispute about the material facts. They then entered into an agreement which contained the stipulated facts and the issue that the Director would use to decide the case.

The parties stipulated that:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix to Initial Brief" has been forwarded by United States Mail to: GUY TURNER, ESQUIRE, 800 Douglas Road, Suite 219, Coral Gables, Florida 33134, this 29th day of July, 1991.

Of Counsel