IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,089

STATE OF FLORIDA,

Petitioner,

vs.

JAMES M. HERNDON,

Respondent.

****

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PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner was the prosecution in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Fourth District Court of Appeal, respectively.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except Petitioner may also be referred to as the State.

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner relies on her statement of the facts and found in the initial brief on the merits; but would add the additional facts set forth below:

1. There is no evidence that the informant had exhausted all his contacts and, thus, was unable to meet the requirements of the substantial assistance program. Nor is there any evidence in the record on appeal that the informant turned to a third party out of desperation. The facts adduced at the motion to suppress hearing were:

(a) The informant had been used by the police before and that other cases were made through the use of this informant. (R 27, 28)

(b) No money was paid to the informant and the informant did not know the terms of the substantial assistant agreement when the informant rendered substantial assistant. (R 30, 42)

(c) It was explained to the informant that all informants must produce prosecutable cases under substantial assistant agreements. (R 13) Arrests must be made. (R 31-33). The statement "you don't get an "A" for effort means you need results and results mean arrests. In other words, an informant cannot read a name in a paper and say that he knows that person deals in drugs. (R 46).

(d) The informant did not turn to the third party to get help in making drug cases. The third party called Maugeri to

tell him the friends of his would be calling Maugeri in order to purchase drugs. The informant called Maugeri to set up a meeting betwwen Maugeri and the undercover police officer. At the meeting Maugeri and the undercover police officer negotiated the terms of the deal. (R 34-40, 46-51). No money was paid to the third party. (R 38). No coercion, threats, or strong-armed persuasion was used to force Maugeri into setting-up the first contact with the under cover police officer, negotiating the deal with the undercover police officer or completing the drug transaction with the undercover police officer. The informant's testimony was not required at trial. Respondent's identity or participation was never known until two hours before the transaction.

SUMMARY OF THE ARGUMENT

Respondent has not stated a position regarding the certified question presented by the Fourth District Court of Appeal. Rather, Respondent has attempted to relitigate certain issues of fact and law without seeking leave from this Court to do so by appropriate motion.

Little or no authority exists that the people of Florida wish to construe the due process clause of our state constitution differently than its federal counterpart. Historical analysis indicates that Article I, Section 9 was initially promulgated as a mirror image of the Fourteenth Amendment to the United States Constitution and that it has been subsequently re-ratified through the constitutional revision process without significant change.

Respondent's contention that the Legislature did not overturn Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985), is belied by the legislative history. The law was amended in Chapter 87-243, Laws of Florida ("Crime Prevention and Control Act") of 1987. Within the proviso language, the Legislature indicates that it is "providing for acquittal of a person prosecuted if he proves by a preponderance of evidence that his criminal conduct occurred as a result of entrapment...." Staff Analysis (See Appendix) confirms a specific intent to overturn Cruz. [1]

[1] Respondent argues in his Brief that an informant should not be allowed to select their targets without input, checks or

ARGUMENT

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, 462 So.2d 1082 (FLA. 1985), AS TO AN INDIVIDUAL ENSNARED BY THAT PERFORMANCE?

Rather than discuss the question certified by the district court of appeal, Respondent Herndon has merely reargued his appeal without requesting that this Court accept those issues for discretionary review by appropriate motion. While it is well recognized that this Court may expand the scope of review to any matter once it accepts the case, there is no compelling reason to provide Respondent with a second direct appeal. There is, however, a very compelling reason to discuss the issue certified by the district court. As outlined in Petitioner's initial brief, an affirmative answer to the certified question will have a significant effect upon the criminal justice system in Florida. First, an affirmative answer to the certified question will overturn long-standing precedent of this Court holding that the due process clause of the state constitution is to be interpreted in a manner consistent with the federal standards. Second, the

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supervision from the police. This in effect is the Cruz objective test for entrapment which focuses on the egregeons conduct of police officers in failing to provide adequate supervision of the informant.

ability of the Executive Branch to enforce laws against drug dealing will be hindered. Petitioner respectfully submits that the slender strand of legal reasoning found in the unique case of State v. Glosson, 462 So.2d 1082 (Fla. 1985), is an insufficient thread upon which to hang these dire consequences.

Petitioner's initial brief noted that "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" ("Petitioner's Brief on the Merits," page 26). Our state due process clause made its explicit debut in Article I, Section 8 of the Constitution of the State of Florida (1868). This occurred because the Congress of the United States had decreed that the southern states which had attempted to secede from the Union could only regain their statehood if they voted to ratify the Fourteenth Amendment to the Constitution of the United States. See Williams, Current & Friedel, A History of the United States to 1877, Alfred A. Knopf, New York (2nd ed., p.704). Floridians revised the state constitution in 1885, and transferred this provisions to Article I, Section 9. See generally, commentary to the 1968 Constitutional Revision by Talbot "Sandy" D'Alemberte, Vol. 25A, Fla.Stat.Ann., p112.

There is no historical evidence to support the notion that Article I, Section 9 should be construed in a more expansive fashion than the Fourteenth Amendment to the United States Constitution. However, an important analogy does exist. Earlier

in this century, this Court wrestled with a similar dilemma in resolving issues of search and seizure under Section 22, Bill of Right, of the 1885 constitution, prior to the United States Supreme Court's decision to apply the Fourth Amendment to the states through the Fourteenth Amendment. However, in Thurman v. State, 116 Fla. 426, 156 So. 484 (1934), and Houston v. State, 113 So.2d 582 (Fla. 1st DCA 1959), the justices of this Court and the judges of the First District noted that the similar language in the state constitutional provision and the federal provision led to the logical conclusion that they should be interpret in similar fashion:

> The Fourth Amendment to the Constitution of the United States, and Section 22 of the Bill of Rights of the Florida constitution are the same in meaning and almost identical in wording. For this reason the ruling of United States Courts on unreasonable searches is generally accepted as authority for a similar ruling in Florida.

Houston, at 584-85. When this Court attempted to stray from the long-standing practice of treating the state constitutional provision on search and seizure as a "mirror image" of the federal amendment, the people of Florida took matters into hand and amended Article I, Section 12 of the 1968 constitution to mandate to United States Supreme Court precedent.[2] Accordingly,

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[2] For an analysis of these early Florida cases and the reaction of the citizenry to the more liberal interpretation of the state constitution, see Cooper, "Beyond the Federal Constitution," 18 Stetson Law Review 242, 275-279, 1989. Petitioner submits that this court's adoption of the Fourth District's interpretations of our state constitution's due process clause would cause a like

the process of defining and interpreting the due process clause should be accomplished with an eye towards the work of United States Supreme Court and the various federal courts of appeal.

As noted in United States v. Meyers, 692 F.2d 823, 846 (2d Cir. 1982), "the use of dishonest and deceitful informants... creates risk to which the attention of juries must be forcefully called, but the due process clause does not forbid their compensation." This thesis has been presented in an overlay to this Court's Glosson decision in "Confidential Informants: When Crime Pays," 39 Univ. of Miami Law Rev., 131 (November 1984). Written by Milton Hirsch, a criminal defense attorney and former prosecutor, the article outlines the inconsistencies between Glosson and the federal decisions involving due process concerns. It also provides a litany of state an federal cases involving perceived instances of outrageous governmental conduct, all of which should convince this Court that an attempt to fashion a per se violation of the due process clause is simply an unworkable illogical and unfair approach.

Petitioner urges the Court adhere to the definition of "deprivation of due process rights" standard enunciated by Judge Joseph Hatchett for the Eleventh Circuit Court of Appeals in the case of United States v. Walther, 867 F.2d 1334 (11th Cir. 1989):

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reaction. See State v. Hume, 512 So.2d 185, 189 (Fla. 1987). If the Court agrees, then it cannot logically interpret our state due process clause as the lower court suggests.

> Although a conviction may be overturned where government involvement in criminal activities is constitutionally impermissible only where it violates fundamental fairness and shocks the universal cause of justice. United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973); Own v. Wainwright, 806 F.2d 1519, 1521 (11th Cir. 1986). Appellant's must show extreme circumstances of outrageous government conduct to establish a due process violation.

Id. at 1339. Based on the cases set forth in our initial brief, it can hardly be said that the type of argument advanced here should meet such a standard.

Florida's district courts of appeal do not generally favor the expansion of this Court's Glosson premise. Compare e.g., Lawrence v. State, 357 So.2d 424 (Fla. 1st DCA 1978), cert. denied, 367 So.2d 1125 (Fla. 1979), Cert. denied, 444 U.S. 847 (1979); State v. McQueen, 501 So.2d 631 (Fla. 5th DCA 1986), review denied, 513 So.2d 1062 (Fla. 1987); Heaton v. State, 543 So.2d 2990 (Fla. 4th DCA 1989); State v. Davis, 557 So.2d 588 (Fla. 5th DCA 1989), review pending, Case No. 75,823 (Fla. 1990); Khelifi v. State, 560 So.2d 333 (Fla. 4th DCA 1990), review denied, 574 So.2d 141 (Fla. 1990); Pidkameny v. State, 569 So.2d 908 (Fla. 5th DCA 1990) and Duke v. State, 16 FLW D786 (Fla. 1st DCA March 21, 1991), with State v. Evans, 537 So.2d 639 (Fla. 2d DCA 1990), review granted, Case No. 73,779 (Fla. 1989), and State v. Embry, 563 So.2d 147 (Fla. 2d DCA 1990), review granted, Case No. 76,199 (Fla. 1990).

Indeed, in Heaton v. State, 543 So.2d 290, 291 (Fla. 4th DCA 1989), the Fourth District itself bluntly held:

> Section 893.135(4), Florida Statutes (1987)...is facially constitutional.

In the Fourth District Court's decision in this case, Judge Barry Stone of the Fourth District, concurring specially, sensibly stayed the obvious:

> The use of informants under "horizontal" substantial assistance agreements is not authorized by the legislature. Under such circumstances, it can hardly by considered outrageous misconduct.

Petitioner's stance is also supported by the concurring opinion of judge Ginsburg in United State v. Kelly, 707 F.2d 1460 (D.C. Cir.,) denied, 104 S.Ct. 264 (1983). [3] Judge Ginsburg wrote:

> The requisite level of outrageousness, the Supreme Court has indicated, is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad "fundamental fairness" guarantee, it appeals from high Court decisions is not transgressed absent "coercion, violence, or brutality to the person."

Logically, such definitions require fact specific analysis in order to ensure that the competing public interests in apprehending criminals and in detecting and eliminating unworthy police conduct are properly balanced. See e.g. Tauber v. State Board of Osteopathic Medical Examiners, 362 So.2d 90 (Fla. 4th

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[3] See "Confidential Informant," supra, at p.152-154, for expanded discussion.

DCA 1978), cert. denied, 368 So.2d 1374 (Fla. 1979) (application of Article I, Section 9 due process protections merits flexible approach focusing on demands of a particular situation), citing Matthews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976).

The particular facts in this case provide a good example of why a case by case analysis is the most appropriate approach. Here, the trial court listened to the witnesses, made credibility determinations, weighed the evidence and ruled in the state's favor. The Fourth District reversed this decision because it viewed Maugeri's, the co-defendant target, dismissal proper and under Glosson/Hunter/Anders others who were not the target of the informant were similarily discharged. However, in each of those cases the "others" had contact with the police informant. The informant and the police knew of their existence. In this case the informant never had contact with the Respondent and never knew of his existence. The police only learned of Respondent's existence one or two hours before the final transaction. What the Respondent argues here is a "per se" violation and "fruit of the poisonous tree" concept. What Respondent argues is that since Maugeri's rights were violated then his rights were also violated - an argument analogous to the fruit of the poisonous tree. Constitutional rights are individual rights. Such rights were never meant to stand or fall depending on the rights of another. Had the informant had contact with Respondent perhaps Respondent would have an argument. Here informant's actions did not affect Respondent.

Respondent offers this Court the language in Glosson which points to the potential for abuse of a defendant's due process right. But, as noted by Hirsch, due process in this context is not a right in and of itself. It is a device which provides the protection of other specific individual rights. "Confidential Informants," at 149-151. The Glosson decision rest on the out-of-State cases State v. Hohensee, 650 S.W. 2d (mu.CT.App 1982) and People v. Issacson, 44 N.Y. 2d 511, 406 N.Y. 2d 714, 378 N.E. 2d 78 (1978). Neither case suggests just what individual right is protected under the due process clause when the government commits various acts of investigatory misconduct. Hirsch's discussion is enlightening:

> Isaacson identifies four factors that are symptomatic of outrageous conduct rising to the level of a constitutional violation: (1) police manufacture of a crime that otherwise would not have occurred; (2) police participation in criminal or improper conduct repugnant to a sense of justice; (3) overcoming the defendant's reluctance to commit the crime by appeals to humanitarian instincts (e.g., sympathy or friendship), by temptation to exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) police desire merely to obtain a conviction rather than preventing crime or protecting the populous. Finding evidence of all of these symptoms, the Isaacson court dismissed the case on due process ground.
>
> Whatever the merits of the four Isaacson factors, they do not refer, even obliquely, to contingent fee arrangements with confidential informants. The Glosson court states and restates that it was the existence

> of just such an arrangement that violated due process. It is difficult to see how Isaacson offers precedential support for Glosson. And Judge Gabrielli, dissenting in Isaacson, reflected on the fundamental problem: even if the police bullying and pressuring of Breniman was outrageous, what particular constitutionally protected right of Isaacson was transgressed: "These action... in no way violated any of the defendant's constitutional rights."
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> * * *

And:

> Clearly, Hohensee is no precedent for Glosson. Hohensee involved no contingent fee. The informants were on a flat salary, which was (from what can be inferred from the opinion) not conditioned on testimony against or on the ultimate conviction of, the defendant. By the reasoning of Hohensee, Glosson, a full-fledged participant in the crime for which he was charged, should not have been convicted. By the reasoning of Glosson, Hohensee, not burdened by an informant/witness earning a contingent fee, should have been convicted. The due process defense swims in subjectivity with no analytical reed to which to cling. (All footnotes omitted).

Id. at 151-52.

Also lost in the sound and fury of this due process discussion is the role of the jury. We utilize juries in an effort to provide that each particular drug deal case is adjudged by a representative group of common citizens who may collectively approve or disapprove of the conduct of those accused of wrongdoing or of the police or their agents by application of the

statute providing an affirmative defense of entrapment. Section 777.201, Fla. Stat. (1987):

> A law enforcement officer, a person engaged in cooperation with a law enforcement officer or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, cause another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

The district court below agreed with the Third District Court of Appeal that the decision of the Legislature to amend the entrapment statute was in direct response to this Court's attempt to alter the standard for entrapment defense in Cruz v. State, supra. Attached as an appendix to this Brief is a copy of the House of Representatives Staff Analysis which states in clear terms the intent to overturn Cruz. (Appendix 1-2)

To summarize our argument, Petitioner contends that the state constitution's due process clause is a mirror image of the Fourteenth Amendment. Second, that this Court has a long history of referencing federal decisions in situations where state and federal constitutional provisions are similar or

identical Third, in the one instance involving a departure from this practice in the criminal law context, the electorate quickly rose up and reversed the court. Fourth, no federal case authority would support the type of sweeping per se violation rule suggested by the Fourth District and no federal or state decision supports the notion that the facts in this case justify Respondent's acquittal. Last, there is clear record evidence to support the position of the Third and Fourth District Courts of Appeal that the Legislature intended to overturn this Court's decision in Cruz and to reassert a subjective entrapment standard in Florida.

CONCLUSION

Petitioner prays this Honorable Court reverse the decision, answer the certified question in the negative, and instruct the district court to reimpose Respondent's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: **GUY TURNER, ESQUIRE,** 800 Douglas Road, Suite 219, Coral Gable, Florida 33134 this 28nd day of August, 1991.

Of Counsel

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