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IN THE SUPREME COURT OF FLORIDA

MANUEL MUNOZ

Petitioner,

vs.

CASE NO: 78,900
DCA NO: 91-00008

STATE OF FLORIDA

Respondent.

PETITIONER'S INITIAL BRIEF

APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT, STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Petitioner, Manuel Munoz, was the appellee at the First District Court of Appeal and the defendant at trial. Petitioner will be referred to as Mr. Munoz. The State of Florida is now the respondent. Reference to the record on appeal will be referred to by the letter "R" followed by the appropriate page number in parenthesis. Reference to the Appendix will be made with the letter "A" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

On June 26, 1990, the state filed an information charging Mr. Munoz with two counts of sale or distribution of harmful materials to a person under 18 years of age, in violation of Florida Statute Section 847.012. (R.21) After depositions and discovery, Mr. Munoz filed his sworn motion to dismiss in accordance with Florida Rule of Criminal Procedure 3.190 (c)(4) The state did not file a traverse. Applying the objective tests for entrapment established in Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), the trial court dismissed the information on the basis of entrapment as a matter of law. (R.203-204)

The state appealed the trial court's dismissal to the First District Court of Appeal. On October 8, 1991, a panel of the First District Court of Appeal reversed the trial court's dismissal. Relying on precedent from the Third District Court

of Appeal, Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990) and from the Fourth District Court of Appeal, Krajewski v. State, 587 So.2d 1175 (Fla. 4th DCA), quashed on other grounds, 589 So.2d 254 (Fla. 1991), the First District concluded that enactment of section 777.201, Florida Statutes (1987) abolished the objective entrapment tests set forth in Cruz.

In petitioner's jurisdictional brief, petitioner pointed out the ongoing conflict between the districts and that the Fourth District had decided, in light of State v. Hunter, 586 So.2d 319 (Fla. 1991), to recede from its position in Krajewski. See Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991). In the state's jurisdictional brief, the state agreed that the Florida Supreme Court should exercise jurisdiction.

STATEMENT OF THE FACTS

Mr. Munoz is the owner and manager of the Video Den, a video store located in Panama City, Florida. (R.173) As a a control measure, Mr. Munoz maintains a separate room for X-rated videos. (R.174) It is also explicitly posted that no person under the age of 18 is allowed to enter this room. (R.174)

In order to rent a video at Mr. Munoz's store, a person must either become a member or present a driver's license reflecting at least 18 years of age and a work and home phone number. To become a member, an applicant must show a driver's license verifying his or her age as at least 18 years old. For a member, normally, no additional identification is required at the time of the rental transaction because the member's age and address are maintained on the store's computer records upon issuance of the membership card. (R.174) Prior to this investigation, law enforcement lacked any information to indicate that the criminal renting

of an X-rated video to a minor had ever occurred at the Video Den. (R.176)

This entire investigation sprung from an anonymous complaint regarding an unrelated video store known as "Top Banana." (R.175) This complaint to officer Dale Smith of the Bay County Sheriff's Office alleged that minors were able to enter the Top Banana store and obtain an X-rated video without any membership card. (R.175) In response, Dale Smith contacted a young woman, Patricia Smith, who was almost 17 years old and who had recently been arrested for negotiating the purchase of a pound of marijuana. (R.104-105) Initially, Dale Smith instructed his juvenile informant, Patricia Smith, to purchase an X-rated video at Top Banana. (R.140) In order to make the outright purchase, no membership card was required. (R.140)

Following this initial investigation, however, Dale Smith decided to spread the investigation to other selected video stores in Bay County that rented X-rated movies. (R.175) In fact, the Video

Den only came to the attention of Dale Smith after he used the Yellow Pages in the telephone book to ascertain if the Video Den rented X-rated movies. (R.175) To further his investigation, Dale Smith obtained a false membership card using the fictitious name of Brian Jackson and providing the Video Den with fake addresses and phone numbers. (R.175) The age reflected on Dale Smith, a/k/a Brian Jackson's membership card was 34 years old. (R.176)

Officer Smith provided this membership card to his juvenile informant, Patricia Smith, with instructions for her to enter the Video Den and obtain an X-rated movie. (R.175) Officer Smith instructed Patricia Smith to lie about her age and further to lie about her relationship with Brian Jackson, the fictitious name used by officer Smith in obtaining the membership. Patricia Smith was instructed to mislead any clerk who inquired about her relationship with Brian Jackson and to indicate that she was either the sister or girlfriend of the

34 year old Brian Jackson. (R.175-176)

On March 16, 1990, Patricia Smith obtained an X-rated video from the adults only room and presented Brian Jackson's membership card at the cash register. (R.110) At this point, Patricia Smith explained to the clerk, later identified as Mr. Munoz, that she was the girlfriend of the 34 year old Brian Jackson. (R.111)

On April 7, 1990, Patricia Smith again entered the Video Den and presented Brian Jackson's membership card along with two X-rated movies. On this occasion, Mr Munoz asked her age and she lied. Patricia Smith further explained that she had walked to the store and forgotten her driver's license. (R.113-114) She further insisted she had rented these movies on previous occasions. (R.114) Finally, Patricia Smith again claimed to be either the girlfriend or sister of the 34 year old Brian Jackson. (R.111,114) It is undisputed that Patricia Smith appears mature beyond her years and that many people consider her to be at least 18 years of age

or older. (R.176)

It is undisputed that Dale Smith, the case agent for the video sting operation, and the Bay County Sheriff's Office had not received any complaints regarding the sale or rental of sexually explicit videos to minors by individuals at the Video Den. (R.174) More specifically, it is undisputed that law enforcement lacked any information indicating the ability of juveniles to use an adult member's card to obtain X-rated videos at the Video Den. (R.176)

In his uncontroverted motion to dismiss, Mr. Munoz states that he has never knowingly rented a sexually explicit video to a minor. (R.173) Dale Smith acknowledged at the commencement of his investigation that he was not aware of <u>any</u> ongoing criminal activity at the Video Den. (R.176) At no point did it occur to Dale Smith to structure the investigation so that Patricia Smith would attempt to obtain the membership card in her own right. (R.176)

SUMMARY OF ARGUMENT

Fundamental values of fairness and judicial integrity have long caused courts a deeply held aversion to police-created criminal activity. Using various terminology such as objective entrapment, due process, judicial integrity or fundamental fairness, courts have universally recognized an outer limit on the ability of law enforcement to create criminal behavior where there otherwise was none.

In Florida, the Supreme Court has articulated this outer limit of police tactics under the rubric of objective entrapment. The Supreme Court has specifically prohibited "virtue testing" and has further required law enforcement to use reasonably tailored tactics that risk ensnaring otherwise innocence of citizens. In Florida, objective entrapment owes its existence to Florida's due process clause and basic values of judicial integrity. Florida's constitutional right to

privacy also suggests a constitutional prohibition against government-created crimes.

Section 777.201, Florida Statutes (1987) does not explicitly abrogate the doctrine of objective entrapment. Objective and subjective forms of entrapment may co-exist. To the extent any conflict exists between section 777.201, Florida Statutes and the doctrine of objective entrapment, it must be recognized that a judicially imposed outer limit on government-created crime will remain. In this regard, the Cruz test functions well as a clearly understood guide for law enforcement and trial courts.

The circumstances of Mr. Munoz's investigation are so egregious that the trial court was well within its authority to grand the uncontroverted motion to dismiss. For these reasons, the First District Court of Appeal's decision should be reversed and the trial court's decision should be reinstated.

ARGUMENT

MAY A FLORIDA TRIAL COURT GRANT AN UNCONTROVERTED MOTION TO DISMISS ON THE BASIS OF OBJECTIVE ENTRAPMENT?

I. HISTORICAL BACKGROUND OF ENTRAPMENT

In the 20th Century, a considerable amount of judicial time and energy has been devoted to the analysis of the entrapment defense. Without a single guiding principle, the law of entrapment varies greatly from state to state and in the federal system.

On the one hand, courts do not want to restrict law enforcement from aggressive and effective investigative techniques. On the other hand, as Judge Learned Hand observed in 1933, there is "a spontaneous moral revulsion" against using the powers of government to beguile the innocent "into lapses they might otherwise resist." United States v. Becker, 62 F.2d 1007,1009 (2d Cir. 1933). In

other words, as the Mississippi Supreme Court has opined in a somewhat more colloquial fashion, "he who gets in the gutter with the skunk is soon indistinguishable." Tanner v. State, 566 So.2d 1246 (Miss. 1990).

Throughout the jurisprudence of entrapment, the underlying concern is that government should not create or improperly induce criminal activity. Also implicit in this focus on governmental conduct is the concept that government should not bring the full force of its investigative power and possible enticements to bear against the ordinary citizen without some articulable reason. Analysis that focuses on the governmental misconduct is commonly referred to as objective entrapment.

In tension with this approach is the doctrine of subjective entrapment. Although subjective entrapment is also concerned with government-created crime, subjective entrapment focuses on the predisposition of the targeted person.

In practical terms, both objective and subjective entrapment may lead to difficult issues. In the face of ignoble governmental conduct, objective entrapment may set the confirmed criminal free. Subjective entrapment, however, seemingly condones governmental misconduct if the prosecution can point to some evidence of the targeted person's predilection for criminal behavior.

A. Federal Case History

The United States Supreme Court first addressed entrapment in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). In Sorrells, an undercover prohibition agent befriended a fellow World War I veteran and made three requests for the defendant to provide him some liquor. It appears Mr. Sorrells was not an alcoholic, had never missed work and there was no evidence that he had ever possessed or sold liquor. The Court condemned the undercover agent's use of "sentiment aroused by reminiscences of their experiences as companions in

arms in the World War." 287 U.S. at 441, 53 S.Ct. at 212.

In reversing the defendant's conviction, the Sorrells Court reasoned that Congress had not intended the Prohibition Act to permit government investigators to instigate criminal acts by "persons otherwise innocent." 287 U.S. at 448, 53 S.Ct. at 215. According to Sorrells, it is "a traditional and appropriate function of the courts" to "construe statutes so as to avoid absurd or glaringly unjust results." 287 U.S. at 450, 53 S.Ct. at 216.

In his concurring opinion, Justice Roberts framed the objective-subjective entrapment debate that has fractured federal entrapment jurisprudence ever since. Justice Roberts grounded the defense of entrapment

> on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. 287 U.S. at 457, 53 S.Ct. at 218.

In the view of Justice Roberts, entrapment was a matter of law for the courts to decide without regard to the "demerits of the defendant or his previous infractions." 287 U.S. at 458, 53 S.Ct. at 219. In those instances, where a defendant has committed a crime "only because of instigation and inducement by a government officer" entrapment exists as a matter of law and the integrity of the judiciary requires dismissal. 287 U.S. at 459, 53 S.Ct. at 219.

In Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), the United States Supreme Court reversed a conviction for sale of marijuana and instructed the lower court to dismiss the indictment. In Sherman, the informant and the defendant met at a doctor's office where they were both being treated for narcotics addiction. After several requests, the defendant provided the informant a quantity of narcotics. Despite his conviction by the jury, the Supreme Court ruled as a matter of law that the defendant's two prior

narcotics convictions were insufficient to prove predisposition. 356 U.S. at 375, 78 S.Ct. at 822. In a five to four decision, the majority refused to adopt the objective entrapment analysis of Justice Roberts in Sorrells.

Justice Frankfurter, however, eloquently propounded the intellectual and judicial basis of the objective entrapment doctrine. In Justice Frankfurter's view, the crucial question was not the defendant's prior history but "whether the police conduct . . . falls below standards, to which common feelings respond for the proper use of governmental power." 356 U.S. at 382, 78 S.Ct. at 825. Without citing explicitly to the authority of due process, Justice Frankfurter grounded his view of entrapment on values of fundamental fairness, principles of equality and "[p]ublic confidence in the fair and honorable administration of justice." 356 U.S. at 380, 383, 78 S.Ct. at 825, 826.

In another sharply divided opinion, the United States Supreme Court continued its internal argument

over objective and subjective entrapment. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). There, an undercover agent provided the essential chemical ingredient for the defendant's production of methamphetamine. The investigation revealed that the defendant had previously been involved in the production of this drug. 411 U.S. at 425, 93 S.Ct. at 1639. In Russell, the Court again rejected objective entrapment. The Court further found that subjective entrapment was not constitutionally rooted. Following Sorrells, Russell held entrapment derives from a matter of statutory construction because "Congress could not have intended criminal punishment for a defendant who . . . was induced to commit [the crime] by the Government." 411 U.S. at 435, 93 S.Ct. at 1644. The Russell decision is also significant for the dictum that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the

Government from invoking judicial processes." 411 U.S. at 431, 93 S.Ct. at 1643.

Foreclosed from an objective entrapment defense, the defendant in Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), made a due process challenge to his conviction for sale to an agent of some heroin that had allegedly been obtained from a government informant. In a plurality opinion, Justice Rehnquist concluded the entrapment defense should never be available to a defendant who was predisposed. 425 U.S. at 489, 96 S.Ct. at 1649. Receding somewhat from Russell, Justice Rehnquist further opined that due process should not serve as a constitutional bar for overzealous governmental instigation of criminal activity. Justice Powell's concurrence in the judgment, joined by Justice Blackmun, recognized due process and the Court's "supervisory power" as viable limitations on police overinvolvement in criminal activity. 425 U.S. at 494, 96 S.Ct. at 1652. With the dissent of Justices Brennan, Stewart

and Marshall, a majority existed in Russell for a limitation as a matter of law on the egregious use of police-instigated criminal activity.

Most recently the United States Supreme Court has reversed the conviction of a Nebraska farmer for receipt of child pornography through the mail. Jacobson v. United States, __U.S.__, 112 S.Ct. 1535, __L.Ed.2d__ (1992). Despite the farmer's previous receipt of "Bare Boys" magazines and his response to a government questionnaire that he enjoyed pre-teen sexual materials, a majority of the Supreme Court found that the prosecution had failed as a matter of law to prove predisposition before government intervention. ___ U.S. at ___, 112 S.Ct. at 1541. Referring back to Sorrells, Jacobson reiterates that Congress did not intend abusive law enforcement investigative techniques when it enacted the child pornography laws. Finally, the Jacobson Court adds the following directive to the already muddled federal jurisprudence of entrapment:

> when the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen,

> who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene. __U.S.__, 112 S.Ct. at 1543.

In sum, despite 60 years of judicial effort, it is still hard to discern when one is entrapped in federal court. Nominally, subjective entrapment with its emphasis on the jury's factual findings as to predisposition remains the operative doctrine. Nevertheless, Jacobson, Sherman, and Sorrells all found entrapment as a matter of law and reversed findings of guilt by juries.

The statutory approach of Sorrells through Jacobson to the effect that Congress could not have intended its criminal statutes to be investigated in an abusive fashion is virtually useless as a predictive analytical tool. Although subjective entrapment remains the nominal form of entrapment in federal court, the Jacobson decision portends a greater willingness of federal courts to intervene as a matter of law. Furthermore, Supreme Court jurisprudence would also indicate the existence of an objective, fundamental fairness and due process

limitation on the governmental power to create criminal activity.

B. Entrapment in Other States

A survey of entrapment in other states reveals, predictably, a variety of approaches. By virtue of judicial pronouncement, legislative enactment or a combination of the two, the states have variously opted for subjective entrapment, objective entrapment or both. Many states follow subjective entrapment to the exclusion of a distinct objective entrapment defense. See, e.g., State v. Gasser, 223 Kan. 24, 574 P.2d 146 (1977). Other courts and legislatures adhere to the objective form of entrapment. See, e.g., Grossman v. State, 457 P.2d 226 (Alaska 1969); State v. Zaccaro, 154 V.t. 83, 574 A.2d 1256 (1990); State v. Kummer, 481 N.W.2d 437 (N.D. 1992)(under objective entrapment statute, "sound public policy reasons" dictate a per se rule of entrapment where police furnish the controlled substance); Tanner v. State, 566 So.2d 1246 (Miss.

1990)(objective entrapment in the form of official misconduct occurs where agents supply-and-buy); People v. Barraza, 23 Cal.3d 675 153 Cal. Rptr. 459, 591 P.2d 947 (1979)(entrapment is governmental conduct likely to induce a normally law-abiding person to commit a crime); People v. Jamieson, 436 Mich. 61, 461 N.W.2d 884 (1990); People v. Juillet, 439 Mich. 34, 475 N.W.2d 786 (1991).

In addition, several jurisdictions have explicitly recognized a hybrid approach in which elements of subjective and objective entrapment co-exist. State v. Johnson, __A.2d__ (N.J., May 13, 1992)(see appendix); Cruz v. State, 465 So.2d 516 (Fla), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985); State v. Sheetz, 825 P.2d 614 (N.M. App. 1991)(because "entrapment is uniquely a matter of state law . . . we believe we are free to adopt a hybrid approach").

C. The Law of Entrapment in the State of Florida

The seminal entrapment case in Florida is Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). In an opinion by Justice Ehrlich and joined by Justices McDonald, Shaw and Overton, the Florida Supreme Court traced the history of entrapment and established a relatively clear definition of entrapment for use by Florida's trial courts. Cruz recognized that factual issues of predisposition would always be the province of the jury. The Court also concluded, however, that an objective test for entrapment should exist as a matter of law. Id. at 521.

Aligning itself with the views of Justices Roberts and Frankfurter, Cruz held the "effect of a threshold objective test is to require the state to establish initially whether 'police conduct revealed in the particular case falls below

standards, to which common feelings respond for the proper use of governmental power.'" Id. at 521, citing Sherman, 356 U.S. at 382, 78 S.Ct. at 825 (Frankfurter, J., concurring in the result). In a commendable effort to define this general concept, the Florida Supreme Court defined entrapment as follows:

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. Cruz, at 522.

The Court explained that the "first prong of this test addresses the problem of police 'virtue testing.'" Id. According to Cruz, this safeguard prohibits prosecution where no crime "exists but for the police activity engendering the crime." Id.

The second test under Cruz provides the courts a means of objecting to official use of excessive inducements or other tactics. The Cruz Court reasoned these tactics run the risk of ensnaring

those not already involved in criminal activity.

The Cruz decision did not specifically ground its authority for objective entrapment in the Constitution, statutory authority or public policy. The Court did, however, acknowledge the parallel concerns of due process and objective entrapment. It also referred to "judicially cognizable considerations" such as protecting itself from "prostitution of the criminal law." Id. at 520. Referring to the New Jersey Supreme Court's decision in State v. Molnar, 81 N.J. 475, 410 A.2d 37 (1980), the Florida Supreme Court shared the view that objective entrapment as a matter of law is necessary to protect the judiciary from official conduct that may "impugn the integrity of a court." Cruz, 465 So.2d at 521.

Interestingly, Cruz acknowledged the potential conflict between judicial and statutory models of entrapment in New Jersey. Id. at 521. In the absence of a Florida entrapment statute in 1985, Cruz did not address the interplay between judicial

and legislative definitions of objective and subjective entrapment. Id., n.3.

Following Cruz, the next major development in Florida's law of entrapment was the enactment of section 777.201, Florida Statutes (1987). Section 777.201(2) placed the burden of proving entrapment on the defendant and provided that entrapment "shall be tried by the trier of fact." Section 777.201(2), Fla. Stat. (1987). By suggesting entrapment is a jury issue and by further requiring that entrapment is available only to "a person other than one who is ready to commit a crime," section 777.201 appears to codify a subjective form of entrapment.

In response to this legislation, the Third District Court of Appeal concluded that objective entrapment under Cruz had been abolished. Gonzalez v. State, 525 So.2d 1005, 1006 (Fla. 3d DCA 1988).

At the time Mr. Munoz's case was dismissed in November, 1990, a majority of the district courts of appeal continued to apply the objective form of entrapment articulated in Cruz. See Bowser v.

State, 555 So.2d 879 (Fla. 2d DCA 1989)(police officers entrapped defendant as a matter of law by inducing hitchhiker to sell prescription drugs); Londono v. State, 565 So.2d 1365 (Fla. 4th DCA 1990)(applying Cruz objective test and finding defendant was entrapped as a matter of law); State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990)(comparing the objective entrapment test with the due process defense); State v. Burch, 545 So.2d 279 (4th DCA 1989), approved on other grounds, 588 So.2d 1 (Fla. 1990)(finding defendant was not entrapped as a matter of law because reverse sting occurred in area of high volume drug trade); State v. Purvis, 560 So.2d 1296 (Fla. 5th DCA 1990)(finding defendant was not entrapped as a matter of law due to prior sales of small amounts of drugs).

Subsequent to the trial court's dismissal below, the Fourth District Court of Appeal joined the Third District in determining that the objective test for entrapment had been abolished by the

legislature. Krajewski v. State, 587 So.2d 1175 (4th DCA), reversed on other grounds, 589 So.2d 254 (Fla. 1991). The decisions abolishing objective entrapment relied heavily on legislative intent behind section 777.201, Florida Statutes as evinced in a staff report from a committee of the House of Representatives. See Gonzalez II v. State, 571 So.2d 1346, 1349 (Fla. 3d DCA 1990); House of Representatives Committee on Criminal Justice Staff Analysis, June 27, 1987 at 177.

In State v. Hunter, 586 So.2d 319 (Fla. 1991), this Court applied the objective test for entrapment established in Cruz. Most importantly, the majority opinion in Hunter recognized the "objective entrapment standard includes due process considerations." Id. at 322. In his concurring opinion, Justice Kogan joined by Justice Barkett, specifically grounds the objective entrapment defense on the due process clause of the Florida Constitution. Art. I, Section 9, Fla. Const. In her concurrence, Justice Barkett expresses her deep

concern about "the complicity of the courts" in the manufacturing of criminal behavior where there otherwise was none. Id. at 323 (Barkett, J., concurring and dissenting in part).

Overall, the Hunter decision stands for the Florida Supreme Court's willingness to construe the Florida due process clause without lock-step adherence to the parameters of the federal due process clause. Hunter also recognizes that objective entrapment is a manifestation of the principles of fairness inherent in Florida's due process clause.

Since Hunter, the Supreme Court has approved the placement of the burden of proving the absence of predisposition on the defendant. Herrera v. State, 580 So.2d 653 (Fla. 1992). This Court, however, has not directly addressed the burden of proof in an objective entrapment context. Id. (Kogan, J., concurring).

In light of the due process sources of objective entrapment recognized in Hunter, the

district courts of appeal, except for the First District, have recommenced application of the objective test for entrapment. Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991); Lewis v. State, 17 F.L.W. D793 (Fla. 3d DCA, March 24, 1992); but see, Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991); State v. Pham, 17 F.L.W. D607 (Fla. 1st DCA, March 2, 1992).

II. THE CONTINUED VIABILITY OF OBJECTIVE ENTRAPMENT IN FLORIDA.

A. Objective Entrapment As Rooted in Florida's Due Process Clause.

Objective entrapment represents the power of courts to protect their integrity and to condemn police activity that creates as opposed to investigates criminals. Although Cruz does a much better job of defining the limits of acceptable police conduct, most states and the federal system recognize a due process limitation on police conduct. See United States v. Russell, 411 U.S.

423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78 406 N.Y.S.2d 714 (1978); State v. Hohensee, 650 S.W.2d 268 (Mo. Ct. App. 1982); Brown v. State, 484 So.2d 1324 (Fla. 3d DCA 1986).

Despite the legions of cases on entrapment, few courts have directly addressed the doctrine's actual source. In the federal system, those judges mentioning objective entrapment have repeatedly referred to issues of fundamental fairness as the basis for the objective entrapment defense. United States v. Sherman, 356 U.S. at 382, 78 S.Ct. at 825 (Frankfurter, J., concurring in the result). The term "fundamental fairness" is synonymous with due process.

Justices Kogan and Barkett have already acknowledged the due process basis of Florida's doctrine of objective entrapment. State v. Hunter, 586 So.2d 319 (Fla. 1991)(Kogan, J., concurring in the result). This Court is free to define Florida's

due process clause, Article I, Section 9, in accordance with the law of Florida. State v. Glosson, 462 So.2d 1082, 1085, (Fla. 1985)("[w]e reject the narrow application of the due process defense found in the federal cases").

Ample precedent exists for explicitly recognizing the due process heritage of objective entrapment. For example, the first prong of the Cruz test requires law enforcement to direct its efforts at ongoing criminal activity. It prohibits police from canvassing a neighborhood of otherwise innocent citizens and attempting to lure them into criminal activity.

Recently, the New Jersey Supreme Court addressed the continued existence of objective entrapment following the legislative enactment of a subjective version of entrapment. State v. Johnson, ___A.2d___ (N.J., May 13, 1992). The Johnson decision, therefore, directly addresses the issue avoided in Cruz regarding the interplay between objective entrapment and the legislative

enactment of a subjective form of entrapment.

According to Johnson:

> Constitutional due process and entrapment doctrine occupy much the same policy grounds. We accordingly reaffirm that entrapment is a defense as a matter of due process. The defense arises when conduct of government is patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government, and offends principles of fundamental fairness. We explicitly found that defense on the New Jersey Constitution. N.J. Const., art. I, para. 2.
>
> The adoption of the defense of entrapment reposes within the authority of state courts. Federal principles of entrapment "are not controlling on the state courts which are free to formulate and establish the contours of the defense of entrapment for their own jurisdictions." The entrapment defense based on due process reflects basic and distinctive state policies that have historically and consistently served principles of fundamental fairness and preserved judicial integrity in the administration of criminal justice. Our own entrapment doctrine has honored those policies, namely, adherence to principles of fundamental fairness, the refusal of courts to "'permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty it is to deter its commission,'" and the fear that police would manufacture crime and

ensnare unwary innocents. Johnson see Appendix at 8 (citations omitted).

Recognizing the variety of formulations used by courts in defining the outer limits of police-created criminal activity, the New Jersey Supreme Court focused on "two major recurrent concerns: the justification for the police in targeting and investigating the defendant as a criminal suspect; and the nature and extent of the government's actual involvement in bringing about the crime." Johnson, Appendix at 9. Notably, these two principal concerns largely coincide with the two prong test set forth in Cruz. In other words, the New Jersey Supreme Court has interpreted its due process clause to prohibit unfounded "virtue testing" of its citizenry and to limit the extent to which government can create criminal behavior for subsequent prosecution. See also People v. Juillet, 439 Mich. 34, 475 N.W.2d 786, 807 (1991)(Cavanaugh, C.J., concurring)("the entrapment doctrine is necessarily rooted in the concept of fundamental

procedural fairness inherent in the due process clause" of the Michigan Constitution).

B. Objective Entrapment and Florida's Right of Privacy.

Implicit in the first prong of the Cruz test for objective entrapment is that police investigate "ongoing criminal activity," not create criminal behavior where there otherwise was none. Cruz, 465 So.2d at 522. Objective entrapment imposes limitations on the intrusion of government into the lives of private citizens for the purpose of creating criminal behavior.

In this regard, Florida is uniquely endowed with a constitutional right of privacy to the effect: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." Fla. Const. Art I, Section 23. The constitutional right of privacy speaks resoundingly against the evil of "virtue testing" described in

Cruz. Certainly, it would be appropriate for this Court to consider the people's enactment of a right of privacy when it considers the ethics of virtue testing and the boundaries of Florida's due process clause. The right to be let alone from governmental intrusion is an implicit aspect of objective entrapment. (See Bennett, L., Gersham, Abscam, the Judiciary, and the Ethics of Entrapment, 91 Yale L.J., 1565 (1982)("the government's ability gratuitously to generate crime through random honesty checks involves unjustified intrusion into citizens' privacy and autonomy").

C. Objective Entrapment and The Supervisory Powers of the Court.

Throughout the history of entrapment jurisprudence, many courts have referred to their "supervisory power" as the basis for objective entrapment. Inherent in this concept is the notion that the judiciary should not condone, comply with or otherwise perpetuate prosecutions based on

reprehensible law enforcement tactics. In this sense, courts often refer to the dangers associated with "prostitution of the criminal law." Sorrells v. United States, 287 U.S. at 457, 53 S.Ct. at 218 (Roberts, J., concurring).

Perhaps the leading recent spokesman for the supervisory power of the courts is Justice Powell. Hampton v. United States, 425 U.S. at 494, 96 S.Ct. at 1652. (Powell, J., concurring). Justice Powell acknowledges the similarity between due process and the court's supervisory power. 425 U.S. at 494 n.6, 96 S.Ct. at 1652 n.6. Justice Powell would require police "overinvolvement" to reach a "demonstrable level of outrageousness" before interfering on the basis of due process or supervisory power. 425 U.S. at 495 n.7, 96 S.Ct. 1653 n.7. In addition, Justice Powell seemed willing to distinguish police investigation of narcotic crimes from other crimes.

In sum, courts reserve the right not to participate in a process that is fundamentally unfair. The supervisory power of the court permits

the judiciary to apply ethical and sound policy positions limiting the prosecution of a government-created crime.

D. Legislative Ambiguity and Objective Entrapment.

Nothing in the language of section 777.201, Florida Statutes expressly abrogates the objective form of entrapment. Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989). It has been argued, however, that certain portions of the statute's legislative history, at least in the House of Representatives, suggest a legislative intent to overrule Cruz.

Well-established principles of statutory construction provide that an inquiry into legislative history is only justified when a statute is inescapably ambiguous. Department of Legal Affairs v. Sanford/Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983); Solis-Ramirez v. United States, 758 F.2d 1426 (11th Cir. 1985). The clearest expression of legislative intent is the

actual statutory language enacted by the legislature. In the case of section 777.201, Florida Statutes, the lack of ambiguity in the statute itself prohibits an inquiry into the statute's legislative history. Here, the statutory language does not expressly abrogate objective entrapment. Rather, the statutory language can reasonably be understood to define subjective entrapment, assign the burden of proof and direct that subjective entrapment is an issue for the jury.

Even if this Court finds the statutory language "inescapably ambiguous," the statute's legislative history is itself not very clear. Overall, the entrapment provision was but a very small part of an enormous bill known as the "Crime Prevention and Control Act." As such, the amount of legislative attention to the entrapment issue was relatively meager. Although the staff analysis of the House of Representatives' Committee on Criminal Justice suggests the intent of House Bill 1467 was to overrule the Cruz decision, this report does not

constitute the full legislative intent. The Senate staff analysis does not indicate an express intent to overrule Cruz. This staff analysis describes entrapment as an affirmative defense available to a defendant who proves by a preponderance of the evidence that he was not predisposed. Senate Staff Analysis and Economic Impact Statement, Florida Archives, Series 18, Carton 1678 at 11. Although this view clearly adopts a subjective version of entrapment, it does not express a legislative intent to abolish objective entrapment. Moreover, the Summary of Senate Amendments on House Bill 1467 ratifies the Senate's view, states there is no comparable provision in the House of Representatives and indicates that the compromise amendment adopts the Senate's version. Summary of Senate Amendments on House Bill 1467, Florida Archives Series 18, Carton 1628.

Because section 777.201 affects a defendant's rights under the criminal law, it is also subject to very strict construction. In this regard, only

a provision that is "clearly and intelligibly described in the statute's very words as well as manifestly intended by the legislature" will be read into the meaning of the statute. Fla. Jur. 2d, Criminal Law, section 195 (1979). Generally, any statute intended to supersede or modify common law rights must "be strictly construed, and will not be interpreted so as to displace the common law further than is expressly declared." Arias v. State Farm Fire and Casualty, 426 So.2d 1136, 1139 (Fla. 1st DCA 1983)(emphasis added).

Finally, if section 777.201, Florida Statutes is interpreted to require all forms of entrapment to be tried by the "trier of fact," the statute would seemingly eliminate the judicial authority to respond to an uncontroverted motion to dismiss. In this case, the uncontroverted motion to dismiss filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) established the absence of ongoing criminal activity, the absence of predisposition and the absence of investigative tactics reasonably

tailored to catch only pre-existing criminal behavior. Sound concerns for ethics, judicial integrity and, if nothing else, judicial economy militate in favor of permitting a court to rule on an entrapment issue presented in an uncontroverted motion to dismiss.

III. PLUCKING DEFENDANT FROM THE TELEPHONE BOOK FOR INVESTIGATION AND EXCESSIVE POLICE RELIANCE ON TACTICS OF TRICKERY, SUPPORT THE TRIAL COURT'S DISMISSAL AS A MATTER OF LAW.

The circumstances leading up to Mr. Munoz's arrest constitute an egregious abuse of police power. As the uncontroverted motion to dismiss makes abundantly clear, the record is thoroughly devoid of any suggestion that Mr. Munoz or the Video Den were involved in any type of ongoing criminal activity. Simply put, the investigating officer openly admitted that he selected Mr. Munoz's store from the telephone book for further investigation. (R.175).

The facts of this case, therefore, squarely present this Court with Florida's law on "virtue testing." In this regard, the issue is whether or not Florida's otherwise innocent citizens should be subject to periodic criminal enticements or honesty checks. The first prong of the Cruz test addresses this concern. It requires that police have some indication of ongoing criminal activity before undertaking a surreptitious sting operation. There is ample precedent for this right to be let alone. See Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928)(Brandeis, J., dissenting); State v. Johnson, ___A.2d___ (WL 101529, N.J., May 13, 1992)(see appendix).

Cruz also required that police tactics must be "reasonably tailored" to avoid ensnaring innocent as well as criminal persons. Cruz, 465 So.2d at 522. Here, the police tactics combined to create a substantial risk that innocent but unwary individuals would be ensnared. First, the police used an informant who appeared mature beyond her

years. (R.176). Second, the police enhanced that impression by clothing the informant with the membership card of a 34 year old man. (R.175-176) To further the apparent legitimacy of the video rental, the informant was told to claim and did claim to be either the sister or girlfriend of this 34 year old man. (R.175-176) In essence, the police tactics circumvented the membership card system that safeguarded against rental of an X-rated video to a minor. The trial court found this totality of circumstances created a substantial risk that an offense would be committed by a person other than one ready to commit a crime. This conclusion is amply supported by the record.

In this case, law enforcement never even considered tailoring the investigation to require the informant to obtain a membership card in her own name. (R.176) This approach would have considerably narrowed the risk of entrapping the innocent but unwary.

In sum, Cruz provides a well-defined standard for the review of police-created criminal behavior. The Cruz tests have the distinct advantage of providing both law enforcement personnel and trial courts clear guidance. In the alternative, Mr. Munoz's prosecution should be dismissed due to the "outrageous" character of the government's tactics. Of course, Cruz provides an effective definition of outrageous police investigation or fundamental unfairness. In any event, this Court, if it varies from Cruz, should define the point at which common feelings respond for the proper use of governmental power.

CONCLUSION

For the foregoing reasons, Mr. Munoz requests this Court to affirm the trial court's dismissal. First, such a ruling should be based on the definition of objective entrapment set forth in Cruz. Section 777.201 does not expressly abrogate the judicial doctrine of objective entrapment. Objective entrapment derives from principles of judicial integrity and fundamental fairness that are inherent in Florida's due process clause. Under the facts presented in Mr. Munoz's uncontroverted motion to dismiss, both subjective and objective entrapment views support the trial court's decision to dismiss.

Wherefore the undersigned respectfully requests this Court to reverse the First District Court of Appeal and to reinstate the trial court's dismissal of the information against Mr. Munoz.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Laura Rush, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 26th day of May, 1992.

ALVIN L. PETERS