IN THE SUPREME COURT OF FLORIDA

MANUEL MUNOZ

Petitioner

vs.

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

STATE OF FLORIDA

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

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

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Each page of the record is numbered sequentially. For ease of reference, reference will be made by "R" and the appropriate page number. Petitioner Manuel Munoz will be referred to as Mr. Munoz.

TABLE OF CITATIONS

STATEMENT OF THE FACTS

Mr. Munoz is the owner and manager of a video store located in Panama City, Florida. (R.173) At Mr. Munoz's store, the members receive a membership card upon proof of being at least 18 years of age. (R.173-74) In order to rent a video, the member typically presents only the membership card. The store's computer records then indicate the member's age, address, and other personal information. (R.174)

The only complaint precipitating this entire criminal investigation concerned a separate and distinct video store in the Panama City area. (R.175) At that store, an anonymous complainant had alleged that minors were able to purchase x-rated videos without a membership card. (R.130,175) Following that complaint, an undercover law enforcement officer used the Yellow Pages in the telephone book to obtain the names of other video stores and to commence a city-wide sting operation directed at selected video stores. (R.127-28)

The 34 year old undercover officer obtained a membership card from Mr. Munoz's store. (R.129) He provided the membership card to a 16 year old female informant. (R.175) The informant was instructed to mislead any video clerk who inquired about her relationship to the cardholder and to indicate that she was either the sister or the girlfriend of the 34 year old undercover cardholder. (R.175) It is undisputed that the female informant appears mature beyond her years and that, by her own admission, many people consider her to be 18 years of age or older. (R.176)

Essentially, the sworn motion to dismiss established the undisputed absence of any ongoing criminal activity at the video store of Mr. Munoz. (R.176) The law enforcement officer admitted pulling Mr. Munoz's store from the telephone book for further investigation. (R.175) The only complaint in the entire community concerned a separate video store that had sold an x-rated video to a minor <u>without</u> benefit of a membership card.

(R.175) In this case, the female informant was provided with a membership card in order to circumvent having to show personal identification with her age. (R.159)

STATEMENT OF THE CASE

Manuel Munoz was charged with renting an x-rated video to a person under 18 years of age. (R.21) In response to a motion to dismiss filed pursuant to Fla. R. Crim. P. 3.190(c)(4), the trial court agreed that the police investigation did not have as its focus the interruption of specific ongoing criminal activity. Moreover, the trial court found the law enforcement tactics created a substantial risk of ensnaring a person other than one ready to commit a crime. (R.203) Essentially, the trial court agreed with the Second District Court of Appeal and the then-precedent of the Fourth District Court of Appeal that Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985) constituted binding precedent.

The state filed an appeal of the trial court's entrapment ruling. (R.205) While the case was pending before the First District Court of Appeal, the Fourth District Court of Appeal reversed its

position as to the viability of objective entrapment in Krajewski v. State, 16 F.L.W. D692 (Fla. 4th DCA March 13, 1991).

On October 8, 1991, the First District Court of Appeal filed its opinion reversing the trial court and agreeing with the Fourth and Third District Courts of Appeal that objective entrapment as described in Cruz was abolished by Florida Statute 777.201 (1987). (Appendix) On October 16, 1991, the Fourth District reversed its position and concluded that Florida Statute Section 777.201 does not supersede the due process concerns underlying the Cruz test for objective entrapment. Strickland v. State, 16 F.L.W. D2671 (Fla. 4th DCA October 16, 1991).

Mr. Munoz has timely filed his notice to invoke the discretionary jurisdiction of the Florida Supreme Court on November 5, 1991.

SUMMARY OF ARGUMENT

When the trial court dismissed the information on the basis of objective entrapment in October, 1990, the Second, Fourth and Fifth District Courts of Appeal all recognized the vitality of the Cruz test for objective entrapment. The Third District Court of Appeal had concluded that Florida Statute section 777.201 had legislatively abrogated the objective test for entrapment. The First District Court of Appeal had not, at that time, considered the issue.

In March, 1991, the Fourth District joined the Third District Court of Appeal in pronouncing the death of objective entrapment. Subsequently, the Florida Supreme Court decided State v. Hunter, 16 F.L.W. S588 (Fla. Aug. 29, 1991). In Hunter, the Supreme Court more clearly recognized the due process constitutional underpinnings of the defense of objective entrapment. Indeed, Justice Kogan specifically pointed to Florida's due process clause as the source for objective entrapment.

On October 8, 1991, the First District joined the Third and Fourth Districts in pronouncing the death of the objective entrapment defense. However, one week later, the Fourth District Court of Appeal cited the constitutional language in Hunter and revitalized the objective test for entrapment.

Objective entrapment is not an obscure issue. Rather, many trial and appellate courts will be faced with sorting through the contradictory appellate decisions on objective entrapment. It would be most appropriate for the Supreme Court to re-address Cruz in light of Hunter and the affect, if any, of Florida Statute section 777.201 on the continued vitality of objective entrapment.

ARGUMENT

The First District Court of Appeal's decision in Munoz, rested upon the decisions of the Third District Court of Appeal in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990) and the Fourth District Court of Appeal in Krajewski v. State, 16 F.L.W. D692 (Fla. 4th DCA March 13, 1991), affirmed on other grounds, 16 F.L.W. S682 (Fla. October 17, 1991). In those decisions, the First, Third and Fourth District Courts of Appeal concluded that Florida Statute Section 777.201 abrogated the objective test for entrapment set forth by the Florida Supreme Court 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).

As Munoz was decided, a conflict was created between the First, Third and Fourth District Courts of Appeal and the Second and Fifth District Courts of Appeal. In Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989) and State v. Purvis, 560 So.2d 1296 (Fla. 5th DCA 1990), the Second and Fifth District

Courts of Appeal have continued to apply the objective form of entrapment set forth in Cruz.

One week after Munoz, the Fourth District reversed its position in Krajewski and concluded the due process underpinnings of objective entrapment protect that doctrine from legislative abrogation. See Strickland v. State, 16 F.L.W. D2671 (Fla. 4th DCA October 16, 1991). The Strickland decision exacerbates the conflict between the districts and heightens the need for the Supreme Court to resolve the uncertainty of the law.

In Strickland, the Fourth District held:

> Appellant also asserts that the trial court erred in rejecting his claim of objective entrapment set out in Cruz v. State . . . Preliminarily, we agree with appellant that the trial court erred in initially concluding that the law of Cruz was superceded by the enactment of section 777.201.
>
> Although this court came to that same conclusion in Krajewski, the Florida Supreme Court has subsequently issued an opinion indicating that Cruz is still alive and well.
>
> More importantly, for purposes of our analysis here, the supreme court held in State v. Hunter, 16 F.L.W. 588 (Fla. Aug. 29, 1991) that the objective entrapment aspects of Cruz are predicated upon constitutional due process concerns . . . Those constitutional due

> process considerations, of course, cannot be superceded by statutory enactments.

Strickland v. State, 16 F.L.W. D2671 (Fla. 4th DCA October 16, 1991); see also, State v. Hernandez, 16 F.L.W. D2627 (Fla. 4th DCA Oct. 9, 1991)(court applied objective tests in Cruz and Hunter to determine police activity was not designed to interrupt ongoing criminal activity).

In State v. Hunter, 16 F.L.W. S588 (Fla. Aug. 29, 1991, the Florida Supreme Court recognized the Cruz objective entrapment test as being tied to "due process considerations." Id. at 589. The concurring opinion of Justice Kogan joined by Justice Barkett amplifies upon the constitutional underpinnings of Florida's objective entrapment defense. Specifically, Justice Kogan recognized the due process clause of the Florida Constitution, Article I, Section 9, as the constitutional source of the Cruz objective test for entrapment. Hunter, 16 F.L.W. S588, 590 (August 29, 1991)(Kogan, J. concurring in part and dissenting in part).

In sum, the Florida Supreme Court set forth the test for objective entrapment in Cruz in 1985. In 1987, the Florida Legislature enacted Florida Statute Section 777.201. Initially, the Second, Fourth and Fifth District Courts of Appeal continued to apply the objective entrapment test. The Third District Court of Appeal, however, concluded that Florida Statute Section 777.201 indicated legislative intent to abolish the Cruz test for objective entrapment.

In March, 1991, the Fourth District reversed itself and joined the Third District in pronouncing the death of the Cruz objective test. On October 8, 1991, the First District relied in part on the position of the Fourth District to conclude that the Cruz test for objective entrapment had been legislatively abrogated.

However, on October 16, 1991, the Fourth District reversed. The majority opinion in Hunter, strongly indicates the ongoing viability of the Cruz objective test for entrapment. Certainly, Justices

Kogan and Barkett recognize the due process underpinnings of objective entrapment. To the extent objective entrapment is an expression of Florida's due process clause, legislative abrogation would be inappropriate.

With the current split of opinion between the districts, there are no clear guidelines for trial courts to follow. The defense of objective entrapment will continue to be raised by defendants. This issue, therefore, is not obscure or unlikely to be presented to future courts. For the time being, defendants will be treated differently and courts will respond differently according to the prevailing decision within their geographical jurisdiction.

By accepting jurisdiction, the Supreme Court would avoid disparate resolutions of the objective entrapment defense. Alternatively, the Supreme Court could remand to the First District for reconsideration in light of Strickland and Hunter.

CONCLUSION

Based on the foregoing argument and citations of authority, petitioner asserts there is ample cause for this Court to accept jurisdiction for consideration on the merits or to remand to the First District Court of Appeal for reconsideration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Gypsy Bailey, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 14th day of November, 1991.

ALVIN L. PETERS