O.A. 10-8-92 07

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IN THE SUPREME COURT OF FLORIDA

MANUEL MUNOZ,

Petitioner,

v. CASE NO. 78,900

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecuting authority and appellee in the tribunals below, and will be referred to herein as the State. Petitioner, Manuel Munoz, was the defendant and appellant in the proceedings below, and will be referred to herein as Petitioner. References to the record on appeal will be noted by the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be noted by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

I. The Florida Legislature abolished the objective entrapment test set forth in Cruz v. State, infra, when it enacted section 777.201. The entrapment statute codifies the subjective test for entrapment by providing that entrapment has occurred when the police methods used to obtain evidence of the commission of a crime involved "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." The statute places the burden on the defendant to prove that his criminal conduct occurred as a result of an entrapment, and that he was not predisposed to commit the crime.

II. While the objective entrapment test under Cruz and due process entrapment address the same policy considerations, the two defenses are not equivalent and coextensive. The due process defense implicates constitutional concerns of fundamental fairness. Under a due process analysis, a defendant bears the burden to show that, under the totality of circumstances, the government involvement in the crime was outrageous, shocking to the universal sense of justice, intolerable or uncivilized. Thus, a successful due process claim must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense. United States v. Jannotti, infra.

ARGUMENT

ISSUE I

WHETHER SECTION 777.201, FLORIDA STATUTES (1985) ABROGATED THE OBJECTIVE TEST FOR ENTRAPMENT SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985).

A. Section 777.201 has abolished the Cruz objective entrapment test.

The Florida Legislature in 1987 enacted Section 777.201, effective October 1, 1987. Ch. 87-243, s. 42, Laws of Florida. The statute provides as follows:

> (1) 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 perpetuates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes 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.
>
> (2) 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.

Prior to the 1987 enactment of **Fla. Stat.** §777.201, entrapment was a judicially created affirmative defense articulated by this Court in Cruz v. State, 465 So.2d 516 (Fla. 1985). In Cruz, Tampa police officers operated a

decoy operation in a high crime area. One officer posed as a drunken bum, leaning against a building with his face to the wall. One hundred and fifty dollars in currency was plainly visible from a rear pants pocket. Cruz happened upon the scene, approached the decoy officer, and then continued on his way. A short time later, Cruz returned to the scene and took the money from the decoy's pocket without harming him in any way. When Cruz was charged by information with grand theft, he moved to dismiss pursuant to **Fla. R. Crim. P.** 3.190(c)(4), arguing that the arrest constituted entrapment as a matter of law.

This Court agreed with Cruz, holding that, under the facts of the case, the police activity constituted entrapment as a matter of law. This Court also enunciated an entrapment defense consisting of two independent and coexisting elements: A subjective test and a threshold objective test, which itself contains two elements. Id. at 522. In Gonzalez v. State, 517 So.2d 1346, 1349 (Fla. 3d DCA 1990), the Third District explained the two elements of entrapment as follows:

> The first element, the "traditional" or "subjective" standard, defined entrapment as "law enforcement conduct which implants in the mind of an innocent person the disposition to commit the alleged crime, and hence induces its commission. . . . Under this traditional formulation, the defense of entrapment is limited to those defendants who were not predisposed to commit the crime induced

> by government actions." Cruz v. State, 465 So.2d 516, 521 (Fla.), cert. denied, 473 U.S. 905 . . . (1985). The second, independent, "objective" standard for assessing entrapment recognized that "when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of the defendant becomes irrelevant." Cruz, 465 So.2d at 521. The subjective test focused on the predisposition of the defendant; the objective test focused on the conduct of the police and the proper uses of governmental power.

Under the objective test, "[e]ntrapment 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, 465 So.2d at 522. The first prong of the objective test examined whether the "police activity seek[s] to prosecute crime where no such crime exists but for the police activity engendering the crime." Id. The second prong of the objective test addressed the problem of inappropriate techniques. Id.

Before the enactment of section 777.201, a defendant had the burden only of adducing evidence of entrapment, and once the trial court determined that the evidence was sufficient, the burden shifted to the state to disprove entrapment beyond a reasonable doubt. See **Fla. Std. Jury Instr. (Crim.)** §3.04(c)(1) (1985) ("On the issue of

entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped."). The threshold objective test required the state to establish initially whether "police conduct revealed in that particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Cruz, 465 So.2d at 521 (quotation omitted). If the state established the validity of the police activity and thereby crossed over the objective test hurdle, the subjective test remained. However, the answer to whether the accused was an innocent person induced by government officials to commit the crime fell within the province of the jury. Id. Following the 1987 enactment of section 777.201, a new standard jury instruction issued, placing the burden wholly on the defendant to show by a preponderance of the evidence that "his criminal conduct occurred as a result of an entrapment." **Fla. Std. Jury Instr. (Crim.)** §3.04(c)(2) (1987).

The Third and Fourth District Courts of Appeal, in considering the effect of the 1987 enactment of section 777.201, have concluded that the new statute abolished the objective test articulated in Cruz. See Gonzalez, 571 So.2d at 1349; Krajewski v. State, 587 So.2d 1175 (4th DCA), quashed on other grounds, 16 F.L.W. S682 (Fla. Oct. 17, 1991). The Third District in Gonzalez found that the new

entrapment statute "codifies the subjective test by providing that entrapment has occurred when the police methods used to obtain evidence of the commission of a crime involved '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.'" 571 So.2d at 1349 (quoting **Fla. Stat. §** 777.201 (1987)). The court found support for its conclusion in the **House of Representatives' Committee on Criminal Justice Staff Analysis**, June 27, 1987, at 177, which stated: "This section overrules the Florida Supreme Court's decision in Cruz v. State, 465 So.2d 516 (Fla. 1985), which held that the objective test of whether law enforcement conduct was impermissible was in the discretion of the trial court." Gonzalez, 571 So.2d at 1349; see also **Senate Staff Analysis and Economic Impact Statement on Crime Prevention**, Bill No. CS/HB 1467 (May 22, 1987) (this section "[c]larifies that entrapment is an affirmative defense that would be available to a defendant who established to the trier of fact by a preponderance of the evidence that he was not predisposed to commit the offense now charged."). The Gonzalez court likewise stated: "Now, the defendant must prove by a preponderance of the evidence that 'his criminal conduct occurred as a result of entrapment.'" 571 So.2d at 1350 (quoting **Fla. Stat. §** 777.201 (1987)).

In addition to the above-referenced statements of legislative intent, the language of the statute clearly implies that section 777.201 embodies the subjective test and abandons the objective test. For example, the statute unequivocally makes entrapment an issue to be "tried by the trier of fact," and places the burden wholly on the defendant to prove by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment. **Fla. Stat. §** 777.201 (1987). While subsection (1) of the statute contains language relating to the second prong of the objective test articulated in Cruz,[1] nothing in the new statute permits entrapment to be considered as a matter of law by the trial court, as required by the Cruz objective test. The Gonzalez court elaborated on this point:

> Subsection (1) of the entrapment statute appears, at first reading, to focus on the conduct of the police by providing that an entrapment has occurred if the police conduct creates a "substantial risk that such crime will be committed by a person other than one who is ready to commit it." However, subsection (2) makes

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[1] This second prong considers "whether a government agent 'induces or encourages another person to engage in conduct constituting such offense by either: (A) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (B) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.' Model Penal Code s. 2.13 (1962)." Cruz, 465 So.2d at 522.

> it clear that a defendant will be acquitted on the basis of entrapment only if he can prove, by a preponderance of the evidence, that "his criminal conduct occurred as a result of an entrapment." The sole statutory test for entrapment is, therefore, the subjective test of whether the defendant was predisposed to commit the crime, or as the statute provides, whether the defendant was a person who was "ready to commit the crime." Subsection (1) appears to prevent a defendant from taking advantage of "coincidental improper police conduct." State v. Rockholt, 96 N.J. 570, _____, 476 A.2d 1236, 1241 (construing an entrapment statute similar to Florida's).

Gonzalez, 571 So.2d at 1349-50 n.3 (emphasis in original).

The Fourth District in Krajewski joined the Third District in concluding that section 777.201 abolished the Cruz test, remarking:

> We align this court with the view expressed by the Third District in Gonzalez. We are persuaded to this view not only by the reasoning of that opinion but also by the language of the new statute. Critical to our analysis and interpretation is the use by the legislature of the term "cause." The objective test is not concerned with cause and effect. It examines only the action of law enforcement or its agencies, and whether that action is permissible rather than "outrageous." On the other hand, the statute is concerned with whether law enforcement activity causes a person to commit a crime. This is entirely a subjective matter.

587 So.2d at 1178 (emphasis in original).

In Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991), however, the Fourth District reversed the position it took in Krajewski for two reasons: (1) This Court said Cruz was alive and well in its State v. Hunter, 586 So.2d 319 (Fla. 1991), opinion; and (2) the Hunter Court said the objective entrapment aspects of Cruz are predicated on constitutional due process concerns which cannot be superceded by statutory enactments. The state submits that Strickland was wrongly decided based on two erroneous lines of reasoning.

First, this Court did not breathe new viability into Cruz in its Hunter decision. Instead, this Court simply found that Cruz applied on those facts. Critical to this Court's decision in Hunter was the fact that Hunter and Conklin committed their offenses in October 1982. Hunter, 586 So.2d at 323 (Barkett, J., concurring and dissenting). Because the offenses occurred long before the 1987 enactment of section 777.201, Cruz clearly applied. For this same reason, the Fourth District's recent decision in Ricardo v. State, 591 So.2d 1002 (Fla. 4th DCA 1991), is similarly flawed.

Second, in Cruz, this Court noted the federal line of cases which "normally focus[] on the predisposition

of the defendant," i.e., the subjective view of entrapment. 465 So.2d at 518. While this Court agreed that the question of predisposition should always be a question of fact for the jury, this Court expressed grave concerns about "entrapment scenarios in which the innocent will succumb to temptation . . . ." Id. at 519. For this reason, this Court "provid[ed] two independent methods of protection in entrapment cases," i.e., the subjective and objective doctrines.

"While the objective test parallels a due process analysis, it is not founded on constitutional principles." Id. at 520 n.2. Thus, the Strickland court's pronouncement that the legislature may not enact a version of section 777.201 which does not incorporate the objective view is unfounded. Further, "the legislature's omission of the objective test does not mean that the government is now free to pursue its law enforcement efforts in any manner it chooses." Gonzalez, 571 So.2d at 1350. After all, "the federal due process clause, which [Florida courts] are obligated to enforce, [will] continue[] to mark the outer limits of permissible police conduct." Id.

The First District has consistently approved the reasoning of the Gonzalez and Krajewski courts. See State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991); Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991)

(pending before this court in case number 75,286); State v. Pham, 17 F.L.W. D271 (Fla. 1st DCA Jan. 17, 1992). While the conclusions reached by the Third and Fourth Districts are compelling, the Second District has declined to find that section 777.201 abolished the objective test. See Beattie v. State, 17 F.L.W. D657 (Fla. 2d DCA March 6, 1992); Morales v. State, 17 F.L.W. D661 (Fla. 2d DCA March 4, 1992); Wilson v. State, 589 So.2d 1036 (Fla. 2d DCA 1991); Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989).

In summary, it is clear from the language of section 777.201, which makes entrapment a matter to be determined solely by the jury, the new standard jury instruction on entrapment, which places the burden wholly on the defendant to establish he was entrapped, and Florida House of Representatives and Senate staff analyses, which expressly state that the intent of the statute was to overrule Cruz and to make entrapment an affirmative defense available only to a defendant who is not predisposed, that section 777.201 abolished the defense of objective entrapment as a matter of law, as articulated in Cruz. In the absence of the Cruz objective entrapment defense, defendants may still seek dismissal of charges by asserting a constitutional due process claim which establishes outrageous government involvement in the crimes.

B. The Objective Entrapment and Due Process Entrapment Defenses are not Equivalent and Coextensive.

This court in Cruz first noted that while the objective test parallels a due process analysis, it is not founded on constitutional principles. 465 So. 2d at 520 n.2. In Hunter v. State, 586 So.2d 319, 322 (Fla. 1991), this court noted that the Cruz objective test included due process considerations.

While the objective entrapment and due process entrapment defenses are similar, they are not equivalent or coextensive. To amount to a constitutional violation under the federal constitution, the law enforcement techniques must be so outrageous that they are fundamentally unfair and "'shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973). In evaluating claims of official misconduct, federal courts have considered the totality of circumstances without designating any single factor as controlling. See Owen v. Wainwright, 806 F. 2d 1519 (11th Cir. 1986); United States v. Gianni, 678 F. 2d 956 (11th Cir. 1982); United States v. Tobias, 662 F. 2d 381 (5th Cir. Unite B), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed. 2d 1317 (1982). The distinction between objective entrapment and due process entrapment was discussed by the court in United States v. Jannotti, 673 F. 2d 578 (3d Cir. 1982), as follows:

> It is plain from the Court's opinion in Russell and the separate opinions in Hampton [v. United States, 425 U.S. 484 (1976)], however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense. The genesis of the entrapment defense lay in the Court's interpretation of legislative intent; "[s]ince the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." United States v. Russell, 411 U.S. at 433, 93 S.Ct. at 1643 (footnote omitted). We must necessarily exercise scrupulous restraint before we denounce law enforcement conduct as constitutionally unacceptable; the ramifications are wider and more permanent than when only a statutory defense is implicated.
>
> We must be careful not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reserved for the constitutional defense only the most intolerable government conduct.

Id., 673 F. 2d at 608.

Florida of course may impose greater restrictions on police activity than those held by the United States Supreme Court to be necessary under the federal constitution. See Oregon v. Haas, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed. 2d 570 (1975); State v. Glosson. To date, however, with the

exception of the narrow Glosson[2] due process claim, which was expressly predicated upon the Florida due process clause, Florida courts have not necessarily distinguished between the Article I, Section 9 due process clause and the Fifth and Fourteenth Amendment provisions of the federal constitution in the context of due process entrapment claims. See Sarno v. State, 424 So.2d 829 (Fla. 3d DCA 1982); But see Brown v. State, 484 So.2d 1324 (Fla. 3d DCA 1986).

Petitioner references State v. Johnson, ___ A. 2d___ (N.J. 1992), 1992 WL 191529 (N.J.), a New Jersey Supreme Court decision which discusses the constitutional due process defense in relationship to New Jersey's statutory subjective entrapment defense. Like section 777.201, New Jersey's entrapment statute incorporates strands of both objective and subjective entrapment, but unequivocally makes the determinative factor the defendant's predisposition. In attempting to define the elusive parameters of a constitutional due process defense, the New Jersey court

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[2] State v. Glosson, 462 So.2d 1082 (Fla. 1985). The court in State v. Hunter clarified the scope of a Glosson due process claim, stating that "an agreement giving someone a direct financial stake in a successful criminal prosecution and requiring the person to testify in order to produce a successful prosecution is so fraught with the danger of corrupting the criminal justice system through perjured testimony that it cannot be tolerated." Id., 586 So.2d at 321. The court in Hunter held that Glosson was inapplicable because the agreement at issue in Hunter involved only a reduction in the informant's sentence in exchange for making new drug cases resulting in the confiscation of a particular quantity of cocaine. The court characterized Glosson as "fact-specific."

noted that "objective entrapment principles remain relevant and instructive with respect to any inquiry into constitutional due process entrapment...." Id., 1992 WL 191529 at 5. But, the court explained that "[d]ue process entrapment ... is an 'involvement-based' doctrine, which focuses on the extent of the government's involvement in the crime, not merely on whether that conduct objectively or subjectively induced or caused the crime." Id., 1992 WL 101529 at 6. The court further explained that

> Nevertheless, due process and objective entrapment serve like policies. I. Wayne R. LaFace & Jerold H. Israel, Criminal Procedure 82, n.4 (Supp. 1991). The similarity of policies and standards can obscure the distinction between ordinary objective entrapment and due process entrapment. See United States v. Jannotti, 673 F. 2d 578, 608 (3d Cir.) (en banc) (the lines between objective entrapment and due process entrapment "are indeed hazy"), rev'g 501 F. Supp. 1182 (E.D. Pa. 1980), cert. denied, 457 U.S. 1106 (1982). [additional cites omitted] The essence of due process entrapment inheres in the egregious or blatant wrongfulness of the government conduct. E.g., United States v. Twigg, 588 F. 2d 373 (3d Cir. 1978) (dismissing indictment for outrageous government conduct.). "A defendant's conviction will be disallowed when the government's overall involvement in his crime was so outrageous as to violate due process." Outrageous Conduct, supra, 19 Seton Hall L.Rev. at 613.

Id., 1992 WL 101529 at 6.

In Johnson, the court identified relevant factors in a constitutional due process entrapment defense as (1) whether the government or the defendant was primarily responsible for creating and planning the crime, (2) whether the

government or the defendant primarily controlled and directed the commission of the crime, (3) whether objectively viewed the methods used by the government to involve the defendant in the commission of the crime were unreasonable, and (4) whether the government had a legitimate law enforcement purpose in bringing about the crime. Johnson, 1992 WL 101529 at 9. The primary focus of the constitutional defense thus is 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. As Petitioner argues, these factors are virtually identical to the Cruz objective entrapment test, which required inquiry as to (1) whether the police activity had as its end the interruption of a specific ongoing criminal activity and (2) utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity. Cruz, 465 So.2d at 522.

The distinction which must be made between objective entrapment and due process entrapment is that, despite the similarity of concerns, constitutional due process, as defined under existing federal and Florida law, ultimately involves the question of whether the government involvement in the crime was outrageous, intolerable, shocking or uncivilized. The Cruz objective test factors are clearly relevant to this determination. However, a due process analysis involves consideration of the totality of

circumstances, with no single factor controlling. Moreover, under Cruz, the state had the initial burden to establish that the police conduct did not fall below standards to which common feelings respond for the proper use of governmental power. Under a due process analysis, the defendant bears the entire burden to show that the challenged conduct was outrageous or shocking.

In summary, the objective entrapment and constitutional due process defenses, while involving similar policy concerns, are not equivalent and coextensive. A defendant challenging government involvement in a crime bears a heavy burden to establish that the police activity was outrageous, and shocking to the universal sense of justice. Under a due process analysis, the government conduct is evaluated under the totality of circumstances, with no single factor controlling.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY GRANTED THE MOTION TO DISMISS.

If this court is disinclined to find that section 777.201 abolished the objective entrapment test, the police activity in this case passed both prongs of the standard articulated in Cruz. If the court agrees that the statutory entrapment defense abolished the Cruz objective test and gave rise to a constitutional due process entrapment defense, petitioner did not establish that the police conduct at issue in this case was outrageous, intolerable, shocking or uncivilized.

Entrapment has not occurred as a matter of law under the Cruz objective test 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.

The trial court found that the investigation of Video Den failed the first prong of the objective test because there was no evidence that the focus of the sting operation was the interruption of ongoing criminal activity at the Video Den. Petitioner similarly argues that "the record is thoroughly devoid of any suggestion that Mr. Munoz or the Video Den were involved in any type of ongoing criminal activity," and that the police activity in this case amounted to impermissible virtue testing. Petitioner's Brief at 41. The trial court and petitioner misconstrue the focus of the first prong of the Cruz objective test. The

test is not whether police suspected petitioner or his business, in particular, of involvement in criminal activity, but rather, whether the sting operation had as its focus the interruption of ongoing criminal activity. As the court in United States v. Jannotti, explained: "We have held, at least in the context of entrapment, that 'it is inconsequential whether law enforcement officials did or did not act on well-grounded suspicion that the defendant was engaging in wrongdoing, or whether they had probable cause for approaching the defendant.'" 673 F. 2d at 609. The court further explained that "where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait." Id.

Police in this case commenced a sting operation in response to a telephone complaint about rentals of adult videos to minors at Top Banana, another video store. They selected stores to include in the investigation from the local telephone book. The fact that police directed their investigation at an existing problem is sufficient to satisfy the first prong of the Cruz test. See Donaldson v, State, 519 So.2d 737 (Fla. 3d DCA 1988). As noted above, the Cruz objective test does not require that the 'existing problem' or the ongoing criminal activity to which police respond specifically involve or identify the defendant. In Donaldson, police conducted a decoy and surveillance

operation to reduce the number of burglaries of stores and cars in downtown Miami. Police ensnared the defendant when they parked an unmarked white decoy car on the street, leaving the driver's side door unlocked and the windows down, and placing a radio and luggage in the rear passenger compartment. The defendant opened the car door and took the radio. In upholding the trial court's denial of the defendant's motion to dismiss the information, the court found that the decoy operation was directed at ongoing problems and was therefore sufficient to satisfy the first prong of the Cruz objective test. Here, as in Donaldson, the sting operation was focused specifically on the rental or sale of adult video tapes to minors by video stores, and was instigated after police received a complaint of such activity. The fact that police had no specific information about petitioner or Video Den is irrelevant. See also State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), affirmed, 558 So.2d 1 (Fla. 1990). The investigation clearly had as its specific focus the unlawful rental of adult videos to minors.

Under the second prong of the Cruz objective test, entrapment has not occurred where police activity "utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Id., 465 So.2d at 522. The second prong of the test focuses on whether the methods employed by the police officers induced or encouraged an individual to engage in criminal conduct by either (a)

making knowingly false representations designed to induce the belief that such conduct is not prohibited or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. In dismissing the charges, the trial court noted the "police tactic of clothing the juvenile informant with the adult membership card," and a totality of circumstances which "created the substantial risk that an offense would be committed by persons other than those ready to commit it."

Section 847.012(2), Florida Statutes, under which petitioner was charged, prohibits the knowing sale, rental or loan to a minor of any video depicting nudity or sexual conduct, and which is harmful to minors.

The use an informant who, in the estimation of the officer, looked 16 or 17, providing her with a membership card of an older male, telling her to lie about her age and her relationship with the cardholder and to say that the videos were for her boyfriend or brother were not false representations designed to induce a belief that knowingly renting adult video tapes to minors was not prohibited. These also were not tactics which created a substantial risk that the offense of knowingly renting an adult video tape to a minor would be committed by one not ready to commit the crime. These tactics were reasonably tailored to apprehend only those who already were knowingly renting adult video tapes to minors.

The tactics employed in this case were far less inducing than those upheld under Cruz in many other cases. See Lusby v. State, 507 So.2d 611 (Fla. 4th DCA), rev. denied, 518 So.2d 1276 (Fla. 1987) (ten to fourteen attempts to persuade individual to enter drug deal not outrageous where there were not threats to personal safety or promises of exorbitant gain); State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), approved, 558 So.2d 1 (Fla. 1990) (tactic of police selling cocaine near schools upheld because the sting operation was reasonably tailored to apprehend ongoing criminal activity and not outrageous); Gonzalez v. State, 525 So.2d 1006 (Fla. 3d DCA 1988) (fact that confidential informant and police had no information that the defendant was selling illicit drugs prior to the subject incident, that the confidential information called the defendant 10 to 15 times to induce the meeting with the undercover officer, and that the informant used cajolery on the defendant did not constitute prohibited police conduct under Cruz); State v. Konces, 521 So.2d 313 (Fla. 3d DCA 1988) (fact that informant made repeated attempts to persuade defendant to obtain and sell cocaine, and allegedly promised to invest in the defendant's business did not constitute prohibited police conduct under Cruz); Donaldson v. State, 519 So.2d 737 (Fla. 3d DCA 1988) (use of radio valued at less than $100 inside partially locked decoy car did not provide an inducement strong enough to tempt an unpredisposed person to surrender to the bait); Brown v. State, 484 So.2d 1324 (Fla.

3d DCA 1986) (sting operation which involved police running a warehouse fencing operation for stolen goods, publicizing the opening of the business in the community, use of business cards and scheduled appointments for "clients" not outrageous under a due process or Cruz objective entrapment analysis because the operation was designed to identify those who were currently committing crimes).

In comparing the facts of this case with others in which constitutional due process claims have been asserted, it is clear that the government's targeting of petitioner and Video Den as part of the investigation, and the use of the underage informant cloaked with an ID belonging to an adult male to obtain an adult video did not constitute shocking, outrageous, intolerable or uncivilized government involvement in the crime. See Hampton v. United States (no due process violation where a defendant convicted of distributing heroin asserted that he merely sold to one government agent the heroin which another government agent supplied him); People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S. 2d 714, 378 N.E. 2d 78 (N.Y. 1978)(due process violation under the state constitutional provision where police enlisted the services of an informant whom they beat and deceived so as to cause him to desperately seek out the defendant, upon whose sympathies he played, in order to satisfy the police thirst for a drug conviction); State v. Hohensee, 650 S.W. 2d 268 (Mo.Ct.App. 1982)(due process violation where the burglary for which the defendant acted

as a lookout was sponsored and operated by police); United States v. Twigg (due process violation where Drug Enforcement Agency and government informant set up drug lab, and planted criminal design in defendants' minds); Brown v. State(police-operated warehouse fencing operation did not violate due process). Clearly, the conduct at issue in this case does not begin to approach the standard of outrageous, shocking, intolerable or uncivilized.

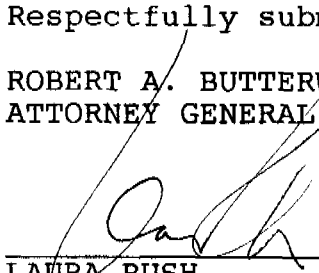
In conclusion, the police conduct at issue in this case did not warrant dismissal of the charges under either a Cruz objective entrapment or a due process entrapment standard.

CONCLUSION

Based on the foregoing arguments and citations of authority, respondent requests this court to find that section 777.201 abolished the Cruz objective test for entrapment, and to approve the decision of the First District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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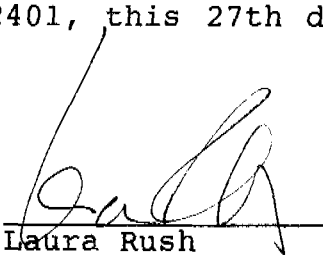
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Alvin L. Peters, McCauley & Peters, Attorneys At Law, 36 Oak Avenue, Panama City, Florida 32401, this 27th day of July, 1991.



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