IN THE SUPREME COURT OF FLORIDA

WILLIAM SIMMONS,

Petitioner,

v. Case No.: 79,094

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Petitioner, WILLIAM SIMMONS, the defendant in the trial court and appellant below, will be referred to in this brief as petitioner. Any record references to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts as reasonably supported by the record.

SUMMARY OF THE ARGUMENT

In 1987, the Florida Legislature enacted **Fla. Stat. §** 777.201 (1987) with the clear intent to overrule Cruz v. State, 465 So.2d 516 (FLa. 1985), and to establish a new law of entrapment. Under Cruz, the entrapment defense embodied a subjective test and a two part objective test. The First, Third, and until recently, Fourth Districts, in considering the effect of section 777.201 on the law of entrapment, have concluded that the new statute abolished the objective test articulated in Cruz.

Today, the sole statutory test for entrapment is the subjective test of whether a defendant is predisposed to commit a crime. Stated differently, the new statute is concerned with whether law enforcement causes a person to commit a crime.

If this Court declines to find that section 777.201 overrules Cruz, the police decoy operation in this case passed both requirements of the Cruz entrapment test. The police activity had as its end the interruption of specific ongoing criminal activity, and the officers used means which were reasonably tailored to apprehend those involved in the illegal activity.

ARGUMENT

Issue

HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987)?

The answer to this question must be in the affirmative. While the statute itself explicitly embodies the subjective entrapment test and implicitly abandons the objective test, other statements of legislative intent show clearly that the legislature intended to overrule Cruz and to mandate the establishment of the defense of entrapment solely through use of a subjective test.

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). Herrera v. State, Case No. 78,290, slip op. at 4, 7 (Fla. Feb. 6, 1992). 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).[1]

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

[1] In Herrera v. State, Case No. 78,290 (Fla. Feb. 6, 1992), this Court upheld the constitutionality of this instruction.

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,[2] 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 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

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[2] 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.

> 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, 16 F.L.W. D2671 (Fla. 4th DCA Oct. 16, 1991), however, the Fourth District reversed the position it took in Krajewski for two reasons: (1) That this Court had 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, 17 F.L.W. D1 (Fla. 4th DCA Dec. 18, 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. [3]

The First District has consistently approved the reasoning of the Gonzalez and Krajewski courts. See State v. Munoz, 16 F.L.W. D2665 (Fla. 1st DCA Oct. 8, 1991) (pending before this Court in case number 78,900); Simmons v. State, 16 F.L.W. D2788 (Fla. 1st DCA Dec. 13, 1991); State v. Pham, 17 F.L.W. D271 (Fla. 1st DCA Jan. 17, 1992). While the conclusions reached by the Third and Fourth

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[3] The state does not address petitioner's Glosson v. State, 462 So.2d 1082 (Fla. 1985), argument other than noting that that case concerned the constitutional right to due process, a much broader protection that the one at issue. And again, as Cruz itself noted, the objective test is not founded on such a constitutional principle.

Districts are compelling, the Second District has declined to find that section 777.201 abolished the objective test. See Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989).

Accordingly, the state urges this Court to find that section 777.201 abolished the Cruz objective test, leaving the entrapment issue to be decided by the jury. If this Court is disinclined to so find, the police undercover operation in this case nevertheless passed both requirements of the objective test.

Under the Cruz two prong test for objective entrapment, entrapment has not occurred as a matter of law where the 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. In the present case, the state clearly intended to stop ongoing criminal activity and utilized reasonably tailored means.

As to the first prong, the record establishes that the undercover operation was initiated based on the shared concern of Officer Deal, a part time employee of UPS, and UPS management, about drug use at the Jacksonville UPS facility (R 20). The fact that the police response was directed 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). The Cruz objective test does not require that the "existing problem" or the ongoing criminal activities to which police respond specifically involve or identify a defendant. In Donaldson, police conducted a decoy and surveillance operation to reduce the number of burglaries in stores and cars in Miami. Police ensnared the defendant when they parked an unmarked decoy car on the street, leaving the driver's side door unlocked and the windows down, and placing a radio and several pieces of luggage in the rear passenger compartment. The defendant, about whom the police had no information, opened the car door and took the radio. In upholding the trial court's denial of the defendant's motion to dismiss the information on objective entrapment grounds, the Third District found that, because the decoy operation was directed to an ongoing problem, the police activity satisfied the first prong of the Cruz objective test.

In this case, the undercover operation specifically focused on the Jacksonville UPS facility, having been initiated only after Officer Deal had received information from fellow employees about drug use (R 20). The fact that police had no specific information about the drug problem at the facility is as irrelevant to establishing objective entrapment in this case as was the officers' lack of information about the defendant in Donaldson.

Similarly, in Burch v. State, 545 So.2d 279, 282 (4th DCA 1989), aff'd, 558 So.2d 1 (Fla. 1990), the Fourth District found that an undercover police operation involving the sale of drugs near schools passed the first prong of the Cruz objective test because "it was obviously undertaken in response to the untenable high volume of drug trade near the school where the defendants were apprehended." Likewise, the fact that police had no information about appellant was irrelevant to the issue of whether the investigation satisfied the first requirement of the Cruz objective test.

The Cruz Court characterized the first requirement of the objective test as addressing the problem of "virtue testing," i.e., police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. 465 So.2d at 522. In Cruz, the Court found that the police decoy operation failed the first prong of the objective test on the undisputed facts that "none of the unsolved crimes occurring near this location involved the same modus operandi as the simulated situation created by the officers." Id. The court stated: "The record thus implies police were apparently attempting to interrupt some kind of ongoing criminal activity. However, the record does not show what specific activity was targeted. This lack of focus is sufficient for the scenario to fail the first prong of the test." Id.

In the present case, the police began the undercover operation specifically in response to a drug use problem identified by UPS management and Officer Deal. The investigation thus had as its focus that specific activity.

Under the second requirement 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. This requirement 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.'" Id. (quoting Model Penal Code §2.13 (1962)).

In the present case, the tactic of Officer McRae posing as a UPS employee was not a false representation designed to induce a belief that drug use was not prohibited; nor was this tactic one which created a substantial risk that the offense of drug use would be committed by one not ready to commit the crime. The tactic used was reasonably tailored to apprehend only those who were already using drugs at the Jacksonville UPS facility.

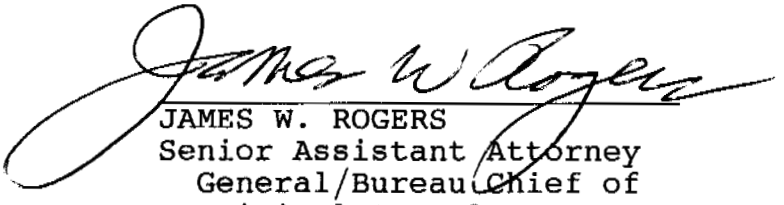
Moreover, the tactic employed in this case was far less inducing that tactics upheld under Cruz in many other cases. See Lusby v. State, 507 So.2d 611 (Fla. 4th DCA 1987); Burch, 545 So.2d at 279; Gonzalez v. State, 525 So.2d 1005 (Fla. 3d DCA 1988); State v. Konces, 521 So.2d 313 (Fla. 3d DCA 1988); Donaldson, 519 So.2d at 737; Brown v. State, 484 So.2d 1324 (Fla. 3d DCA 1986).

CONCLUSION

For these reasons, the state respectfully requests this Honorable Court to answer the certified question in the affirmative, or in the alternative, find that the police activity in this case passed the requirements of Cruz.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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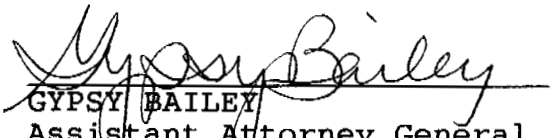

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to NANCY L. SHOWALTER, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 13th day of February, 1992.

GYPSY BAILEY
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