IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,058

STATE OF FLORIDA,

Petitioner,

vs.

BRIAN LEWIS,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner was the Appellee in the Third District Court of appeal and the prosecution in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent was the Appellant in the District court and the defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court. The symbol "App." will be used to designate the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Respondent, Brian Lewis, was arrested and charged with trafficking in cocaine and conspiring to traffic in cocaine as a result of his encounter with a confidential informant. (App. 1). Respondent moved to dismiss the charges against him arguing 1) violation of his due process rights; and, 2) objective entrapment. (App. 1, p.3). The trial court rejected both arguments and denied Respondent's motion to dismiss. (App.1 p.3). As a result, Respondent entered a plea of no contest, reserving his right to appeal. (App. 1, p.3).

On appeal, Respondent argued that he had been "randomly picked out by a police informant who was paid a contingent fee that was determined, in part, by the amount of property seized" and that he had been "objectively entrapped because the police activity in question did not have as its end, the interruption of a specific ongoing criminal activity." (App. 1).

The state responded to these claims by arguing that Respondent's due process rights were not violated because payment to the informant was not contingent on the informant testifying at trial. See State v. Hunter, 586 So.2d 319 (Fla. 1991). The state also argued that the issue of objective entrapment was to be decided by the jury. See §777.201, Florida Statutes (1987).

The Third District Court of Appeal rejected Respondent's due process argument, but found the Respondent had been objectively entrapped as a matter of law. (App. 1, p.4-5.).

In a petition for rehearing and rehearing en banc, the state argued that the Third District had improperly relied on the application of the objective entrapment test in State v. Hunter inasmuch as §777.201 was not in effect when Hunter was charged, nor when Hunter's crimes were committed. (App. 2). Rehearing and rehearing en banc were denied on June 9, 1992 (App. 3).

Notice invoking the jurisdiction of this Honorable Court was filed on June 16, 1992.

SUMMARY OF THE ARGUMENT

The instant opinion is in express and direct conflict with Herrera v. State, 17 FLW S 84 (Fla. February 7, 1992), State v. Thinh Thien Pham, 17 FLW D 607 (Fla. 1st DCA March 2, 1992) and other district court opinions. Discretionary review should be exercised to resolve this conflict and ensure uniformity among the districts.

POINT ON APPEAL

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH HERRERA V. STATE, 17 FLW S 84 (FLA., FEBRUARY 7, 1992, STATE V. THINH THIEN PHAM, 17 FLW D607 (FLA. 1ST DCA MARCH 2, 1992) AND OTHER DISTRICT COURT OPINIONS?

ARGUMENT

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH HERRERA V. STATE, 17 FLW S 84 (FLA. FEBRUARY 7, 1992, STATE V. THINH THIEN PHAM, 17 FLW D607 (FLA. 1ST DCA MARCH 2, 1992) AND OTHER DISTRICT COURT OPINIONS.

Section 777.201 of the Florida Statutes (1989) expressly states that the "issue of entrapment shall be tried by the trier of fact." In Herrera v. State, 17 FLW S 84 (Fla. February 7, 1992), this Honorable Court was asked to consider whether §777.201 impermissibly and unconstitutionally shifted the burden of proof to the defense. This question was answered in the negative since the state is not relieved of the burden of proving each element of the crime charged where the defense claims entrapment and is required to persuade the jury that he or she was entrapped. 17 FLW at 585. By reaching this decision, this Honorable Court necessarily and implicitly ruled that the statute was in all other respects constitutionally sound and in full force and effect. However, because the objective entrapment defense could not be applied to the facts of Herrera, the issue of whether the objective entrapment defense remained viable in light of 777.201 was not reached. 17 FLW at 585. (Justice Kogan concurring).

This decision was reached by the First District Court of appeal in State v. Thinh Thien Pham, 17 FLW D 607 (Fla. 1st DCA

March 2, 1992; Simmons v. State, 16 FLW D 3092 (Fla. 1st DCA Dec. 13, 1991); and State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991). In the foregoing cases, the First District Court of appeal recognized the uncertainty among the districts and ruled that § 777.201, Florida Statutes (1987) "effectively abolished the objective entrapment test articulated 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)." 17 FLW at D 607.

The Third District Court of Appeal in the instant case reversed Respondent conviction because "neither part of the Cruz test was satisfied." (App 1, p. 5). In ruling that neither part of the Cruz test was satisfied in the instant case, the Third District effectively ruled that the Cruz test of objective entrapment is viable notwithstanding § 777.201, Florida Statutes (1987), and implicitly ruled that §777.201 is void and of no effect. These rulings expressly and directly conflict with the decisions in Herrera v. State, Thinh Thien Pham, and Simmons v. State. Therefore, discretionary review jurisdiction should be exercised by this Honorable Court to settle the conflict among the districts and ensure statewide uniformity.

CONCLUSION

WHEREFORE, based upon the foregoing Petitioner respectfully requests that this court grant discretionary review in the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON JURISDICTION** was furnished by mail to **KENNETH J. RONAN**, 2600 N. Military Trail, 4th Floor Boca Raton, FL 33431 on this 25th day of June 1992.

ANGELICA D. ZAYAS
Assistant Attorney General

/gdp

IN THE SUPREME COURT OF FLORIDA

CASE NO.

STATE OF FLORIDA,

Petitioner,

vs.

BRIAN LEWIS

Respondent.

_____/

APPENDIX

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91-131496-K

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1992

BRIAN LEWIS, **

Appellant, **

vs. ** CASE NO. 91-1072

THE STATE OF FLORIDA, **

Appellee. ** #90-30002-B

Opinion filed March 24, 1992.

An Appeal from the Circuit Court for Dade County, Juan Ramirez, Jr., Judge.

Lavalle, Wochna, Raymond & Brown, and Kenneth J. Ronan, for appellant.

Robert A. Butterworth, Attorney General, and Angelica D. Zayas, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and BARKDULL, and GERSTEN, JJ.

PER CURIAM.

Appellant, Brian Lewis (Lewis), appeals the denial of a motion to dismiss. We reverse.

Lewis, a thirty year old car salesman who had never been arrested, fatefully encountered Juan Carlos at a night club. Juan

APP. 1

Carlos, a confidential informant for the Miami Beach Police Department, was particularly friendly to Lewis and insisted they go to another nightclub.

Juan Carlos, flashing a lot of money, paid for the entrance fee to the club, and for several drinks. During the course of the evening, Juan Carlos stated that he was involved in drug dealing.

Juan Carlos said there was a lot of money to be made in the business and offered Lewis cocaine. Lewis, however, refused. Juan Carlos told Lewis that if Lewis could introduce Juan Carlos to a purchaser of a kilo or more of cocaine, Lewis would make between $1,000 and $2,000. Lewis declined to get involved.

The next day, Juan Carlos repeatedly called Lewis's home and left messages on Lewis's answering machine. When Lewis returned the calls, Juan Carlos again offered $1,000 - $2,000 for an introduction to a purchaser of cocaine. Lewis again declined, saying that he "didn't want to get involved."

Later on at work, Lewis spoke to Eugene Marzullo (Marzullo), a coemployee and codefendant in this case. Lewis told Marzullo about his very unusual night (with Juan Carlos), and about Juan Carlos's offer. Marzullo expressed an interest in buying drugs and also offered to pay Lewis if the deal could be made. Meanwhile, Juan Carlos continued calling Lewis frequently at home and at work, insisting that Lewis find a buyer for the cocaine.

Finally, Lewis agreed to introduce Juan Carlos to Marzullo. A meeting was set up. Lewis brought Marzullo, who had $20,000 with him, to purchase the drugs. Juan Carlos, brought a

detective, who posed as Juan Carlos's cousin. After the drug transaction was finalized, the police arrested both Lewis and Marzullo for trafficking in cocaine.

The unfolding of Juan Carlos's personal history shows that he had previously been arrested and convicted for trafficking in cocaine. Juan Carlos entered into a substantial assistance agreement with the State and was placed on probation.

At the time of Lewis's arrest, Juan Carlos had fulfilled his substantial assistance agreement. Juan Carlos, however, chose to continue living in the nether world of drugs and fast money. This convicted drug trafficker was working as an informant for pay. Juan Carlos's payment was neither contingent upon his testimony nor participation in trial. Juan Carlos's fee was contingent, in part, on the amount of property seized in an arrest.

Lewis moved to dismiss the charges against him, arguing: 1) violation of his due process rights; and, 2) objective entrapment. The trial court rejected both of Lewis's arguments and denied the motion. Lewis pled no contest, reserving his right to appeal.

On appeal, Lewis again argues that his due process rights under Article 1, Section 9, of the Florida Constitution, were violated. He claims he was randomly picked out by a police informant who was paid a contingent fee that was determined, in part, by the amount of property seized. Lewis further asserts that he was objectively entrapped because the police activity in question did not have as its end, the interruption of a specific ongoing criminal activity.

Appellee contends that because payment to the informant was not contingent on the informant testifying at trial, Lewis's due process rights were not violated. Appellee also argues that the issue of entrapment should be decided by a jury.

State v. Hunter, 586 So.2d 319 (Fla. 1991), a case similar to this one, controls. In that case, the Florida Supreme Court rejected the argument that the appellant's due process rights had been violated. The court limited the holding of State v. Glosson, 462 So.2d 1082 (Fla. 1985), to cases where the confidential informant's contingent fee was conditioned on his trial testimony.

Here, the confidential informant was not required to testify in order to receive his fee. Therefore, we must reject Lewis's due process argument. State v. Hunter, 586 So.2d at 321.

However, the Hunter court also found that the appellant had been objectively entrapped by the police. The court gave trial courts guidance by stating:

> To guide trial courts, we set out a threshold test for establishing entrapment: "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."

State v. Hunter, 586 So.2d at 322 [quoting from 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 Hunter court reversed based on objective entrapment reasoning that neither part of the Cruz test had been met. The court in Hunter found that, like here, there was no "specific

ongoing criminal activity" until the informant created such activity.

Similarly, in this case, we find that neither part of the Cruz test was satisfied. The first prong of the Cruz test was not met because Lewis was not involved in a specific ongoing criminal activity. In fact, there was no crime until Juan Carlos created it. It was Juan Carlos who flashed money, and persistently pursued Lewis, attempting to bring him into the drug trade. Also, the second prong of the Cruz test was not met because the police activity was not reasonably tailored to apprehend those involved in ongoing crime. Accordingly, we reverse and remand with instructions that Lewis be discharged.

Reversed and remanded.[1]

BARKDULL and GERSTEN, JJ., concur.

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[1] We are not unaware of the line of cases holding that the enactment of section 777.201, Florida Statutes, evinces a legislative intent to overrule Cruz. See, e.g., State v. Thinh Thien Pham and Hang Thi Vu, 17 F.L.W. D271 (Fla. 1st DCA Jan. 17, 1992); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), review denied, 584 So.2d 998 (Fla. 1991). However, we choose to rely on our most recent Supreme Court cases on the issue. See State v. Krajewski, 589 So.2d 254 (Fla. 1991); State v. Hunter, 586 So.2d 319 (Fla. 1991).

SCHWARTZ, Chief Judge (specially concurring).

Lewis does not claim he was coerced or seduced into an offense he was not predisposed to commit. He need just have said "no" to the criminal opportunity presented him. Instead, for expected profit, he voluntarily chose to traffic in cocaine. Nevertheless, the charges against him, although true, are dismissed because the state did not previously know of his proclivities and therefore, it is said, had no constitutional right to proceed against him. While the wisdom and logic, not to mention justice, of this result--which is the law only in Florida--completely escape me,[1] I concur in this decision[2] because it is mandated by my judicial superiors. I am forced to agree that State v. Hunter, 586 So.2d 319 (Fla. 1991) is controlling and that it holds--notwithstanding legislation we have determined is directly to the contrary, see Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), review denied, 584 So.2d 998 (Fla.

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[1] The law of this state condemns outright any "police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime." Cruz v. State, 465 So.2d 516, 522 (Fla. 1985), cert. denied, 473 U.S. 905 (1985). As I understand it, it therefore astonishingly forbids the conviction of a judge or other public official who accepts a cash bribe at the instance of an undercover agent, unless the state shows he had done this sort of thing before and had thus been engaged in a "specific ongoing criminal activity." Cruz v. State, 465 So.2d at 522. O sting, here is thy death!

[2] This case is obviously in direct conflict with State v. Pham, _____ So.2d _____ (Fla. 1st DCA Case nos. 91-2 & 91-3, opinion filed, March 2, 1992)[17 FLW D607; and Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991).

1991)--that "objective entrapment"[3] as defined by the Florida supreme court, remains a conclusive defense to a criminal prosecution. Nevertheless, several factors lead me to share the uncertainty and misgivings which have been expressed about this conclusion. See State v. Pham, _____ So.2d _____ (Fla. 1st DCA Case nos. 91-2 & 91-3, opinion filed, March 2, 1992)[17 FLW D607]; Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991); see also State v. Petro, 592 So.2d 254, 255 n.1 (Fla. 2d DCA 1991).

In the first place, it is clear that Hunter can be rationalized only on one of the alternative grounds that section 777.201, Florida Statutes (1987) did not overrule the objective entrapment aspect of Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985); contra Gonzalez v. State, 571 So.2d at 1349[4]; State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991), or, if it did, that the statute is unconstitutional. But Hunter

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[3] I also agree that the present facts constitute "objective entrapment" under Hunter, 586 So.2d at 319 and Cruz, 465 So.2d at 522.

[4]

> Florida's new entrapment statute codifies the subjective test...§ 777.201. The objective test articulated in Cruz was abolished. Gonzalez v. State, 525 So.2d 1005 (Fla. 3d DCA 1988); State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988). See also House of Representatives Committee on Criminal Justice Staff Analysis, June 27, 1989), at 177 ('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'). [footnotes omitted]

Gonzalez, 571 So.2d at 1349.

does not so much as cite the statute or Gonzalez and does not even directly say that "objective entrapment" is constitutionally prohibited; indeed, the discussion of the issue in the majority opinion does not contain either the word "constitutional" or "unconstitutional." The statement that "[b]y focusing on police conduct, this objective entrapment standard includes due process considerations," Hunter, 586 So.2d at 322--if it indeed amounts to an implied invalidation of section 777.201--is hardly the reasoned and explicit holding one might expect if a statute is to be struck down.

Moreover, any such determination, as explicated in the separate opinion of Justice Kogan (which was not referred to by the majority and which also does not mention section 777.201 or Gonzalez), is directly contrary to the statement in Cruz itself that

> [w]hile the objective view parallels a due process analysis, it is not founded on constitutional principles.

Cruz, 465 So.2d at 520 n.2.[5] Hunter contains no acknowledgment of, much less an explanation for the sea change it embodies from

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[5] The entire passage is as follows:

> While the objective view parallels a due process analysis, it is not founded on constitutional principles. The justices of the United States Supreme Court who have favored the objective view have found that the court must 'protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.' Sorrells, 287 U.S. at 457, 53 S.Ct. at 218 (Roberts, J., in a separate

this conclusion.[6] What is more, Hunter does not refer to that portion of Cruz which comments upon its adoption of the holding in State v. Molnar, 81 N.J. 475, 410 A.2d 37 (1980), that objective entrapment is a viable[7] and separate defense.[8] Cruz states that:

> Subsequent to its Molnar decision, the New Jersey court held that statutory law had superseded the common law, placing the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact, State v. Rockholt, 96 N.J. 570, 476 A.2d 1236 (1984). Even though the

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> opinion). Justice Frankfurter also found that a judge's decision using the objective view would offer significant guidance for future official conduct, while a jury verdict offers no such guidance. Sherman, 356 U.S. at 385, 78 S.Ct. at 827 (Frankfurter, J., concurring in the result).

Cruz, 465 So.2d at 520 n.2; see also State v. Anders, _____ So.2d _____(Fla. 4th DCA Case no. 89-1183, opinion filed, March 11, 1992).

[6] The only thing which occurred between Cruz and Hunter was § 777.201.

[7] Cruz may be the only decision anywhere which precludes pure "virtue testing"-type entrapment, Cruz, 465 So.2d at 522, even as a matter of judicially created common law. Every other of the small minority of courts which recognizes "objective entrapment" at all, contra United States v. Russell, 411 U.S. 423 (1973); cases collected, 1 W. LaFave & A. Scott, Jr., Substantive Criminal Law § 5.2(b) (1986), requires far more than the mere approach to a previously unsuspected subject which is forbidden by Cruz, 465 So.2d at 522, as an intrusion into "[im]permissible waters." See 1 W. LaFave & A. Scott, supra, § 5.2(c). It is thus even more anomalous that only Florida's due process clause--even though it is virtually identical to that of the United States and every other state constitution--has been found affirmatively to prohibit the practice as a constitutional imperative.

[8] With the possible exception of New Jersey, the other "objective entrapment" states, see supra note 7, regard it and subjective entrapment as mutually exclusive, choosing objective entrapment as the preferable but only entrapment defense. 1 W. LaFave & A. Scott, supra, § 5.2(c), (d). In sharp contrast, Florida's objective entrapment rule is an additional and distinct defense. Cruz, 465 So.2d at 520-21.

> New Jersey court concluded that its common law paradigm had been supplanted, it noted that there may still be situations where the government conduct is so outrageous that constitutional due process requires dismissal. See discussion at note 1, supra. There is no parallel to the New Jersey legislative action in Florida, and we conclude that the policy considerations of the Molnar decision remain valid in this case. [e.s.]

Cruz, 465 So.2d at 521 n. 3. Section 777.201--which was at least in part apparently intended to overrule Cruz[9]--has made the present situation the rough equivalent of the one which produced the contrary decision in State v. Rockholt, 96 N.J. 570, 476 A.2d 1236 (1984). See discussion of Rockholt in Gonzalez. However, Hunter does not cite Rockholt either.

Considered as an original proposition, moreover, it is hard to see, and we are not told, the basis for recognizing a constitutionally protected interest in the particular manner in which one's criminality is discovered and pursued.[10,11] Not only

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[9] See supra note 4.

[10] It may be true that while

> '[s]ociety is at war with the criminal classes,'...[p]olice must fight this war, not engage in the manufacture of new hostilities.

State v. Hunter, 586 So.2d at 324 (Kogan, J., concurring in part, dissenting in part), quoting from Cruz, 465 So.2d at 522. Nevertheless, I did not previously know that the Florida Constitution embodied a manual of military tactics which restricts only one side, the state, to combat on an open field of battle against enemies who have already made their presence and identity known. The Redcoats lost the War of Independence largely because those who wrote the United States Constitution were not bound by such a rule.

[11] Query: Is Lewis, since he has now become known to the authorities and is thus presumably no longer protected by the Cruz-Hunter rule, subject to investigation for any future drug dealing on the ground that even a dog is entitled only to the

is the contrary conclusion that mere "objective entrapment" is constitutionally proscribed unprecedented in any jurisdiction,[12, 13, 14] it is very arguably an improper judicial interference with

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first bite; or, because he was unconstitutionally discovered, is he immune from any subsequent prosecution as a "fruit of the poisonous tree"?

[12] See supra note 7.

[13] "Objective entrapment" is perhaps to be distinguished from the far more egregious behavior involved in cases like Kelly v. State, _____ So.2d _____ (Fla. 4th DCA Case no. 90-0465, opinion filed, February 3, 1992)[17 FLW D154], in which the police manufactured the crack cocaine the defendant was charged with possessing. See generally State v. Petro, 592 So.2d 254, 255 (Fla. 2d DCA 1991). I believe, however, that the underlying basis even of these decisions--as well as the "objective entrapment" cases--is not some never-articulated-because-inarticulable individual right not to be "improperly" encountered, investigated or prosecuted, but rather a determination that, as a matter of public policy, the courts should not be used to further unacceptable conduct. See State v. Glosson, 462 So.2d 1082 (Fla. 1985); Cruz; Molnar; see also Petro, 592 So.2d at 254. But cf. Hunter, 586 So.2d at 324-27 (Kogan, J., concurring in part, dissenting in part). On that basis, these decisions embody perfectly legitimate and, I believe, largely correct conclusions. But it is primarily the legislature which determines the public policy of the state. If--as Gonzalez holds, it actually did in this instance--the legislature statutorily disagrees with the courts on any of these issues, its decision should, at least ordinarily, be deemed the final one.

In other words, not everything of which judges disapprove, even strongly and conscientiously, is unconstitutional. Although they have the undoubted power, they should not disregard this principle by elevating sincerely-held, but not inarguable, judicial views into unchallengeable constitutional doctrine. Similarly, while a state court undoubtedly has the authority to give its own constitution a more expansive or "liberal" reading than the Supreme Court's interpretation of the same or similar language in the Constitution of the United States, only an appropriate determination that the result is independently required by the state constitution itself would justify an actual decision to that effect.

[14] The holding is also at odds with the established law that a defendant may not complain about how his crime came to be discovered, Bush v. State, 369 So.2d 674 (Fla. 3d DCA 1979), or the manner in which he was brought to court. Frisbie v. Collins,

the prerogative of the executive in law enforcement and criminal prosecution and, after section 777.201, with the legislative function, as well. But see Chiles v. Children A,B,C, D,E, and F, 589 So.2d 260 (Fla. 1991)(applying doctrine of separation of powers).

Finally, it is unclear whether Hunter, which overruled Gonzalez or partially invalidated section 777.201 without referring to either one, has been affected by Herrera v. State, _____ So.2d _____ (Fla. Case no. 78,290, opinion filed, February 6, 1992)[17 FLW S84], which specifically applies both without referring to Hunter. I do not believe the doubts about Hunter created by this remarkable omission are entirely dissipated by Justice Kogan's separate opinion explaining it on the basis of a dichotomy between objective and subjective entrapment; unfortunately, the distinction is not reflected in the opinion of the court which, to the contrary, employs only the unqualified, generic term "entrapment."

For all these reasons, I am emboldened to think aloud that an ipse dixit is not enough to justify freeing persons who have committed serious violations of the criminal law solely because they were found out by a common investigative technique which is forbidden by no other jurisdiction and which has been specifically

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342 U.S. 519 (1952); Jones v. State, 386 So.2d 804 (Fla. 1st DCA 1980).

approved by the legislature. But a lower court judge is like the unfortunate six hundred at Balaklava.[15] Because I have to, I concur.

15

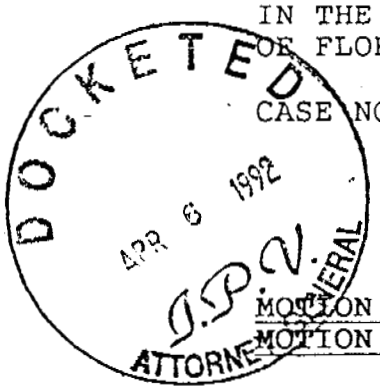
Theirs not to make reply,
Theirs not to reason why

Alfred Lord Tennyson, The Charge of the Light Brigade, st. 2 (1854). See Pacheco v. State, 485 So.2d 1379 (Fla. 3d DCA 1986)(Schwartz, C.J., specifically concurring); Van Horn v. State, 485 So.2d 1380 (Fla. 3d DCA 1986)(Schwartz, C.J., dissenting).

91-13.496-K

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 91-1072



BRIAN LEWIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING AND
MOTION FOR REHEARING EN BANC

Appellee, the STATE OF FLORIDA, by and through undersigned counsel, pursuant to Rule 9.330, Fla.R.App.P., respectfully moves this Honorable Court for rehearing in the above-styled cause and as grounds therefore states:

1. Appellant, Brian Lewis, was arrested and charged with trafficking in cocaine and conspiring to traffic in cocaine. (R. 1-2).[1] Prior to trial, Appellant moved to dismiss the charges against him arguing that his due process rights had been violated by the use of a confidential informant and that he had been objectively entrapped by the confidential informant. (R. 127-143). In support of his claim that his due process rights had been violated, Appellant relied on State v. Glosson, 462 So.2d 1082 (Fla. 1985), State v. Hunter, 531 So.2d 239 (Fla. 4th DCA 1988), and State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990). (R. 138-142). In support of his objective entrapment

APP. 2

argument, Appellant relied on Cruz v. State, 465 So.2d 516 (Fla. 1985). (R. 134-138). Appellant also recognized that the theory of subjective entrapment had been codified by the Florida legislature and that this Honorable Court had taken the position that the objective entrapment defense had been abolished by §777.201 of the Florida Statutes. (R. 138-139).

At a hearing on the matter, Judge Juan Ramirez stated that he was bound to follow the precedent set forth by this Honorable Court and ruled that the issue of entrapment was to be decided by the jury pursuant to §777.210. (T. 113).[2] Judge Ramirez then looked to Appellant's due process claim and found that, because the informant was not required to testify, there was no Glosson violation. (T. 122-123). The trial court denied Appellant's motion to dismiss and Appellant entered into a guilty plea preserving his right to challenge the denial of his motion. (T. 121-123; S.T. 8-9; S.R. 1).[3]

On appeal, Appellant again argued that he had been objectively entrapped and that his due process rights had been violated. (AB).

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1 The symbol "R" refers to the record on appeal.

2 The symbol "T" represents the hearing transcript.

3 The Symbol "S.T." represents the supplemental transcript filed by Appellant on October 18, 1991. The symbol "S.R." represents the trial court's order filed with this Honorable Court on December 18, 1991.

2. In reversing Appellant's conviction this Honorable Court relies on State v. Hunter, 586 So.2d 319 (1991) and State v. Krajewski, 589 So.2d 254 (Fla. 1991) as controlling. (Slip Op. 4-5). Appellee submits that this reliance is misplaced. As noted by Chief Judge Schwartz in his specially concurring opinion, the court in Hunter does not even cite §777.201. Appellee submits that the court in Hunter had no reason to discuss §777.201 since the statute was not in effect when Hunter and Conklin were charged and therefore, could not have been in effect when the crimes were committed. Section 777.201 went into effect on October 1, 1987. Ch. 87-243, §42, Laws of Fla. Because the Fourth District Court of Appeal's opinion in Hunter v. State reflects 1986 appellate court case numbers 4-86-0807 and 4-86-0808, the appeals in Hunter were originally filed in 1986 and the crimes clearly were committed before October 1, 1987. See Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988) (see title page reflecting appellate case numbers). Any application of §777.201 to the offenses in Hunter would violate ex post facto considerations. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). Section 777.201 does, however, apply to the instant case because Appellant was charged in 1990 - well after the statute went into effect.

3. State v. Krajewski is also inapplicable to the facts of the instant case. When presented with the issue of objective entrapment in Krajewski, the Fourth District Court of Appeal

agreed with prior Third District Court rulings and held that the defense of objective entrapment had been abolished by §777.201. Krajewski v. State, 587 So.2d 1175, 1177-78 (Fla. 4th DCA 1991).[4] After finding that the objective entrapment defense had been abolished by §777.201, the Fourth District addressed State v. Glosson and due process criteria and found that Krajewski's due process rights had been violated. 587 So.2d at 1183-84. The Fourth District then certified to the Supreme Court the limited question of whether the facts of Krajewski violated State v. Glosson. 587 So.2d at 1184. The Supreme Court answered the certified question in the negative, indicating that there was no due process or Glosson violation. 589 So.2d at 255. The Supreme Court in Krajewski did not address Cruz v. State, 465 So.2d 516 (Fla. 1985), or the issue of objective entrapment because the certified question dealt solely with Glosson and due process considerations. 589 So.2d at 254.

4. Based upon the foregoing, it is extremely clear that neither Hunter nor Krajewski mandate the application of the objective entrapment test to the facts of the instant case.

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[4] This ruling was not altered or rejected by the Supreme Court in Krajewski v. State, 589 So.2d 254 (Fla. 1991). However, like the court in the instant, the Fourth District has receded from this position and recently ruled that State v. Hunter revives the objective entrapment test despite §777.201. See Ricardo v. State, 17 FLW D1 (Fla. 4th DCA January 3, 1992); Strickland v. State, 16 FLW D2671 (Fla. 4th DCA October 25, 1991).

5. As Chief Judge Schwartz points out in his concurring opinion, the Supreme Court in State v. Hunter neither expressly overrules §777.201, nor holds the statute to be unconstitutional. (Slip Op. 7). In fact, in Herrera v. State, 17 FLW S84 (Fla. February 7, 1992), the Supreme Court was asked to consider whether §777.201 impermissibly shifted the burden of proof from the prosecution to the defense. Implicit in the Supreme Court's ruling that the statute did not unconstitutionally shift the burden to the defense, was a ruling that the statute was otherwise constitutionality sound. However, because the objective entrapment defense could not be applied to the facts of Herrera, the issue of whether the objective entrapment defense remained viable in light of §777.201 was not reached. 17 FLW at S85 (Justice Kogan concurring).

6. Because the Supreme Court has not yet addressed the viability of the objective entrapment defense in light of §777.201, Appellee respectfully requests that this Honorable Court grant rehearing to reconsider the instant case in light of its previous decisions in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), review denied, 584 So.2d 998 (Fla. 1991), and State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988).

7. Appellee also respectfully requests that the following question be certified to the Florida Supreme Court as a question

of great public importance:

> 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)?

This question has certified to the Florida Supreme Court by the First District Court of Appeal in State v. Thinh Thien Pham, 17 FLW D607 (Fla. 1st DCA March 2, 1992) and Simmons v. State, 16 FLW D3092 (Fla. 1st DCA December 13, 1991).

8. Assuming, for the sake of argument only, that the foregoing analysis is unpersuasive and that State v. Hunter does in fact revive the objective entrapment defense despite §777.201, Appellee submits that the instant cause should be remanded to the trial court without direction to discharge so that the State may present evidence to rebut the claim of objective entrapment and so that the trial court may reach the issue of objective entrapment.

9. Although the issue of objective entrapment was raised below, the trial court did not reach the issue, believing the issue of subjective entrapment to be reserved for the jury pursuant to §777.201 of the Florida Statutes, and believing the issue of objective entrapment to be no longer viable due to §777.201 and this Honorable Court's opinion in Gonzalez v. State, 571 So. 1346 (Fla. 3d DCA 1990), Gonzalez v. State, 525 So.2d

1005 (Fla. 3d DCA 1988), and State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988). (T. 112-113, 122-123; S.R. 1). [5] Before this Honorable Court may decide the issue of objective entrapment, the trial court must first be given an opportunity to reach the issue. State v. Embry, 17 FLW D554 (Fla. 2d DCA February 21, 1992). This is especially true since the trial court, although not ruling on the issue, stated that the confidential informant had contradicted Appellant's testimony regarding his alleged entrapment. (T. 122-123). See Clemons v. State, 533 So.2d 321 (Fla. 5th DCA 1988)(remand necessary to determine whether defendant's car would have been routinely stopped for a traffic infraction absent drug suspicions of police officers where testimony in this regard was neither credited nor discredited and issue not reached by trial court); Sanchez v. State, 516 So.2d 1061 (Fla. 3d DCA 1987)(correctness of trial court's ruling on suppression motion turned on resolution of conflict between testimony of two officers necessitating relinquishment of jurisdiction to trial court for entry of findings of fact and conclusions of law); Adams v. State, 417 So.2d 826 (Fla. 1st DCA 1982)(where defendant's motion for new trial raised issue that verdict was contrary to weight of evidence but order denying motion was worded so as to indicate that trial court may have limited itself to sufficiency of evidence standard, remand was

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[5] When told by defense counsel that there was a conflict among the districts, the trial court stated "I feel bound being in the third district to follow the law in this district and I think it would be chaotic for the trial courts to start off in all directions. I think if this district has spoken to the subject I'm duty bound to follow that." (T. 113).

necessary to allow trial court to state whether its ruling was on weight of evidence as well as sufficiency). See also United States v. Torres, 720 F.2d 1506 (11th Cir. 1983)(failure to make sufficient findings of fact to enable panel to properly review conclusion of law requires remand for clarification by trial court); United States v. Kastenbaum, 613 F.2d 86 (5th Cir. 1980)(case may be remanded if the trial court has made no findings or insufficient findings).

10. Appellee further submits that if the issue of objective entrapment is to be decided by this Honorable Court, the record on appeal must be supplemented with the in camera testimony of the confidential informant and the videotaped meeting among the informant, detective and codefendants which were considered by the trial court and which contradict Appellant's in court testimony. (T. 123).[6] If the matter is not remanded for consideration ~~by the trial court,~~ Appellee respectfully requests that the State be given leave to supplement the record on appeal with the aforementioned transcripts and videotape.

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[6] In response to defense counsel's argument that the informant's testimony would be vital to the entrapment defense, the trial court stated "You forget that I have interviewed this witness and I've talked to him in an incamera (sic) proceeding and I know I've rule (sic) that his testimony would not in fact help you at all, it would in fact contradict a lot of testimony that was given here." (T. 123).

11. Because, as was discussed above, State v. Hunter does not apply to the facts in the instant case and the Florida Supreme Court has not expressly ruled that the objective entrapment defense survives §777.201, undersigned counsel respectfully requests rehearing en banc pursuant to Fla.R.App.P. 9.331 and certifies:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), Gonzalez v. State., 525 So.2d 1005 (Fla. 3d DCA 1988), and State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988).

12. Pursuant to Fla.R.App.P. 9.331 undersigned counsel further certifies:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Appellant requests rehearing and rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC was furnished by mail to KENNETH RONAN, ESQ., 2600 N. Military Trail, 4th Floor, Boca Raton, Florida 33431, on this 6th day of April, 1992.

ANGELICA D. ZAYAS
Assistant Attorney General

/blm

91-1396-K

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1992

JUNE 9, 1992

BRIAN LEWIS, **

Appellant, **

vs. ** CASE NO. 91-1072

THE STATE OF FLORIDA, **

Appellee. **

Upon consideration, appellee's motions for rehearing and rehearing en banc are hereby denied.

A True Copy

ATTEST:

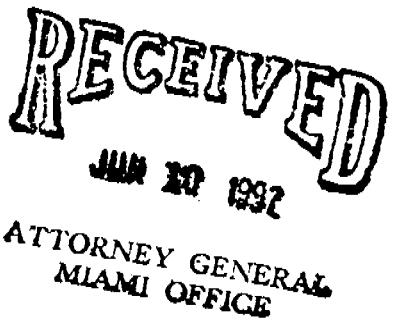
LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Kenneth J. Ronan
Angelica D. Zayas

/nbc



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equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for 3 years, plus $500 to apply on any court costs which may be taxed in any proceeding to enforce said lien.

[1]*See* § 627.756, Fla. Stat. (1987).

[2]*See* § 627.736(8), Fla. Stat. (1987).

* * *

Criminal law—Entrapment—Statute which allocates to defendant the burden of proving entrapment defense is not unconstitutional—Defendant not deprived of due process by jury instruction shifting burden of proving entrapment to defense

ORLANDO HERRERA, Petitioner, v. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 78,290. February 6, 1992. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 90-00583 (Palm Beach County). Richard L. Jorandby, Public Defender, and Allen J. DeWeese, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Petitioner. Robert A. Butterworth, Attorney General; Joan Fowler, Bureau Chief, Senior Assistant Attorney General and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, Florida, for Respondent.

(McDONALD, J.) In *Herrera v. State*, 580 So.2d 653, 654 (Fla. 4th DCA 1991), the district court certified the following question as being of great public importance:

> Do Instruction 3.04(c)(2), Florida Standard Jury Instructions in Criminal Cases, and Section 777.201(2), Florida Statutes (1989), both applicable to offenses after 1987, unconstitutionally shift the burden to the defense to prove entrapment?

We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution, answer the question in the negative, and approve *Herrera*.

The State charged Herrera with trafficking in cocaine, conspiracy to traffic in cocaine, and obstructing an officer without violence. These charges resulted from a sting operation initiated by a confidential informant, and Herrera raised entrapment as an affirmative defense. Herrera asked the trial court to give the jury the former standard instruction on entrapment, the last paragraph of which stated: "On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped." Instead, the court gave the jury the current standard instruction on entrapment, the final paragraph of which reads: "On the issue of entrapment, the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of entrapment." The jury convicted Herrera of the trafficking and obstruction charges, for which the trial court imposed consecutive fifteen and one-year sentences, respectively. The district court affirmed the convictions, but remanded for resentencing, and certified the question set out above.

The new paragraph in the entrapment instruction is based on section 777.201, Florida Statutes (1989), which reads 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 perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, 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.

This section is derived from chapter 87-243, section 42, Laws of Florida, and codifies, for the first time, a general entrapment defense. This Court approved the new instruction for use in Florida's trial courts, but noted the instructions committee's concern over the constitutionality of the legislation and this Court's refusal to consider such an issue in nonadversarial proceedings. *In re Standard Jury Instructions in Criminal Cases*, 543 So.2d 1205 (Fla. 1989). The instant case squarely presents the issue for our resolution.

Herrera argues that this Court's decisions on previous versions of the entrapment instruction, *e.g.*, *State v. Wheeler*, 468 So.2d 978 (Fla. 1985), demonstrate that the new instruction and subsection 777.201(2) violate the due process clauses of the United States and Florida Constitutions. The State, on the other hand, contends that the instruction and statute are constitutional because they shift only the burden of persuasion of an affirmative defense, not the burden of proving the elements of the crime charged and the defendant's guilt. The two district courts that have considered this issue have agreed with the State. *E.g.*, *Krajewski v. State*, 587 So.2d 1175 (Fla. 4th DCA 1991);[2] *Gonzalez v. State*, 571 So.2d 1346 (Fla. 3d DCA 1990), *review denied*, 584 So.2d 998 (Fla. 1991). We do likewise.

Entrapment is a judicially created[3] affirmative defense designed to prevent the government from contending a defendant "is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells v. United States*, 287 U.S. 435, 452 (1932).[4] To this end, "[t]he predisposition and criminal design of the defendant are relevant." *Id.* at 451. If the defendant "is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials . . . . common justice requires that the accused be permitted to prove it." *Id.* Thus, we have defined the "essential element of the defense of entrapment" as "the absence of a predisposition of the defendant to commit the offense." *State v. Dickinson*, 370 So.2d 762, 763 (Fla. 1979). Subsection 777.201(1) now provides that lack of predisposition is an element of the defense.

Over the years Florida courts have gone back and forth on which side must produce evidence regarding the defendant's having been entrapped.[5] Some cases hold that defendants must show entrapment by proving their lack of predisposition toward criminal activity. *E.g.*, *Priestly v. State*, 450 So.2d 289 (Fla. 4th DCA 1984); *Evenson v. State*, 277 So.2d 587 (Fla. 4th DCA 1973); *Koptyra v. State*, 172 So.2d 628 (Fla. 2d DCA 1965). Other cases have held that the State must disprove entrapment by showing the defendant's predisposition to commit the offense. *E.g.*, *Wheeler*; *Moody v. State*, 359 So.2d 557 (Fla. 4th DCA 1978). Subsection 777.201(2) evidences the legislature's intent that the defendant should prove entrapment instead of requiring the State to disprove it.

Entrapment is an affirmative defense and, as such, is in the nature of an avoidance of the charges.[6] *Evenson*. As this Court has previously stated: "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." *State v. Cohen*, 568 So.2d 49, 51 (Fla. 1990). In considering affirmative defenses the United States Supreme Court has held that "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citations omitted). The burden of proving the elements of a crime cannot be shifted to a defendant. *E.g.*, *Sandstrom v. Montana*, 442 U.S. 510 (1979). If "a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged," however, "a defendant's constitutional rights are not violated." *Walton v. Arizona*, 110 S.Ct. 3047, 3055 (1990). Earlier Florida cases recognized the principles set out in these more recent Supreme Court cases. *E.g.*, *Koptyra*, 172 So.2d at 632 ("While the state always has the burden of proving the guilt of accused beyond a reasonable doubt and the accused never has the burden of proving his innocence, nevertheless, the burden of adducing evidence on

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the defense of entrapment is on the accused unless the facts relied on otherwise appear in evidence to such an extent as to raise in the minds of the jury a reasonable doubt of guilt.")

For the first time the State, through the legislature, has decided that the burden is on defendants claiming entrapment to prove that they were entrapped. § 777.201(2). We hold that allocating this burden to a defendant is not unconstitutional. *Cf. Patterson*, 432 U.S. at 210 (the Court refused "to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused" because "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required.")

As stated earlier, the lack of predisposition to commit the crime charged is an essential element of the defense of entrapment. The predisposition to commit a crime, however, is not the same as the intent to commit that crime. As explained by the New Jersey Supreme Court in its consideration of this issue, "predisposition is not the same as *mens rea*. The former involves the defendant's character and criminal inclinations; the latter involves the defendant's state of mind while carrying out the allegedly criminal act." *State v. Rockholt*, 476 A.2d 1236, 1242 (N.J. 1984). Requiring a defendant to show lack of predisposition does not relieve the State of its burden to prove that the defendant committed the crime charged. The standard instructions require the State to prove beyond a reasonable doubt all the elements of the crime, and we find no violation of due process in requiring defendants to bear the burden of persuading their juries that they were entrapped.

Therefore, we answer the certified question in the negative and approve the district court's decision in *Herrera*.[7]

It is so ordered. (SHAW, C.J. and OVERTON, GRIMES and HARDING, JJ., concur. KOGAN, J., concurs in result only with an opinion, in which BARKETT, J., concurs.)

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[1]Prior to enacting chapter 87-243, Laws of Florida, the legislature had done little regarding entrapment. In 1977 the legislature codified the affirmative defense of entrapment for violations of the Florida Anti-Fencing Act, sections 812.012 through 812.037. § 812.028(4), Fla. Stat. (1977). This Court found that act, including its codification of entrapment, constitutional in State v. Dickinson, 370 So.2d 762 (Fla. 1979). Before the enactment of subsection 812.028(4), the legislature had also addressed entrapment by abolishing its use in bribery prosecutions. § 838.11, Fla. Stat. (1957). Section 838.11, however, has been repealed. Ch. 59-234, § 1, Laws of Fla.

[2]In Krajewski v. State, 587 So.2d 1175 (Fla 4th DCA 1991), the district court certified the same question that we answered in State v. Hunter, 586 So.2d 319 (Fla. 1991), and, in reviewing *Krajewski*, we answered that question and did not consider the issue presented in the instant case. State v. Krajewski, No. 77,685 (Fla. Oct. 17, 1991).

[3]1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.2(a) (1986).

[4]The United States Supreme Court first recognized and applied the entrapment defense in Sorrells v. United States, 287 U.S. 435 (1932). United States v. Russell, 411 U.S. 423 (1973). This Court recognized the defense shortly afterwards. *E.g.*, Hall v. State, 144 Fla. 333, 198 So. 60 (1940).

[5]At least 40 jurisdictions have considered which side should bear the burden regarding entrapment, with slightly more than half placing it on the defendant. John H. Derrick, Annotation, *Burden of Proof as to Entrapment Defense—State Cases*, 52 A.L.R. 4th 775 (1987).

[6]An affirmative defense generally concedes the elements of an offense. State Cohen, 568 So.2d 49 (Fla. 1990). Regarding the affirmative defense of entrapment, however, we have held that "a request for an instruction on entrapment when there is evidence to support the defense should be refused only if the defendant has denied under oath the acts constituting the crime that is charged." Wilson v. State, 577 So.2d 1300, 1302 (Fla. 1991). *See* Mathews v. United States, 485 U.S. 58 (1988).

[7]We decline to address the second issue raised by Herrera.

KOGAN, J., concurring in result only.) While I have no quarrel with the result reached by the majority in construing section 777.201, Florida Statutes (1989), I write separately to stress that the majority is concerned exclusively with the "subjective" form of entrapment. Although the majority does not note the fact, a second constitutionally-based form of entrapment exists in Florida. This second form is "objective" entrapment, which we recognized as a matter of state law in *Cruz v. State*, 465 So.2d 516, 520-21 (Fla.), *cert. denied*, 473 U.S. 905 (1985). *Accord State v. Glosson*, 462 So.2d 1082 (Fla. 1985).

Although no similar defense exists in the federal system, Justice McDonald's majority opinion in *State v. Hunter*, 586 So.2d 319, 322 (Fla. 1991), expressly recognized that "this objective entrapment standard includes due process considerations." The majority does not discuss the objective-entrapment analysis developed by *Cruz*, *Glosson*, and *Hunter*, and it thus is obvious that the majority has not attempted to address the exact nature of the burdens of proof under an objective entrapment defense.

I am somewhat surprised by the majority's failure even to mention objective entrapment. In the recent case of *Traylor v. State*, No. 70,051 (Fla. Jan. 16, 1992) [17 F.L.W. S42], Chief Justice Shaw joined in relevant part by five other members of this Court recognized the existence of the doctrine of primacy. Under primacy, state courts are required to give first consideration to state constitutional issues, and only to address analogous federal questions if no violation of the state Constitution is found.

In the present case, the majority fails even to make a perfunctory gesture at honoring its own recently announced doctrine of primacy. This is especially troubling, since petitioner raised state constitutional issues in his brief and expressly argued that his entrapment defense was based on article I, section 9 of the Florida Constitution. Certainly when state issues are properly raised and briefed, this Court has a duty and an obligation to honor its own doctrine of primacy.

I do not quarrel with the result reached by the majority only because I agree with its implicit holding that objective entrapment was not a defense available to this petitioner based on the facts at hand. In discussing objective entrapment, we previously have stated that it is not a permissible defense

> 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 emphasis of objective entrapment is on forbidding the state from prosecuting "crime" that never would have existed but for police activity engendering the offense or police conduct that otherwise overstepped the standards of permissible governmental conduct. *Id.* at 521. Here, I cannot agree that the crime for which petitioner was convicted was manufactured by police or was otherwise improper. The use of subterfuge is subject to definite due process limitations even in cases involving criminally predisposed defendants; but I do not agree that the limits were crossed here. This was a routine and rather unremarkable sting operation. Thus, the only possible defense available to petitioner was subjective entrapment.

On this last question, I agree with the majority that section 777.201 meets the minimum standards of the state and federal constitutions. In Florida, an affirmative defense does not concern itself with the elements of the crime, but essentially concedes them. *State v. Cohen*, 568 So.2d 49 (Fla. 1990). Thus, the due process requirement of proof beyond a reasonable doubt is not violated if a defendant must prove subjective entrapment by a preponderance of the evidence, as section 777.201 requires, because the State is not being relieved of its burden of proof. The statute therefore is valid, although this holding necessarily is limited solely to the statute's application to subjective entrapment. In this sense, the majority is recognizing that the relevant portion of our opinion in *State v. Wheeler*, 468 So.2d 978 (Fla. 1985), has been legislatively overruled by section 777.201 as *Wheeler* is applied to subjective entrapment.

This does not necessarily mean, however, that the same conclusions would apply to the defense of *objective* entrapment. As *Cruz* and *Hunter* held, objective entrapment by its very nature raises distinct due process questions. *See Cruz*, 465 So.2d at 521-

22. Some of the preliminary considerations . t objective entrapment are questions of law that must be decided by the trial court, not the jury—a situation that is quite different from subjective entrapment. Moreover, we have recognized that the state bears a significant burden of proof with regard to this legal ques- [redacted] *Id.* at 520-22. Accordingly, the question of the burdens of p[redacted] applicable to objective entrapment is a far more serious issue of Florida constitutional law, and one that the majority does not address or modify today. That is as it should be, since this is not an objective entrapment case. (BARKETT, J., concurs.)

* * *

Mechanic's lien—Where property owner and contractor share a common identity, privity may be established between a subcontractor and the owner so as to excuse the notice to owner requirement for perfecting mechanic's lien—Common identity is established between contractor and owner where party who is president and sole shareholder of contractor is also president and sole shareholder of the company that is the managing partner of the joint venture which owns the property under construction—Privity exists either when the owner knows a subcontractor is working on the job and that owner has assumed the contractual obligation for the work or when the owner and contractor share a common identity—Attorney's fees awardable against surety on lien-transfer bond are not limited to $500—Surety's liability may not be increased beyond face amount of bond in order to cover costs—Any part of lien-transfer bond not included in foreclosure judgment can be awarded for costs, but lienor is left with an unsecured judgment against the owner for any costs which exceed the remaining face amount of the bond

AETNA CASUALTY AND SURETY COMPANY, etc., et al., Petitioners, v. GORDON F. BUCK, P.E., etc., Respondent. Supreme Court of Florida. Case No. 76,925. February 6, 1992. Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. Fourth District - Case No. 89-2906 (Palm Beach County). John M. Jorgensen of Scott, Royce, Harris, Bryan & Hyland, P.A., Palm Beach Gardens, Florida, for Petitioners. Isidro [redacted] of Joseph A. Vassallo, P.A., Lake Worth, Florida, for Respondent.

H[redacted]ING, J.) We have for review *Pappalardo Construction Co. v. Buck*, 568 So.2d 507 (Fla. 4th DCA 1990), in which the district court acknowledged conflict with *Floridaire Mechanical Systems, Inc. v. Alfred S. Austin-Daper Tampa, Inc.*, 470 So.2d 17 (Fla. 2d DCA), *review denied*, 480 So.2d 1293 (Fla. 1985), on the issue of whether privity should be found where an owner and contractor share a common identity so as to excuse the notice-to-owner requirement for perfecting a mechanics' lien. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

Vincent J. Pappalardo (Pappalardo) is the president and sole shareholder of Pappalardo Construction Company (Pappalardo Construction) and the president and sole shareholder of Bay Colony Land Company (Bay Colony Land). Pappalardo Construction is the general contractor on the construction site known as Bay Colony. Bay Colony Land is one of the two partners in the joint venture which owns the property under construction. Gordon F. Buck (Buck) orally contracted with Pappalardo Construction to furnish metal construction materials to the construction site. The parties disputed the reasonableness of the delivery time and Pappalardo Construction subsequently withheld payment for the materials. Buck filed a claim of lien against Pappalardo. Pappalardo transferred the lien to a surety bond issued by Aetna Casualty and Surety Company (Aetna). Buck never served a notice of lien on the joint venture as owner of the property.

The trial court held that because the owner and general contractor shared a common identity, the owner's knowledge of the subcontractor's presence on the job, obtained through his actions as the general contractor, established privity of contract between [redacted] and subcontractor. The trial court granted attorney's fees against Aetna and ordered an increase in the bond amount to cover these fees. On appeal, the district court agreed with the trial court's definition of privity and affirmed the trial court's final judgment and order.

Mechanics' liens are "purely creatures of the statute." *Sheffield-Briggs Steel Prods., Inc. v. Ace Concrete Serv. Co.*, 63 So.2d 924, 925 (Fla. 1953). As a statutory creature, the mechanics' lien law must be strictly construed. *Home Elec. of Dade County, Inc. v. Gonas*, 547 So.2d 109, 111 (Fla. 1989). As a prerequisite to perfecting a mechanics' lien, all lienors who are not in privity with the owner, except for laborers, must serve a notice on the owner. § 713.06(2), Fla. Stat. (1987). The purpose of serving notice to an owner is " 'to protect an owner from the possibility of paying over to his contractor sums which ought to go to a subcontractor who remains unpaid.' " *Broward Atlantic Plumbing Co. v. R.L.P., Inc.*, 402 So.2d 464, 466 (Fla. 4th DCA 1981) (quoting *Boux v. East Hillsborough Apartments, Inc.*, 218 So.2d 202, 202 (Fla. 2d DCA 1969)). In other words, as the trial court recognized, the notice requirement is just that, a notice to the owner that those not in privity with the owner are in fact providing improvements to the property. Because the purpose of serving notice is to alert the owner to guard against double payment, such notice will be excused only when privity exists between the owner and the subcontractor. *See* § 713.05, Fla. Stat. (1987).[1] Privity, however, is not defined in the statute. *Tompkins Land Co. v. Edge*, 341 So.2d 206, 207 (Fla. 4th DCA 1976).

In *Harper Lumber & Manufacturing Co. v. Teate*, 98 Fla. 1055, 125 So. 21 (1929), this Court held that privity requires both knowledge by an owner that a particular subcontractor is supplying services or materials to the job site and an express or implied assumption by the owner of the contractual obligation to pay for those services or materials. *Id.; see also First Nat'l Bank of Tampa v. Southern Lumber & Supply Co.*, 106 Fla. 821, 145 So. 594 (1932). The Second District Court applied this definition of privity in *Floridaire*, and the petitioners contend that it should be applied in the instant case.

Although we agree with the *Harper Lumber* and *Floridaire* definitions of privity, we also hold that privity is established where, for all practical purposes, a common identity exists between the owner and the contractor. *Cf. Broward Atlantic Plumbing Co. v. R.L.P., Inc.*, 402 So.2d 464, 466 (Fla. 4th DCA 1981) (the three owners of a real estate project were also the principals in the contracting corporation). In such a case, service of notice on the owner is not necessary in order to perfect a mechanics' lien. Thus, we find that privity exists either when the owner knows a subcontractor is working on the job and that owner has assumed the contractual obligation for the work or when the owner and contractor share a common identity. In either situation, notice is not required.

In the instant case, the trial court made a factual determination that the owner and the contractor share a common identity. The record more than adequately supports the trial court's finding of this common identity. Here, the warranty deed and the Notice of Commencement both list the address of the owner as "c/o Vincent J. Pappalardo, 4440 PGA Blvd., Palm Beach Gardens, Florida." The construction contract between the joint venture and Pappalardo Construction lists the address of the owner and of the contractor as "4440 PGA Blvd., Palm Beach Gardens, Florida." Furthermore, the construction contract itself lists Bay Colony Land, of which Pappalardo is 100% owner, as the managing partner of the joint venture. Pappalardo signed the construction contract both in his capacity as president of Bay Colony Land, which is listed as the owner, and in his capacity as president of Pappalardo Construction. Pappalardo personally approved the subcontract between Pappalardo Construction and Buck. Pappalardo also acknowledged that he was on the job site once or twice a day in his capacity as general contractor and as the agent for the owner. In addition, the project manager for Pappalardo Construction, Palermo, believed that Pappalardo was the owner and, upon inquiry by Buck, informed Buck of such. Thus, even if Buck had actually given notice to the owner,

No. 91-584. Opinion filed March 2, 1992. Appeal from an order of the Judge of Compensation Claims, Elwyn M. Akins. Jonathan D. Ohlman and John E. Dawson of Pattillo & McKeever, P.A., Ocala, for appellant. Mark A. Massey of the Law Office of Daniel L. Hightower, P.A., Ocala, for appellees.

(PER CURIAM.) Appellant appeals from a final order of the judge of compensation claims (JCC) raising a number of issues, only two of which need to be addressed: (1) Whether the JCC erred in denying a claim for medical mileage reimbursement, and (2) whether the JCC erred in denying a claim for penalties and interest. The employer/carrier conceded at oral argument that the case should be remanded for a determination of the claimant's entitlement to penalties and interest, and we find that there was no basis for denying reimbursement for medical mileage prior to the date of maximum medical improvement. We reverse and remand on these issues, but affirm the order of the JCC in all other respects. (BOOTH, WOLF and KAHN, JJ., concur.)

* * *

Criminal law—Entrapment—Question certified whether the objective entrapment test set forth in *Cruz v. State*, 465 So.2d 516 (Fla. 1985), *cert. denied*, 473 U.S. 905 (1985), has been abolished by the enactment of Section 777.201, Florida Statutes (1987)

STATE OF FLORIDA, Appellant, v. THINH THIEN PHAM AND HANG THI VU, Appellees. 1st District. Case Nos. 91-2 and 91-3 (consolidated). Opinion filed March 2, 1992. An Appeal from the Circuit Court for Bay County, Don T. Sirmons, Judge. Robert A. Butterworth, Attorney General, Gypsy Bailey, Assistant Attorney General and Wendy Morris, Legal Intern, Tallahassee, for Appellant. Alvin L. Peters of McCauley & Peters, Panama City, for Appellees.

ON MOTION FOR REHEARING
[Original Opinion at 17 F.L.W. D271]

(JOANOS, Chief Judge.) Appellees seek rehearing of our decision in which we reversed the trial court's order dismissing the informations filed against them. Our decision in this case was based upon this court's prior decision in *State v. Munoz*, 586 So.2d 515 (Fla. 1st DCA 1991), in which the identical issue presented in this case was decided adversely to appellees' interests. In *Munoz*, a prior panel of this court held that section 777.201, Florida Statutes (1987), effectively abolished the objective entrapment test articulated 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). We are constrained to follow this court's prior decisions. Therefore, the motion for rehearing is denied.

However, we recognize the uncertainty among the district courts of appeal concerning the continuing viability of the objective entrapment test following enactment of section 777.201, Florida Statutes (1987), and the supreme court's discussion of objective entrapment in the context of a due process analysis in *State v. Hunter*, 586 So.2d 319 (Fla. 1991). Justice Kogan's concurrence in *Herrera v. State*, __So.2d __, 17 F.L.W. S84 (Fla. Feb. 6, 1992), also emphasizes the need for further enlightenment on this issue by the Florida Supreme Court. Accordingly, we certify the question previously certified on rehearing in *Simmons v. State*, 16 F.L.W. D3092 (Fla. 1st DCA Dec. 13, 1991), as a question of great public importance:

> 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)?

In all other respects, appellees' motion for rehearing is denied. (ERVIN, J., and WENTWORTH, S.J., CONCUR.)

* * *

Civil procedure—Costs—Voluntarily dismissed action—Where supreme court remanded case only because it could not tell from record whether trial court had used proper analysis in connection with judgment for costs, trial court complied with mandate by meeting with counsel and stating that the analysis articulated by the supreme court was the analysis he had used in entering the original judgment—Once trial court clarified that he had used proper analysis, no further action was required

COASTAL PETROLEUM COMPANY, Petitioner, vs. MOBIL OIL CORPORATION, Respondent. 1st District. Case No. 91-3034. Opinion filed March 2, 1992. Petition for Writ of Certiorari. Robert J. Angerer, Tallahassee, for Petitioner. Michael Rosen, Julian Clarkson and Robert Feagin, III, of Holland & Knight, Tallahassee, for Respondent.

(ALLEN, J.) This is the second petition for writ of certiorari Coastal Petroleum Company (Coastal) has filed with this court in connection with a judgment for costs entered in 1987, following Coastal's voluntary dismissal of claims against Mobil Oil Corporation. Our opinion in response to the earlier petition, *Coastal Petroleum Co. v. Mobil Oil Corp.*, 550 So.2d 158 (Fla. 1st DCA 1989), was followed by the supreme court's opinion upon review, *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So.2d 1022 (Fla. 1991). Coastal contends that, upon remand, the trial court failed to comply with the decision of the supreme court. Concluding that the trial court's actions were consistent with the supreme court's decision, we deny the petition.

The supreme court opinion explained the analysis to be used by a trial court in deciding a motion for award of trial preparation costs following voluntary dismissal of an action. Because the supreme court could not determine from the record whether the trial court had used the proper analysis, it remanded the cause for reconsideration in light of its opinion and directed the trial court to conduct a hearing on the request for costs, applying the analysis developed in the opinion.

Upon remand, the trial judge met with counsel for the parties and stated that the analysis articulated by the supreme court was the analysis he had used in entering the 1987 judgment for costs. Because he had employed the proper analysis when reviewing the evidence presented at the 1987 hearing, he denied Coastal's request for a second evidentiary hearing. The judge's subsequent order reaffirmed the 1987 costs judgment, explained again that the analysis required by the supreme court had been used at the original costs hearing, declared that the reasonableness and necessity of the costs awarded had been determined before entering the judgment, and concluded that there was no need to hold a second evidentiary hearing or disturb his previous findings.

We believe the trial court's actions on remand complied with the supreme court's directive. Remand following the supreme court opinion was necessary only because the record before the supreme court did not reveal whether the trial court had used the proper analysis. Once the trial court clarified the record deficiency by indicating that the proper analysis had been used, there was no need for further action by the trial court. Like the trial court, we do not understand the supreme court opinion to require a second evidentiary hearing under these circumstances. *See Avis Rent-A-Car Sys., Inc, v. Abrahantes*, 559 So.2d 1262 (Fla. 3d DCA 1990); and *Buchanan v. Golden Hills Turf & Country Club, Inc.*, 308 So.2d 168 (Fla. 1st DCA 1975).

Coastal has failed to show that the trial court departed from the essential requirements of law. Accordingly, the petition for writ of certiorari is denied. (KAHN, J., CONCURS; WEBSTER, J., DISSENTS WITH WRITTEN OPINION.)

(WEBSTER, J., dissenting.) My reading of *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So.2d 1022 (Fla. 1991), leads me to conclude that the Supreme Court intended thereby to establish, for the first time in Florida, a rule delineating what expenses (including those attributable to experts) may be assessed as "costs," pursuant to Rule 1.420(d), Florida Rules of Civil Procedure, against a party who takes a voluntary dismissal before trial. My reading of that opinion leads me to conclude, further, that the Supreme Court believed that, by its decision, it was altering the common law of Florida.

The final paragraph of the Supreme Court's opinion reads as follows:

> [W]e quash the opinion below without prejudice for the par-