IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,058

THE STATE OF FLORIDA,

Petitioner,

-vs-

BRIAN LEWIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THIRD DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Petitioner was the appellee in the District Court of Appeal, Third District. Respondent was the appellant in the Third District.

In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal
"T"	Transcript
"ST"	Supplemental Transcript
"App."	Appendix to Petitioner's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

On August 17, 1990, Respondent, Brian Lewis, was charged with trafficking in cocaine and conspiracy to traffic in cocaine. (R. 1-2). Respondent moved for dismissal on March 21, 1991, arguing that his due process rights had been violated by the actions of the Miami Beach Police Department and its confidential informant, "Juan Carlos." (R. 127-143). A hearing on the matter was held on April 1, 1991, and the motion was denied. (T. 1-124).

At the hearing on the motion to dismiss, Respondent testified that he met "Juan Carlos" at a bar or nightclub on Sunday, July 22, 1990. (T. 10-14). Respondent spent the evening drinking with "Juan Carlos" and two unidentified ladies, visiting two other nightclubs and eventually going home together to Respondent's apartment. (T. 16-24). During the course of the evening, "Juan Carlos" allegedly told Respondent that he had his own business and referred to drugs and the great deal of money to be made in the business. (T. 22, 27). Respondent spent the next day running errands and when he returned home, there were numerous messages from "Juan Carlos." (T. 29-31). When Respondent returned these phone calls, "Juan Carlos" told Respondent that he could make money simply by introducing "Juan Carlos" to somebody who might be interested in purchasing cocaine. (T. 32-33). When he returned to work on Tuesday,

Respondent discussed his weekend activities with a co-worker, Eugene Marzullo. (T. 35-37). Marzullo seemed interested in the subject, so when "Juan Carlos" called about setting up a deal, Respondent told him that he knew somebody who would be interested if the price were right. (T. 38-44). On Tuesday evening, Respondent and "Juan Carlos" discussed a tentative meeting of all interested parties. (T. 44-45). "Juan Carlos" and Respondent agreed to meet on Miami Beach on Wednesday to introduce Respondent to the supplier. (T. 45-46). At that time, "Juan Carlos" introduced Respondent to "his cousin," Detective Palaez, who was working undercover. (T. 46). At the meeting, Respondent discussed the price of a kilogram of cocaine, took a sample of cocaine for Marzullo and tasted a sample of the cocaine himself. (T. 46-47). On Thursday, the parties negotiated the price over the phone and agreed to meet on Friday to consummate the deal. (T. 53).

Detective Jeff Palaez testified that he first met the confidential informant, "Juan Carlos," in 1989 when he arrested the informant for trafficking in cocaine. (T. 76, 80). "Juan Carlos" was first documented as a confidential informant on August 30, 1989. (T. 80). At that time, "Juan Carlos" entered a substantial assistance agreement with the State. (T. 80). During the instant case, "Juan Carlos" was not performing under this agreement, having previously satisfied his obligation under the agreement. (T. 82, 105). Detective Palaez testified that

"Juan Carlos" was working purely for monetary reasons and that payment was not contingent upon trial participation. (T. 105). In fact, "Juan Carlos" was paid upon the completion of the police Investigation. (T. 105). Accordingly, at the time of the hearing, "Juan Carlos" had been paid two thousand dollars for his participation in the instant case. (T. 82, 91). Detective Palaez testified that payment to informants is "based on numerous factors, those factors include but are not limited to the danger involved in the investigation, the amount of time the CI spends on this investigation, the number of subjects arrested, the amount of property seized, things of that nature... ." (T. 92-93). "Juan Carlos" would not have been paid anything if his efforts had not resulted in an arrest. (T. 95). Although Detective Palaez didn't have any contact with "Juan Carlos" on Sunday, July 22, 1990, he did speak with "Juan Carlos" on Monday, July 23, 1990, and Tuesday, July 24, 1990. (T. 101-102). Detective Palaez met with "Juan Carlos" and Respondent on Wednesday, July 25, 1990, and Friday, July 27, 1990. (T. 102). Detective Palaez could not remember if he spent time with "Juan Carlos" on Thursday, July 26, 1990, but he did speak with "Juan Carlos" every day since initial contact on Monday. (T. 102, 110). From the moment that "Juan Carlos" contacted Detective Palaez, Detective Palaez told "Juan Carlos" what to say and do and monitored all communication between Respondent and the informant. (T. 106).

Detective Palaez further testified that he met with Respondent on July 25, 1990, and handed him a kilogram of cocaine. (T. 106-107). Respondent looked at the package and removed approximately one gram from the package and "sniffed" the cocaine. (T. 108).

Following presentation of evidence and argument by counsel, the trial court found that the key element of the cases cited by Respondent in his motion to dismiss was the fact that the payment to the informants was contingent upon trial testimony. (T. 121). The trial court also found that "Juan Carlos" was not a vital or essential witness for the prosecution. (T. 122-123). On April 2, 1991, Respondent entered a plea of no contest to trafficking in cocaine, reserving his right to appeal the motion to dismiss. (ST. 8-9). In return, the state dropped the conspiracy charge and reduced the 15 year minimum mandatory sentence to five years. (ST. 8-9). The $250,000 fine was also reduced to $400.00 (ST. 9).

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, upon the amount of property that would be seized" as a result of his arrest and that he had been objectively entrapped because "the police activity in this case did not have as its end the interruption of a specific ongoing criminal activity." (App. 1). In support of his first claim,

Respondent relied on State v. Glosson, 462 So.2d 239 (Fla. 4th DCA 1988). (App. 1, p. 9-18). In support of his claim that he had been objectively entrapped, Respondent acknowledged the existence of §777.201 of the Florida Statutes and recognized that the Third District had "taken the position that the legislature has abolished objective entrapment by enacting the subjective entrapment statute. (App. 1, p. 19). Respondent nonetheless maintained that Cruz v. State, 465 So.2d 516 (Fla.), cert. denied 473 U.S. 9056, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1955), was controlling. (App. 1, p. 19).

Petitioner 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 informants testifying at trial. (App. 2, p. 8-14). Petitioner also argued that the issue of entrapment was to be decided by the trier of fact pursuant to §777.201 of the Florida Statutes. (App. 2, p. 15).

The Third District Court of Appeal rejected Respondent's Glosson claims, but found that Respondent had been objectively entrapped as a matter of law. (App. 3, p. 43-5). In so doing, Chief Judge Schwartz noted in a specially concurring opinion that the district court was obligated to apply the objective entrapment test to the facts presented in the instant case, despite the mandate of §777.201 that the issue of entrapment be decided by the trier of fact, because of this Court's decision in

State v. Hunter, 586 So.2d 319 (Fla. 1991), applying the objective entrapment test to the facts presented in Hunter. (App. 3, p. 6-13).

In a motion for rehearing and motion for rehearing en banc, filed in the district court, Petitioner argued that the appellate court's reliance on State v. Hunter was misplaced inasmuch as the crimes in Hunter were committed prior to the enactment of §777.201 of the Florida Statutes. (App. 4, p. 3). Rehearing and rehearing en banc were denied on June 9, 1992. (App. 5).

This appeal follows.

SUMMARY OF THE ARGUMENT

Section 777.201, the companion jury instruction, and the House and Senate Staff analysis clearly evidences the legislature's intent to abolish the Cruz objective entrapment test and have the issue of entrapment be decided by the trier of fact. The application of the Cruz objective entrapmenet test by this Court in State v. Hunter, 586 So.2d 319 (Fla. 1991), did not "revive" the objective entrapment test since the crimes in Hunter were committed long before the effective date of §777.201.

In the absence of the Cruz objective entrapment test, defendants may assert a constitutional due process claim which establishes outrageous government involvement in the charged crimes. See e.g. State v. Glosson, 462 So.2d 1082 (Fla. 1985). Although the Cruz objective is based in part upon due process considerations, the Cruz test is not constitutionally mandated. The rights protected by Cruz may be protected by due process claims similar to those presented in Glosson.

Assuming for the sake of argument that the objective entrapment test was not abolished by §777.201, Petitioner respectfully requests that the matter be remanded for consideration of this test by the trial court, which expressly declined to reach the merits of Respondent's objective entrapment claim in light of §777.201 and the apparent abolishment of the

objective entrapment test. If the matter is to be decided by this Honorable Court, Petitioner respectfully requests an opportunity to supplement the record with transcripts of the in camera meeting between the trial judge and the confidential informant and other evidence considered by the trial court.

QUESTION PRESENTED

WHETHER SECTION 777.201, FLORIDA STATUTES (1987) ABROGATES THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (FLA.), CERT. DENIED, 473 U.S. 905 (1985).

ARGUMENT

SECTION 777.201, FLORIDA STATUTES (1987) ABROGATES THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 So.2d 516 (FLA. 1985), CERT. DENIED, 473 U.S. 905 (1985).

A. Section 777.201, Fla. Stat. (1987) Abolishes the Cruz Objective Entrapment Test.

Section 777.201, Florida Statutes (1987) provides:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetuates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

This section was enacted by the Florida Legislature in 1987 and went into effect on October 1, 1987. Ch. 87.243, §§42, 43 Laws of Florida.

Before §777.201 was enacted, the judicially created defense of entrapment consisted of two independent, coexisting elements. 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." Cruz v. State, 465 So.2d 516, 521 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990). The "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 v. State, 465 So.2d at 521; Gonzalez v. State, 571 So.2d at 1349.

Under the standards set forth in Cruz, 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 the police activity had as its end the interruption of a specific ongoing criminal activity and utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity there was no entrapment as a matter of law. Cruz, 465 So.2d at 521-522. If the State established the validity of the police activity and demonstrated that the police had "cast their nets in permissible waters, 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. Cruz, 465 So.2d at 521. Following the 1987 enactment of §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]

Following the enactment of §777.201, the Third and Fourth District Courts of Appeal ruled that §777.201 abolished the objective entrapment test by mandating that the issue of entrapment be decided by the trier of fact. Krajewski v. State, 587 So.2d 1175 (Fla. 4th DCA), quashed on other grounds, 589 So.2d 254 (Fla. 1991); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990); Gonzalez v. State, 525 So.2d 1005 (Fla. 3d DCA 1988); State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988). The Third

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[1] In Herrera v. State, 17 F.L.W. S84 (Fla. February 6, 1992), this Court was asked to consider whether §777.201(2) of the Florida Statutes and Instruction 3.04(c)(2) of the Florida Standard Jury Instructions in Criminal Cases unconstitutionally shifted the burden of proof to the defendant to prove entrapment. In Herrera, this Court ruled that both the statute and the instruction shifted only the burden of persuasion of an affirmative defense rather than burden of proving the elements of the crime and the defendant's guilt. 17 F.L.W. at S84. Although this Court did not address the viability of the Cruz objective test directly, this Court noted that §777.201(2) "evidences the legislature's intent that the defendant should prove entrapment instead of requiring the State to disprove it" and found that there was "no violation of due process in requiring the defendants to bear the burden of persuading their juries that they were entrapped." 17 F.L.W. at S87-85.

District found support for its conclusion in the House of Representative's Committee on Criminal Justice Staff Analysis, June 22, 1987, 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.").

Evaluating the viability of the Cruz objective test in light of §777.201, the Gonzalez court noted:

> 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 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 statutes. Critical to our analysis and interpretation is the use by the legislature of the term "cause." The objective test is not concerned with cause and effect. It examines only the action of law enforcement or its agencies, and whether that action is permissible rather than "outrageous." On the other hand, the statute is concerned with whether law enforcement activity causes a person to commit a crime. This is entirely a subjective matter.

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

In Strickland v. State, 588 So.2d 269, 270-271, (Fla. 4th DCA 1991), however, the Fourth District reversed the position it took in Krajewski for two reasons: (1) that this Court indicated that Cruz was alive and well in State v. Hunter, 586 So.2d 319 (Fla. 1991); and (2) this Court held the objective entrapment aspects of Cruz are predicated on constitutional due process concerns which cannot be superceded by statutory enactments.[2]

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[2] Following this Court's decision in Hunter, both the Third and Fourth Districts have receded from this position. Lewis v. State, 17 F.L.W. ___ (Fla. 3d DCA March 24, 1992);

The Third District Court in the instant case also receded from its decision in Gonzalez, relying on the application of the Cruz objective entrapment test to the facts of Hunter.[3] (App. 3, p. 4).

Ricardo v. State, 591 So.2d 1002 (Fla. 4th DCA 1992); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991). The First District has aligned itself with the Third District's position in Gonzalez, 571 So.2d at 1346, notwithstanding this Court's opinion in Hunter. State v. Pham, 17 F.L.W. D271 (Fla. 1st DCA January 17, 1992); Simmons v. State, 590 So.2d 442 (Fla. 1st DCA 1991)(Pending before this court, Case No. 75,287); Munoz v. State, 586 So.2d 515 (Fla. 1st DCA 1991)(Pending before this court Case No. 78,900). The Second District has consistently held that the Cruz objective test remained viable despite the passage of §777.201. See e.g. Beattie v. State, 17 F.L.W. D657 (Fla. 2d DCA March 6, 1992); Morales v. State, 17 F.L.W. D661 (Fla. 2d DCA 1992); Wilson v. State, 589 So.2d 1036 (Fla. 2d DCA 1991); Bowser v. State, 555 So.2d 879 (Fla. 2d DCA 1989). Although the Fifth District has continued to apply the Cruz objective test, it has not yet addressed the effect of §777.201 on the objective entrapment test. See e.g. Smith v. State, 575 So.2d 776 (Fla. 5th DCA 1991); State v. Purvis, 560 So.2d 1296 (Fla. 5th DCA 1990).

3 The Third District also relied on this Court's decision in State v. Krajewski, 589 So.2d 254 (Fla. 1991). This reliance is similarly misplaced. 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). 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.

Petitioner submits that reliance on Hunter in Strickland and the instant case is misplaced. Critical to this court's decision in Hunter was the fact that Hunter and Conklin were arrested in October, 1982 - long before §777.201 went into effect on October 1, 1987. Hunter, 586 So.2d at 323-324 (Barkett, J. concurring and dissenting). As noted by Chief Judge Schwartz in the instant case, the Hunter decision does not address the viability of the Cruz objective entrapment test in light of §777.201, nor even cite the entrapment statute. (App. 3, p. 7-8). Petitioner submits that this is so because §777.201 was clearly inapplicable to the offenses committed by Hunter and Conklin. 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).

Furthermore, because this Court noted in Cruz noted that although the objective test "parallels a due process analysis, it is not founded on constitutional principles," the Strickland Court's pronouncement that the legislature may not enact an entrapment statute which does not incorporate the objective view is unfounded. Cruz, 465 So.2d at 520, n. 2.

Petitioner submits that since the entrapment defense is not of a constitutional dimension, the Florida Legislature may adopt any substantive definition that it may find desirable. See

United States v. Russell, 411 U.S. 423, 433, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

Section 777.201(1) clearly defines entrapment by stating that:

> A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetuates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

Section 777.201(2) just as clearly evidences the legislature's intent that the issue of entrapment be decided by the trier of fact, not the trial court.

It is clear from the language of §777.201, which makes entrapment a matter to be determined solely by the jury, the new standard jury instruction on entrapment, which places the burden wholly on the defendant to establish he was entrapped, and Florida House of Representatives and Senate staff analyses, which expressly state that the intent of the statute was to overrule Cruz and to make entrapment an affirmative defense available only to a defendant who is not predisposed, that section 777.201 abolished the defense of objective entrapment as a matter of law, as articulated in Cruz.

However, in the absence of the Cruz objective entrapment defense, defendants may still seek dismissal of charges by asserting a constitutional due process claim which establishes outrageous government involvement in the crimes.

B. The Objective Entrapment And Due Process Entrapment Defenses Are Not Equivalent And Coextensive.

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

While the objective entrapment and due process entrapment defenses are similar, they are not equivalent or coextensive. To amount to a constitutional violations under the federal constitution, the law enforcement techniques must be so outrageous that they are fundamentally unfair and "'shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973). In evaluating claims of official misconduct, federal courts have considered the totality of circumstances without designating any single factor as controlling. See Owen v. Wainwright, 806 F.2d

1519 (11th Cir. 1986); United States v. Gianni, 678 F.2d 956 (11th Cir. 1982); United States v. Tobias, 662 F.2d 381 (5th Cir. Unite B), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed. 2d 1317 (1982). The distinction between objective entrapment and due process entrapment was discussed by the court in United States v. Jannotti, 673 F. 2d 578 (3d Cir. 1982), as follows:

> It is plain from the Court's opinion in Russell and the separate opinions in Hampton [v. United States, 425 U.S. 4894 (1976)], however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense. The genesis of the entrapment defense lay in the Court's interpretation of legislative intent; "[s]ince the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." United States v. Russell, 411 U.S. at 433, 93 S.Ct. at 1643 (footnote omitted). We must necessarily exercise scrupulous restraint before we denounce law enforcement conduct as constitutionally unacceptable; the ramifications are wider and more permanent than when only a statutory defense is implicated.
>
> We must be careful not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reversed for the constitutional defense only the most intolerable government conduct.

Jannotti, 673 F.2d at 608.

Florida of course may impose greater restrictions on police activity than those held by the United States Supreme Court to be necessary under the federal constitution. See Oregon v. Haas, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed. 2d 570 (1975); State v. Glosson, 462 So.2d at 239. To date, however, with the exception of the narrow Glosson[4] due process claim, which was expressly predicated upon the Florida due process clause, Florida courts have not necessarily distinguished between the Article I, Section 9 due process clause and the Fifth and Fourteenth Amendment provisions of the federal constitution in the context of due process entrapment claims. See Sarno v. State, 424 So.2d 829 (Fla. 3d DCA 1982); But see Brown v. State, 484 So.2d 1324 (Fla. 3d DCA 1986).

The distinction which must be made between objective entrapment and due process entrapment is that, despite the similarity of concerns, constitutional due process, as defined

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

under existing federal and Florida law, ultimately involves the question of whether the government involvement in the crime was outrageous, intolerable, shocking or uncivilized. The Cruz objective test factors are clearly relevant to this determination. However, a due process analysis involves consideration of the totality of circumstances, with no single factor controlling. Moreover, under Cruz, the State had the initial burden to establish that the police conduct did not fall below standards to which common feelings respond for the proper use of governmental power. Under a due process analysis, the defendant bears the entire burden to show that the challenged conduct was outrageous or shocking.

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

C. Application Of The Cruz Objective Test To The Instant Case.

Assuming for the sake of argument only, that the objective entrapment test was not abolished by the enactment of §777.201,

Petitioner would respectfully request an opportunity to present evidence rebutting Respondent's claim of objective entrapment.

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 the Third District's opinion in 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). (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

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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).

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 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).

Petitioner 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 Respondent's in court

testimony. (T. 123).[6] If the matter is not remanded for consideration by the trial court, Petitioner respectfully requests that the State be given leave to supplement the record on appeal with the aforementioned transcripts and videotape.[7]

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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).

7 Undersigned counsel has been informed that the transcripts of the in camera hearing have been ordered sealed by the trial court and will not be transcribed and made available to the State absent an order from the court.

CONCLUSION

WHEREFORE, Based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that this Court find that §777.201 of the Florida Statutes abolished the Cruz objective entrapment test and reverse the opinion of the Third District below. In the event that Petitioner's arguments are unpersuasive, Petitioner respectfully requests an opportunity to supplement the record on appeal with the transcripts and record necessary to rebut Respondent's claims of objective entrapment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by mail to **KENNETH RONAN, ESQ.**, 2600 N. Military Trail, 4th Floor, Boca Raton, Florida 33431, on this 26th day of October, 1992.

Angélica Zayas

ANGELICA D. ZAYAS
Assistant Attorney General

/blm

IN THE SUPREME COURT OF FLORIDA

CASE NO. **80,058**

THE STATE OF FLORIDA,

Petitioner,

vs.

BRIAN LEWIS,

Respondent.
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INDEX TO THE APPENDIX