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IN THE SUPREME COURT OF FLORIDA

CASE NO: 80,058

THE STATE OF FLORIDA

Petitioner,

vs.

BRIAN LEWIS,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW FROM THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner was 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 and Petitioner was the Appellee in the District Court of Appeal, Third District.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as defendant, and Petitioner may also be referred to as the State.

The following symbols will be used:

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

STATEMENT OF THE CASE AND FACTS

Respondent herein acknowledges and adopts Petitioner's Statement of the Case and Facts as set forth at pages 2-7 of PETITIONER'S BRIEF ON THE MERITS as generally correct, with the following additions and/or corrections:

1. During the evening that "Juan Carlos" (the confidential informant herein) first approached Respondent at the Dragon Club, Carlos offered Lewis cocaine, and Respondent refused, (T20), told Respondent that he was in the cocaine business, (T22), made it clear that he had made his money from dealing cocaine, asked Lewis if he would like to get involved, and told Lewis that if Lewis could introduce Carlos to a purchaser of a kilo or more of cocaine, Lewis could make $1000.00-$2000.00 (T27). Lewis declined, stating that he didn't "do that stuff" (T27).

2. The next day, Carlos phoned Lewis numerous times, leaving messages on his answering machine, although Lewis had no recollection of giving Carlos his phone number. (T30,31,111). When Lewis returned these calls, Carlos again offered Lewis $1000.00-$2000.00 for an introduction to a purchaser of cocaine, to which Respondent replied that he "didn't want to get involved." (T32-34).

3. On Tuesday, July 24, 1990, Carlos again called Lewis at work several times, (T38), and when Lewis returned the calls, pressed him again about finding a cocaine purchaser. (T38-39). At that time, Respondent mentioned his co-worker Marzullo, who had expressed interest in buying drugs after Lewis told him about

Carlos, and had also offered Lewis money "if the deal can be made" (T39,40,44). When Respondent arrived home that evening, Carlos had phoned again, leaving two-three messages on his answering machine (T42).

4. Juan Carlos works not only for Detective Pelaez of the Miami Beach Police Department, but for at least two other law enforcement agencies as well (T86). Prior to Respondent's arrest, Carlos was paid $15,400.00 for his informant efforts in seven cases (T85). The largest payments were $5000.00 and $4000.00 (T86). He received $2000.00 for Respondent's arrest (10% of the monies seized) (T82,93). Palaez also gave Carlos money for his personal bills as cash advancements for potential confidential informant fees (T87,88,105). It is unknown whether Carlos had other employment (T91). Carlos' work as an informant was not restricted by any geographic boundaries (T101).

5. Lewis was unknown to Detective Palaez (or to any other police involved herein) until Carlos introduced himself to Respondent at the Dragon Club and ultimately brought him to Palaez's attention (T103).

QUESTION PRESENTED

WHETHER THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 SO.2D 516 (FLA. 1985), CERT. DENIED, 473 U.S. 905 (1985), REMAINS VALID DESPITE THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987).

SUMMARY OF THE ARGUMENT

Despite the enactment of Section 777.201 Fl.Stat. (1987), this Court's opinion in State v. Hunter, 586 So.2d 319 (Fla. 1991) reflects this Court's intention to uphold the dictates of Cruz. Respondent maintains that, despite this Court's failure to address the statute in its Hunter opinion, and despite Petitioner's argument that Section 777.201(2) abrogates Cruz, this Court correctly concluded that the judicially created Cruz objective entrapment test remains valid and viable in Florida, having its foundation in Florida's due process clause, and should be construed to be coextensive with, or to invalidate, the legislatively enacted subjective entrapment statute at issue herein. As Cruz "parallels" federal due process claims, and has been determined by this Court in Hunter to include due process considerations, the statute cannot be deemed to override Cruz. Constitutional due process considerations cannot be superceded by statutory enactments. If the effect of Section 777.201 is to eliminate a defense based on constitutional due process, then the statute must be deemed unconstitutional.

Further, there are simply no grounds for this Court to grant Petitioner's request to revisit the issue of objective entrapment by remanding this cause to the lower court, as Cruz was properly argued in both the trial court and Third District Court of Appeal, whose ruling that both prongs of Cruz had been violated is now the law of the case. Only if this Court finds that Cruz has been statutorily abolished, contrary to Respondent's position herein,

should this cause be remanded, with leave for Respondent to withdraw his nolo contendere plea, as such a ruling by this Court would abrogate the premise upon which Respondent entered his plea, thereby rendering it involuntary. In that case, Respondent, having a valid defense of subjective entrapment, should be given the option to withdraw his plea and submit the entrapment issue to the trier of fact at trial.

ARGUMENT

THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 SO.2D 516 (FLA. 1985), CERT. DENIED, 473 U.S. 905 (1985), HAS NOT BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987).

Prior to this Court's decision in State v. Hunter, 586 So.2d 319, (Fla. 1991), the Third and Fourth District Courts of Appeal had taken the position that the enactment of Section 777.201, Florida Statutes, (1987) had abolished the objective entrapment defense set forth in Cruz v. State, 465 So.2d 516, (Fla. 1985), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), by mandating that the entrapment issue be determined 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. 3rd DCA 1990); Gonzalez v. State, 525 So.2d 1005 (Fla. 3rd DCA 1988); State v. Lopez, 522 So.2d 537 (Fla. 3rd DCA 1988). The First District, despite Hunter, continues to align itself with the position enunciated in Gonzalez, as reflected in 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 applied Cruz despite enactment of the Statute. 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). The Fifth District has not addressed the Statute, but also continues to apply Cruz. Smith v. State, 575 So.2d 776 (Fla. 5th DCA 1991); State v. Purvis, 560 So.2d 1296 (Fla. 5th DCA 1990).

As is reflected in the Third District's opinion in the instant case, however, Lewis v. State, 17 F.L.W. D793, (Fla. 3rd DCA, March 24, 1992), the Third District, as well as the Fourth District, have conceded that Hunter reflects this Court's intention to uphold the dictates of Cruz, see e.g. Ricardo v. State, 591 So.2d 1002 (Fla. 4th DCA 1992); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991). Respondent maintains that, despite this Court's failure to address Section 777.201, Fl.Stat. in its Hunter opinion, and despite Petitioner's argument that Section 777.201 abrogates Cruz, this Court correctly concluded that the judicially created Cruz objective entrapment test remains valid and viable in Florida, and should be construed to be coextensive with, or to invalidate, the legislatively enacted subjective entrapment statute at issue herein.

A. CRUZ AND SECTION 777.201 CAN AND SHOULD COEXIST.

A careful examination of Cruz itself clearly supports Respondent's position that objective and subjective entrapment can coexist. After a review of the federal law, which focused primarily on subjective entrapment, or the prediposition of the defendant, the Cruz court stated:

> "We agree with the Second District that the question of predisposition will always be a question of fact for the jury.

However, we also believe that the First District's concern for entrapment scenarios in which the innocent will succumb to temptation is well founded. To protect against such abuse, we turn to another aspect of entrapment." at 519.

The Court then set forth the foundation for the objective test it was to enunciate, again looking to federal law, as follows:

"The entrapment defense adopted in Sorrells, focusing on the predisposition of the defendant, is termed the subjective view of entrapment. However, beginning with Justice Roberts' concurrance in Sorrells, a minority of the United States Supreme Court has favored what is termed the objective view. This view was well expressed by Justice Frankfurter, in Sherman v. United States:

The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power...
...[A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society......(further elaboration omitted) (emphasis supplied).

The subjective view recognizes that innocent, unpredisposed, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. **In those cases, the subjective view allows conviction of predisposed defendants. The objective view requires that all persons so ensnared be released."** at 520 (emphasis supplied).

The Cruz Court went on to elaborate, in a footnote, on the justification for adopting an objective view, 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....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...(citation omitted)" at 520, fn.2. (emphasis supplied).

The Cruz Court then stated, in plain, unambiguous language that:

> "We do not foresee a problem in providing two independent methods of protection in entrapment cases. The New Jersey Supreme Court has found that the two tests of entrapment can coexist.....(quotation omitted).....
> **We find, like the New Jersey court, that the subjective and objective entrapment doctrines can coexist. The subjective test is normally a jury question. The objective test is a matter of law for the trial court to decide.**
>
> The effect of a threshold objective test is to require the state to establish initially whether 'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power.' (citation omitted). Once the state has established the validity of the police activity, the question remains whether 'the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute'. (citation omitted). This question is answered by deciding whether the defendant was predisposed, and is properly for the jury to decide. **In other words, the court must first decide whether the police have cast their nets in permissible waters, and, if so, the jury must decide whether the particular defendant was one of the guilty the police may permissibly ensnare."** at 521-522 (emphasis supplied).

The Court then went on to promulgate the now infamous Cruz two-pronged objective test (see Cruz at 522), the first prong directed to police "virtue testing", the second prong addressing the problem of "inappropriate technique". However, the Court obviously felt the need to further explain its position, elaborating in footnote 4 as follows:

> **"We note that, under this threshhold test, considerations which normally might not be recognized under the subjective test may be cognizable...**(citation and text omitted)...Under

> the threshhold test we adopt here, the strength of the inducement is certainly a significant factor, since there could be a 'substantial risk that such an offense will be committed by persons other than those who are ready to commit it'. While such a factor is thus cognizable, it does not always dictate a finding of entrapment as a matter of law, since, as the Third Circuit found in the context of its predisposition analysis, even substantial sums of money offered to city officials may be found to create no such substantial risk. Likewise, the relative 'benignity' of the favor asked of the officials in Jannotti.....(explanation omitted) was a question of fact for the jury in its determination of whether the defendants were predisposed, not a question of whether there was predisposition as a matter of law. **Once such issues are addressed in the context of the threshhold test, the problems inherent in attempting to determine whether certain facts tend to show predisposition as a matter of law are resolved.** (emphasis supplied)

Based on the above language and carefully thought out analysis of the court in Cruz, there can be no doubt that the court contemplated the harmonious coexistence of objective and subjective entrapment in Florida, each designed to protect against and prevent separate potential abuses of the criminal justice system. Despite Judge Schwartz's cryptic concurrence in Lewis, and the State's implicit, if not explicit agreement therewith, the court in Cruz fully contemplated the prospect that a defendant's likelihood or inclination to commit a crime can be outweighed an "advanced society's" intolerance of egregious police conduct designed to "ensnare him into further crime". Respondent submits that the construction utilized by the Fourth District in Ricardo v. State, 591 So.2d 1002 (Fla. 4th DCA 1991) to reconcile Cruz with Section 777.201 is the correct analysis. The court held that there are two aspects of entrapment, "one tested objectively by the court, and the other subjectively by the trier of fact." The objective aspect is the "threshhold test" outlined in Cruz. As the court stated:

"If either prong of this test is violated, then there is entrapment as a matter of law and the entrapped individual is entitled to be discharged. Simply for the sake of completing the Cruz analysis, we point out that where neither prong of the objective test is violated, the defendant then may present his affirmative defense of entrapment to the jury or other trier of fact by alleging that he or she was not predisposed to commit the offense. See Sec.777.201(2), Fla.Stat.(1989). The test to be applied at this stage is a subjective one." at 1006.

Respondent submits that the legislation at issue must be reconciled as in Ricardo and as thoroughly contemplated by the court in Cruz, despite its predating the statute. Further, Respondent submits that, as Cruz "parallels" federal due process claims, and has been determined by this Court in Hunter to include due process considerations (discussed next), the statute at issue cannot be deemed to override Cruz.

B. CRUZ AND FLORIDA'S DUE PROCESS CLAUSE.

Section 777.201(2), Fla. Stat. (1987) provides:

(1) A law enforcement officer...perpertrates 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 entrapment. The issue of entrapment shall be tried by the trier of fact.

It is the last sentence of paragragh (2) that has caused the courts and Petitioner to conclude that the Cruz objective entrapment test has been abolished by the legislature and replaced by solely a

subjective entrapment defense. Note that subsection (1) of the statute recites the language of Cruz as one of the considerations in determining whether the second prong of the objective entrapment test has been met, specifically whether government agents induce of encourage 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 those who are ready to commit it". Cruz at 522.

Respondent submits that nothing in the plain words of the statute completely eliminates objective entrapment, nor does it distinguish between subjective and objective entrapment, although it mandates, through the use of the word "shall", that the issue be determined by the trier of fact. The statute thus seemingly eliminates all judicial authority to respond to an uncontroverted motion to dismiss, regardless of the egregious nature of the governmental conduct involved. Not only does this dictate abrogate the public policy, judicial integrity, and judicial economy considerations upon which the objective entrapment doctrine has evolved, it flies in the face of the state constitutional due process considerations upon which the objective test has been established to have been founded. Thus, Respondent submits that this defense cannot be abolished by statute.

In Hunter, this court specifically held that "[b]y focusing on police conduct, this objective entrapment standard includes due process considerations." Id. at 322. Justice Kogan, concurring in part and dissenting in part (in which Justice Barkett concurred),

pointing out that the issue of police conduct meeting the Cruz objective standard is entirely one of **law**, elaborated on the court's holding as follows:

> "The Cruz Court did not directly confront whether the objective test finds its origin in the Florida Constitution, although it did note that the **federal** advocates of the objective standard had not claimed a constitutional basis for their views. Id. at 520 n.2 (discussing opinions of federal justices favoring objective standard). The Cruz Court did, however, note that the objective entrapment defense involves issues that substantially overlap due process concerns. Id. at 519 n.1 (citing cases so holding).
>
> Today, the majority opinion resloves the question of the source of Florida's objective entrapment defense. The majority holds that 'this objective entrapment standard includes due process considerations.'...It goes on to deny Hunter's claim because he allegedly is vicariously asserting the due process rights of Conklin...Because the federal system does not recognize the objective entrapment defense, **the majority opinion clearly is premised entirely on the due process clause of the Florida Constitution. Art.I, Sec.9, Fla. Const.** I fully concur in this conclusion. Indeed, I believe it necessarily flows from our prior case law.
>
> In Glosson, for example, we held that the due process clause of the Florida Constitution, article I, section 9, restricts the ability of the state to apprehend criminal wrongdoers if the state does so through serious misconduct of its own....The Glosson Court did not expressly characterize this as an objective entrapment analysis, but a review of that case shows that it indeed was. Glosson merely confronted a particularly egregious violation. Thus, although I agree that foth this case and Glosson properly are decided based on Florida due process concerns, I disagree with that part of the majority analysis suggesting that Glosson created a defense distinct from objective entrapment. The two plainly are coextensive. at 325. (emphasis supplied).

Respondent maintains that Hunter clearly establishes this Court's willingness to construe the Florida due process clause more broadly than its federal counterpart. This Court is free to define Florida's due process clause in accordance with the laws of Florida. State v. Glosson, 462 So.2d 1082, 1085, (Fla. 1985) ("[w]e reject the narrow application of the due process defense

found in the federal cases"). It is unquestionable that Florida may impose greater restrictions on police conduct for the protection of its citizenry than those afforded under federal law. Glosson, supra, Oregon v. Haas, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). Despite Petitioner's position that this construction of Hunter is misplaced, due to the fact that defendant Hunter was arrested prior to the enactment of the statute at issue herein, coupled with this Court's failure to address the statute in its opinion, Respondent submits that Hunter must be construed to reiterate and reemphasize both the validity of Cruz in Florida, together with its constitutional dimensions and foundations. Indeed, only Petitioner and the First District have refused to concede that this is the inevitable effect of Hunter. Justice Kogan reiterates this conclusion in his concurrance (in result only, with which Justice Barkett concurred) in Herrara v. State, 17 F.L.W. S84 (Fla. February 6, 1992), writing that "As Cruz and Hunter held, objective entrapment by its very nature raises distinct due process questions...Some of the preliminary considerations about 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." at S86 (citation omitted).

In the instant case, the Third District, in reversing the lower court's denial of Respondent's Motion to Dismiss based on both Glosson and Cruz, agreed that Hunter validates Cruz, and is the controlling law in Florida, receding from its prior decisions

based on its interpretation of Section 777.201. Finally, in Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991), the Fourth District also conceded that the effect of Hunter is that "Cruz is alive and well", and in acknowledging that the objective entrapment aspects of Cruz are predicated on constitutional due process concerns, stated that **"Those constitutional due process considerations, of course, cannot be superceded by statutory enactments."** at 271, (emphasis supplied). See also State v. Hernandez, 587 So.2d 1171 (Fla. 4th DCA 1991). If the effect of Section 777.201 is to eliminate a defense based on constitutional due process, then the statute is unconstitutional.

Interestingly, while the Cruz Court obviously did not address the interplay between the judicial and legislative definitions of objective and subjective entrapment in Florida due to the absence of a Florida statute at the time of the opinion, it did acknowledge the potential conflict between the judicial and statutory models of entrapment in New Jersey. Id. at 521 fn.3. In State v. Johnson, 606 A.2d 315 (N.J., May 13, 1992), the New Jersey Supreme Court squarely confronted this very interplay following legislative enactment in that state of a subjective version of entrapment. That court held as follows:

> "Constitutional due process and entrapment doctrine occupy much the same policy grounds. We accordingly reaffirm that entrapment is a defense as a matter of due process. The defense arises when conduct of government is patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government, and offends principles of fundamental fairness. We explicitly found that defense on the New Jersey Constitution. N.J. Const. Art.I, para. 2.
>
> The adoption of the defense of entrapment reposes within the

authority of state courts. Federal principles of entrapment 'are not controlling on the state courts which are free to formulate and establish the contours of the defense of entrapment for their own jurisdictions.' The entrapment defense based on due process reflects basic and distinctive state policies that have historically and consistently served principles of fundamental fairness and preserved judicial integrity in the administration of criminal justice. Our own entrapment doctrine has honored those principles of fundamental fairness, the refusal of the courts to 'permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty it is to deter its commission', and the fear that police would manufacture crime and ensnare unwary innocents." (Appendix, p.8).

The New Jersey Supreme Court focused on two principal concerns in Johnson, which notably coincide with the two prong test set forth in Cruz: the justification for police to target and investigate a defendant as a criminal suspect, and the nature and extent of the government's actual involvement in bringing about the crime. In other words, the court has interpreted its due process clause to prohibit unfounded "virtue testing" of its citizens, and to limit the extent to which government can create criminal behavior upon which to prosecute. See also People v. Juillet, 439 Mich. 34, 475 N.W.2d 786, 807 (1991)(Cavanaugh, C.J. concurring)("the entrapment doctrine is necessarily rooted in the concept of fundamental procedural fairness inherent in the due process clause" of the Michigan Constitution).

In summation, it is emanently clear that Cruz is not only alive and well and the law of the land in Florida, but that both due process and fundamental fairness considerations mandate that it remain so. If the statute in question purports to abolish this constitutionally rooted doctrine designed to prevent "prostitution of the criminal laws" and to promote judicial integrity, then said

statute must be deemed unconstitutional.

C. Application of Cruz To The Instant Case.

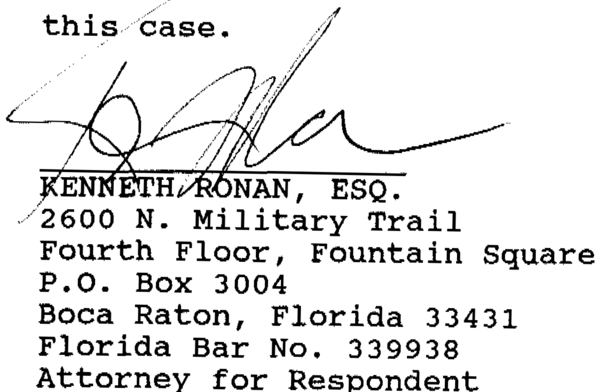
Petitioner maintains that if Cruz is still good law, the State is entitled to a remand to present evidence rebutting Respondent's claim of objective entrapment. Petitioner concedes that the Cruz issue was properly presented to the lower court in its pretrial Motion to Dismiss (R127-143, Petitioner's brief, p.2), and again on appeal to the Third District (Petitioner's brief, p.5-7, and Appendix 1 to Petitioner's brief, p.9-19). Petitioner further concedes that the lower court declined to specifically rule on the Cruz issue because it believed it was bound by the Third District's opinion in Gonzalez that Cruz had been abolished by Section 777.201. (Petitioner's brief, p.23, T.112-3, 122-3, ST.1-17). Additionally, the State refused to produce the confidential informant herein for testimony at trial, agreeing only to an in camera proceeding before the court (T.118,123), and the lower court based its rejection of Respondent's Glosson argument and Motion to Dismiss on the fact that the C.I. was not required to testify at trial, (T.121-3, ST1-17), a ruling upheld by the Third District in Lewis. Thus, there are simply no grounds for this Court to grant Petitioner's request to revisit this issue. However, the bottom line herein is that the Third District, as this Court did in Hunter, did address the Cruz issue, ruling that neither prong of the Cruz test was satisfied, that Respondent was not involved in a

specific ongoing criminal activity, that the police activity with respect to Respondent was not reasonably tailored to apprehend those involved in ongoing crime, and reversed and remanded with instructions that Respondent be discharged. This ruling has now become the law of the case, which may be changed only where strict adherence to the ruling would result in manifest injustice. Valsecchi v. Proprietors Ins. Co., 502 So.2d 1310 (Fla 3rd DCA 1987), Brunner Enterprises v. Dept. of Revenue,452 So.2d 550 (Fla. 1984), Strazzulla v. Hendrick, 117 So.2d 1 (Fla. 1965). Thus, a remand in the instant case should only be allowed, and Respondent submits would in fact be mandated, if this Court determines that Cruz has, as urged by Petitioner, been abolished by Section 777.201. Should this Court so rule, **and said ruling is deemed to apply to Respondent,** then Respondent requests that this Court remand this matter to the lower court with instructions to allow Respondent to withdraw his nolo plea. Said plea was entered and predicated solely upon Respondent's preservation, agreed upon by the State and the lower court, of his right to appeal his Motion to Dismiss, (ST1-17), which in turn was based on advice of trial counsel who believed in good faith that Cruz was, and is, good law. If Cruz is abolished by this Court, then Respondent's plea must be deemed involuntary, and he must be permitted to withdraw same and proceed to trial. A defendant's nolo contendere plea is involuntary if it is induced by defense counsel's mistaken advice, or a promise that cannot be kept because it is contrary to law. Shell v. State, 501 So.2d 1334, (Fla. 2d DCA 1987). The test is

whether defendant can establish "that he was prejudiced by an honest misunderstanding which contaminated the voluntariness of his plea." Ramsey v. State, 408 So.2d 675, 676 (Fla. 4th DCA 1982). Certainly, should this Court abolish Cruz, Respondent's plea would have been induced by counsel's mistaken advice, and contaminated by an honest misunderstanding. Under these hypothetical circumstances, Respondent would also be entitled to withdraw his plea based on ineffective assistance of counsel, as he was not only mislead by counsel, but also had a viable, **subjective entrapment defense** that would necessarily be required to be submitted to the trier of fact, thus necessitating a trial in this cause. Siegel v. State, 586 So.2d 1341 (Fla. 5th DCA 1991), Rule 3.850, Florida Rules of Criminal Procedure. Respondent submits that only if Petitioner prevails in the instant appeal should this case be remanded with instructions to allow Respondent to withdraw his plea and go to trial in this cause.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Respondent respectfully requests that this Court find that Cruz remains the law in Florida, that the Cruz objective entrapment test has not be abolished by Section 777.201, Fl.Stat., and uphold the opinion of the Third District below. In the event that Cruz is abolished by this Court, Respondent respectfully requests that this Court remand Respondent's cause to the trial court with instructions that Respondent be allowed to withdraw his plea of nolo contendere, and be permitted to proceed to trial in this case.



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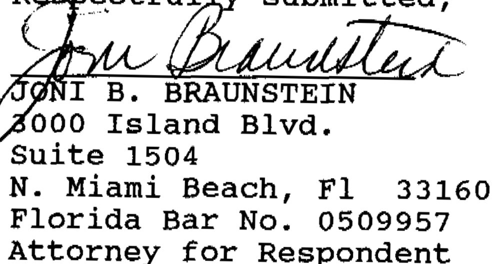
Respectfully submitted,



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Florida Bar No. 0509957
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to **ANGELICA D. ZAYAS,** Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Ave., Suite N921, Post Office Box 013241, Miami, Florida 33101, on this 16th day of **December, 1992.**

JONI B. BRAUNSTEIN, ESQ.

APPENDIX

of the defen-

127 N.J. 458

⌊458STATE of New Jersey, Plaintiff–Appellant,

v.

Jerome JOHNSON and Wanda Bonet, Defendants–Respondents.

Supreme Court of New Jersey.

Argued Sept. 24, 1991.

Decided May 13, 1992.

In prosecution for drug and other related offenses, the Superior Court dismissed indictment, concluding that defendants had been entrapped as a matter of due process. On appeal, the Superior Court, Appellate Division, affirmed, and State's petition for certification was granted. The Supreme Court, Handler, J., held that government conduct of soliciting police officer and his girlfriend into crime involving theft and sale of illegal drugs did not constitute entrapment as a matter of due process.

Reversed and remanded.

Stein, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐37(2)

Defense of entrapment, which serves to excuse defendant from criminal responsibility, can arise whenever defendant introduces evidence of government's involvement in crime through initiation, solicitation or active participation.

2. Constitutional Law ⇐257.5

Entrapment based on standards of due process may occur even though entrapment has not been established under statute. N.J.S.A. 2C:2–12; U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 2.

3. Constitutional Law ⇐257.5

Due process entrapment concentrates on government conduct, focusing on extent of government's involvement in the ⌊459crime, not merely on whether conduct objectively or subjectively induced or caused the crime. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐257.5

Essence of due process entrapment inheres in egregious or blatant wrongfulness of government conduct. U.S.C.A. Const. Amend. 14.

5. Constitutional Law ⇐257.5
Criminal Law ⇐37(2)

Entrapment is defense as a matter of due process and arises when government conduct is patently wrongful in that it constitutes abuse of lawful power, perverts proper role of government and offends principle of fundamental fairness. U.S.C.A. Const.Amend. 14.

6. States ⇐4.5

Adoption of defense of entrapment reposes within authority of state courts.

7. States ⇐4.5

Federal principles of entrapment are not controlling on state courts which are free to formulate and establish contours of defense of entrapment for their own jurisdictions.

8. Constitutional Law ⇐257.5

Due process right to entrapment defense is recognized under principles of state constitutional doctrine. N.J.S.A. Const. Art. 1, par. 2.

9. Constitutional Law ⇐257.5

Relevant factors in evaluating defense of due process entrapment are whether government or defendant was primarily responsible for creating and planning the crime; whether government or defendant primarily controlled or directed commission of crime; whether objectively viewed the methods used by government to involve defendant in commission of crime were reasonable; and whether government had legitimate law ⌊460enforcement purpose in bringing about the crime. U.S.C.A. Const. Amend. 14; N.J.S.A. Const. Art. 1, par. 2.

10. Constitutional Law ⇐257.5
Criminal Law ⇐37(6, 8)

Government conduct of soliciting police officer and his girlfriend into crime involving theft and sale of illegal drugs did not constitute entrapment as a matter of due process; it was defendant who first ex-

pressed desire to "rip off" drug dealer, crime was not primarily police-inspired, police did not resort to excessive inducements, and use of full-circle transaction in which police arranged for both supply and sale was reasonable. N.J.S.A. 2C:2-12; U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 2.

James D. Harris, Deputy Atty. Gen., argued the cause, for plaintiff-appellant (Robert J. Del Tufo, Atty. Gen. of N.J., attorney; Alexander P. Waugh, Jr., Asst. Atty. Gen., of counsel).

Diane Toscano, Asst. Deputy Public Defender, argued the cause, for defendant-respondent Jerome Johnson (Wilfredo Caraballo, Public Defender, attorney; Diane Toscano and Joseph E. Krakora, First Asst. Deputy Public Defender, on the briefs).

Marcia Blum, Asst. Deputy Public Defender, argued the cause, for defendant-respondent Wanda Bonet (Wilfredo Caraballo, Public Defender, attorney).

The opinion of the Court was delivered by

HANDLER, J.

This criminal case requires the Court to revisit the defense of entrapment. Defendants, a police officer and his girlfriend, attempted to sell drugs pursuant to a plan that had been devised by law enforcement officers and proposed to defendants through an informant. As a result, defendants were indicted for drug and other related offenses. They then moved ⌊461 to dismiss the indictment on the ground that they had been entrapped. The trial court dismissed the indictment, concluding that defendants had been entrapped as a matter of due process. The Appellate Division affirmed in an unreported opinion. This Court granted the State's petition for certification. 127 *N.J.* 327, 604 *A.*2d 601 (1991).

I

During the summer of 1988, defendants, Jerome Johnson, a New Jersey State Trooper, and Wanda Bonet, his girlfriend, met a person with whom they used cocaine. Thereafter, on a fairly regular basis, that person supplied Johnson and Bonet with small amounts of cocaine. On one of those occasions, Johnson told his cocaine supplier, "I would like to rip off a drug dealer with a lot of cocaine and then I could turn around and sell it and make some money."

Some months later, Johnson's supplier was arrested while delivering a large quantity of cocaine to an undercover agent of the Drug Enforcement Task Force. The supplier thereafter decided to cooperate with law enforcement authorities by becoming an informant. He told agents of the United States Drug Enforcement Administration that Johnson would be willing to "rip off" drugs from a drug dealer and then sell those drugs for money.

The federal agents verified Johnson's employment as a State Trooper, and then communicated what they had learned to the New Jersey State Police. The two law enforcement agencies then jointly developed a plan to give Johnson the opportunity to steal drugs from a drug dealer and to sell those drugs. The plan contemplated that the informant would tell Johnson that he knew of an opportunity for Johnson to steal drugs from a drug courier and make a lot of money; that he, the informant, was acting as a broker for the sale of a kilogram of cocaine, and that he had arranged for a "mule," a paid courier, to transport the drugs by car to a meeting place with a prospec⌊462tive buyer; and that the informant and the seller of the cocaine would be in a second car following the mule. According to the plan, Johnson, wearing his State Trooper uniform, would pretend to make a traffic stop of the mule's car at a prearranged location on Frelinghuysen Avenue in Newark, and then would seize the cocaine. The seller of the cocaine, following in the car with the broker-informant, would see the seizure and chalk up the loss of the cocaine as a cost of doing business. Johnson then would meet the broker at Johnson's apartment and sell the cocaine to the mule for $5,000.

The informant thereafter presented and explained the scheme to Johnson. Johnson ⌊ readily agreed to participate, adding new

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elements to the plan. He requested $1,000 cash in advance, an unmarked car, and a portable flashing red light to use to make the traffic stop. Johnson also indicated he would change shifts so that he would be off-duty at the time of the stop. Bonet, present during the meeting, actively participated in the conversation, at times explaining to Johnson how the plan would be accomplished.

On December 22, 1988, the informant and a detective, acting as the mule, met with defendants at defendants' Newark apartment. The parties reviewed and discussed the details of the plan. Bonet encouraged Johnson's participation, and both defendants actively engaged in the discussions and refinement of the plan. The detective gave Johnson $1,000 in marked one-hundred-dollar bills and the portable flashing red light. The participants arranged to meet again the following morning.

The next morning, Johnson, who had changed shifts, was supplied with the 1988 Chevrolet Caprice automobile to be used in stopping the mule. Johnson also viewed the car that the mule would be driving at the time of the stop and the precise location where the seizure of the drugs would occur. Johnson then changed into his State Trooper uniform. At approximately 11:30 a.m., the plan was put into effect. Driving the Chevrolet with the portable flashing red light and dressed in his ⌊463uniform, Johnson stopped the mule and seized from him one kilogram of cocaine. The informant and a special agent, posing as the seller, drove off. Johnson drove to his apartment, followed by the mule. On his arrival at approximately 12:05 p.m., Johnson was arrested. In his possession were the kilogram of cocaine, the Chevrolet, the flashing red light, and seven of the ten marked one-hundred-dollar bills. The sale of the cocaine back to the mule was not completed.

The State Grand Jury indicted defendants on five counts. Count One charged them with a second-degree conspiracy to violate the drug laws of this State, to exercise unlawful control over movable property of the State, and to commit misconduct in office, contrary to *N.J.S.A.* 2C:5–2. Count Two charged defendants with possession with intent to distribute a controlled dangerous substance, a first-degree crime contrary to *N.J.S.A.* 2C:35–5a(1) and *N.J.S.A.* 2C:35–5b(1). The third count charged possession of a controlled dangerous substance, a crime of the third degree, contrary to *N.J.S.A.* 2C:35–10a(1). Count Four charged theft of movable property, a second-degree crime contrary to *N.J.S.A.* 2C:20–3, and Count Five charged official misconduct in office, a second-degree crime contrary to *N.J.S.A.* 2C:30–2.

Defendants conceded for purposes of their motion to dismiss the indictment that they were predisposed to commit the crime, the effect of which was to raise the defense of entrapment only as a matter of due process. Because the parties did not dispute the facts concerning the nature of the government's conduct in investigating the crimes and predisposition was not an issue, they agreed to have the matter decided on the facts adduced in the Grand Jury proceedings. The lower courts were satisfied that the government conduct was improper and constituted entrapment as a matter of due process. That determination calls for an examination of the general doctrine of entrapment and the entrapment defense as it has evolved in this state. We can then address entrapment as a constitutional doctrine and ⌊464consider whether the facts in this case demonstrate that defendants were entrapped as a matter of due process.

II

[1] The defense of entrapment, which serves to excuse the defendant from criminal responsibility, can arise whenever a defendant introduces evidence of the government's involvement in the crime through initiation, solicitation, or active participation. Ted K. Yasuda, *Entrapment as a Due Process Defense*, 57 *Ind.L.J.* 89, 92 (1982) ("*Entrapment Due Process*"). There are two major, somewhat opposing views of entrapment: subjective and objective. The choice between the two theories usually "centers on whether the purpose of the entrapment defense is to deter govern-

ment misconduct or to protect the innocent." Paul Marcus, *The Entrapment Defense* 81 (1989).

Subjective entrapment concentrates on the criminal predisposition of the defendant wholly apart from the nature of the police conduct. The defense will fail if the defendant was ready and willing to commit the crime. The subjective approach reflects the policy that law enforcement officials should detect existing crime rather than entice the innocent into committing crime. *State v. Dolce,* 41 *N.J.* 422, 432, 197 *A.*2d 185 (1964). Subjective entrapment protects the unwary innocent but not the unwary criminal.

In contrast, objective entrapment stresses the wrongfulness of government action without regard to the defendant's criminal predisposition. "The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power." *Sherman v. United States,* 356 *U.S.* 369, 382, 78 *S.Ct.* 819, 825, 2 *L.Ed.*2d 848, 856 (1958) (Frankfurter, J., concurring). Objective entrapment seeks to deter police misconduct, even if the unwary criminal goes free.

⌊465The determinative elements of the respective tests are the defendant's criminal predisposition and the government's conduct. The objective theory focusing on improper police conduct asks whether the government acts would have induced the average law abiding citizen to commit crime. The subjective theory stressing individual culpability asks whether the particular defendant would have committed the crime even without the government inducement. Kevin H. Marino, *Outrageous Conduct: The Third Circuit's Treatment of the Due Process Defense,* 19 *Seton Hall L.Rev.* 606, 612–13, 625, 630 (1989) (*"Outrageous Conduct"*). Although many courts purport to espouse either a pure subjective test or a pure objective test, "[a]s a matter of practicality, in many instances the application of the two theories overlap." *People v. Jamieson,* 436 *Mich.* 61, 461 *N.W.*2d 884, 889 (1990); *accord* Marcus, *supra,* § 304; Roger Park, *The Entrapment Controversy,* 60 *Minn.L.Rev.* 163, 179–84 (1976).

Under the subjective test, for example, in order to demonstrate that the predisposition of the defendant did not cause the crime, some courts suggest that highly improper police conduct may be found to be the cause of the crime. *United States v. Townsend,* 555 *F.*2d 152, 155 n. 3 (7th Cir.) ("even the most habitual offender can be entrapped if the officers use coercive inducement to overbear the defendant's reluctance"), *cert. denied,* 434 *U.S.* 897, 98 *S.Ct.* 277, 54 *L.Ed.*2d 184 (1977); *United States v. Watson,* 489 *F.*2d 504, 511 (3d Cir.1973) ("the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition"). Emphasis on the nature of government conduct resembles the objective test.

Similarly, in objective entrapment, although the focus is whether the police conduct is likely to ensnare an average law abiding citizen, courts often perceive the average law abiding citizen as one who would not succumb to a simple invitation to commit a crime. *E.g., People v. Barraza,* 23 *Cal.*3d 675, 153 *Cal.Rptr.* 459, 467, 591 *P.*2d 947, 955 (1979); *State v. Tookes,* ⌊466 67 *Haw.* 608, 699 *P.*2d 983, 987 (1985). Some courts believe that the defendant's obvious predisposition can mute the wrongfulness of police conduct, and, conversely, the defendant's lack of predisposition can magnify the wrongfulness of that conduct. *E.g., United States v. Batres–Santolino,* 521 *F.Supp.* 744, 751 (N.D.Cal.1981); Marcus, *supra,* at 90–92. Hence, depending on the circumstances, the emphasis on the defendant's predisposition "collapses" the objective test into the subjective test. Mark M. Stavsky, *The "Sting" Reconsidered: Organized Crime, Corruption and Entrapment,* 16 *Rutgers L.J.* 937, 947–49 & n. 81 (1985) (*"The 'Sting' Reconsidered"*).

Some jurisdictions pursue hybrid approaches combining both objective and subjective elements of entrapment. *See, e.g.,*

State v. Molnar, 81 *N.J.* 475, 486, 410 *A.*2d 37 (1980) (Code of Criminal Justice represents intermediate position between the subjective and objective views on entrapment); *see also Cruz v. State,* 465 *So.*2d 516, 521 (Fla.) ("subjective and objective entrapment doctrines can coexist"), *cert. denied,* 473 *U.S.* 905, 105 *S.Ct.* 3527, 87 *L.Ed.*2d 652 (1985); *Baird v. State,* 440 *N.E.*2d 1143, 1145–46 (Ind.Ct.App.1982) (explaining dual nature of Indiana's statutory entrapment defense); *People v. Isaacson,* 44 *N.Y.*2d 511, 406 *N.Y.S.*2d 714, 378 *N.E.*2d 78 (1978) (creating an entrapment test combining both subjective and objective aspects).

New Jersey recognized both forms of the entrapment defense prior to the adoption of the Code of Criminal Justice, which became effective in 1979. Historically, the common-law entrapment defense in New Jersey was based primarily on a subjective test. *See generally State v. Rockholt,* 96 *N.J.* 570, 574–76, 476 *A.*2d 1236 (1984) (a detailed history of subjective entrapment in New Jersey). The critical factor was the presence or absence of the defendant's predisposition to commit the crime, which depended on whether disposition to commit the crime originated with the defendant or with the police. This Court's opinion in *State v. Dolce, supra,* 41 *N.J.* at 430, 197 *A.*2d 185, explained that "[e]ntrapment exists when the criminal design ⌊467 originates with the police officials, and they implant in the mind of an innocent person the disposition to commit the offense and they induce its commission in order that they may prosecute." Subjective entrapment was available only to a defendant who had "no predisposition to commit the crime induced by the government agents," *State v. Stein,* 70 *N.J.* 369, 391, 360 *A.*2d 347 (1976), or when "the criminal conduct was the product of the creative activity of law enforcement officials." *State v. Talbot,* 71 *N.J.* 160, 165, 364 *A.*2d 9 (1976). The basic purpose of subjective entrapment was to "protect the innocent from being led to crime through the activities of law enforcement officers but ... [not to] protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to commit crime safely." *Dolce, supra,* 41 *N.J.* at 431–32, 197 *A.*2d 185.

Although the entrapment defense first recognized in New Jersey was based on the subjective theory, the Court, in *Talbot, supra,* 71 *N.J.* at 168, 364 *A.*2d 9, adopted an objective theory of entrapment. That form of entrapment focused on the nature of police conduct and could arise "as a matter of law even though predisposition to commit the crime may appear...." *See Molnar, supra,* 81 *N.J.* at 484–86, 410 *A.*2d 37. Objective entrapment was "bottomed on the principles of fundamental fairness.... [T]he methods employed by the State must measure up to commonly accepted standards of decency of conduct to which government must adhere. The manufacture or creation of a crime by law enforcement authorities cannot be tolerated." *Talbot, supra,* 71 *N.J.* at 168, 364 *A.*2d 9. Nevertheless, even though police conduct was determinative under objective entrapment, the predisposition of the defendant was not wholly irrelevant and immaterial. According to the Court, the importance of the defendant's criminal intent decreases as the part played by the State increases, "until finally a point may be reached where the methods used by State cannot be countenanced, even though a defendant's predisposition is shown." *Id.* at 167–68, 364 *A.*2d 9.

⌊468 Three years after *Talbot,* the Legislature adopted a statutory entrapment defense. When it enacted the Code, it was mindful of the prevailing theories of entrapment and the common-law background of the defense. Sean M. Foxe, *New Jersey Criminal Code Modifies Entrapment Defense,* 15 *Seton Hall L.Rev.* 464 (1985); Michael A. Gill, *The Entrapment Defense in New Jersey: A Call for Reform,* 21 *Rutgers L.J.* 419, 438–40 (1990) (*"Call for Reform"*). The Code "replaced the prior law of entrapment with a single statutory defense" that intertwined the two conventional strands of common-law entrapment. *Rockholt, supra,* 96 *N.J.* at 579, 476 *A.*2d 1236.

The Code defense of entrapment provides:

a. A public law enforcement official or a person engaged in cooperation with such an official or one acting as an agent of a public law enforcement official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by * * *

* * * * * *

(2) Employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. [*N.J.S.A.* 2C:2–12.]

However, the formulation of entrapment under the Code did not simplify the doctrine. The Code requires that the defendant address an objective prong that stresses the nature or character of government conduct. That conduct must involve (1) "methods of persuasion or inducement" that (2) create "a substantial risk" of the commission of a crime (3) by a person not otherwise "ready to commit [that crime]." *N.J.S.A.* 2C:2–12a(2). That test focuses on "the ability of the average person, rather than the particular defendant, to withstand inducements to engage in criminal activity." *Rockholt, supra,* 96 *N.J.* at 579, 476 *A.*2d 1236.

The Code also imposes a causation requirement, namely, that police conduct "as a direct result, cause[ ]" the defendant to commit the crime. *N.J.S.A.* 2C:2–12a. That constitutes a subjective prong because it focuses on the predisposition of the particular defendant. "This additional language," the Court ⌊469explained in *Rockholt,* "pinpoints the effect of the police action on the particular defendant and thus necessarily triggers an inquiry into the defendant's predisposition." 96 *N.J.* at 578, 476 *A.*2d 1236.

In this case, application of the Code standards was obviated because defendants, for the purpose of their motion to dismiss the indictment on constitutional grounds, conceded that they had been predisposed to commit the crime. However, traditional objective entrapment doctrine applies to a predisposed defendant under the rubric of due process entrapment. Therefore, objective entrapment principles remain relevant and instructive with respect to any inquiry into constitutional due process entrapment, the central issue of this case.

III

[2] Entrapment based on standards of due process may occur even though entrapment has not been established under a statute. *See State v. Medina,* 201 *N.J.Super.* 565, 576–77, 493 *A.*2d 623 (App.Div.) (*Talbot* defense is of constitutional due process nature and thus exists independently of *N.J.S.A.* 2C:2–12), *certif. denied,* 102 *N.J.* 298, 508 *A.*2d 185 (1985); *Commonwealth v. Mathews,* 347 *Pa.Super.* 320, 500 *A.*2d 853 (1985) (jury rejected defendant's entrapment defense under statutory objective approach, yet court used due process standard to bar conviction because police conduct was so egregious). This Court in *Rockholt* recognized that the pre-Code defense of entrapment had a constitutional basis in due process and that due process entrapment survived the enactment of the statutory entrapment defense. 96 *N.J.* at 580–81, 476 *A.*2d 1236. As explained in *Molnar,* 81 *N.J.* at 486, 410 *A.*2d 37, the rationale for the "objective entrapment" defense of *Talbot* was based on the constitutional considerations of due process and fundamental fairness. *Medina, supra,* 201 *N.J.Super.* at 576–77, 493 *A.*2d 623.

⌊470**[3]** Due process entrapment is like traditional objective entrapment in that it concentrates on government conduct. *E.g., United States v. Valdovinos–Valdovinos,* 588 *F.Supp.* 551, 554–55 (N.D.Cal.), *rev'd on other grounds,* 743 *F.*2d 1436 (9th Cir. 1984), *cert. denied,* 469 *U.S.* 1114, 105 *S.Ct.* 799, 83 *L.Ed.*2d 791 (1985). Due process entrapment, however, is an "involvement-based" doctrine, which focuses on the extent of the government's involvement in the crime, not merely on whether that conduct objectively or subjectively induced or caused the crime. *Outrageous Conduct, supra,* 19 *Seton Hall L.Rev.* at 613. Nevertheless, due process and objec-

tive entrapment serve like policies. 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* 83 n. 4 (Supp.1991). The similarity of policies and standards can obscure the distinction between ordinary objective entrapment and due process entrapment. *See United States v. Jannotti,* 673 *F.*2d 578, 608 (3d Cir.1982) (en banc) (the lines between objective entrapment and due process entrapment "are indeed hazy"), *rev'g* 501 *F.Supp.* 1182 (E.D.Pa. 1980), *cert. denied,* 457 *U.S.* 1106, 102 *S.Ct.* 2906, 73 *L.Ed.*2d 1315 (1982); *Call for Reform, supra,* 21 *Rutgers L.J.* at 435 n. 136 (due process entrapment is distinguishable from the objective theory of entrapment "only in degree"); *see also United States v. Ramirez,* 710 *F.*2d 535, 539 (9th Cir.1983) (due process defense is "a close relative of entrapment" but it is independent); *cf.* Jeffrey N. Klar, *The Need for a Dual Approach to Entrapment,* 59 *Wash.U.L.Q.* 199, 216 (1981) ("*Dual Approach*") (objective approach makes due process defense unnecessary).

[4] The essence of due process entrapment inheres in the egregious or blatant wrongfulness of the government conduct. *E.g., United States v. Twigg,* 588 *F.*2d 373 (3d Cir.1978) (dismissing indictment for outrageous government conduct). "[A] defendant's conviction will be disallowed when the government's overall involvement in his crime was so outrageous as to violate due process." *Outrageous Conduct, supra,* 19 *Seton Hall L.Rev.* at 613. Thus, in *Rockholt,* the Court held that a constitutional underpinning of entrapment could be based on ⌊471police conduct that was "so egregious" as to offend due process. 96 *N.J.* at 576, 581, 476 *A.*2d 1236 (citing *dictum* from *United States v. Russell,* 411 *U.S.* 423, 431–32, 93 *S.Ct.* 1637, 1642–43, 36 *L.Ed.*2d 366, 373 (1973), which, in turn, cited *Rochin v. California,* 342 *U.S.* 165, 172, 72 *S.Ct.* 205, 209, 96 *L.Ed.* 183, 190 (1952) (holding evidence inadmissible because police conduct "shock[ed] the conscience")). In *Talbot, supra,* 71 *N.J.* at 167–68, 364 *A.*2d 9, the court referred to "commonly accepted standards of decency to which government must adhere" as the measure of fundamental fairness. *See* Edward G. Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience,* 7 *W.New Eng. L.Rev.* 1, 26–27 (1984) ("*Fundamental Fairness.*").

Entrapment implicates concerns that have always been central to due process. Both share a concern over the "proper use of government power." *Sherman, supra,* 356 *U.S.* at 382, 78 *S.Ct.* at 825, 2 *L.Ed.*2d at 856. Both doctrines require that government adhere to its proper role and not abuse lawful power. *Sorrells v. United States,* 287 *U.S.* 435, 444, 53 *S.Ct.* 210, 213, 77 *L.Ed.* 413, 418 (1932). Wrongful government conduct also arouses the specter that relatively innocent persons may be coerced or seduced into crime. "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobson v. United States,* — *U.S.* —, —, 112 *S.Ct.* 1535, 1543, 118 *L.Ed.*2d 147 (1992); *see Call for Reform, supra,* 21 *Rutgers L.J.* at 440 (defendant is less culpable when enticed into committing crime by government). That concern recognizes that entrapment is not only unfair, it is counterproductive. The creation of crime increases crime, it does not detect or deter it. *Id.* at 435 n. 133 (giving an example of a sting operation that itself created a rise in drug trafficking and gun thefts). Punishing the otherwise innocent * MESSAGE(S) *MORE SECTIONS FOLLOWoffender would not serve any of the familiar goals of the criminal justice system. As cogently stated by the Ninth Circuit:

> ⌊472Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate per-

sons who, absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself—"to secure the conviction of a private criminal." [*Olmstead v. United States,* 277 *U.S.* 438, 485, 48 *S.Ct.* 564, 575, 72 *L.Ed.* 944 (1928) (Brandeis, J., dissenting).] Under such circumstances, the criminal justice system infringes upon personal liberty and violates due process. [*United States v. Bogart,* 783 *F.*2d 1428, 1436 (9th Cir. 1986).]

Entrapment, like due process, monitors the relationship between government and its citizens. Respect for the governed insists that government be justified before it moves against any of its citizens. First, a contest between the government and its citizens is not a fair fight. *United States v. Jannotti, supra,* 673 *F.*2d at 615 (Aldisert, J., dissenting) (an objective theory of entrapment, which lets the "technical transgressor go free," recognizes the "awesome power of the financial and personnel resources" at the disposal of law enforcement authorities and encourages the proper use of those resources). Second, government should not have unfettered power to probe the public. *Call for Reform, supra,* 21 *Rutgers L.J.* at 440 (government should not be allowed to "stress test" morality of ordinary citizens). This latter concern in turn implicates the right to be let alone: "the government's ability gratuitously to generate crime through random honesty checks involves unjustified intrusion into citizens' privacy and autonomy." Bennett L. Gersham, *Abscam, the Judiciary, and the Ethics of Entrapment,* 91 *Yale L.J.* 1565, 1584, 1589 (1982); *see United States v. Bogart, supra,* 783 *F.*2d at 1436.

Due process and entrapment seek to uphold judicial integrity. Courts should not underwrite outrageous government conduct or the companion invasion of citizens' rights. As Judge Friendly observed in *United States v. Archer,* 486 *F.*2d 670, 677 (2d Cir.1973):

> ⌊473Government "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.

Judicial integrity is compromised when courts impose criminal sanctions arising out of wrongful government conduct. *State v. Sugar,* 100 *N.J.* 214, 229, 495 *A.*2d 90 (1985); *State v. Kennedy,* 247 *N.J.Super.* 21, 30, 588 *A.*2d 834 (App.Div.1991); *see also Russell, supra,* 411 *U.S.* at 445, 93 *S.Ct.* at 1649, 36 *L.Ed.*2d at 381 (Stewart, J., dissenting) (courts should bar manufacture of crime to preserve their institutional integrity).

[5] Constitutional due process and entrapment doctrine occupy much the same policy grounds. We accordingly reaffirm that entrapment is a defense as a matter of due process. The defense arises when conduct of government is patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government, and offends principles of fundamental fairness. We explicitly found that defense on the New Jersey Constitution. *N.J. Const.,* art. I, para. 2.

[6–8] The adoption of the defense of entrapment reposes within the authority of state courts. Federal principles of entrapment "are not controlling on the state courts which are free to formulate and establish the contours of the defense of entrapment for their own jurisdictions." *Talbot, supra,* 71 *N.J.* at 165–67, 364 *A.*2d 9. The entrapment defense based on due process reflects basic and distinctive state policies that have historically and consistently served principles of fundamental fairness, *e.g., State v. Abbati,* 99 *N.J.* 418, 493 *A.*2d 513 (1985), and preserved judicial integrity in the administration of criminal justice, *e.g., State v. Sugar, supra,* 100 *N.J.* at 228–29, 495 *A.*2d 90 (citing *Molnar,*

supra, 81 *N.J.* at 484, 410 *A.*2d 37). Our own entrapment doctrine has honored those policies, namely, adherence to principles of fundamental fairness, *Talbot, supra,* 71 *N.J.* at 168, 364 *A.*2d 9; the refusal of courts to " 'permit their process to be used in aid of a scheme for the actual ⌊474creation of a crime by those whose duty it is to deter its commission,' " *id.* at 165, 364 *A.*2d 9 (quoting *Dolce, supra,* 41 *N.J.* at 431, 197 *A.*2d 185); and the fear that police would manufacture crime and ensnare unwary innocents. *Id.* (citing *Sherman, supra,* 356 *U.S.* at 372, 78 *S.Ct.* at 820–21, 2 *L.Ed.*2d at 851). Consideration of strong state policy impels us to recognize a due process right to an entrapment defense under principles of state constitutional doctrine. *E.g., State v. Williams,* 93 *N.J.* 39, 459 *A.*2d 641 (1983); *State v. Hunt,* 91 *N.J.* 338, 358–68, 450 *A.*2d 952 (1982) (Handler, J., concurring). *See generally* Robert F. Williams, *The New Jersey State Constitution: A Reference Guide* 31 (1990) (interpretation of state constitution influenced by distinctive factors).

[9] Due process entrapment requires a comprehensive approach encompassing careful scrutiny of the nature of government conduct in light of all the surrounding circumstances "and in the context of proper law enforcement objectives." *People v. Isaacson, supra,* 406 *N.Y.S.*2d at 719, 378 *N.E.*2d at 83; *see United States v. Tobias,* 662 *F.*2d 381, 387 (5th Cir.1981), *cert. denied,* 457 *U.S.* 1108, 102 *S.Ct.* 2908, 73 *L.Ed.*2d 1317 (1982). Relevant factors are (1) whether the government or the defendant was primarily responsible for creating and planning the crime, (2) whether the government or the defendant primarily controlled and directed the commission of the crime, (3) whether objectively viewed the methods used by the government to involve the defendant in the commission of the crime were unreasonable, and (4) whether the government had a legitimate law enforcement purpose in bringing about the crime. *See, e.g., United States v. Norton,* 700 *F.*2d 1072, 1075 (6th Cir.), *cert. denied,* 461 *U.S.* 910, 103 *S.Ct.* 1885, 76 *L.Ed.*2d 814 (1983); *People v. Isaacson, supra,* 406 *N.Y.S.*2d at 719, 378 *N.E.*2d at 83. Although courts have used varying formulations of the primary factors governing due process entrapment, the factors most invoked center around two major recurrent concerns: the justification for the police in targeting and investigating the defendant as a criminal suspect; and the nature and ⌊475extent of the government's actual involvement in bringing about the crime. Those principle elements serve to constitute the operative standard that measures due process entrapment.

IV

[10] We consider first whether the police had adequate justification to target and investigate defendants as criminal suspects. A defendant's conduct and circumstances and the law enforcement purpose for bringing about the crime are important aspects of this inquiry.

Whether the record reveals simply a desire to obtain a conviction of *any* person, without any purpose to prevent further crime or to protect the populace, can be significant. "In their zeal to enforce the law ... Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson, supra,* — *U.S.* at —, 112 *S.Ct.* at 1540; *see Sorrells v. United States, supra,* 287 *U.S.* at 444, 53 *S.Ct.* at 213, 77 *L.Ed.* at 418 ("It is not [the duty of the police] to incite and create crime for the sole purpose of prosecuting and punishing it."); *Isaacson, supra,* 406 *N.Y.S.*2d at 719, 378 *N.E.*2d at 83 ("proper law enforcement objectives [are] the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness"). Police are far less likely to create otherwise non-existent crimes when the crime into which they lure defendant is part of an ongoing, present course of conduct. *See, e.g., Talbot, supra,* 71 *N.J.* at 169, 364 *A.*2d 9 (Schreiber, J., concurring) (ferreting out those engaged in criminal activity, ready and willing to continue in that course of conduct, is appropriate and

proper). Hence, in most cases, the police should have a reasonable suspicion that the targeted defendant was participating in crimes similar to those charged. *See, e.g., Norton, supra,* 700 *F.*2d at 1075; *Batres–Santolino, supra,* 521 ⌊476 *F.Supp.* at 751–52; *Isaacson, supra,* 406 *N.Y.S.*2d at 719, 378 *N.E.*2d at 83; *Entrapment Defense, supra,* 21 *Rutgers L.J.* at 436–38. In addition to prior similar criminal activity, whether the defendant rather than the police initiated the original contact or instigated the criminal scheme is a relevant circumstance. Thus, in *Rockholt, supra,* 96 *N.J.* at 574, 476 *A.*2d 1236, the Court rejected the entrapment defense in light of the evidence that established that the defendant, a police officer, rather than the undercover detectives, had initiated the criminal transactions. *See, e.g., United States v. Jannotti, supra,* 501 *F.Supp.* at 1203; *Isaacson, supra,* 406 *N.Y.S.*2d at 719, 378 *N.E.*2d at 83; Molly K. Nichols, *Entrapment and Due Process: How Far is Too Far?,* 58 *Tulane L.Rev.* 1207, 1224 (1984).

In this case, the solicited crime involved the theft and sale of illegal drugs. Defendants had not been involved in similar crimes; their prior criminal activity consisted only of personal use of illegal drugs. Nevertheless, Johnson actually had the core idea for the crime. It was he, without any prodding by anyone, who first expressed the desire to "rip off" a drug dealer. Although the police devised the actual plan, it incorporated exactly Johnson's basic idea. That defendants had previously and regularly engaged in illegal personal drug use might not alone invite a police investigation beyond those kinds of offenses. *See, e.g., State v. Gibbons,* 105 *N.J.* 67, 80–85, 519 *A.*2d 350 (1987) (the similarity between a prior conviction for possession and a current charge of drug distribution is attenuated). Nevertheless, surrounding circumstances may generate the inference that defendants, though only drug users, might well commit a more serious crime. Johnson's expressed desire to steal and sell drugs itself indicates defendants had a need for money and drugs.

Moreover, Johnson, as a police officer, had the unique capability and ample opportunity to commit a serious drug offense. *Cf. Batres–Santolino, supra,* 521 *F.Supp.* at 752–53 (absent the contributions of the government, amateur defendants lacked resources, skills, and connections to distribute drugs ⌊477 successfully). Johnson presumably was trained to cope with illegal drug activity and had contact with drug traffickers, lending plausibility to his expressed wish to escalate his illegal drug activity. That the cases have uniformly rejected the entrapment defense with respect to defendants who are law enforcement officers is not, we believe, a coincidence. Thus, in *Rockholt, supra,* 96 *N.J.* 570, 476 *A.*2d 1236, the defendant was a police officer who was convicted of misconduct in office for selling a motorcycle owned by his police department, receiving stolen police identification cards, and distributing a controlled dangerous substance. *See, e.g., Harrison v. Baylor,* 548 *F.Supp.* 1037 (D.Del.1982); *Jamieson, supra,* 461 *N.W.*2d at 894–95, 897.

The record thus fairly indicates that the police had cause not to discount Johnson's expressed desire to "rip off" a drug dealer as wishful thinking or an idle threat. Defendants initiated the chain of events that eventuated in the criminal acts. Johnson's position as a police officer with regular involvement in the drug world, coupled with his ongoing drug use and expressed desire to commit a more serious drug offense, created a sufficient likelihood that the desire would become the deed, even without government intrusion. Confronted with a realistic possibility of serious crimes by defendants involving drugs and official corruption, the police had a legitimate law enforcement purpose to expose and stop that kind of criminal activity. We conclude that under the circumstances, the police had adequate justification to direct their investigative authority against defendants.

Due process entrapment is equally concerned with the nature and extent of the police involvement in bringing about the crime. That broad consideration encompasses several factors, particularly the circumstances surrounding the creation of the crime, the methods undertaken by govern-

ment to induce the defendant to commit the crime, and the actions entailed in the commission of the crime itself.

⌊478The police effort in the creation and manufacture of the crime is an aspect of the nature and extent of government involvement. Here, as noted, defendant Johnson authored the basic idea for the crime. When the police presented him with a specific criminal plan, he developed it further. He requested the unmarked car and the flashing red light in order to enhance the plan's success. He also insisted on the $1,000 prepayment, which indicated that he was fully committed to the criminal venture. In addition, Johnson intended to be in uniform and to change his regular shift at work to be available. Further, throughout the discussions, defendant Bonet actively and affirmatively encouraged Johnson's participation. The record, in short, does not suggest that the crime was primarily police-inspired.

The nature of the efforts directed to encourage defendants to commit the crime is another measure of the propriety of the government conduct. Tactics like heavy-handed pressure; repetitive and persistent solicitation, or threats or other forms of coercion; the use of false and deceitful appeals to such humanitarian instincts as sympathy, friendship, and personal need; and the promise of exorbitant gain are generally disallowed because they can overwhelm the resistance of ordinary people. *See Jacobson, supra,* — *U.S.* at —, 112 *S.Ct.* at 1542; *Jannotti, supra,* 501 *F.Supp.* at 1200; *Barraza, supra,* 153 *Cal. Rptr.* at 466, 591 *P.*2d at 954; *Isaacson, supra,* 406 *N.Y.S.*2d at 719, 378 *N.E.*2d at 83. In many cases, improper police conduct inheres in the resort to such tactics. In *Talbot, supra,* 71 *N.J.* at 163, 168, 364 *A.*2d 9, for example, even though there was no evidence that the defendant was reluctant, the police used repeated requests to persuade him both to buy and to sell the heroin. *See also, e.g., Jacobson, supra,* — *U.S.* at —, 112 *S.Ct.* at 1542 (Government excited defendant's interest in unlawful sexually explicit materials and exerted substantial pressure on defendant to obtain such materials "as part of a fight against censorship and the infringement of individual rights."); *Sherman, supra,* 356 *U.S.* 369, 78 *S.Ct.* ⌊479819, 2 *L.Ed.*2d 848 (government informant befriended defendant in drug rehabilitation program, repeatedly asked defendant to obtain drugs for him, claiming he was not responding to treatment, and used requests to persuade defendant to agree to obtain drugs for himself and informant and split costs); *Sorrells, supra,* 287 *U.S.* 435, 53 *S.Ct.* 435, 53 *S.Ct.* 210, 77 *L.Ed.* 413 (defendant yielded to repeated requests to obtain whisky for agent, who, masquerading as a tourist, emphasized that during World War I he had served in same military unit as defendant); *United States v. Gardner,* 658 *F.Supp.* 1573 (W.D.Pa.1987) (government agent badgered, induced, and used position to acquire defendant's friendship to induce defendant to obtain drugs for agent).

The police in this case did not resort to excessive inducements. There were no repeated requests or persistent solicitations in the face of unwillingness, nor was there any heavy-handed pressure brought to bear on defendants. The police did not appeal to humanitarian instincts involving sympathy, past friendship, or the like to persuade defendants to go along with the plan. No tactics, objectively considered, were calculated to overwhelm. The police conduct was "an invitation, not a seduction." *People v. Paccione,* 99 *Misc.*2d 1027, 417 *N.Y.S.*2d 850, 852 (Nassau County Ct.1979).

The extent of the police involvement in bringing about the crime also calls for consideration of whether the government directed and controlled the enterprise. That inquiry examines "the impact of the police activity on the commission of the crime," *see, e.g., Norton, supra,* 700 *F.*2d at 1075, and the "importance of the roles played by the government and the defendants in the offense." *Entrapment Due Process, supra,* 57 *Ind.L.J.* at 120 (citing *Twigg* and *Jannotti*). It also looks to "whether the government provided essential materials or services and the likelihood defendants could have obtained them from another source." *Id.*

[480]However, in gauging the reasonableness of the police techniques used in the commission of the crime, the type of crime, the level of danger involved, and the circumstances of the suspect are material considerations. Special efforts may be required to cope with the difficulties of investigating drug offenses and official corruption, particularly when law enforcement officers are involved. *Hampton v. United States,* 425 *U.S.* 484, 495 n. 7, 96 *S.Ct.* 1646, 1653 n. 7, 48 *L.Ed.*2d 113, 122 n. 7 (1976) (Powell, J., concurring); *see Russell, supra,* 411 *U.S.* 423, 93 *S.Ct.* 1637, 36 *L.Ed.*2d 366 (1973) (drug distribution is difficult to detect without sting operations); *United States v. Alexandro,* 675 *F.*2d 34, 43 (2d Cir.) ("the special relationship between the public and those who serve the Government" demands that law enforcement have available the weapons of "special investigative techniques to uncover insidious corruption"), *cert. denied,* 459 *U.S.* 835, 103 *S.Ct.* 78, 74 *L.Ed.*2d 75 (1982). We recognized that in *Talbot, supra,* 71 *N.J.* at 168, 364 *A.*2d 9: "government properly may use artifice to trap unwary criminals, particularly in its efforts to stamp out drug traffic."

Both illegal drug offenses and official corruption are present in this case. That the government sought to ferret out a corrupt member of law enforcement and that the corruption related to unlawful drug activity is clear. *E.g., People v. Rathbun,* 141 *A.D.*2d 570, 529 *N.Y.S.*2d 178, 179 (in a scheme in which police officers stole from drug dealers, police were not trying simply to obtain a conviction but to root out police corruption), *appeal denied,* 72 *N.Y.*2d 1049, 534 *N.Y.S.*2d 948, 531 *N.E.*2d 668 (1988).

Furthermore, Johnson's basic scheme, incorporated in the plan devised by the police, was inherently dangerous. As the danger a defendant poses increases, the permissible scope of police activities enlarges. *Dual Approach, supra,* 59 *Wash. U.L.Q.* at 213. The plan was for the commission of a predatory crime, a crime against criminals. The plot was intricate and called for careful timing and several participants who would [481]have to rely on one another. Much could go wrong. Those considerations strongly suggest that the scheme would have appealed not to an average law abiding citizen but only to someone—like a criminal or police officer—intimately familiar with illegal drug activity, with the background and knowledge to assess the feasibility of the criminal scheme, with the nerve and experience to deal with dangerous criminals, and with the training and skill to carry out the brazen plot.

However, the trial court was persuaded to find excessive and impermissible police involvement because it believed the crime had been orchestrated entirely by the police. It stressed that most of the "props" for the commission of the crime had been furnished by the police. Although the government did supply the unmarked car and the flashing red light, those were furnished at Johnson's request, and were hardly special or unique equipment for a police officer. *Cf. Batres–Santolino, supra,* 521 *F.Supp.* at 752–53 (defendants, who were amateurs, clearly did not have the "means" to commit the crime). Moreover, Johnson was the person who effected the stop and seizure of the cocaine, and presumably he did so with all the necessary accoutrements of a police officer—the uniform, badge, identification, and gun—to lend authenticity to the "police action." That the police relied on Johnson to play the major and most difficult role in the commission of the crime is obvious. Although Johnson was not the producer or director of the crime drama, he alone created its central theme. Most important, Johnson was its star, not a puppet or a patsy.

In the same vein, the lower courts stressed that the crime was a so-called "full circle" transaction in which the police arranged for both the supply and the sale of drugs by defendant. The courts below relied on *State v. Talbot, supra,* 71 *N.J.* 160, 364 *A.*2d 9, as stating unequivocally that due process entrapment occurs whenever the police resort to a full-circle transaction.

⌊482In *Talbot,* additional factors impugned the police conduct. As noted, the police made repeated requests to encourage defendant to commit the crime. 71 *N.J.* at 163, 364 *A.*2d 9. Nevertheless, we decline to hold that a *per se* due process violation occurs whenever the government attempts to prosecute a full-circle transaction. To that extent, we recast that interpretation of the *Talbot* decision. *See, e.g., People v. Roy,* 80 *Mich.App.* 714, 265 *N.W.*2d 20, 23 (1978) (full-circle transaction that was basis for prison guard's entrapment defense was a necessary investigative technique under the circumstances). The standard now adopted considers whether the police involvement in bringing about the crime was patently wrongful. The party supplying as well as purchasing the contraband continues to be an important factor in applying that standard, but the weight to be assigned to that factor will depend on all of the circumstances. *Batres-Santolino, supra,* 521 *F.Supp.* at 751. In this case, we conclude that the use of a full-circle transaction under the circumstances was a reasonable law enforcement technique and does not as such constitute patently wrongful government conduct.

Finally, we do not view the position of Bonet differently from that of Johnson with respect to the availability of the due process entrapment defense. The record contains no evidence to indicate that Bonet should or could have been approached in a different manner by the police with respect to her possible involvement in or disengagement from the criminal enterprise. In theory, it might not have been necessary from a law enforcement standpoint to encourage a police officer's lover into the commission of serious crimes simply to counter the danger to the public posed primarily by the criminally-inclined police officer. Nevertheless, in ferreting out the corrupt police officer removing such personal friends and willing participants from the investigation without jeopardizing the investigation itself may not be feasible. That is particularly true because Bonet previously had participated with Johnson in his past drug activity, was clearly his confidante, readily involved herself in ⌊483the criminal scheme, and directly and affirmatively encouraged Johnson to engage in the criminal activity. Under the circumstances revealed by this record, we see no need to differentiate the accomplice from the principal with respect to the availability of the entrapment defense.

V

We conclude that the government conduct did not constitute entrapment as a matter of due process. That determination requires reinstatement of the indictment and a remand of the case for trial. Our ruling eliminates the need to address the State's argument that the trial court improperly dismissed the conspiracy and misconduct in office counts as being tainted by the entrapment on the drug counts. Those counts will be revived with the reinstatement of the indictment.

The status of statutory entrapment as an issue is not presented. Defendants, as noted, in raising the entrapment defense on constitutional grounds, conceded their criminal predisposition. However, we are unable to anticipate whether, on remand, defendants' criminal predisposition will be an issue and whether defendants will present any additional evidence relating to the Code's objective test of entrapment. Nevertheless, because objective entrapment is often subsumed by due process entrapment, our determination should guide the trial court and the parties if the statutory entrapment defense is raised.

The judgment is reversed and the matter remanded to the trial court to reinstate the indictment.

STEIN, J., concurring in part and dissenting in part.

The United States Supreme Court's "minority" view on the defense of entrapment had for some time been that "courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be ⌊484countenanced."

Sherman v. United States, 356 *U.S.* 369, 380, 78 *S.Ct.* 819, 824, 2 *L.Ed.*2d 848, 855 (1958) (Frankfurter, J., concurring). Adherents to Justice Frankfurter's point of view, including Justice Roberts, see *Sorrells v. United States,* 287 *U.S.* 435, 453–59, 53 *S.Ct.* 210, 216–19, 77 *L.Ed.* 413, 423–26 (1932), Justice Stewart, see *United States v. Russell,* 411 *U.S.* 423, 439–45, 93 *S.Ct.* 1637, 1646–49, 36 *L.Ed.*2d 366, 377–81 (1973), and Justices Brennan and Marshall, see *Hampton v. United States,* 425 *U.S.* 484, 495–97, 96 *S.Ct.* 1646, 1652–54, 48 *L.Ed.*2d 113, 122–23 (1976), would doubtless be reluctant to find fault with the majority opinion in this case, in view of its forceful and unqualified recognition of a state constitutional "due process right to an entrapment defense" grounded in principles of fundamental fairness. *Ante* at 473–74, 606 *A.*2d at 322–23. Unfortunately, what the majority so generously bestows with one hand it promptly retracts with the other. Ignoring the trial court's conclusion that the crime in this case was "produced by the government, directed by the government, cast by the government and one in which the government even supplied the props," the Court holds that due process is not offended, primarily because defendant Johnson had allegedly confided on one occasion to a federal informant seeking favorable treatment for his own crimes that he had a "desire" to commit the offense for which he was indicted.

I

The essential facts are set forth in the majority opinion. *Ante* at 460–63, 606 *A.*2d at 316–17. I add only such supplemental references to the record as may be necessary to focus the entrapment issue more sharply.

As noted, the direct source of information concerning defendant Johnson's alleged desire to "rip off" drugs from a drug dealer and sell the drugs for money was a federal informant who had been arrested on federal weapons charges and also charged with conspiracy and possession of a large quantity of ⌊485cocaine. The informant, who began cooperating with federal authorities after his arrest, was not called to testify before the grand jury. The informant's allegations about defendant Johnson were communicated to the grand jury second-hand by a special agent of the Federal Drug Enforcement Administration (FDEA) who had been in charge of the investigation leading to the informant's arrest. An assistant supervisor of the New Jersey State Police narcotics bureau gave testimony to the grand jury concerning the informant's motives:

> The informant had some very heavy federal charges lodged against him and like many drug dealers there is no honor among thieves. He was testifying against people that he had dealt with in order to reduce his sentence, in consideration for his sentencing.

The special agent testified that the informant and Johnson had used cocaine together on a few occasions, and that after their first meeting the informant gave Johnson small amounts of cocaine on a fairly regular basis. The agent testified that Johnson had identified himself to the informant as a New Jersey State Trooper. According to the agent, after the informant had been arrested, he disclosed his relationship with Johnson to federal drug officials, informing them that Johnson had expressed to the informant on an unspecified occasion a desire "to rip off a drug dealer with a lot of cocaine * * * and sell it to make some money." The agent testified that federal drug officials decided to "provide [Johnson] with the opportunity to do what he wanted to do." Acting through the informant, they then presented to Johnson the scheme described in the majority opinion. See *ante* at 460–63, 606 *A.*2d at 316–17.

The government's scheme, proposed to Johnson by the FDEA's informant, called for Johnson to make a "traffic stop" of an automobile operated by a Union County detective on assignment to the FDEA—but described to Johnson as a paid "mule"—who would be carrying a government-owned "bogus" kilogram of cocaine. The mule's car was to be followed by a second car transporting the informant, allegedly acting as a ⌊486broker for the sale of the

cocaine, and the ostensible seller of the cocaine, a Jersey City police officer on assignment to the FDEA. The plan contemplated that the informant and the seller would leave the scene after Johnson stopped the mule's car, and the mule would give Johnson the package of cocaine. Johnson was then to drive back to his apartment with the cocaine. He was to be met there by the informant and the mule, turn over the cocaine to the mule, and be paid $5,000 for his participation.

When the informant presented the plan to Johnson, he agreed to participate and suggested two modifications: first, that he be paid $1,000 in advance; second, that he be supplied with a vehicle resembling a State Police vehicle, with a portable red light that could be installed on the dashboard. The federal agents agreed to both requests.

On the designated date, the informant and the mule provided Johnson with a 1988 Chevrolet Caprice that had been rented by the FDEA. They then drove with Johnson to Frelinghuysen Avenue in Newark and instructed him how and where to park his car in order to be properly situated to make the stop. After stopping the mule's car, Johnson drove to his apartment with the package of cocaine. On his arrival he was arrested. The package, described by a State Police officer as containing cocaine "in a very, very minuscule form," was on the front seat of his car. Seven of the ten hundred-dollar bills previously delivered to Johnson were in his possession.

Johnson was indicted for five offenses: official misconduct, *N.J.S.A.* 2C:30–2; theft of movable property, *N.J.S.A.* 2C:20–3; possession of a controlled dangerous substance, *N.J.S.A.* 2C:35–10a(1); possession with intent to distribute a controlled dangerous substance, *N.J.S.A.* 2C:35–5a(1) and –5(b)(1); and conspiracy to commit the foregoing offenses, *N.J.S.A.* 2C:5–2. The State's grand jury presentation demonstrates, however, that the alleged crimes, if committed, were victimless. The "bogus cocaine" that was the subject of the alleged "theft" and the ⌊487subject of the charges of possession and possession with intent to distribute belonged to and was recovered by the State Police. The charge of official misconduct was based solely on Johnson's participation in the government's plan. Every significant detail of the plan—other than the request for the flashing red light, a vehicle similar to State Police vehicles, and the cash advance—was conceived and executed by federal and state officials and the federal informant.

According to a State Police official's grand jury testimony, no evidence that Johnson had a drug problem or any "prior record" had been uncovered in the course of Johnson's State Police background investigation. Johnson had experienced no disciplinary problems during his service as a State Trooper other than a "minor problem" concerning lost equipment at Washington Station in Warren County, for which he had been reprimanded.

In the course of argument on the motion to dismiss the indictment on the basis of entrapment, Johnson's counsel explained that if the case had to be tried, the issue of Johnson's alleged predisposition was "clearly" one that would be disputed. Johnson's counsel conceded his client's predisposition solely for the purpose of the motion to dismiss, relying on *State v. Talbot*, 71 *N.J.* 160, 364 *A.*2d 9 (1976), for the principle that Johnson had been entrapped "as a matter of law even though predisposition to commit the crime may appear." *Id.* at 168, 364 *A.*2d 9.

II

For the purpose of resolving fully the entrapment issue in this case, the existing record—consisting solely of the grand jury proceedings—inadequately serves the interests either of the State or defendants. As previously noted, with respect to the motion to dismiss the indictment defendant Johnson hypothetically conceded his predisposition to commit the alleged offenses, although intending to contest predisposition if the case were tried. The Court's opinion acknowledges that were it ⌊488not for that concession, the entrapment issue would also require application of the statutory entrapment defense enacted in the

Code of Criminal Justice, *N.J.S.A.* 2C:2-12. *Ante* at 468-69, 606 *A.*2d at 320. The majority asserts that although the Code's entrapment provision stresses the nature or character of the government's conduct, it also imposes a causation requirement that "triggers an inquiry into the defendant's predisposition." *Ante* at 468-69, 606 *A.*2d at 320 (quoting *State v. Rockholt,* 96 *N.J.* 570, 578, 476 *A.*2d 1236 (1984)). The majority acknowledges that inquiring into defendant Johnson's predisposition was "obviated" because of defendant's concession. *Ibid.* The majority opinion takes into account the contingency that the statutory entrapment defense might be asserted at a later stage in the proceedings, *ante* at 483, 606 *A.*2d at 327.

Because in my view the character of the governmental conduct revealed by the grand jury record sufficiently establishes the due-process-entrapment defense embraced by the Court's opinion, *ante* at 472-75, 606 *A.*2d at 322-23, recognition of the State's law-enforcement interest compels the acknowledgment that the grand jury proceeding may not have included all of the evidence material to the State's contention that the entrapment defense should fail. Given the opportunity, the State might have offered additional evidence of predisposition or additional evidence tending to justify the government's aggressive role in facilitating defendant's commission of the charged offenses. Although the State's grand-jury presentation anticipated the entrapment defense to the extent of offering some evidence on the issue of predisposition, the evidence adduced before the grand jury was intended primarily to procure an indictment and not to rebut the defense of due-process entrapment.

In this and similar cases in which the due-process-entrapment defense is critical, both the trial court's initial disposition and appellate review would be facilitated by an evidentiary hearing that permitted development by all parties of a record on the [489]entrapment issue. That procedure has been invoked by a number of federal courts. See, *e.g., United States v. Bogart,* 783 *F.*2d 1428, 1429, 1433-34 (9th Cir.1986) (declining to adjudicate defendant's claim of due-process entrapment and remanding to district court for fact-finding on nature of and motivation for government's conduct); *see also United States v. Simpson,* 813 *F.*2d 1462, 1464 (9th Cir.) (reversing district court's dismissal of indictment based on due-process entrapment after eight-day evidentiary hearing), *cert. denied,* 484 *U.S.* 898, 108 *S.Ct.* 233, 98 *L.Ed.*2d 192 (1987). Had a hearing been conducted, defendant would not have had to concede the issue of predisposition and the State's justification for the governmental actions at issue could have been fully presented.

III

The majority opinion recognizes and endorses a due-process-entrapment defense rooted in our state constitution, reflecting "basic and distinctive state policies that have * * * served principles of fundamental fairness," and that is unconstrained by federal entrapment principles. *Ante* at 473, 606 *A.*2d at 322. That formulation of this state's due-process-entrapment defense represents a sharp departure from the prevailing federal precedents that heretofore have narrowly limited the scope of the due-process-entrapment defense under the federal constitution. That defense was first identified by the United States Supreme Court in *United States v. Russell, supra,* 411 *U.S.* 423, 93 *S.Ct.* 1637, 36 *L.Ed.*2d 366, in which the Court reinstated the defendant's convictions for the illegal manufacture and sale of methamphetamine, reversing the Court of Appeals decision setting aside the conviction on entrapment grounds. In dictum, the Court observed that

> [w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952), the instant case is distinctly not of

that breed. [411 *U.S.* at 431–32, 93 *S.Ct.* at 1643, 36 *L.Ed.*2d at 373.]

⌊490Subsequently, in *Hampton v. United States, supra,* 425 *U.S.* 484, 96 *S.Ct.* 1646, 48 *L.Ed.*2d 113, the Court affirmed the defendant's conviction for selling heroin to undercover federal agents, and rejected the defendant's contention that the trial court had erred in refusing to charge the jury that the defense of entrapment would bar the defendant's conviction if the informant who arranged the sale had also provided the defendant with the heroin. Justice Rehnquist's plurality opinion, retreating from *Russell* 's dictum, expressed the view that a defendant predisposed to commit a crime could never successfully assert as a defense the government's involvement in the crime. *Id.* at 488–90, 96 *S.Ct.* at 1649–50, 48 *L.Ed.*2d at 117–19. Justice Powell's concurring opinion disagreed, apparently acknowledging that due-process principles could justify a bar to conviction even in a case in which the evidence establishes the defendant's predisposition to commit the crime, *id.* at 492–95, 96 *S.Ct.* at 1651–53, 48 *L.Ed.*2d at 120–22, but emphasizing that such cases "will be rare." *Id.* at 495 n. 7, 96 *S.Ct.* at 1653 n. 7, 48 *L.Ed.*2d at 122 n. 7.

Although the federal courts acknowledge that a due-process-entrapment defense is available even with respect to a defendant predisposed to commit the alleged crime, in practice the defense has rarely been accorded recognition. *See* Ted K. Yasuda, *Entrapment as a Due Process Defense: Developments After Hampton v. United States,* 57 *Ind.L.J.* 89, 105–13 (1982). A few federal cases have applied the due-process-entrapment defense. See *United States v. Twigg,* 588 *F.*2d 373, 377–81 (3d Cir.1978); *United States v. Batres–Santolino,* 521 *F.Supp.* 744, 750–52 (N.D.Cal. 1981); *United States v. Jannotti,* 501 *F.Supp.* 1182, 1203–05 (E.D.Pa.1980) (sustaining defense), *rev'd,* 673 *F.*2d 578 (3d Cir.), *cert. denied,* 457 *U.S.* 1106, 102 *S.Ct.* 2906, 73 *L.Ed.*2d 1315 (1982). The highly restrictive approach to the due-process-entrapment defense that characterizes the federal court opinions is based on the commonly-held view that "the due process channel which *Russell* kept open is a most narrow one," *United States v. Ryan,* 548 *F.*2d 782, 789⌊491(9th Cir.), *cert. denied,* 429 *U.S.* 939, 97 *S.Ct.* 354, 50 *L.Ed.*2d 308 (1976), and 430 *U.S.* 965, 95 *S.Ct.* 1644, 52 *L.Ed.*2d 356 (1977), and the related view that the defense is available only where "the government is so involved in the criminal endeavor that it shocks our sense of justice." *United States v. So,* 755 *F.*2d 1350, 1353 (9th Cir.1985).

The due-process-entrapment defense has been applied somewhat more aggressively by state courts. Paul Marcus, *The Entrapment Defense* § 7.11, at 308–14 (1989). See, *e.g., State v. Glosson,* 462 *So.*2d 1082 (Fla.1985) (applying due-process-entrapment defense based on sheriff's agreement to pay contingent fee of 10% of value of civil forfeitures to informant who sold drugs to defendant resulting in seizure and forfeiture of vehicles and over $80,000 in cash); *State v. Hohensee,* 650 *S.W.*2d 268, 270–75 (Mo.Ct.App.1982) (reversing on grounds of due-process entrapment defendant's conviction for burglary based on his conduct as lookout, when police officials paid two convicted felons to stage burglary by removing safe from building with police officer's assistance); *People v. Isaacson,* 44 *N.Y.*2d 511, 406 *N.Y.S.*2d 714, 378 *N.E.*2d 78 (1978) (invoking due-process-entrapment defense under New York State constitution to reverse defendant's conviction for selling drugs to informant who, having been brutalized by police and deceived into believing he faced prison sentence, induced and persistently solicited defendant to enter New York State and sell drugs to informant in quantity specified by police); *Commonwealth v. Mathews,* 347 *Pa.Super.* 320, 500 *A.*2d 853 (1985) (reversing defendants' convictions for manufacturing methamphetamine based on due-process entrapment where police provided defendants with funds to rent house, purchase chemicals, and buy food, and government narcotics experts had on several occasions provided defendants with step-by-step instructions for manufacture of methamphetamine).

In recognizing and forcefully endorsing a state-constitution-based defense of due-process entrapment, the majority opinion adheres to and enhances our existing entrapment jurisprudence. ⌊492In *State v. Talbot, supra,* 71 *N.J.* at 168, 364 *A.*2d 9, we held that

> where an informer or other agent generally acting in concert with law enforcement authorities, furnishes a defendant with heroin for the purpose of then arranging a sale of the heroin by the defendant to an undercover officer, which sale is then consummated, defendant has been entrapped as a matter of law even though predisposition to commit the crime may appear, and notwithstanding that the furnishing of the heroin is unknown to and contrary to the instructions of the law enforcement authorities. Those authorities, having set the agent to work in enticing the defendant, the prosecution should bear the onus of the means selected by the agent. [*Ibid.*]

We noted in *Talbot* that our ruling was rooted in "the principle of fundamental fairness." *Ibid.*

Having staked out a field of due-process-entrapment protection that extends considerably beyond the restrictive parameters for relief recognized under federal law, the majority inexplicably declines to apply to the facts at hand the constitutional principles so forcefully defined. It invokes a two-element test with four factors in deciding whether the due-process defense is available to these defendants, and proceeds to misapply three of the four factors to the evidence adduced before the grand jury. Concerning the first factor, "(1) whether the government or the defendant was primarily responsible for creating and planning the crime," *ante* at 474, 606 *A.*2d at 323, the Court emphasizes that "Johnson actually had the core idea for the crime," *ante* at 476, 606 *A.*2d at 324, virtually ignoring the overwhelming role of federal and state officials in crafting the elaborate details of the plan.

With respect to the second factor, "whether the government or the defendant primarily controlled and directed the commission of the crime," *ante* at 474, 606 *A.*2d at 323, the Court observes that although the police presented Johnson with a specific plan, he "developed it further" by requesting the unmarked car, the flashing red light and the $1,000 prepayment. The Court also stresses that Johnson "effected the stop and seizure of the cocaine, and * * * did so with * * * the uniform, badge, identification and a gun—to lend authenticity to the 'police action.'" *Ante* at 481, 606 *A.*2d at 326. The Court's ⌊493description of Johnson's participation in the government's scheme may be accurate, but it begs the question. That the government—not Johnson—primarily controlled and directed the commission of the crime is incontrovertible.

I concur in the Court's view concerning the third factor that the methods used by the government to involve defendant Johnson in the commission of the crime were not unreasonable. *Ante* at 478–79, 606 *A.*2d at 325. The record does not reflect any excessive inducement in obtaining Johnson's cooperation.

The fourth factor considers "whether the government had a legitimate law enforcement purpose in bringing about the crime." *Ante* at 474, 606 *A.*2d at 323. The Court concedes that "[d]efendants had not been involved in similar crimes," *ante* at 476, 606 *A.*2d at 324, but concludes that Johnson's status as a police officer and his opportunity for "contact with drug traffickers" created a "realistic possibility of serious crimes by defendants involving drugs." *Ante* at 477, 606 *A.*2d at 324. That so-called "realistic possibility" on which the Court's opinion so precariously rests is based entirely on the hearsay statement offered by a federal informant facing serious drug charges in an attempt to make a "deal." In concluding that "the police had adequate justification to direct their investigative authority against defendants," *ante* at 477, 606 *A.*2d at 324, the Court apparently is prepared to credit fully the informant's allegations without discounting their credibility to reflect the informant's acknowledged self-serving motivation.

A more basic question arises with respect to the justification for the government's creation of a scheme intended to induce Johnson to commit the crimes with which he was charged. The grand jury record indicates that the informant had reported to federal officials that Johnson had used cocaine on numerous occasions, an allegation that undoubtedly could have been a basis for the institution of departmental disciplinary or removal proceedings. *Cf. In re Carberry,* 114 *N.J.* 574, 578, 556 *A.*2d ⌊494314 (1989) ("The use of illegal drugs is incompatible with the integrity of the State Police and with the ability of troopers to perform their duties."). On the assumption that Johnson's prior use of cocaine would have warranted his expulsion from the State Police, both the necessity and propriety of the elaborate scheme concocted by federal and state officials to entrap Johnson are highly questionable.

In my view, the due-process-entrapment defense based on our State constitution and endorsed by the Court's opinion, *ante* at 472–75, 606 *A.*2d at 322–23, warrants dismissal of the indictment on the record before us. Defendants' crimes were almost entirely the product of governmental planning, ingenuity, and resources. The record presents but meager justification for the governmental decision to stage those crimes in order to procure defendants' convictions. Some would doubtless argue that neither the government's staging of those "crimes" nor its limited justification for targeting defendant Johnson should be of any concern to the judiciary: "[T]he defense of entrapment * * * was not intended to give the judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *United States v. Russell, supra,* 411 *U.S.* at 435, 93 *S.Ct.* at 1644, 36 *L.Ed.*2d at 375. However, as the majority opinion acknowledges, a primary purpose of our due-process-entrapment defense is to "preserve[ ] judicial integrity in the administration of justice." *Ante* at 473, 606 *A.*2d at 322. Hence, when the judiciary is presented with a crime manufactured by the government, its duty is to scrutinize the record and determine whether the government's involvement under the circumstances exceeds the proper use of governmental power. "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." *Sherman v. United States, supra,* 356 *U.S.* at 380, 78 *S.Ct.* at 825, 2 *L.Ed.*2d at 856 (Frankfurter, J., concurring).

⌊495The unseemliness of the government's role in this case compellingly justifies the application of a due-process-entrapment defense:

> We have not accepted the view that this highly discrete group of extreme cases of police brutality defines the limits of unconstitutionally outrageous governmental conduct. We have held that law enforcement conduct also becomes constitutionally unacceptable "where government agents engineer and direct the criminal enterprise from start to finish," *Ramirez,* 710 F.2d at 539; *So,* 755 F.2d at 1353, or when governmental conduct constitutes "in effect, the generation by police of new crimes merely for the sake of pressing criminal charges against the defendant." *Ramirez,* 710 F.2d at 540.
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> Our view, shared by Justice Brandeis, that a crime manufactured by the government "from whole cloth" would constitute outrageous conduct also has a firm jurisprudential basis. Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who, absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punish-

ment ceases to be a response, but becomes an end in itself—"to secure the conviction of a private criminal." [citation omitted]. Under such circumstances, the criminal justice system infringes upon personal liberty and violates due process. [*United States v. Bogart, supra,* 783 *F.*2d at 1436.]

IV

As noted, *supra* at 487–88, 606 *A.*2d at 329–30, I do not consider the present record adequate for the resolution of the due-process-entrapment issue. Accordingly, I would remand the matter to the Law Division for an evidentiary hearing that would permit the parties to supplement the existing record. Based on the record before us, I would affirm the judgment of the Appellate Division.

For reversal and remandment—Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN and GARIBALDI—6.

Concurring in part, dissenting in part—Justice STEIN—1.

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⌊496In the Matter of Steven F. MILLER, an Attorney at Law.

Supreme Court of New Jersey.

May 13, 1992.

ORDER

The Office of Attorney Ethics having filed a petition with the Supreme Court recommending that STEVEN F. MILLER of HACKENSACK, be immediately temporarily suspended from the practice of law, and good cause appearing;

It is ORDERED that STEVEN F. MILLER is temporarily suspended from the practice of law, effective immediately, and until further Order of this Court; and it is further

ORDERED that the Office of Attorney Ethics take such protective action, pursuant to *Rule* 1:20–11(c), as may be appropriate to gain possession and control of the legal files, records, practice and trust assets of STEVEN F. MILLER, wherever situate, pending further Order of this Court; and it is further

ORDERED that all funds, if any, currently existing in any New Jersey financial institution maintained by STEVEN F. MILLER, pursuant to *Rule* 1:21–6, shall be restrained from disbursement except upon application to this Court, for good cause shown, pending the further Order of this Court; and it is further

ORDERED that STEVEN F. MILLER show cause before this Court on June 11, 1992, at 1:00 p.m., Supreme Court courtroom, Hughes Justice Complex, Trenton, New Jersey, why his temporary suspension and the restraints herein should not continue pending final disposition of any ethics proceedings pending against him and further why the funds restrained from disbursement should not be transmitted by the financial institu⌊497tions who are the present custodians to the Clerk of the Superior Court for deposit in the Superior Court Trust Fund, pending the further Order of this Court; and it is further

ORDERED that David E. Johnson, Jr., Esquire, or his designee, present this matter to the Court; and it is further

ORDERED that STEVEN F. MILLER be restrained and enjoined from practicing law during the period of his suspension and that he comply with Administrative Guideline No. 23 of the Office of Attorney Ethics dealing with suspended attorneys.