IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,042

THE STATE OF FLORIDA,

Petitioner,

-vs-

FRANCISCO RAMOS, et al.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF ON THE MERITS

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INTRODUCTION

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

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State; Respondent, Lazaro Diaz, may also be referred to as Defendant. Lazaro Diaz may also be referred to as "Diaz," Jose Ramos may also be referred to as "Jose;" and Francisco Ramos may also be referred to as "Francisco."

The following symbols will be used:

"R"	Record on Appeal
"T"	Trial Transcript

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, Lazaro Diaz, and his co-defendants, Francisco and Jose Ramos were arrested on March 22, 1990, and were later charged with armed trafficking in cocaine, unlawful possession of a firearm while engaged in a criminal offense and burglary. (R. 1-11).

On September 20, 1990, Respondent ("Diaz") filed a motion to dismiss the information filed against him, alleging a due process violation and entrapment as a matter of law. (R. 23-36). Francisco and Jose Ramos joined in the motion at a later date. (T. 9).

A hearing on the motion was held on January 14, 1991. (T. 11-117). At the hearing, Diaz testified that he met Salvador Xique at a party approximately one month before his arrest. (T. 21). According to Diaz, Xique called him 15-16 times to tell him about a "business deal" where Diaz would be given a key to a warehouse so he could pick something up from the warehouse and "make a lot of money." (T. 22-23). Xique later introduced Diaz to a man who would give Diaz the key to the warehouse. (T. 23). Diaz also testified that Xique told him to go to the warehouse with two other men and to give him firearms to use "to take precautions." (T. 23-24). Diaz went to the warehouse with Jose and Francisco Ramos as instructed by Xique and the unidentified

man. (T. 25). When the trio could not find the key which had been hidden near the door, Diaz called the unidentified man and was told once more where the key was hidden. (T. 25). Diaz claimed that he went to the warehouse only because Xique called him more than 15 times, but admitted that he had not been threatened to participate. (T. 26). During cross-examination, Diaz admitted that he never told Xique that he did not want to talk to Xique and that Xique didn't mention the warehouse deal until the fourth or fifth call. (T. 29-30). Diaz never told the unidentified man that Xique was pressuring him to participate in the deal. (T. 35).

Detective Jesus Garcia testified that he met Diaz on March 21, 1990, at Latin American Cafeteria while he was working undercover at the request of a Detective Luis Fernandez. (T. 42-43). Detective Garcia told Diaz that he was expecting a shipment of cocaine, but was not sure when the shipment would arrive. (T. 43-44). Detective Garcia arranged to call Diaz when the shipment arrived so that Diaz could come and take the cocaine in the detective's absence. (T. 44). Detective Garcia left Diaz with the understanding that the detective would call Diaz when he knew when and where the shipment would be arriving and that Diaz "would take care of it from there on, and that he would be prepared." (T. 51). During cross-examination, Detective Garcia stated that he did not tell Diaz to go to the scene armed, but admitted that he did not know if Xique had told Diaz to arm himself. (T. 54).

Detective Fernandez told the court that Salvador Xique was the informant in the instant case and that Xique was working for "monetary reasons," explaining that the informant had already been paid "two or three hundred dollars" and that payment was not contingent on Xique's testimony at trial. (T. 61, 76). Nor was payment dependent upon the arrest of any individuals. (T. 89). Detective Fernandez further explained that Xique was not performing under any substantial assistance agreement and had no known pending charges in Dade County when he introduced Diaz to Detective Garcia. (T. 88-89). Detective Fernandez also told the court that several days before the appellees were arrested, Xique told the detective that he "had made contact with some individuals or with an individual that was in the business of dealing narcotics rip-offs." (T. 62, 83). Detective Fernandez told Xique to tell this person that a shipment of cocaine would soon be arriving in the area and that Xique would soon know where the drugs would be located. (T. 65). Detective Fernandez explained that he introduced Detective Garcia to Xique and Diaz to determine whether or not the information provided by the confidential informant was reliable and to remove the informant from the negotiations. (T. 74-75, 84).

On January 15, 1991, the trial court ruled on the motion and stated:

> On the Due Process argument, I am granting the Motion to Dismiss insofar as it reduces the charges from armed trafficking or any charges related to the use of a firearm, to unarmed. I believe that the actions of the confidential informant violated the Due Process provision as described in the various cases that were mentioned yesterday, but only to the extent that it would call for a reduction of the charges.
>
> However, as to the objective entrapment test, the Court finds that, based upon the Cruz case, the police activity does not meet the first prong of the test. ...
>
> With regard to the first prong, I find that the police action did not have as its aim interruption of a specific ongoing criminal activity. There was no specific ongoing criminal activity in this case. There was nothing to interrupt. The police set it all up.
>
> Second, the second prong deals with whether the activities were reasonably tailored to apprehend those involved in ongoing criminal activity. I also don't think the police activity met that test. ...
>
> Based on all those matters, the Court is granting the Motion to Dismiss. ...

(T. 121-122).

The state objected to the ruling and argued that the state had not been allowed to elicit testimony regarding the objective entrapment claim and the Cruz criteria.[1] (T. 122-123).

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[1] See Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

On January 25, 1991, the court informed the parties that he had "reconsidered all the facts and circumstances" of the case and was granting the motion to dismiss based upon the due process arguments. (T. 131-132). The trial court also found that the facts justified dismissal under the objective entrapment test "although the Third District has ruled there is no longer an entrapment test." (T. 132).

On February 11, 1991, the trial court signed a written order dismissing the charges due to alleged due process violations. (R. 224-227). The trial court also made the following findings of fact:

> 1. This case involves a "reverse sting" with police providing the contraband and the warehouse for the so-called "rip-off."
>
> 2. A confidential informant was utilized by the police in this case. This individual initiated and handled substantially all negotiations leading up to the arrest of the Defendants, including being present during the undercover officers' meeting with Defendant Diaz. The confidential informant advised the Defendants on all essential aspects of committing the crimes alleged by the State.
>
> 3. In particular, the confidential informant told the Defendants to use firearms in committing the crime, and in fact provided the firearms used by the Defendants.
>
> 4. The [sic] was no history, information, or intelligence known to law enforcement of any involvement by these Defendants in any narcotics activities or drug "rip-offs" before the confidential informant brought the Defendants into the scheme.

> 5. The informants [sic] target, Defendant Diaz, brought the other co-defendants into the scheme, at the instance of the confidential informant.
>
> 6. The confidential informant utilized in this case operated on essentially a contingent fee basis. The informant was not under prosecution by the State, was not seeking a promise of release from any prison sentence, nor was he to be paid a percentage of the value of any property seized.
>
> 7. The confidential informant in this case operated in a manner that was unsupervised and uncontrolled by any agent of the State, and he would only make contact with the State when he decided to do so. He was left unrestricted and unguided in how he was to set up transactions and who his targets might be. He would have been a key witness in the case had the matter proceeded to trial.
>
> 8. The informant, acting under apparent law enforcement authority, was given a free reign to instigate and create criminal activity where none previously existed. (R. 224-226). This order was filed with the Clerk's office on April 5, 1991.

(R. 224-226).

Petitioner challenged the dismissal in the Third District Court of Appeal, arguing that the defendants' due process rights had not been violated. (R. 230-235). The state also argued that the objective entrapment test set forth in Cruz had been abolished by the enactment of § 777.201 of the Florida Statutes. (R. 230-235).

The Third District Court of Appeal agreed that the defendants' due process rights had not been violated, but affirmed the dismissal of the charges filed against Diaz on the ground of objective entrapment. (R. 230-235). Because Jose and Francisco Ramos had been induced by Diaz and not the confidential informant, the trial court's order dismissing the charges against Jose and Francisco was reversed. (R. 230-235).

The state's Motion for Rehearing and Motion for Rehearing En Banc was denied by the Third District Court of Appeal on December 22, 1992. (R. 236).

Notice invoking the jurisdiction of this Honorable Court was filed on or about January 5, 1993.

POINT ON APPEAL

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

SUMMARY OF THE ARGUMENT

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

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

Assuming for the sake of argument that the objective entrapment test was not abolished by §777.201, Petitioner respectfully requests that the matter be remanded for reconsideration of this test by the trial court, which expressly refused to allow the State to present testimony to rebut the defendant's claims of objective entrapment.

ARGUMENT

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

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

Section 777.201, Florida Statutes (1987) provides:

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

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

Before §777.201 was enacted, the judicially created defense of entrapment consisted of two independent, coexisting elements.

The "traditional" or "subjective" standard defined entrapment as "law enforcement conduct which implants in the mind of an innocent person the disposition to commit the alleged crime, and hence induces its commission." Cruz v. State, 465 So. 2d 516, 521 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985); Gonzalez v. State, 571 So. 2d 1346 (Fla. 3d DCA 1990). The "objective" standard for assessing entrapment recognized that "when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of the defendant becomes irrelevant." Cruz v. State, 465 So. 2d at 521; Gonzalez v. State, 571 So. 2d at 1349.

Under the standards set forth in Cruz, a defendant had the burden only of adducing evidence of entrapment, and once the trial court determined that the evidence was sufficient, the burden shifted to the state to disprove entrapment beyond a reasonable doubt. See Fla. Std. Jury Instr. (Crim.) §3.04(c)(1) (1985)("On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped."). The threshold objective test required the state to establish initially whether the police activity had as its end the interruption of a specific ongoing criminal activity and utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity there was no entrapment as a matter of law. Cruz, 465 So. 2d at 521-522. If the State established

the validity of the police activity and demonstrated that the police had "cast their nets in permissible waters, the subjective test remained. However, the answer to whether the accused was an innocent person induced by government officials to commit the crime fell within the province of the jury. Cruz, 465 So. 2d at 521. Following the 1987 enactment of §777.201, a new standard jury instruction issued, placing the burden wholly on the defendant to show by a preponderance of the evidence that "his criminal conduct occurred as a result of an entrapment." Fla. Std. Jury Instr. (Crim.) §3.04(c)(2) (1987).[2]

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

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[2] In Herrera v. State, 594 So. 2d 275 (Fla. 1992), this Court was asked to consider whether §777.201(2) of the Florida Statutes and Instruction 3.04(c)(2) of the Florida Standard Jury Instructions in Criminal Cases unconstitutionally shifted the burden of proof to the defendant to prove entrapment. In Herrera, this Court ruled that both the statute and the instruction shifted only the burden of persuasion of an affirmative defense rather than burden of proving the elements of the crime and the defendant's guilt. Although this Court did not address the viability of the Cruz objective test directly, this Court noted that §777.201(2) "evidences the legislature's intent that the defendant should prove entrapment instead of requiring the State to disprove it" and found that there was "no violation of due process in requiring the defendants to bear the burden of persuading their juries that they were entrapped."

DCA 1990); Gonzalez v. State, 525 So. 2d 1005 (Fla. 3d DCA 1988); State v. Lopez, 522 So. 2d 537 (Fla. 3d DCA 1988). The Third District found support for its conclusion in the House of Representative's Committee on Criminal Justice Staff Analysis, June 22, 1987, which stated: "This section overrules the Florida Supreme Court's decision in Cruz v. State, 465 So. 2d 516 (Fla. 1985), which held that the objective test of whether law enforcement conduct was impermissible was in the discretion of the trial court." Gonzalez, 571 So. 2d at 1349. See also Senate Staff Analysis and Economic Impact Statement on Crime Prevention, Bill No. CS/HB 1467 (May 22, 1987)(this section "[c]larifies that entrapment is an affirmative defense that would be available to a defendant who established to the trier of fact by a preponderance of the evidence that he was not predisposed to commit the offense now charged.").

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

> Subsection (1) of the entrapment statute appears, at first reading, to focus on the conduct of the police by providing that an entrapment has occurred if the police conduct creates a "substantial risk that such crime will be committed by a person other than one who is ready to commit it." However, subsection (2) makes it clear that a defendant will be acquitted on the basis of entrapment only if he can prove, by a preponderance of the evidence, that "his criminal conduct occurred as a result of an entrapment." The sole statutory test for entrapment is, therefore, the subjective test

> of whether the defendant was predisposed to commit the crime, or as the statute provides, whether the defendant was a person who was "ready to commit the crime." Subsection (1) appears to prevent a defendant from taking advantage of "coincidental improper police conduct." State v. Rockholt, 96 N.J. 570, ___, 476 A.2d 1236, 1241 (construing an entrapment statute similar to §777.201 of the Florida Statutes).

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

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

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

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

In Strickland v. State, 588 So. 2d 269, 270-271, (Fla. 4th DCA 1991), however, the Fourth District reversed the position it took in Krajewski for two reasons: (1) that this Court indicated that Cruz was alive and well in State v. Hunter, 586 So. 2d 319 (Fla. 1991); and (2) this Court held the objective entrapment aspects of Cruz are predicated on constitutional due process

concerns which cannot be superceded by statutory enactments.[3] The Third District Court in the instant case also receded from its decision in Gonzalez, relying on the application of the Cruz objective entrapment test to the facts of Hunter.[4] Lewis v. State, 594 So. 2d 871 (Fla. 3d DCA 1992).

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3 Following this Court's decision in Hunter, both the Third and Fourth Districts have receded from this position. Lewis v. State, 594 So. 2d 871 (Fla. 3d DCA 1992); Ricardo v. State, 591 So. 2d 1002 (Fla. 4th DCA 1992); Strickland v. State, 588 So. 2d 269 (Fla. 4th DCA 1991). The First District has aligned itself with the Third District's position in Gonzalez, 571 So. 2d at 1346, notwithstanding this Court's opinion in Hunter. State v. Pham, 595 So. 2d 85 (Fla. 1st DCA 1992); Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991)(Pending before this court, Case No. 75,287); Munoz v. State, 586 So. 2d 515 (Fla. 1st DCA 1991)(Pending before this court Case No. 78,900). The Second District has consistently held that the Cruz objective test remained viable despite the passage of §777.201. See e.g. Beattie v. State, 595 So. 2d 249 (Fla. 1992); Morales v. State, 595 So. 2d 343 (Fla. 2d DCA 1992); Wilson v. State, 589 So. 2d 1036 (Fla. 2d DCA 1991); Bowser v. State, 555 So. 2d 879 (Fla. 2d DCA 1989). Although the Fifth District has continued to apply the Cruz objective test, it has not yet addressed the effect of §777.201 on the objective entrapment test. See e.g. Smith v. State, 575 So. 2d 776 (Fla. 5th DCA 1991); State v. Purvis, 560 So. 2d 1296 (Fla. 5th DCA 1990).

4 The Third District also relied on this Court's decision in State v. Krajewski, 589 So. 2d 254 (Fla. 1991). This reliance is similarly misplaced. When presented with the issue of objective entrapment in Krajewski, the Fourth District Court of Appeal agreed with prior Third District Court rulings and held that the defense of objective entrapment had been abolished by §777.201. Krajewski v. State, 587 So. 2d 1175, 1177-78 (Fla. 4th DCA 1991). After finding that the objective entrapment defense had been abolished by §777.201, the Fourth District addressed State v. Glosson and due process criteria and found that Krajewski's due process rights had been violated. 587 So. 2d at 1183-84. The Fourth District then certified to the Supreme Court the limited question of whether the facts of Krajewski violated State v. Glosson, 587 So. 2d at 1184. The Supreme Court answered the certified question in the negative, indicating that there was no due process or

Petitioner submits that reliance on Hunter in Strickland and the instant case is misplaced. Critical to this court's decision in Hunter was the fact that Hunter and Conklin were arrested in October, 1982 - long before §777.201 went into effect on October 1, 1987. Hunter, 586 So. 2d at 323-324 (Barkett, J. concurring and dissenting). As noted by Chief Judge Schwartz in Lewis v. State, the Hunter decision does not address the viability of the Cruz objective entrapment test in light of §777.201, nor even cite the entrapment statute. Lewis v. State, 594 So. 2d 871 (Fla. 3d DCA 1992). Petitioner submits that this is so because §777.201 was clearly inapplicable to the offenses committed by Hunter and Conklin. Any application of §777.201 to the offenses in Hunter would violate ex post facto considerations. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

Furthermore, because this Court noted in Cruz noted that although the objective test "parallels a due process analysis, it is not founded on constitutional principles," the Strickland Court's pronouncement that the legislature may not enact an

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Glosson violation. 589 So. 2d at 255. The Supreme Court in Krajewski did not address Cruz v. State, 465 So. 2d 516 (Fla. 1985), or the issue of objective entrapment because the certified question dealt solely with Glosson and due process considerations. 589 So. 2d at 254.

entrapment statute which does not incorporate the objective view is unfounded. Cruz, 465 So. 2d at 520, n. 2.

Petitioner submits that since the entrapment defense is not of a constitutional dimension, the Florida Legislature may adopt any substantive definition that it may find desirable. See United States v. Russell, 411 U.S. 423, 433, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

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

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

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

It is clear from the language of §777.201, which makes entrapment a matter to be determined solely by the jury, the new standard jury instruction on entrapment, which places the burden

wholly on the defendant to establish he was entrapped, and Florida House of Representatives and Senate staff analyses, which expressly state that the intent of the statute was to overrule Cruz and to make entrapment an affirmative defense available only to a defendant who is not predisposed, that section 777.201 abolished the defense of objective entrapment as a matter of law, as articulated in Cruz.

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

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

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

While the objective entrapment and due process entrapment defenses are similar, they are not equivalent or coextensive. To amount to a constitutional violations under the federal constitution, the law enforcement techniques must be so outrageous that they are fundamentally unfair and "'shocking to

the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973). In evaluating claims of official misconduct, federal courts have considered the totality of circumstances without designating any single factor as controlling. See Owen v. Wainwright, 806 F.2d 1519 (11th Cir. 1986); United States v. Gianni, 678 F.2d 956 (11th Cir. 1982); United States v. Tobias, 662 F.2d 381 (5th Cir. Unite B), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed. 2d 1317 (1982). The distinction between objective entrapment and due process entrapment was discussed by the court in United States v. Jannotti, 673 F. 2d 578 (3d Cir. 1982), as follows:

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

> reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reversed for the constitutional defense only the most intolerable government conduct.

Jannotti, 673 F.2d at 608.

Florida of course may impose greater restrictions on police activity than those held by the United States Supreme Court to be necessary under the federal constitution. See Oregon v. Haas, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed. 2d 570 (1975); State v. Glosson, 462 So. 2d at 239. To date, however, with the exception of the narrow Glosson[5] due process claim, which was expressly predicated upon the Florida due process clause, Florida courts have not necessarily distinguished between the Article I, Section 9 due process clause and the Fifth and Fourteenth Amendment provisions of the federal constitution in the context of due process entrapment claims. See Sarno v. State, 424 So. 2d

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

829 (Fla. 3d DCA 1982); But see Brown v. State, 484 So. 2d 1324 (Fla. 3d DCA 1986).

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

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

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

Assuming for the sake of argument only, that the objective entrapment test was not abolished by the enactment of §777.201, Petitioner would respectfully request an opportunity to present evidence rebutting Respondent's claim of objective entrapment.

At the hearing on Respondent's motion to dismiss, the trial court repeatedly stated that Cruz and the objective test for entrapment was not at issue and that the hearing was to deal solely with the due process claim. The court repeatedly refused to allow the state to present testimony regarding this issue. (T. 46-48, 62-64). The state did, however, attempt to prove the existence of an ongoing criminal activity. (T. 63-64). The state also proffered the contents of the taped conversations between Detective Garcia and Appellee Diaz to prove predisposition. (T. 122-123).

Before this Honorable Court may decide the issue of objective entrapment, the trial court must first be given an opportunity to reach the issue. State v. Embry, 593 So. 2d 327 (Fla. 2d DCA 1992). This is especially true since the trial court, although not ruling on the issue, stated that the confidential informant had contradicted Appellant's testimony regarding his alleged entrapment. (T. 122-123). See Clemons v.

State, 533 So. 2d 321 (Fla. 5th DCA 1988) (remand necessary to determine whether defendant's car would have been routinely stopped for a traffic infraction absent drug suspicions of police officers where testimony in this regard was neither credited nor discredited and issue not reached by trial court); Sanchez v. State, 516 So. 2d 1061 (Fla. 3d DCA 1987) (correctness of trial court's ruling on suppression motion turned on resolution of conflict between testimony of two officers necessitating relinquishment of jurisdiction to trial court for entry of findings of fact and conclusions of law); Adams v. State, 417 So. 2d 826 (Fla. 1st DCA 1982) (where defendant's motion for new trial raised issue that verdict was contrary to weight of evidence but order denying motion was worded so as to indicate that trial court may have limited itself to sufficiency of evidence standard, remand was necessary to allow trial court to state whether its ruling was on weight of evidence as well as sufficiency). See also United States v. Torres, 720 F.2d 1506 (11th Cir. 1983) (failure to make sufficient findings of fact to enable panel to properly review conclusion of law requires remand for clarification by trial court); United States v. Kastenbaum, 613 F.2d 86 (5th Cir. 1980) (case may be remanded if the trial courot has made no findings or insufficient findings).

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that this Court find that §777.201 of the Florida Statutes abolished the Cruz objective entrapment test and reverse the opinion of the Third District below. In the event that Petitioner's arguments are unpersuasive, Petitioner respectfully requests an opportunity to rebut the claim of objective entrapement in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing BRIEF ON THE MERITS was furnished by mail to GERARDO REMY, Counsel for Lazaro Diaz, 2400 Coral Way, Suite 501, Miami, Florida 33145 and HARVEY SEPLER, Counsel for Jose and Francisco Ramos, Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 5th day of April, 1993.

ANGELICA D. ZAYAS
Assistant Attorney General

/bfr