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IN THE SUPREME COURT OF FLORIDA

CASES No. 81,165

STATE OF FLORIDA,

Petitioner,

vs.

PATRICIA FRUETEL,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner/appellee below, will be referred to herein as either "the State" or "Petitioner". Respondent, Patricia Fruetel, defendant/appellant below, will be referred to herein as "Respondent". A copy of the opinion of the case on review and order certifying conflict is attached hereto as Exhibit "A".

References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellant, Patricia Fruetel, and codefendant, Vaden Williams[1] were charged with trafficking in cocaine and conspiracy to traffic in cocaine (R. 1038-1039). A jury trial was held in the Seventeenth Judicial Circuit before the Honorable William Dimitrouleas. Appellant was convicted on both counts as charged (R. 1103). Appellant was sentenced to concurrent 15 years mandatory minimum sentences with a fine of $250,000 (R. 1104).

The Fourth District reversed Appellant's conviction and ordered Appellant discharged. Fruetel v. State, 17 Fla. L. Weekly D2686 (Fla. 4th DCA December 2, 1992). The State filed a Motion for Rehearing/Motion to Certify conflict on December 10, 1992. Rehearing was denied but the district court certified conflict with State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991), jurisdiction accepted, 598 So. 2d 77 (Fla. 1992) and Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991) in a January 7, 1993 order. (Exhibit A).

This appeal follows.

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[1] Williams v. State, 596 So. 2d 1202 (Fla. 4th DCA 1992), review denied, Case No. 80,035 (Fla. September 28, 1992).

STATEMENT OF THE FACTS

The opinion below does contain a lengthy rendition of facts. Fruetel v. State, 17 Fla. L. Weekly D2686 (Fla. 4th DCA December 2, 1992). The State believes that the Fourth District ignored many facts that were important to the State's case. Therefore, the State rejects the rendition of the facts found in the opinion and would outline the facts as follows.

On April 3, 1990, Appellant, Patricia Fruetel, Vaden William (Fruetel boyfriend) and pilot Mitchell Britt flew in a private aircraft from Norfolk, Virginia to Ft. Lauderdale, Florida (R. 588-591). Upon landing in Ft. Lauderdale at 4:00 p.m. (R. 802) a car was rented and the three drove to Miami (R. 593, 803). One of the first thing Appellant did upon arriving in Miami was to contact Anibal Duarte (R. 803).

Anibal Duarte, also known as Cookie, had been arrested by the federal authorities and prosecuted for possession of cocaine and conspiracy to possess cocaine (R. 529). He pled guilty in federal court to the charges against him on March 30, 1990 (R. 529).

Thereafter, Duarte met with Special Agent Lou Cabanillas of the Drug Enforcement Administration and a United States Attorney in order to discuss whether he would be able to provide the government with substantial assistance in drug cases (R. 531). That is, if he were able to provide the authorities with the information leading to the arrest of a substantial violator, with the accompanying seizure of a significant amount of drugs, his help would be brought to the attention of his sentencing federal

judge (R. 531). Duarte was released on his own recognizance pending sentencing (R. 534-535).

Duarte was not informed of the Federal rules governing the behavior of informants (R. 531). Cabanillas said Duarte was characterized as a "source of information" rather than a "confidential informant," because he did not actively participate in an investigation in a continuing manner under the agent's direction (R. 528-531). Duarte was sentenced on July 10, 1991 in Federal District Court to 136 months in Federal prison (R. 534). Duarte's sole involvement in this case was to set up the meeting between Appellant and Agent Cabanillas (R. 536).

On April 4, 1990 at 3:00 p.m., Cabanillas received a telephone call from Duarte (R. 494). As a result, Cabanillas, acting as a source of cocaine met later that day with Duarte and Appellant, Patricia Fruetel, at Bennigan's Restaurant in Miami (R. 494-495). Cabanillas testified that he and Appellant went to the bar area for a private discussion about a drug transaction (R. 496). Cabanillas told Appellant he wanted to sell not less than five kilograms of cocaine, while Appellant responded that she only wanted two kilograms of cocaine because she liked to "ounce it out" back in Virginia Beach, where she was from (R. 496-497). Appellant only wanted two kilos as she didn't want to expand her business (R. 497). The price they agreed upon was $32,000 for two kilos (R. 497). This conversation was not recorded (R. 497). On its conclusion, Appellant left with Duarte (R. 552). Cabanillas gave Appellant his beeper number on a match book (R. 498, 821).

Cabanillas thereafter called the Broward Sheriff's Office and made arrangements for a deal to be organized that day by the Broward County agency (R. 499, 501), since the transaction involved an amount less than five kilograms (R. 538). Cabanillas then called Duarte at 4:00 p.m. to try to get in touch with Appellant (R. 502). Duarte put her on the phone, and Cabanillas told her that they could meet again at 5:30 that evening (R. 503).

Appellant called again at 5:30, Cabanillas told her the meeting would have to be put off for an hour (R. 504-505). He proceeded to a Howard Johnson's Hotel in Hallandale, where he waited with several Broward Sheriff's deputies for Appellant to arrive (R. 505). Two kilograms of cocaine (R. 574-575) were also provided by the Sheriff for the transaction (R. 660-661).

From the hotel lobby, Cabanillas saw Ms. Fruetel arrive in a car driven by Mitchell Britt (R. 506). Appellant was sitting in the back seat of the vehicle (R. 464). According to Cabanillas and another officer, Appellant and Williams (codefendant) got out of the car and went to the trunk (R. 465, 507). Appellant put money into a brown shoulder bag (R. 508) while codefendant, Williams, watched (R. 511). Appellant proceeded into the hotel, while Williams waited outside in the car with Britt (R. 468). Cabanillas greeted Appellant in the hotel lobby (R. 512).

The motel room in which Agent Cabanillas took Appellant was wired and a tape recording of the ensuing conversation was introduced into evidence (R. 693). Ms. Fruetel told Cabanillas

that she had brought some people with her (R. 514). Cabanillas entered the hotel room at approximately 7:30 p.m. (R. 514).

Appellant produced the money ($31,000)(R. 673) which Cabanillas counted (R. 502). The two kilos of cocaine were brought into the room, and Ms. Fruetel cut into the cocaine with a knife she took from her purse (R. 518-519, 656-657). She complained that the drugs in one of the packages was too yellow, so Cabanillas promised that he would give Ms. Fruetel a discount on her next purchase from him (R. 519-521, 658-659). Appellant said she didn't know if she could cut one of the kilos (R. 519). Ms. Fruetel agreed to the transaction and put the drugs in her bag, whereupon she was promptly arrested (R. 521, 674).

Williams and Mr. Britt were arrested while they waited in the parking lot (R. 523). Williams had $4900 in his front pocket (R. 616-674). He was read his rights upon being brought back to the motel room (R. 524). In response to the question, if he knew why Ms. Fruetel was going to the motel, Williams answered that he knew some kind of drug deal was involved but did not know it was cocaine (R. 525).

Mitchell Britt (a private pilot) testified as a State witness that he knew Williams from working on his boat (R. 587). Williams asked Britt to fly Williams and Appellant, Ms. Fruetel, to Florida so Williams could pick up a government contract (R. 587). Britt knew nothing about any drug transaction (R. 592). The group flew to Ft. Lauderdale on April 3, 1990, and then rented a car to drive to Miami (R. 593). There Williams told Britt that they might be able to complete the deal that day, so

they would not rent a room unless it was necessary (R. 597). Later that evening, however, Britt was told to rent a motel room, which Williams paid for (R. 599).

Britt and Williams had some drinks, but Appellant was not there (R. 600). Nor was Appellant present the next morning (R. 602). It was about 3:00 the next day when Appellant and Williams told Mr. Britt that the business was almost wound up, but they needed one more signature before they could return home (R. 603). Britt put their luggage in the rental car and drove the other two to a mall, where he shopped while Ms. Fruetel tried to get hold of the partner on the phone, while Williams waited nearby (R. 604-646).

Britt and the others then drove to the Howard Johnson's in Hallandale (R. 607), where William suggested to Appellant that she "pick up the paperwork and let's go home" (R. 608) and Britt waited in the car (R. 608). When the police arrived and arrested them, both Britt and Williams protested (R. 609). Appellant asked Williams what to do, and he told her that he did not know, "let me think about it. Maybe I can call somebody." (R. 617). Appellant told Britt after the arrest that she was sorry (R. 612). Britt retained an attorney and then gave a statement to the prosecutor (R. 622). No charges were ever brought against him (R. 585).

Appellant, Patricia Fruetel, testified in her own behalf. A sophomore in marine biology at Old Dominion University, she admitted to being Williams' girlfriend, even though he was married (R. 795). While on vacation with him Florida about a

year and a half earlier, she met Anibal Duarte, whom she knew as Cookie, through friends (R. 793). She and Duarte's girlfriend, Shelby, became friends (R. 794). When Appellant returned to Virginia, Duarte called her numerous times, telling her that his girlfriend, Shelby, was in the hospital with an injured back. Duarte wanted to borrow money from Ms. Fruetel for Shelby's medical bills (R. 796). Ms. Fruetel gave him a total of $475 in two separate cash payments (R. 796-798). Around the 20th of February, Duarte called again, requesting one additional loan to fix his car, which he told Mr. Fruetel he would then sell to repay her the loans (R. 798). Appellant loaned Duarte a total of $750 in cash (R. 798). On or about March 20th Appellant contacted Duarte (R. 799) asking about repayment of the money. Appellant and Williams decided to charter a plane to fly to Florida (R. 801). The Florida trip had two purposes, 1) to reestablish the Fruetel-Williams relationship; 2) to have Duarte repay the loan (R. 801).

Williams arranged for a friend of his (Britt) to fly them (R. 801), and they arrived in Ft. Lauderdale on April 3, 1990 at 4 p.m. (R. 801-802). They told him (Britt) they were pursuing a government contract to cover up the purpose of their trip (R. 867). After landing in Ft. Lauderdale, they drove to Miami, where Appellant called Duarte (R. 803). They met at a Holiday Inn, (at 9:00 p.m.) and Duarte told Appellant that he needed more money ($2,000) to get a gold watch of his out of pawn. After selling the watch, he would be able to repay her (R. 806). Appellant gave Duarte $2000, keeping the keys to his car as

security (R. 807). Appellant went to a bar with Duarte that evening (R. 809).

The next morning, Appellant went to Duarte's house, at 9:30 a.m. (R. 810). He told her that they were both in big trouble, because he had taken her money to a drug dealer. There had never been a gold watch, he told her (R. 812). This was the first time drugs were ever discussed. When the phone rang, Duarte picked it up and conversed in Spanish before handing the phone to Ms. Fruetel (R. 816). It was agent Cabanillas, who asked Appellant if she was ready (R. 817). Appellant replied that she had no choice, and Duarte then took the phone back and continued the conversation in Spanish (R. 817).

Appellant and Duarte went to Bennigan's later that day and met with Cabanillas (R. 820). Appellant and Cabanillas talked privately at the bar (R. 820). Duarte remained at the table. Cabanillas gave Appellant his beeper number on a matchbook (R. 821). On the way back from Bennigan's, Duarte allegedly placed money in a bag and placed the bag in the trunk of Appellant's car (R. 824). Appellant beeped Cabanillas at around 5:15 p.m. (R. 826) and 6:15 p.m. (R. 827). The meeting at the hotel in Hallandale was arranged (R. 827). Appellant arrived at the hotel around 6:30 p.m. (R. 828). Appellant opened the trunk, removed the bag and walked into the hotel (R. 828). Inside the bag containing the money was makeup, a comb, a book and other personal items belonging to Appellant (R. 828). The book was about an Ivy League drug dealer (R. 845). The discussion in the room was taped and the voice on the tape was Appellant's (R.

831). During the drug transaction Appellant cut into the cocaine, tasted the cocaine, smashed cocaine between her fingers (R. 832). Appellant put the cocaine in her bag (R. 833). She was arrested in the hotel room (R. 834).

On cross-examination Appellant testified she was a bartender who made eleven to twelve thousand dollars annually (R. 839).

SUMMARY OF ARGUMENT

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

Today, the sole statutory test for entrapment is the subjective test of whether a defendant is predisposed to commit a crime. Stated differently, the new statute is concerned with whether law enforcement causes a person to commit a crime. There is no question that the instant facts fail to establish entrapment.

If this court, however, declines to find that section 777.201 overrules Cruz, the police operation in this case nevertheless passed both requirements of the Cruz entrapment test. The police activity had as its end the interruption of Fruetel's drug selling activities, and the officers used means which were reasonably tailored to apprehend only Fruetel and her codefendant, who were involved in the illegal activity.

ARGUMENT

THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE HAS BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201 FLORIDA STATUTES (1989). THEREFORE, THE OPINION BELOW MUST BE QUASHED AS IT IS BASED ON AN APPLICATION OF THE TWO PART ANALYSIS OF CRUZ.

Below, the Fourth District Court of Appeal reversed Appellant's conviction and directed that Appellant be discharged. Fruetel v. State, 17 Fla. L. Weekly D2686 (Fla. 4th DCA December 2, 1992). The Fourth District's opinion has as its foundation a judicial analysis of the facts based on the holding of Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). The State believes that the objective entrapment analysis announced in Cruz was statutorily overruled with the enactment of Florida Statutes §77.201 (1987), Laws of Florida 87-243 §42. Therefore, the opinion below should be quashed and the case remanded to the Fourth District.

Prior to the 1987 enactment of Fla. Stat. §777.201, entrapment was a judicially created affirmative defense articulated by the Florida Supreme Court in Cruz v. State, 465 So. 2d 516 (Fla. 1985). Herrera v. State, 594 So. 2d 275 (Fla. 1992). In Cruz, Tampa police officers operated a decoy operation in a high crime area. One officer posed as a drunken bum, leaning against a building with his face to the wall. One hundred and fifty dollars in currency was plainly visible from a rear pants pocket. Cruz happened upon the scene, approached the decoy officer, and then continued on his way. A short time

later, Cruz returned to the scene and took the money from the decoy's pocket without harming him in any way. When Cruz was charged by information with grand theft, he moved to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4), arguing that the arrest constituted entrapment as a matter of law.

This Court agreed with Cruz, holding that, under the facts of the case, the police activity constituted entrapment as a matter of law. The Court also enunciated an entrapment defense consisting of two independent and coexisting elements: A subjective test and a threshold objective test, which itself contains two elements. Id. at 522. In Gonzalez v. State, 517 So. 2d 1346, 1349 (Fla. 3d DCA 1990), the Third District explained the two elements of entrapment as follows:

> The first element, the "traditional" or "subjective" standard, defined entrapment as "law enforcement conduct which implants in the mind of an innocent person the disposition to commit the alleged crime, and hence induces its commission . . . Under this traditional formulation, the defense of entrapment is limited to those defendants who were not predisposed to commit the crime induced by government actions." Cruz v. State, 465 So.2d 516, 521 (Fla.), cert. denied, 473 U.S. 905 . . . (1985). The second, independent, "objective" standard for assessing entrapment recognized that "when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of the defendant becomes irrelevant." Cruz, 465 So. 2d at 521. The subjective test focused on the predisposition of the defendant; the objective test focused on the conduct of the police and the proper uses of governmental power.

Under the objective test, "entrapment has not occurred as a matter of law where police activity (1) has its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Cruz, 465 So. 2d at 522. The first prong of the objective test examined whether the "police activity seek[s] to prosecute crime where no such crime exists but for the police activity engendering the crime." Id. The second prong of the objective test addressed the problem of inappropriate techniques. Id.

Before the enactment of section 777.201, a defendant had the burden only of adducing evidence of entrapment, and once the trial court determined that the evidence was sufficient, the burden shifted to the state to disprove entrapment beyond a reasonable doubt. See **Fla. Std. Jury Instr. (Crim.)** §3.04(c)(1) (1985) ("On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped."). The threshold objective test required the state to establish initially whether "police conduct revealed in that particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Cruz, 465 So. 2d at 521. (quotation omitted). If the state established the validity of the police activity and thereby crossed over the objective test hurdle, the subjective test remained. However, whether the accused was an innocent person induced by government officials to commit the crime fell within the province of the jury. Id. Following the 1987 enactment of section 777.201, a

new standard jury instruction issued, placing the burden wholly on the defendant to show by a preponderance of the evidence that "his criminal conduct occurred as a result of an entrapment." **Fla. Std. Jury Instr. (Crim.)** §3.04(c)(2) (1987).[2]

The First[3] and Fourth District Courts of Appeal, in considering the effect of the 1987 enactment of section 777.201, have concluded that the new statute abolished the objective test articulated in Cruz. See Gonzalez, 571 So. 2d at 1349; Krajewski v. State, 587 So. 2d 1175 (4th DCA), quashed on other grounds, 589 So. 2d 254 (Fla. 1991). The Third District in Gonzalez found that the new entrapment statute "codifies the subjective test by providing that entrapment has occurred when the police methods used to obtain evidence of the commission of a crime involved 'methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.'" 571 So. 2d at 1349 (quoting Fla. Stat. §777.201 (1987)). The court found support for its conclusion in the **House of Representatives' Committee on Criminal Justice Staff Analysis** (June 27, 1987, at 177, which stated: "This section overrules the Florida Supreme Court's decision in Cruz v. State, 465 So. 2d 516 (Fla. 1985), which held that the objective test of whether law enforcement conduct was

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[2] In Herrera v. State, 594 So. 2d 275, the Florida Supreme Court upheld the constitutionality of this instruction.

[3] In an order dated January 7, 1993, the Fourth District certified conflict with two cases from The Third District, State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991), jurisdiction accepted, 598 So. 2d 77 (Fla. 1992) and Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991).

impermissible was in the discretion of the trial court." Gonzalez, 571 So. 2d at 1349; see also **Senate Staff Analysis and Economic Impact Statement on Crime Prevention,** Bill No. CS/HB 1467 (May 22, 1987) (this section "[c]larifies that entrapment is an affirmative defense that would be available to a defendant who established to the trier of fact by a preponderance of the evidence that he was not predisposed to commit the offense now charged."). The Gonzalez court likewise stated: "Now, the defendant must prove by a preponderance of the evidence that 'his criminal conduct occurred as a result of entrapment.'" 571 So. 2d at 1350 (quoting **Fla. Stat.** §777.201 (1987)).

In addition to the above-referenced statements of legislative intent, the language of the statute clearly implies that section 777.021 embodies the subjective test and abandons the objective test. For example, the statute unequivocally makes entrapment an issue to be "tried by the trier of fact," and places the burden wholly on the defendant to prove by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment. Fla. Stat. §777.021 (1987). While subsection (1) of the statute contains language relating to the second prong of the objective test articulated in Cruz, [4] nothing in the new statute permits entrapment to be considered as a

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[4] This second prong considers "whether a government agent 'induces or encourages another person to engage in conduct constituting such offense by either: (A) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (B) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.' Model Penal Code s. 2.13 (1962)." Cruz, 465 So. 2d at 522.

matter of law by the trial court, as required by the Cruz objective test. The Gonzalez court elaborated on this point:

> Subsection (1) of the entrapment statute appears, at first reading, to focus on the conduct of the police by providing that an entrapment has occurred if the police conduct creates a "substantial risk that such crime will be committed by a person other than one who is ready to commit it." However, subsection (2) makes it clear that a defendant will be acquitted on the basis of entrapment only if he can prove, by a preponderance of the evidence, that "his criminal conduct occurred as a result of an entrapment." The sole statutory test for entrapment is, therefore, the subjective test of whether the defendant was predisposed to commit the crime, or as the statute provides, whether the defendant was a person who was "ready to commit the crime." Subsection (1) appears to prevent a defendant from taking advantage of "coincidental improper police conduct." State v. Rockholt, 96 N.J. 570, ___, 476 A.2d 1236, 1241 (construing an entrapment statute similar to Florida's).

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

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

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

> concerned with whether law enforcement activity causes a person to commit a crime. This is entirely a subjective matter.

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

In Strickland v. State, 588 So. 2d 269 (Fla. 4th DCA 1991), however, the Fourth District reversed the position it took in Krajewski for two reasons (1) That the Florida Supreme Court had said Cruz was alive and well in its State v. Hunter, 586 So. 2d 319 (Fla. 1991), opinion; and (2) the Hunter court said the objective entrapment aspects of Cruz are predicated on constitutional due process concerns which cannot be superceded by statutory enactments. The state submits that Strickland was wrongly decided based on two erroneous lines of reasoning.

First, the State believes that this Court did not breathe new viability into Cruz in its Hunter decision. Instead, the Court simply found that Cruz applied on those facts. Critical to the Court's decision in Hunter was the fact that Hunter and Conklin committed their offenses in October 1982. Hunter, 586 So. 2d at 323 (Barkett J., concurring and dissenting). Because the offenses occurred long before the 1987 enactment of section 777.201, Cruz clearly applied. For this same reason, the Fourth District's decision in Ricardo v. State, 592 So. 2d 1002 (Fla. 4th DCA 1991), is similarly flawed.

Second, in Cruz, this Court noted the federal line of cases which "normally focus[] on the predisposition of the defendant," i.e., the subjective view of entrapment. 465 So. 2d at 518. While the Court agreed that the question of predisposition should always be a question of fact for the jury, it expressed grave

concerns about "entrapment scenarios in which the innocent will succumb to temptation . . ." Id. at 519. For this reason, the Court "provid[ed] two independent methods of protection in entrapment cases," i.e., the subjective and objective doctrines.

"While the objective test parallels a due process analysis, it is not founded on constitutional principles." Id. at 520 n.2. Thus, the Strickland court's pronouncement that the legislature may not enact a version of section 777.201 which does not incorporate the objective view is unfounded. Further, "the legislature's omission of the objective test does not mean that the government is now free to pursue its law enforcement efforts in any manner it chooses." Gonzalez, 571 So. 2d at 1350. After all, "the federal due process clause, which [Florida courts] are obligated to enforce, [will] continue [] to mark the outer limits of permissible police conduct." Id. See also, Hunter, 586 So. 2d at 321.

The State contends that this Court should approve the reasoning of the Gonzalez, Krajewski, and Munoz courts. See State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991) (pending before the Florida Supreme Court in case number 78,900); Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991) (pending before the Florida Supreme Court in case number 75,286); State v. Pham, 595 So. 2d 85 (Fla. 1st DCA 1992).[5] Accordingly, the state urges

[5] While the conclusions reached by the First, Third and Fourth Districts (in Krajewski) are compelling, the Second District has declined to find that section 777.201 abolished the objective test. See Beattie v. State, 595 So. 2d 249 (Fla. 2d DCA 1992); Morales v. State, 594 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).

this Court find that section 777.201 abolished the Cruz objective test, leaving the entrapment issue to be decided by the finder of fact, as was done at the trial court level in this case.

If this court finds that the Cruz test survived the amendment to section 777.201 the state believes the police activity in the present case passes both requirements of the objective test. In reversing the trial court, the Fourth District overlooked several facts which were crucial to the state's case. This was contrary to the well-settled principle that "a defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence" Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974) All facts introduced in evidence are admitted by a defendant who moves for judgment of acquittal. McConnehead v. State, 515 So. 2d 1046, 1048 (Fla. 4th DCA 1987) (emphasis added).

The Cruz court characterized the first requirement of the objective test as addressing the problem of "virtue testing," i.e., police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. 465 So. 2d at 522. In Cruz, the Court found that the police decoy operation failed the first prong of the objective test on the undisputed facts that "none of the unsolved crimes occurring near this location involved the same modus operandi as the simulated situation created by the officers." Id. The court stated: "The record thus implies police were apparently

attempting to interrupt some kind of ongoing criminal activity. However, the record does not show what specific activity was targeted. This lack of focus is sufficient for the scenario to fail the first prong of the test." Id.

As to the first prong, the record establishes that the police conduct was directed at specific ongoing criminal activity. Appellant and her codefendant flew to Florida on a privately chartered plane with the intention of returning to Virginia possibly on the same day (R. 597). Appellant and her codefendant carried a large amount of cash (R. 616, 674, 807). They told the pilot they were going to pick up a "government contract" (R. 587). Appellant was quite familiar with drug jargon and very familiar with the procedures utilized in a drug negotiation and transactions (R. 494-497, 517-520, 832). Appellant cut into the bricks of cocaine, tasted the cocaine, felt it with her fingers and commented on the yellow color of one cocaine brick (R. 518-520, 832). Appellant stated she was "ouncing it out" in Virginia (R. 496-497). Appellant's story was too incredible for belief. Appellant testified that a drug transaction was first mentioned at 9:30 a.m. on April 4th (R. 810-812). Between this time and her arrest at 6:30 p.m. on the same day she 1) met with an undercover officer at 3:30 p.m. and negotiated the term of a cocaine transaction involving 2 bricks of cocaine and $32,000 in cash, 2) after the meeting she had several telephone conversations with the undercover officer that finalized the location and the time of the drug transaction; 3) Appellant placed $32,000 cash in a handbag and walked into the

lobby of a hotel to meet the undercover officer and 4) once in the hotel room Appellant removed a knife from her bag and cut into the bricks of cocaine, exchanged the money and placed the cocaine bricks into her bag. Appellant suggests she was cohersed into participating in the drug transaction; however, at all times she had a plane and a pilot available to fly her and her boyfriend out of the state. In addition, the state knows of no case in which an objective entrapment defense was successful when the undisputed time period between the inducement to purchase drugs and the actual purchase of the drugs was nine hours.

In the present case the above evidence clearly indicates that Appellant was involved in "ongoing criminal activity" sufficient to satisfy the first prong of the Cruz test. Lusby v. State, 507 So. 2d 611 (Fla. 4th DCA 1987) Appellant, through her own actions demonstrated she was not an innocent individual induced by police activity to commit a crime. See Krajewski v. State, 597 So. 2d 814 (Fla. 4th DCA 1992) (broad interpretation of ongoing criminal activity both logical and more practical).

Under the second requirement of the Cruz objective test, entrapment has not occurred where police activity "utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." 465 So. 2d at 522. This requirement focuses on whether the methods employed by the police officers induced or encouraged an individual to engage in criminal conduct by either" ' (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial

risk that such an offense will be committed by persons other than those who are ready to commit it.'" Id. (quoting Model Penal Code §2.13 (1962)).

In the present case, it is a logical inference based on the facts that Appellant came to Florida to purchase drugs. Appellant could have been placed in contact with a real drug dealer. In such a case the purchase would have occurred without police intervention. Appellant would have returned to Virginia and "ounced the cocaine" and sold it at a substantial profit. At bar, all police did was to provide Appellant with what she wanted, two bricks of cocaine (R. 497).

The tactic used was reasonably tailored to apprehend only Fruetel and Williams, and in no way coerced Freutel into dealing in narcotics. See State v. Purvis, 560 So. 2d 1296, 1301 (Fla. 5th DCA 1990) (no threats or promises of exorbitant gain); Story, 355 So. 2d at 1216. Further, the tactic employed in this case was far less inducive than tactics upheld under Cruz in many other cases. See Lusby v. State, 507 So. 2d 611 (Fla. 4th DCA 1987); State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989); Gonzalez v. State, 525 So. 2d 1005 (Fla. 3d DCA 1988); State v. Konces, 521 So. 2d 313 (Fla. 3d DCA 1988); Brown v. State, 484 So. 2d 1324 (Fla. 3d DCA 1986).

CONCLUSION

This court should quash the opinion below and remand the case to the District Court with instructions that the District Court reinstate the trial court's denial of Appellant's Motion for Judgment of Acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Initial Brief of Appellant" has been furnished by U.S Mail, to: **ANTHONY MUSTO**, Esquire, P. O. Box 16-2032, Miami, Florida 33316 this 24th day of February, 1993.

Of Counsel

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