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w/app

IN THE SUPREME COURT OF FLORIDA

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CHRISTOPHER N. SARGENT,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent/Appellee.

CASE NO. 81,911

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER N. SARGENT, Appellee/Petitioner,	)	
v.	)	CASE NO. 81,911
STATE OF FLORIDA, Appellant/Respondent.	)	

STATEMENT OF THE CASE

On April 30, 1991, Petitioner, Christopher N. Sargent, and co-defendant Andrea L. Magers were charged by amended information with possession of lysergic acid diethylamide (LSD), and possession of marijuana in excess of twenty (20) grams (R132). The offenses were alleged to have occurred on November 15, 1990, and arose from a transaction set up by a confidential informant who was working under the direction of the Orange County Sheriff's Office (R7, 33, 90-91, 132).

Petitioner Sargent filed a motion to dismiss the information (R135-138). The motion argued that Mr. Sargent was entrapped by the Orange County Sheriff's Office, and that his due process rights had been violated (R135-138).

An in camera hearing was held on May 6, 1991, before the Honorable Belvin Perry, Jr., in Osceola County (SR3-15).[1] During the in camera hearing, the court questioned the

[1] "SR" refers to the supplemental record on appeal.

confidential informant, referred to only by number, as to his involvement with the sheriff's office and Petitioner Sargent's arrest (SR3-15).

Hearings on Petitioner Sargent's motion to dismiss and motion to suppress were held on July 29, 1991, and October 14, 1991, with the Honorable Belvin Perry, Jr. presiding (R3-87, 89-100). Concisely, the defense's position that Mr. Sargent had been entrapped was based on the following facts and arguments contained in his motion to dismiss (R135-138). The confidential informant (C.I.) sold some LSD to Mr. Sargent, apparently while the C.I. had already begun working under the guise of an assistance agreement with the Osceola Sheriff's Office. The C.I. subsequently contacted Mr. Sargent and asked him to supply an ounce of marijuana. The C.I. made all the arrangements and negotiations for the transaction, and did not notify the Sheriff's Office until the date of the transaction. The C.I. met with Mr. Sargent, and then went back to the police and told them that Mr. Sargent had marijuana which the C.I. was supposed to purchase. The police then stopped Mr. Sargent based on this information and Mr. Sargent was charged with possession of marijuana, and possession of the same LSD the C.I. had sold to Mr. Sargent (R135-138). In exchange for setting up three cases, and testifying if necessary, the sheriff's office agreed to drop the felony charges pending against the C.I. (R136). The defense argued that Mr. Sargent had been entrapped as a matter of law and fact, and that his due process rights had been violated (R138,

89-98). The trial court took the motion to dismiss under advisement, and granted Petitioner Sargent's motion to dismiss by an order dated December 30, 1991 (R99, 154).

The State filed a timely notice of appeal on January 7, 1992 (R155). On appeal, the State argued that Mr. Sargent failed to establish that he had been entrapped, under both the objective and subjective tests outlined in Cruz v. State, 465 So. 2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985). The State never argued on appeal that the objective entrapment test had been abolished by statute.

In an opinion filed May 7, 1993, the Fifth District Court of Appeal reversed the trial court's order dismissing the information. State v. Sargent, 18 Fla. L. Weekly D1188 (Fla. 5th DCA May 7, 1993) (Appendix "A"). In reaching the decision that the trial court erred in dismissing the information, the district court reasoned that the substantial assistance agreement was not violative of Sargent's due process rights because the confidential informant did not receive cash in exchange for his involvement, his testimony was not required by the agreement with the police, and the police conduct in the case did not constitute objective entrapment under Cruz v. State, 465 So. 2d 516 (Fla. 1985), cert. denied, 473 U.S. 905 (1985). Sargent, 18 Fla. L. Weekly at 1189-1190. Although the court did make use of the objective test outlined in Cruz, supra, in rendering its decision, the court questioned whether the objective entrapment test has been abolished by Florida Statute Section 777.201

(1987). The opinion noted they have continued to uphold the application of the objective entrapment test, notwithstanding the enactment of the entrapment statute. The Fifth District also recognized that the Second, Third, and Fourth District Courts of Appeal, have considered the objective entrapment a viable defense, despite the enactment of Florida Statute Section 777.201 (1987). Sargent, 18 Fla. L. Weekly at 1189-1190. In that regard, the Fifth District Court of Appeal certified the following question to be of great public importance:

> WHETHER SECTION 777.201, FLORIDA STATUTES (1987), SUPERSEDES THE DECISION IN CRUZ AND PLACES THE DECISION ON BOTH THE SUBJECTIVE AND OBJECTIVE ASPECTS OF ENTRAPMENT IN THE HANDS OF THE TRIER OF FACT EXCEPT IN SITUATIONS WHERE THE GOVERNMENT CONDUCT IS SO OUTRAGEOUS THAT CONSTITUTIONAL DUE PROCESS REQUIRES DISMISSAL?

Sargent, 18 Fla. L. Weekly at 1190. On June 4, 1993, Petitioner Sargent filed a notice to invoke this Court's discretionary jurisdiction on this question certified to be of great public importance. This appeal follows.

STATEMENT OF THE FACTS

Petitioner Sargent's arrest arose from an alleged attempted drug purchase, set up by a confidential informant working for the Osceola Sheriff's Office. The confidential informant, Mike Diaz,[2] was arrested on October 8, 1990 for committing the felony offense of delivering LSD to an undercover officer, named Agent Dennis (R4, 5-6, 26). Mr. Diaz sold LSD, which turned out to be a counterfeit substance, to Agent Dennis (R27). Mr. Diaz had been the target of the police officers investigation, and another confidential informant set up the deal which resulted in Mr. Diaz's arrest (R49). Mr. Diaz was the "supplier" of LSD and marijuana (R49). Mr. Diaz, however, denied that he was ever arrested for sale and delivery of LSD, and instead testified that he turned himself in because he "wanted to stop" and "that he could help them get whoever was supplying me with it [LSD]" (SR5-6).

Agent Haydel's first contact with Mr. Diaz was on October 29, 1990, when Mr. Diaz's father brought him into the sheriff's department (R5, 28). Mr. Diaz's father worked for one of the detectives in the department, and Mr. Diaz's father turned in an additional sixty-three hits of LSD (which belonged to Mr. Diaz) to police department (R28, 53).

Officer Haydel offered Mr. Diaz a substantial assistance agreement. The officer testified that the agreement was offered

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[2] Also referred to as confidential informant # 9-33, or 9-32 (R63).

where the lab was located (R49). The department targeting the illegal distribution of LSD, and not marijuana (R59). It was not clear why the officer thought Mr. Diaz could lead them to an LSD lab, when he sold only a substitute drug to Agent Dennis (R63-64). The informal agreement provided that Agent Haydel would not file charges against Mr. Diaz, as long as Mr. Diaz "made" three cases for the police, and testify if necessary (R5, 32, 47, 90). The State Attorney's Office was never notified of the pending charges, or of the substantial assistance agreement, and it was never ratified or approved by a prosecuting attorney (R34, 53, 91).

Agent Haydel testified that if Mr. Diaz had told him that he did not know anyone who sold drugs, or if he could not be of any assistance, then the agent would file charges against Mr. Diaz (R55). Mr. Diaz testified at the an in camera hearing that he "would be in trouble for it [selling LSD]" if he did not make the three cases (SR7-8).

Although Agent Haydel contended that Mr. Diaz had provided the name "Chris" and an address (supposedly referring to Mr. Sargent) on a list of people he had dealings with, Mr. Diaz testified that he never provided Mr. Sargent's name on the list, and did not even mention the name Christopher Sargent to the agent until the date of Mr. Sargent's arrest (R8, SR10). Mr. Diaz was told not to set up deals on his own, however, he was not given any specific instructions as to how to proceed (SR8). The officer testified that the investigation was not to be directed

against those people with whom the C.I. may have occasionally or socially consumed drugs (R33). The prosecutor stated that there was no written contract for the assistance agreement, but Agent Haydel testified that Mr. Diaz was given a confidential informant "packet" (R11, 94).[3] Mr. Diaz testified that he was not given specific criteria to follow, but Haydel rather "left it up to me" (SR8).

Both Mr. Sargent and Mr. Diaz testified that they were friends (SR10, R67). Mr. Sargent had purchased LSD from Mr. Diaz in the past (R67). The same "hits" of LSD Mr. Sargent bought from Mr. Diaz was the LSD found in Ms. Madgers purse, and the LSD found in Ms. Madgers purse provided the basis for the charge brought against Mr. Sargent (R67-68, 132). In other words, Petitioner Sargent was charged in this case with possessing precisely the same LSD the confidential informant had sold him.

Mr. Sargent testified that Mr. Diaz contacted him first about getting some marijuana, and then Mr. Sargent called him back (R68, 70). Mr. Diaz, however, testified that Mr. Sargent called him and said he had some marijuana available (SR10). Since they had been friends, Mr. Diaz knew where Mr. Sargent lived, and knew his phone number (R68). Mr. Diaz and Mr. Sargent would smoke marijuana with each other if either one had any (R67). Mr. Sargent would "buy an ounce for himself" on occasion (R68).

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[3] The State submitted an "information source statement," consisting of a one page agreement, filed as part of the supplemental record on appeal at page 17.

On the date of the arrest Mr. Diaz was the one who set up the meeting place and time (R46, 71). After Mr. Diaz had arranged to get marijuana from Mr. Sargent, Mr. Diaz called agent Haydel, and they made plans to go together to the Ames parking lot to meet Mr. Sargent (R69, SR10). Mr. Sargent was supposed to get gas money and "a couple of joints" for delivering the marijuana to Mr. Diaz (R70). Mr. Sargent waited in the parking lot, and Mr. Diaz approached him and said that his ATM card was not working (R78-79). Mr. Sargent then left the parking lot, and planned to keep the marijuana for himself, as no arrangements were made at this time for Mr. Diaz to purchase the marijuana, or to deliver any currency to Mr. Sargent (R79). Mr. Diaz was not wired or monitored in any way, and nothing changed hands (R21, 23). The only manner in which the officer gained knowledge of the attempted transaction was from what Mr. Diaz alleged, and the officer testified that there was no way to corroborate what had occurred between the C.I. and Mr. Sargent (R35).

After Mr. Sargent pulled away, the police officers conducted a traffic stop of his vehicle, and cited Mr. Sargent's conversation with Mr. Diaz as probable cause to conduct a search (R40, 47, 96). The drugs were found in Ms. Madger's purse (R25). Ms. Madgers did not give the officer consent to search her purse (R47). The traffic stop and search led to Mr. Sargent's arrest.

SUMMARY OF THE ARGUMENTS

POINT I: The enactment of Florida Statutes Section 777.201 (1987), did not destroy the defense of objective entrapment. The legislature may not supersede constitutionally protected rights by statute. Since its enactment, the district courts and this Court have continued to apply the objective entrapment defense. It is a threshold issue, properly considered in a pretrial motion to dismiss. Due process requires that the objective entrapment defense set forth by this Court in Cruz, supra, remain in place. Petitioner respectfully requests that this Court answer the certified question in the negative.

POINT II: The trial court properly granted Petitioner Sargent's motion to dismiss, based on the fact that he was entrapped. Mr. Sargent's constitutional rights to due process were violated by the officers of the Osceola Sheriff's Department, and entrapment as a matter of law and fact was established. There was sufficient evidence presented to support the trial court's conclusion that entrapment occurred. The facts revealed during the hearings clearly supported the trial court's findings. The trial court's order came to the Fifth District Court of Appeal with the presumption of correctness, and this ruling should not have been disturbed. Petitioner requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal, and reinstate the trial court's finding that entrapment occurred in this case as a matter of law.

ARGUMENTS

POINT I

WHETHER SECTION 777.201, FLORIDA STATUTES (1987), SUPERSEDES THE DECISION IN CRUZ AND PLACES THE DECISION ON BOTH THE SUBJECTIVE AND OBJECTIVE ASPECTS OF ENTRAPMENT IN THE HANDS OF THE TRIER OF FACT EXCEPT IN SITUATIONS WHERE THE GOVERNMENT CONDUCT IS SO OUTRAGEOUS THAT CONSTITUTIONAL DUE PROCESS REQUIRES DISMISSAL?

The trial court correctly determined that Petitioner Sargent was entrapped by the Osceola County Sheriff's Department and dismissed the information. In reaching the conclusion that the information should be dismissed, the trial judge made use of the objective entrapment test 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). On appeal the State argued that Mr. Sargent did not carry the burden of showing that he was "subjectively entrapped" and that the police conduct did not constitute objective entrapment. The State did not argue below, or on appeal, that the objective entrapment test had been abolished by statute.

The Fifth District Court of Appeal reversed the trial court's order dismissing the information. In doing so, the district court employed the objective entrapment analysis set forth in Cruz, supra. The district court, however, went on to question the viability of the objective entrapment defense in light of the legislature's enactment of Florida Statute Section 777.201 (1987). State v. Sargent, 18 Fla. L. Weekly D1198 (Fla.

5th DCA May 7, 1993). The court noted that it has heretofore upheld this use of this defense, despite the enactment of the statute defining entrapment. The opinion also mentioned that all the remaining districts, except the First District Court of Appeal, "have either specifically or impliedly recognized that the objective entrapment defense defined in Cruz is still viable and is a matter which the trial court may decide in response to a pretrial motion to dismiss the charges." Sargent, 18 Fla. L. Weekly at 1189-1190.

The conflict as to the viability of the objective entrapment defense has not yet been resolved by this Court. The Fourth District Court of Appeal in Krajewski v. State, 597 So. 2d 814 (Fla. 4th DCA 1992), held that the objective entrapment defense was still viable. The First District Court of Appeal in State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991), summarily found that § 777.201 had abolished the objective entrapment test set forth in Cruz, supra. In Krajewski v. State, 18 Fla. L. Weekly S397 (Fla. July 1, 1993), this Court remarked that jurisdiction has been accepted in State v. Munoz, 586 So.2d 515 (Fla. 1st DCA 1991), review granted, 598 So.2d 77 (Fla. 1992), and stated that in Munoz, the Court will be resolving the conflict as to the viability of the objective entrapment defense.

It is Petitioner Sargent's position that the enactment of Florida Statutes Section 777.201 (1987) did not destroy the defense of objective entrapment. The Florida Entrapment Statute 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 perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crimes by employing methods of persuasion or inducement which creates 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.

Section 777.201, Fla. Stat. (1987).

It should first be noted that this statutory section in no way supersedes the objective entrapment defense defined in Cruz, because it fails to define the defense. A close examination of the language of the statute, as compared with the definition of entrapment defined by case law, reveals that the statute utterly fails to codify the defense of objective entrapment. It should therefore follow, that the objective entrapment defense still stands.

Specifically, as opposed to the decision in Cruz, the statute does not provide for a defense where the police or law enforcement agent engaged in impermissible activities. Although the last part of subsection (1) of the statute seemingly defines the outer limits of the police conduct as that "which create[s] a substantial risk that such crime will be committed by a person

other than the one who is ready to commit it," there is present the additional requirement that the defendant also be predisposed to commit the offense. The holding in Cruz, supra, however, provides otherwise. The question of whether a defendant is predisposed to commit a crime and whether the police conduct was overreaching are two very distinct issues. The question of the propriety of police activity is a legal issue not to be decided by the trier of fact and it is not clearly defined in Section 777.201, Florida Statutes (1987). "No matter what the defendant's past record and present inclinations to criminality, or the depth to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crimes is not to be tolerated by an advanced society.... Permissible police activity does not vary according to the particular defendant's concern." Cruz, 465 So.2d at 520, quoting, Sherman v. United States, 356 U.S. 369, 382-83 (1958). Allowing the statute to abrogate the holding in Cruz, would therefore permit the legislature to ratify improper police conduct, except in those cases where the defendant is found not to be "predisposed" to commit a certain crime. Abolishing the threshold objective entrapment would allow for the sanctioning of misconduct, based merely upon the defendant's character or propensity to commit crime.

Furthermore, the legal limits of the police department's conduct is clearly a threshold issue to be decided by the trial court prior to submitting the entrapment issue as defined in

Florida Statute Section 777.201 to the trier of fact. The jury should not be the only entity charged with the role of determining appropriate police conduct, or the outer limits of police conduct, as this is a question of law.

An analogy can be made to certain search and seizure questions which hinge on possible police misconduct. Issues such as these are appropriately dealt with as a pretrial matter, with the trial court ruling upon the validity of a search before the issue goes before the trier of fact. A defendant cannot be precluded from arguing whether his or her constitutionally protected rights were violated by the state in the form of a pretrial motion to dismiss based on objective entrapment standards. This would be the result if this Court finds answers the certified question in the affirmative,

This Court in State v. Hunter, 586 So. 2d 319 (Fla. 1991), made it abundantly clear that the objective entrapment analysis announced in Cruz, supra, remains the law in Florida. The Hunter court, despite the existence of Florida Statutes § 777.201, and the date of Hunter's offenses, nevertheless held that the district court erred by failing to decide the appeal based on an objective entrapment analysis. Hunter, 586 so. 2d at 321-322. As the majority opinion and Justice Kogan's concurring opinion made clear, objective entrapment is a judicially created doctrine which involves constitutionally protected due process considerations and exists "simultaneously" with the subjective view of entrapment. Id., at 324.

In accordance with this Court's decision in Hunter, supra, the Second District Court of Appeal in Bowser v. State, 555 So. 2d 879, 881 (Fla. 2d DCA 1989), provided:

> Neither party has addressed the application to this case, if any, of Section 777.201, Florida Statutes (1987). However, we determined it to be appropriate to state that we decline to follow the footnoted suggestion of our colleagues of the Third District that the objective test of Cruz has been abolished by Section 777.201. See Gonzalez v. State, 525 So. 2d 1005 (Fla. 3d DCA 1988); State v. Lopez, 522 So. 2d 537 (Fla. 3d DCA 1988). Other colleagues on the Fourth District apparently concur with our view that the Cruz objective test remain viable. State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989). There is nothing expressed or implied in the wording of Section 777.201 which to us, can be seized upon to reveal any legislative intent to abolish the Cruz objective test. Moreover, while the Cruz decision recognizes that its objective test analysis is not founded on constitutional principles, it does not parallel a due process analysis. Cruz, 465 So. 2d at 520, n.2. As the Cruz court stated: "The objective view is a statement of judicially cognizable considerations worthy of being given as much weight as the subjective view." Cruz, 465 So. 2d at 520 (emphasis supplied). As the New Jersey Supreme Court pointed out in State v. Molnar, 81 N.J. 475, 410 A.2d 37 (1980), the objective test is utilized to prevent conduct that tends to impugn the integrity of a court. Those matters are such that they are exclusively within the power of a court to determine as a matter of law." Id. at 881 (emphasis in original).

Even the Third District Court of Appeal, which has ruled to the contrary, has stated that the doctrine of objective entrapment is still viable in Florida pursuant to general due process considerations. Gonzalez v. State, 571 So. 2d 1346, 1349-1351 (Fla. 3d DCA 1990). Indeed, the position of the

Gonzalez courts that Florida Statutes Section 777.201 abolish the Cruz test remains unclear based upon the court's statement that: "In sum, although the entrapment statutes did not codify the Cruz objective test, the federal due process clause, which we of course are obligated to enforce, continues to mark the outer limits of permissible police conduct." Gonzalez, 571 So. 2d at 350 (emphasis supplied).

Only the First District Court of Appeal has conclusively held that the objective entrapment test of Cruz has been abolished by Florida Statutes. Munoz, supra. That decision is questionable, however, because it relied on Krajewski, supra, which the Fourth District receded from in Strickland v. State, 16 Fla. L. Weekly D2671 (Fla. 4th DCA October 16, 1991). Additionally, the one paragraph per curium decision in Munoz does not cite to Hunter. It is clear that this court's holding in Hunter, and the greater weight of the other District Court opinions, clearly reaffirm the vitality of the due process based entrapment test annunciated in Cruz. The legislature may not supersede constitutionally protected rights by statute.

In examining the question certified by the Fifth District in this case (included as the question presented herein), some other problems arise. The objective entrapment is essentially a due process analysis. See generally Brown v. State, 484 So. 2d 1324 (Fla. 3d DCA 1986), review denied, 492 So. 2d 1330 (Fla. 1986). The certified question, however, asks whether section 777.201 "supersedes" the decision in Cruz and places the decision on both

the subjective entrapment and objective aspects of entrapment in the hands of the trier of fact except in situations where the government conduct is so outrageous that constitutional due process requires dismissal." Sargent, 18 Fla. L. Weekly at 1190 (emphasis added). This does not make sense, and should be reworded. It ignores the fact that objective entrapment is in fact a due process consideration. If the statute does in fact abolish the objective entrapment defense, then how and when will the determination be made as to whether a certain case falls within the underlined exception? It seems to distinguish between levels of due process violations, and fails to recognize that a determination of whether the "government conduct is so outrageous" is a threshold issue included in an objective entrapment analysis.

In summary, it is clear that Florida Statutes Section 777.201 had not abolished the objective entrapment defense. The legislature should not be permitted to abrogate a constitutionally mandated defense. Since its enactment, the district courts and this Court have continued to apply the objective entrapment defense. It is a threshold issue, properly considered in a pretrial motion to dismiss. Due process requires that the analysis and finding establishing and defining objective entrapment set forth by this Court in Cruz remain in place. Petitioner respectfully requests that this Court answer the certified question in the negative.

POINT II

THE TRIAL COURT PROPERLY GRANTED APPELLEE'S MOTION TO DISMISS WHERE MR. SARGENT WAS ENTRAPPED AS A MATTER OF LAW.

The trial court's order granting Appellee's motion to dismiss comes to this court clothed with a presumption of correctness. Medina v. State, 466 So. 2d 1046, 1049-1050 (Fla. 1985); Johnson v. State, 438 SO. 2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). An appellate court shall not disturb the lower court's ruling if there is any legal basis to sustain it. Sommer v. State, 465 So. 2d 1339 (Fla. 5th DCA 1985). In reviewing the order, all evidence an the reasonable inferences and deductions therefore must be reviewed in the light most favorable to sustaining the trial court's ruling. Medina, supra,; Johnson, supra The trial court was given the opportunity to observe the witnesses, and determine their credibility. There slightly different versions of how the "deal" was set up, and the trial court ruled in favor of Mr. Sargent. It should also be noted that Mr. Diaz's testimony even conflicted with the officer's testimony concerning how Mr. Diaz got involved with the police, in that Mr. Diaz even denied ever being arrested for selling LSD (SR5-6). Additionally, the appellate court if required to examine the facts presented in the light most favorable to the trial court's ruling.

The trial court ruled in favor of Petitioner Sargent. The trial court's written order granting Mr. Sargent's motion to dismiss cited Krajewski v. State, 587 So. 2d 1175 (Fla. 4th DCA

1991), State v. Hunter, 586 So. 2d 319 (Fla. 1991), and State v. Adams, 17 Fla. L. Weekly D1564 (Fla. 5th DCA June 26, 1992), as support for the ruling (R154). In the light most favorable to Appellee, the evidence showed that Mr. Sargent was entrapped as a matter of law, because the police activity did not have as its end the interruption of a specific ongoing criminal activity, and did not use means reasonably tailored to apprehend someone involved in ongoing criminal activity. Cruz v. State, 465 So. 2d 516, 522 (Fla. 1985), cert. denied, 473 U.S. 905 (1985).

In Cruz, supra, this Court recognized that the issue of "objective entrapment" is a matter of law for the Court to decide without reference to any element of the predisposition of the accused. Cruz, supra, set forth the test to determine the existence of objective entrapment as follows:

> To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where the police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonable tailored to apprehend those involved in the ongoing criminal activity.

Cruz, 465 So. 2d at 522 (emphasis added).

This Court reaffirmed the doctrine of "objective entrapment" established in Cruz, by specifically holding that:

> "In Cruz we stated that the state must "establish initially whether 'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'" 465 So.2d at 521 (quoting Sherman v. United States, 356 U.S. 369,382 (1958), Frankfurter, J., concurring in result). To guide trial courts, we set out a threshold test for es-

> tablishing entrapment: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Id. at 522 (emphasis added). By focusing on police conduct, this objective entrapment standard includes due process considerations.
>
> Diamond had become the state's agent, and his acts must be construed as "police activity." His activities, however, meet neither part of the Cruz test, let alone both, because there was no "specific ongoing criminal activity" until Diamond created such activity in order to meet his quota. Therefore, as in Cruz, Conklin established entrapment as a matter of law, and the trial court erred in denying his motion for judgment of acquittal based on entrapment. Cf. Myers, Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985), review denied, 488 So.2d 831 (Fla. 1986)."

Hunter, 586 So. 2d at 321-322 (emphasis added).

The State of Florida clearly cannot rebut the existence of the first prong of the Cruz, supra, and Hunter, supra, threshold test in this case. First of all, by Agent Haydel's own testimony, it was abundantly clear that there was never any ongoing criminal investigation of Mr. Sargent, other than that instigated by Mr. Diaz. Agent Haydel stated that he was given the name "Chris" and an address, but Mr. Sargent was never a target of an investigation or someone the police wanted to go after. In fact, Haydel testified that Mr. Diaz violated his confidential informant agreement by setting up a deal with Mr. Sargent on his own, and without the agent's authorization (R39).

When Agent Haydel was asked, "There was no requirement of this C.I. [Mr. Diaz] that he make cases on people who were

actively in the business of selling smaller or larger quantities of drugs, is that correct?," he responded "No. We just required him to, you know, help us by introducing us to a person that he had prior dealings with, or you know, purchasing" (R33). The police, therefore by the agent's own admission were not looking into specific ongoing criminal activity. Apparently, Mr. Diaz had only used drugs with Mr. Sargent in a social setting. Agent Haydel also testified that his primary concern in entering into a substantial assistance agreement with Mr. Diaz was to find the supplier of the LSD he sold (R59). There had been no allegations whatsoever that Mr. Sargent was ever involved in the sale of LSD. See also Smith v. State, 575 So.2d 776 (Fla. 5th DCA 1991) (applying the Cruz, supra threshold test of objective entrapment). Mr. Sargent was not targeted as a "dealer," in any sense of the word, although he was admittedly engaged in using marijuana for his personal use. Where law enforcement, with the cooperation of an informant, does not have as its end the interruption of specific, ongoing criminal activity by the target of the investigation, but rather initiates, instigates, generates the essential first prong of the Cruz, supra, threshold test for the "objective entrapment." Pezzella v. State, 513 So.2d 1328, 1329 (Fla. 3d DCA 1987); Marrero v. State, 493 So.2d 463 (Fla. 3d DCA 1985); review denied, 488 So.2d 831 (Fla. 1986). In the instant case, the confidential informant set up the meeting with Mr. Sargent, and there was no corroboration of an attempted drug sale before the police stopped and searched Mr. Sargent. As the

Court in Cruz discussed:

> "The first prong of this test addresses the problem of police "virtue testing", that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Robert wrote in his separate opinion in Sorrels [287 U.S. 435, 453-454, 53 S.Ct. 210, 217 (1932)], "Society is at war with the criminal classes," Police must fight this war, not engage in the manufacture of new hostilities."

Cruz, 465 So. 2d at 522. See also Lewis v. State, 17 Fla. L. Weekly D793 (Fla. 3d DCA March 24, 1992) (fact that payment to the C.I. was not predicated on informant testifying did not defeat entrapment defense; defendant not engaged in specific ongoing criminal activity and means used to apprehend him were not proper under Cruz).

The second prong of the Cruz, supra, Hunter, supra, test if clearly not in issue in the instant case where there is not ongoing criminal activity on the part of the accused such that the Court would need to examine whether law enforcement "utilize(d) means reasonably tailored to apprehend" individuals so involved. This second prong of the Cruz test is examined only if there existed specific ongoing criminal activity on the part of the accused before law enforcement's involvement. Hunter, 586 So. 2d at 322.

As stated in Hunter, "objective entrapment" focuses on the "objective acts" leading up to the Defendant's arrest, not on the predisposition of the accused. Nor does "objective entrapment" involve such issues as whether, regardless of predisposition, the

accused nevertheless demonstrated "ready acquiescence" to participate in criminal activity that is generated by law enforcement. State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983).

As this Court stated in State v. Banks, 499 So.2d 894 (Fla. 5th DCA 1986), actions of law enforcement must be "accurately directed only at the apprehension of one involved in a specific ongoing criminal activity." Id. at 895 (relying upon and applying the Cruz test). This "objective entrapment standard" has specifically been held to include due process considerations, Hunter, supra, seemingly rooted at a minimum in Article I, Section 9 of the Florida Constitution (concurring opinion of Justice Kogan, Hunter, 586 So. 2d at 325). Indeed, therefore, the legislature is without authority to even attempt to authorize law enforcement to do what they have in the instant case -- to-wit: create new criminal activity.

Even assuming, arguendo, that the second prong of the Cruz test need be addressed at all by this Court, law enforcement clearly did not employ "means reasonably tailored to apprehend" someone involved in ongoing criminal activity. Cruz, 465 So. 2d at 522. Mr. Diaz was not monitored, and had no specific criteria or contract to follow in an attempt to assist in the apprehension of drug vendors. In the instant case, Mr. Diaz testified that he did not ever give Agent Haydel Mr. Sargent's name, and Agent Haydel testified that Mr. Diaz violated the agreement by his attempt to set up a deal with Mr. Sargent. As discussed in the statement of the facts, the sheriff's office was after the

supplier of LSD, and there was never any allegations made that Mr. Sargent was ever involved in with selling this drug. Moreover, Mr. Sargent was charged with possessing the very drugs sold to him by the confidential informant. Furthermore, it cannot be considered "reasonable means" where the confidential informant himself, as Haydel testified, was in violation of the agreement under which he was working. As in State v. Ramos, 17 Fla. L. Weekly 1895, 1896 (Fla. 3d DCA Aug. 11, 1992), where entrapment was found to have occurred as a matter of law, "there was no history, information, or intelligence known to law enforcement of any involvement of the Defendants in any narcotics activities of drug 'rip-offs' before the confidential informant brought the Defendants into the scheme."

This Court's ruling in State v. Krajewski, 589 So. 2d 254 (Fla. 1991) does not affect the trial court's ruling in this case. The trial court's ruling in the case sub judice was not based on the fact that Mr. Diaz may get a reduced sentence. However, it should be noted as a factor that Mr. Diaz was clearly pressured by the fact that he would be facing a felony conviction if he did not "make" three felony cases. The district court's finding that entrapment did not occur based on the fact that Mr. Diaz did not received money is clearly in error, and does not view the facts in the light most favorable to the trial court's ruling. The situation here is analogous to Hunter, where the Court found that their CI's interest in securing his own freedom defeated the purpose of the substantial assistance agreement by

encouraging the CI to convince another to traffic in cocaine. "In essence, a convicted cocaine trafficker was allowed to secure his own freedom by convincing someone else to traffic in cocaine." Hunter v. State, 531 So. 2d 239, 242-243 (Fla. 4th DCA 1988).

The outrageous actions of the confidential informant under the direction of Agent Haydel offended basic notions of due process and fundamental fairness guaranteed by Article I, Section 9, of the Florida Constitution. Hunter, supra. It is not up to the appellate court to re-weigh the fact finder on credibility issues, and the trial court properly found that Petitioner Sargent was entrapped as a matter of law. The trial court correctly ruled that the motion to dismiss be granted, and Petitioner requests that this Honorable Court reverse the district court's decision, and reinstate the ruling of the trial court.

CONCLUSION

BASED ON the arguments contained herein, and authorities cited in support thereof, Petitioner requests that this Honorable Court answer the certified question in the negative, reverse the decision of the Fifth District Court of Appeal, and affirm the ruling of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Christopher N. Sargent, 823 Kentucky Avenue, Apt. B, St. Cloud, Florida 34769, on this 30th day of July, 1993.

SOPHIA EHRINGER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER N. SARGENT, Appellant/Petitioner, vs. STATE OF FLORIDA, Appellee/Respondent.	)	SUPREME COURT CASE NO. 81,911

A P P E N D I X

92-81 SE A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1993

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

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 92-92

CHRISTOPHER N. SARGENT,

Appellee.

Opinion filed May 7, 1993

Appeal from the Circuit Court
for Osceola County,
Belvin Perry, Jr., Judge.

Robert A. Butterworth, Attorney General,
Tallahassee, and Nancy Ryan,
Assistant Attorney General,
Daytona Beach, for Appellant.

James B. Gibson, Public Defender,
and Sophia B. Ehringer,
Assistant Public Defender,
Daytona Beach, for Appellee.

DIAMANTIS, J.

The state appeals the order entered by the trial court dismissing the charges of possession of lysergic acid diethylamide (LSD)[1] and possession of marijuana[2] which were filed against appellee, Christopher Sargent. The trial court dismissed these charges because it concluded that the state's use of a

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[1] §§ 893.13(1)(a)2, 893.03(1)(c), Fla. Stat. (1989).

[2] §§ 893.03(1)(c), 893.13(1)(f), Fla. Stat. (1989).

confidential informant (CI) to help establish its case against Sargent either violated Sargent's due process rights or constituted objective entrapment. We disagree with the trial court's conclusion and, therefore, reverse the order of dismissal and remand this cause for further proceedings.

The CI involved in this case had been arrested on a charge of selling LSD after a female confidential informant had attempted to purchase some marijuana from the CI at the CI's residence. The CI advised her that he did not have any marijuana but that he could sell her LSD. After his arrest on the charge of selling LSD, the CI was offered a substantial assistance agreement because the Osceola County Sheriff's Department was trying to find out from whom the CI was obtaining his LSD and, ultimately, where the LSD laboratory was located. Specifically, the sheriff's department offered to drop the charges against the CI if he helped to establish three felony cases against persons known to deal in drugs. The CI was not given any money as part of the agreement or required to testify at trial. The CI was instructed to abide by several guidelines, including the instruction not to engage in any "buys" without approval. The sheriff's department agreed to make every reasonable effort to keep the identity of the CI confidential but informed the CI that his identity might be disclosed and that he might be ordered to testify in court.

The CI provided the sheriff's department with a list of four or five names, including the name "Chris", who lived on Kentucky Avenue in St. Cloud.[3] On November 15, 1990, the CI informed the sheriff's department that appellee, Christopher Sargent, had called twice offering to sell marijuana. Sargent

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[3] Sargent's address at the time of his arrest was 823 Kentucky Avenue, St. Cloud, Florida.

testified that the CI, who was known to him for the past two years as Mike Diaz, called him first and asked where he could purchase marijuana and that Sargent then called Diaz back with an offer to sell him an ounce of marijuana. Sargent also testified that in the last two years he had sold marijuana to Diaz approximately ten times, that they had smoked marijuana together, and that Diaz had sold LSD to Sargent in the past. That night officers of the sheriff's department conducted surveillance of a prearranged meeting between Diaz and Sargent in a parking lot. Before any drugs changed hands, the officers arrested Sargent and a woman accompanying him. The officers found one ounce of marijuana and seven "hits" of LSD in the woman's purse. Sargent testified that he had bought the seven "hits" of LSD from Diaz a month earlier.

Under State v. Hunter, 586 So. 2d 319, 320-321 (Fla. 1991), the substantial assistance agreement in this case does not violate the due process rights of Sargent because Diaz did not receive any remuneration for helping the sheriff's department establish the three felony drug cases and the substantial assistance agreement did not require Diaz to testify. See also State v. Ramos, 608 So. 2d 830 (Fla. 3d DCA 1992), rev. granted, No. 81,042 (Fla. Mar. 19, 1993); Pidkameny v. State, 569 So. 2d 908 (Fla. 5th DCA 1990).

The more difficult question involves the issue of entrapment. In Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985), the Florida Supreme Court outlined the defenses of entrapment, explaining that a defendant may raise both a subjective entrapment defense and an objective entrapment defense. The objective entrapment defense focuses on the police conduct leading up to defendant's arrest. The court ruled that the determination as to whether police conduct

constitutes objective entrapment must be made by reference to the following test:

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

Cruz, 465 So. 2d at 522. The first prong of the test is aimed at discouraging the police from manufacturing new crimes where, but for the activities of the police, no crime would exist. The second prong of the test is concerned with preventing the police from inducing someone into committing a crime, either by persuading the person that the conduct is not illegal or by using 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. Cruz, 465 So. 2d at 521-522. If the police conduct was such as to constitute entrapment, then the trial court is authorized to dismiss the charges as a matter of law.

In Cruz, the court also discussed the subjective entrapment defense, explaining that the subjective entrapment defense focuses on whether the defendant was predisposed to commit a particular offense. The existence of subjective entrapment is a question of fact for the jury. Cruz, 465 So. 2d at 519. The defense of subjective entrapment may be raised at trial even though the trial court has ruled previously as a matter of law that the police conduct did not constitute objective entrapment.

Subsequent to Cruz, the legislature enacted section 777.201, effective as to offenses committed on or after October 1, 1987, which generally codifies the defense of entrapment without distinguishing between the theories of objective and subjective entrapment:

> 777.201 **Entrapment.--**
>
> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

§ 777.201, Fla. Stat. (1987).

In Herrera v. State, 594 So. 2d 275 (Fla. 1992), the court upheld the constitutionality of section 777.201(2) and the corresponding criminal jury instruction 3.04(c)(2), rejecting the argument that the statute and jury instruction violate federal and state constitutional due process provisions. While Herrera, in several of its passages, refers to the "predisposition" of a defendant to commit a crime, which historically has been language used in defining subjective entrapment, the majority opinion does not discuss whether section 777.201 includes both the objective and subjective entrapment defenses. See Cruz, 465 So. 2d at 519-521. In this regard, of significant import is the discussion in Cruz concerning the New Jersey entrapment statute:

> Subsequent to the [*State v. Molnar*, 81 N.J. 475, 410 A. 2d 37 (1980)] decision, the New Jersey court held that statutory law had superseded the common law, placing the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact. *State v. Rockholt*, 96 N.J. 570, 476 A. 2d 1236 (1984). Even though the New Jersey court concluded that its common law paradigm had been supplanted, it noted that there may still be

> situations where the government conduct is so outrageous that constitutional due process requires dismissal. See discussion at note 1, *supra*. There is no parallel to the New Jersey legislative action in Florida.

Cruz, 465 So. 2d at 521 n.3. Because the New Jersey entrapment statute closely parallels the Florida entrapment statute, section 777.201,[4] it appears that, when presented with the issue, the Florida Supreme Court will adopt the reasoning of the New Jersey court and rule that the enactment of section 777.201 operates to supersede the decision in Cruz and places the decision on

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[4] The New Jersey statute, N.J.S.A. 2C:2-12, which became effective in 1979, provides in pertinent part:

> 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 either:
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> * * * * * *
>
> (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.
>
> b. Except as provided in subsection c. of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the trier of fact.
>
> c. The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

State v. Rockholt, 476 A. 2d at 1239 (footnote omitted).

both the subjective and objective aspects of entrapment in the hands of the trier of fact except in situations where the government conduct is so outrageous that constitutional due process requires dismissal.

Although our district courts of appeal have not specifically addressed this related issue, the courts have addressed the current issue of the continued viability of the Cruz objective entrapment defense. In this regard our courts are split, with the first district holding that the entrapment statute abolishes the objective entrapment defense. See Gonzalez v. State, 571 So. 2d 1346 (Fla. 1st DCA 1990), rev. denied, 584 So. 2d 998 (Fla. 1991). See also State v. Thinh Thien Pham, 595 So. 2d 85 (Fla. 1st DCA 1992)(question certified); Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991)(question certified); State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991), juris. accepted, 598 So. 2d 77 (Fla. 1992). In contrast, this district, as well as the second, third, and fourth districts have either specifically or impliedly recognized that the objective entrapment defense defined in Cruz is still viable and is a matter which the trial court may decide in response to a pretrial motion to dismiss the charges. This view is primarily based on the supreme court's decision in State v. Hunter, 586 So. 2d 319 (Fla. 1991).[5] See Jeralds v. State, 603 So. 2d 643 (Fla. 5th DCA), juris. accepted, 613 So. 2d 5 (Fla. 1992); Ramos v. State, 608 So. 2d 830 (Fla. 3d DCA 1992), rev. granted,

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[5] Such reliance appears to be misplaced because apparently the crimes in Hunter occurred prior to the enactment of section 777.201. The Florida Supreme Court's opinion in State v. Hunter, 586 So. 2d 319, 320 (Fla. 1991), and the fourth district's opinion, Hunter v. State, 531 So. 2d 239, 240 (Fla. 4th DCA 1988), both indicate that the substantial assistance agreement which led to the arrest of the defendants was rendered pursuant to section 893.135(3), Florida Statutes (1985). More importantly, the fourth district opinion indicates 1986 appellate case numbers 4-86-0807 and 4-86-0808. Consequently, we have reservations concerning whether Hunter should be considered to be a post-statutory case.

No. 81,042 (Fla. Mar. 19., 1993); Lewis v. State, 597 So. 2d 842 (Fla. 3d DCA), juris. accepted, 605 So. 2d 1266 (Fla. 1992); Krajewski v. State, 597 So. 2d 814 (Fla. 4th DCA), juris. accepted, 605 So. 2d 1261 (Fla. 1992); Bowser v. State, 555 So. 2d 879 (Fla. 2d DCA 1989). See also Adams v. State, 600 So. 2d 1302 (Fla. 5th DCA), juris. accepted, 613 So. 2d 1 (Fla. 1992); Smith v. State, 575 So. 2d 776 (Fla. 5th DCA 1991); State v. Purvis, 560 So. 2d 1296 (Fla. 5th DCA 1990).

Applying the objective entrapment analysis set forth in Cruz, we conclude that the police conduct in this case did not constitute objective entrapment.[6] Under Cruz, the threshold question is whether the defendant was involved in specific ongoing criminal activity. See Cruz, 465 So. 2d at 522. Here, Sargent specifically testified that Diaz had purchased marijuana from him at least ten times in the past and that they had smoked marijuana together. Sargent also testified that he had bought LSD from Diaz in the past and that the LSD that he possessed when arrested was purchased around October 15, 1990, two weeks before Diaz became a confidential informant. Accordingly, by his own testimony, Sargent established that a specific ongoing criminal activity was occurring between himself and Diaz. See State v. Purvis, 560 So. 2d 1296 (Fla. 5th DCA 1990); Taffer v. State, 504 So. 2d 436 (Fla. 2d DCA), cause dismissed, 506 So. 2d 1043 (Fla. 1987). Compare State v. Ramos, 608 So. 2d 830 (Fla. 3d DCA 1992), rev. granted, No. 81,042 (Fla. Mar. 19, 1993); Pezzella v. State, 513 So. 2d 1328 (Fla. 3d DCA 1987), rev. denied, 523 So. 2d 578 (Fla. 1988).

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[6] In reaching this decision we recognize that, because this is a post-statutory case, objective entrapment is, in all probability, a question for the fact-finder to determine.

We further conclude that the sheriff's department utilized a means reasonably tailored to apprehend those involved in the ongoing criminal activity. See Cruz, 465 So. 2d at 522. Here, Diaz agreed to "make" three cases and, in exchange, the sheriff's department agreed to drop the charges which were pending against him. Diaz was not given any money as part of the agreement, and the evidence establishes that Diaz was asked first to list those persons he knew who were engaging in drug sales and then was instructed to abide by several guidelines, including the instruction not to engage in any "buys" without approval.

Because we conclude that the police conduct in this case did not violate Sargent's due process rights and did not constitute objective entrapment, we must reverse the order of the trial court and remand for further proceedings consistent with this opinion. Further, because of the great public importance of the impact of the enactment of the entrapment statute upon the decision in Cruz, we certify the following question:

> WHETHER SECTION 777.201, FLORIDA STATUTES (1987), SUPERSEDES THE DECISION IN *CRUZ* AND PLACES THE DECISION ON BOTH THE SUBJECTIVE AND OBJECTIVE ASPECTS OF ENTRAPMENT IN THE HANDS OF THE TRIER OF FACT EXCEPT IN SITUATIONS WHERE THE GOVERNMENT CONDUCT IS SO OUTRAGEOUS THAT CONSTITUTIONAL DUE PROCESS REQUIRES DISMISSAL.

REVERSED and REMANDED.

SHARP, W. and THOMPSON, JJ., concur.