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Confidential Informants: When Crime Pays

MILTON HIRSCH*

This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect, but suffice it to say here, the issue is substantial.¹

In the twenty years since Chief Justice Warren wrote the above quotation, the issue—defining the limits within which the police may use an informant—has become more substantial. In reality, this issue is but one subspecies of a larger topic—the use of “reverse stings”² by the police. Other subspecies include, among others, the payment of contingent fees to informants, the “targeting” of defendants in reverse stings, and entrapment. Generally, courts have allowed prosecutors great latitude in this area. The courts have recognized that the major crime involved in Florida’s drug wars requires wide-ranging responses; therefore, they have approved such investigative and prosecutorial tools as undercover operations, “reverse stings,” and extensive use of confidential informants. Nevertheless, the limits to which Chief Justice Warren alluded must exist, and the courts have struggled to map them.

The jurisprudential fountainhead of reverse stings is *Williamson v. United States*.³ Williamson and co-defendant Lowrey were

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1. *Lopez v. United States*, 373 U.S. 427, 444 (1963) (Warren, C.J., concurring).

2. In response to concerns over such issues, Judge Marvin Mounts of Florida’s Fifteenth Judicial Circuit persuaded the Florida Bar Association to create a subcommittee on “Morality and Reverse Stings.” The subcommittee defined “reverse sting” as “[a]n operation in which law enforcement offers or attempts to deliver or sell, or actually delivers or sells, alleged contraband.”

3. 311 F.2d 441, *reh’g denied*, 340 F.2d 612 (5th Cir.), *cert. denied*, 381 U.S. 950 (1965). Pre-*Williamson* cases are of antiquarian interest only. In *Cantwell v. United States*, 81 F.2d 31 (9th Cir. 1935), an officer of the United States Indian Service hired two Indians to try to

convicted of possessing 179 gallons of whiskey in unstamped containers, in violation of federal law.⁴ Williamson was also convicted of carrying on the business of a wholesale liquor dealer and of willfully failing to pay the special tax that federal law required.⁵ The government's chief witness at trial was a confidential informant. The witness, named Moye, bought the whiskey from Williamson and produced the evidence against Williamson and Lowrey. The government agents paid Moye two hundred dollars for the evidence against Williamson, and one hundred dollars for the evidence against Lowrey.⁶ It was the unexplained and, in the court's view, the unjustified terms of Moye's employment that necessitated reversal:

It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, \$200.00 for Williamson and \$100.00 for Lowrey, to produce the legally admissible evidence against each of them. It may be also that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts or circumstances were developed in the evidence, though Moye's deposition had been taken months before the trial.

Without some just justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed.⁷

In his concurrence, Judge Brown drew an important distinction: "I do not think, however, that this is an aspect of entrapment. Its kinship to entrapment is not that the act of a Government representative induced the commission of a crime. Rather, it is that the

buy liquor from anyone who would sell it to them. The officer had never known or heard of Cantwell and had no reason to believe that he was selling, or was disposed to sell, liquor to Indians. The court rejected Cantwell's entrapment argument on appeal.

In *Cantwell*, the federal officer "furnished the [Indians] two marked \$1 bills with which to make . . . purchases of liquor. . . . [Cantwell] did then and there sell and deliver to them a pint of whisky [sic] and they paid him therefor \$1.50." *Id.* at 31. By the time that the ABSCAM cases came along in the 1980's, the cost of law enforcement via reverse stings had increased slightly. See *infra* note 51.

4. *Williamson*, 311 F.2d at 441; see 26 U.S.C. § 5604(a)(1) (1983).

5. *Williamson*, 311 F.2d at 441 (the court mistakenly referred to the violated statute as § 569(a), see 26 U.S.C. § 5691(a) (1983)).

6. *Id.* at 444-45.

7. *Id.* at 444.

means used to 'make' the case are essentially revolting to an ordered society."⁸ He concluded that, "[f]or Government to offer a specific sum of money [to an informant] to convict a specified subject is really more than civilized sensibilities can stand."⁹ Judge Cameron, dissenting, recognized that the ratio decidendi of *Williamson* was not the subjective, predisposition-type entrapment involved there, but that, "[i]n the majority's view, the very fact of hiring an informer on a contingency is ignoble" and improper.¹⁰

In the twenty years since *Williamson*, courts and commentators have struggled with its teachings. What exactly a prosecutor cannot authorize or permit an informant to do, and what actions are impermissible remain uncertain. What rights of defendants are implicated, and what is the remedy when those rights are transgressed? On retrial, *Williamson* was convicted again. But the pithy per curiam affirmance on appeal serves only to obscure and dilute the import of the first opinion. The court stated:

On the retrial of this case, as our mandate plainly called for, the deposition of Moye was not offered by either party for any purpose. . . . Entrapment as such on this record was not therefore raised. Nor was there any evidence which the Trial Judge knew either judicially, actually, or factually which indicated that the initiation or prosecution of this case was the fruit of any illegal contingent agreement with Moye. On the intrinsic merits, the evidence amply sustained the finding of guilty.¹¹

A contemporary commentator observed that "the opinion in [*Williamson*] is distressingly ambiguous."¹² Only one court before that, in *State v. Glosson*,¹³ found the rationale of *Williamson* sufficiently lucid and self-explanatory to embrace wholeheartedly. To the district court in *United States v. Curry*,¹⁴ the theory of *Williamson* was obvious: "[t]he evil . . . is that the informer is paid only for evidence of crimes not yet committed when the agreement is sealed."¹⁵

8. *Id.* at 445.

9. *Id.*

10. *Id.* at 446.

11. *Williamson*, 340 F.2d at 612.

12. Note, *Recent Decisions: Criminal Law*, 49 VA. L. REV. 1021, 1024 (1963).

13. 10 FLA. L. WEEKLY 56 (Sup. Ct. Jan. 18, 1985). In *Glosson*, the government promised to pay an informant a fee upon the successful prosecution of the defendants. The court held that the defendants, who purchased marijuana from the informant, were denied due process. *Id.* at 57.

14. 284 F. Supp. 458 (N.D. Ill. 1968).

15. *Id.* at 469.

Williamson failed to establish clear guidelines as to what conduct is specifically forbidden. Was it, as the *Curry* court stated, the focusing on crimes not yet committed?¹⁶ Was it the contingent fee arrangement? Was it the targeting of *Williamson* and *Lowrey*? Or was the court simply ruling that the prosecution failed to lay an adequate predicate because it failed to show either the preexistence of "certain knowledge that *Williamson* and *Lowrey* were [already] engaged in illicit . . . dealings,"¹⁷ or that the informant had been "carefully instructed . . . on the rules against entrapment?"¹⁸ The bright-line test that Judge Brown urged in concurrence—that dismissal is required anytime the "Government . . . offer[s] a specific sum of money to convict a specified suspect"¹⁹—does not resolve these problems.

A contingent fee arrangement²⁰ may be offensive, but courts agree that alone it is not enough to warrant dismissal. Judge Cameron pointed out in his dissent in *Williamson* that every informant is, in effect, on a contingent fee basis. "Every such informer knows

16. *Id.*

17. *Williamson*, 311 F.2d at 444.

18. *Id.*

19. *Id.* at 445.

20. The court in *United States v. Dickens*, 524 F.2d 441 (5th Cir. 1975), reproduced with approval a jury instruction that the trial court gave that purported to define a contingent fee arrangement:

If the arrangement between [the informant and the government] by word or by deed, expressly or inferred, was such that he was to receive benefits commensurate with whether or not a case was made against one or more of these defendants, then that becomes a contingent fee. If the evidence is such that what help, if any, or what pay, if any, he was to receive did not depend on the success or validity of whatever he did in this case, then it would not be a contingent fee.

Id. at 446. *Dickens* does not distinguish between the contingency in *Williamson*, where the government promised the informant a flat fee of \$200, and that in *Glosson*, where the informant was to receive a percentage of the civil forfeitures resulting from criminal proceedings. For purposes of a defendant's claim of prosecutorial misconduct, this appears to be an insignificant distinction. Judge Cameron, citing I.R.C. 7214(a), 7623 (1983), seems to suggest in his dissent in *Williamson* that a percentage commission arrangement whereby individuals who inform on tax evaders are routinely awarded a percentage of the "take" is less offensive. *Williamson*, 311 F.2d at 446; see also *United States v. Grimes*, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971) (analogizing contingent fee arrangements in criminal context with percentage of fines paid to those who inform on tax evader). The analogy is inapposite. The collection of taxes is essentially a civil matter, and expenses of collection are properly chargeable to the res, the collection of which is the purpose of the law. The purpose of criminal prosecution is the regulation of criminal conduct and not the generation of income. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(c), EC 7-28 (1979).

Recently, in *United States v. Valle-Ferrer*, 739 F.2d 545 (11th Cir. 1984), the court upheld a contingent fee arrangement where the informant learned after the investigation was completed, and only a few days prior to trial, that he was to receive an additional fee for each defendant convicted.

that his day to day arrangement with the Government will continue only if he delivers the goods. . . . If [he] succeeds in landing some of the criminals the Government is after, he is well paid and his service will continue. If he does not, he is dropped."²¹ The contingent reward for which the informant is working does not have to be money. Instead, the court in *Curry* dramatically described a common alternative.²² The informant's "consideration was far more precious than money. Liberty was his objective, in the form of a dismissal of the complaint against him."²³ The consensus of opinion is that every confidential informant is on a contingent fee basis in the sense that he must "deliver the goods" or forego reward.²⁴ The defendant's remedy is not dismissal of the indictment or information. Rather, the method or form of reward is properly a matter for the jury to consider in weighing the credibility of the evidence presented at trial.²⁵

The result in *Williamson* is most often explained not in terms of the contingent fee arrangement but on the basis of the targeting of the defendants. "*Williamson's* progeny indicates that *Williamson* requires reversal 'only when the specific defendant was picked out for the informer's efforts by a Government agent.'"²⁶

Among the line of Fifth Circuit cases that concentrate on the targeting of defendants, *United States v. Lane*²⁷ involved one Levy Bradley who, after contacting the Fort Worth, Texas, police department, became a confidential informant for the Federal Drug Enforcement Administration (DEA) and participated in approximately twenty-two narcotics transactions.²⁸ The defendants, citing *Williamson*, argued that because the government obtained the incriminating information on a contingent fee basis, the convictions

21. *Williamson*, 311 F.2d at 446.

22. *Curry*, 284 F. Supp. at 469.

23. *Id.*

24. See, e.g., *United States v. Grimes*, 438 F.2d 391, 395-96 (6th Cir.), cert. denied, 402 U.S. 989 (1971).

25. *United States v. Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979).

26. *United States v. Lane*, 693 F.2d 385, 388 (5th Cir. 1982) (citing *United States v. Onori*, 535 F.2d 938, 942-43 (5th Cir. 1976)); see also *United States v. Joseph*, 533 F.2d 282, 285-86 (5th Cir. 1976) (conviction upheld where contingent fee paid with no particular person as target); *United States v. Oquendo*, 505 F.2d 1307, 1310 (5th Cir. 1975) (acquittal denied where no particular person was the target of an informer who was paid for arranging a drug purchase, but who did not go through with the deal); *United States v. Durham*, 413 F.2d 1003, 1004 (5th Cir.) (conviction upheld where informer was paid to investigate numerous suspects), cert. denied, 396 U.S. 839 (1969).

27. 693 F.2d 385 (5th Cir. 1982).

28. *Id.* at 387.

should be reversed.²⁹ The court conceded the existence of the contingent fee arrangement but added that "there [was] no indication in the record that Bradley was to implicate government-targeted defendants. To the contrary, the record demonstrate[d] that Bradley randomly implicated narcotics traffickers and was not directed toward certain individuals by the DEA."³⁰ Similarly, in *United States v. Onori*,³¹ the court found the existence of a contingent fee arrangement:

Even so, the *Williamson* rule does not require that we reverse. *Williamson* has been subsequently limited to require reversal of a conviction only when the specific defendant was picked out for the informer's efforts by a government agent. . . . Although government agents eventually participated in the case, the record does not show that [the informant] was directed by government agents to make a case³²

This language is cited with approval in *State v. Eshuk*,³³ the leading Florida case on government use of informants.³⁴ In *United States v. Joseph*,³⁵ the court stated that, "[h]ere, however, the informants were paid for setting up drug purchases by the undercover agents with no particular person as the target of the buying efforts. . . . This factor takes this case outside the ambit of the *Williamson* doctrine."³⁶

There are conceptual difficulties in building the *Williamson* rationale around targeting. The Supreme Court of the United States and courts generally have sanctioned targeting as an investigative and prosecutorial practice. In *Hoffa v. United States*,³⁷ the Department of Justice used a convict and union associate of the defendant to make the case. In the words of a cellmate, "[the informant] told me during this time that he was working with . . . the FBI to frame Hoffa."³⁸ Nevertheless, the Supreme Court upheld the conviction, thereby implicitly approving the practice of targeting an individual with a view toward criminal conviction.

29. *Id.*

30. *Id.* at 387-88.

31. 535 F.2d 938 (5th Cir. 1976).

32. *Id.* at 942-43 (citations omitted).

33. 347 So. 2d 704, 708-09 (Fla. 3d DCA 1977).

34. See also *United States v. McClure*, 577 F.2d 1021, 1022-23 (5th Cir. 1978); *United States v. Garcia*, 528 F.2d 580, 586 (5th Cir. 1976).

35. 533 F.2d 282 (5th Cir. 1976).

36. *Id.* at 285-86.

37. 385 U.S. 293 (1966).

38. *Id.* at 318 (Warren, C.J., dissenting); see also *id.* at 296 n.3.

The Fifth Circuit and courts that have followed *Williamson* have been uneasy with the notion that targeting is what made the conduct in *Williamson* improper. Instead, a series of opinions, starting with *Hill v. United States*,³⁹ have cited *Williamson* as setting forth a point of evidentiary procedure. As an evidentiary predicate in a *Williamson*-type case, the prosecution must show that the police had "prior knowledge that the accused is [going to] commit the unlawful act."⁴⁰ This line of cases draws on the language in *Williamson* that, "[i]t may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis. . . . None of these facts or circumstances were developed in the evidence"⁴¹

In *Hill*, a detective named Morris expressly arranged with an informant named Odum to assist in the apprehension and conviction of the defendant. Thus, the element of targeting was present. Moreover, Odum was paid ten dollars per day and Morris promised that he would try to get him a three hundred dollar reward if the defendant were caught. Only a year after the *Williamson* opinion was rendered, the Fifth Circuit found it to be inapplicable "[w]hen the government showed, as it did here, that (1) accused had a past record (in this case there were past convictions for the same offense), and (2) that neighbors had informed and complained to an agent of the accused's activities."⁴² If neighborhood gossip and prior convictions are an antedote to the *Williamson* transgressions, *Williamson* is indeed weak poison. The *Hill* court even allowed the introduction of this "predicate" evidence in rebuttal rather than in the government's case in chief.⁴³

The Fifth Circuit continued to approve of contingent fee arrangements and targeting in situations where the government could show that it operated with "prior knowledge" of the defendant's potential for criminal conduct. In *Sears v. United States*,⁴⁴ the court permitted the targeting-plus-contingent-fee practice on the basis of prior government knowledge, where the "prior knowledge" of the defendant's illicit activities came from the confiden-

39. 328 F.2d 988 (5th Cir.), cert. denied, 379 U.S. 851 (1964).

40. *Id.* at 989.

41. *Williamson*, 311 F.2d at 444.

42. *Hill*, 328 F.2d at 989 (citations omitted).

43. *Id.* at 988.

44. 343 F.2d 139 (5th Cir. 1965).

tial informant. "[The informant] approached federal agents and informed them that [the defendant] has accepted payoffs and furnished protection in the past. The federal agents thus had adequate grounds to believe that Sears had been or was engaging in illegal activities."⁴⁵

This line of argument speaks the language of entrapment, making muddy again the waters that *United States v. Russell*⁴⁶ cleared. To ask for proof that the government had knowledge that the defendants were already engaged in illicit dealings is, in effect, to ask for proof that the defendants were predisposed. But *Williamson* is concededly not a predisposition-entrapment case. The pith of the defendants' argument in *State v. Glosson* was that, predisposition notwithstanding, the government's conduct was so improper that no prosecution should flow from it.⁴⁷ Because a defense claim based on governmental over-reaching is "available to even those up to their ears in 'predisposition,'"⁴⁸ prior knowledge is irrelevant. Note that all of the Fifth Circuit cases adopting the "prior knowledge" theory antedate *Russell*.

Furthermore, if *Williamson* is meant to stand for nothing more than a fairly minor point of evidentiary procedure, then it ill-serves the legal community. The issue of governmental misconduct of criminal prosecutions in a free society is a far-reaching one. Its resolution ought not to turn on small procedural technicalities. Prosecutors, defense attorneys, judges, and citizens all have a right and a need to know where the line of demarcation will be drawn between those governmental means that are both justified by their ends and consistent with due process, and those that are neither. These issues must be resolved on their merits.

Two of the three *Williamson* judges—Brown in concurrence and Cameron in dissent—recognized that *Williamson* should not be grounded on evidentiary technicalities. Judge Brown stated boldly that "[f]or Government to offer a specific sum of money to convict a specified suspect is *really more than civilized sensibilities can stand*."⁴⁹ Judge Cameron rejected the argument but recognized that "[t]he majority, in reality, reverses this case because of

45. *Id.* at 144; see also *Harris v. United States*, 400 F.2d 264, 266 (5th Cir. 1968) (prior knowledge that defendant committed an unlawful act sufficient to uphold); cf. *United States v. Ladley*, 517 F.2d 1190, 1192-93 n.2 (9th Cir. 1975) (offering of a "bounty" for activities leading to arrest of defendant did not violate due process).

46. 411 U.S. 423 (1973); see *infra* text accompanying notes 63-73.

47. *Glosson*, 441 So. 2d at 1180 (Nimmons, J., dissenting).

48. *Id.*

49. *Williamson*, 311 F.2d at 445 (emphasis added).

the ignoble part assigned by the Government to the informer.”⁵⁰

The prior knowledge requirement for use of an informant on a contingent fee basis was put to its strictest test in the ABSCAM cases and was found wanting. ABSCAM was a complex Federal Bureau of Investigation undercover operation that ultimately led to the conviction of a number of major political figures.⁵¹ The case

50. *Id.*

51. See *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.) (government's conduct in ABSCAM undercover operation did not reach that demonstrable level of outrageousness that would bar prosecution of defendant congressman), *cert. denied*, 104 S. Ct. 264 (1983); *United States v. Williams*, 705 F.2d 603 (2d Cir.) (in prosecution of United States Senator and second defendant on charges arising out of ABSCAM undercover operation, evidence of defendants' predisposition was sufficient to permit jury to reject defense of entrapment), *cert. denied*, 104 S. Ct. 524 (1983); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) (evidence in ABSCAM prosecution entitled jury to find beyond a reasonable doubt defendant congressman's predisposition to accept a bribe), *cert. denied*, 103 S. Ct. 2437 (1983); *United States v. Alexandro*, 675 F.2d 34 (2d Cir.) (federal law enforcement agents' conduct in asking defendant, an employee of the Immigration and Naturalization Service, to provide a green card in exchange for a bribe did not violate due process), *cert. denied*, 103 S. Ct. 78 (1982); *United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (en banc) (no entrapment as a matter of law where evidence that government presented was sufficient to permit jury to find that defendants had a sufficient predisposition to commit the crimes), *cert. denied*, 457 U.S. 1106 (1982).

Judge Kaufman cogently set out the mechanics and expense of a typical ABSCAM reverse sting in his opinion in *United States v. Alexandro*:

Beginning in January 1979, as part of the investigation termed "Abscam," FBI agent Anthony Amoroso, using the pseudonym Tony DeVito, and Melvin Weinberg, a paid informant, bore the guises of officers of a fictitious corporation, Abdul Enterprises. Through Amoroso and Weinberg, this company supposedly was a vehicle for investing millions of dollars of the wealth of oil-rich Arab sheiks, Kambir Abdul Rahman and Yassir Habib, in business ventures in the United States. To effect the goals of the investigation, Amoroso and Weinberg would often meet with various individuals at the offices of Abdul Enterprises in Holbrook, Long Island and elsewhere and offer them the opportunity to make whatever business proposals they desired. If illegal schemes were proposed, they were pursued by the FBI.

As part of the portrait of limitless Arab riches, lavish parties were held in Florida aboard the luxurious yacht, the *Left Hand*. On March 23, 1979, Alfred Carpentier, a Long Island businessman, at the invitation of Melvin Weinberg, attended one such party. During the course of the affair, Carpentier introduced Amoroso and Weinberg to one of his friends, a supposed Count Montforti. Montforti managed to create an occasion to display a diplomatic passport and documents indicating that he was a Knight of Malta. Carpentier then interjected that Amoroso and Weinberg, or even the sheiks, could rise to Knight of Malta rank with diplomatic status not on merit, but by merely paying \$25,000.

Carpentier had more than bogus knighthood to offer. He stated he could provide passports and green cards for aliens by calling upon the services of Alexander A. Alexandro Sr. and Jr., a father and son team who worked for the Immigration and Naturalization Service. Carpentier, eager to generate illegal and lucrative business with the sheiks, offered to arrange a meeting with the Alexandros at any time their offices were desired.

of Congressman Kelly of Florida is instructive.⁵² The district court accepted Kelly's argument that he had been the victim of outrageous prosecutorial excess where the investigation proceeded absent any suspicion of corruption in government generally, or of Kelly in particular.⁵³

If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being "outrageous." No concept of fundamental fairness can accommodate what happened to Kelly in this case.⁵⁴

Although the court of appeals found ample prior knowledge, on the part of the FBI, of Kelly's wrongdoing,⁵⁵ and thus was not obliged to decide whether due process required prior knowledge,⁵⁶ it still cited with approval the opinions of other ABSCAM reviewing courts.⁵⁷ The Second Circuit in *United States v. Myers*,⁵⁸ and the Third Circuit in *United States v. Jannotti*,⁵⁹ rejected the argu-

Amoroso and Weinberg reported Carpentier's offer to their FBI supervisor, and the decision was reached to pursue it. They would ask Carpentier to obtain a green card for an Irish alien, Thomas Foley, as a favor to the shiek [sic] who was allegedly a friend of Foley's father. Accordingly, on May 30, 1979, Amoroso and Weinberg met with Carpentier and explained that Foley was experiencing difficulty emigrating to the United States. The sheik, they noted, would greatly appreciate assistance in procuring Foley's green card. Carpentier quickly accepted the chance to turn an illegal profit, and named Alexander Alexandro Jr. as the Immigration official who would do the job. The price was normally determined by the alien's wealth and the urgency of his need to enter the United States, Carpentier explained. Although similar operations had cost as much as \$100,000, Carpentier believed that Alexandro, whom he stated was "very good," would charge only \$10,000.

675 F.2d 34, 36 (2d Cir. 1982) (footnote omitted). Thus, although the bartered commodity was different—influence, not narcotics—ABSCAM had all the features of a traditional reverse sting: the seedy informant, the undercover police officers, the temptation of quick profit, the potential for government complicity in illegal acts, etc. In *Myers*, one United States Congressman was handed \$50,000 cash. 692 F.2d at 823. In *Williams*, the court referred to a "proposed loan of \$100 million and . . . proposed profits of \$70 million" made available to a United States Senator. 705 F.2d at 620.

52. See *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.), cert. denied, 104 S. Ct. 264 (1983).

53. *United States v. Kelly*, 539 F. Supp. 363, 371 (D.D.C. 1982), rev'd, 707 F.2d 1460 (D.C. Cir.), cert. denied, 104 S. Ct. 264 (1983).

54. *Id.* at 376.

55. *Kelly*, 707 F.2d at 1471.

56. *Id.* at 1471 n.58.

57. *Id.*

58. 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

59. 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982).

ment that the government must have a reasonable suspicion of wrongdoing before proceeding with an undercover operation. The *Jannotti* court cited *United States v. Silver*,⁶⁰ where the court held that, "it is *inconsequential* whether law enforcement officials did or did not act on *well-grounded suspicion* that the defendant was engaging in wrongdoing" ⁶¹

At this point, the *Williamson* line of cases produces the following precarious standards: (1) prosecutions based on contingent fee arrangements with informants are impermissible unless the government can show that there was no targeting; (2) targeting is impermissible unless the government can show prior suspicion; and (3) lack of prior suspicion is impermissible, unless *it is not*.

In fact, there is no consensus about what exactly is wrong, if anything, with the *Williamson* scenario. Nevertheless, for some reason, the scenario gives courts a funny feeling in their due process bones.

The infirmity in *Williamson* may be merely accidental. *Williamson* was decided in 1962. Prior to *Russell*,⁶² two essentially different theories of entrapment existed. Subjective entrapment turned on the state of mind of the defendant. The test for subjective entrapment comprised two questions:

(1) [D]id the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it.⁶³

By contrast, objective entrapment focused on the conduct of the government.

The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of law-enforcement officials.⁶⁴

60. 457 F.2d 1217 (3d Cir. 1972).

61. *Jannotti*, 673 F.2d at 609 (citation omitted).

62. 411 U.S. 423 (1973).

63. *United States v. Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952).

64. *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring),

In *Russell*, narcotics detective Shapiro met with the defendant and two co-defendants. Shapiro's assignment was to locate a laboratory where, it was believed, methamphetamine was being manufactured illegally.⁶⁵ He offered to provide phenyl-2-propanone, an essential and legal ingredient of methamphetamine, in return for one-half of the drug produced.⁶⁶ Shapiro also saw the defendant's laboratory and some methamphetamine samples. Two days later, Shapiro brought the phenyl-2-propanone and observed the manufacturing process.⁶⁷ He received one-half the product and purchased more.⁶⁸ The following month, after purchasing additional methamphetamine, Shapiro returned with a search warrant.⁶⁹ On defendant's appeal following conviction at trial, the Ninth Circuit reversed, finding an "intolerable degree of governmental participation in the criminal enterprise"⁷⁰ based on the conduct of Shapiro in supplying the scarce ingredient. The Supreme Court, in turn, resolved the definitional schism, holding that where a defendant is subjectively predisposed to the commission of the crime, an entrapment defense must fail.⁷¹ Had *Russell* antedated *Williamson*, the Fifth Circuit and readers of its opinions might have been spared a great deal of confusion.

There is another reason why the legal community has been less than eager to accept the fact that the *Williamson* jurisprudence represents a line of cases in search of a rationale. In resolving the definitional schism in *Russell*, the Supreme Court could not resist leaving the back door open. The Court noted that "[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due

rev'g 240 F.2d 949 (2d Cir. 1957).

65. *Russell*, 411 U.S. at 425.

66. *Id.*

67. *Id.*

68. *Id.* at 426.

69. *Id.*

70. *Russell*, 459 F.2d 671, 673 (9th Cir. 1972), rev'd, 411 U.S. 423 (1973).

71. *Russell*, 411 U.S. at 431-36. This definitional schism, however, refuses to stay dead. Recently, the Supreme Court of Vermont adopted the objective test articulated in the Model Penal Code:

A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, [he or she] induces or encourages another person to engage in conduct constituting such offense by . . . employing methods of persuasion or inducement [that] create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

State v. Wilkins, 473 A.2d 295, 299 (Vt. 1983) (quoting MODEL PENAL CODE § 2.13(1)(b) (Proposed Official Draft 1962)).

process principles would absolutely bar [prosecution] . . . , the instant case is distinctly not of that breed.”⁷² Since that time, the search by criminal lawyers for “the case” has become more than mildly reminiscent of the search by King Arthur’s knights for the Holy Grail. This enthusiasm is understandable. The use of techniques such as reverse stings is a product of the grisly battle between narcotics traffickers and law enforcement officials. Such techniques are, perhaps, a necessary evil. Given the magnitude of drug crime, they appear necessary; given the relative simplicity and forth-rightness of traditional crime-fighting devices, they appear evil. Unsurprisingly, judges and attorneys concerned with the propriety as well as the legality of police action have strained to find a principled basis upon which to attack reverse stings.

*Hampton v. United States*⁷³ represents the Supreme Court’s most far-reaching scholarship in this area. Hampton claimed that he was a conduit in a narcotics transaction that began and ended with the government; i.e., he was prosecuted for the distribution of heroin that he received from a police informant and then sold to a police officer.

The Court, in affirming Hampton’s conviction, split three ways. Justice Rehnquist, speaking for a three-man plurality,⁷⁴ cited the principles of *Russell* in denying Hampton’s claim.⁷⁵ Justice Powell, who concurred, read the plurality opinion as announcing a per se rule: “The plurality thus says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.”⁷⁶ But Justice Powell was unwilling to go as far as the plurality:

[W]e left these questions open in *Russell*, and this case is controlled completely by *Russell*. I therefore am unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition.⁷⁷

72. *Russell*, 411 U.S. at 431-32 (citation omitted).

73. 425 U.S. 484 (1976).

74. Justice White and Chief Justice Burger joined in Justice Rehnquist’s opinion; Justice Blackmun joined in Justice Powell’s concurring opinion; and Justices Stewart and Marshall joined in Justice Brennan’s dissent. Justice Stevens took no part in the case. *Id.* at 484.

75. *Id.* at 491-93.

76. *Id.* at 492.

77. *Id.* at 495 (footnote omitted). For a brief but lucid explanation and application of

Conversely, one well-intentioned but unsound attempt to find the "Holy Grail" issued recently from the Supreme Court of Florida. The defendants in *State v. Glosson*⁷⁸ were charged with trafficking and conspiracy to traffic in cannabis.⁷⁹ The court dismissed the two-count information on the ground of prosecutorial misconduct.⁸⁰ The state and the defendants stipulated to the following facts, upon which the defendants' motions to dismiss were presented:

1. The defense of entrapment has been asserted by each of the defendants charged by information in this case.
2. The State's chief witness in this matter, Norwood Lee Wilson, entered into an oral contract with the Sheriff of Levy County, Florida.
3. The above-mentioned contract was entered into with full knowledge, concurrence and carried out under the investigative supervision of the State Attorney's Office of the Eighth Judicial Circuit.
4. The conditions of this contract with Norwood Lee Wilson was for Wilson to receive ten percent of all civil forfeiture proceedings filed as a result of the criminal investigations which he initiated and in which he participated.
5. The contingency fee was to be paid out of civil forfeitures going to the Levy County Sheriff's Department.
6. Norwood Lee Wilson is required to testify and cooperate in the prosecution of the criminal cases filed as a result of the investigations which he initiated and in which he participated in order to collect the contingent fee.
7. This case is one of the aforementioned cases.
8. The successful prosecution of this case cannot be accomplished without the testimony, participation, and cooperation of Norwood Lee Wilson.⁸¹

Based on these stipulated facts, the trial court entered the order dismissing the information on the basis of prosecutorial misconduct resulting in the denial of constitutional due process.⁸² The

the *Hampton* principles, see *United States v. Nunez-Rios*, 622 F.2d 1093 (2d Cir. 1980) (rejecting a defense of misconduct where a police informant supplied drugs to the defendant).

78. 10 FLA. L. WEEKLY 56 (Sup. Ct. Jan. 18, 1985).

79. 441 So. 2d 1178 (Fla. 1st DCA 1983).

80. *Id.*

81. *Id.* at 1179-80 (Nimmons, J., dissenting).

82. *Id.* at 1179; cf. *Owen v. State*, 443 So. 2d 173 (Fla. 1st DCA 1983) (no prosecutorial

First District Court of Appeal affirmed in a two-to-one decision.⁸³ Judge Joanos stated for the majority:

The state has admitted its involvement in a scheme whereby an individual is promised payment contingent upon his successfully making criminal cases against others to whom he is to sell cannabis. . . . This "payment to make cases against criminal defendants" arrangement deprives the defendants of due process. . . . The circumstances of this case are not a situation where the state merely seeks evidence of criminal activity but is more akin to the manufacturing of criminal activity by the state. We cannot tolerate such behavior under our system of constitutional protections.⁸⁴

Prior Florida case law offered little underpinning for the *Glosson* decision. The first case to give expanded consideration to the *Williamson/Glosson* issues was *State v. Eshuk*.⁸⁵ *Eshuk* involved a conventional "buy/bust," as opposed to a reverse sting. The alleged governmental impropriety lay in the use of an informant, Woosley, who had criminal charges pending against him at all pertinent times.⁸⁶ After canvassing the law and concluding that targeting was the only evil proscribed, the court found that the police conduct at bar was not offensive.⁸⁷

Two years later, in *State v. Dickinson*,⁸⁸ the Florida Supreme Court rejected in dictum "[a] trial court's holding that a high degree of law enforcement participation constitutes a defense to a criminal charge. That issue was squarely confronted in *Russell* and

misconduct where the informant's fee did not depend on the effectiveness of his cooperation). *Owen* distinguished the district court's opinion in *Glosson*, where the fee was contingent on the success of the cases against the defendants. *Id.* at 176.

83. *Glosson*, 441 So. 2d at 1178-79.

84. *Id.* at 1179 (citation omitted).

85. 347 So. 2d 704 (Fla. 3d DCA 1977).

86. *Id.* at 705. Before becoming an informant, Woosley had been arrested on suspicion of committing several burglaries. In *Eshuk*, a dispute arose as to whether Woosley was promised that the investigation of his burglaries would be dropped in exchange for his cooperation as an informant. *Id.*

87. *See id.* at 708-09. The court distinguished *Williamson* by noting that the informant in that case had been promised money if he could make a purchase of contraband from a specified individual. This contingency fee was considered improper because it raised the probability that the informant might use entrapment. *United States v. Joseph*, 533 F.2d 282, 285 (5th Cir. 1976) limited *Williamson* by holding that it is proper to pay an informant to set up a contraband purchase where no particular person is the target of the buying effort. The *Eshuk* court held that the use made of the informant in that case was routine in nature and that it did not matter that the informant had charges pending against him. 347 So. 2d at 709.

88. 370 So. 2d 762 (Fla. 1979).

rejected"⁸⁹ In *State v. Brider*,⁹⁰ the Second District Court of Appeal of Florida, citing *Dickinson*, reversed the dismissal of an information on the premise that "furnishing the contraband with which the defendant is later charged . . . does not constitute governmental misconduct"⁹¹ The second district in turn cited *Brider* in *State v. Sokos*,⁹² which reversed the dismissal of an information where there was a jury question as to the defendants' "ready acquiescence" and intent to commit the crime. In *Sokos*, undercover agents went to Sokos's pizza parlor and offered to sell him untaxed cigarettes.⁹³ The officers had no reason to believe that the defendant or his place of business were involved in any criminal activity. Indeed, the entire reverse sting operation involved fifty-eight individuals; five were chosen at random and the rest were chosen on the basis of prior criminal intelligence.⁹⁴ Nevertheless, the court said that "there is nothing in this record to indicate that the transaction in question was tainted by any governmental misconduct, much less outrageous conduct."⁹⁵

Finally, in *Sarno v. State*,⁹⁶ the Third District Court of Appeal of Florida rejected in a cursory fashion an "outrageous miscon-

89. *Id.* at 763. In *Dickinson*, the court held that there is "no constitutional prohibition against a law enforcement officer providing the opportunity for a person who has the willingness and readiness to break the law." *Id.* at 763.

90. 386 So. 2d 818 (Fla. 2d DCA 1980).

91. *Id.* at 821. The court in *Brider*, citing *Hampton*, acknowledged that because of the problems that law enforcement authorities confront in dealing effectively with an expanding narcotics traffic, [e]nforcement officials must be allowed flexibility adequate to counter effectively such criminal activity. *Id.*

92. 426 So. 2d 1044 (Fla. 2d DCA 1983).

93. *Id.* at 1044. *State v. Bass*, 451 So. 2d 986 (Fla. 2d DCA 1984), held that there is no misconduct where the government merely provides the contraband but does not perform an essential element of the substantive crime. See also *State v. Brandon*, 399 So. 2d 459 (Fla. 2d DCA 1981) (no misconduct where the government provides the money to purchase the contraband). But see *King v. State*, 104 So. 2d 730 (Fla. 1958) (where a police officer conspires with another who unknown to him is a government agent acting in line of duty to commit an offense under an agreement and with the intention that an essential ingredient of the offense is to be performed by and only by, such government agent, such person cannot be legally convicted of a conspiracy).

94. *Id.* at 1045. "The officers did know that sales of stolen property had been made . . . next door . . . and that the defendant associated with [the neighboring establishment]." *Id.* at 1044.

95. *Sokos*, 426 So. 2d at 1045. The defense of entrapment fails even when the defendant has not been involved in prior criminal activity, or been suspected of such activity, if the state can establish the defendant's ready acquiescence in the commission of the crime. Thus, random solicitation of a crime is not necessarily governmental misconduct. But government participation in the offense can constitute misconduct. See *supra* note 93 and accompanying text.

96. 424 So. 2d 829 (Fla. 3d DCA 1982).

duct" attack on a reverse sting.⁹⁷ Thus, the *Glosson* court could draw no support from Florida decisions; it turned to *Williamson* and its progeny for precedent.

If the *Williamson* jurisprudence is a line of cases sailing in search of a rationale, *Glosson* (to strain a metaphor) is hopelessly at sea. First, grounded as it is wholly and solely on *Williamson* and its progeny, *Glosson* suffers from all of the analytical infirmities of those cases.⁹⁸ Second, although Judge Brown's reference in *Williamson* to what "civilized sensibilities can stand" is the language of due process,⁹⁹ the *Williamson* court purported to act under the supervisory power of the federal courts.¹⁰⁰ The *Glosson* court, by contrast, claimed to act under the due process clause.¹⁰¹ Thus, what little precedential support *Glosson* might have hoped to draw from *Williamson* is forfeited.¹⁰² "[T]he Supreme Court has never applied the Due Process Clause to invalidate a conviction based on 'outrageous' governmental inducement,"¹⁰³ and "with the exception of a decision by a divided panel of the Third Circuit, *United States v. Twigg*, . . . convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement after the decisions of the Supreme Court in *Russell* and *Hampton*."¹⁰⁴ *Twigg*¹⁰⁵ involved the following scenario: in October

97. *Sarno* involved a sting operation utilizing extensive "bugging" of offices, telephones, and informants. Because the informants had consented to the "bugs," the defendants in *Sarno* did not have standing to challenge the legality of the means used to acquire evidence against them. 424 So. 2d at 836.

98. See *supra* notes 11-12 and accompanying text.

99. See *Williamson*, 311 F.2d at 445.

100. *Accord* *McNabb v. United States*, 318 U.S. 332, 340-42 (1943).

101. Perhaps the *Glosson* court took its cue from Judge Brown's due process language in his *Williamson* concurrence: "For government to offer . . . money to convict a specified suspect is really more than civilized sensibilities can stand." *Williamson*, 311 F.2d at 445.

102. On December 13, 1983, the First District Court of Appeal reissued the *Glosson* opinion, adding a few paragraphs but making no substantive changes. *Glosson*, 441 So. 2d 1178.

103. *Williams*, 705 F.2d at 619. This may be a slight overstatement. In *Rochin v. California*, 342 U.S. 165 (1952), the Supreme Court declared that a conviction must be reversed where it was obtained by methods violative of due process. After *Rochin* swallowed two capsules that police officers suspected contained illegal drugs, the officers took him to a hospital. His stomach was pumped against his will and the capsules recovered.

The distinction between [*Rochin*] . . . and the . . . [ABSCAM cases] is clear.

There, the challenged conduct ranged from an invasion into the integrity of the body to an extraordinarily coercive interrogation. The activities called into question here, however, merely involve special investigative techniques for obtaining evidence of Alexandro's voluntary participation and do not entail bodily invasion. Moreover, not a scintilla of evidence suggests coercion.

United States v. Alexandro, 675 F.2d 34, 40 (2d Cir. 1982).

104. *United States v. Myers*, 692 F.2d 823, 837 (2d Cir. 1982) (citation omitted), *cert.*

1976, a DEA confidential informant named Kubica contacted the defendant, Neville, to discuss the setting up of a methamphetamine laboratory.¹⁰⁶ Kubica undertook the acquisition of the necessary equipment, raw materials, and production site. DEA agents supplied him with phenyl-2-propanone.¹⁰⁷ "Kubica was completely in charge of the entire laboratory. Any production assistance provided by Neville and Twigg was minor and at the specific direction of Kubica. Twigg often ran errands for groceries or coffee, while Neville spent much of his time away from the farmhouse."¹⁰⁸

The Third Circuit concluded that the governmental misconduct rose to the level of a due process violation unparalleled by *Russell* and *Hampton*. The court noted that as to Neville, "[u]nlike other cases rejecting this defense, the police investigation here was not concerned with an existing laboratory . . . ; the illicit plan did not originate with the criminal defendants . . . ; and neither of the defendants were chemists—an indispensable requisite to this criminal enterprise."¹⁰⁹ Additionally, as to Twigg, "[a]ll actions taken by Twigg . . . were at the specific direction of . . . the government agent. . . . Twigg contributed nothing in terms of expertise, money, supplies, or ideas. It also appear[ed] that Twigg would not even have shared in the proceeds from the sale of the drug."¹¹⁰

Judge Adams, in a lengthy and thoughtful dissent, pointed out that the above-described government conduct was not qualitatively different from that approved in *Russell* and *Hampton*.¹¹¹ On even a cursory review of the factors that the majority cited—whether the laboratory was pre-existing, and whether the criminal plan originated with the government or elsewhere—it is obvious that entrapment, and not outrageous governmental misconduct, was uppermost in the court's mind. Had the majority been able to re-

denied, 103 S. Ct. 2438 (1983).

105. 588 F.2d 373 (3d Cir. 1978).

106. *Id.* at 375. When contacted, Neville expressed an interest in setting up the laboratory. He subsequently assumed primary responsibility for raising capital and for distribution.

107. *Id.*

108. *Id.* at 376.

109. *Id.* at 381 (citations omitted).

110. *Id.* at 382.

111. *Id.* at 384-89. In *Hampton*, for example, the government not only provided the contraband but also arranged for its sale and purchase, 425 U.S. 484 (1976); in *Twigg*, Judge Adams noted that both defendants were actively part of a criminal conspiracy. 588 F.2d 373 (3d Cir. 1982).

solve the issue on entrapment grounds, it is likely that it would never have offered its strained interpretation of *Russell* and *Hampton*. Unfortunately, "Twigg did not raise the issue of entrapment on appeal. A defense based on entrapment would not be available to him because he was brought into the criminal enterprise by Neville, not a government agent."¹¹²

In *Twigg*, the evidence of Neville's predisposition was ample.¹¹³ Therefore, the case could not be resolved on entrapment grounds. The court's obvious distaste for the facts of the case—a distaste that the dissent shared¹¹⁴—may have made it heedless of its own warning in *Jannotti* "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."¹¹⁵

The Supreme Court of Florida, in its review of the appellate court's decision in *Glosson*, acknowledged that *Twigg* stands alone among a forest of federal cases that reject the objective due process defense.¹¹⁶ Nonetheless, the court held that an agreement to pay an informant a contingent fee conditioned on his cooperation and testimony in criminal prosecutions is violative of the due process clause of the Florida Constitution. The evil is that the informant has a powerful incentive not only to "make" criminal cases but also to color his testimony or even to commit perjury in order to earn the contingent fee. "The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions."¹¹⁷

One federal court after another has recited a littyany of rebuttals.¹¹⁸ Most fundamentally, the "due process rights of all citizens"

112. *Id.* at 376 (citation omitted). The law is the same in Florida. See *State v. Perez*, 438 So. 2d 436 (Fla. 3d DCA 1983).

113. 588 F.2d at 376. Neville had previously operated a laboratory with Kubica and had been an acquaintance of twenty years.

114. See *id.* at 388-89.

115. *Jannotti*, 673 F.2d at 608. *United States v. Nunez-Rios*, 622 F.2d 1093 (2d Cir. 1980), suggests that *Twigg* should be limited to crimes of manufacturing, as opposed to crimes of possession, sale, or delivery. *Id.* at 1098. In *Nunez-Rios*, the court found no outrageous governmental misconduct where a confidential informant initiated the drug transaction and provided the defendant with the drugs that the defendant then sought to deliver to an undercover police officer. *Id.*

116. *State v. Glosson*, 10 FLA. L. WEEKLY 56, 57 (Sup. Ct. Jan. 18, 1985).

117. *Id.* at 57.

118. The court acknowledged as much with a citation to *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983). See *supra* p. 139. Kelly's last stand in the court of appeals is at 748 F.2d 691 (D.C. Cir. 1984). That opinion only discusses the subjective-entrapment test and not the objective due process defense.

are not at issue until a particular right is transgressed. The Supreme Court of Florida is saddled with the rhetorical question that Justice Rehnquist posed in *United States v. Payner*:¹¹⁹ what constitutionally protected right of this defendant was violated? His right to deal in illegal drugs? His right to deal in illegal drugs only with "bona-fide" informants? His right to deal in illegal drugs only with informants acting out of a sense of altruism, or something other than a desire for economic gain? No court, including the *Glosson* court, has even attempted to identify with specificity a component of the due process clause, state or federal, that the *Glosson* scenario implicates.

In lieu of analysis, the court muses that it "can imagine few situations with more *potential* for abuse of a defendant's due process right."¹²⁰ Undoubtedly, every complex criminal investigation is brimming with the *potential* for abuse, but courts and constitutions exist to prevent *actual* transgressions, not speculative, possible, or potential ones. If *Glosson* is before the court alleging merely the potential violation of his rights, then he is not properly before the court.

The court musters precedent no more persuasively than it does principle. Alleging that state judges have embraced the objective due process defense,¹²¹ it offers a grand total of two citations: *State v. Hohensee*¹²² and *People v. Isaacson*.¹²³

The outrageous conduct complained of in Isaacson (the earlier of the two cited cases) victimized the informant, more than the defendant. Breniman, while out on bail pending appeal for one drug offense, was arrested for another. It later developed that the substances that formed the basis for the new arrest were not controlled substances. This fact, however, was kept from Breniman until long after he had been pressured and bullied into becoming an informant against the seller of those substances—the defendant Isaacson. Ultimately, Breniman discharged his obligations as an informant with ruthless mendacity, going so far as to lure Isaacson

119. 447 U.S. 727, 737 n.9 (1980). *Payner* involved an especially outrageous attempt by federal agents to smoke out tax evaders. The stratagem included, inter alia, the use of prostitutes. Although Payner ended up a criminal defendant, he was not the one victimized by the government's scandalous practices. Accordingly, he was without standing to protest. *Glosson* was decided on state constitutional grounds; thus, the *Glosson* court was able to duck the hard questions raised by *Payner*.

120. *Glosson*, 10 FLA. L. WEEKLY 57 (emphasis added).

121. *But see* Talbot v. State, 251 S.E.2d 126 (Ga. 1978).

122. 650 S.W.2d 268 (Mo. Ct. App. 1982).

123. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

across the New York State line from Pennsylvania in order to facilitate the arrest.¹²⁴

What is perhaps most useful about the majority opinion is its attempt to develop standards for the due process defense. *Isaacson* identifies four factors that are symptomatic of outrageous misconduct rising to the level of a constitutional violation: (1) police manufacture of a crime that otherwise would not have occurred; (2) police participation in criminal or improper conduct repugnant to a sense of justice; (3) overcoming the defendant's reluctance to commit the crime by appeals to humanitarian instincts (e.g., sympathy or friendship), by temptation to exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) police desire merely to obtain a conviction, rather than preventing crime or protecting the populace.¹²⁵ Finding evidence of all of these symptoms, the *Isaacson* court dismissed the case on due process grounds.¹²⁶

Whatever the merits of the four *Isaacson* factors, they do not refer, even obliquely, to contingent fee arrangements with confidential informants. The *Glosson* court states and restates that it was the existence of just such an arrangement that violated due process. It is difficult to see how *Isaacson* offers precedential support for *Glosson*. And Judge Gabrielli, dissenting in *Isaacson*, reflected on the fundamental problem: Even if the police bullying and pressuring of Breniman was outrageous, what particular constitutionally-protected right of *Isaacson* was transgressed? "These actions . . . in no way violated any of *defendant's* constitutional rights."¹²⁷

The circumstances of *State v. Hohensee*¹²⁸ are so bizarre that the holding should be limited to the facts, rather than applied expansively, as precedent. Hohensee acted as a lookout while his three cohorts committed a burglary. Hohensee was unaware that his three "cohorts" were in reality a police officer and two paid police informants. The two informants were "working off charges" and earning weekly *non-contingent* salaries. They, along with the police, knew the defendant as a willing and habitual participant in burglaries. Mustering the facts to support its finding that due process was violated, the court observed:

124. *Id.* at 514-19, 378 N.E.2d at 79-81, 406 N.Y.S.2d at 715-18.

125. *Id.* at 521-22, 378 N.E.2d at 83, 406 N.Y.S.2d at 719-20.

126. The court acted on state rather than federal, due process grounds. *Id.* at 82.

127. *Id.* at 87 (emphasis added).

128. 650 S.W.2d 268 (Mo. Ct. App. 1982).

If the conduct of (the informants) and Officer Roberts, each acting as a salaried agent of the police department, is subtracted from the . . . break-in, what remains of that midnight enterprise is a lone figure, sitting in a parking lot ½ block away. It is true that defendant had criminal intent but his conduct, standing alone, represented no more of a threat to society than that of a stargazer, similarly situated, contemplating Polaris.¹²⁹

It is easy to empathize with the *Hohensee* opinion. The above-captioned language is, if anything, restrained. But it tells us little about the persistent questions attending the due process defense. What specific acts of the police or its informants violated constitutional rights? Whose rights, and what rights, were violated?

Clearly, *Hohensee* is no precedent for *Glosson*. *Hohensee* involved no contingent fee. The informants were on a flat salary, which was (from what can be inferred from the opinion) not conditioned on testimony against, or on the ultimate conviction of, the defendant. By the reasoning of *Hohensee*, Glosson, a full fledged participant in the crime for which he was charged, should have been convicted. By the reasoning of *Glosson*, Hohensee, not burdened by an informant/witness earning a contingent fee, should have been convicted. The due process defense swims in subjectivity with no analytical reed to which to cling.

The facts of *Hohensee* are unique. The only facts comparably close to them appear in dicta in *United States v. Archer*.¹³⁰ *Archer* involved a complex federal plan to prosecute corruption in the Manhattan District Attorney's office.¹³¹ Judge Friendly, writing for the court, stated:

We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern. However, we base our reversal of these convictions and our instruction to dismiss the indictment on the more limited ground that the Government did not provide sufficient proof of use or agreement to use interstate or foreign telephone facilities to satisfy the requirements of the

129. *Id.* at 274.

130. 486 F.2d 670 (2d Cir. 1973).

131. *Id.*

so-called "Travel Act," 18 U.S.C. § 1952.¹³²

Although he could not resolve the case on the ground of outrageous governmental misconduct, Judge Friendly offered what he considered to be a limit beyond which government could not go. "[T]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums."¹³³ For better or for worse, this is dictum; and pre-*Hampton* dictum at that.

Where, then, does the matter stand? Are there any objective limitations (subjective considerations being the province of the entrapment defense at trial) on police conduct vis-a-vis reverse stings? The general rule must be that the use by the government of reverse stings, confidential informants, or other special investigative techniques—without more—gives rise neither to the entrapment defense, nor to any governmental misconduct defense. Entrapment turns only on the subjective predisposition, if any, of the defendant. Governmental misconduct gives rise to a defense to criminal prosecution only in a *Rochin*-type situation;¹³⁴ that is, where the facts involve direct physical or psychological coercion. Although these are only general principles, appellate courts should not strain to create exceptions to them.

Judge Ginsburg, concurring in *United States v. Kelly*, made a cogent, albeit reluctant, "state of the art" analysis:

The requisite level of outrageousness, the Supreme Court has indicated, is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad "fundamental fairness" guarantee, it appears from High Court decisions, is not transgressed absent "coercion, violence or brutality to the person." . . . Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority.¹³⁵

Judge Ginsburg's footnote added: "lower courts have generally read Supreme Court precedent to confine the broad due process

132. *Id.* at 672 (footnote omitted).

133. *Id.* at 676-77 (footnote omitted).

134. *See supra* note 104 and accompanying text.

135. 707 F.2d at 1476 (citations and footnote omitted).

check on the conduct of law enforcement officers to the slim category of cases in which the police have been brutal, employing against the defendant physical or psychological coercion that 'shocks the conscience.'"¹³⁶

Taking *Glosson* as the exemplar of "drug war/reverse sting" cases, not even bare allegations of *Rochin*-type transgressions appear. What does emerge from the *Glosson* fact stipulation is that a police informant was paid contingent fees to initiate reverse sting investigations. To characterize such police procedures as novel and creative, or shabby and sneaky is not even the beginning of the analysis. Mere distaste for such investigative techniques is not a sufficient basis to hold that they fall below that aggregate of constitutional minimum known as due process. Yet, it was just such distaste that prompted the *Glosson* court's declaration that: "[w]e cannot tolerate such behavior under our system of constitutional protections."¹³⁷ But precisely what constitutional protections are undermined is unclear. Applying Judge Ginsburg's analysis in *Kelly*,¹³⁸ the trial court in *Glosson* should not have dismissed the case before trial. It should have permitted the trial to proceed, and the defense to cross-examine the informant as to his employment, supervision, and compensation.

A defendant in a reverse sting has the entire panoply of constitutional protections before him. He may not be victimized by an unreasonable search and seizure, nor by the deprivation of counsel. He has extra-constitutional protections, such as the entrapment defense. He has a specific due process right to be free from "violence or brutality to the person."¹³⁹ But he has no general due process right to be free from flagrant governmental conduct. If the police unearth his crime with the use of an informant; if that informant is paid on a contingent or percentage basis; if that informant is part of a reverse sting; if that reverse sting involves police distribution of contraband to suspects; then, the defendant is without a specific "remedy" for these police practices. The police practices are themselves a remedy for some of society's most egregious criminal ills.

The use of dishonest and deceitful informants . . . creates risks to which the attention of juries must be forcefully called, but the

136. *Id.* at 1476 n.13 (citations omitted).

137. *Glosson*, 441 So. 2d at 1179.

138. *Kelly*, 707 F.2d at 1476.

139. *Id.*

Due Process Clause does not forbid their employment, detail their supervision, nor specify their compensation.¹⁴⁰

140. United States v. Myers, 692 F.2d 823, 846 (2d Cir. 1982) (Newman, J.).