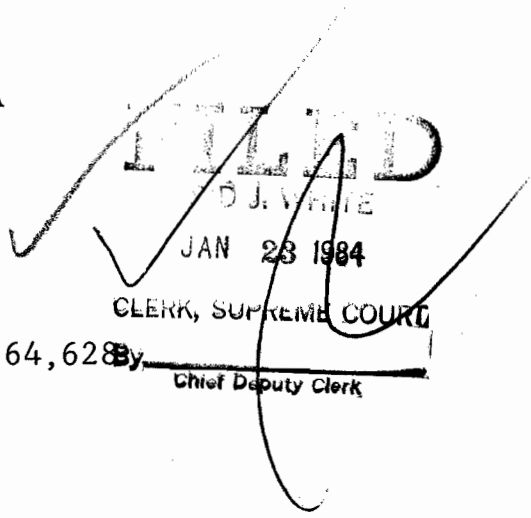
IN THE SUPREME COURT OF FLORIDA



JERRY W. JOHNSON,

Petitioner,

vs. CASE NO. 64,628

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the District Court of Appeal, First District, and the Defendant in the Circuit Court of Duval County. Respondent was the Appellee in the District Court of Appeal, First District, and the prosecutor in the Circuit Court of Duval County.

The symbol "T," followed by the appropriate page number will refer to the record on appeal.

ARGUMENT

THE JURY WAS CORRECTLY INSTRUCTED ON THE STATE'S BURDEN OF PROOF IN AN ENTRAPMENT CASE.

Initially, it should be noted that this precise issue is pending before the Court in McCray v. State, Case No. 64,058, and Rotenberry v. State, Case No. 63,719. Also, a similar issue is pending in State v. Wheeler, Case No. 63,346. It should also be noted that although Petitioner has relied upon State v. Casper, 417 So.2d 263 (Fla. 1st DCA), cert. denied, 418 So.2d 1280 (Fla. 1982), the Second District Court of Appeal has rejected Casper and certified the case to be in express and direct conflict with Cruz v. State, 426 So.2d 1308 (Fla. 2d DCA 1983) (Florida Supreme Court Case No. 63,451).

The issue in this case concerns whether the standard jury instructions on entrapment adequately inform the jury of the State's burden of proof. The State submits that the standard jury instruction on entrapment, coupled with the standard instruction on reasonable doubt, more than adequately instructs the jury on the State's burden of proof.

Standard jury instruction 3.04(c) on entrapment has been specifically approved and adopted by this Court. Since the new instruction differs markedly from the previous instruction 2.11(e), the State submits that the court was aware of the change and approved the new instruction after finding it constitutionally and legally

sufficient. Yet although the court approved the new instruction as substantially given in Petitioner's case, Petitioner is now arguing that the new instruction really did not change the law and that the instruction should still be as was given in Moody v. State, 359 So. 2d 557 (Fla. 4th DCA 1978). However, Petitioner's reliance upon Moody is misplaced for several reasons.

First, in Moody, the trial court failed to give the former standard jury instruction, and he compounded that error by failing to state on the record his reasons for not giving the instruction. Second, the four-ponged test of Moody is inconsistent on its face--how can a trial court logically instruct a jury that under part one of the instruction, the defendant has the burden of adducing any evidence of entrapment, while under part four of the instruction, the trial court is never allowed to instruct the jury "on the defendant's burden of adducing evidence." Id.

In Wheeler, the First District rejected these arguments and held instead that the reason the instruction had been changed was because this Court no longer wished to emphasize the State's burden of proof. The State submits that this construction is illogical. Does it make sense to deemphasize the State's burden of proof by deliberately building reversible error into the record? Obviously not--yet this is precisely what Petitioner would have to convince this Court that the court did when it changed the instruction.

Throughout the recent litigation on entrapment, defendants and courts have frequently stated that Moody adopted the "so called

federal view" of entrapment. See, e.g., Wright v. State, ___ So.2d ___, 8 F.L.W. 2929, 2930 (Fla. 1st DCA 1983). However, federal law in this circuit does not require the government to disprove the affirmative defense of entrapment beyond a reasonable doubt. See United States v. Vadino, 680 F.2d 1329, 1337 (11th Cir. 1982), cert. denied, ___ U.S. ___, 76 L.Ed.2d 344 (1983). In that case, the Eleventh Circuit held that as long as the jury understood that the government had to prove its case beyond a reasonable doubt, it was not necessary to include within the entrapment instruction itself another instruction on the government's burden of proof. In accord, United States v. Sonntag, 684 F.2d 781, 787 (11th Cir. 1982). In Petitioner's case, the trial court instructed the jury that the defendant did not have to prove anything and that the State had to prove its case beyond a reasonable doubt (T-322). This is all that was required under the standard jury instructions approved by this Court, and federal law is the same. Vadino, supra.

It has long been the law in Florida that the State does not have to disprove an affirmative defense. See State v. Kahler, 232 So.2d 166, 168 (Fla. 1970), in which Justice Boyd specifically noted that the State was not required "to anticipate defensive matters or exceptions and negative them. The obvious result of such a requirement would render prosecution under our criminal laws unfeasible, if not impossible." See also the various cases described in footnote 5 of State v. Kahler.

The current standard jury instruction, as approved by this Court, passes constitutional muster. See Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281, 292 (1977). Compare Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (insanity), and Barnes v. United States, 412 U.S. 837, 846, 93 S.Ct. 2357, 37 L.Ed.2d 380, 387, n. 11 (1973) (possession of recently stolen property).

In summary, the State has the burden to prove all elements of a crime beyond a reasonable doubt--this burden remains with the State throughout an entire trial, regardless of whatever affirmative defense is raised by the defendant. The Constitution permits the government to allow the burden of persuasion to shift to a defendant, but the burden of proof to prove the entire case beyond a reasonable doubt stays with the State throughout the trial. Since the standard jury instruction given in Petitioner's case, along with the standard jury instruction on reasonable doubt and the instruction that the defendant does not have to prove anything, complies with constitutional standards, the State submits that the Court should not alter the standard jury instruction which has already been approved by the Court.

CONCLUSION

Petitioner's judgment and sentence should be affirmed. However, the Court should make it clear that the standard jury instruction is

sufficient and that the State does not have to disprove an affirmative defense beyond a reasonable doubt. State v. Kahler, supra. State v. Wheeler should be reversed, and the inconsistent language in both Rotenberry and McCray should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ronald D. Trow, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida, 32202, on this 23rd day of January, 1984.

LAWRENCE A. KADEN

OF COUNSEL