

IN THE SUPREME COURT OF FLORIDA

FILED

S/D J. WHITE

FEB 14 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JERRY W. JOHNSON,
Petitioner,

vs.

CASE NO.: 64,628

STATE OF FLORIDA,
Respondent.

PETITIONER'S REPLY BRIEF

LOUIS O. FROST, JR.
PUBLIC DEFENDER

Ronald D. Trow
Assistant Public Defender

Fourth Judicial Circuit
407 Duval County Courthouse
Jacksonville, Florida 32202
904/633-6820

Attorney for Petitioner



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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, in and for Duval County, Florida. Respondent was the Appellee in the District Court of Appeal, First District, and the prosecutor in the Circuit Court of Duval County.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE
PETITIONER'S SPECIAL REQUESTED JURY
INSTRUCTION REGARDING THE BURDEN OF PROOF
IN RELATION TO THE DEFENSE OF ENTRAPMENT.

The Respondent argues that the issue in this case concerns whether the standard jury instructions on entrapment adequately inform the jury of the government's burden of proof. This is only the broader issue presented in this case. The narrower issue is whether the trial court erred in not giving the requested special instruction based on the facts unique to this case.

The facts of this case differ significantly from the facts presented in Rotenberry v. State, Case No. 63,719; and McCray v. State, Case No. 64,058. In this case presently before the Court, the jury returned to the courtroom three times in five and one-half hours requesting the instruction relating to the defense of entrapment and also requested that the jury instruction be sent back to the jury room to aid them in their deliberations. This clearly shows the jury's confusion on the burden of proof regarding the defense of entrapment in this case, and thus the additional instruction requested by Petitioner's counsel would have aided them in their decision. Also in Rotenberry and McCray, supra, there was evidence independent of the accused's own testimony presented to the jury relating to the facts which the accused in those cases claimed constituted the defense of entrapment. In the present case only the Petitioner testified to the operative facts regarding the defense of entrapment. This was so because the Respondent exercised its non-disclosure privilege regarding the confidential informant and in effect left the Petitioner to prove his affirmative defense of entrapment by his own testimony alone. (Emphasis supplied). Thus, the Respondent stands before this court and argues on the one

hand that the Petitioner must prove his affirmative defense sufficiently to the jury to raise a reasonable doubt and then takes the position on the other hand that is is allowed to exercise its privilege to withhold from the Petitioner the only other source of evidence to help him meet this burden they claim rests upon him. The Respondent's two positions are inconsistent and when combined together clearly demonstrate the due process problems raised in this case and clearly show that this case is different from the two previously cited cases by the Respondent and that the Trial Court erred when it did not instruct the jury as Petitioner requested.

CONCLUSION

While the defense of entrapment is an affirmative defense, it is the government who has much more access and control to the facts which constitute the defense of entrapment than the Petitioner. This is so because the defense itself specifically concerns acts of governmental agents in the course of their duties. The Petitioner is not allowed access to many of these facts and reports. This makes the defense of entrapment a unique affirmative defense and the burden of proof should be placed upon the party that clearly has much more access and control to the operative facts. Thus Petitioner requests this Court to find the present standard jury instruction on the defense of entrapment insufficient and defective and reverse Petitioner's conviction and remand for a new trial. Petitioner would also point out that do to the unique combination of facts of this case, in which the government exercised its non-disclosure privilege; the Petitioner specifically requested the special jury instruction; the jury clearly showed its confusion regarding the burden of proof of the defense of entrapment;

and that there was no other evidence to help the Petitioner to establish his defense that the trial court erred in not granting Petitioner's requested jury instruction and thus Petitioner's conviction should be reversed and remanded for a new trial.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U. S. Mail, to Lawrence A. Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302, by mail, this 10th day of February, A.D., 1984.

Ronald D. Trow