IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 73,758

LOUIS COHEN,

Appellee.

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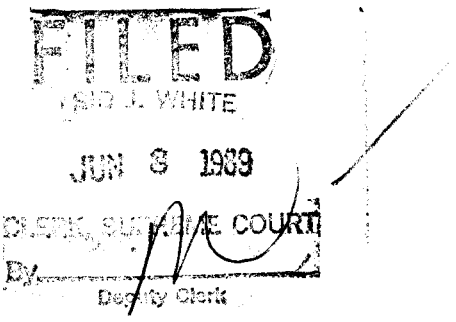

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Appellee accepts the Appellant's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The courts below properly ruled that Florida Statute Section 914.22(1) was unconstitutional in this case insofar as it prohibits knowingly engaging in misleading conduct toward another with intent to influence the testimony of a person in an official proceeding. That subsection fails to give adequate notice of the behavior it proscribes, has a chilling effect on Appellee's first amendment rights, and attempts to criminalize innocent conduct.

In addition, the courts below were further correct in holding §914.22(3) unconstitutional, as that subsection shifts the burden of proof from the State to the defendant, thereby depriving Appellee of due process of law.

The rulings of the courts below should be affirmed.

ARGUMENT

FLORIDA STATUTE SECTION 914.22(1)(a) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND AN ABUSE OF THE STATE'S POLICE POWER AS APPLIED TO APPELLEE AND SECTION 914.22(3) VIOLATES THE DUE PROCESS CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS

Appellee Louis Cohen, a licensed private investigator, was hired by an attorney assigned to represent an indigent defendant in a criminal case. As a consequence of his employment in that case, Appellee was charged with "knowingly" using "misleading conduct . . . with intent to . . . [i]nfluence the testimony of any person in an official proceeding", a violation of Section 914.22(1)(a) Florida Statutes.

Section 914.22(1)(a) in its entirety also proscribes intimidation, force, threats and bribery:

> A person who knowingly uses intimidation or physical force, or threatens another person, or attempts to do *so,* or engages in misleading conduct toward another person, or offers pecuniary benefit or gain to another person with intent to: (a) influence the testimony of any person in an official proceeding is guilty of a felony of the third degree.

The constitutionality of this section, when any act other than "engages in misleading conduct" is charged, is not an issue in this case.

Rather, the sole issue before this Court is whether the statute, as charged in this case against Mr. Cohen, can pass constitutional muster. Appellee maintains that the Fourth District Court of Appeal and the trial court were correct in holding that it could not.

A. Section 914.22(1)(a) Proscribing "Misleading Conduct" is Vague, Overbroad and an Abuse of the State's Police Power.

The narrow subsection of 914.22 that Mr. Cohen is charged with violating wholly fails to give adequate notice of what conduct it prohibits. When people of reasonable intelligence must guess at the scope and meaning of a statute, then the statute is unconstitutionally vague. Kolender v. Lawson, 461 U.S. 352, 357 (1983); Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351 (Fla. 1984). Section 914.22 is unconstitutionally vague, even when read together with the definitions of "misleading conduct" contained in § 914.21. That section defines "misleading conduct" expansively as either knowingly making a false statement, or intentionally omitting or concealing information to mislead or create a false impression, or inviting reliance on a false writing, recording, map or other object, or knowingly using a trick, scheme or device with intent to mislead. Furthermore, that section defines "misleading conduct" circularly; the definitions set forth rely on an intent to mislead to define misleading.

Thus, persons of reasonable intelligence can only guess at what conduct constitutes "knowingly engaging in misleading conduct with intent to influence the testimony of another person". For instance, does the statute prohibit prosecutors and their investigators from testing a witness' recollection of the facts? Can the prosecutor or detective deliberately try to confuse or "mislead" or "create a false impression" to test that witness' recollection? Or may they advise a witness that other

witnesses have given statements inconsistent with his, or tell a defendant that his co-defendant is giving a statement? Does this statute prohibit a police officer from using any deception to obtain a statement from an arrestee, even though such deception would not render the arrestee's subsequent statement otherwise suppressible? Does this statute prohibit a police officer or prosecutor from begging, harassing or overbearing the will of a rape victim in order to get her to press charges, and testify even though personally painful? By its language, Section 914.22 would make all of these lawful or permissible acts crimes.

Indeed, the State seems to be arguing in this Court that these lawful acts are crimes unless the actor can prove they were not. The State argues that the statute is not unconstitutionally vague and does not punish innocent as well as guilty behavior because the statute prohibits influencing a witness to testify truthfully or falsely or not at all, not just falsely. As the State wrote in its Brief in this Court:

> The Legislature can prohibit any form of misleading conduct which attempts to influence i.e., alter or affect, the testimony of a witness, victim or informant. Defense lawyers and investigators may be required to avoid intimidation, threats and deception in the performance of the (sic) duties.

Appellant's Brief pp. 7-8.

Of course, what the State advances as legal argument in support of its position is nothing more than a restatement of the issue presented by this case. The question that this Court will resolve is whether the legislature can make it a crime for any lawyer, investigator or other person to use "misleading conduct"

to influence a witness.1 Once again, it is important to remember that intimidation, force, bribery or threats by any person are not the subject of this appeal and are not an issue in this case. Rather, the issue here is whether a statute criminalizing knowingly using "misleading conduct'' with intent to influence the testimony of any person in an official proceeding is vague, overbroad and an abuse of the State's police power.

The State's contention that this statute is not vague because it prohibits everything is problematical. If the statute was meant to punish misleading conduct designed to influence a witness to testify truthfully, the legislature would not have made that very same conduct the subject of the affirmative defense in subsection (3). And, if the State is correct when it argues that the statute is not vague because it prohibits everything, then the State is virtually conceding it to be overbroad.

The scope and definiteness of this statute are vague, its ambiguities are great, and it is substantially overbroad in its potential chilling effect on speech that is entitled to the most

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1/ It is revealing that the State has framed its entire argument in this Court in terms of what conduct the legislature can prohibit by defense lawyers and private investigators. This illustrates one of the prime difficulties with this statute. Because the statute is inordinately vague, it improperly encourages arbitrary, selective enforcement. Obviously, conduct can not be measured by whether the actor is defense counsel or prosecutor, police investigator or private investigator. Nevertheless, State agents - prosecutors and police investigators - are empowered to seek prosecutions for conduct they may deem lawful when they engage in it, but unlawful when it originates from the defense.

fundamental protection:

> If prosecutions can be brought under [this] section . . . on theories such as this, then defense counsel - who must interview witnesses, who must be able to test and challenge their recollection and their testimony, and who cannot be expected to reveal information provided by their clients or evidence they have learned which is harmful to their clients' case- are truly and unfairly at peril. Under prior law, criminality was based on the defendant's corrupt' intent. This focused the question of criminal liability on the result sought by the defendant: the subversion of the truth-finding process. Under [this] section . . ., the focus is not on the intended result but on the tactics used. While the tactics of a Perry Mason, who by trick, scheme and device always managed to expose the perjury of the prosecutor's witnesses, are admired because they succeeded, the message of [this] section . . . seems to be that nothing of this sort will be tolerated, should this strategy fail.

Jeffress, The New Federal Witness Tampering Statute, 22 Amer.Crim.L.Rev. 1, 13-14.

As this Court has noted, statutes attempting to restrict the exercise of first amendment rights are overbroad when they have a chilling effect on constitutionally protected speech or conduct. Southeastern Fisheries, supra, 453 So.2d 1351, 1353. To determine if a statute is substantially overbroad, the courts must look to all the possible applications of the law, including the ambiguities, or vagueness, in the statute. Falzone v. State, 500 So.2d 1337, 1339 (Fla. 1987).

The subsection of this statute that Appellee is charged with is unconstitutionally overbroad. As a licensed private investigator it is Mr. Cohen's job to conduct investigations, interview witnesses and try to obtain reliable information and recollections from witnesses. He has a legitimate business interest in being a thorough investigator; the proper conduct of

his profession is unquestionably a protected business activity. Section 914.22 unreasonably criminalizes the non-criminal conduct of his business, and creates a chilling effect on his continued conduct of his business. The statute requires him to conduct his business at his peril. He can be subjected at any time to criminal charges and he will be required to prove to the satisfaction of the jury judging him that his conduct of his business was not merely in good faith, relying on what a criminal defendant told him was true, but was in pursuit of what that same jury later decides to be true, notwithstanding anything that may have happened in the original defendant's case. See, Jeffress, supra, 22 Amer.Crim.L.Rev. at 7, 17. The common good may not be protected at such a tremendous cost to an individual.

The Legislature certainly has a legitimate interest in prohibiting witness tampering and protecting victims of crimes. However, the Legislature does not have unfettered power to make innocent conduct a crime, as the State here suggests it can. The State's police power allows it to reasonably intrude, within limits, on the rights of the individual to further legitimate state interests. However, due process requires that, to be upheld, the intrusion must be necessary for the general welfare and the means chosen to promote that object must be reasonably and substantially related to that object and not be unreasonably arbitrary or capricious. State v. Saiez, 489 So.2d 1125, 1127-8 (Fla. 1986).

In Saiez, this Court found that Florida Statute Section

817.63 unconstitutionally violated the due process clauses of the federal and state constitutions. That statute made it a crime to possess embossing machines and incomplete credit cards. The Court held that the curtailment of credit card fraud was a legitimate goal within the proper scope of the State's police power. But, the Court held, the statute did not bear a rational relationship to that goal and thus violated substantive due process because it prohibited legitimate, non-criminal behavior.

Similarly, the instant statute has a proper goal, i.e., to prohibit witness tampering. However, the means selected to achieve that goal violate due process because the statute is susceptible of application to entirely innocent activities. In the proper and innocent conduct of every investigator's business, both private and police, and in the proper and innocent conduct of every attorney questioning a witness on a deposition or pursuing a possible lead in testimony, lies the potential for a violation of Section 914.22. Anyone could be charged and could save himself only by proving to a jury's satisfaction that his conduct was lawful, and intended only to get to what the jury must determine was the truth.

Thus, Section 914.22 unconstitutionally prohibits innocent conduct as well as criminal conduct. When a statute cuts so broadly, it also cuts too deeply into the rights of the citizenry to substantive due process of law and must be stricken. Robinson v. State, 393 So.2d 1076 (Fla. 1980) (statute prohibiting wearing of a mask or other face covering stricken as violative of due process); State v. Walker, 444 So.2d 1137 (Fla. 2nd DCA 1984),

aff'd 461 So.2d 108 (Fla. 1984) (statute prohibiting possession of lawfully dispensed drugs in any container but the original stricken as violative of due process).

The State's police power must always be exercised rationally and non-arbitrarily. Section 914.22(1)(a) is an arbitrary, irrational exercise of the police power and is an unwarranted and unconstitutional invasion of the state and federal due process clauses.

The State has advanced different arguments to uphold this statute in every court. The State now argues that the legislature has the power to make any "misleading conduct" criminal. Previously, the State argued that the statute was not unconstitutionally vague nor overbroad nor an abuse of the State's police power because corrupt intent is necessarily implicit in the statute. That argument was properly rejected by the District Court of Appeal and the trial court, as unsupported by the legislative history behind 5914.22.

Florida Statute Section 914.22(1)(a), enacted in 1984, replaced former Section 918.14 (1975 & 1983) which, in one relevant part, made it

> ". . . unlawful for any person, knowing that a criminal trial . . . is pending, or . . . is about to be instituted, to endeavor or attempt to induce or otherwise cause a witness to . . . [t]estify or inform falsely". (emphasis added).

It is hard to imagine why the Legislature changed a statute which specifically referred to inducing a witness to testify falsely if, as Appellant argued, the Legislature, in passing the new statute actually intended to proscribe only the act of

influencing another to testify falsely. The Legislature is presumed to know the ordinary meaning of words, and the Legislature specifically eliminated the word "falsely" from the new statute. Thus, a requirement that a defendant acted to influence a person to testify falsely may not be read into the statute to save it from constitutional attack. To do so would run counter to the Legislature's intent in adopting Section 914.22(1)(a). Brown v. State, 358 So.2d 16, 19 (Fla. 1978); City of Pompano Beach v. Capalbo, 455 So.2d 468, 472 (on denial of motion for rehearing) (Fla.App. 4th DCA 1984).

In fact, the Legislature's intent in adopting this section is not a mystery. The Florida Legislature intended to and did adopt, wholesale, the federal Victim and Witness Protection Act, including 18 U.S.C. Section 1512, the counterpart to Section 914.22. It is settled that the effect of, and the intent behind, 18 U.S.C. Section 1512 was to eliminate the specific corrupt intent that characterized the former sections, 18 U.S.C. Section 1503 and 1510 and the former Florida Statute Section 918.14. In Senate Report No. 97-532, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, the Judiciary Committee wrote about the Senate bill which then provided that a person commits an offense if he knowingly uses or attempts to use "force, threat, intimidation or fraud" (rather than misleading conduct), with intent to influence the testimony of another. The Committee wrote as follows:

> "[t]he purpose of [this bill] is to strengthen existing legal protections for victims and witnesses "(at 2515) and, specifically: "Section 1512 . . . lowers the threshold of seriousness for commission of an intimidation offense and increases the penalties.

> "Current law covers at least some of the acts proscribed by [Section 1512-1515], though the punishments for offenses are considerably lower under present law. Current law, however, requires a relatively high threshold of seriousness for commission of a crime. For instance, Section 1503 requires corruption, threats or force as elements as (sic) the offense of influencing a witness. Section 1510 requires bribery, misrepresentation, intimidation, force or threats as elements of obstructing criminal investigations. Neither proscribe conduct knowingly and maliciously hindering, delaying, preventing or dissuading testimony . . .

(at 2521).

> "The first prohibited purpose [of Section 1512(a)(1)] uses the term 'influence'. This is the broadest word used in 18 U.S.C. 1503, and the Committee intends that it also received an expansion (sic) interpretation in this Section. The fact that the Section requires that force, threat, intimidation, or deception be employed, suffices to narrow the offense to clearly culpable conduct.2

(at 2522) (emphasis added).

The quoted legislative history makes it abundantly clear that a specific, corrupt criminal intent cannot be implied, as Appellant has asked the courts to do, to save this statute from its unconstitutional overbreadth and vagueness. In fact, the commentators and the cases which have addressed this issue uniformly agree that the federal counterpart to Section 914.22 eliminates the requirement of corrupt intent. Instead, the statute requires only the far more relaxed standard that the defendant act knowingly, i.e., voluntarily, with the intent only to influence the testimony of a person. Jeffress, supra, 22 Amer.Crim.L.Rev. 1,6 (Summer 1984); Note, Defining Witness

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2/ Again, this Senate report detailed the ABA/Senate Judiciary Committee bill which provided that a person commits an offense if he knowingly uses or attempts to use "force, threat, intimidation or fraud" 1982 U.S. Code Cong. & Ad. News at 2522. The bill that Congress passed, however, (and that Florida adopted) substituted "engages in misleading conduct" for "fraud", a much more ambiguous standard that does not "narrow the offense to clearly culpable conduct".

Tampering Under 18 U.S.C. Section 1512, 86 Colum. L. Rev. 1417, 1421 (1986); see generally, United States v. Hernandez, 730 F.2d 895, 898 (2d Cir. 1984); United States v. Maggitt, 784 F.2d 590, 593-4 (5th Cir. 1986). Without a requirement of corrupt intent, § 914.22(1)(a) unconstitutionally criminalizes both lawful and unlawful conduct.

Once the Legislature removed the requirement of corrupt intent from the witness tampering law, and added misleading conduct - conduct which is not inherently culpable like bribery, intimidation or threats - it cut too broadly and criminalized innocent conduct. Under this statute, for instance, an insurance adjuster could be precluded from going to a hospital and encouraging an accident victim to settle a claim. Civil and criminal lawyers alike would be burdened in the practice of their profession. "Schemes", "devices" and even "tricks" of various sorts are virtually built into our adversary system of justice. The skillful use of "devices" is, in fact, the crucible of cross-examination, deemed essential in our adversary system, especially in protecting the due process rights of citizens accused of crimes.

United States v. Wilson, 565 F.Supp. 1416 (S.D.N.Y. 1983) (Weinfeld, J.), relied on by Appellant, does not require a finding that Section 914.22 is not unconstitutionally vague, overbroad and an abuse of the State's police power. In that case, Edwin P. Wilson, the infamous CIA agent turned traitor, was charged with 17 counts of conspiring to murder witnesses and Assistant United States Attorneys, kidnapping, obstruction of justice, retaliation against witnesses, and tampering with

witnesses. Wilson was charged, under 18 U.S.C. Section 1512(a)(2), with knowingly threatening another with intent to cause them to evade legal process or absent themselves from an official proceeding. The federal district court held that Section 1512(a)(2) was not facially overbroad because the government must prove a true threat to obtain a conviction; "innocent remarks" are not made unlawful by that subsection, ruled the court. 565 F.Supp. at 1429-1431.

Since the Wilson case addressed a different subsection of the statute, that decision is not persuasive in this case. Similarly, United States v. Kalevas, 622 F.Supp. 1523 (S.D.N.Y. 1985), relied on so heavily by the State, is not dispositive of the present case. In Kalevas, as in Wilson, while the defendants were charged with threats, intimidation and misleading conduct in the statutory language, the gravamen of the charges was true threatening conduct. The instant case is qualitatively different because Appellee is not charged with any inherently coercive conduct.

Certainly, as the court found in Wilson and Kalevas, the very essence of a threat is its coercive unlawfulness. That unlawfulness which is implicit in a threat is, notably, not necessarily present in, or incidental to, a charge of engaging in "misleading conduct". Threats are inconsistent with innocent remarks or conduct. Therefore, a charge of threatening a witness would not cut so deeply and broadly as does the charge in the instant case. Since a charge of "knowingly engaging in misleading conduct with intent to influence another's testimony" can apply to innocent conduct as well as guilty conduct, and can interfere with the exercise of Appellee's first amendment rights,

Section 914.22(1)(a) in this case is unconstitutionally vague and overbroad.

The court below was absolutely correct in finding that the element of corrupt intent cannot be read into this statute prohibiting misleading conduct to save it. Further, if that corrupt intent is not read into this statute, as the State now asks this Court to find, the statute fails to define a crime.

B. The Affirmative Defense Provided for in Section 914.22(3) Unconstitutionally Shifts the Burden of Proof from the State to the Defendant.

The court below properly found that § 914.22(3) impermissibly shifted the burden of proof from the State to the defendant. That section provides:

> In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce or cause the other person to testify truthfully.

The State has adopted a different position as to this subsection in every court in which it has brought Appellee to answer its claims. In the trial court, the State conceded that § 914.22(3) did unconstitutionally shift the burden of proof (R.62-63). In the Fourth District Court of Appeal, the State argued that since § 914.22 must be read to require specific, corrupt criminal intent to be found constitutional, that corrupt intent becomes an element that the State must prove beyond a reasonable doubt. Therefore, the State argues, the burden never shifts to a defendant. The State's argument in this Court is, in reality, a variant of the position it took in the court below.

Apart from the fact that corrupt criminal intent was specifically not intended to be an element of this statute, as

noted earlier, if Appellant is correct, there is no reason for subsection (3) to exist at all. Of course, legislatures will not be presumed to enact unnecessary, meaningless laws. Thus, the question remains if the affirmative defense in Section 914.22(3) is unconstitutional.

The trial court and the Fourth District Court of Appeal correctly held that subsection (3) unconstitutionally shifts the burden of proof from the State to the defendant. Since the subsection requires the defendant to prove his innocence, it deprives the defendant of due process of law. In re Winship, 397 U.S. 358, 364 (1970), held that due process requires that an accused may not be convicted except on proof beyond a reasonable doubt of every fact necessary to constitute the crime charge. Since Winship, the United States Supreme Court has considered the question of whether statutes or jury instructions impermissibly shift the burden of proof from the State to the defendant on a number of occasions. See, e.g., Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Virginia, 443 U.S. 307 (1979); Engle v. Isaac, 456 U.S. 107 (1982); Francis v. Franklin, 471 U.S. 307 (1985); Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); Martin v. Ohio, 479 U.S. 228, 107 S.Ct.1098, 94 L.Ed.2d 267 (1987).

The principle which has controlled all these decisions is the fundamental requirement that the prosecution has the burden

to establish every essential element of a crime beyond a reasonable doubt. Thus, in those cases where a state places the burden of proof on a defendant to establish an affirmative defense that does not negate the ~~mens~~ ~~rea~~ of the underlying offense, that affirmative defense does not unconstitutionally shift the burden of proof from the state to the defendant. See, e.g., Patterson v. New York, supra; McMillan v. Pennsylvania, supra.

However, where a crime requires knowing or voluntary or unlawful behavior, if the affirmative defense would negate the ~~mens~~ ~~rea~~, then the state is forbidden to shift the burden. Instead, the state must disprove that affirmative defense beyond a reasonable doubt as part of its task of establishing knowing, voluntary or unlawful behavior. See, e.g., Mullaney v. Wilbur, supra; Patterson v. New York, supra; Engle v. Isaac, supra.

A classic affirmative defense may place some burden on a defendant to show that his unlawful conduct ought to be excused or justified. For example, in an entrapment situation the defendant is not saying that his conduct is lawful. Rather, the defendant is saying that his unlawful conduct should be excused because his will was overborne. In short, there is a confession and avoidance. Similarly, states may view the affirmative defenses of self-defense or insanity in the same way. The defendant is not saying that his conduct was lawful; in the case of a killing, there is still a homicide. Rather, the defendant is saying that the unlawful conduct should be excused or was justified because he acted to protect himself or in a way he was

not competent to control.

In the instant case there is no confession and avoidance or classic affirmative defense at all. Instead the defendant must prove not that his unlawful conduct ought to be excused, but that his conduct was never unlawful to begin with, and was always wholly innocent conduct. Section 914.22(1)(a) has as one of its essential elements that the defendant "knowingly" engaged in "misleading conduct" with "intent" to "influence the testimony" of a person in an official proceeding. The affirmative defense in subsection (3) is not merely mitigating. It can completely negate "knowledge" since it specifies that the defendant must show that his conduct "consisted solely of lawful conduct." Section 914.22(3). No state can constitutionally decide to criminalize lawful conduct. State v. Saiez, 489 So.2d 1125 (Fla. 1986); Robinson v. State, 393 So.2d 1076 (Fla. 1980); State v. Walker, 444 So.2d 1137 (Fla.App. 2 DCA 1984). Certainly, it is an improper shifting of the burden of proof to say that conduct is presumptively unlawful unless the defendant proves that it is lawful. Sandstrom v. Montana, supra. This improper shifting of the burden of proof denies the defendant due process of law. Holloway v. McElroy, 632 F.2d 605, 634-635 (5th Cir. 1980); Miller v. Norvell, 775 F.2d 1572, 1576 (11th Cir. 1985); Yohn v. State, 476 So.2d 123, 126 (Fla. 1985); Moody v. State, 359 So.2d 557, 560 (Fla.App. 4th DCA 1978).

Now, however, the State argues that the affirmative defense is not unconstitutional because a defendant need not avail himself of the affirmative defense. Relying on three federal

district court cases, United States v. Kalevas, 622 F.Supp. 1523 (S.D.N.Y. 1985); United States v. Wilson, 565 F.Supp. 1416 (S.D.N.Y. 1983); and United States v. Clemons, 658 F.Supp. 1116 (W.D.Pa. 1987), the State now concludes that, like its federal counterpart 18 U.S.C. § 1512(c), §914.22(1)(a) does not allow the government to prevail without proving each element of the offense beyond a reasonable doubt. The State is wrong.

In Kalevas and Wilson the same district court judge held that there was no impermissible burden shifting in cases where intimidation and threats were charged. 622 F.Supp. at 1527. That finding fails to address the issue presented by this case of whether a defendant charged with influencing testimony by "misleading conduct" can be asked to prove that his conduct was lawful, rather than putting the government to its proof to establish that his conduct was unlawful.

Since this case involves only alleged "misleading conduct", the State's reliance on United State v. Clemons, 658 F.Supp. 1116, supra, is also misplaced. In Clemons, as in Kalevas and Wilson, the defendant was charged with knowingly using intimidation and threats to another person to influence that person to withhold testimony, not with the vague act of "engaging in misleading conduct" as alleged in this case. Even so, because the trial court in Clemons was concerned about the possible burden shifting of the statute, the judge carefully instructed the jury that the defendant had no burden of proof whatever. 658 F.Supp. at 1122–1124. Then, on the defendant's motion for a new trial, the trial court held that the affirmative defense was not

unconstitutional because it was not obligatory, in language quoted by the State in its Brief in this Court at page **9**.

Although the State quoted the lower court in Clemons, the State did not go on to quote or even explain the decision of the Third Circuit Court of Appeals reviewing the Clemons opinion that the State relies on here.

In United States v. Clemons, 843 F.2d 741 (3d Cir. 1988), the court, after much discussion, stated that United States Supreme Court precedent and established principles of constitutional law raise serious doubts about the constitutionality of the affirmative defense. That court noted that:

> [M]erely labelling something an affirmative defense does not mean the statute is constitutional. 'It must appear that the so-called defense does not in actuality negate any element of the crime.' (citations omitted). A defendant may be required to bear the burden of persuasion with respect to defenses such as those showing justification or excuse but not with respect to those that 'negative guilt by cancelling out the existence of some required element of the crime.' (citation omitted). Accordingly, in assessing the constitutionality of an affirmative defense, we must inquire whether 'the defense is defined in terms of a fact *so* central to the nature of the offense that, in effect, the prosecutor has been freed of the burden' of establishing each constituent element of the crime charged beyond a reasonable doubt.

843 F.2d at 752.

After questioning the constitutionality of the statute, the court held that even assuming that part of the statute to be unconstitutional, the constitutional error was harmless beyond a reasonable doubt in that case, because the proof of intimidation and threats by Clemons was *so* overwhelming.

The State is asking this Court to adopt the reasoning of federal trial courts, arrived at in considering cases which

charged entirely different crimes than the allegations in this case. However, on the facts of this case, that reasoning is neither sound nor constitutionally applicable. And, the only federal appellate court to consider the affirmative defense on any facts assumed it to be an unconstitutional shifting of the burden of proof. But, even assuming arguendo that such a shift in the burden of proof might be acceptable in the federal courts under Winship, Mullaney and Patterson, it would still be entirely unacceptable under Florida law. Yohn v. State, 476 So.2d 123 (Fla. 1985).

In Yohn v. State, this Court held that there is a rebuttable presumption of sanity which, if overcome by the defendant, must be proven by the State beyond a reasonable doubt, like any other element of the offense, because if a defendant was insane he could not be guilty of the offense. 476 So.2d at 128. The Court noted that under Patterson v. New York, 432 U.S. 197, it may not be unconstitutional for a state to require a defendant to prove he was insane at the time of the offense, but:

> " . . . we have chosen not to place this burden of proof on the defendant in the state of Florida, but as we have said, to create a rebuttable presumption of sanity which if overcome, must be proven by the state just like any other element of the offense. We do not reconsider that policy in this decision."

476 So.2d 126.

Thus, under Yohn, the affirmative defense contained in Section 914.22(3) would necessarily violate due process by impermissibly shifting to the defendant the burden of proving that his conduct was lawful. This is so because the lawfulness of a defendant's conduct is even more basic to a finding of

"knowing" conduct than is the question of a defendant's sanity. If a defendant is insane, his conduct is excused because he can not form the requisite intent to commit any crime. But, where a defendant's conduct is lawful, there is, simply, no crime at all and nothing to excuse. See, Jeffress, supra, 22 Amer.Crim.L.Rev. at 16-20.

The State contends that Appellee and the courts below have misread Yohn. Appellee maintains that even a restrictive reading of Yohn supports the conclusion that § 914.22(3) improperly shifts the burden of proof. However, even if this Court had never decided Yohn, the conclusion that this subsection of the statute is unconstitutional is inescapable. See, U.S. v. Clemons, supra, 843 F.2d at 752-753.

This is so because the mere fact that a provision requiring a defendant to prove that his conduct consisted solely of lawful conduct and that his sole intention was to encourage, induce, or cause the other person to testify truthfully, is called an affirmative defense does not make that provision an affirmative defense. Section 914.22(3) inverts our system of justice by requiring the defendant to come forward and prove to a jury's satisfaction that whatever the State says he did was actually not a crime at all, but was completely lawful. Placing such a burden on a defendant in a criminal prosecution violates the due process provisions of the state and federal constitutions and renders meaningless the protections guaranteed by Winship that the State must prove every essential element of a crime beyond a reasonable doubt.

CONCLUSION

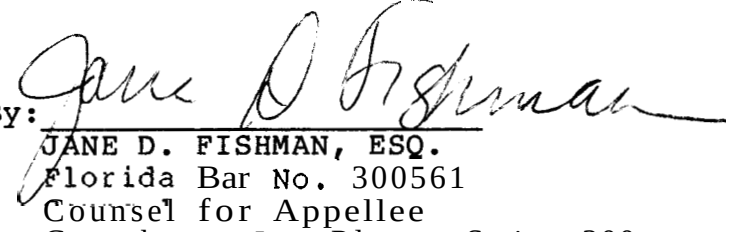
Florida Statute Section 914.22(1)(a) insofar as it proscribes engaging in misleading conduct with intent to influence the testimony of another is vague, overbroad and an abuse of the State's police power.

In addition, Section 914.22(3) unconstitutionally shifts the burden of proof by making it an affirmative defense for the defendant to prove by a preponderance of the evidence that his conduct was solely lawful and designed to influence the other person to testify truthfully.

The decision of the courts below should be AFFIRMED.

Respectfully submitted,

LEWIS A. FISHMAN, P.A.

By: 

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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 Gary L. Printy, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 6th day of June, 1989.

By: _____
JANE D. FISHMAN, ESQ. of
LEWIS A. FISHMAN, P.A.