IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 73,758

LOUIS COHEN,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case arose out of an order granting a motion to dismiss filed before the Honorable Robert B. Carney of the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The State of Florida was the prosecution in the trial court and the Appellant in the Fourth District Court of Appeal. Louis Cohen was the defendant in the trial court and the Appellee in the Fourth District Court of Appeal. The State of Florida will be referred to as Appellant or the State. The Appellee will be referred to as Cohen or the defendant. The record on appeal will be designated by the symbol "R" followed by the appropriate page number in parentheses. A copy of the opinion of the Fourth District Court of Appeal is included in the Appendix. **State** v. **Cohen,** 14 F.L.W. 446 (Fla. 4th DCA February 15, 1989).

STATEMENT OF THE CASE AND FACTS

Appellee, Louis Cohen, was charged by information on July 25, 1986, with three counts of witness tampering alleging he engaged in misleading conduct with the intent to influence the testimony of a witness in a criminal proceeding in which he was the defense counsel's investigator. (R 47-49) (R 12).

On August 21, 1986, and on October 29, 1986, Appellee filed a motion to dismiss the information. (R 50-53).

Circuit Judge Robert B. Carney heard argument on the motion on November 14, 1986. A transcript of the argument appears in the record. (R 3-46). On January 12, 1987, the trial court entered an order granting Appellee's motion to dismiss the information. (R 122-123). In it's order, the court stated:

> 2. Neither Florida Statute 914.21 nor Florida Statute 914.22, defines the phrase "influence the testimony of any person". Specifically, the statute leaves ambiguous whether it is criminal to influence to testify falsely, or truthfully, or both. The only assistance seems to appear in Florida Statute 914.22(3) which states that if the Defendant's intent was to influence to testify truthfully then he has the burden of proof to establish this fact which is an affirmative defense. Subsection (3) unconstitutionally shifts the burden of proof from the State to the Defendant. By requiring the Defendant to prove his innocence, this Section would relieve the State of its obligation to prove the Defendant's guilt, beyond a reasonable doubt, of every element of the crime. That result would deprive Defendant of due process of law. In re: **Winship**, 397 U.S. 358 (1970); **Mullaney** v. **Wilbur**, 421 U.S. 684 (1975); **Yohn** v. State, 476 So.2d 123 (Fla. 1985).
>
> 3. Florida Statute 914.22(1)(a), to the extent that it attempts to criminalizeinnocent speech conduct as in

> the present case, is unconstitutionally overbroad and vague. This Section criminalizes innocent conduct and well as unlawful conduct and therefore denies Defendant due process of law.
>
> 4. For the reasons stated herein and for the reasons stated in open court and hearings on this motion, this Court finds that Florida Statute 914.22(1)(a) and (3) are unconstitutional as applied in this case.

On January 27, 1987, the State filed a notice of appeal to the Fourth District Court of Appeal for the State of Florida. The Fourth District Court of Appeal affirmed the order of the trial court on February 15, 1989, stating:

> Under Section 914.22(3), the Defendant must prove that his intentional conduct constituted wholly innocent conduct from the outset. The statute creates a presumption of unlawful conduct until the Defendant can prove that his actions were lawful. Unlike the affirmative defense of insanity, there is no confession of unlawful conduct followed by Defendant's excuse or justification that he acted in a particular manner and was incompetent to control his actions. In this instance, the Defendant has the burden of production of evidence as well as the burden of persuasion taking from the prosecution the burden of proving unlawful activity and intent beyond a reasonable doubt. Section 914.22(3) does not have the requisite narrowing affect to overcome the broad scope of activities encompassed in Section 914.22(1)(a).
>
> We affirm the trial court's order declaring Sections 914.22(1)(a) and (3) unconstitutional.

The State of Florida filed a notice of appeal to this Court on February 21, 1989.

SUMMARY OF ARGUMENT

This is a case of first impression presenting this Court with a challenge to the constitutionality of the witness victim or informant tampering statute. The District Court below upheld a trial court finding that the statute punishes innocent as well as guilty conduct and unfairly relieves the government of the burden of proof as to an element of the offense. The witness victim or informant tampering statute sets forth the elements of the offense as (1) the knowing use of intimidation or physical force, threats or misleading conduct directed to another person or an offer of pecuniary benefit or gain to another person: (2) with the intent to influence that person's testimony in an official proceeding. The State is at all times required to prove the above elements beyond a reasonable doubt.

Another portion of the statute allows a defendant to introduce evidence of the lawful nature of his conduct or evidence that he had the intent to encourage, induce or cause the other person to testify truthfully. The flaw in the trial court's and district court's order below stems from their interpretation of this provision as a mandatory obligation of the Defendant to present such evidence in violation of the Florida Constitution. The courts below misconstrued the State's obligation to prove tampering beyond a reasonable doubt with an option of an affirmative defense with a presumption of tampering mitigated by a Defendant's proof of lawful conduct or intent to induce only truthful testimony.

ARGUMENT

ISSUE

THE DISTRICT COURT ERRED IN AFFIRMING THE ORDER GRANTING APPELLEE'S MOTION TO DISMISS THE INFORMATION BASED ON THE ALLEGED UNCONSTITUTIONALITY OF THE WITNESS TAMPERING STATUTE

In 1984, the Florida Legislature repealed the witness tampering statute set forth in Section 918.14 and replaced it with Section 914.22, Florida Statutes, which was an adaptation of the federal witness tampering statute found at 18 U.S.C. §1512. The record below contains the Senate Staff Analysis which briefly states the purpose of the statute was to include victims and informants in the witness tampering statute. (R 109).

Section 914.22(1)(a), states:

> 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 defendant in this case, Louis Cohen, was charged with making a false statement in that he intentionally omitted information from a statement thereby causing a portion of such statement to be misleading or knowingly used a scheme with intent to mislead a witness in a criminal case regarding the sentence of another defendant. Section 914.21(2), Florida Statutes, defines misleading conduct as:

> (a) knowingly making a false statement: (b) intentionally omitting information from a statement and thereby causing a

> portion of such statement to be misleading, or intentionally concealing a material fact and thereby creating a false impression by such statement:
> (c) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity:
> (d) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect or
> (e) knowingly using a trick, scheme or device with intent to mislead.

This definition of misleading conduct is taken directly from the federal definition set forth in 18 U.S.C. §1515(3).

The first question presented is whether the above definition of misleading conduct punishes innocent as well as guilty behavior. The answer is no.

The purpose of the witness, victim, or informant tampering statute is a general prohibition against influencing the testimony of witnesses, victims, or informants by threats or tricks. Webster's New Third International Dictionary at 1160 defines influence as:

> To affect or alter the conduct, thought, or character of by indirect or intangible means:

See Rogers v. **State,** 511 So.2d 526, 533 (Fla. 1987), and Justice Barkett's reference to the dictionary definition of calculated in interpreting the cold, calculated and premeditated aggravating factor.

A person has no more right to use threats, tricks or financial inducements to influence i.e., alter or affect, a witness to testify truthfully then he would have to use the above

means to obtain false testimony or no testimony at all . The statute expands the protection afforded witnesses, victims and informants and is consistent with the new found emphasis afforded victim's rights in the recently adopted amendment to Florida Constitution. See Article 1, Section 16(b), Florida Constitution.

The District Court opinion below is the first appellate interpretation of Section 914.22. However, as the opinion below recognizes, federal courts have affirmed the federal counterpart set forth in Title 18 U.S.C. §1512 and 31515 in the face of similar constitutional challenges. In **United States v. Kalevas,** 622 F.Supp. 1523 (D.C. N.Y. 1985), a defendant argued that 18 U.S.C. 1515(3), which dealt with the definition of the term "misleading conduct", was insufficient to place the defendant on notice as to what conduct was prohibited. A federal court held that the detailed definition of misleading conduct set forth in 18 U.S.C. §1515(3) was adequate notice to a defendant and denied the claim. The fears expressed by the appellee to the lower court regarding the chilling affect of the statute on defense attorney's and their conduct is unfounded given the statute: "defines misleading conduct as knowing or intentional conduct, and does so in a manner which adequately apprises a person of the prohibited conduct. Id., at 1527. It is of no consequence whether the misleading conduct intended to illicit truthful or false testimony. 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 duties. The question of whether a defense attorney or his investigator or any person intimidated, threatened or misled a witness, victim or informant is a question of fact for the jury. See **United States v. Wilson,** 565 F.Supp. 1416 (S.D.N.Y. 1983), stating:

> Whether the statements made and the acts engaged in amount to "true threats" is a question of fact for the jury.

Id., at 1431.

Here, if the State fails to prove Mr. Cohen's conduct was misleading in its case in chief, then there is no need to address the issue of an affirmative defense. This point has been lost in the district court opinion.

The second question presented is whether the affirmative defense set forth in Section 914.22(3) unconstitutionally shifted the burden of proof from the government to the defendant. This claim was also presented in **Kalevas, supra.** The court, in **Kalevas,** distinguished the holding in **Mullaney v. Wilbur,** 421 U.S. 684 (19751, from that in **Patterson v. New York,** 432 U.S. 197 (1977), and denied the defendant's claim. A federal district court, in **Kalevas,** interpreted **Patterson v. New York, supra,** as holding that the United States Supreme Court has:

> Made clear that neither **Mullaney** nor the Constitution prohibits a legislature from requiring a defendant to prove an affirmative defense by a preponderance of the evidence. The court re-affirmed that the Due Process Clause requires that the prosecution prove each and every element of the crime charged beyond a reasonable doubt, but held that it need not negate by such a standard the non-existence of

> affirmative mitigating defenses that may be raised.

Id., at 1526.

In **Kalevas**, the court distinguished between the elements of the offense which must be proven beyond a reasonable doubt and the elements of the affirmative defense which are independent facts, proof of which by a preponderance of the evidence is sufficient to avoid criminal liability. Neither Section 1512(c) nor Section 914.22(1)(a) allows the government to prevail without proving each element of the offense beyond a reasonable doubt. The defendant need not present an affirmative defense. The Legislature has afforded defendants the opportunity to prove such additional facts as would demonstrate the allegedly illegal conduct was, in fact, lawful. See **United States v. Clemmons**, 658 F.2d 1116 (W.D. Penn. 1987), holding:

> Section 1512(c) does not mandate or require a defendant to introduce evidence of the lawful nature of his conduct, or evidence that the defendant had the intent to encourage, induce or cause truthful testimony at all relevant times. Section 1512(c) is not obligatory at all but is merely permissive and if the defendant does introduce such exculpatory evidence, he is rewarded by being able to require the court to give a favorable charge to the affect that if the jury believes that the defendant in fact was encouraging, inducing, or causing the person to testify truthfully, the jury could acquit said defendant.
>
> However, the defendant has no obligation to present such evidence as is described in Section 1512(c) and the failure of the defendant to present such evidence is not to be held against the defendant in any way as this court *so* charged the jury.

Id., at 1124.

The decision of the District Court in Clemmons was affirmed on other grounds in **United States v. Clemmons,** 843 F.2d 741 (3rd Cir. 1988).

The district court opinion below cites the above cases but goes astray in holding that this Court's decision in **Yohn v. State,** 476 So.2d 123 (Fla. 1985), adopted a narrower view of the due process clause than the United States Supreme Court would allow in **Patterson v. New York, supra.** In **Patterson,** the United States Supreme Court held:

In **Kalevas, supra,** the court also dealt with an allegation that the use of the term "misleading conduct" was insufficient to place a defendant on notice as to what conduct was prohibited. The court cited the detailed definition of misleading conduct set forth in 18 U.S.C. 1515(3). Section 914.21 uses the same definition of misleading conduct contained in the federal statute. The fears expressed by the Appellee to the lower court regarding the chilling affect of the statute on defense attorney's and their conduct is unfounded given the statute "defines misleading conduct as knowing or intentional conduct, and does so in a manner which adequately apprises a person of the prohibited conduct". **Id.,** at 1527. The District Court opinion below cites the above cases but goes astray in applying the constitutional requirements of **Patterson v. New York, supra,** and the Florida state law requirements of **Yohn** v. **State, 476** So.2d 123 (Fla. 1985). In **Patterson,** the United States Supreme Court held:

> We thus decline to adopt as a constitutional imperative, operative

> countrywide, that a state must disprove beyond a reasonable doubt, every fact constituting any and all affirmative defenses related to the culpalbility of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed: more subtle balancing of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Patterson, at 210.

The court, in **Patterson,** recognized that Legislatures may not declare an individual presumptively guilty or create a presumption of the existence of all facts essential to guilt. Id. The Federal District Court, in **Kalevas, supra,** correctly applied the **Patterson** test to 18 U.S.C. §1512 in rejecting the constitutional challenge therein. Here, the lower court admits that §914.22(3) does not offend due process clause of the federal constitution under the test of **Patterson** but interprets **Yohn** v. **State, 476** So.2d 123 (Fla. 1985), as an interpretation of the state constitutional Due Process Clause which places limits upon the prosecution which the federal constitution would not. This construction of the holding in **Yohn** paints with to broad a brush. **Yohn** stands for the proposition that the general standard jury instruction on insanity incorrectly stated Florida law when confronted with a request for a specific instruction on the

State's ongoing burden of proof as to the defendant's sanity. **Yohn** simply states that the standard jury instruction misstated the State's burden of proving sanity. See **Smith** v. **State,** 521 So.2d 106 (Fla. 1988), where Justice Grimes rejected the defendant's argument that **Yohn** constituted a fundamental change in the law stating:

> There was no constitutional infirmity in the old standard jury instruction because there is no denial of due process to place the burden of proof of insanity on the defendant. **Leland** v. **Oregon,** 343 **U.S.** 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). The basis for the decision in **Yohn** was that under Florida law where there is evidence of insanity sufficient to present a reasonable doubt of sanity in the minds of the jurors, the presumption of sanity vanishes and the State must prove beyond a reasonable doubt that the defendant was sane. (citation omitted). The court, in **Yohn,** felt that the standard jury instruction was not sufficiently clear on this subject. Since the defendant had requested an instruction which more adequately set forth the law, **Yohn's** conviction was reversed. There was no reference in **Yohn** to fundamental error in the giving of the standard jury instruction.

Smith, at 108.

Judge Carney and the district court below assumed that **Yohn v. State, supra,** established a more stringent standard of review obtains under the Due Process Clause of the Florida Constitution in reviewing an affirmative defense in Florida. **Smith, supra,** rejects this construction of **Yohn.**

The Legislature was free to create a permissive affirmative defense which imposes no obligation on the defendant to produce evidence or fail to rebut a presumption. The statute, in itself,

does not create a presumption of unlawful conduct but instead defines unlawful conduct i.e., in this case misleading conduct in a very detailed manner of Section 914.21. Moreover, the fact that the Legislature chose to require the defendant prove the affirmative defense by a preponderance of the evidence, it is not fatal to the State's position. The State is aware that the prosecution conceded the preponderance of evidence standard was to great to pass constitutional muster before the trial court. This court is not bound by the concession and should ignore it. Even Justice Powell's dissent in **Patterson, supra,** recognized a defendant may be required to prove affirmative defenses by a preponderance of the evidence standard. **Patterson,** note 14, 432 U.S. at 229. Justice Powell specifically referred to Washington statute which permits a defendant to plead affirmative defense of mistake as to the age of the victim in a statutory rape. Generally, statutory rape is a strict liability. Washington's Legislature has chosen a defendant to prove by a preponderance of the evidence that he reasonably believed the victim was legal age. See **State** v. **Bennett,** 672 P.2d 772, 776 (Wash. App. 1983). The courts below fundamentally erred in construing **Yohn** v. **State, supra,** as a construction of Florida Constitution due process clause regarding the use of an affirmative defense and this court should reverse. The statute, 3914.22, condemns attempts to influence testimony of a witness in an official proceeding but allows a defendant to avoid conviction if he can prove that he only attempted to use lawful means to secure truthful testimony. The statute still condemns all unlawful conduct intended to influence.

CONCLUSION

The State of Florida respectfully requests this Court reverse the opinion of the district court below and uphold the constitutionality of the witness tampering statute and quash the order granting Cohen's Motion to Dismiss.

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 Lewis A. Fishman, Esq., and Jane Fishman, Esq., Courthouse Law Plaza, Suite 300, 750 Southeast Third Avenue, Ft. Lauderdale, Florida 33316, this 24th day of April, 1989.

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