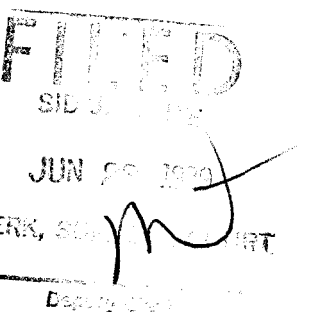
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Appellant,

v. CASE NO. 73,758

LOUIS COHEN,

Appellee.

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

The Florida Witness Tampering Statute by its own terms sufficiently narrows the conduct prohibited by the act so as to pass constitutional challenge on overbreadth. The affirmative defense provided for in the witness tampering statute is not an unconstitutional shifting of the burden of proof to the defendant as it is permissive and does not relieve the state's burden of proof on any of the elements of the offense. Florida's Witness Tampering Statute is patterned on the Federal Witness Tampering Statute and this Court should look to Federal case law in interpreting the statute in absence of applicable state law cases. The case relied upon by the district court below did not involve a holding by this Court that the burden of proof had been unconstitutionally shifted to the defendant.

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.

The answer brief delineates a parade of horribles before this Court that might befall prosecutors, police officers, defense lawyers, and even private investigators like Mr. Cohen if this Court upholds the constitutionality of the Florida Witness Tampering Statute. Appellee argues that the term "misleading conduct" is the culprit which renders this statute unconstitutional in spite of the fact that the federal courts reviewing this statute have noted a precise definition of the term misleading conduct has been provided for the benefit of anyone seeking to avoid the prohibited conduct.

Cohen maintains that as a private investigator he has a constitutional right to knowingly make false statements in order to influence a witness' testimony in an official proceeding. In other words Cohen has a First Amendment right to lie to witnesses in order to influence their testimony. Appellee suggests at page 12 of his answer brief that using the term fraud in lieu of misleading conduct as suggested by the ABA proposal would more clearly narrow the offense to clearly culpable conduct. The federal courts reviewing this statute have noted that the federal statute which has been adopted by the State of Florida as to the

term misleading precisely narrows and defines that term so as to avoid a challenge on overbreadth. See United States v. Kalevas, 622 F.Supp. 1523 (D.C. N.Y. 1985).

Generally, Florida courts place great reliance on federal case authority in reviewing state laws patterned after a federal counterpart, Morton v. Gardner, 513 So.2d 725, 727 n.6 (Fla. 3rd DCA 1987), and federal courts who have reviewed this statute have rejected this constitutional claim. See Kalevas, supra. In fact, the lower court approved the federal court construction and accepted the state's position that the phrase "influence the testimony in an official proceeding" narrows the application to avert the overbreadth claim. See State v. Cohen, 14 F.L.W. 426 (Fla. 4th DCA February 15, 1989) at 427. The district court below found the statute unconstitutional due to its view of the burden shifting nature of Section 914.22(3), Florida Statutes (1984), and the state law as set forth in Yohn v. State, 476 So.2d 123 (Fla. 1985).

Initially, the district court looked to federal precedent in reviewing the same claim and noted the federal courts had ductly questioned in United States v. Clemmons, 843 F.2d 741 (3rd Cir. 1988), cert. denied, Clemmons v. United States, 109 S.Ct. 97 (1988). Cohen at ____. This was partially true but ignored the opinion of the trial court in United States v. Clemmons, 658 F.Supp. 1115 (W.D. Penn. 1987) which was quoted in the Appellant's initial

brief. In any event, the court below construed Yohn, supra, as a rejection of burden shifting defenses by this Court. This Court stated in Smith v. State, 521 So.2d 106 (Fla. 1988) that this is not the law in Florida.

Given that the court apparently felt compelled to disapprove the affirmative defense under Yohn, the real question before this Court is whether Patterson v. New York, 432 U.S. 197 (1977) entitled Cohen to relief as a matter of state or federal constitutional law. Cohen argues that the affirmative defense of Section 914.22(3) does not meet this test because the defendant is required to prove his conduct was never unlawful as opposed to unlawful but excused for some other reason offered in mitigation. This argument falls short of the mark.

Section 914.22(1)(a) and (b) prohibits "any person" from engaging in misleading conduct intended to influence the testimony of any person in an official proceeding. A relative of a victim or defendant may engage in misleading conduct with intent to influence a person's testimony in an official proceeding and would have no basis for asserting the affirmative defense of Section 914.22(3) because there is no lawful explanation for this conduct. However, a private investigator such as Mr. Cohen is permitted to present a defense that says, my roll and function as a private investigator for a defense lawyer makes my conduct "lawful" if it was also done solely to elicit truthful

testimony. There is no defense available under this provision if the conduct was designed to elicit false testimony. Apparently, the Legislature has determined that false statements, deceit, and trickery intended to get at the truth is preferable to the use of the same tactics intended to produce lies.

Vigorous cross examination by a prosecutor or defense lawyer of a crucial witness in a pretrial deposition may be "lawful" because the prosecutor or defense lawyer is not just "any person" but an officer of the court. On the other hand, the defense investigator who represents himself to be a state attorney investigator interviewing a potential witness would have a more difficult time establishing this particular deceit was every "lawful" regardless of whether the deceit was designed to elicit truthful testimony. This investigator could inform a witness that the defendant has pleaded guilty without his testimony and the person would never come forward perhaps depriving the state of an essential witness.

The state is never relieved of the obligation to prove any of the elements of the offense but the defendant is permitted to prove his conduct was lawful, i.e., in conformity with or derived from some special status conferred upon him by the judicial system.

The state agrees an analogy to the issue of entrapment may be helpful. In Cruz v. State, 465 So.2d 516 (Fla.

1985), this Court adopted a threshold test for determining lack of entrapment as a matter of law where the police activity is directed at ongoing criminal activity and uses means reasonably tailored to apprehend suspects involved in the above activity. Id. at 522. This second prong requires the trial court to decide as a matter of law whether the government agents engaged in conduct such as (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited or (b) by employing methods of persuasion which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

Here, the trial court could determine as a matter of law via a pretrial motion to dismiss that the defendant's conduct was lawful or not and eliminate the numerous scenarios advanced by Appellee without a trial. On the other hand, a person not involved in the legal system such as family members or defendants who seek to employ self-help by talking to witnesses and victims in order to influence their testimony would probably not be able to show as a matter of law his conduct was lawful.

In sum, this Court should adopt the district court's view that the perimeters of the statutory language pass constitutional muster as narrowed by the phrase "influence the testimony of any person in an official proceeding" and reject the district court's conclusion that the affirmative

defense is an unconstitutional shifting of the burden of proof to the defendant as that result is not compelled by federal case law, Patterson, supra, or Florida law, Yohn, supra. All that is required even if Yohn is applicable is an instruction reminding the jury that the state must prove all elements of the offense before convicting the defendant. Yohn involved a defect in the standard jury instructions for improperly stating the applicable law and did not alter the existing law on Florida's insanity defense.

This Court should reject Cohen's attempt to distinguish the case of threats to influence testimony, an issue in the federal cases construing section **1512**, from the alleged misleading conduct involved sub judice, as a distinction without a difference. The affirmative defense of Section **914.22(3)** applies with equal force to the use of physical intimidation or threats, i.e., a threat to seek the death sentence by a prosecutor or defense investigator, yet Appellee admits to no unconstitutional problem in that context. The state agrees with this assessment and recommends it to this Court as a basis for upholding the statute.

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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I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been forwarded by U.S. Mail to Lewis A. Fishman, Esquire, and Jane Fishman, Esquire, Courthouse Law Plaza, Suite 300, 750 Southeast Third Avenue, Fort Lauderdale, Florida 33316, this 23rd day of June, 1989.

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