IN THE SUPREME COURT OF FLORIDA

CALVIN WILSON, :

Petitioner, :

VS. : CASE NO. 75,012

STATE OF FLORIDA, :

Respondent. :

_____ :

PETITIONER'S REPLY BRIEF

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I SUMMARY OF ARGUMENT

The state argued the defendant must admit the act to get a jury instruction on entrapment, but in Mathews, infra, the United States Supreme Court abolished any admitting requirement. The state argued Mathews applied only to intent-type elements, but Mathews rejected such a limitation. The state argued that, because petitioner denied committing the act, there was no evidence he was entrapped. Evidence of entrapment need not come from the defendant himself, however, and in this case, came from the undercover police officer's testimony.

The state argued entrapment is not constitutional and Mathews is not binding on Florida courts. First, Mathews did not reach a constitutional issue. Second, this court has never made entrapment less available than the federal courts. Third, while no Florida court has delineated the due process limits of the defense of entrapment, this court has acknowledged that entrapment does have a constitutional due process aspect.

II ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN NOT GRANTING JUDGMENT OF ACQUITTAL ON THE ISSUE OF ENTRAPMENT, AND EVEN IF THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY, PETITIONER WAS ENTITLED TO A JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT.

The state argued that it has been the law of Florida for more than half a century that to be entitled to a jury instruction on the defense of entrapment, the defendant must admit the underlying acts (Respondent's Brief on Merits (hereafter, RBM) 6). While this is true, based on the cases cited by the state, the last time the Florida Supreme Court addressed the issue was in 1934. Neumann v. State, 116 Fla. 98, 156 So. 237, 240 (1934) (RBM-6). This rule contrasts starkly with and is insupportable in light of modern trends in Florida law, and is ripe for reconsideration by this court.

In Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), the United States Supreme Court abolished any requirement that a defendant admit the elements of the offense before he can get a jury instruction on entrapment. In Mathews, the defendant was charged with accepting a loan in exchange for an official act. His defense was that while he accepted the loan, he believed it was unrelated to his official duties. In other words, he admitted every element of the offense charged except intent. Both the First District and the state seized upon intent as a unique element, which both the

district court and the state conceded the defendant need not admit to have the jury instructed on entrapment.

Petitioner here, on the other hand, did not deny merely an intent element. Rather, he wholly denied committing the offense. In the state's view, this distinction is quite significant (RBM-5). The view of the United States Supreme Court in Mathews, however, was not narrowly limited to intent or other mental elements. Rather, the court said:

> We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. (emphasis added)

Mathews, 99 L.Ed.2d at 60.

The state's argument that the Supreme Court meant this pronouncement to be limited to the element of intent is particularly unpersuasive in light of the Court's exposition of the various approaches taken by the federal circuit courts to the defense of entrapment. The Supreme Court said three circuits required the defendant to admit all the elements of the offense before he could have an entrapment instruction; four circuits said the defendant could not affirmatively deny committing the elements of the crime if he wanted an entrapment instruction; one circuit said the defendant could deny the elements and still get the instruction, if the issue were raised by the Government's evidence; one circuit had developed a "hybrid rule allowing a testifying defendant to contest the intent element of the offense charged, but not the acts, while

arguing entrapment," and two circuits allowed the defendant to deny the acts, and still be entitled to an instruction on entrapment. Mathews, 99 L.Ed.2d 59 at n. 1.

The circuit which allowed the defendant to contest the intent element only and still get an entrapment instruction was the Fifth. United States v. Henry, 749 F.2d 203 (5th Cir. 1984) (en banc). This is the approach embraced by the state here and the First District in its opinion below. Lest there be any doubt, the Fifth Circuit itself has acknowledged that Henry was overruled by Mathews. United States v. Jones, 839 F.2d 1041, 1053 (5th Cir.), cert. den. 486 U.S. 1024, 108 S.Ct. 1999, 100 L.Ed.2d 230 (1988).

The circuits which permitted the defendant to deny the acts and still get the instruction were the Ninth and the District of Columbia. United States v. Demma, 523 F.2d 981 (9th Cir. 1975) (en banc); Hansford v. United States, 112 U.S. App. D.C. 359, 303 F.2d 219 (1962). The Supreme Court quoted Demma with approval for a discussion of how a defendant who raises inconsistent defenses "seriously impairs and potentially destroys" his credibility. Inter alia, the Ninth Circuit said:

> While we hold that a defendant may both deny the acts and other elements necessary to constitute the crime charged and at the same time claim entrapment, the high risks to him make it unlikely as a strategic matter that he will choose to do so. (emphasis added)

Mathews 99 L.Ed.2d at 63, quoting United States v. Demma, supra, at 985. This is the approach the U. S. Supreme Court endorsed, not Henry's.

In Stripling v. State, 349 So.2d 187, 191 (Fla. 3d DCA 1977), cert. den. 359 So.2d 1220 (Fla. 1978), the Third District enunciated the principle that "inconsistencies in defenses in criminal cases are allowable so long as the proof of one does not necessarily disprove the other." The Third District cited no Florida case for this rule, but rather relied on two Fifth Circuit cases, United States v. Newcomb, 488 F.2d 190 (5th Cir.), cert. den. Sadler v. United States, 417 U.S. 931, 94 S.Ct. 2642, 41 L.Ed.2d 234 (1974), and McCarty v. United States, 379 F.2d 285, 286-87 (5th Cir.), cert. den. 389 U.S. 929, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967), later to be expressly overruled as too narrow by United States v. Henry, supra, which was itself later implicitly overruled as too narrow by Mathews. Inasmuch as Stripling relied on federal caselaw, which Mathews has abrogated, Stripling has lost its foundation and must be revisited.

The state argued the defendant has the burden of establishing a prima facie case of entrapment, and if he does, it will be submitted to the jury with appropriate instructions[1]

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[1]Petitioner was charged with an offense committed in July, 1987, which predates the introduction of section 777.201, Florida Statutes, which shifts the burden of proof of entrapment to the defendant. The state correctly stated only the first part of the burden of proof as to this case. The defendant does have the burden of making a prima facie case, and if he does, the burden then shifts back to the state to overcome it beyond a reasonable doubt. Only then is the issue presented to the jury. Presumably, believing petitioner had not met his portion of the burden, the state saw no need to

(Footnote Continued)

(RBM-6). The state argued petitioner offered no evidence he was entrapped because he testified he did not commit the act. Evidence of entrapment need not come from the defendant himself, however, if there is other evidence of entrapment. In the instant case, petitioner relies not on his own testimony, but on that of the undercover police officer to establish a prima facie case of entrapment. The rule enunciated in Edwards and Mellins as to when an instruction on voluntary intoxication is to be given is instructive on this point. The court said:

> ...[Mellins] holds that a requested instruction on intoxication must be given even though the only evidence of it comes from cross-examination of a state witness, is not supported by empirical evidence, and the defendant denies being intoxicated.

Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983), citing Mellins v. State, 395 So.2d 1207, 1209 (Fla. 3d DCA 1981), review den. 402 So.2d 613 (Fla. 1981); see also United States v. Smith, 757 F.2d 1161 (11th Cir. 1985).

Citing Justice White's dissent in Mathews, the state argued that where the defendant denies committing the act, entrapment is a plausible alternate theory of defense only if the accused is lying (RBM-6). This view was rejected by a 6-2 majority of the U.S. Supreme Court and is perhaps too cynical, even by criminal law standards. If a police officer or agent says the defendant committed an act, and he denies it, both

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(Footnote Continued)
discuss its own burden. Petitioner believes the state concluded incorrectly that he failed to carry his burden.

cannot be true. It is no foregone conclusion, however, that the discrepancy means the accused is lying. The defendant might be lying, or the police officer might be lying (a thought which no doubt never crossed Justice White's mind), or the officer might be merely mistaken. Moreover, if a defendant tells his attorney it was not him, but counsel can see that whoever it was was entrapped, in weighing whether a jury is likely to believe his client's testimony that it was not him over a police officer's testimony that it was, defense counsel might well opt for an alternate theory of defense. If the inconsistent defenses are not credible, they are, as Justice Scalia put it in his concurrence, "self-penalizing."

In the instant case, a female undercover police officer went to two bars and solicited various patrons of the bars, most of them male, to procure drugs for her. Officer Wilson and petitioner met for the first time that evening. When she asked if he knew "anybody doing anything," a reference to drug transactions, Calvin said he did not and, according to Officer Wilson, they did not have a specific conversation about drugs at this point. Petitioner, who was in his baseball uniform, talked about the game he played earlier (T-9,13).

Later, after "someone" suggested Calvin as a target, Officer Wilson went back to the Squeeze Inn to find him. When he was not there, she went to Saul's Place, looking for him. She found him there. She told him she had been looking for him and asked him to get her some crack (T-25-27). This is Officer Wilson's own account of her activities that evening.

Calvin talked to Officer Wilson about his baseball game, told her where he worked and when he got paid, and showed her where he lived. These topics of conversation have nothing to do with the drug trade and are distinctly social in nature. Calvin spoke to Officer Wilson socially, in the kind of terms which people use in a social environment where they are interested in meeting persons of the opposite sex. A situation where a female police officer leaves the impression that she is available socially to men, and asks that they procure drugs for her is precisely the kind of police conduct that gives rise to a probability that it will ensnare innocent victims. Officer Wilson's testimony established a prima facie case of entrapment.

The state argued Mathews is not binding on Florida courts because it is not a constitutional ruling, citing Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (RBM-7). In considering whether "Murph the Surf" Murphy was denied a fair trial on a breaking and entering charge in Dade County Criminal Court because members of the jury were tainted by media accounts of the charged offense and prior convictions, the United States Supreme Court distinguished its earlier decision in Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). Of its previous decision reversing Marshall's conviction because the jurors had been exposed to information with a high potential for prejudice, the Court said:

> It did so, however, expressly "[i]n the exercise of [its] supervisory power to formulate and apply proper standards for the enforcement of the criminal law in the federal courts" and not as a matter of constitutional compulsion.
>
> In the face of so clear a statement, it cannot be maintained that Marshall was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States.

Murphy, 44 L.Ed.2d at 593. The Supreme Court went on to hold that the circumstances of Murphy's trial did not rise to the level of a constitutional due process violation.

In Mathews, however, the Court did not reach any constitutional question. The Court said:

> The Government finally contends that since the entrapment defense is not of "constitutional dimension," and that since it is "relatively limited" [citations omitted], Congress would be free to make the entrapment defense available on whatever conditions and to whatever category of defendants it believed appropriate. Congress, of course, has never spoken on the subject, and so the decision is left to the courts. We are simply not persuaded by the Government's arguments that we should make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency to which no other such defense is subject.

Mathews, 99 L.Ed.2d at 63. While the Court appears to concede that Congress could place limitations on the defense of entrapment, this pronouncement is considerably less than the no-constitutional-violation holding of Murphy. It also contrasts with the Florida Supreme Court's implicit acknowledgement that the defense of entrapment does have a constitutional aspect.

In Cruz v. State, 465 So.2d 516 (Fla. 1985), cert. den. 473 U.S. 904, 105 S.Ct. 3527, 887 L.Ed.2d 652 (1985), the court said:

> In Russell and Hampton, [infra], the [United States Supreme] Court recognized that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. (citations omitted) (emphasis added)
>
> In both Russell and Hampton the Court found no such due process violation. However, at least two United States circuit courts have found due process violations in the entrapment context. Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), cf. United States v. Beverly, 723 F.2d 11 (3d Cir. 1983). At least five other circuits have recognized the possibility of due process violations, but have rejected finding such violations in the fact situations of the particular cases. (citations omitted)

Id. at 519, n. 1, citing United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). Further, the right to present a defense certainly has a constitutional dimension. U.S. Const., ams. VI, XIV; see Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Finally, it is illuminating to consider the discussion in Mathews with the basis of decision in the cases cited by the state for the proposition that the defendant must admit the act to get an entrapment instruction (RMB-6). Neumann gave no basis for its ruling; Mellins dealt with the affirmative defense of voluntary intoxication, not entrapment; Stripling cited Pearson and Ivory; Pearson cited Ivory and 22 C.J.S. Criminal Law § 45(1); and Ivory cited 61 A.L.R.2d 677, Annotation and cases therein. Neumann, Mellins, Stripling, supra; Pearson v. State, 221 So.2d 760 (Fla. 2d DCA 1969); Ivory v. State, 173 So.2d 759 (Fla. 3d DCA 1965). In other words, in tracing the principle in Florida back to its source, one is sent back to secondary sources! These simply do not compare to decisions of the United States Supreme Court as compelling precedent.

To sum up, Mathews reached no constitutional issue, and this court has acknowledged, but not delineated, a constitutional dimension to entrapment, so the constitutional ramifications of the defense of entrapment remain an open question in Florida at this writing.

The state argued that petitioner did not challenge the denial of the judgment of acquittal in the district court (RBM-7). This does not prevent the court from addressing the issue if it chooses. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982) ("Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case").

It is likely that in the majority of cases that reach this court on discretionary review, the issues remain more or less constant in the district court and before this court. That was not true here. When the initial brief was filed in the district court in March, 1988, it was the first case in which undersigned counsel had argued a Carawan issue, and most attention was directed to that issue. Carawan v. State, 515 So.2d 161 (Fla. 1987). At the same time, while Mathews had been decided shortly before the initial brief was filed, counsel was not aware of it and did not cite it. Before Mathews, the law appeared to be that petitioner had abrogated his right to an entrapment instruction because he did not admit the act. The focus of the case has shifted dramatically since the initial brief was filed in the district court, where the focus was on the Carawan issue, to now, where the focus is on entrapment. Now that it is two years later, the Carawan issue was long ago resolved, and Mathews has changed the shape of law on the defense of entrapment.

What the state wants this court to do is inconsistent with the development of Florida law on entrapment. This court has never made the defense of entrapment less available in Florida than in the federal courts. Moreover, because Florida recognizes objective as well as subjective entrapment (Cruz, supra), entrapment has been a broader defense in Florida than in the

federal system.[2] The decision of the United States Supreme Court to abolish any requirement to admit the act to claim the defense of entrapment is soundly reasoned. The state argues this rule should not be applied in Florida, but the state's position is incongruous with Florida precedent and the modern trend.

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[2]Petitioner acknowledges that section 777.201, Florida Statutes (1987), shifted the burden of proving entrapment to the defendant, but notes this provision has not yet been been considered by any appellate court. Section 777.201 also provides that entrapment is to be tried by the trier of fact. Due to its effective date, this statute does not apply to petitioner.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the affirmative, and reverse the district court decision on the entrapment instruction; and also, to discharge his conviction on an objective entrapment theory for improper police conduct, discharge on a subjective entrapment theory for the state's failure to prove predisposition, or remand for new trial with a jury instruction on entrapment.

Respectfully submitted,
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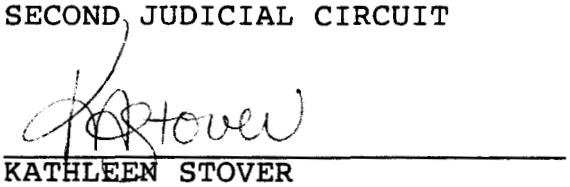

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to John Koenig, Assistant Attorney General, Room 204, 111 Georgia Avenue, Palm County Regional Service Center, West Palm Beach, Florida, 33401, and a copy has been mailed to Mr. Calvin Wilson, Route 2, Jasper, Florida 32052, this 22 day March, 1990.

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