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IN THE SUPREME COURT OF FLORIDA

CARLOS DELEON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,299

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. Petitioner was the appellant and Respondent was the appellee in the Fourth District Court of Appeal.

In the brief, the parties will be referred to as Petitioner and Respondent.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Petitioner was charged and convicted on one count of trafficking in cocaine over 28 grams and on two counts of delivery of cocaine. In one count Jose Alberto Perez was charged as a co-defendant, but Petitioner was tried alone (R 485, 501-503, 507).

After being convicted, Petitioner appealed to the Fourth District Court of Appeal, arguing that the trial court had erred in instructing the jury that Petitioner had the burden to prove the defense of entrapment. On May 22, 1991, the District Court filed an opinion affirming the conviction (Appendix to this brief). Petitioner then moved for certification to this Court of the following question of great public importance (Appendix):

> Do Instruction 3.04(c)(2), Florida Standard Jury Instructions in Criminal Cases, and Section 777.201(2), Florida Statutes (1989), both applicable to offenses after 1987, unconstitititionally shift the burden to the defense to prove entrapment?

By order filed June 24, 1991, the District Court granted the motion for certification (Appendix).

Notice of Intent to Invoke Discretionary Jurisdiction was filed July 17, 1991 (Appendix).

By order filed July 25, 1991, this Court ordered briefing on the merits but postponed the decision on jurisdiction.

STATEMENT OF THE FACTS

The three cocaine deliveries for which Petitioner was convicted were made within a period of a few days to Detective Kathy Wilde, who was working undercover. Wilde testified at trial that she was brought into contact with Petitioner by a confidential informant who had been arrested for prostitution six months before (R 43-44, 156-159). Wilde and her partner and the informant went to the Athenian Corner restaurant to meet Petitioner. They all then drove to Jose Perez's house. Wilde gave Petitioner $50 for a gram of cocaine. Petitioner went inside and came back with the cocaine. Wilde took Petitioner back to the Athenian Corner and dropped him off (R 44-59).

The next day, Wilde picked up Petitioner again at the Athenian Corner. This time she did not bring the informant. Wilde and Petitioner again went to Perez's house. Again Petitioner got Wilde a gram of cocaine for $50 (R 62-67).

Two days later, Petitioner beeped Wilde and said to pick him up, they would try to make a deal for eight ounces of cocaine. Wilde picked up Petitioner, taking along another detective who she introduced as her boyfriend and as the person from whom she got the money (R 68-69). At Perez's, Petitioner went in and brought Perez out to negotiate with Wilde and her partner. Several delays and discussions took place. Petitioner took Wilde into the house and showed her two ounces of cocaine. After further delay, Wilde, her partner, Petitioner, Perez, and a man named Ortez all met at a nearby gas station, where Perez took a plastic container of cocaine out of some bushes and handed it over to Wilde. The arrests then

occurred. Wilde could not say where Petitioner was at the time of the exchange (R 70-82).

In a statement after his arrest, Petitioner said that he had first bought cocaine from Perez three or four days before his arrest. Petitioner got involved because he wanted to make enough money to go back to his country, Guatamala (R 95-98, 105-106, 109).

Wilde's partner, Detective Downing, and the owner of the Athenian Corner testified about the informant. Downing testified that the informant had been working for the police for at least six months, that she was working as a prostitute, and that she was paid $100 in Petitioner's case (R 216-219). The restaurant owner testified that the informant was named Emma and, like Petitioner, frequented the restaurant. Her price was $20. The owner had once seen Petitioner and Emma leave the restaurant together (R 251-258). The owner also testified that Wilde acted like a prostitute. Emma told the owner that Wilde was a prostitute, and introduced her as "the new kid on the block," with a price of $50 (R 259-260, 264).

Petitioner testified on his own behalf that he once paid Emma $20 for sex. Several days later she started coming to him and asking for drugs, but he never responded. Emma introduced Wilde to Petitioner as another prostitute. The first time they went to Perez's for cocaine, Emma and Wilde asked him to get it for them as a favor. Petitioner made no profit (R 290-306).

The second night, Wilde again asked Petitioner to do her a favor. They drove to Perez's and Petitioner again got her a gram for $50. On the way home, Wilde asked Petitioner if Perez sold cocaine by the ounce. He said he didn't know, but that he thought

the cocaine they got had been scraped off a big chunk. However, he said he didn't want to make a deal for an ounce (R 307-309).

The next day, Wilde called Petitioner at the Athenian Corner. She asked if Petitioner has talked to Perez, and Petitioner said no. Wilde said that she and her boyfriend wanted more cocaine in order to sell it. Petitioner went with them again to Perez's house. Wilde offered Petitioner $50 per ounce if he could get Perez to sell her six ounces; this would give him $300 to buy toys for his children in Guatamala, who he was planning to visit soon. Petitioner refused the offer, but introduced Wilde to Perez. They all went inside, where Petitioner heard Wilde and Perez talking about cocaine but did not see any of the drug. Later at the gas station, Petitioner did not see the cocaine change hands between Perez and Wilde. Petitioner denied having any intention of selling cocaine before he met Emma (R 309-312).

At the jury charge conference, the defense requested an instruction placing the burden of proof on entrapment on the state to prove beyond a reasonable doubt that the defendant was not entrapped. The defense objected to instructing that the defendant must prove by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment. The defense objected that the first instruction was an unconstitutional shift in the burden of proof. The defense's request was denied, the court stated that it was bound to follow the latest standard instruction promulgated by the Florida Supreme Court placing the burden on the defense, and the defense registered an objection (R 357-359).

The court instructed the jury as follows on entrapment (R 448-450):

The defendant was entrapped if he was, for the purpose of obtaining evidence of the commission of a crime, induced or encouraged to engage in conduct instituting [sic] the crime of, as in the case of Count I trafficking in cocaine, as to the other two counts, delivery of cocaine.

And he engaged in such conduct as a direct result of such inducement or encouragement, and the person who induced or encouraged him was a law enforcement officer or a person engaged in cooperating with or acting as an agent of a law enforcement officer.

And the person who induced or encouraged him employed methods of persuasion or inducement which created a substantial risk that the crime would be committed by a person other than one who was ready to commit it, and the defendant was not a person who was ready to commit the crime.

It is not entrapment if the defendant had the predisposition to commit as to Count I, trafficking in cocaine, and Counts II and III, delivery of cocaine.

The defendant had the predisposition if before any law enforcement officer or person acting for the law officer persuaded, induced or lured the defendant, he had a readiness or a willingness to commit, as to Count I, trafficking in cocaine, or Counts II and III, delivery of cocaine, if the opportunity presented itself.

Its also not entrapment merely because a law enforcement officer in a -- in good faith attempted to detect a crime, provided the defendant the opportunity, means, and facilities to commit the offense which the defendant intended to commit and would have committed otherwise.

Used tricks, decoys or subterfuge to expose the defendant's criminal acts, or was present and pretending to aid and assist in the commission of the offense.

On the issue of entrapment raised by the defense in this case, the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of the entrapment.

At the beginning of the instructions, the court instructed the jury as follows on presumption of innocence, burden of proof, and reasonable doubt (R 439-440):

> To these three charges, the defendant's entered a plea of not guilty and that means you must presume or believe the defendant is innocent, and that presumption stays with the defendant as to each material allegation in the information through each stage of the trial until it's been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the defendant's presumption of innocence, the state has the burden of proving the following two elements.
>
> First, that the crime which the defendant is charged was in fact committed. And second, the defendant is the person who committed the crime.
>
> The defendant's not required to prove anything. Whenever the words reasonable doubt are used, you must consider the following.
>
> A reasonable doubt is not a possible doubt, an imaginary, speculative or forced doubt.
>
> That kind of doubt should not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.
>
> On the other hand, if after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or if having a conviction, its one that's not stable, but one that waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this tricl and to that evidence alone that you are to look for that proof.
>
> A reasonable doubt as to the guilt of the defendant may arise from the evidence, the lack of evidence, or a conflict in the evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

SUMMARY OF ARGUMENT

The new standard jury instruction on entrapment, and the statute upon which it is based, are unconstitutional. Under the Florida Constitution, both the instruction and the statute improperly shift the burden of proof to the defendant to prove entrapment. Under the United States Constitution, although the statute is not unconstitutional on its face, the jury instruction is unconstitutional because the jury is not also instructed that it must consider all the evidence in first determining whether the state has met its primary burden of proving beyond a reasonable doubt that the defendant has committed the crime charged.

ARGUMENT

INSTRUCTION 3.04(c)(2), FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, AND SECTION 777.201(2), FLORIDA STATUTES (1989), BOTH APPLICABLE TO OFFENSES AFTER 1987, UNCONSTITUTIONALLY SHIFT THE BURDEN TO THE DEFENSE TO PROVE ENTRAPMENT.[1]

A. Florida Constitutionality

This Court in 1989, in response to the enactment of Section 777.201(2), Florida Statutes (1987), provisionally approved a new standard jury instruction shifting the burden of proof on entrapment to the defendant. In re Standard Jury Instructions in Criminal Cases, 543 So.2d 1205, 1208 (Fla. 1989). The new instruction, tracking the statute, states, "On the issue of entrapment, the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment." The old instruction stated, "On the issue of entrapment, the state must convince you beyond a reasonable doubt that the defendant was not entrapped."

This Court, in adopting the new standard instruction, explicitly declined to pass on its constitutionality or on the constitutionality of Section 777.201(2). In a footnote on page 1208 of this Court's opinion In re Standard Jury Instructions in Criminal Cases, supra, this Court noted that the statute does place the burden of proof of entrapment on the defendant, but stated that

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[1] This question was certified to this Court because a similar issue was already pending in this Court in State v. Krajewski, Case No. 77,685. The argument in this brief under subheading B of this point on appeal is essentially the same as the argument of the defense in Krajewski. The argument here under subheading A, however, is not. The arguments here are also before this Court in Herrera v. State, Case No. 78,290.

for the limited purpose of adopting the standard instructions the statute's constitutionality must be assumed. This Court stated, "The court deems it inappropriate to pass on the constitutionality of a statute except in adversary proceedings."

The instant case presents the constitutionality of the instruction and the statute in an adversary proceeding appropriate for a decision on constitutionality.

In the instant case, over defense objection (R 357-359), the trial court instructed the jury in accordance with the new instruction placing the burden on the defendant (R 450). The defense is entitled to have the jury correctly instructed on its theory of defense. Stiglitz v. State, 270 So.2d 410 (Fla. 4th DCA 1972). It is always the responsibility of the trial judge to correctly instruct the jury in each case, and the approval of a standard jury instruction does not relieve the trial judge of this responsibility. In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 598 (Fla. 1981).

This Court's decisions on the previous versions of the standard entrapment instruction demonstrate that the new instruction and the statute are unconstitutional under the due process clause of the Florida Constitution because of the burden shift. Article I, Section 9, Florida Constitution. The Florida due process clause offers greater protection to its citizens from police overreaching than does the Federal Constitution. State v. Glosson, 462 So.2d 1082, 1084-1085 (Fla. 1985).

First, in State v. Wheeler, 468 So.2d 978 (Fla. 1985), this Court adopted the following four-step statement of the burden of proof in an entrapment case:

> (1) the defendant has the burden of adducing any evidence of entrapment;
>
> (2) the trial court determines the sufficiency of the evidence of entrapment;
>
> (3) if the evidence of entrapment is sufficient the jury must be instructed that the state has the burden of disproving entrapment beyond a reasonable doubt; and
>
> (4) the jury should never be instructed on the defendant's burden of adducing evidence.

Steps three and four are governing in the instant case. Following steps one and two, the trial court did determine that entrapment should be submitted to the jury; under steps three and four the court erred, however, in giving an instruction placing the burden on the defense.

Next, in Rotenberry v. State, 468 So.2d 971 (Fla. 1985), this Court approved the then-current version of the standard jury instruction:

> If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

This Court held that this instruction was adequate because it was given in combination with the general instructions on burden of proof and reasonable doubt, which placed the burden of proof on the state. See also McCray v. State, 478 So.2d 203 (Fla. 1985), approving McCray v. State, 433 So.2d 5 (Fla. 4th DCA 1983).

After Rotenberry, however, this Court returned to the original pre-Rotenberry standard instruction, which explicitly placed the

burden of proof on the state to establish beyond a reasonable doubt that the defendant was not entrapped. The Florida Bar re Standard Jury Instructions-Criminal, 508 So.2d 1221 (Fla. 1987). The instruction then adopted was the one termed the "old" instruction in this brief. It was in effect until the 1987 adoption of Section 777.201(2). The instruction stated:

> On the issue of entrapment, the state must convince you beyond a reasonable doubt that the defendant was not entrapped.

This, Petitioner submits, is the correct statement of the law. Certainly the new instruction would not have passed muster under Wheeler and Rotenberry. Wheeler stated, "When the defendant has adduced sufficient evidence to make a prima facie case of entrapment, the burden of proof regarding entrapment shifts entirely to the state. After the burden has shifted, no consideration of the defendant's initial burden is permissible." 468 So.2d at 981 (emphasis added). Plainly the new jury instruction is improper further consideration. Rotenberry approved an instruction which in fact made no comment on the burden of proof one way or the other:

> If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

468 So.2d at 972. Based as it was on other instructions clearly placing the burden of proof on the state, the Rotenberry decision would not have approved the new instruction squarely placing the burden on the defense.

Wheeler is still good law and should not be overruled by this Court. Although Wheeler was based at least in part on decisions

of the United States Supreme Court, 468 So.2d at 980-981, and although the federal law does not go as far as the Florida Constitution (see subheading B below), nonetheless the federal cases still provide the basic underpinning for this Court's prior rulings, while the Florida Constitution requires more. State v. Glosson, supra. Having previously approved a jury instruction squarely and properly placing the burden of proof on the state, this Court must now disapprove the new instruction shifting that burden one hundred eighty degrees to the defense.

This Court must also hold the provision of the statute placing the burden on the defense to be unconstitutional, or, in the alternative, hold that no jury instruction is authorized by it or may be based upon it. Certainly in the instant case, the statute and instruction must be evaluated in tandem, since the instruction transmitted the statute to the jury, thereby giving its practical effect in the trial. This effect must be the paramount consideration. The effect of burden-shifting jury instructions must be determined by the way in which a reasonable juror could have interpreted the instruction. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Here, a reasonable juror would interpret the new entrapment instruction as placing the burden of proof on the defendant.

B. Federal Constitutionality.

Respondent must concede that under the United States Constitution, unlike the Florida Constitution (subheading A above), Section 777.201(2), Florida Statutes (1987), is not necessarily unconstitutional on its face. However, the United States Supreme Court has made it clear that it is constitutionally permissible to

place upon the defendant the burden of proving an affirmative defense by a preponderance of the evidence only if the jury is carefully instructed that it must consider all the evidence, including that of the affirmative defense itself, in first determining whether the state has met its primary burden of proving beyond a reasonable doubt that the defendant has committed the crime charged. The jury instructions in the instant case do not meet these standards, so that the instructions were a violation of the federal due process clause. Fifth and Fourteenth Amendments, United States Constitution. Additionally, the statute was unconstitutional as applied in the instant case, because it was the basis for the instruction.

The federal case law implicitly recognizes that, as with any affirmative defense, a defendant seeking to avoid conviction by claiming that he was entrapped must first make a preliminary showing that such a verdict in his favor on that issue would not be wholly inconceivable. In Matthews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), the Supreme Court held that, as with any other affirmative defense, the defendant "is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." 485 U.S. at 62, 108 S.Ct. at 886, 99 L.Ed.2d at 60. See also Simopoulos v. Virginia, 462 U.S. 506, 510; 103 S.Ct. 2532, 2536; 76 L.Ed.2d 755 (1983) ("Placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible.")

The question presented by the statute and the jury instruction under examination here, however, is not what quantum of proof must

be shown before a defendant is entitled to have the jury instructed on entrapment. Rather, the statute posits that, in order to be found not guilty by reason of entrapment, the defendant must establish the existence of that defense by the preponderance of the evidence. In Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the United States Supreme court held that due process was not offended where a state requires the defendant to prove an affirmative defense once the state has established each of the elements of the offense beyond a reasonable doubt. Thus, in Patterson, the defendant was accused of murder, and the state of New York proved beyond a reasonable doubt that he had committed each of the elements of that crime. Thereupon, there was no constitutional defect in requiring the defendant to prove his proper defense of extreme emotional disturbance by a preponderance of the evidence.

In so holding, the court relied on Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed.2d 1302 (1952), which upheld a procedure whereby the jury first had to find each element of the crime beyond a reasonable doubt, based on all the evidence, including the evidence going to an insanity defense. Only thereafter was the jury to consider separately the legal issue of insanity itself, which the defendant was required to establish. And in Patterson, the Supreme Court was most careful to emphasize that the jury was instructed that if it found beyond a reasonable doubt that the defendant intentionally killed the deceased, but that the defendant had demonstrated by the preponderance of the evidence that he acted under the influence of extreme emotional

disturbance, then it had to find the defendant guilty of the lesser included crime of manslaughter.

The United States Supreme Court repeated its emphasis on the completeness of the jury charge with respect to the state's burden of proof as it interrelated to the defense's burden to prove an affirmative defense in its most recent pronouncement on this issue in Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). In Martin, the defendant was charged with murder by causing the death of another "with prior calculation and design." At trial, she sought to avoid conviction by arguing that she acted in self defense. She was convicted, however, of murder, and on appeal contended that by instructing the jury that she had the burden of proving self defense by a preponderance of the evidence, the state impermissibly shifted the burden of proof from the prosecution to prove every element of its case.

By a five to four vote, the Supreme Court rejected the defendant's position that someone acting in self defense virtually never effects a death "with prior calculation and design" because the circumstances giving rise to the defense generally occur in an extremely short period of time, making forethought largely impossible. Thus, argued the defendant, by being required to prove self defense, she was in effect being required to disprove an element of the state's case, prior calculation. Such a scheme would be in violation of the burden-shifting prohibition expressed in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508

(1975).[2] See also In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In deciding the case adversely to the defense, the Supreme Court reasoned that Ohio had not impermissibly shifted the burden of proof because the instruction as given to the jury made it clear, as had the instructions in Patterson, that the jury was to consider all the evidence, including the evidence of self defense, in determining, first, whether the state had proved its case beyond a reasonable doubt. Only thereafter, upon being convinced that the elements of the offense had been satisfactorily established, was the jury to decide whether the defendant had adequately shown that she acted in self defense, so as to excuse her homicide. The court cautioned:

> It would have been quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the state's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of Winship's mandate.

Martin v. Ohio, supra, 480 U.S. at 233-234, 107 S.Ct. at 1102, 94 L.Ed.2d at 274. In Martin, to the contrary, the jury had been instructed:

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[2] In Mullaney, the Supreme Court held that Maine had unconstitutionally shifted the burden to the defendant to prove his innocence of murder where it required him to assume the burden of proving that he acted in the heat of passion on sudden provocation, where the crime of murder was defined as a killing committed suddenly, "without any, or without a considerable provocation." Thus, in order to prove his defense, the defendant would have to negate an element of the offense which the state should properly have been required to prove.

> that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated of murder has been proved by the State beyond reasonable doubt and that the burden of proof with respect to these elements did not shift. To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by Martin in connection with her plea of self-defense or by Martin in connection with her plea of self-defense, raised a reasonable doubt that Martin had killed her husband, that she had a specific purpose and intent to cause his death, or that she had done so with prior calculation and design. It was told, however, that it could acquit if it found by a preponderance of the evidence that Martin had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger.

Id. 480 U.S. at 233, 107 S.Ct. at 1101, 94 L.Ed.2d at 274 (emphasis added).

As shown, then, under the United States Constitution the burden of an affirmative defense may be placed on the defense only where the jury instructions still require the state to prove beyond a reasonable doubt all the elements of the crime. The jury is to consider all the evidence in reaching this initial conclusion; only then may the jury consider whether the defendant should nevertheless be acquitted because he has demonstrated his defense by a preponderance of the evidence. Absent such a clarifying instruction, the danger that the jury will misunderstand its task and erroneously conclude that the defendant has the burden of disproving an element of the state's case would violate the defendant's due process rights in contravention of Mullaney v. Wilbur, supra.

As a result of this analysis, it is evident that the United States Constitution gives Florida the right -- although not the obligation[3] -- to determine that a defendant will be required to prove a particular affirmative defense by the preponderance of the evidence. Federal due process requires, however, that the jury instructions relating to the entrapment defense must expressly advise the jury that it is first to consider all the evidence, including the defense evidence of entrapment, in deciding whether or not the state has proven its case beyond a reasonable doubt.

The instructions given in the instant case were inadequate to meet that requirement. The jury was instructed only in the most general terms with respect to the state's burden of proof (R 439-440) (quoted at length in statement of facts in this brief), and only at a point well removed from the entrapment instructions. These instructions made absolutely no mention of the way in which the jury was to consider any evidence of entrapment in assessing whether the state had proven its case. Nor did the instructions on entrapment other than the one at issue here remedy this omission (R 448-450) (quoted at length in statement of facts). The instructions made no attempt to interrelate the state's burden of proof to establish the elements of the crime, which may never shift to the defense, and the burden of showing entrapment. They also

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[3] The United States Supreme Court noted in Martin v. Ohio, supra, 480 U.S. at 236, 107 S.Ct. at 1103, 94 L.Ed.2d 275, that all but two states require the prosecution to prove the absence of self defense when it is properly raised by the defendant. See also Yohn v. State, 476 So.2d 123 (Fla. 1985) (state required to disprove insanity beyond a reasonable doubt once defendant presents evidence rebutting presumption of sanity). Petitioner argues above in subheading A, however, that the Florida Constitution prohibits the burden shift.

contained no explicit statement that the jury must consider all the evidence, including specifically any evidence of entrapment which it found, in deciding whether the state had proven its own case beyond a reasonable doubt. Where there is any reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, the conviction must be set aside. Francis v. Franklin, 471 U.S. 307, 322-323, n. 8; 105 S.Ct. 1965, 1975-1976; 85 L.Ed.2d 344 (1985).

Consequently, the entrapment instruction given at Petitioner's trial had the improper effect of impermissibly shifting the burden of proof from the state to the defendant, in violation of the due process clause of the United States Constitution as well as the Florida Constitution.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the District Court and to remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Georgina Jimenez-Orosa, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 13th day of August, 1991.

Counsel for Petitioner