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SEP 5 1991
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,299

CARLOS DELEON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Carlos DeLeon, was the the appellant before the District Court of Appeal, Fourth District, and the defendant in the trial court, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the appellee and the prosecution, respectively, in the courts below.

In this brief, the parties will be referred to as they appear before this Honorable Court, except that Respondent may also be referred to as "the State."

References to the record on appeal will be made by the following symbols:

"A"	=	Appendix to Answer Brief
"PMB"	=	Petitioner's Initial Merits Brief
"R"	=	Record on Appeal

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

The State accepts Petitioner's statement of the case as it appears on page two of his Initial Brief, except that the State would like to clarify the following matters:

First, count I of the information charged Petitioner **and** Jose Alberto Perez with trafficking in cocaine over 28 grams on March 9, 1990. And counts II and III of the information charged Petitioner **alone** with two separate counts of delivery of cocaine, one on March 6, 1990, and one on March 7, 1990 (R. 485). Appellant went to trial **alone**; and the jury found him guilty on all three counts (R. 501-503, 507).

Second, the **sole** issue before the Fourth District Court of Appeal was whether the trial court erred in reading to the jury the **new** Standard Jury Instructions on Entrapment, as approved by this Court in 1989. The opinion filed by the District Court, on May 21, 1991, in the case at bar was a per curiam affirmance, without opinion, citing to Herrera v. State, [580 So.2d 653] (Fla. 4th DCA May 8, 1991); Krajewski v. State, 16 FLW D692 (Fla. 4th DCA March 13, 1991); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990).

STATEMENT OF THE FACTS

The State cannot accept the Statement of the Facts as it appears at pages three (3) through eight (8) of Petitioner's Initial Brief because it is incomplete, inaccurate and insufficient to assist this Court in making its decision on jurisdiction, and/or address the limited issue presented to this court through the certified question. In order to present this Court with an adequate and complete statement of the facts, the State presents the following as its own statement of the facts in compliance with the requirements of Fla. R. App. P. 9.210.

Detective Kathy Wilde testified that about one week prior to March 6, 1990 (R. 44), the confidential informant (hereinafter CI) told her that there was a Latin male trying to sell some cocaine out of a restaurant called the Athenian Corner Restaurant on Federal Highway in Hollywood, FL (R. 45). On March 6, 1990, Detective Wilde and her law enforcement partner, Detective Larry Downing (R. 44), went to the Athenian Corner Restaurant (hereinafter Restaurant) (R. 46, 47). At the Restaurant, Detective Wilde saw several Latin males and heard conversations of cocaine, but she did not see any transactions or cocaine (R. 46).

While Detective Wilde was still at the Restaurant, Petitioner came in (R. 47), and he appeared to be comfortable talking, and was knowledgeable, about cocaine (R. 48). After their initial conversation, Petitioner offered to take Detective Wilde to get cocaine, but since the detective was not wearing a listening device, and did not want to go anywhere with

Petitioner, without her backup, she postponed the initial buy (R. 49).

At that point, Detectives Wilde and Downing left to get a listening device, and came back later that same night, March 6, to meet Petitioner at the Restaurant (R. 49). From the Restaurant, Petitioner took Detectives Wilde and Downing, together with the CI, to the west side of Hollywood to buy cocaine (R. 49). The CI came along because Petitioner was not yet comfortable with taking Wilde -- a stranger to him -- to buy drugs (R. 51). Petitioner had known the CI for a week or two (R. 51).

On the way to 5933 Filmore Street, Petitioner and Detective Wilde talked "of different prices of cocaine, ounces, grams, what [Petitioner] would want if [Wilde] did a larger deal," (R. 52), and how much of a cut - monetarily - Petitioner would expect for his participation in a cocaine deal (R. 52). Detective Wilde testified that at that point the name of Jose Perez was not mentioned, but Petitioner did mention "Khadafi," which later she found out is the name Jose Perez went by (R. 52). On the ride to get the cocaine on March 6, Petitioner made Detective Wilde take all kinds of turns until they arrived at the 5900 block of Tyler Street, which is a couple of blocks over from Filmore Street (R. 53); this was so that Detective Wilde would not know where the supplier lived (R. 55).

When they stopped, Petitioner asked Detective Wilde for $50 so he could get her the gram of cocaine (R. 56). Detective Wilde gave Petitioner $50, and Petitioner told Wilde to wait in the car

for him, and he left (R. 56). When Petitioner left the car, Detective Wilde told one of the backup/surveillance officers where Petitioner was headed, and the other officer picked him up by sight and followed him to the house (R. 57). Petitioner was gone for 10 to 15 minutes (R. 56), when he came back he had the cocaine with him, and gave it to Detective Wilde (R. 58). Detective Wilde then drove back to the Restaurant (R. 58), asked Petitioner about prices for purchasing a larger amount of cocaine (R. 58). Detective Wilde gave Petitioner a "beeper" number where he could reach her (R. 55), and Wilde told Petitioner she would be back at the Restaurant the next day (R. 59).

The next day, March 7, Detective Wilde met Petitioner again at the Restaurant at 7:30 p.m. (R. 62). The CI did not accompany Detective Wilde on March 7 (R. 63). After having a drink at the Restaurant, Detective Wilde once again drove Petitioner to the house (R. 64). On the drive to the house, Petitioner told Detective Wilde the price would be "between $650 an ounce to $750 an ounce, depending on the quantity, and an extra $50 an ounce for [Petitioner's] cut" (R. 65). The day of the second buy, March 7, Petitioner let Detective Wilde drive up to the house. Detective Wilde parked in front but had to remain in the car, while Petitioner went inside (R. 67). Petitioner once again was gone 10 to 15 minutes before returning with the cocaine (R. 67). At the conclusion of the transaction on the 7th of March, Detective Wilde asked Petitioner about buying a larger amount the next time, Petitioner responded he would have to check with his supplier first (R. 68).

On Friday, March 9, Petitioner beeped Detective Wilde, and asked her to pick him up so they could try to make an eight (8) ounce of cocaine deal at $650 per ounce (R. 68). Because of the larger amount of money and cocaine involved, Detective Wilde decided to bring Detective Dowling along (R. 68). The Detectives picked Petitioner up at the Shell gas station at 8:00 p.m. (R. 69), and Wilde introduced Dowling as her boyfriend, and the man with the money (R. 69).

From the gas station, they began driving towards the same house as on the two prior occasions, but then Petitioner told Wilde to park in front of an auto parts store on 441 until it was alright with Jose Perez that Wilde come to the house (R. 70). Petitioner then exited the car, and went to Jose Perez' house (R. 70). Petitioner came back a short time later and told Detective Wilde all the cocaine was not there, and that they would have to wait (R. 71).

While they were waiting, Detective Wilde saw Jose Perez come out of the house, make a telephone call from a pay phone, while looking over to the undercover car and its occupants (R. 71). When Perez finished the telephone call, Petitioner introduced Jose Perez to Detective Wilde (R. 71). Jose Perez discussed money with the detectives and said that the price was up to $750, and that did not include the extra $50 for Petitioner (R. 71-72). Perez then went back inside his house, and later came back out to say the cocaine was still not all there. Petitioner wanted Detective Wilde to give them the money first, but the detective refused (R. 72-73). Finally, Jose Perez told Wilde that if she

wanted six (6) ounces, she would have to wait 45 minutes. Detective Wilde told him she did not want to sit in her car with $6,000, that she would leave, and come back later (R. 73). The Officers left, but the undercover surveillance remained (R. 73).

When Detectives Wilde and Dowling came back 45 minutes later, Petitioner told them the drugs were still not there, and he kept stalling for more time (R. 73-74). Detective Wilde convinced Petitioner and Perez to let her go in the house (R. 75), inside she saw two (2) ounces of cocaine in Jose Perez' secret compartment (R. 75). While inside, Detective Wilde pretended she did not like the situation, pretended to call her baby-sitter, but instead called her Sergeant so as to receive approval for moving the completion of the transaction to the Hess gas station (R. 76-77). On the way to the Hess station, Jose Perez decided to change the location to the Toomy Restaurant (R. 78). They all waited at the Toomy Restaurant for approximately half an hour (R. 79). At that point, Eddie Ortez, a person Detective Wilde had met at Perez' house, came to the Toomy Restaurant, and then Jose Perez said that they would have to go back and complete the transaction at the Hess station (R. 79). Detectives Wilde and Downing drove to the station, but Petitioner and Ortez walked over to the station. When Wilde and Downing arrived at the station, Jose Perez was already there in a van, and Petitioner and Ortez were arriving on foot (R. 79-81).

Perez took Detective Wilde over to some bushes where he pulled out a yellow plastic container. Perez and Wilde walked over to the van, where Perez showed the cocaine to Detective

Wilde. Detective Wilde told Perez she had the money in the car; Perez handed over the cocaine to Wilde, and they walked toward Wilde's car. At that point, Detective Wilde gave a signal to the backup units that she had the cocaine; the police moved in and made the arrests (R. 81-82).

Detective Wilde testified that after Petitioner was arrested, he was read his Miranda rights, then Petitioner gave a statement to the police (R. 86). The taped statement was introduced into evidence and played to the jury (R. 90-108). In the statement Petitioner claims he became involved in this business to make enough money for a trip back to his country to see his kids (R. 109). Petitioner also claimed he received the one gram he sold to Detective Wilde four or five days before from Khadafi, but nothing before that ever (R. 113). That, "he never done this before, but he needs money because he wants to go back to his county." (R. 114-116).

On cross-examination, and in response to defense counsel's attempts to set up an entrapment defense, Detective Wilde testified that she was introduced to Petitioner by the confidential informant, Emma, who had been arrested for prostitution six months prior to March 1990 (R. 145), but that at no time was there any mention by Petitioner, or anyone, that he [Petitioner] wanted sex from Detective Wilde (R. 63). In the transcript of the March 7 transaction Petitioner stated that he was not looking for Detective Wilde's body (R. 63-64). Detective Wilde's testimony also was to the effect that the confidential informant (hereinafter CI) introduced Detective Wilde as a girl

she met from the streets (R. 128). Detective Wilde stated that prostitutes do frequent the area where the Athenian Corner Restaurant is located (R. 130), and that the CI does frequent the Restaurant, and the people there were friendly with her (R. 131), but that there was no reason for Detective Wilde to believe the CI was working the Restaurant as a prostitute (R. 141); **but more importantly, Detective Wilde did not pretend to be a prostitute in this case before asking Petitioner if she could buy cocaine from him, or whether he knew someone that could sell cocaine to her (R. 143-143).**

The testimony of Detective Wilde was that the CI did not ask Petitioner to get the cocaine for Detective Wilde as a favor because the Detective was a friend of the CI (R. 152-3); nor did Detective Wilde try to give Petitioner the impression that he, the CI and Detective Wilde would be partying together (R. 167). Instead, in her instructions to the CI, Detective Wilde was careful to warn the CI against using sex to entrap Petitioner, or anybody (R. 43, 136, 140, 164). Any mention of $50.00 was regarding the price of a gram of cocaine; **and is the amount Detective Wilde paid Petitioner (not the other way around) on March 6, and March 7, in exchange for one gram of cocaine each time (R. 56, 67).** When an agreement was reached that the supplier would sell Detective Wilde two (2) ounces of cocaine for $750.00 an ounce, Petitioner demanded an extra $50.00 an ounce for himself (R. 71-72).

Detective Wilde's partner, Detective Lawrence Downing testified that the prior prostitution charges against the CI were

not "forgiven" as a result of her acting as a confidential informant in the case at bar (R. 220). Rather, the CI was working as a **paid** informant for the police; the instant case was a "paid transaction" (R. 220) for which the CI received $100.00 (R. 219). That as far as he knew, the CI had met Petitioner a short time prior to March 6, 1990 (R. 215); that once the CI did the introductions between Detective Wilde and Petitioner, Detective Wilde picked up the investigation (R. 215), and the CI was no longer a participant in the negotiations.

As to the entrapment defense, Petitioner's testimony regarding the CI was that he never went with the CI, but two months prior to March 1990, he talked to the CI in the Athenian Corner Restaurant (R. 291). The first time he saw the CI at the Restaurant was to buy cigarettes, and the CI just said, "hi" (R. 293). The CI was friendly (R. 294). Then one time the CI asked Petitioner if he wanted to have sex with her (R. 294); the two of them went to Petitioner's apartment (R. 297), and he paid the CI $20.00 (R. 298).

The tape statements and the defense of entrapment notwithstanding, at trial Petitioner emphatically denied he needed money to go back to Guatemala (R. 305). Rather Petitioner stated he told Detective Wilde that he knew she was an undercover officer, and did not want to get involved in anything, because he already had his plane ticket ready, and he was going to Guatemala to see his four (4) kids (R. 310, 319, 336-337). Although Petitioner testified he thought the CI and Detective Wilde were in the same business (R. 301); the defense did not present any

testimony that Detective Wilde made any suggestions regarding sex between them. Petitioner's testimony was that all Detective Wilde wanted was for Petitioner to find her a gram of cocaine for $50.00 (R. 305, 311). Petitioner also alleged he had never met Jose Perez, the cocaine supplier, before March 6 (R. 300, 317-318).

SUMMARY OF THE ARGUMENT

Since the issue was properly decided in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), rev. denied, ___ So.2d ___, (Fla. Case No. 77,459 June 27, 1991), relied upon by the District Court in the instant case, this Court should decline to exercise its discretionary jurisdiction to answer the certified question. Should the Court, however, decide to accept jurisdiction over the case, the State submits that for the following reasons the certified question must be answered in the negative.

Florida Standard Jury Instruction 3.04(c)(2), in allocating the burden of proving entrapment to the defendant, does not violate a defendant's constitutional rights since it does not relieve the State of its burden of proving beyond every reasonable doubt all the elements of the offenses charged. In proving an affirmative defense in a criminal case, such as entrapment, the burden of persuasion rests with the defendant, and the State is not obligated to prove the defendant's explanation untrue. Proof of the nonexistence of all affirmative defenses has never been constitutionally required. The record is clear that in the case at bar, Petitioner not only failed to establish "entrapment as a matter of law," he totally failed to meet his burden of persuasion.

ARGUMENT

JURISDICTION

On direct appeal to the Fourth District Court of Appeal, Petitioner raised one single issue: "Whether the trial court erred in instructing the jury that [Petitioner] had the burden to prove the defense of entrapment." Agreeing with the Third District Court of Appeal's analysis and decision of the issue in Gonzalez v. State, 571 So.2d 1346, 1349-1351 (Fla. 3d DCA 1990), rev. denied, ___ So.2d ___ (Fla. No. 77,459 June 27, 1991), the Fourth District Court issued its decision in the case at bar without opinion, but citing to Herrera v. State, 580 So.2d 653 (Fla. 4th DCA May 8, 1991); Krajewski v. State, 16 FLW D692 (Fla. 4th DCA March 13, 1991) and Gonzalez, See Appendix A.

As to this particular issue - Constitutionality of the Standard Jury Instruction on Entrapment - in Krajewski the District Court specifically held that "the jury instructions [are] adequate as a whole to convey the requirement that the jury must consider all the evidence in determining whether the state met its burden of proof." 16 FLW at 694. In Herrera, the Fourth District Court of Appeal also found "no error in the trial court's instructing the jury with the relatively new standard instruction on entrapment," citing to Krajewski and Gonzalez.

The State submits that since this Court declined to review the Third District's opinion in Gonzalez (See order of this Court entered in Case No. 77,459 on June 27, 1991), which was the case relied upon by the Fourth District in Herrera,

Krajewski, and the instant case, the Court should likewise decline to accept jurisdiction sub judice. See, Jollie v. State, 405 So.2d 418 (Fla. 1981). Although the District Court granted Petitioner's motion for certification (See Appendix B), the District Court did not specify what question it was certifying (See Appendix B), as the District Court did in Herrera, see Herrera v. State, 16 FLW D2140 (Fla. 4th DCA June 21, 1991).

Further, the record on appeal shows that while it is true that Detective Wilde testified that she was introduced to Petitioner by the confidential informant, Emma, who had been arrested for prostitution six months prior to early March, 1990 (R. 145), Detective Wilde also testified that at no time was there any mention by Petitioner, or anyone, that Petitioner wanted sex from Detective Wilde (R. 63), and the tape recording of the March 7 transaction clearly shows that Petitioner states he is not looking for Detective Wilde's body (R. 63-64). Detective Wilde's testimony also was to the effect that the CI introduced Detective Wilde as a girl she met from the streets (R. 128). Detective Wilde stated that prostitutes do frequent the area where the Athenian Corner Restaurant is located (R. 130), and that the CI does frequent the Restaurant, and the people there were friendly with her (R. 131), but that there was no reason for Detective Wilde to believe the CI was working the Restaurant as a prostitute (R. 141); **but more importantly, Detective Wilde did not pretend to be a prostitute in this case before asking Petitioner if she could buy cocaine from him, or**

whether he knew someone that could sell cocaine to her (R. 143-143).

The testimony of Detective Wilde was that the CI did not ask Petitioner to get the cocaine for Detective Wilde as a favor because the Detective was a friend of the CI (R. 152-3); nor did Detective Wilde try to give Petitioner the impression that Petitioner, CI and Detective Wilde would be partying together (R. 167). Instead, in her instructions to the CI, Detective Wilde was careful to warn the CI against using sex to entrap Petitioner or anybody (R. 43, 136, 140, 164). Any mention of $50.00 was regarding the price of a gram of cocaine; **and is the amount Detective Wilde paid Petitioner (not the other way around) on March 6, and March 7, in exchange for one gram of cocaine each time (R. 56, 67).** When an agreement was reached that the supplier would sell Detective Wilde two (2) ounces of cocaine for $750.00 an ounce, Petitioner demanded an extra $50.00 an ounce for himself (R. 71-72).

Detective Wilde's partner, Detective Lawrence Downing testified that the prior prostitution charges against the CI were not "forgiven" as a result of her acting as a confidential informant in the case at bar (R. 220). Rather, the CI was working as a **paid** informant for the police; the instant case was a "paid transaction" (R. 220) for which the CI received $100.00 (R. 219). That as far as he knew, the CI had met Petitioner a short time prior to March 6, 1990 (R. 215); that once the CI did the introductions between Detective Wilde and Petitioner, Detective Wilde picked up the investigation (R. 215), and the CI was no longer a main participant in the negotiations.

Petitioner's testimony regarding the CI was that he never went with the CI, but two months prior to March 1990, he talked to the CI in the Athenian Corner Restaurant (R. 291). The first time he saw the CI at the Restaurant was to buy cigarettes, and the CI just said, "hi" (R. 293). The CI was friendly (R. 294). Then **one time** the CI asked Petitioner if he wanted to have sex with her (R. 294); the two of them went to Petitioner's apartment (R. 297), and he paid the CI $20.00 (R. 298).

When Petitioner took the witness stand in his own behalf, he emphatically denied he needed money to go back to Guatemala (R. 305). Rather Petitioner stated at trial in front of the jury that he told Detective Wilde that he knew she was an undercover officer, and did not want to get involved in anything, because he already had his plane ticket ready, and he was going to Guatemala to see his four (4) kids (R. 310, 319, 336-337). Although Petitioner testified he thought the CI and Detective Wilde were in the same business (R. 301); the defense did not present any testimony that Detective Wilde made any suggestions regarding sex between them. Petitioner testified that all Detective Wilde wanted was for Petitioner to find her a gram of cocaine for $50.00 (R. 305, 311). Petitioner also alleged he had never met Jose Perez, the cocaine supplier, before March 6 (R. 300, 317-318).

As mentioned, at trial during his own testimony, Petitioner emphatically denied he needed money to go back to Guatemala (R. 305). Rather Petitioner testified that he had quit his job prior to March 6, 1990, in anticipation of his trip to Guatemala to see

his four (4) kids (R. 328-329). And that when he met Detective Wilde he told her he did not want to get involved because he already had his airplane ticket bought, and he was ready to go (R. 310, 336-337).

Recently, the Florida Supreme Court once again reiterated that in Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985), it set out a threshold test for establishing entrapment: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Id. at 522 (emphasis added); State v. Hunter, ___ So.2d ___ (Fla. No. 73,230 August 29, 1991) (Slip opinion page 6.). In the case at bar, the CI introduced Detective Wilde to Petitioner because the CI allegedly had seen Petitioner selling cocaine out of the Restaurant. As soon as the introductions were made and the first buy was completed, the CI vowed out of the picture. The record shows that the CI was not fully identified at trial, and she did not even testify at the trial. It is clear that "Entrapment as a matter of law" was not proven in the case at bar. The CI did nothing that could be seen as "police conduct" that fell below standards for the proper use of governmental power. The "police conduct" of Detective Wilde had as its end the interruption of a specific ongoing criminal activity (i.e., Petitioner selling cocaine out of the Restaurant); and the police conduct (the CI introducing Wilde to Petitioner as a potential buyer) utilized means reasonably

tailored to apprehend Petitioner and Perez, the supplier, in the ongoing criminal activity. Thus the State maintains Petitioner did not make out a sufficient allegation of an entrapment defense to entitle him to the instructions requested.

Thus, because Gonzalez is no longer pending before this Court; the question certified to this Court in Krajewski is very different to the question preserved by Petitioner in the case at bar; the certified question is properly before this Court in Herrera; and Petitioner obviously failed to establish "entrapment as a matter of law," this Court need not overextend its resources by exercising jurisdiction to answer the certified question in a case where the facts do not make out an entrapment defense, and a case which was clearly properly decided by the District Court. The State urges this Honorable Court to decline taking jurisdiction in this case.

MERITS

THE TRIAL COURT DID NOT ERR IN GIVING STANDARD JURY INSTRUCTION 3.04(c)(2) ON ENTRAPMENT WHERE APPELLANT ASSERTED ENTRAPMENT AS AN AFFIRMATIVE DEFENSE.

Here as he did below, Petitioner argues that the standard jury instruction on entrapment [Standard Instruction No. 3.04(c)(2)], and §777.201, Fla. Stat. (1987), the Statute on which the instruction is based, violate the Due Process Clause of the state and federal constitutions by placing on Petitioner the burden of proving entrapment by a preponderance of the evidence. The State disagrees, and points out that the issue was correctly decided in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), rev. denied ___ So.2d ___ (Fla. No. 77,459 June 27, 1991), relied upon by the District Court in the instant case, and over which this Court declined to accept discretionary review (See order issued in Case No. 77,459 on June 27, 1991).

In Gonzalez, supra, contrary to the argument advanced by Petitioner herein, the Third District Court of Appeal specifically held that the standard jury instruction tracking the language of the entrapment statute does not unconstitutionally relieve the State of the burden of proving beyond reasonable doubt all elements of offenses charged. Citing Patterson v. New York, 432 U.S. 197, 211, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977), the Court pointed out that proof of the nonexistence of all affirmative defenses has never been constitutionally required. Further, the Gonzalez court

reiterated this Court's observation in Cruz v. State, 465 So.2d 516, 518 (Fla. 1985) that the defense of entrapment is not of constitutional dimension. Consequently, the Gonzalez court opined that it saw "no reason not to treat entrapment like any other affirmative defense in Florida by placing the burden of proving that defense on the defendant." This reasoning is in accord with State v. Cohen, 568 So.2d 49 (Fla. 1990), wherein this Court held that "[a]n 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. **An affirmative defense does not concern itself with the elements of the offense [which must always be proven by the State] but it concedes them.**" The State submits that the District Court below was correct in following the thoughtful, well-reasoned and legally sound opinion of the Third District in Gonzalez, rev. denied, ___ So.2d ___ (Fla. No. 77,459 June 27, 1991) and as such the District Court's decision herein adopting the reasoning in Gonzalez should be approved by this Court.

Section 777.201, Florida Statutes (1987), states as follows:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial

> risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

Contrary to Petitioner's allegations, the record is clear that the defense did not even present sufficient evidence to entitle Petitioner to have the judge read the entrapment instructions to the jury that found him guilty as charged.

The record on appeal shows that while it is true that Detective Wilde testified that she was introduced to Petitioner by the confidential informant, Emma, who had been arrested for prostitution six months prior to early March, 1990 (R. 145), Detective Wilde also testified that at no time was there any mention by Petitioner, or anyone, that Petitioner wanted sex from Detective Wilde (R. 63), and the tape recording of the March 7 transaction clearly shows that Petitioner stated that he was not looking for Detective Wilde's body (R. 63-64). Detective Wilde's testimony also was to the effect that the CI introduced Detective Wilde as a girl she met from the streets (R. 128). Detective Wilde stated that prostitutes do frequent the area where the Athenian Corner Restaurant is located (R. 130), and that the CI does frequented the Restaurant, and the people there were friendly with her (R. 131), but that there was no reason for Detective Wilde to believe the CI was working the Restaurant as a prostitute (R. 141); **but more importantly, Detective Wilde did not pretend to be a prostitute in this case before asking**

Petitioner if she could buy cocaine from him, or whether he knew someone that could sell cocaine to her (R. 143-143).

The testimony of Detective Wilde was that the CI did not ask Petitioner to get the cocaine for Detective Wilde as a favor because the Detective was a friend of the CI (R. 152-3); nor did Detective Wilde try to give Petitioner the impression that Petitioner, CI and Detective Wilde would be partying together (R. 167). Instead, in her instructions to the CI, Detective Wilde was careful to warn the CI against using sex to entrap Petitioner or anybody (R. 43, 136, 140, 164). Any mention of $50.00 was regarding the price of a gram of cocaine; **and is the amount Detective Wilde paid Petitioner (not the other way around) on March 6, and March 7, in exchange for one gram of cocaine each time (R. 56, 67).** When an agreement was reached that the supplier would sell Detective Wilde two (2) ounces of cocaine for $750.00 an ounce, Petitioner demanded an extra $50.00 an ounce for himself (R. 71-72).

Detective Wilde's partner, Detective Lawrence Downing testified that the prior prostitution charges against the CI were not "forgiven" as a result of her acting as a confidential informant in the case at bar (R. 220). Rather, the CI was working as a **paid** informant for the police; the instant case was a "paid transaction" (R. 220) for which the CI received $100.00 (R. 219). That as far as he knew, the CI had met Petitioner a short time prior to March 6, 1990 (R. 215); that once the CI did the introductions between Detective Wilde and Petitioner, Detective Wilde picked up the investigation (R. 215), and the CI was no longer a main participant in the negotiations.

Petitioner's testimony regarding the CI was that he never went with the CI, but two months prior to March 1990, he talked to the CI in the Athenian Corner Restaurant (R. 291). The first time he saw the CI at the Restaurant was to buy cigarettes, and the CI just said, "hi" (R. 293). The CI was friendly (R. 294). Then one time the CI asked Petitioner if he wanted to have sex with her (R. 294); the two of them went to Petitioner's apartment (R. 297), and he paid the CI $20.00 (R. 298).

When Petitioner took the witness stand in his own behalf, he emphatically denied he needed money to go back to Guatemala (R. 305). Rather Petitioner stated, at trial in front of the jury, he told Detective Wilde that he knew she was an undercover officer, and did not want to get involved in anything, because he already had his plane ticket ready, and he was going to Guatemala to see his four (4) kids (R. 310, 319, 336-337). Although Petitioner testified he thought the CI and Detective Wilde were in the same business (R. 301); the defense did not present any testimony that Detective Wilde made any suggestions regarding sex between them. Petitioner testified that all Detective Wilde wanted was for Petitioner to find her a gram of cocaine for $50.00 (R. 305, 311). Petitioner also alleged he had never met Jose Perez, the cocaine supplier, before March 6 (R. 300, 317-318).

As mentioned, at trial during his own testimony, Petitioner emphatically denied he needed money to go back to Guatemala (R. 305). Rather Petitioner testified that he had quit his job prior to March 6, 1990, in anticipation of his trip to Guatemala to see

his four (4) kids (R. 328-329). And that when he met Detective Wilde he told her he did not want to get involved because he already had his airplane ticket bought, and he was ready to go (R. 310, 336-337).

Recently this Court once again reiterated that in Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985), it set out a threshold test for establishing entrapment: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Id. at 522 (emphasis added), State v. Hunter, ___ So.2d ___ (Fla. No. 73,230 August 29, 1991) (Slip opinion page 6.). In the case at bar, the CI introduced Detective Wilde to Petitioner because the CI allegedly had seen Petitioner selling cocaine out of the Restaurant. As soon as the introductions were made and the first buy was completed, the CI vowed out of the picture. The record shows that the CI was not fully identified at trial, and she did not even testify at the trial. It is clear that "Entrapment as a matter of law" was not proven in the case at bar. The CI did nothing that could be seen as "police conduct" that fell below standards for the proper use of governmental power. The "police conduct" of Detective Wilde had as its end the interruption of a specific ongoing criminal activity (i.e., Petitioner selling cocaine out of the Restaurant); and the police conduct (the CI introducing Wilde to Petitioner as a potential buyer) utilized means reasonably

tailored to apprehend Petitioner and Perez, the supplier, in the ongoing criminal activity. Thus the State maintains Petitioner did not make out a sufficient allegation of an entrapment defense to entitle him to the instructions requested.

In Mathews v. United State, 485 U.S. 58, 62, 108 S.Ct. 883, 886, 99 L.Ed.2d 54, 60 (1988), the 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." See also, Simopoulos v. Virginia, 462 U.S. 506, 510, 103 S.Ct. 2532, 2536, 76 L.Ed.2d 755 (1983) which holds that "placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible." As shown above, sub judice Petitioner failed to show any reason for the CI to entrap him. Further, and more importantly, it is obvious that once the CI introduced Petitioner to Detective Wilde, the CI immediately vowed out of any negotiations for drugs. Petitioner himself denied any "sexual entrapment" from Detective Wilde. It is clear therefore that Petitioner failed to present any evidence to support an affirmative defense of entrapment. See, State v. Hunter, ___ So.2d ___ (Fla. Case No. 73,230 August 29, 1991). Therefore, but without conceding, if error is found with the instructions as read in this case, the error was harmless at best.

The above notwithstanding, because a defendant is entitled to have the jury instructed on his theory of defense, the trial court complied with Petitioner's request for instructions on the

affirmative defense of entrapment. During the charge conference, defense counsel asked the trial court to read the standard jury instructions as they appeared prior to the most recent amendment (R. 357-359). In response the trial court stated he would read the entrapment instruction as **currently** promulgated by the Florida Supreme Court (R. 359-360). The State submits that the trial court was correct in reading the standard instruction on entrapment as recently amended by this Court. It is settled law that a trial judge should use the Standard Jury Instructions where they are appropriate. Kelley v. State, 486 So.2d 578 (Fla. 1986); State v. Bryan, 290 So.2d 482 (Fla. 1974). And as recently stated in Hurtado v. State, 546 So.2d 1176-1177 (Fla. 2d DCA 1989), unnecessary departure from the standard jury instructions may undermine the unquestionably beneficial effect of those forms on the Florida trial system as a whole. See also, Smith v. Mogelvang, 432 So.2d 119, 125 (Fla. 2d DCA 1983).

At bar, in addition to instructing the jury on reasonable doubt, the trial court also charged the jury on the issue of entrapment following Standard Jury Instruction 3.04(c)(2) as follows:

> Now, in this case, ladies and gentlemen, the defense of entrapment has been raised.
>
> 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 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.

It's also not entrapment merely because a law enforcement officer in a -- in good faith attempted to detect 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.** (R. 448-450)

Petitioner claims that the burden to prove predisposition must remain on the State where entrapment is raised in defense to a crime which has intent or state of mind as an element. The Petitioner, however, is mixing apples and oranges. The defendant in raising an affirmative defense never has a burden of proof but rather a burden of persuasion.

A review of the record on appeal clearly shows that the State proved beyond a reasonable doubt that Petitioner was predisposed to traffic in cocaine by brokering the sale between Detective Wilde and Jose Perez. The defense as a last resort attempted to attack the actions of the State by suggesting that the confidential informant had acted improperly by having sex with Petitioner on one prior occasion for money. Based on this allegation, they extrapolated and attempted to suggest that because the CI, a prostitute, introduced Detective Wilde as a "high class" prostitute; and that because Detective Wilde arranged the drug buy with Petitioner, this case involved sexual entrapment. However, the record is abundantly clear that the allegations were never supported by any testimony from any of the witnesses. Specifically, Petitioner testified that Detective Wilde never propositioned him, and any discussions had were regarding $50 **paid by Detective Wilde to Petitioner** for the purchase of one gram of cocaine. Nevertheless, Petitioner requested, and the trial court complied, the jury be instructed on the **affirmative defense of entrapment**. Therefore, since the State had satisfied its burden of proving beyond a reasonable doubt all the elements of trafficking and delivery of cocaine,

Petitioner was left with the burden of persuasion on his alleged affirmative defense of entrapment.

"Burden of proof" actually encompasses two separate burdens. One burden is that of going forward with evidence. If the party who has the burden of producing evidence does not meet that burden, the consequence is an adverse ruling on the matter at issue. The other burden is the burden of persuasion, which becomes crucial only if the parties have sustained their respective burdens of producing evidence and only when all the evidence has been introduced. It becomes significant if the trier of fact is in doubt; if he is, then the matter must be resolved against the party with the burden of persuasion. See McCormick, Evidence § 337 (3d Ed. 1984). Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); Cf. Walton v. Arizona, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 511 (1990). "It is well within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." See Patterson v. New York, 432 U.S. 197, 97 S.Ct. 319, 53 L.Ed.2d 287 (1977). Florida's allocation to the defendant of proving by a preponderance of the evidence that his criminal conduct occurred as a result on an entrapment is consistent with due process given the law in Florida concerning the burden of proving affirmative defenses.

The decisions of federal courts, even those of the United States Supreme Court are not controlling or even necessarily persuasive in regard to the subject of entrapment in state

courts. Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988). Entrapment, whether it is recognized as a defense and, if so, how it is pleaded and the burden of proof in regard thereto, has so far remained exclusively within the rule-making and precedent-establishing authority of the particular jurisdiction that recognizes the defense. See Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988). The Bauer court, citing Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978), stated as follows:

> The federal view of the burden of proof on entrapment is not binding on the States because it is not based on any constitutional requirement. State v. Brown, 287 A.2d 400 (Del.Super. 1972). Thus, California requires by statute that the defendant prove entrapment by a preponderance of the evidence. See, People v. Moran, 1 Cal.3d 755, 83 Cal. Rptr. 411, 463 P.2d 763 (1970). Many states require the defendant to prove entrapment by a preponderance of the evidence before requiring the state to disprove entrapment beyond a reasonable doubt. State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975); State v. Amundson, 69 Wis.2d 394 (1972). Others adhere to the typical view that a defendant has the burden of proving all affirmative defenses such as self-defense and entrapment by a preponderance of the evidence without placing any burden at all upon the state. Commonwealth v. Wilkes, 414 Pa.246. 199 A.2d 411 (1964), cert. den., 379 U.S. 939, 85 S.Ct. 344, 13 L.Ed.2d 349 (1969); State v. Rogers, 43 Ohio St.2d 28, 330 N.E.2d 674 (1975). The freedom of the states in this regard is illustrated in Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977) where the Court said:
> "We thus decline to adopt as a constitutional imperative operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative

> defenses related to the culpability of an accused.... Proof of the nonexistence of all affirmative defenses has never been constitutionally required...." 359 So.2d at 560.

528 So.2d at 6.

As the United States Supreme Court stated in Patterson v. New York, supra:

> It is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'and its decision in this regard is not subject to proscription under the Due Process Clause unless' it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

53 L.Ed.2d at 287.

In determining whether Florida's allocation to the defendant of proving by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment is consistent with due process, this court must look to Florida case law with respect to the burden of proving affirmative defenses.

At common law the burden of proving affirmative defenses, indeed "all ... circumstances of justification, excuse or alleviation," rested on the defendant. 4 W. Blackstone Commentaries, Commentaries 201; M. Foster, Crown Law 255 (1762). Mullaney v. Wilbur, 421 U.S. 684, 693-694, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified. Commonwealth v. York, 50 Mass. 93

(1845), as cited in Patterson v. New York, supra, 53 L.Ed.2d at 287.

In Florida, the burden of persuasion in proving an affirmative defense in a criminal case also rests with the defendant. 23 Fla. Jur. 2d Evidence and Witnesses, § 75 Affirmative Defenses; 29 Am.Jur.2d, Evidence § 156; Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1984); Evenson v. State, 277 So.2d 587 (Fla. 4th DCA 1973); Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965).

As the Court in Koptyra v. State held:

> While the State always has the burden of proving the guilt of the accused beyond a reasonable doubt and the accused never has the burden of proving his innocence, nevertheless, the burden of adducing evidence on the defense of entrapment is on the accused unless the facts relied on otherwise appear in evidence to such an extent as to raise in the minds of the jury a reasonable doubt of guilt.

172 So.2d at 632.

For an interesting analysis, see Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1986), which held that under the Ohio Revised Code, the burden of proving the elements of a criminal offense is upon the prosecution, but for an affirmative defense, the burden of proof by a preponderance of the evidence is placed on the accused. Self defense is an affirmative defense under Ohio law and therefore must be proved by the defendant.

In State v. Wheeler, 468 So.2d 978 (Fla. 1985), the State argued that when the Florida Supreme Court adopted instruction 3.04(c) (former instruction - not the instruction involved in

the instant cause), the Florida Supreme Court altered the substantive law regarding entrapment. In rewriting the earlier jury instruction, 2.11(e), the Florida Supreme Court deleted a statement of the burden of proof: "The State must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers, and unless it has done so, you should find the defendant not guilty."[1] The State argued that the deletion altered the burden of proof, so that the defendant bore the burden of establishing entrapment as with other affirmative defenses. The Court in Wheeler held this was not the case, as when it adopted the current standard jury instructions in In Re Use by the Trial Courts of the Standard Jury Instructions in criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594, 595-99. The Court discussed those areas where substantive changes were made. No mention, according to the Florida Supreme Court, was made of the entrapment instruction, indicating it did not intend to alter the status quo. This, however, is not the situation now. In Florida Statute 777.201 (1987), and the new Standard Jury Instruction 3.04(c), the intent was very much to change the status quo and to place the burden of establishing entrapment on the defendant as with any other affirmative defense. The case law cited prior to the enactment of the new statute clearly is inapplicable.

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[1] The full text of both versions of he instruction can be found in Rotenberry v. State, 468 So.2d 971 (Fla. 1985).

The applicable statute and jury instruction on entrapment adequately and correctly charged the jury on the substantive law in Florida on this issue. The statute and jury instruction clearly cannot be shown to be unconstitutional. Proof of the nonexistence of all affirmative defenses has never been constitutionally required. As no constitutional violation occurred in giving Florida Standard Jury Instruction 3.04(c)(2) to the jury in the instant case, the trial court's judgment of conviction and sentence must be affirmed.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court decline to take jurisdiction to review the decision of the District Court; or in the alternative, to approve as correct the decision of the District Court which simply adopted the rational by the Third District in Gonzalez.

Respectfully submitted,

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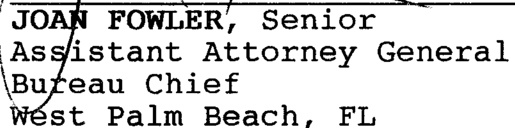

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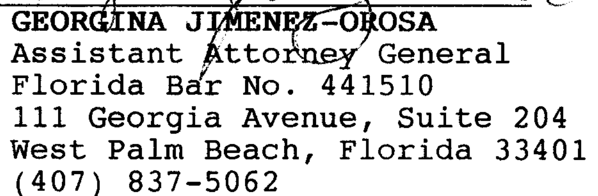

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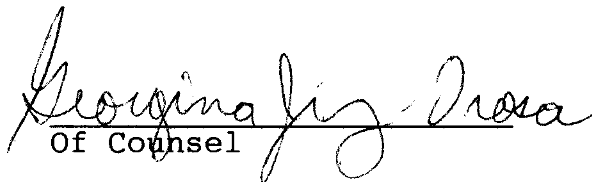
<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been furnished by Courier to: ALLEN J. DeWEESE, Assistant Public Defender, Counsel for Petitioner, at The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 3rd day of September, 1991.



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