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IN THE SUPREME COURT OF FLORIDA

PETER BRUNETTI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,535

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

In this 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, along with co-defendants Rocco Ilaria, Mike Bocchino, and Terry Kennerknecht, with trafficking in cocaine over 400 grams and conspiracy to traffic (R 277). Petitioner and Bocchino and Kennerknecht were tried together. Ilaria testified for the state (R 1046). Bocchino was granted judgment of acquittal at the conclusion of the state's case (R 2077). Petitioner was convicted of conspiracy but the jury was unable to reach a verdict on the trafficking (R 2752, 2782, 2783). The jury was unable to reach any verdict on Kennerknecht (R 2752).

Petitioner appealed his conviction to the Fourth District Court of Appeal, which affirmed on two issues, the standard jury instruction placing the burden on the defense to prove entrapment, and the limitation of voir dire. The opinion was filed July 10, 1991 (Appendix to this brief).

A timely motion for certification was filed, and by order of August 22, 1991, the District Court certified the following question (Appendix):

> Do Instructions 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?

Notice of intent to invoke discretionary jurisdiction was filed August 23, 1991.

By order of September 11, 1991, this Court ordered briefing on the merits but postponed its decision on jurisdiction.

STATEMENT OF THE FACTS

A. Entrapment.

Petitioner claimed at his trial that he was entrapped (R 2048, 2088, 2097). At the jury charge conference, the defense objected to the new standard jury instruction on entrapment, arguing that it unconstitutionally shifted the burden of proof to the defense (R 2393-2398). The defense submitted a written special requested instruction, which was denied by the court, worded as follows (R 2408-2410, 2781):

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

The defense's objection was renewed at several points (R 2622, 2673).

The court instructed the jury as follows on the burden of proof and entrapment (R 2654):

> 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 complete jury instructions given on entrapment, burden of proof and reasonable doubt are included in the Appendix to this brief.

During deliberations, the jury asked several questions about entrapment. They were reinstructed three times on entrapment, including the portion objected to by the defense, quoted above, concerning burden of proof. The defense renewed its objection after each reinstruction (R 2684, 2689, 2698-2707, 2714, 2719-2721, 2725).

B. Trial Evidence.

The main witnesses at Petitioner's trial were Rocco Ilaria, the co-defendant, and Detective Medley, an undercover officer who participated in the alleged cocaine negotiations. Ilaria had pled guilty to trafficking and conspiracy and was expecting, with a favorable recommendation from the state, a reduced sentence (R 1048-1051).

Ilaria testified that he worked as a car salesman at a lot named Everything Automotive, where the arrests and the seizure of the cocaine eventually occurred (R 1047). Ilaria had known Petitioner and the other co-defendants, Mike Bocchino and Terry Kennerknecht (who owned another car lot named Prestigious Motor Cars) for some time (R 1052-1056). Ilaria testified that two weeks before they were all arrested Petitioner telephoned and then went to Everything Automotive, saying that he was looking for a car. At the lot Petitioner asked if Ilaria could help him: Petitioner had friends who were looking to purchase cocaine and he wanted Ilaria to help. Ilaria shrugged the question off, but Petitioner phoned again the next day and asked again. Ilaria didn't think he wanted to be involved, but Petitioner asked him to look around and see what he could do. There were several more phone calls (R 1057, 1071-1077).

A few days later Petitioner returned to the lot. Ilaria agreed to meet Petitioner's friend at the Raw Bar. At the bar, Petitioner introduced his friend as Carmine (R 1077-1078). Carmine turned out to be a police confidential informant, whose full name was Rocco Carmine Scarfone (R 1807). Carmine said he was looking for five kilos of cocaine and offered $20,000 per kilo. Ilaria

said he didn't know if he could help out, but he would think about it (R 1079-1081).

Petitioner called Ilaria several times during the next few days. Ilaria agreed to a new meeting with Carmine at the Raw Bar. It took place two days before the arrests (R 1081-1084). Ilaria told Carmine he still hadn't found anything out about the cocaine. Carmine admired Ilaria's car and said he might buy it after the cocaine transaction (R 1085-1086).

Afterwards, Ilaria drove Petitioner home. Petitioner said he needed money. Ilaria said that if he could find the cocaine for Petitioner he could probably swing a couple of thousand dollars Petitioner's way (R 1086-1087).

Ilaria started asking around about cocaine. Someone mentioned Kennerkneht, and Ilaria called him. Ilaria went over to Kennerknecht's shop and told him he had some friends interested in cocaine. Kennerknecht said he would see what he could do (R 1087-1090). Ilaria and Kennerknecht had a second meeting, where Ilaria said his friends wanted five kilos and Kennerknecht said he would look into it (R 1092-1093). Later, Kennerknecht stated he could supply the cocaine for $16,000 to $17,000 per kilo. At this point Ilaria also told Kennerknecht he might have a buyer for his Corvette; at the Raw Bar meeting Carmine had told Ilaria that he was looking for one (R 1094-1096).

Ilaria spoke with Carmine to schedule the deal, and with Petitioner several more times (R 1097). The day before the arrests, Ilaria went to Kennerknecht's shop to try to set the deal up for that day. He told Kennerknecht he wanted to do two kilos. Kennerknecht showed Ilaria a compartment in a car where he would

put the cocaine. Ilaria then went over to Petitioner's and called Carmine who said, however, that he could not get the money to do the deal that day. They agreed on the next day (R 1100-1106).

The next day, Carmine and Petitioner arrived in Carmine's Corvette at Everything Automotive at about noon. They discussed the deal and Carmine agreed on two kilograms (R 106-108). Kennerknecht arrived a short time later in his Corvette and the others went over to talk to him. Bocchino arrived in a Toyota (R 110-111).

Bocchino got in Kennerknecht's Corvette and said that the keys to the Toyota were in it. Kennerknecht told Ilaria to look the Toyota over. Kennerknecht and Bocchino drove off. Ilaria told Petitioner and Carmine they would try to complete the deal that afternoon (R 112-114). Ilaria went back to work. After about an hour, he went to move the Toyota, opened the trunk, and saw a box containing the cocaine inside (R 115-122).

Ilaria called Carmine and told him that he was ready when Carmine and his money man were. At 4:00 Carmine said he was on his way. At 5:15 Kennerknecht and Bocchino arrived saying they were there to pick up the Toyota. Since Carmine wasn't there, Kennerknecht left. Bocchino stayed for awhile but then left in the Toyota at 5:45 (R 1128-1134).

Two minutes later, Petitioner and "Steve" (Detective Medley, undercover) arrived in Carmine's Corvette. Ilaria told them that the cocaine was gone but that he would call to try to get it back. Steve left to meet Carmine with the money, but Petitioner waited. Ilaria called Bocchino and told him to come back. He called Carmine and told him that the cocaine was on the way. Steve

returned and took Ilaria to see the money where Carmine was parked down the street (R 1134-1145).

When they returned to the lot, Bocchino was there. The Toyota was gone but the box of cocaine was under two cars. Ilaria took it over to Medley in the Corvette. Ilaria was standing by the side of the car when the police moved in and made the arrests. He couldn't see what Petitioner and Bocchino were doing at this point (R 1147-1156).

Ilaria decided to cooperate with the police the next day (R 1157).

Ilaria testified that he was surprised when Petitioner asked him if he could help with a deal for a kilo. Up until this point he knew only that Petitioner was a problem user of cocaine (R 1164-1165). Previously he had only seen Petitioner with amounts of one-fourth ounce or less for personal use (R 1191).

Detective Steve Medley, the undercover officer, testified that he was introduced by telephone to Petitioner by Carmine the day before the arrests (R 1815). Petitioner wanted to do the deal that day but Medley told him he couldn't get the cash together than (R 1818). They agreed on two kilos at $20,000 per kilo (R 1820-1821).

The next day, Medley sent Carmine to meet Petitioner to find out where the car lot was. At 1:00 Carmine called and gave the location. A group of police officers then assembled to plan the bust (R 1823-1826).

Medley had Carmine call Petitioner and set up a preliminary meeting at an Embassy Suites Hotel about two miles from Everything Automotive. Medley drove a Corvette while Officer DiPerna, also undercover, followed in a Mercedes. At the hotel, Carmine

introduced Medley to Petitioner. Petitioner got in the Corvette and Carmine got in the Mercedes and they proceeded toward Everything Automotive with the Mercedes pulling off in a nearby shopping center before getting there. On the way, Petitioner told Medley that he had seen the cocaine in the trunk of the Toyota and that he had done deals with Ilaria before (R 1827-1837).

At the lot, Ilaria said that the cocaine was on the way back (R 1845). Petitioner told Ilaria that the money was in the Mercedes nearby (R 1846). Medley drove Ilaria over to see the money, then back to the lot. Kennerknecht and Bocchino were there in the Corvette. Ilaria pointed out the cocaine in the box under the car, then brought it to Medley and put it in the trunk of his car. When the police moved in Bocchino and Petitioner were not in sight (R 1858-1878).

Medley acknowledged in his testimony that he had attempted to arrange a drug deal with a Greg Spradlin, who was later mentioned in Petitioner's testimony (R 1942-1943).

The defense argued that Petitioner was a cocaine addict who had been entrapped (R 2088, 2097). Petitioner testified on his own behalf that he had never been involved in a drug deal before he met Carmine and that he had no intention of becoming involved in one. Petitioner had met Carmine through Tom Disenta, the son of Petitioner's then-employer, who had nagged Petitioner for over a month to set up a deal for a friend of Disenta's. Finally, Petitioner agreed to introduce Disenta to Greg Spradlin, from whom Petitioner had been purchasing cocaine for his own use for about a year. Petitioner had a cocaine problem and had been making $40 to $150 purchases from Spradlin, for his own use only (R 2101-

2105). Eventually Petitioner and Spradlin met Disenta at a Pizza Hut and were introduced to Carmine. Carmine said he was looking for five kilos. The next day, Carmine called Petitioner and said he was waiting with $40,000 to make a purchase. Petitioner told him he could not help, that he had no way to contact Spradlin (R 2105-2108).

Petitioner gave Spradlin Carmine's number and Spradlin called him. Two days later Carmine called Petitioner, upset because nothing was happening with Spradlin. Carmine said he was going to send someone to beat up Spradlin. Petitioner believed it because Disenta had told him that Carmine was "connected." Petitioner was afraid that if he didn't help Carmine, he would do bodily harm to Petitioner or his family. Petitioner then contacted Ilaria because they used to use cocaine together and Petitioner sometimes bought from him, again for personal use (R 2109-2114). Petitioner took Carmine to meet Ilaria at Everything Automotive, and then arranged the meetings at the Raw Bar. Petitioner did this to get Carmine off his back. He was calling all the time and Petitioner was afraid of him. He made further threats about Spradlin (R 2114-2122). Although Ilaria told Petitioner he would receive $1,000, Petitioner didn't want the money so much as he wanted Carmine off his back (R 2124-2125).

As the day of the arrests drew near, Carmine was insistent about doing the deal soon. Finally, Ilaria said he had found someone with the cocaine. The day before the arrests, Carmine called and introduced Appellant to Medley over the phone. Ilaria told Appellant to have Carmine meet him at Everything Automotive the next day to get the two kilos. Petitioner was very eager to

get the deal over with because he thought Carmine would then stop bothering him (R 2125-2128).

On the day of the deal, Petitioner was afraid. Carmine was upset and angry about the delays throughout the day. On the way to the lot, Petitioner lied to Medley when he told him that he had seen the cocaine in the trunk and that he had done deals before with Spradlin and Carmine. Petitioner wanted them to think that he wasn't wasting their time because they were very upset (R 21-37-2140).

Petitioner testified that he would not have become at all involved if Carmine hadn't pressured him (R 2145). He was entrapped (R 2148).

C. Jury selection issue.

The following facts are relevant to Point II in this brief:

The trial lasted three weeks (R 2786). Voir dire began with the impanelment of 21 prospective jurors (R 81-83). After challenges were exercised (R 554-572), the court excused all but five of the first panel. The court then impanelled 16 more prospective jurors (R 577-579). The court then recessed for the weekend (R 582).

Before voir dire continued after court resumed, the court stated that it would first question the 16 new panel members, and that the state and each defendant would then be limited to one-half hour for its questioning. Counsel for Petitioner objected, stating that one-half hour was not sufficient (R 585-586).

After excusing two panel members for cause and replacing them (R 598-609), the court questioned the new panel members for approximately two hours (R 609-745). Before continuing voir dire,

counsel for Petitioner renewed his objection to the time limit imposed upon him, stating that 30 minutes was insufficient to question 15 prospective jurors (R 746). After one more panel member was excused for cause (R 749-750), the prosecutor questioned the panel until the court called time (R 751-789).

Counsel for Petitioner then questioned the panel until the court called time (R 789-833). Counsel renewed his objection to the time limit and requested more time. He stated that the 30 minutes had been insufficient and that he had been unable to individually question five of the prospective jurors. In particular, counsel had not asked the five about entrapment. The court denied a request for additional time, as well as Petitioner's motion for mistrial (R 834-837). The transcript shows that defense counsel spoke individually to 13 of the new panel members (R 797, 798, 803, 804, 805, 806, 809, 815, 821, 824, 827, 829, 831).

SUMMARY OF ARGUMENT

I.

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.

II.

The trial court improperly limited the defense's voir dire questioning of the second group of prospective jurors impaneled to 30 minutes, or two minutes apiece. Such a time limit requires reversal where, as here, the defense is prevented from questioning some of the panel members on the crucial issue in the case, here the defense of entrapment, and where, as here, the trial is a long and complex one.

ARGUMENT

POINT I

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

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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 Deleon v. State, Case No. 78,299 and Herrera v. State, Case No. 78,290.

Criminal Cases, supra, this Court noted that the statute does place the burden of proof of entrapment on the defendant, but stated that 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 2393-2398, 2408-2410, 2622, 2673), the trial court instructed the jury in accordance with the new instruction placing the burden on the defendant (R 2654). The defense had specifically objected to the new instruction's placement of the burden of proof on Respondent. The defense also asserted entrapment as its defense (R 2048, 2088, 2097). 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 (see Appendix to this brief). 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. 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 contained no explicit statement that the jury must consider all the evidence, including specifically any evidence of entrapment which it found, in deciding

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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.

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. 311, 323, n. 8; 105 S.Ct. 1965, 1975; 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.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN LIMITING PETITIONER'S VOIR DIRE OF THE SECOND GROUP OF JURORS IMPANELLED TO TWO MINUTES PER JUROR.[4]

At Petitioner's trial, prospective jurors were voir dired in two groups. After all but five of the first group of 21 were excused, the court impaneled a second group of 16 (R 81-83, 554-572, 577-579). After a weekend recess, the court announced that it would first question the new panel members, then limit the state and each defendant to one-half hour. Petitioner objected (R 585-586). After the court's questioning and three excusals and two replacements, Petitioner objected before conducting his voir dire that 30 minutes was insufficient to question 15 prospective jurors (R 746). Counsel for Petitioner questioned the jurors until the court called time (R 789-833). Counsel then stated that the 30 minutes had been insufficient, renewed his objection to the limit, requested more time, and stated that he had been unable to question several of the prospective jurors about his defense of entrapment. The court denied any additional time, and also denied the requested mistrial (R 834-837).

The limitation of voir dire to two minutes apiece for the second group of jurors empaneled requires reversal. Florida Rule of Criminal Procedure 3.300(b) give the defense the right to orally

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[4] Although this issue was not the subject of the question certified by the District Court, it was raised before the District Court as Petitioner's Point II. Review by this Court encompasses not only the certified question, but the entire decision of the court below. Reed v. State, 470 So.2d 1382 (Fla. 1985).

voir dire the prospective jurors. Under the rule, the court in Gosha v. State, 534 So.2d 912 (Fla. 3d DCA 1988) held that limiting counsel's voir dire examination of each potential juror to one to three minutes was unreasonable and an abuse of discretion as a matter of law. Time limits can result in the loss of the fundamental right to a fair and impartial jury. Williams v. State, 424 So.2d 148 (Fla. 5th DCA 1982). The court in Williams reversed where the defense was limited to 20 minutes for voir dire. The court noted that defense counsel had proffered two areas of inquiry which he was unable to pursue, and stated that the time limit had prevented counsel from asking questions.

In the instant case, the defense was prevented from questioning several of the jurors about his defense of entrapment, the crucial issue in the trial. The trial was a long one, lasting three weeks (R 2786), and the evidence was extensive and complicated. In such a case, even more than in a shorter and simpler case, the right to sufficient voir dire is critical. The fact that entrapment was important but difficult for the jurors to apply is shown by the fact that they asked for reinstruction on it three times (R 2684, 2689, 2698-2707, 2714, 2719-2721, 2725). The limitation of voir dire to two minutes for each of the second group of jurors cannot be sustained on the facts of this case.

The unfair curtailment of voir dire was a denial of due process and a fair trial under the Florida and United States Constitutions.

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 Jacqueline Saltiel, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 19th day of September, 1991.

Counsel for Petitioner