No. _____

In The
Supreme Court of the United States

PHIL MIRANDA LUNA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, Second District, State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1: Whether due process is denied when a trial court refuses to instruct a jury on a statutory entrapment defense because a defendant, charged with attempted capital sexual battery and traveling to engage in sex with a minor as a result of an internet sting operation, admitted conduct constituting the offenses, but testified he did not believe there was a minor involved nor did he intend to engage in sex with a minor.

QUESTION 2: Whether a Florida appellate court denies a defendant due process when it issues a one-word affirmance *per curiam*, without discussion, deciding a challenge to a lower court's refusal to instruct a jury on a statutory entrapment defense on grounds that conflict with precedent and due process, when the failure to explain the affirmance deprives the defendant of discretionary review by the court that can resolve the conflict and declare the law.

LIST OF PARTIES

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OPINIONS BELOW

Florida's Second District Court of Appeal is the highest state court to review this case. Its opinion is reported at *Luna v. State*, 252 So.3d 1196 (Fla. 2nd DCA 2018), affirming, without elaborated opinion, Petitioner's conviction and sentence in *State v. Luna*, No. 12-CF-4889 (Fla. 10th Cir. Aug. 18, 2016).

JURISDICTION

Florida's Second District Court of Appeal is the highest state court to review this case. Its *per curiam* affirmance was entered May 18, 2018. A copy of the order appears at App. 1.

A timely motion for written opinion, certification of conflict and rehearing *en banc* was filed (App. 12-20) and denied August 3, 2018. A copy of the order appears at App. 11.

An extension of time to file the petition for a writ of certiorari was granted to and including December 31, 2018, on October 29, 2018, in Application No. 18A430.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Article V, section 3 of the Florida Constitution renders the Florida Supreme Court without jurisdiction to review appellate court cases affirmed without opinion. *Jenkins v. Florida*, 385 So.2d 1356,

1359 (Fla. 1980); *see also Perez v. Florida*, 137 S. Ct. 853 (March 6, 2017) (order denying certiorari).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . .

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 777.201, Florida Statutes, provides:

> (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 or she 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 the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

STATEMENT OF THE CASE

A. Luna before contact with an agent

Petitioner is serving 17 years in Florida State prison. Forty-eight hours before he was arrested and accused of being a child sex predator, PHIL MIRANDA LUNA was NASA's Ames Research Center safety and mission assurance representative for a planned reconfiguration of Kennedy Space Center launch pads and refurbishment of the Shuttle crawler to accept new

rockets.[1] He had worked for NASA since before earning a bachelor's degree in mechanical engineering from San Jose State University in 1983 and a master's degree from Stanford University in 1985. He had taught math at Stanford University and the National Hispanic University from 1995 to 2000. He maintained required security clearances, had no criminal record, and had never been arrested.

The 52-year-old native of San Jose, California, was married and the father of two sons and a daughter, who were bright, healthy and either in or headed to college. He had been active in his children's education and extracurricular activities, tutoring, coaching and officiating soccer and T-ball teams. In all the years he coached, refereed, and taught, he was never the subject of a complaint of inappropriate conduct.

When Luna's marriage fell on the rocks in 2009, he turned to the internet for female companionship. He had an account with Ashley Madison, but he wasn't interested in an on-going affair; he preferred no-strings-attached encounters with women arranged through Craigslist personal ads. Although his Craigslist searches often went unrewarded, two or three times a year he succeeded in meeting a woman.

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[1] The record on appeal is in two parts: the record of proceedings other than the trial (R) and trial transcripts (T [transcript page number]). Luna testified. (T 826-910, 945-81)

B. Communications between Luna and the agent

On June 1, 2012, Luna was to travel to Florida's Space Coast two days hence. He perused Craigslist ads in the adult-only "casual encounters" section and found one entitled "whats happening – W4M (orlando); here on vaca looking to see whats happening in the area."[2] Copying and pasting parts of responses he used previously, Luna sent a 170-word reply from his "tlcare" email account, saying that he was an adventurous, handsome older Latino, arriving Sunday evening on business, who wanted to get together that night, and offering to indulge "fantasies" among other things.

The email response was delivered to Osceola Sheriff's Detective Kristin Stroker, a "chatter" with the Central Florida Internet Crimes Against Children (ICAC) task force, who had posted the ad as part of a sting operation, using a "funinthesun" email address and posing as "Jessica."[3] Stroker replied that she and her 11-year-old daughter were vacationing and "looking for some 'fun' for Holly that Disney can't provide." Fourteen hours later, Luna replied: "What do you have in mind? BTW, are you with law enforcement? I am not; are you?"

A day later, after flying to Orlando and checking into a hotel, Luna found Stroker's reply: "Heck no I'm not a cop! Are you sure [you are] not??? Because you have to tell me if you are!. . . . But I'm looking for

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[2] (R 654-67)

[3] Stroker testified. (T 383-403, 425-531)

someone who could help teach holly some things. She is SUPER curious about everything. It's crazy out there for an 11-year-old these days, so looking for someone nice." Reciprocal assurances of non-affiliation with law enforcement recurred throughout the ensuing communications, as did Stroker's failure to capitalize her fictional daughter's name.

"So," Luna asked, "what do you have in mind to help her with her CURIOUSITY [sic]." Stroker replied: "I'm looking for someone to help bring her into womanhood. Do you think you could help teach her?" (T 433, 865) Luna asked whether she'd be there, "guiding, overseeing, maybe even demonstrating with me?" But, no, Jessica wouldn't be there; she'd take a walk; "holly has a phone."

In subsequent emails, Stroker related that "Holly" was curious because all of her friends and classmates were talking about and having sex, although she had never seen nor done anything. Together, they decided to find a caring stranger to teach Holly in a controlled, safe setting, without laughing, embarrassing, or hurting her. Although 11 seems young, and was "back in our generation," Stroker said, it's "not for these days." Holly had attained menarche, requiring condoms.

"What about oral," Luna asked, "is she curious about" that as well? Indeed, she was: "[T]hat's . . . the one thing kids are doing the most."

When Luna wondered whether she had received many replies to her ad, Stroker wrote that she had, "But I want to pick the right person. . . . I have been

talking to you for as long as I have because I feel like you really care and may be the right person . . . ," later saying, "I am looking for an experienced nice and caring man. . . ."

Luna proposed meeting that night and asked for a picture "of you (not Holly)." Stroker responded: "[W]hy one of me and not of holly?" Luna allowed that a picture "of both" would be okay. They exchanged pictures.

"Holly," Luna said, "can change her mind at any time and that is OK." Stroker replied: "I knew you were a great guy! . . . [S]ame goes for you. If this is not for you, just let me know as well."

But first, Stroker wanted him "to talk to holly." Luna agreed: "[P]ut your phone on speaker and that way it will be the three of us." The ensuing telephone conversation repeated the email exchange between Luna and Stroker, who passed the phone to Polk Sheriff's Detective Tina Yale, portraying Holly, who obviously was unaware of Stroker's previous assertions of knowledge and interest. Ending, Luna suggested Holly didn't want her mom leaving the house and Stroker agreed to discuss the matter further when he arrived: "We'll figure it out."

After obtaining an address, Luna departed his hotel, calling *en route* to say he was delayed by traffic. When Luna called for the gate code, Stroker said she'd be waiting for him.

C. Arrest and prosecution

At 12:47 a.m. June 4, 2012, Luna knocked on the door of the designated house. He was arrested and searched. Items seized were the two bags of Skittles and condoms Stroker asked him to bring.

Luna submitted to a videotaped interrogation and consented to the seizure of his computer to be searched for child pornography and described the hotel where it could be found. He was released after posting high bond.

An Information charged Luna with attempted capital sexual battery[4] and traveling to meet a minor for sex;[5] two other counts were later dropped.

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[4] Attempt: "A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt. . . ." § 777.04(1), Fla. Stat. (2012).

Capital Sexual Battery: "A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony. . . ." § 794.011(2)(a), Fla. Stat. (2012).

[5] "Any person who travels any distance either within this state, . . . for the purpose of engaging in any illegal act described in chapter 794, . . . or to otherwise engage in other unlawful sexual conduct . . . with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to: (b) Solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child

Luna filed a pretrial motion to dismiss the charges, claiming he was both objectively and subjectively entrapped as a matter of law. The motion was denied. (R 120-98, 202-08, 209-16, 217-21)

The prosecution's motion *in limine* to exclude from trial any psychosexual evaluation of Luna was granted as inadmissible opinion testimony regarding character. (R 222-24, 254-55) Luna in turn filed a motion *in limine* to exclude from evidence the videotaped interrogation that was not a confession and contained inadmissible and unduly prejudicial assertions and opinions by the interrogator; the trial court directed redaction of the video. Granting the prosecution's motion, the trial court also excluded from trial as irrelevant Luna's forensic computer examiner's testimony that no child pornography existed on the computer, but there was evidence that Luna previously sought relationships with adult women.

The case proceeded to trial before a jury of six, who were screened as to whether they would have trouble applying an entrapment defense.

The state presented the emails, telephone conversations and a redacted version of Luna's videotaped interrogation. His motion for judgment of acquittal at the close of the state's case was made and denied. Luna testified that he engaged in what he thought was Jessica's fantasy and never believed there was an

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in any act described in chapter 794 . . . or to otherwise engage in any sexual conduct, commits a felony of the second degree." § 847.135, Fla. Stat.

11-year-old at the end of the road. He never desired nor previously sought sex with a minor and had never been arrested.

The jury returned a verdict of guilty as to both counts of the Information. Luna was taken into custody and his motion for bail pending sentencing and appeal was denied. His motion for new trial was denied. He was sentenced to 17 years in Florida State Prison and remains incarcerated.

D. Request and denial of an entrapment jury instruction

Luna's testimony at trial was interrupted by the state's objection to an entrapment instruction because Luna had denied elements of the crimes: intent and belief. Luna's counsel explained the due process basis of Luna's entrapment defense, specifically, citing United States Supreme Court opinions regarding the entrapment defense. (Appendix B, App. 6-7) (*citing United States v. Jacobson*, 466 U.S. 109 (1984), *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *Mathews v. United States*, 485 U.S. 58 (1988)).

The trial court sustained the state's objection, refusing to give Florida's standard jury instruction on entrapment as requested by the defendant, citing as controlling precedent *Seo v. State*, 143 So.3d 1189, 1190

n.1 (Fla. 1st DCA 2014), *quashed* SC14-1803 (Apr. 28, 2016).[6] (Appendix B, App. 2-9)

E. Luna's appeal

Luna appealed his conviction and sentence to Florida's Second District Court of Appeal. Luna argued on appeal that his conviction should be reversed, among other reasons, because the trial court had erroneously denied his request for the entrapment jury instruction. Again on appeal, Luna asserted the federal constitutional basis of his entrapment argument. The Second District Court of Appeal affirmed *per curiam* without discussion. (Appendix A, App. 1) Luna's motion for written opinion, certification of conflict and rehearing *en banc* (Appendix D) was denied. (Appendix C)

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted because the trial court's denial of an entrapment jury instruction violated Luna's due process right to present a full defense, and this issue is likely to recur.

The trial court's denial of Luna's request for an entrapment jury instruction deprived Luna of a meaningful opportunity to present a full defense for which

[6] Almost simultaneously with the trial court determining *Seo* to be controlling precedent, the Florida Supreme Court quashed the decision on other grounds. *Ho Yeaon Seo v. State,* No. SC14-1803 (Apr. 28, 2016).

there was sufficient evidence for a jury to find in his favor, thereby violating Luna's right to due process under the Fourteenth Amendment to the United States Constitution. The trial court ruled that Luna was not entitled to an entrapment instruction because he denied criminal intent, even though he admitted all elemental acts. Moreover, the trial court ruled that, "in order to prove entrapment, there has to be a crime committed,"[7] which cannot be denied by a defendant. The ruling is not the law of Florida and is inconsistent with Luna's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as explained by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984), as well as opinions of the United States Supreme Court and the federal and state appellate courts. Moreover, the denial of the defendant's right to put on a full defense, in violation of due process, is likely to recur because this case is but one in a multitude of factually similar cases resulting from internet sting operations conducted by undercover law enforcement officers.

(a) The trial court's denial of an entrapment jury instruction violated Luna's due process rights.

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require

[7] App. 3.

that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). One such standard of fairness is that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988).

The failure to instruct the jury on entrapment deprived Luna of his due process right to present a full defense. *Bradley v. Duncan*, 315 F.3d 1091, 1098-99 (9th Cir. 2002), *cert. denied*, *Duncan v. Bradley*, 540 U.S. 963 (2003); *see also Tyson v. Trigg*, 50 F.3d 436, 448 (7th Cir. 1997). Although the entrapment defense has not been declared to be grounded in the constitution, where the defense is recognized, a defendant is entitled as a matter of due process and equal protection to assert it and have the jury decide the issue. *Bradley*, 315 F.3d at 1099. Florida in 1987 codified entrapment in Section 777.201, Florida Statutes.[8] The Florida

[8] (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 or she 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 the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

Supreme Court affirmed legislative authority to redefine what previously had been a judicially crafted defense based on federal jurisprudence; in *Munoz v. State*, 629 So.2d 90 (Fla. 1993), it explained that Florida's codified entrapment defense adopts the subjective test articulated in *United States v. Sherman*, 200 F.2d 880, 882-83 (2nd Cir. 1952), as refined by *Jacobson v. United States*, 503 U.S. 540, 553 (1992) (prosecution must show beyond a reasonable doubt that predisposition existed prior to and independent of the inducement). *Munoz*, 629 So.2d at 99. A defendant, therefore, may claim entrapment upon (1) showing by a preponderance that an agent of the government induced the accused to commit the offense charged and (2) producing evidence of a lack of predisposition to commit the offense charged, which then (3) shifts the burden to the prosecution to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to and independent of the inducement. 629 So.2d at 99. Although the statute overruled the objective entrapment test announced in *Cruz v. State*, 465 So.2d 516 (Fla. 1985), *cert. denied*, 473 U.S. 905 (1985),[9] 629

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[9] 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.

The first prong of this test addresses the problem of police "virtue testing," that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. . . .

The second prong of the threshold test addresses the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include whether a

So.2d at 91, "the legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional right." 629 So.2d at 98. Thus, the objective test was tossed out the front door and let in through the back door. *Id.* at 102 (Kogan, J., concurring).

There was little doubt that Luna showed sufficient inducement and lack of predisposition to put the issue of entrapment to the jury; neither the prosecution nor the trial court contested the sufficiency of evidence. This case is the product of a sting operation. Although it is acceptable police practice to employ a sting operation in which a suspect is offered nothing more than an ordinary opportunity to commit an offense, when police offer an opportunity, plus something else, the added element is an inducement giving rise to an entrapment claim. *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994); *see also Farley v. State*, 848 So.2d 393, 396 (Fla. 4th DCA 2003). It also began as a virtue test,[10] using an advertisement placed in an adults-only

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government agent "induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." *Cruz*, 465 So.2d at 522.

[10] *Cruz*, 465 So.2d at 522; *State v. Finno*, 643 So.2d 1166, 1169 (Fla. 4th DCA 1994) (targeting one or more individuals not known to be engaged in crime). *See also Medina v. State*, 634 So.2d 1149, 1150 (Fla. 4th DCA 1994) (bait and switch defense theory warranted an entrapment instruction).

website that did not hint of illegal activity. Assurances of protection from government scrutiny were given.[11] Luna was then subjected to a series of psychologically graduated inducements[12] to recruit him to "help bring [Holly] into womanhood," which was justified when Luna questioned it.[13]

More importantly, Luna was recruited to be a "sexual mentor" in a manner recognized as "problematic because some targets of the operation may feel pressured to agree to 'teach' a child about sex in the hope of obtaining a sexual relationship with the child's older relative." *Mizner v. State*, 154 So.3d 391, 393 n.1 (Fla. 2nd DCA 2014), *citing Poehlman, Gamache* and *State v. Canady*, 641 N.W.2d 13, 263 Neb. 566 (2002).

In light of the foregoing, coupled with a lack of predisposition, Luna was entitled to an entrapment instruction under both federal and Florida law. "It is axiomatic that a defendant has the right to have the jury instructed on the law of entrapment when evidence is presented which tends to prove such defense."

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[11] *Farley v. State*, 848 So.2d 393, 398 (Fla. 4th DCA 2003); *Beattie v. State,* 636 So.2d 744, 745 (Fla. 2nd DCA 1993), reaching the same result as *Beattie v. State*, 595 So.2d 249 (Fla. 2nd DCA 1992). *Jacobson v. United States*, 503 U.S. 540, 552-53 (1992) (solicitation assured petitioner that a mailed order could not be inspected without a court order; it also asked for petitioner's affirmation that he was not a government agent); *United States v. Poehlman,* 217 F.3d 692, 702 (9th Cir. 2000) (diminished risk of detection); *Woo Wai v. United States*, 223 F. 412, 413 (9th Cir. 1915) (defendant assured he would not be arrested).

[12] *United States v. Gamache*, 156 F.3d 1, 10-11 (1st Cir. 1998).

[13] *Poehlman,* 217 F.3d at 702; *Gamache*, 156 F.3d at 11.

Terwilliger v. State, 535 So.2d 346, 347 (Fla. 1st DCA 1988).[14] The threshold for including an entrapment instruction in the jury charge is low; the evidence need only suggest the possibility of entrapment. *Ayala v. State*, 232 So.3d 517, 520 n.3 (Fla. 2nd DCA 2017); *Morgan v. State*, 112 So.3d 122, 124 (Fla. 5th DCA 2013); *Terwilliger v. State*, 535 So.2d 346, 347 (Fla. 1st DCA 1988). Moreover, "It is not necessary that the defendant convince the trial judge of the merits of the entrapment defense because the trial judge may not weigh the evidence before him in determining whether the instruction is appropriate; it is enough if the defense is suggested by the evidence presented." *Morgan,* 112 So.3d at 124, *quoting Terwilliger,* 535 So.2d at 347.

The trial court, however, refused to give Florida Standard Criminal Jury Instruction 3.6(j) on entrapment as requested by the defendant, citing as controlling precedent *Seo v. State,* 143 So.3d 1189 (Fla. 1st DCA 2014), *quashed* SC14-1803 (Apr. 28, 2016). In *Seo*, a fractured majority affirmed *per curiam*, without discussion, the trial court's denial of an entrapment instruction, explaining in a footnote that Seo denied belief that there was a child, which was a material element of the crime. Applying the rule to Luna, the trial court said that "in order to prove entrapment, there has to be a crime committed." (Appendix B, App. 3)

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[14] "Even a defendant who denies one of the elements of the offense for which he is charged is entitled to an entrapment instruction. *See Mathews v. United States*, 485 U.S. 58 (1988)." *Terwilliger*, 535 So.2d at 347.

Moreover, the trial court held that Luna could not claim to have believed he was engaged in role playing, disbelieved there was a child and still claim to have been entrapped because he denied committing a crime. *Id*.

As explained in *United States v. Henry,* 749 F.2d 203 (5th Cir. 1984), and raised in his motion (Appendix D, App. 16), a defendant who claims entrapment cannot be required to admit, nor not deny, the crime as a matter of due process. The Fifth Circuit reasoned that the Fifth Amendment[15] allows a nontestifying defendant, through "examination of witnesses and argument[,] to contest every element of the charged offense and still request and obtain an entrapment instruction. The defendant is not required to testify or to concede guilt in order to pursue the entrapment theory." 749 F.2d at 210-11. Nor does a "different rule . . . apply when (as here) a defendant elects to testify to his personal belief that he acted without criminal intent." 749 F.2d at 211. Moreover, based on principles of constitutional due process, the Fifth Circuit declared that "entrapment is not in the nature of confession and avoidance; therefore, the nature of the doctrine itself does not require a defendant to confess criminal intent or guilty knowledge in order to have a jury consider the entrapment issue." 749 F.2d at 213.

Although the *Seo* footnote cited *Wilson v. State*, 577 So.2d 1300, 1302 (Fla. 1991), the holding was misconstrued; *Wilson* actually held that a request for an

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[15] U.S. Const. amend. V.

entrapment instruction supported by evidence "should be refused only if the defendant has denied under oath the ***acts*** constituting the crime that is charged." *Id*. As pointed out by the *Seo* dissent, the majority ignored the qualification *Wilson* placed on its ruling that "'[a]sserting the entrapment defense is not necessarily inconsistent with denial of the crime even when it is admitted that the requisite acts occurred, for the defendant might nonetheless claim that he lacked the requisite ***bad state of mind***.'" *Seo,* 143 So.3d at 1194 (Benton, J., dissenting), *citing Wilson,* 577 So.2d at 1302. Moreover, *Wilson* draws a distinction between a defendant who claims entrapment, but denies an elemental criminal act (*actus reus*), and a defendant who claims entrapment and denies an elemental mental state (*mens rea*). In doing so, *Wilson* cited *Mathews v. United States,* 485 U.S. 58, 62-63 (1988), as a "good illustration" of a defendant who admitted the act (accepting a loan), but denied criminal intent (in exchange for government favor upon the lender). 577 So.2d at 1301-02. Further illustrating the qualification it placed on its holding, *Wilson* cited *Henry* (defendant may claim entrapment while denying criminal intent, so long as he does not deny committing the acts charged). 577 So.2d at 1301. While *Wilson* notes that *Mathews* is not grounded in the federal constitution, *Henry* is.

All but lost in judicial discussions of whether a defendant may claim entrapment, yet deny the crime, is the fact that Florida's entrapment defense is statutory and subject to the rules of statutory construction and

interpretation, the first of which is that if a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction. *Kasischke v. State*, 991 So.2d 803, 807 (Fla. 2008); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917). Florida's statutory entrapment defense states plainly enough that a law enforcement officer "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." § 777.201(1), Fla. Stat. (emphasis added). The statute requires that a person "engage in conduct constituting such crime." It does not require actual commission of a crime, but "a substantial risk that such crime will be committed. . . ." Moreover, according to the plain meaning of the statute, Luna was entitled to a Florida's standard jury instruction on entrapment. *Fiore v. White*, 531 U.S. 225, 228-29 (2001).

In this case, Defendant admitted the acts of which he was accused. He admitted that he wrote the emails, sent a picture, talked on the telephone, purchased condoms and Skittles, and traveled to the house where he was arrested. What he denied was a belief that there would be an 11-year-old girl there and denied having any intent to engage in sexual conduct with an 11-year-old girl. Instead, he believed he was engaging in a role-play fantasy in which he had offered to engage and of which he was never disabused by the

undercover deputy, notwithstanding the scenario she spun lent itself open to such a notion. He was in all respects, and in truth, correct. Under the circumstances, it was a denial of due process to deny his request that the jury be instructed on the entrapment defense.

(b) The issue presented by this petition is likely to recur in other jurisdictions.

Owing to the confluence of ICAC's use of internet sting operations nationwide, application of local laws, and the diversity of states' interpretation and application of entrapment defenses, the violation of due process is likely to recur in other jurisdictions. *See* Appendix E.

Within the Department of Justice Office of Juvenile Justice and Delinquency Prevention is the Internet Crimes Against Children Task Force Program (ICAC), which "helps state and local law enforcement agencies develop an effective response to technology-facilitated child sexual exploitation and Internet crimes against children. This help encompasses forensic and investigative components, training and technical assistance, victim services, and community education."[16] Comprised of a nationwide network of 61 coordinated task forces involving more than 4,500 federal, state, and local law enforcement and prosecutorial agencies, ICAC has spent some $407 million training and assisting more than 629,000 law enforcement officers and prosecutors in reactive and proactive

[16] https://www.ojjdp.gov/programs/progsummary.asp?pi=3

investigations, resulting in more than 83,000 arrests since its inception in 1998.[17]

One of the "tools" ICAC uses in its proactive investigations is 18 U.S.C. § 2423(b),[18] outlawing travel with intent to engage in illicit sexual conduct.[19] Although useful for proactive sting operations, that provision requires interstate or foreign travel. So, task force officers must charge persons arrested as a result of the sting operations, but who have not traveled in interstate commerce, under a variety of attempts to violate state laws such as statutory rape[20] and lewd and lascivious battery,[21] depending on what the accused agreed to do. In 2007, Florida enacted an analog to the federal "traveler" statute, adding a subsection to § 847.135, Fla. Stat., and making it unlawful for an adult to travel any distance for the purpose of engaging in an illegal act or unlawful sexual conduct with a person believed to be a child. § 847.135(4), Fla. Stat. The intent of the statute obviously is to facilitate sting operations conducted by ICAC task forces. It is likely

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[17] *Id*.

[18] Enacted as part of the PROTECT ACT of 2003, 108 P.L. 21, 117 Stat. 650.

[19] A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. 18 U.S.C. § 2423(b).

[20] *E.g.* § 794.011, Fla. Stat.

[21] *E.g.* § 800.04(4), Fla. Stat.; *e.g. Carlisle v. State*, 105 So.3d 625 (Fla. 5th DCA 2013).

other states have enacted similar provisions to facilitate sting operations.

Luna was one arrest by one ICAC task force among the 61 task forces operating nationwide and conducting sting operations. About 10,000 people are arrested annually as a result of ICAC's efforts.[22] No doubt many of the accused were arrested as a result of ICAC sting operations and charged either under the federal traveler statute or under a variety of state attempted sex crimes against children. And equally without doubt some of the accused will raise an entrapment defense. Those charged federally will have the benefit of *Mathews*; others may not.

As noted above, entrapment is not a defense grounded in the constitution. Therefore, every state may recognize an entrapment defense, or not, and may characterize it as it sees fit. Some states recognize an objective entrapment, some states recognize a subjective entrapment, others recognize both. More pertinent to the instant issue, some states allow defendants who deny commission of a crime to claim entrapment, others don't. Appendix E is an effort to show which states permit an entrapment defense, notwithstanding denial of the crime (yes), while others require that the crime, or some portion of it, be admitted (no). The latter jurisdictions are where defendants may face a denial of due process similar to what Luna has experienced.

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[22] Supra, n.9.

Luna contends that the entrapment defense cannot be withheld from a defendant who admits the conduct (*actus reus*), but denies the *mens rea* (belief, purpose, intent). Not all scenarios spun by ICAC chatters are believable. To require that a defendant admit *mens rea* erects an irrebuttable presumption that they are and relieves the prosecution of the burden to prove its case beyond a reasonable doubt. It denies the accused the right to have a jury decide the case based on the facts as related by the prosecution as well as the accused. Such a rule requires either a sworn confession by the accused or denies the defendant the right to testify to his version of events. Moreover, to condition the entrapment defense on an admission that a crime was committed offends a defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.

2. Florida's Second District Court of Appeal denied Petitioner's right to due process by affirming his erroneous convictions and sentence, without elaborated opinion that explained the idiosyncratic and unconstitutional rule of law, while rendering him unable to seek further review by the Florida Supreme Court.

Luna continues to serve 17 years on unconstitutional convictions and an unjust sentence for which he cannot seek review by the Florida Supreme Court because even discretionary review is foreclosed by a *per curiam* affirmance without discussion of the issues he

raised on appeal. Indeed, the opinion is but one word: Affirmed. In his motions for written opinion, certification of conflict and rehearing *en banc*,[23] Luna complained that the appellate court panel in this case denied him the right to due process, as guaranteed to him under the Florida Constitution, Fla. Const. Art. I, § 9, and the United States Constitution, U.S. Const., Amend. XIV. *See Anastasoff v. United States*, 223 F.3d 898, 914 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000). In detail, he described how the refusal to give an entrapment instruction denied him the right to assert a recognized defense, constituted harmful error, denied him due process and conflicted with Florida Supreme Court and other district court precedent. The Second District Court of Appeal, however, denied his request and persisted in its refusal to address his meritorious challenge to his conviction. (Appendix C, App. 11) Luna asks that this Court address and correct this denial of due process.

The Florida Constitution grants an appeal as a matter of right from all final orders of trial courts, conferring on appellate courts jurisdiction to review such judgments. *Bain v. State*, 730 So.2d 296, 298 (Fla. 2nd DCA 1999). But that right is for one appeal only; it is "intended that the district courts . . . have final appellate jurisdiction in most cases." *Whipple v. State*, 431 So.2d 1011, 1014 (Fla. 2nd DCA 1983). The 1980 amendment to Article V, section 3, of the Florida Constitution limits Florida Supreme Court jurisdiction to

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[23] Appendix D, App. 16-19.

mandatory review of district court of appeal decisions invalidating a state statute or provision of the state constitution, and discretionary review of district court decisions declaring valid state statutes, expressly construing the state or federal constitution, affecting a class of constitutional or state officers as well as "decisions expressly and directly conflict with the decision of another district court of appeal or the supreme court on the same question of law." *Whipple*, 431 So.2d at 1014. The supreme court is without jurisdiction to look beyond a district court's one-word affirmance to determine whether there is a conflict between the districts that ought to be resolved.

The jurisdictional scheme is premised on the notion that "the district courts of appeal engage primarily in the so-called error-correcting function to insure that every litigant receives a fair trial." 431 So.2d at 1014. Although Florida's appellate courts may have aspirational internal guidelines for when to write opinions, *Whipple*, 431 So.2d at 1015, they guard the prerogative to not write "opinions to merely repeat well established principles" of law. *Id*. at 1016.

In this case, however, the form and function of Florida's appellate courts as both court of final review and gatekeeper failed and denied due process.

If a right of appeal is granted by a state, it must be administered according to the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. *See Halbert v. Michigan*, 545 U.S. 605, 610 (2005); *Jones v. Barnes*,

463 U.S. 745, 751 (1983). Moreover, such judicial review must comport with the judicial function of the nation's courts as established at the common law as incorporated by the United States Constitution:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). The judiciary cannot avoid deciding cases; it cannot choose not to act. And it is not within the exercise of the judicial function to permit a conflict of law to exist.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). "To the extent necessary for the decision, a court's declaration of law is authoritative and must be applied in subsequent cases to similarly situated parties." *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th

Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

The doctrine of *stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Although a court may overrule precedent, the doctrine of *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000). These principles seem to be more than mere policy, but fundamental to the rule of law and due process; "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Anastasoff*, 223 F.3d at 901-02 (citations omitted).

If all that is true, then a one-word affirmance of a defective conviction is irreconcilable with the judicial function and due process. Although *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972), said "courts of appeal should have wide latitude in their decisions of whether or how to write opinions," it remanded the case to the circuit court with directions to write an opinion so that its reasoning and that of the district court could be evaluated. *United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999), also said that a "litigant's right to have all issues fully considered and ruled on

by the appellate court does not equate to a right to a full written opinion on every issue raised," noting that it had written an extensive opinion which was criticized by the death row prisoner for not having addressed a sentencing issue. Moreover, the courts that espouse the prerogative do not necessarily endorse it.

The *Anastasoff* court was unconvinced by the *Whipple* court's complaint that it didn't have time to write opinions in every case:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

223 F.3d at 904. The short-lived opinion[24] in *Anastasoff* addressed whether an unpublished opinion should have precedential effect, deciding that it should and declaring unconstitutional a rule of court to the

[24] The decision was vacated because it was rendered moot by a settlement of the parties.

contrary; a rule that allows a court to decide a case, but declare that it is not binding precedent, "exceeds the judicial power, which is based on reason, not fiat." 223 F.3d at 904.

Anastasoff's reasoning is sound and touched off commentary not only about the efficacy of non-precedential unpublished opinions, but whether one-word opinions can fulfill constitutional judicial function. *See* David Johnson, *"You Can't Handle The Truth!" – Appellate Courts' Authority To Dispose Of Cases Without Written Opinions*, 22 App. Advoc. 419 (Summer 2010); Chad Oldfather, *Remedying Judicial Inactivism: Opinions As Informational Regulation*, 58 Fla. L. Rev. 743, 761 (Aug. 2006); Chad Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty To Decide*, 94 Geo. L.J. 121, 123 (Nov. 2005). Commentators contend that written opinions must be required even if the opinions merely contain citations to the authority the court considers controlling. 94 Geo. L.J. at 123. Such written opinions provide a check on judicial behavior, put the parties in a better position to respond, require decisional justification and logic, assure that a meaningful review was conducted, and provide a party with an opportunity for further review by a higher court. *See* 22 App. Advoc. at 420-21, 58 Fla. L. Rev. at 743 (2006). Moreover, minimally responsive written opinions assure that the judicial function has been fulfilled, provide notice of what the law is and how it was applied in this and future cases, and that due process was done.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The process due is a function of the private interest affected by the official action, "the risk of an erroneous deprivation of such interest through the procedures used," and the cost. 424 U.S. at 335. In the context of adjudicating property rights in federal benefits, a "decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing," and to "demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). One would hope that Luna's liberty and challenge to a conviction obtained unconstitutionally by denial of a jury instruction would be of equal import.

While PCAs are no doubt a useful judicial tool in cases in which there is a clear binary issue, they are constitutionally infirm, and a violation of due process, when they serve to preserve and protect a secret body of law immune from challenge to a court vested with the power to declare the law for the entire state.

The Constitution does not permit an appellate court to turn a blind eye and deaf ear to the application

of an unconstitutional rule, such as applied in *Seo*[25] and this case, that conflicts with the state supreme court,[26] its sister districts,[27] and adopted federal precedent.[28] The equal protection clause[29] does not allow the courts to apply different law to different parts of the state. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (a court order must contain some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied). If Florida's constitution does not permit supreme court jurisdiction to review and resolve conflicts among the appellate courts that are contained within *per curiam* opinions without discussion, then appellate courts cannot enter such opinions consistent with the United States Constitution.

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[25] 143 So.3d 1189, 1190 n.1.

[26] *Wilson*, 577 So.2d at 1302.

[27] *E.g. Morgan v. State*, 112 So.3d 122, 124-25 (Fla. 5th DCA 2013) (error to refuse entrapment instruction to accused who disavowed intent to have sex with fictitious minor).

[28] *Mathews*, 485 U.S. at 62-63; *Henry*, 749 F.2d at 210-13.

[29] U.S. Const. amend. XIV.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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