

No. _____

**In the
SUPREME COURT
of the
UNITED STATES**

**PHIL MIRANDA LUNA,
Applicant-Petitioner**

-vs-

**STATE OF FLORIDA
Respondent-Defendant**

**Application for Extension of Time to File
Petition for Writ of Certiorari to the
Florida's Second District Court of Appeal**

To: The Honorable Justice Clarence Thomas, Circuit Justice for the State of Florida within the Eleventh Circuit of the United States Courts.

Applicant-Petitioner, PHIL MIRANDA LUNA, by and through undersigned counsel, requests a 60-day extension of time in which to file a petition for writ of certiorari.

Jurisdiction

Florida's Second District Court of Appeal on August 3, 2018, denied Mr. Luna's motion for written opinion, certification of conflict and rehearing *en banc*, which was docketed June 4, 2018, following the *per curiam* order entered May 18, 2018, in *Luna v. State*, No. 2D16-4073, 2018 WL 2271124, 2018 Fla. App. LEXIS

6966 (Fla. 2d DCA May 18, 2018), affirming, without opinion, Mr. Luna's conviction and sentence imposed August 18, 2106, from which appeal was taken September 12, 2016. Copies of the orders denying rehearing and affirming Mr. Luna's conviction and sentence are attached.

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). A petition for writ of certiorari from Florida's court of last resort is currently due November 1, 2018. If this request is granted, the extended due date would be December 31, 2018. This application is filed at least 10 days prior to the expiration of the filing deadline.

Issues to be Presented

Mr. Luna claims he was convicted and sentenced in violation of due process clauses contained within the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. He requested an entrapment jury instruction at trial as permitted by Florida statute and rule, but that request was denied by the trial court, which ruled that because Mr. Luna denied an element of the crime (belief) he could not claim entrapment. *Seo v. State*, 143 So.3d 1189 (Fla. 1st DCA 2014), *quashed* SC14-1803, 2016 WL 1700522, 2016 Fla. LEXIS 877 (Apr. 28, 2016). The trial

court's ruling conflicts with *Morgan v. State*, 112 So. 3d 122, 124 (Fla. 5th DCA 2013), as well as *Wilson v. State*, 577 So.2d 1300, 1302 (Fla. 1991), that in *dicta* partially adopted *Mathews v. United States*, 485 U.S. 58, 62-63 (1988), to the extent that a defendant is otherwise entitled to an entrapment instruction, even if *mens rea* is denied, so long as the *actus reus* is not. Moreover, as stated in *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984), due process requires that the prosecution to prove beyond a reasonable doubt each and every element of the crime charged regardless of whether a defendant raises an entrapment defense; a plea of not guilty places all elements in controversy and requires nothing less; that a defendant denies the requisite *mens rea* does forfeit the entrapment defense.

Mr. Luna was arrested as part of an Internet Crimes Against Children task force sting operation in early June, 2012. He answered an advertisement placed in the adults-only casual encounters section of the Orlando Craigslist website by an undercover ICAC operative. Although neither the ad nor Mr. Luna's emailed response suggested illicit activity, the ICAC operative, through a series of email exchanges, invited Mr. Luna to sexually mentor a fictitious eleven-year-old daughter, who was portrayed by another (adult) ICAC operative during a telephone conversation. Mr. Luna traveled to a meeting at a house in Polk County, Florida, where he was arrested and charged with attempted capital sexual battery, in violation of § 777.04(1) and § 794.011(2)(a), Fla. Stat., and traveling to meet a

minor for sex, in violation of § 847.0135(4), Fla. Stat., which was adopted in 2007 and closely resembles 18 U.S.C. § 2423(b) as amended by the PROTECT Act of 2003.

Mr. Luna raised the issue of entrapment by pretrial motion, as permitted by Florida rules of court and case law, as well as at trial in motions for judgment of acquittal, directed verdict and new trial. His request that the jury be given Florida's standard jury instruction on entrapment, however, was denied, as described earlier. The denial of the entrapment instruction, among other things, was raised on appeal. The affirmance without an opinion leaves Mr. Luna in prison, serving a 17-year sentence on a conviction obtained in violation of due process.

This issue is likely to recur in other jurisdictions, owing to the confluence of ICAC's use of internet sting operations nationwide, application of local laws patterned after the PROTECT Act of 2003, and the diversity of states' interpretation and application of entrapment defenses.

Lastly, the Court may want to address whether Florida appellate courts deny due process to defendants when they enter *per curiam* affirmances without opinions while failing to address departures from fundamental principles of law.

Reasons for Extending Time

Undersigned counsel is recovering from lung cancer surgery performed about a year ago as well as post-operative complications and treatment. As a result,

counsel has had significantly less time, energy, strength and stamina to devote to professional, business and personal matters and obligations. Counsel is a sole practitioner with a practice limited to federal and state criminal defense.

While researching and drafting a petition, it became apparent that the issue presented in Mr. Luna's case has the potential to recur in other jurisdictions. Thus, counsel recently conducted a 50-state survey of how each state addresses whether a defendant may claim entrapment while denying an element of the crime. In addition, counsel requires more time to conduct a 50-state survey of which states have conducted sting operations to enforce local laws similar to the PROTECT Act and using ICAC resources and methods.

Conclusion

Based on the foregoing, counsel prays an Order extending the November 1, 2018, due date for filing a petition for writ of certiorari until December 31, 2018.

Respectfully submitted:

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s/ Daniel F. Daly
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