IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 91,541
	)	
RAUL VAZQUEZ,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent agrees with the statement in petitioner's initial brief on the merits except to note that:

This cause is before this Court on the following question certified by the lower court as being of great public importance:

> Does the inaccuracy or incompleteness of the current standard jury instruction for the defense of entrapment reflect a fundamental change in the law requiring retroactive application to all cases after Munoz [v. State, 629 So.2d 90 (Fla.1993)] or is it instead an evolutionary change in the law requiring only prospective application?

Vazquez v. State, 22 Fla. Law Weekly D 2254 (Fla. 4th DCA Sept. 24, 1997) (on rehearing); Appendix A.

At bar, the state filed an information on January 5, 1995 alleging that on December 15, 1994 respondent committed the offense of trafficking in cocaine. R 1. In July 1995, it filed an amended information again charging respondent with committing that offense on December 15, 1994. R 12. The trial occurred in December 1995. R 14-17.

SUMMARY OF THE ARGUMENT

The certified question is moot, so that this Court should dismiss this cause. Most of petitioner's argument is directed to a question that the district court did not certify to this Court. As to that question, the jury instruction on entrapment did not correctly set out the state's burden regarding the entrapment defense. Hence, this Court should either dismiss this cause or affirm the decision of the lower court.

ARGUMENT

THIS COURT SHOULD DISMISS THIS CAUSE OR AFFIRM THE JUDGMENT OF THE LOWER COURT.

A. This cause is before this Court on the following question certified by the lower court as being of great public importance:

> Does the inaccuracy or incompleteness of the current standard jury instruction for the defense of entrapment reflect a fundamental change in the law requiring retroactive application to all cases after Munoz [v. State, 629 So.2d 90 (Fla.1993)] or is it instead an evolutionary change in the law requiring only prospective application?

Vazquez v. State, 22 Fla. Law Weekly D 2254 (Fla. 4th DCA Sept. 24, 1997) (on rehearing). Appendix A. At bar, the state filed its information on January 5, 1995 alleging that on December 15, 1994 respondent committed the offense of trafficking in cocaine. Appendix B. Hence, retroactive application of this Court's 1993 decision in Munoz is simply not an issue in this cause. The certified question is moot, and this Court should dismiss this cause.

In Montgomery v. Dept. of Health & Rehab. Serv., 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985), the Court wrote:

> Mootness has been defined as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973), quoted with approval in United States Parole Commission v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479, 491 (1980). Mootness occurs in two basic situations: "[W]hen the issues presented are no longer 'live' or [when] the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491, 502 (1969).
>
> A case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief. 3 Fla.Jur.2d, Appellate Review, S 287, p. 337. Mootness can be raised by the appellate court on its own motion. DeHoff v. Imeson, 153 Fla. 553, 15 So.2d 258 (1943); Barrs v. Peacock, 65 Fla. 12, 61 So. 118 (1913). The rule discouraging review of moot cases is derived from the requirement of

> the United States Constitution, Article III, under which the existence of judicial power depends upon the existence of a case or controversy. Liner v. Jafco, Inc., 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). It is the function of a judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue. 2 Am.Jur.2d, Administrative Law, S 572, p. 389.

Under the foregoing authorities, the certified question is moot. Respondent has no interest in the outcome of the question of the retroactivity of Munoz. Regardless of the answer to the certified question, Munoz applies to him. Hence, this Court should dismiss this cause as involving a moot question.

B. Given the foregoing, it is understandable that petitioner has devoted the bulk of its brief to a question which the lower court declined to certify to this Court. On this question, petitioner contends that the instruction on entrapment was sufficient notwithstanding

that it does not comply with this Court's ruling in Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993).

In Munoz, this Court wrote that the defendant presenting an entrapment defense has the initial burden of showing lack of predisposition, and added: "However, as soon as a defendant produces evidence of no predisposition, the burden then shifts to the prosecution to rebut this evidence beyond a reasonable doubt."

Notwithstanding this straightforward proposition, the trial court at bar instructed the jury as follows:

> It is not entrapment if Raul Vazquez had the predisposition to commit Trafficking in Cocaine. Raul Vazquez had the predisposition [if] before any law enforcement officer or person acting for the officer persuaded, induced or lured Raul Vazquez he had a readiness or a willingness to commit the crime of trafficking in cocaine if the opportunity presented itself.
>
> It is also not entrapment merely because a law enforcement officer in a good faith attempt to detect crime:
>
> > A, provided the defendant with the opportunity, means and facilities to commit the offense which the defendant intended to

commit and would have committed otherwise,

Or B, used tricks, decoys or subterfuge to expose the defendant's criminal acts,

Or C, was present and pretending to aid or assist in the commission of the offense.

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.

R 1168-69.

This instruction inarguably failed to notify the jury that the state had the burden of proving predisposition beyond a reasonable doubt. Hence, it was improper, and the trial court erred under Yohn v. State, 476 So. 2d 123 (Fla. 1985).

In Yohn, as at bar, the state had the burden of disproving a defense beyond a reasonable doubt. The defense in Yohn was insanity; the defense at bar is entrapment. In Yohn, as at bar, the standard instruction

did not specifically set out the state's burden. Finding the standard instruction insufficient, this Court wrote:

> Since Florida law leaves to the jury the decision as to whether there has been sufficient evidence of insanity presented to rebut the presumption of sanity, it is crucial that the jury be clearly instructed on the state's ultimate burden to prove that the defendant was sane at the time of the offense. Instead, Standard Jury Instruction 3.04(b) stops after instructing the jury on the presumption of sanity and the requirement that the elements of insanity be shown sufficiently to raise a reasonable doubt as to the defendant's sanity. The instruction frames the issue as one of finding the defendant legally insane. This places the burden of proof on the defendant's shoulders since it will always be the defendant who will be showing his or her insanity. The jury is never told that the state must prove anything in regard to the sanity issue. This is not the law in Florida.

Id. 128. Yohn specifically rejected the state's claims that use of the standard instruction on reasonable doubt cured this error. It also rejected the state's argument that this Court's prior approval of the standard instruction barred a subsequent challenge to the instruction.

The instruction at bar is even worse than the instruction in Yohn: it not only relieves the state of its burden, it puts on the defendant the burden of proving the defense by a preponderance of the evidence.

By relieving the state of its burden, and shifting the burden to the defense, the instruction violates due process. See Wilhelm v. State, 568 So. 2d 1 (Fla. 1990) and Yates v. Aiken, 484 U.S. 211, 214, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). Accordingly, this Court should affirm the ruling of the lower court and answer the certified question in the affirmative.

C. For the rest, the state's argument focusses on arguments concerning whether Munoz might apply retroactively to other litigants in other cases. While petitioner may have a legal interest in such matters, respondent does not. He only seeks application of Munoz to his post-Munoz trial. Hence, the present case does not involve the issue of retroactive application, and this Court should not render an advisory opinion for the state on this point.

CONCLUSION

This Court should either dismiss this cause or affirm the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Diana Block, Assistant Attorney General, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607, by mail this 5th day of December, 1997.

Of Counsel