IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

FSC. NO. 91,541

v.

RAUL VAZQUEZ,

Respondent.
_____/

DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

STATE STATUTES

PRELIMINARY STATEMENT

All references to the record on appeal shall be designated by the letter "R," all references to the trial transcript will be preceded by the symbol "T," and all references to the supplemental record will be preceded by the symbol "SR," followed by the page number. Petitioner shall be referred to as the State and Respondent shall be referred to as Respondent or defendant.

STATEMENT OF THE FACTS AND CASE

Respondent was charged with trafficking in cocaine on December 12, 1994, in an amount exceeding 400 grams but less than 150 kilograms. (R 1) At trial Respondent mounted a defense based upon a theory of entrapment. The trial court below gave the standard jury instruction for a defense of entrapment.[1] A jury found

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[1]The defense of entrapment has been raised. Raul Vazquez was entrapped if:

> One, he was for the purpose of obtaining evidence of the commission of a crime, induced or encouraged to engage in conduct constituting the crime in trafficking in cocaine.
>
> And, two, he engaged in such conduct as a result - - excuse me, as the direct result of such inducement or encouragement.
>
> Three, the person who induced or encouraged him was a law enforcement officer or a person engaged in cooperating with or acting as an agent of a law enforcement officer.
>
> And, four, the person who induced or encouraged him employed methods of persuasion or inducement which created a substantial risk that the crime would be committed by a person other than one who is ready to commit it.
>
> And, five, Raul Vazquez is not a person who was ready to commit the crime.
>
> 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:

him guilty as charged. (R 49) He was sentenced to fifteen years with a fifteen year mandatory minimum and a $250,000.00 fine. (R 52-54; R 1195)

Respondent raised three issues on direct appeal of his conviction and sentence to the Fourth District Court of Appeal:

Issue One:	The trial court reversibly erred in refusing to permit Appellant to reopen cross of the lead detective and in denying a proffer on that motion.
Issue Two:	The taped conversations between the informant and a third party were erroneously admitted over hearsay objection.
Issue Three:	The conviction violates due process of law because the jury was not instructed that the state had the burden of proving predisposition beyond a reasonable doubt.

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 1168-1169)

The appellate court found that the trial court had erred in failing to re-open cross-examination of the lead detective to allow additional testimony to be taken relying upon Louisy v. State, 667 So.2d 972 (Fla. 4th DCA 1996) and Hahn v. State, 58 So.2d 188 (Fla. 1952). The appellate court failed to address Issue Two as raised by Respondent. Neither of these two issues are relevant to this appeal.

However, at issue herein is the appellate court's finding as to Issue Three, wherein the appellate court found that:

> It is apparent from *Munoz* that the court has now aligned the law of entrapment in Florida and the shifting burden of proof with that of the United States Supreme Court in *Jacobson*.
>
> Under this new formulation set forth in *Munoz,* it seems clear that the following text from the current standard jury instruction is inaccurate or incomplete:
>
> > 'the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment.'
>
> *Munoz* held that the defendant has the burden of proving inducement. Moreover, once defendant presents any evidence showing a lack of predisposition, the burden of proving predisposition then shifts back to the prosecution to overcome the defendant's showing beyond a reasonable doubt. Thus, we agree that the standard jury instruction does not fairly and correctly present the current state of the law on this issue. The trial judge should therefore have given an instruction that complies with *Munoz*. *State*

> *v. Bryan*, 287 So.2d 73 (Fla. 1973), *cert. denied*, 417 U.S. 912 (1974) (despite the supreme court's approval of the standard jury instructions, the trial judge is not relieved of his or her responsibility under the law to correctly charge the jury).

On September 24, 1997, the Fourth District Court of Appeal, Case No. 96-0072 filed its Order denying Petitioner's Motion For Rehearing, Motion For Clarification and rehearing en banc, but certified a question of great public importance to this Court. Raul Vazquez v. State, 22 Fla. L. Weekly D2254a (Fla. 4th DCA 1997), *See Appendix*. Petitioner timely filed its Notice To Invoke Discretionary Jurisdiction on September 25, 1997. On October 15, 1997, this Court entered its order postponing a decision on jurisdiction, but setting a schedule for briefs on the merits.

SUMMARY OF THE ARGUMENT

The standard jury instruction on the affirmative defense of entrapment is constitutional and was properly given to the jury in this case to determine, under a subjective test, whether or not the Appellant was predisposed to commit the crime.

Alternatively, should this Honorable Court determine that the standard jury instruction is incomplete or inaccurate, then, in that event, the application of the new requirements for a jury instruction on entrapment should be viewed as an evolutionary change, and not a fundamental change in the law. Such a determination would require a contemporaneous objection to preserve the issue for appeal and the new jury instruction requirements would afford no collateral attack in postconviction matters to those defendants whose cases have become final.

ARGUMENT

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, OR IS IT INSTEAD AN EVOLUTIONARY CHANGE IN THE LAW REQUIRING ONLY PROSPECTIVE APPLICATION?

The question certified by the Fourth District Court of Appeal, as it appears above, was proposed by Petitioner to the appellate court as a second-prong question to be answered in the event the primary question was answered by this Honorable Court in the affirmative. The pivotal primary question was:

> IS THE CURRENT STANDARD JURY INSTRUCTION FOR THE DEFENSE OF ENTRAPMENT INACCURATE OR INCOMPLETE IN LIGHT OF *MUNOZ v. STATE*, 629 So.2d 90 (Fla. 1993), WHEN IT DOES NOT STATE THAT ONCE THE DEFENDANT HAS SHOWN A LACK OF PREDISPOSITION THE BURDEN TO SHOW PREDISPOSITION BEYOND A REASONABLE DOUBT SHIFTS BACK TO THE PROSECUTION, WHEN THE JURY HAS ALSO BEEN INSTRUCTED AS TO THE BURDEN OF THE STATE TO PROVE THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT?

As phrased, the foregoing question as certified by the court, presupposes that the standard jury instruction on entrapment is inaccurate or incomplete. Therefore, a

proper consideration of this certified question requires the review and analysis of whether or not the current standard jury instruction is, in fact, incomplete or inaccurate in light of Munoz v. State, 629 So.2d 90 (Fla. 1993) and Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992).

A. Sufficiency Of Standard Jury Instruction On Entrapment When Raised As Affirmative Defense

Contrary to the finding of the appellate court below, this Honorable Court in Munoz, supra, did not create a new standard in connection with the entrapment defense, nor did the Court set forth any requirements beyond those found within the standard jury instruction for the entrapment defense regarding the shifting of the burden as to predisposition of a defendant. Not even in light of Jacobson, supra, does Munoz, supra, stand for the proposition that there needs to be specific language within the affirmative defense instruction for entrapment. *Also See*: United States of America v. King, 73 F.3d 1564 (C.A. 11 (Ga.) 1996) (Jacobson did not change the law regarding the burden and standard of proof in an entrapment case. . .).

In Munoz the heart of the issue was whether or not the question of entrapment required mandatory submission to a jury, or could the trial judge, as a matter of law, make a finding that based upon uncontradicted facts, that the defendant in a particular case, under certain circumstances, was in fact, entrapped by law

enforcement. This finding by this Court does not negate the use of the standard jury instruction, and in fact, under Herrera v. State, 594 So.2d 275 (Fla. 1992), the Court specifically found that the standard jury instruction appropriately set forth the defendant's burden with the affirmative defense of entrapment. Herrera addressed the question of whether or not the standard jury instruction improperly placed the burden on a defendant to prove that the defendant was entrapped. The Court found that it did not and upheld the use of the standard jury instruction for the affirmative defense of entrapment. This finding by the Court in Herrera is not rendered moot by its subsequent ruling in Munoz, specifically finding that "the legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional right. Accordingly, section 777.201, Fla. Stat., cannot overrule a decision of this Court regarding entrapment in any case decided under the due process provision of article I, section 9, of the Florida Constitution." Munoz at 98.

Specifically rejecting any construction of Fla. Stat. 777.201, Fla. Stat., which would mandate "that the issue of entrapment is to be submitted to a jury for determination as a matter of law would result in an unconstitutional construction that would violate article I, section 9, of the Florida Constitution." Ibid at 100. This Court in Munoz, supra, states:

> We find that, in enacting section 777.201, the legislature did eliminate the objective test in *Cruz*, but we find that the legislature **cannot prohibit the *judiciary* from objectively reviewing the issue of entrapment to the extent such review involves the due process clause of article I, section 9, of the Florida Constitution.** 629 So. 2d at 91. [Emphasis added]

This ruling does not modify, enhance or inhibit the standard jury instruction concerning the burden of a defendant to show, by a preponderance of the evidence, that he was not predisposed to commit the crime of which he is charged as an element of his alleged affirmative defense. The decision of this Honorable Court in Munoz, supra, does not effect the substantive law established under Herrera, supra.

Jacobson, supra, stands for the proposition that the Government must prove that a defendant's predisposition is independent and not the product of the attention directed at a defendant by the Government over a projected period of time, slowly eroding that defendant's free will and creating a criminal intent within the defendant's mind that would otherwise not have been present. Jacobson at 1541. This case talks about the sufficiency of evidence to establish beyond a reasonable doubt that a defendant is predisposed, it does not establish a new burden upon the State. It can not and does not support the Respondent's position that this case requires a new standard jury instruction, especially in light of the fact that the standard jury instruction now at issue was established by the Florida Legislature in

1987; in direct response to the adoption of the Cruz[2] objective standard, effectively abolishing the objective standard and establishing, by legislative intent and act, the subjective standard as the proper standard under Florida law to be applied to the defense of entrapment.

The application of Jacobson by this Court in Munoz does not equate to re-establishment of the standard jury instruction on this issue of burden. Rather, Jacobson is used to support the Court's ruling that a trial court can, as a matter of law, rule on the issue of entrapment. Jacobson at 97.

The State has always had a burden to show beyond a reasonable doubt that a defendant was predisposed when the defense of entrapment was raised, specifically pre-section 777.201, Fla. Stat. *See*: State v. Wheeler, 468 So.2d 978 (Fla. 1985); Rotenberry v. State, 468 So.2d 971 (Fla. 1985). The standard jury instruction pre-section 777.201, Fla. Stat., clearly stated that "if evidence of entrapment is sufficient, jury must be instructed that state has burden of disproving entrapment beyond reasonable doubt; and jury should never be instructed on defendant's burden of adducing evidence." *Ibid* at 978. Therefore, it has always been the burden of the state to prove predisposition beyond a reasonable doubt.

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[2]*Cruz v. State*, 465 so.2d 516 (Fla.), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

Further, as pointed out by the Fourth District Court of Appeal in *Raul Vazquez v. State*, Case No. 96-0072, Opinion Issued July 2, 1997, which is the subject of this appeal:

> Before the adoption of this amended instruction in 1989, the final paragraph of the standard instruction on entrapment had read: 'On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped.' ***When the drafting committee transmitted the proposed new instruction to the court, it specifically called the court's attention to this change in the instruction on burden of proof for entrapment.*** *In re Standard Jury Instr. In Criminal Cases*, 543 So.2d 1205 (Fla. 1989). ***The court adopted the change without comment***, however. (Footnote omitted, Emphasis added) At Page 5.

This Honorable Court was well aware of the evidentiary burden of the state, and how the newly established jury instructions post-section 777.201, Fla. Stat. reflected that burden when ruling in Herrera, supra.

It appears that this Court in Rotenberry v. State, 468 So. 2d 971 (Fla. 1985), visited the question of whether or not the then current entrapment instructions,[3] when given in conjunction with the general instruction on the State's burden to prove the defendant's guilt beyond a reasonable doubt was sufficient, ***when the state has***

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[3]This case was decided in 1985, at that time *Cruz* was still good law; however, the logical premise upon which the Court relied in its opinion is still valid.

the burden to prove beyond a reasonable doubt that a defendant was not entrapped, to properly charge the jury. This Court found that the standard instruction was an adequate instruction when given in conjunction with the general reasonable doubt instruction. Justice Alderman, joined by Justices Overton and Ehrlich, dissented in Yohn v. State, 476 So. 2d 123 (Fla. 1985), stating that: "There is neither the need to give added emphasis to the state's burden of proof, Sylvester v. State, 46 Fla. 166, 35 So. 142 (1903), nor the necessity to include a statement of the state's burden of proof in the entrapment instruction when the jury is also instructed, as it always is in a criminal case, as to the state's general burden to prove guilt beyond a reasonable doubt." It is entirely probable that if the question posed by Yohn had been the issue of the entrapment defense, rather than the insanity defense cloaked with its own nuances, [4] that Justice Alderman might well have been authoring the majority opinion.

The position of the State propounded in Herrera, supra, is still the law as it concerns the affirmative defense of entrapment and the shifting of the burden to the

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[4]It should be noted that there is a legal presumption that all defendants are sane when brought to trial; however, there is no presumption of predisposition until the issue of entrapment is raised by a particular defendant. *See: Standard Jury Instructions In Criminal Cases (97-1),* No. 89,771, issued July 10, 1997.

defendant for the purpose of showing a lack of predisposition upon submission to the jury, is stated as follows:

> Herrera argues that this Court's decisions on previous versions of the entrapment instruction, e.g., State v. Wheeler, 468 So. 2d 978 (Fla. 1985), demonstrate that the new instruction and subsection 777.201(2) violate the due process clauses of the United States and Florida Constitutions. **The State, on the other hand, contends that the instruction and statute are constitutional because they shift only the burden of persuasion of an affirmative defense, not the burden of proving the elements of the crime charged and the defendant's guilt.** The two district courts that have considered this issue have agreed with the State. E.g., *Krajewski v. State*, 587 So. 2d 1175 (Fla. 4th DCA 1991); . . .*Gonzalez v. State*, 571 So. 2d 1346 (Fla. 3d DCA 1990), review denied, 584 So. 2d 998 (Fla. 1991). **We do likewise.** 594 So. 2d at 276-278. [Emphasis added]

In essence the Court ruled that "requiring a defendant to show lack of predisposition does not relieve the State of its burden to prove that the defendant committed the crime charged." Ibid.

The standard has not changed, the burdens have not changed, the issue of predisposition is still an essential element of the defense of entrapment as a result of the enactment of Section 777.201, Fla. Stat. (1987). It is not the State's burden that is in question; rather, it is the instruction to the jury that is at issue. Is the jury

sufficiently on notice that the State must prove, beyond and to the exclusion of any reasonable doubt, that the defendant was predisposed to commit the crime.

It must also be noted that the standard jury instruction on entrapment is read in tandem with other standard jury instructions and therefore, consideration of the establishment of the state's burden can not be made in a vacuum. The standard jury instruction for reasonable doubt, which was given by the trial court in the case *sub judice*, states:

> The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the information, through each stage of the trial, until it has been overcome by the evidence, to the exclusion of and beyond a reasonable doubt.
>
> To overcome the defendant's presumption of innocence, the State has the burden of proving the following two elements. One, the crime with which the defendant is charged was committed. Two, the defendant is the person who committed the crime. The defendant is not required to prove anything. Whenever the words, reasonable doubt, are used, you must consider the following. A reasonable doubt is not a possible doubt, speculative, imaginary, or a forced doubt. Such a doubt must not influence you to return a verdict of not guilty, if you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or if having a conviction, it is one which is not stable, but one which waivers and vacillates, then the charge is not

> proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is the evidence introduced upon this trial and to it alone that you're to look for that proof. A reasonable doubt as to the guilt of a defendant may arise from the evidence, conflict in the evidence, or the lack of evidence. If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty. (T 724-726)

Importantly, this reasonable doubt instruction was given immediately after the standard jury instruction on entrapment was read to the jury. (T 722-724) This Court in Rotenberry, supra, when considering the context of the entire set of instructions to the jury, held "that instruction 3.04(c) is adequate in combination with the general reasonable doubt instruction." Ibid at 973. This holding is based upon the following logic espoused by the Court:

> Instruction 3.04(c) is adequate because it contains the essential element the state is required to prove, predisposition: 'The defense of entrapment has been raised. This means that (defendant) claims he had no prior intention to commit the offense. . . .(Defendant) was entrapped it: 1. He had no prior intention to commit (crime charged). . . .' (Emphasis added.)[5] The jury thus is instructed that the predisposition of the defendant is an essential element in determining guilt. The reasonable doubt instruction, 2.03, states in relevant part: 'The

[5]The emphasis noted in quoted text has been placed by the court and has not been inserted by this author.

> presumption [of innocence] stays with the defendant as to each material allegation in the (information)(indictment) through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. . . . The defendant is not required to prove anything.' (Emphasis added.) If the defendant is required to prove nothing, then the predisposition element of the entrapment instruction clearly must be proved by the state, not the defendant.
>
> We agree that the language requested by Rotenberry during the charge conference, taken from the old entrapment instruction, more clearly sets out the state's burden of proof on entrapment. **However, as we explain in Wheeler, the reason for deleting this language was to de-emphasize the state's burden of proof. *Sylvester v. State*, 46 Fla. 166, 35 So. 142 (1903), nor the necessity to include a statement of the state's burden of proof in the entrapment instruction when the jury is also instructed, as it always is in a criminal case, as to the state's general burden to prove guilt beyond a reasonable doubt. '[A] single instruction is not required to contain all the law relating to the subject treated, and, in determining what challenged instructions are proper or improper, the entire instructions as given must be considered as an entirety and should not be considered in isolated portions.'** *Peele v. State*, 155 Fla. 235, 239, 20 So.2d 120, 122 (1944). A delicate balance has been struck between informing the jury on the law of entrapment and avoiding undue emphasis on the state's burden of proof.

When determining the appropriateness of using the standard jury instruction, the trial court below correctly relied upon the standard jury instruction. *See*: Fruetel v. State, 638 So. 2d 966 (Fla. 4th DCA 1994)(issued post-Munoz). When

appropriate, the trial court should use the standard jury instructions: it was appropriate for the trial court to use the standard jury instruction as same has been upheld not only by this Honorable Court, but also by the Fourth District Court of Appeal. State v. Bryan, 290 So. 2d 482 (Fla. 1974), rehrg. denied. *See also:* Herrera, supra; Munoz, supra and Fruetel, supra.

The trial court properly used the standard jury instruction for the affirmative defense of entrapment. Therefore, the decision of the Fourth District Court of Appeal, determining that the standard jury instruction on entrapment was inaccurate or incomplete is in error and should be reversed.

B. Application Of Evolutionary Change In Law Versus Fundamental Change In Law

This Honorable Court in Witt v. State, 387 So.2d 922 (Fla. 1980), set forth the essential considerations required for determining whether a new rule of law should be applied retroactively, those being:

(1) the purpose to be served by the new rule;

(2) the extent of reliance on the old rule; and

(3) the effect on the administration of justice of a retroactive application of the new rule.

Assuming arguendo, that a new rule of law has evolved, the purpose of the new law must be deemed to be to better inform the jury as to the appropriate burden

borne by each party when the affirmative defense of entrapment is raised by a defendant in a particular case. The purpose is not, and can not be construed to be, a change in the actual burden of each party, i.e., the defendant raising a defense of entrapment must show by a preponderance of the evidence that he was not predisposed to commit the crime with which he has been charged and the state must prove the defendant's guilt, including his predisposition, beyond a reasonable doubt. Munoz, supra; Herrera, supra.

The state has greatly relied upon the established standard jury instruction used when a defendant raises a claim of entrapment. It is axiomatic that the courts have encouraged such reliance. *See*: State v. Bryan, 290 So.2d 482 (Fla. 1974), rehrg. denied. Clearly, King, supra, instructs us that the burden of proof as spelled out in the standard jury instruction on entrapment is proper, and thus no error occurred in this case. Cf. Lacy v. State, 387 So.2d 561, 563 (Fla. 4th DCA 1980) ("[w]here standard jury instructions are involved, having been approved by the supreme court. . ., we are understandably reluctant to find grounds for reversal absent a clear showing that the rights of the accused have been meaningfully prejudiced by the instruction under review").

The effect upon the administration of justice is best summed up in this Honorable Court's own words found in Witt: "[e]mergent rights in these categories,

or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit."

Our system of justice requires finality, without it the system will fail. Therefore, this Court's further finding in Witt is directly on point when reviewing the question of whether or not, if a change is deemed to have occurred that same necessitates the construction of a new standard jury instruction for entrapment, and whether this change requires retroactive application:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole. Witt at 925.

In order for a change of law to be considered a fundamental change it must equate to a "jurisprudential upheaval" evidencing more than mere "evolutionary

refinements in the criminal law," as set forth by this Honorable Court in Witt at 929:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Only this Honorable Court "and the United States Supreme Court can adopt a change of law sufficient to precipitate a postconviction challenge to a final conviction and sentence." Ibid at 930. Petitioner would argue that there has been no evolutionary change or fundamental change in the law; rather, would argue that the standard jury instruction is consistent with the law as applied to the defense of entrapment. No change has been adopted by this Honorable Court that would require the creation of a new postconviction challenge to a final conviction and sentence. Ibid.

Even if it were determined that the standard jury instruction was in some way incomplete or inaccurate, that would not, in and of itself constitute a necessity for

retroactive application to those cases that have become final since the Munoz decision. Should the standard jury instruction be considered a change in the law, it must be considered, at best, an evolutionary change requiring that "the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review" and be nonfinal when the new law is deemed to have become effective. Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992).

CONCLUSION

Based on the foregoing arguments and authorities, the current standard jury instruction on entrapment, should be upheld by this Honorable Court and the decision of the Fourth District Court of Appeal finding that the standard jury instruction is inaccurate or incomplete should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That a true and correct copy of the foregoing Answer Brief of Appellee has been furnished to Stephen Malone, Assistant Public Defender, Attorney for Appellant, Office of The Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, 421 Third Street/6th Floor, West Palm Beach, Florida, 33401, this 10th day of November, 1997, by ordinary U.S. Mail.

Kristina K. Bock

OF COUNSEL

APPENDIX

22 Fla. L. Weekly D2254a

Criminal law--Entrapment--Jury instructions--Question certified: 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*, or is it instead an evolutionary change in the law requiring only prospective application?

RAUL VAZQUEZ, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 96-0072. Opinion filed September 24, 1997. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carole Y. Taylor, Judge; L.T. Case No. 94-21177CF10A. Counsel: Richard L. Jorandby, Public Defender, and Steven H. Malone, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Diana K. Bock, Assistant Attorney General, Tampa, for appellee.

ON MOTION FOR REHEARING
[Original Opinion at 22 Fla. L. Weekly D1630a]

(FARMER, J.) We deny the motion for rehearing, clarification and rehearing en banc but certify the following question to the supreme court as 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, or is it instead an evolutionary change in the law requiring only prospective application?

(GLICKSTEIN and GROSS, JJ., concur.)

* * *