IN THE SUPREME COURT OF FLORIDA

CASE NO. **94,916**

THE STATE OF FLORIDA,

Petitioner,

-vs-

PAUL MILLER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar Number 0239437
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Ft. Lauderdale, Florida 33301
(954) 712-4600
Fax (954) 712-4761

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INTRODUCTION

The Petitioner, the **STATE OF FLORIDA**, was the Appellee below. The Respondent, **RALPH MILLER**, was the Appellant below. The parties will be referred to as the State and the Respondent. The symbol "R" will designate the record on appeal, the symbol "T" will designate the transcript of proceedings and the symbol "A" will designate the Appendix to this brief.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in 12 point Courier New type size and style.

STATEMENT OF THE CASE AND FACTS

The Respondent was charged with trafficking in over 400 grams of cocaine and conspiracy to traffic in over 400 grams of cocaine. (R. 9-11). Respondent pled not guilty and requested trial by jury. (R. 12).

Detective Wilde of the Hollywood Police Department testified that early on the morning of March 21, 1996, she was contacted by Fabian Pesantes, Jr., and told that two individuals were looking to buy two kilos of cocaine. Pesantes, Jr. told her that these two wanted to get the deal done quickly and get out of town. (T. 209).

Detective Wilde had received some Drug Enforcement Administration training and was assigned to a task force that involved several local agencies. (T. 204). According to Wilde, Fabian Pesantes, Jr. was documented as a confidential informant which meant that she filled out some paperwork, got some approvals through the DEA, and had Pesantes, Jr. sign an agreement. The written agreement, dealt with entrapment issues. (T. 206). Part of the written agreement was that Pesantes, Jr. was not to represent himself as a police officer or agent of the government, could not carry a firearm, and could not tell anyone that he was working for the DEA. (T. 207).

Detective Wilde testified that she was the controlling agent. She was responsible for maintaining control of the informant and making sure that he was given directions on how to proceed in any

case .(T 208-209).

After Detective Wilde was contacted on the morning of March 21, 1996, concerning two individuals wanting to buy two kilos of cocaine, she had very little time to investigate Pesantes, Jr.'s information. She contacted the DEA and found out there was no one available to help her, so she got permission from a DEA supervisor to call the Hollywood Police Department. (T. 209).

Detective Wilde contacted Detective Graziadei and asked him to contact Pesantes, Jr. to find out details. She provided Detective Graziadei with the phone number for Pesantes, Jr.'s shop. Thereafter Detective Wilde went with Detective Graziadei to sign out two kilograms of cocaine from the Hollywood Police Department's vault and proceeded to their office location to coordinate the sale of the two kilograms of cocaine to the two people who, Pesantes, Jr. said, wanted to purchase it. (T. 211-213).

A meeting was set up for the transaction to occur in the vicinity of the Hollywood Clock Restaurant. (T. 214). Detective Wilde and Detective Graziadei arrived at that location about 4:45 P.M., and they had audio and video equipment inside their car, as well as an exterior video camera set up to view the parking lot. (T. 215). Detective Wilde further testified that Pesantes, Jr.'s place of business had been equipped with audio and video equipment and that he had been instructed to tape all meetings that took place to corroborate any evidence of illegal activity. (T. 216).

Detective Dave Graziadei testified that Detective Wilde contacted him in the late morning of the 21st, and told him that she was involved all day and needed help on the spur of the moment. (T. 351). The first thing Detective Graziadei did was call the confidential informant and told him to get a look at the money and to tell Respondent to go home and someone would contact him later. This was done in order to delay the deal because they needed time to get the surveillance team together. (T. 352).

Later that day, Detective Graziadei contacted Pesantes, Jr. and obtained Respondent's home number. He called Respondent twice; first to set up a deal and to let him know why it was being delayed, and then to finalize the meeting place where the deal would take place. (T. 354-358).

Detective Graziadei testified that Detective Wilde was driving a black Honda, in which he was a passenger, and that she drove to the Clock Restaurant and parked. He got out of the car, went into the restaurant, and met Respondent. After introducing themselves, they walked to the green car that Respondent had previously described. Detective Graziadei said that there were two men in the green car, and one was the codefendant Marion. (T. 359).

Once at the green car, Detective Graziadei said that codefendant Haynes handed a twotoned purple bag to Respondent, who in turn then showed it to him. The bag contained money. Graziadei then asked the two people seated in the front seat, Marion and

Haynes, which one of them was going to come with him to see the cocaine. (T. 361). Marion and Haynes then looked at each other and codefendant Marion motioned to Haynes, and Haynes then said something to Marion about a knife. (T. 362). Graziadei testified that he didn't want anyone taking a knife, so he told them that the package of cocaine had "windows" already cut in the tape. Haynes then got out of the car and then Haynes, Graziadei, and Respondent walked over to Detective Wilde's black Honda. (T. 363-364).

Haynes entered the Honda and sat behind Detective Wilde in the rear driver's side while Respondent sat in the rear passenger's side. Detective Graziadei did not enter the car. Respondent then handed the money to Detective Wilde, and she gave him a bag which contained the two kilos of cocaine. Haynes and Respondent then opened the bag and checked the quality of the cocaine. Haynes then took the cocaine, got out of the Honda, and walked back to the green car. (T. 364). Respondent remained behind but got out of the Honda and talked to Graziadei about his cut of the money. Respondent then got back into the Honda in order to take his money out of the bag. (T. 365-366).

Respondent testified that he had only intended on introducing two sets of his friends to each other so that one set, who wanted to buy some cocaine, could get what they wanted from the other set, who wanted to sell some cocaine. Respondent said that this did not start out to be a two kilogram cocaine deal. (T. 429).

The Respondent had known the Pesantes since 1989. Codefendant Leroy Marion was more of a friend than any of the others. Marion's mother lives across the street from Respondent’s mother. Respondent knew Isaac Haynes because they grew up in the same small town outside of Orlando. (T. 430).

Respondent testified that his Marion called him and said that he was due to turn himself in for a work release program, but before he did, he wanted to come to South Florida, for a day or two, to party. Respondent maintained he did not know Haynes was going to show up with Marion. (T. 430-431). Marion and Haynes arrived during that evening of March 20, 1997. Marion asked Respondent if he knew anyone who had any cocaine to sell and he said that he did. (T. 486-487).

Respondent, met Pesantes, Jr. when he helped him obtain phone numbers from his employer, Costco, in order for Pesantes to use them in his cellular phone cloning scam. He testified that in December 1995, Pesantes, Jr. asked him if he knew anyone who wanted to buy cocaine. Pesantes, Jr. told Respondent that he and his father needed to make extra money to open up a second store in Hollywood. (T. 447-448). Respondent said that, other than knowing that his college roommate had purchased marijuana from the Pesantes, this was the first time he learned that they were involved in cocaine trafficking. Respondent stated that he never participated in any drug transaction with the Pesantes until March

21, 1996. (T. 439-440).

Respondent said that Pesantes, Jr. started coming to Costco when he was working and questioning him about finding someone to purchase cocaine (T. 448-449). Respondent kept putting Pesantes, Jr. off, but eventually Pesantes, Jr. started threatening him by asking how his boss would react when he learned that Respondent was involved in stealing Costco's cellular phone numbers in a cloning operation. (T. 449). Respondent explained that the reason he decided to get involved in brokering the cocaine deal was to get Pesantes, Jr. off his back and to stop him from coming to his place of employment and threatening to get him fired. (T. 451, 452).

Fabian Pesantes, Sr. testified that, for ten years, he had owned a company named The Ultimate Sound that sells cellular phones, beepers, and car alarms in Opa-Locka, Florida. (T. 250-251). He explained that his son, Pesantes, Jr., had worked in the same business for ten years. (T. 252). Pesantes, Sr. testified that he was a confidential informant for the DEA because he had to try to help his son get out of trouble who had been charged with crimes by the federal government, and that he believed it involved ten kilograms of cocaine. (T. 252-253).

Pesantes, Sr. first met Respondent at Costco when he went there to set up an account. Respondent helped him set up the Costco account for The Ultimate Sound about six or seven years prior to the trial. (T. 253).

Pesantes, Sr. related that at eight o'clock on the morning of March 21, 1996, Respondent showed up at The Ultimate Sound and said that he was interested in buying two kilos of cocaine. (T. 254-255). Pesantes, Sr. told Respondent that he had to wait for his son to arrive and that this meeting lasted between three to five minutes. (T. 255). On direct examination, Pesantes, Sr. said that, at this eight o'clock meeting, he asked Respondent how much he was reselling the cocaine for, and Respondent told him "nineteen-five." The prosecutor then asked Pesantes, Sr. if Respondent brought up the price of nineteen-five at eight o'clock, and Pesantes, Sr. said "yes," and Pesantes, Sr. then said, "I gave him one price and he gave me another." Pesantes, Sr. then said that he told Appellant to come back at ten o’clock. (T. 256).

On cross-examination, Pesantes, Sr. testified that he and Respondent did not do any price transaction at the eight o’clock meeting and that there was no fixed count at that time. (T 277-278). During Pesantes, Jr.’s testimony, he maintained that it was his father, not him, who was the one doing this transaction. (T. 301). Pesantes, Jr. also testified that his father quoted the Respondent a price of sixteen thousand dollars at the eight o'clock meeting. (T. 313).

The prosecutor asked Pesantes, Sr. why people would come up to him to buy cocaine, and Pesantes, Sr. answered that there are certain circumstances why people come to him because he has two

brothers that are mixed up in the drug business. (T. 256-257). According to Pesantes, Sr., Respondent had approached him before March 21, 1996, and tried to purchase cocaine, but he had never done any drug transactions with Respondent before. (T. 257-258).

Pesantes, Sr. acknowledged that-law enforcement had provided him with equipment with which he was supposed to video and audio tape meetings and transactions involving drug sales. (T. 258). Pesantes, Sr. taped all the negotiations involving the Respondent on March 21, 1996, except for the eight o'clock meeting, and that he turned the tape over to law enforcement. (T. 259, 278-282).

On cross examination, Pesantes, Sr. said that his son arrived at the business around nine or nine-thirty, and after Pesantes, Sr. told him about Respondent, Pesantes, Jr. had a telephone conversation with the agents, and then he had a telephone conversation with Respondent. (T. 283). Pesantes, Sr. testified that they recorded the telephone conversation between his son and Respondent that took place between nine and ten in the morning, and that they turned those tapes over to Detective Wilde. (T. 284). On direct examination, Fabian Pesantes, Jr. said his father paged him early on the morning of March 21, 1996, and he got to the business as fast as he could. After he arrived, Pesantes, Jr. testified that he discussed with his father the incident involving Respondent. Pesantes, Jr. did not have a telephone conversation with Respondent between nine and ten o'clock. (T. 298-299).

Fabian Pesantes, Jr. revealed that he had previously been indicted by the federal government for murder for hire, false imprisonment, conspiracy, and distribution of cocaine. (T. 291-292). Pesantes, Jr. testified that he was in federal custody for three months before he decided he was going to cooperate and entered into an agreement with the federal government the end of October or first of November, 1995. (T. 292). Pesantes, Jr. was facing life in prison, and that was his motivation for becoming an informant was to get his time reduced. (T. 292-293). He said the federal government just told him to do as much as he could do, and did not make any promises or guarantees to him, however, he had received some benefits already. (T. 293). Pesantes, Jr. pled to a cocaine charge and the government dismissed the indictment for murder. His sentence on the cocaine charge was still pending. The Pesantes were also paid DEA confidential informants. (T. 293-294).

Pesantes, Jr. testified that Respondent arrived at the business after ten o'clock in the morning, and after Respondent left, he had phone conversations with him, however, those conversations were not tape recorded. (T. 298-299). Pesantes, Jr. arranged for a money show to be held in the rear of the business, outside of the view of the video cameras. Two men were in a car that drove to the back of the store, and Pesantes, Jr. walked to the car with Respondent. They went to the side of the car, by the back door, and someone opened up a bag, and he saw a lot of money.

Pesantes, Jr. said that was all he had been instructed to do, just make sure there was money. (T. 303-304). Pesantes, Jr. testified that he then contacted Detective Graziadei, told him he had seen the money, and gave him Respondent's telephone number so that the detective could take over from there. (T. 305).

At the charge conference, the trial court advised that it would give the entrapment instruction. (T. 555). The Respondent remained silent at that time. Without objection, the trial court instructed the jury on entrapment as follows:

> On the issue of entrapment, Defendant Miller must prove to you by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment.

(T. 639). The next instruction given was the reasonable doubt instruction where the jury was told that Respondent was not required to prove anything. (T. 639). Thereafter, Respondent was found guilty as charged and sentenced to 15 years imprisonment on each count to run concurrently. (T. 654, 658).

On appeal to the Fourth District Court of Appeal, the Respondent alleged that it was fundamental error for the trial court to have given the old entrapment instruction. The District Court agreed and held that the giving of the standard jury instruction on entrapment, as it existed at the time of Respondent's trial, was inaccurate or incomplete relying on its decision in *Vazquez v. State*, 700 So. 2d 5 (Fla. 4th DCA 1997) *appeal dismissed*, 718 So. 2d 755 (Fla. 1998). In addition the

District Court held that the defects in the standard jury instruction were of a nature which amounted to fundamental reversible error which did not require a contemporaneous objection to preserve the issue for appellate review. (A.1-2). The State sought rehearing, which was denied.

The discretionary jurisdiction of this Court was invoke and this Court accepted jurisdiction herein.

QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY GIVING THE JURY THE STANDARD INSTRUCTION ON ENTRAPMENT IN EFFECT IN 1997?

SUMMARY OF THE ARGUMENT

The Respondent was tried in May 1997 for tafficking and conspiracy to traffic in cocaine. His defense at trial was entrapment. The trial court instructed the jury on entrapment, without objection, with the standard jury instruction in effect in 1997. The Respondent was convicted as charged. The Fourth District found this was fundamental error and reversed. This Court accepted jurisdiction to determine if the giving of said instruction is fundamental error.

The State submits that the giving of the standard jury instruction on entrapment without objection is not fundamental error. The standard jury instruction on entrapment was constitutional since due process is not violated by placing the burden of producing evidence of entrapment on the defendant. Since entrapment is an affirmative defense, the State can require the defendant to assume either a burden of persuasion or a burden to produce evidence on lack of predisposition. As long as the State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, a defendant's constitutional rights are not violated and thus the statute was upheld.

Since the old standard jury instruction did not violate due process and the standard instructions as a whole clearly informed the jury that it was the State's burden to prove all of the

elements of the offense beyond a reasonable doubt, the giving of the old entrapment instruction without objection is not fundamental error

ARGUMENT

THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR BY GIVING THE JURY THE STANDARD INSTRUCTION ON ENTRAPMENT IN EFFECT IN 1997.

The Respondent was tried in May 1997 for tafficking and conspiracy to traffic in cocaine. His defense at trial was entrapment. The trial court instructed the jury on entrapment, without objection, with the standard jury instruction in effect in 1997. The Respondent was convicted as charged. The Fourth District found this was fundamental error and reversed. This Court accepted jurisdiction to determine if the giving of said instruction is fundamental error.[1]

The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. *Ray v. State*, 403 So. 2d 956 (Fla. 1981). The State submits that the old standard jury instruction on entrapment was not so flawed as to deprive defendant's claiming the defense of entrapment of a fair trial. The standard jury instructions, as a

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[1] The Fourth District denied the State's motion to stay mandate. Thereafter, Respondent pled guilty to the charges. Although the underlying criminal proceeding has ended, the case is not moot because the issue presented is likely to, and has in fact, recurred. *Holly v. Auld*, 450 So. 2d 217, 218 n. 1 (Fla. 1984). *See Holiday v. State*, 24 Fla. L. Weekly D982 (Fla. 1st DCA April 13 1999)(holding that the giving of improper standard jury instruction on entrapment is not fundamental error and certifying conflict with the instant case).

whole, made it quite clear that the burden of proof was on the state to prove all the elements of the crime beyond a reasonable doubt and thus the error was not fundamental. *Smith v. State*, 521 So. 2d 106 (Fla. 1988)(jury instruction on insanity which was previously disapproved of was not fundamental error, as instruction on the whole made it quite clear that the burden of proof was on the State to prove all elements of the crime beyond a reasonable doubt).

This Court in *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1985), visited the question of whether or not the then current entrapment instructions,[2] 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 the burden to prove beyond a reasonable doubt that a defendant was not entrapped, to properly charge the jury. The Court found that the standard instruction was an adequate instruction when given in conjunction with the general reasonable doubt instruction.

The Court in *Rotenberry,* held that although the instruction "stops short of explaining that the state still has the burden to disprove entrapment once the accused has adduced sufficient evidence", when considered in the context of the entire set of

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[2] This case was decided in 1985, at that time *Cruz v. State,* 465 So.2d 516 (Fla.), *cert denied* 473 U.S. 905, 105 S. Ct. 3527, 87 L. Ed. 2d 652 (1985), was still good law; however, the logical premise upon which the Court relied in its opinion is still valid.

instructions to the jury, "instruction 3.04(c) is adequate in combination with the general reasonable doubt instruction." *Id* at 974. This holding was 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 <u>no prior intention</u> to commit the offense. . . .(Defendant) was entrapped if: 1. He had <u>no prior intention</u> to commit (crime charged). . . .' (Emphasis added.) 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 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. . . . <u>The defendant is not required to prove anything</u>.' (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. 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. '[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. (Emphasis in original).

Id. at 974-75.

Similar to the language of the standard jury instruction relied upon in *Rotenberry* discussing the defendant's claims of no prior intention, the standard jury instruction in the instant case also discussed in general terms the need for proof of lack of predisposition. Element 5 of the entrapment instruction stated "(defendant) was not a person who was ready to commit the crime." The instruction goes on the read "It is not entrapment if (defendant) had the predisposition to commit the (crime charged). (Defendant) had the predisposition if before any law enforcement officer or person acting for the officer persuaded, induced, or lured (defendant), [he] had a readiness or willingness to commit(crime charged) if the opportunity presented itself." Thus, as in the instruction addressed in *Rotenberry* the issue of predisposition (previously intent) is raised in the instruction yet the burden of such proof regarding predisposition is not specifically addressed. However, when the instruction is read in

conjunction with the general reasonable doubt instruction the State's burden of proof, as it relates to predisposition is made.

The standard jury instruction for reasonable doubt, which was given by the trial court in the instant case, was as follows:

> Now, each 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.
>
> Now, to overcome the defendant's presumption of evidence(sic), the State has the burden of proving the following two elements; number one, the crime with which the defendant is charged was committed; number 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.
>
> Now, it is to the evidence introduced at this trial and to it alone that you are 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 639-640)

Importantly, this reasonable doubt instruction was given immediately after the standard jury instruction on entrapment was read to the jury. (T 637-639). Thus, as shown the standard has not changed, the burdens have not changed, the issue of predisposition is still an essential element of the defense of entrapment and the State still has the burden to prove that element.

Thus, it is not the State's burden that is in question; rather, it is the instruction to the jury that is at issue. As shown the jury was 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.

In finding fundamental error, the Fourth District focused on only one small section of the entrapment instruction. Said section provided:

> ...the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment.

Although this instruction is inaccurate or incomplete, the State submits that said instruction, in and of itself, does not negates the overall instructions that tell the jury that the defendant does not have any burden of proof and that the State has the burden to prove its case beyond a reasonable doubt.

Instructive is how this Court handled the exact same situation regarding the insanity instruction. In *Yohn v. State*, 476 So. 2d 123 (Fla. 1985) this Court held that the standard jury instructions on the defense of insanity did not accurately apprise the jury on the defense on insanity. In particular, the insanity instructions did not apprise the jury that the defendant only had to present some competent evidence as to insanity and that it was then the State's burden to prove sanity beyond a reasonable doubt.

In *Smith v. State*, 521 So. 2d 106 (Fla. 1988) this Court was faced with, in the insanity situation, the same exact situation that is presented herein in the entrapment situation. In *Smith* the defendant presented evidence of insanity at the time of the offense and the trial court gave the standard jury instruction that was disapproved of in *Yohn*. However, the defendant did not object to the standard jury instruction or request a special instruction on the subject. This Court did not find that instructing the jury with the unobjected to standard jury instruction on insanity was not fundamental error. This Court reasoned that the standard jury instruction was constitutional since due process is not violated by placing the burden of proof of insanity on the defendant. Thus the Court looked to the all of the standard jury instruction, as a whole, and found that they quite clearly informed the jury that the burden of proof was on the State to prove all of the elements of the crime beyond a reasonable doubt.

An application of the foregoing rationale to the instant case, requires this Court to find that the giving of the standard jury instruction on entrapment without objection is not fundamental error. The standard jury instruction on entrapment was constitutional since due process is not violated by placing the burden of producing evidence of entrapment on the defendant. *Herrera v. State*, 594 So. 2d 275 (Fla. 1992). In *Herrera* this Court found that § 777.201, Florida Statutes (1989) and the corresponding jury instruction, which is the one at issue herein, did not violate the due process provisions of either the federal or state constitutions. The Court held that since entrapment is an affirmative defense, the State can require the defendant to assume either a burden of persuasion or a burden to produce evidence on lack of predisposition. As long as the State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, a defendant's constitutional rights are not violated and thus the statute was upheld. This Court then specifically held:

> ...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. The standard instructions require the State to prove beyond a reasonable doubt all the elements of the crime, and we find no violation of due process in requiring defendants to bear the burden of persuading their juries that they were entrapped.

Id., at 278. Therefore, since the old standard jury instruction did not violate due process and the standard instructions as a whole clearly informed the jury that it was the State’s burden to prove all of the elements of the offense beyond a reasonable doubt, the giving of the old entrapment instruction without objection is not fundamental error. Thus, the decision under consideration should be quashed.

CONCLUSION

Based on the foregoing, Petitioner requests this Court quash the decision of the District Court and hold that failure to object to the entrapment instruction is not fundamental error.

Respectfully submitted,
ROBERT A. BUTTERWORTH

Attorney General

____

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar Number 0239437
Office of the Attorney General
110 S.E. 6th Street
Ft Lauderdale, Florida 33131
(954) 712-4600
Fax (954) 712-4761

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by mail to **RONALD B. SMITH,** Attorney for Respondent, 73 S.W. Flagler Avenue, Stuart, Florida 34994 on this ___ day of May, 1999.

____

MICHAEL J. NEIMAND
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. **94,916**

THE STATE OF FLORIDA ,

Petitioner,

vs.

RALPH MILLER,

Respondent.

_______________________/

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437
Office of the Attorney General
110 S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4600
Fax No. (954) 712-4761