IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. PAUL MILLER, Respondent.	)	CASE NO. 94,916

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. Respondent was the Appellant and Petitioner the Appellee in the Fourth District Court of Appeal. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote the Trial Transcript.

The symbol "PB" will denote Petitioner's Brief on the Merits.

The symbol "PJ" will denote Petitioner's Brief on Jurisdiction.

The symbol "MR" will denote Petitioner's Motion for Rehearing or Clarification in the Fourth District Court of Appeal.

The symbol "AB" will denote Petitioner's Answer Brief in the Fourth District Court of Appeal.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the following additions or modifications.

Respondent was initially tried for the same offense, but the trial resulted in a hung jury and a mistrial. R 35-39.

Respondent was again tried for trafficking in cocaine and conspiracy to traffic in cocaine. His co-defendant Leroy Marion's trial resulted in a hung jury and mistrial. Respondent was found guilty, convicted, and sentenced to a fifteen year minimum mandatory sentence and $250,000 fine.

On direct appeal the Fourth District Court of Appeal reversed Respondent's conviction finding the court committed fundamental error by giving an incorrect jury instruction on entrapment.

Petitioner filed a Motion for Rehearing or Clarification or Certification which was denied by the Fourth District Court of Appeal.

This Court accepted certiorari on a certified conflict asserted by Petitioner with this Court's decision in *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1985).

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts subject to the following additions and modifications.

Respondent has no prior criminal record.

Entrapment was Respondent's only defense.

Respondent testified that he had only intended on introducing two sets of his friends of 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.

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 told the jury that his friend, Leroy 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 the evening of March 20, 1997. Marion asked Respondent if he know anyone who had any cocaine to sell and Respondent said that he did. T 486-487.

Respondent had gotten involved in a cellular phone "cloning" operating with the Pesantes in 1993. Respondent was afraid that Pesantes, Jr. would use the information about the phones to get Respondent fired from Costco. T 438-439;449.

In December, 1995, Pesantes, Jr. questioned him if he knew anyone who wanted to buy cocaine. Pesantes, Jr. told Respondent that he and his father wanted to open up a second store in Hollywood and they needed to make extra money in order to do that. T 447-448. Respondent said that, other than knowing that his college roommate had purchased marijuana from Pesantes, this was the first time he learned that they were involved in cocaine trafficking. According to Respondent, 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 Respondent about finding someone to purchase cocaine. T 448-449. Respondent testified that he kept putting Pesantes, Jr. off, but eventually Pesantes, Jr. started threatening him by asking how his boss wold 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 Fabian 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.

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. The prosecutor asked Pesantes, Sr. if he taped the negotiations involving Respondent on March 21, 1996, and Pesantes, Sr. answered, "Yes, sir," and said that he turned the tape over to law enforcement. T 259.

Pesantes, Sr. violated DEA rules requiring the taping of all meetings and negotiations involving narcotic transactions, and did not tape the eight o'clock meeting with Respondent. T 278-282.

Pesantes, Sr. pulled out a firearm while being videotaped. This was a violation of the terms and conditions of the agreement that he had with the DEA that was entered into before he was allowed to become a "documented" confidential informant. T 27. In addition, there is a point on the video where Respondent leaves Pesantes' office and Pesantes, Sr. testified that he directed that someone else turn off the camera. This, too, was a violation of the rules that Pesantes, Sr. had agreed to with the DEA. T 272-273.

Fabian Pesantes, Jr. revealed that he had previously been indicted by the federal government for murder for hire, conspiracy, and distribution of cocaine. T 291. The prosecutor then asked if the murder for hire conspiracy also involved false imprisonment, and Pesantes, Jr. acknowledged that it did. T 292. The prosecutor then asked how many kilos of cocaine was involved and Pesantes, Jr. said that it was fifteen. T 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 at the end of October or the first of November, 1995. T 292. Pesantes, Jr. was facing life in prison and 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. said that he had entered a plea to a cocaine charge and the

government dismissed the indictment for murder. His sentence on the cocaine charge was still pending. Pesantes, Jr. and his father were also getting paid by the DEA for working as 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 293-294.

In closing the prosecutor told the jury:

> . . . I only have to prove the elements of the crime beyond and to the exclusion of every reasonable doubt. The judge is going to read to you that at the time the defendant in this case knowingly purchase or possessed a certain substance containing or a mixture of cocaine.
>
> The quantity involved in this particular charge that I'm prosecuting is 400 grams or more and that the defendant intended in this case to purchase or possess the controlled substance of cocaine or a mixture containing cocaine during the course of this transaction. That's what I have to prove to you. T 611.

The trial court never read the instruction prior to giving it, but merely advised it would provide an entrapment instruction. T 555.

The court instructed the jury:

> 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 trial court never instructed the jury that the state had the burden of proving beyond a reasonable doubt that Respondent was predisposed to commit the crime.

SUMMARY OF THE ARGUMENT

The trial court's instruction that the defendant must prove by a preponderance of evidence that his criminal conduct occurred as a result of entrapment was error under this Court's decision in *Munoz v. State*, 629 So. 2d 90 (1993).

The issue of whether such an instruction is fundamental error is not properly before this Court as this Court accepted jurisdiction on an alleged conflict with *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1995) and the State to preserve its arguments against fundamental error by presenting them in the Fourth District Court of Appeal.

Where entrapment was his only defense, the erroneous instruction that the defendant must prove by a preponderance of evidence that his criminal conduct occurred as a result of entrapment violated Respondent's right to have the jury correctly and intelligently instructed on the law and was fundamental error.

ARGUMENT

I. THE INSTRUCTION OF THE TRIAL COURT THAT THE DEFENDANT MUST PROVE BY A PREPONDERANCE OF EVIDENCE THAT HIS CRIMINAL CONDUCT OCCURRED AS A RESULT OF ENTRAPMENT IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT, VIOLATING THE DEFENDANT'S FUNDAMENTAL RIGHT TO BE PRESUMED INNOCENT AND CONTRAVENING THIS COURT'S DECISION IN *MUNOZ V. STATE*.

The state asserts that even given the instruction, "the standard has not changed, the burdens have not changed, the issue of predisposition is till an essential element of the defense of entrapment and the State still has the burden to prove that element." PB 20. Contrary to Petitioner's representation, the jury was never instructed that the state had the burden of proving predisposition beyond a reasonable doubt. Rather the jury was instructed that the defendant must prove that the entrapment occurred:

> 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.

Under this Court's decision in *Munoz v. State*, 629 So. 2d 90, 99 (Fla. 1993), a case not cited by Petitioner, the entrapment instruction clearly shifted the burden of proof to the defendant. The burden shifting instruction given in this case clearly violates Respondent's right to have the jury correctly and intelligently instructed on the law of entrapment[1]. *State v. Delva*, 575 So. 2d

[1] The correct jury instruction, which was not given provides:

> On the issue of entrapment, the defendant must prove to you by the greater weight of the evidence that a law enforcement officer or agent induced or encouraged the crime charged.

643, 644 (Fla. 1991). Due process is violated where the jury is wrongly told the state does not have the burden of proving its case beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). The jury here was improperly informed that the defense had the burden of proof on lack of predisposition, and was never informed that the state had that burden.

In *Munoz v. State*, 629 So. 2d 90, 99 (Fla. 1993), this Court thoroughly discussed the law of objective and subjective entrapment in Florida in light of Section 777.201, *Florida Statutes* (1987). In *Munoz*, this Court held that in a subjective entrapment case tried to a jury, once the defendant shows some evidence of a lack of predisposition, the burden shifts to the state to prove predisposition beyond a reasonable doubt:

> The first question to be addressed under the subjective test is whether an agent of the government induced the accused to commit the offense charged. On this issue, the accused has the burden of proof and, pursuant to section 777.201, must establish this factor by a preponderance of the evidence. If the first question is answered affirmatively, then a second question arises as to whether the accused was predisposed to commit the offense charged; that is, whether the accused was awaiting any propitious opportunity or was ready and wiling, without persuasion, to commit the offense. On

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> Greater weight of the evidence means that evidence which is more persuasive and convincing. If the defendant does so, the State must prove beyond a reasonable doubt that the defendant was predisposed to commit the (crime charged) existed prior to and independent of the inducement or encouragement.

In re Standard Jury Instr. In Criminal Cases, 23 Fla. L. Weekly S407, S415-416 (Fla. July 16, 1998).

> this second question, according to our decision in *Herrera*, the defendant initially has the burden to establish lack of predisposition. **However, as soon as the defendant produces evidence of no predisposition, the burden then shifts to the prosecution to rebut this evidence beyond a reasonable doubt....**

Munoz, 629 So. 2d at 99 (emphasis supplied).

In adopting the shifting burden of proof and reasonable doubt standard in *Munoz*, this Court relied on the previous year's decision in *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). *Jacobson* is the entrapment case involving obscene magazines. The jury rejected the entrapment defense at trial, but the Court found it as a matter of law, holding the government had failed to meet its burden of proving predisposition. This burden, the Supreme Court held, is that the state must prove predisposition beyond a reasonable doubt. *Id*. 112 S.Ct. at 1540.

The instruction in this case never informed the jury the state had the burden of proving predisposition beyond a reasonable doubt. In fact, it inaccurately told them just the opposite: that the burden was on the defense to show entrapment by a preponderance of the evidence. This instruction is plainly improper according to *Munoz* and *Jacobson*.

In *Rotenberry*, this Court found no error under a predecessor statute in refusing to instruct on burden of proof regarding entrapment defense. However the this Court had replaced the *Rotenberry* instruction with one allocating the burden of proof in *The Florida Bar re: Standard Jury Instructions -- Criminal*, 508 So. 2d 1221 (Fla. 1987).

The standard instruction given here follows the language of Section 777.201, *Florida Statutes* (1991), and was upheld in *Herrera v. State*, 594 So. 2d 275 (Fla. 1992). But *Herrera* is no longer good law on this issue, because the law was changed in *Munoz*. As this Court noted in *Munoz*, *Herrera* "did not discuss the subjective, two-step burden of proof test from *Sorrells*[2] or a trial court's ability to rule as a matter of law on the issue of entrapment. Moreover, at that time, the United States Supreme Court's decision in *Jacobson* had not been rendered." *Munoz*, 629 So. 2d at 97-98. According to *Jacobson* and *Munoz*, now it could not be clearer that "as soon as the defendant produces evidence of no predisposition, the burden then shifts to the prosecution to rebut this evidence beyond a reasonable doubt." *Munoz*, 629 So. 2d at 99. The jury here was not told that critical information, and reversal is required. *See Fruetel v. State*, 638 So. 2d 966 n.1 (Fla. 4th DCA 1994) (finding entrapment instruction that "the state must convince you beyond a reasonable doubt that [defendant] was not entrapped" "coincided with the standard for subjective entrapment as codified in section 777.201, *Florida Statutes* (1987)).

The burden shifting jury instruction on entrapment is reversible error. *Vasquez v. State*, 700 So. 2d 5 (Fla. 4th DCA 1997); *Broker v. State*, 726 So. 2d 307 (Fla. 2d DCA 1998); *Guerra-Villafane v. State*, 199 Fla. App. LEXIS 3117 (Fla. 3d DCA March 17, 1999).

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[2] *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.2d 413 (1932).

II. THE ISSUE OF FUNDAMENTAL ERROR IN THIS CAUSE IS OUTSIDE THIS COURT'S JURISDICTION, AS PETITIONER NEVER ARGUED BELOW THAT THE JURY INSTRUCTION WAS NOT FUNDAMENTAL ERROR AND THE CERTIFIED CONFLICT BEFORE THIS COURT WAS WITH *ROTENBERRY V. STATE* AND NOT WITH *HOLIDAY V. STATE.*

Petitioner's argument that the jury instruction is not fundamental error is not properly before this Court in this cause. This Court accepted certiorari in the instant cause to address a conflict asserted by Petitioner with this Court's decision in *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1985). This case is not before this Court on a certified conflict with *Holiday v. State*, 24 Fla. L. Weekly D982 (Fla. 1st DCA April 13, 1999). This cause should be dismissed.

In *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) this Court held that to preserve an issue for review by a higher court the issue and the specific legal argument or grounds for review must be presented to the lower court. Petitioner has not met that burden with regards to fundamental error. The state has waived its arguments by failing to brief them in the Fourth District Court of Appeal in the Answer Brief or Motion for Rehearing. *Id.*, *See also Steagald v. United States*, 451 U.S. 204, 209 (1981).

Indeed, in its Answer Brief in the Fourth District Court of Appeal Petitioner conceded "as to the entrapment instruction, it would appear that pursuant to recent decisions by [the Fourth District Court of Appeal] that the standard instruction on entrapment that was given was in error." AB 10. Petitioner then went on to urge the lower court to hold its decision on the issue in abeyance until this Court reached a decision in *Vazquez v. State*, 700 So. 2d 5 (Fla. 4th DCA 1997), which was then under

review. This Court dismissed the *Vazquez* case, determining it did not have jurisdiction to review whether the *Munoz* decision was retroactive, where the lower court had never ruled on the issue. Likewise, the instant cause should be dismissed.

Petitioner's Motion for Rehearing or Clarification or Certification sought rehearing with the argument that this Court's decision in *Munoz* "did not create a new standard in connection with the entrapment defense" and sought clarification and certification of whether *Munoz* was a fundamental or evolutionary change in the law. PR. The state did not object to the error being fundamental error. The only comment the state made about fundamental error is that such a finding would overburden the judicial system. PR at 14. Thus, although the state never challenged the fundamental error issue before the Fourth District Court of Appeal, Petitioner makes the issue for the first time in this Court.

Petitioner's Brief on Jurisdiction requested this Court certify a conflict of the Fourth District's decision with *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1985). PJ 4-9. However, the *Rotenberry* issue was disposed of by this Court in *Munoz*. The alleged conflict before this Court does not exist and the cause should be dismissed.

Further, the present case is moot as to the alleged *Rotenberry* issue as the mandate issued from the Fourth and Respondent pleaded guilty and was sentenced on remand. Petitioner claims that this case should still be reviewed due to conflict with *Holiday*. However, Petitioner brought this case before this Court on an alleged conflict with *Rotenberry* which is still moot. Petitioner

should not be allowed to raise a new alleged conflict under the guise of a moot issue.

III. THE INSTRUCTION THAT THE DEFENDANT MUST PROVE BY A PREPONDERANCE OF EVIDENCE THAT HIS CRIMINAL CONDUCT OCCURRED AS A RESULT OF ENTRAPMENT VIOLATED HIS RIGHT TO HAVE THE JURY CORRECTLY AND INTELLIGENTLY INSTRUCTED ON THE LAW AND WAS FUNDAMENTAL ERROR.

The entrapment instruction was fundamental error which prejudiced the defendant's right to a fair trial by shifting the burden to the defendant, in contravention of this Court's decision in *Munoz v. State*, 629 So. 2d 90 (Fla. 1993).

In the instant cause the instruction which improperly shifts the burden of proof constitutes fundamental error. It has long been recognized by this Court that an inherent and indispensable requirement of a fair and impartial trial is that the jury be correctly and intelligently instructed on the law. *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991). Misleading the jury on the burden of proof on a critical and disputed issue by giving an inadequate instruction on an affirmative defense denies the defendant a fair trial in the most fundamental sense. *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971) (failure to instruct on affirmative defense to the crime of unlawful abortion); *Motley v. State*, 155 Fla. 545, 20 So. 2d 798, 800 (1945) (incorrect charge on the law of self-defense); *Miller v. State*, 573 So. 2d 337 (Fla. 1991)(erroneous jury instruction on justifiable or excusable homicide was fundamental error); *Tobey v. State*, 533 So. 2d 1198, 1199 (Fla. 2d DCA 1988)(en banc)(omission of any reference to justifiable or excusable homicide in the definition of manslaughter was fatal); *Rodriguez v. State*, 396 So. 2d 798, 800 (Fla. 3d DCA 1981) (failure to instruct on defense of justifiable homicide when counsel failed to object at trial); *Bagley v. State*, 119 So. 2d 400, 403 (Fla. 1st

DCA 1960)(failure to instruct on defense of justifiable homicide when counsel failed to object at trial).

In order to protect the fundamental right to have the jury correctly instructed on the law, erroneous instructions on the state's burden of proof are fundamental, without need for contemporaneous objection, except where the state can show that the instruction merely touches on matters not in dispute. *Delva* at 644-645. This Court held in *Delva* that fundamental error "must reach down to the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the error."[3] *Id*. As a corollary, erroneous instructions on undisputed matters do not impact the validity of the trial. *Id*.

In *Delva*, this Court analyzed the evidence and arguments presented in the trial court and held that the record demonstrated that the erroneous instruction could not impact the jury's decision because the instruction involved a matter not in dispute. *Id*. at 645. Here, however the erroneous instruction goes to the heart of the only defense at trial that the defendant was entrapped by the state to commit the crime.

Fundamental error is error which goes to the foundation of the case. *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970). In the instant cause the foundation of the case was whether Respondent was entrapped. It was his only defense.

Petitioner argues that based on *Smith v. State*, 521 So. 2d 106 (Fla. 1988) the burden-shifting instruction in this case was not fundamental error. However, *Smith* is totally different from the

[3] Citing to *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

instant case. The burdens in an entrapment case and in an insanity case such as *Smith* are different. A essential premise in *Smith*, an insanity defense, revolves on the initial presumption in law that all persons are presumed sane. *Id.* at 107. The defendant has the burden of overcoming the presumption of sanity and proving that he was insane at the time of the offense. By contrast, the entrapment defense does not involve an similar presumption in law that the defendant must overcome. There is no presumption in law that all persons are predisposed to commit the crime charged. The burden on the defendant is much less rigorous -- he simply must prove by the greater weight of the evidence that some government agent induced or encouraged the crime charged. As a corollary, the government's burden in proving predisposition to commit the crime is higher. Thus, an improper instruction shifting the burden in an entrapment case is much more likely to adversely affect the defense of entrapment than it would in an insanity case.

"Where the instructional error consists of a misdescription of the burden of proof [it] vitiates **all** the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993) (emphasis in original).

The key to this issue is whether the record shows that the erroneous instruction that the defendant had to prove entrapment was not used by the jury in reaching a guilty verdict. Because the erroneous instruction improperly shifted the burden to the defendant to prove beyond a reasonable doubt that he was not predisposed to commit the crime, the error was fundamental in a case where entrapment was the only defense. *State v. Delva*, 575 So. 2d 643 (Fla. 1991).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, this Court should either dismiss the instant cause or affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MICHAEL J. NEIMAND, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of June, 1999.

_____
Attorney for Paul Miller