ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,916

THE STATE OF FLORIDA,

Petitioner,

-vs-

PAUL MILLER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Respondent, Paul Miller, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "Ex." followed by the appropriate letter and a colon to indicate the appropriate page number.

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

This is a petition for discretionary review of a decision of the Fourth District Court of Appeal which reversed the Defendant's conviction and sentence for trafficking and conspiracy to traffic in 400 grams or more of cocaine.

> At trial the court instructed the jury on the defense of entrapment, reading Florida Standard Jury Instruction in Criminal Cases 3.04(c)(2) (1993). The final paragraph of the standard jury instruction provided:
>
> > 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.
>
> Appellant did not object at trial to the standard jury instruction on entrapment given by the court. However, he now complains on appeal that the court committed reversible error by failing to give a fully accurate instruction on the current state of the law on entrapment. Relying on our decision in *Vazquez v. State*, 700 so. 2d 5, 13 (Fla. 4th DCA 1997) *appeal dismissed*, 23 Fla. L. Weekly S428 (Fla. August 27, 1998), appellant argues that the error was fundamental. In *Vazquez*, we determined that the portion of the standard jury instruction addressing predisposition is inaccurate or incomplete.
>
> Florida Rule of Criminal Procedure 3.390(d) provides that "[n]o party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires . . ." Since appellant failed to preserve this issue by objecting at trial, we are precluded from considering the matter on appeal unless there was fundamental error. *Archer v. State*, 673 So. 2d 17 (Fla. 1996). Fundamental error is error which "must reach down into the validity of the trial itself to

> the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *State v. Delva*, 575 So. 2d 643, 644-5 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)). "[F]undamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982).
>
> In *Vazquez*, we analyzed our supreme court's decision in *Munoz v. State*, 629 So. 2d 90 (1993), which held that a defendant asserting the statutory defense of entrapment initially has the burden to establish lack of predisposition, but as soon as the defendant produces evidence of no predisposition, the burden shifts to the prosecution to rebut this evidence beyond a reasonable doubt. We concluded that the above quoted portion of the standard jury instruction does not comport with the dictates of *Munoz* or "fairly and correctly present the current state of the law on the issue." *Id.* at 13 *See also Henkel v. State*, 709 So. 2d 130 (Fla. 4th DCA 1998).
>
> For the reasons stated above, we find that the court committed fundamental reversible error by giving the standard jury instruction on entrapment. . . ..

(Ex. A). The case was reversed for a new trial. The State filed a motion for Rehearing and/or Clarification and Certification of a Question. (Ex. B). That motion was denied. (Ex. C). This petition follows.

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH Rotenberry v. State, 468 So. 2d 971 (Fla. 1985)?

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal conflicts with that of *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1985). The instant case holds that the trial court committed fundamental error in giving the standard jury instruction on entrapment. The Fourth District Court of Appeal, considering the instruction in isolation, held that the standard instruction gives an inaccurate or incomplete instruction on the State's burden of proof regarding predisposition. This Court, in *Rotenberry*, held that an entrapment instruction which does not instruct on the State's burden of proof regarding predisposition is accurate when that instruction is read in conjunction with the standard instruction on reasonable doubt. Hence, the decision of the Fourth District Court of Appeal is in direct conflict with the decision of this Court in *Rotenberry* and this Court should grant jurisdiction to review the decision of the Fourth District Court of Appeal.

ARGUMENT

This Court should accept jurisdiction in this case because the decision of the Fourth District Court of Appeal expressly and directly conflicts with that of Rotenberry v. State, 468 So. 2d 971 (Fla. 1985). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829 (Fla. 1986).

In the instant case, the District Court of Appeal found that the giving of the standard jury instruction on entrapment was fundamental reversible error. The court held that in addressing predisposition the instruction was inaccurate or incomplete. The court cited the last paragraph of the instruction as being inaccurate or incomplete. The paragraph stated:

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

The district court, citing *Munoz v. State*, 629 So. 2d 90 (Fla. 1993), pointed out that although the defendant has the initial burden of establishing a lack of predisposition, once the defendant has produced such evidence the burden shifts to the prosecution to rebut that evidence beyond a reasonable doubt. Thus the district court held the giving of the standard instruction was fundamental error because it did not specifically address the prosecution's

burden of rebutting the defendant's evidence of lack of predisposition.

In *Rotenberry v. State*, 468 So. 2d 971 (Fla. 1985), this Court held that, although the state bears the burden of proving a defendant was predisposed to commit a crime where the defendant has adduced some evidence of entrapment, "where the standard instruction stops short of explaining that the state still has the burden to disprove entrapment once the accused has adduced sufficient evidence" such instruction "is accurate when read in the context of the entire set of instructions to the jury, which includes the general instruction on reasonable doubt."[1] *Id.* at 974. In *Rotenberry*, this Court held that the standard instruction which stated "the defense of entrapment has been raised. This means that (defendant) claims he had *no prior intention* to commit the offense . . ." adequately instructed the jury that an essential element the state needed to prove was predisposition. *Id.* This Court went on to state that when that instruction was read in conjunction with the standard instruction on reasonable doubt, emphasizing the

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[1] The State would point out that the wording of the standard jury instruction on entrapment was slightly different at the time of this Court's decision in *Rotenberry* than what existed at the time of the instant trial, however, the principle remains the same.

statement that "*the defendant is not required to prove anything.*", it is clear that the state must prove the element of predisposition. *Id.* This Court went on to explain that although the instruction could have more clearly set out the state's burden of proof such is not necessary as there is no need to give added emphasis to the state's burden of proof, nor is there a necessity to include further statements on the State's burden where the instructions, when read and considered in there entirety, adequately instruct the jury as to the state's burden of proof. *Id.*

Just as the instruction considered by this Court in *Rotenberry,* the instruction read in the instant case clearly expressed to the jury that an essential element needed to be proven in regards to entrapment was predisposition. The instruction given stated that in order to prove entrapment it would have to be proven that "(defendant) was not a person who was ready to commit the crime." Thus, as in *Rotenberry*, when this instruction is read in conjunction with the standard instruction on reasonable doubt it too adequately instructs the jury of the State's burden of proof as to predisposition.

Contrary to the holding of this Court in *Rotenberry*, the Fourth District Court of Appeals, in the instant case, views the standard instruction on entrapment in isolation and holds the failure of the instruction to more specifically address the state's burden of proof to be fundamental error.

Since the Fourth District's opinion in the instant case directly and expressly conflicts with the majority decision in Rotenberry, this Court should accept jurisdiction.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that the Court accept jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed to Ronald B. Smith, Special Assistant Public Defender, 73 S.W. Flagler Avenue, Stuart, Florida 34994 on this 15th day of February 1999.

DOUGLAS GURNIC
Assistant Attorney General