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IN THE

SUPREME COURT OF FLORIDA

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

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

CONTENTS PAGE

TABLE OF CONTENTS i

AUTHORITIES CITED ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT

THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE 1) THERE IS NO CONFLICT WITH ROTENBERRY V. STATE AND 2) THE DECISION BELOW IS CONSISTENT WITH MORE RECENT RULINGS OF THIS COURT. 3

CONCLUSION 10

CERTIFICATE OF SERVICE 10

AUTHORITIES CITED

CASES CITED PAGE

Cruz v. State, 465 So. 2d 516
(Fla. 1985) 3

Francis v. Franklin, 471 U.S. 307,
105 S.Ct. 1965, 85 L.Ed.2d 344
(1985) 9

Gibbs v. State, 698 So. 2d 1206
(Fla. 1997) 6

Guerra-Villafane v. Singletary, 1999 Fla. App. LEXIS 3117
(Fla. 3d DCA Case No. 98-1547 March 17, 1999) 5

Hernandez v. State, 723 So. 2d 857
(Fla. 4th DCA 1998) 8

Jacobson v. United States, 503 U.S. 540,
112 S.Ct. 1535, 118 L.Ed.2d 174
(1992) 7

Jenkins v. State, 385 So. 2d 1356
(Fla. 1980) 3

Mullaney v. Wilbur, 421 U.S. 684,
95 S.Ct. 1881, 44 L.Ed.2d 508
(1975) 9

Munoz v. State, 629 So. 2d 90
(Fla. 1993) 4-8

Rotenberry v. State, 468 So. 2d 971
(Fla. 1985) 3

Sorrells v. United States, 287 U.S. 435,
53 S.Ct. 210, 77 L.Ed.2d 413
(1932) 7

State v. Vazquez, 718 So. 2d 755,
23 Fla. L. Weekly S428
(Fla. 1998) 8

The Florida Bar re: Standard Jury Instructions -- Criminal, 508 So. 2d 1221 (Fla. 1987) 5

Yohn v. State, 476 So. 2d 123 (Fla. 1985) 8

FLORIDA STATUTES

Section 777.291 (1987) 3

PRELIMINARY STATEMENT

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

Respondent accepts, for purposes of the jurisdictional argument, Petitioner's recitation of the case and facts below.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision below does not conflict with Rotenberry v. State, 468 So. 2d 971 (Fla. 1985) as Rotenberry involved interpretations of a predecessor statute. Moreover, this Court has since receded from Rotenberry in Munoz v. State, 629 So. 2d 90 (Fla. 1993) and replaced the jury questions at issue with an entrapment instruction which is consistent with the decision of the Fourth District in this cause.

ARGUMENT

THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE 1) THERE IS NO CONFLICT WITH ROTENBERRY V. STATE AND 2) THE DECISION BELOW IS CONSISTENT WITH MORE RECENT RULINGS OF THIS COURT.

The decision of the Fourth District Court of appeal does not expressly and directly conflict with Rotenberry v. State, 468 So. 2d 971 (Fla. 1985), in that Rotenberry involved a predecessor statute and in the trial court's refusing to instruct on burden of proof regarding entrapment defense.[1] The Rotenberry decision did not involve the statute involved in this case -- it involved a predecessor statute.

Prior to the enactment of Florida's entrapment statute, section 777.291, Florida Statutes (1987), this Court rejected the federal subjective test for entrapment and adopted instead the basic principles of an objective standard. See Cruz v. State, 465 So. 2d 516, 521 (Fla. 1985). In adopting that objective standard, this Court propounded the following judicially formulated two-part objective threshold test for determining entrapment as a matter of law: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing

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[1] "This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. Id. at 522. After Cruz, the legislature enacted section 777.201, providing that: (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it. (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact. Based upon the legislative history of this statute, this Court recognized in Munoz that this statute had been enacted to reinstate the federal subjective test rejected in Cruz. See Munoz v. State, 629 So. 2d 90, 96 (Fla. 1993). With the enactment of section 777.201, the Munoz court stated that the following three areas of inquiry are relevant under the subjective test: 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 willing, without persuasion, to commit the offense. On this second question, 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. The third question under the subjective test is whether the entrapment valuation should be submitted to a jury. Munoz, 629 So. 2d at 99. See Guerra-Villafane v. Singletary, 1999 Fla. App. LEXIS 3117 (Fla. 3d DCA Case No. 98-1547 March 17, 1999).

Subsequent to Rotenberry, this Court 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). It is important to note that the Rotenberry decision specifically concerned the following certified question:

> IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS NOT ENTRAPPED WHEN THAT DEFENSE HAS BEEN RAISED, IS THE GIVING OF THE PRESENT ENTRAPMENT INSTRUCTION AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04(c)ALONG WITH THE GENERAL REASONABLE

DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDING THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS NOT THE VICTIM OF ENTRAPMENT BY LAW ENFORCEMENT OFFICERS?

To the extent that the Rotenberry decision was limited to a jury instruction which has since been replaced by this Court, Rotenberry is not controlling precedent in this area.[2]

Moreover, the decision of the Fourth District Court of Appeal is consistent with current decisions and jury instructions issued by this Court. 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

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[2] Further, this Court overruled Rotenberry's other holding regarding dual convictions for sale and trafficking in Gibbs v. State, 698 So. 2d 1206 (Fla. 1997).

> awaiting any propitious opportunity or was ready and wiling, without persuasion, to commit the offense. On 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 Court held, is that the state must prove predisposition beyond a reasonable doubt. Id. 112 S.Ct. at 1540.

As this Court noted in Munoz, in Herrera the same court "did not discuss the subjective, two-step burden of proof test from Sorrells[3] 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."

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

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 Fourth District Court of Appeal's decision is consistent with Yohn v. State, 476 So. 2d 123 (Fla. 1985) (reversed where standard instruction stated improper burden of proof on sanity).

The Fourth District Court of Appeal's decision below is consistent with it's prior decision in Vazquez, which was tacitly approved of by this Court. In Vazquez on motion for rehearing, the Fourth certified a question to the Florida Supreme Court addressing the inaccuracy or incompleteness of the jury instruction for the defense of entrapment. This Court denied certification, noting that "the standard jury instruction on the defense of entrapment was recently modified by our opinion in Standard Jury Instructions in Criminal Cases, 1998 Fla. LEXIS 1332, 23 Fla. L. Weekly S407, S417-16, So. 2d (July 16, 1998)." State v. Vazquez, 718 So. 2d 755, 23 Fla. L. Weekly S428 (Fla. 1998). See also Hernandez v. State, 723 So. 2d 857 (Fla. 4th DCA 1998).

The Fourth District Court of Appeal's decision is consistent with decisions of the United States Supreme Court. 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).

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to deny Petitioner's request that this Court accept discretionary review of this cause.

Respectfully submitted,

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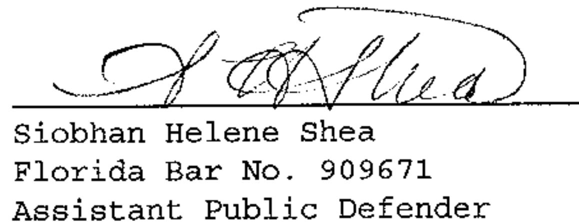

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MICHAEL NEIMAND, Assistant Attorney General, 110 S.E. 6th Street, Ft. Lauderdale, Florida 33301 by courier and U.S. Mail this [illegible] day of April, 1999.

Attorney for Paul Miller

12TH CASE of Level 1 printed in FULL format.

PAUL MILLER, Appellant, v. STATE OF FLORIDA, Appellee.

CASE NO. 97-1915

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

723 So. 2d 353; 1998 Fla. App. LEXIS 16042; 24 Fla. Law W. D 23

December 23, 1998, Opinion Filed

SUBSEQUENT HISTORY: [*1] Rehearing Denied February 3, 1999. Released for Publication February 3, 1999.

PRIOR HISTORY: Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; James I. Cohn, Judge;. L.T. Case No. 96-5224 CF 10 A.

DISPOSITION: REVERSED and REMANDED.

CORE TERMS: entrapment, jury instruction

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Robert A. Butterworth, Attorney General, Tallahassee, and Douglas Gurnic, Assistant Attorney General, Fort Lauderdale, for appellee.

JUDGES: POLEN, GROSS and TAYLOR, JJ., concur.

OPINION:
PER CURIAM.

Appellant, Paul Miller, was tried by jury and convicted of trafficking and conspiracy to traffic in 400 grams or more of cocaine. We reverse.

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, [*2] 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, *718 So. 2d 755, 23* Fla. L. Weekly S428 (Fla. 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. n1

n1 Since Vazquez the supreme court has approved a new version of Florida Standard Jury Instruction `3.04(c)(2) which provides in pertinent part:

> 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. 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). The state must prove defendant's predisposition to commit the (crime charged) existed prior to and independent of the inducement or encouragement.

In re Standard Jury Instr. In Criminal Cases, 1998 Fla. LEXIS 1332, 23 Fla. L. Weekly S407, S415-416 (Fla. July 16, 1998).

[*3]

Florida Rule of Criminal Procedure 3.390(d) provides that "no 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))*. "Fundamental 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, [*4] 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 this issue." *700 So. 2d 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 error by giving the standard jury instruction on entrapment. Because we are reversing appellant's conviction on this point, we do not reach the other issues raised in his appeal.

REVERSED and REMANDED.

POLEN, GROSS and TAYLOR, JJ., concur.