IN THE SUPREME COURT OF FLORIDA

ZACHERY HOLIDAY,

Petitioner,

CASE NO. 95,582

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, ZACKERY ROMERO HOLIDAY, the appellant in the First District, will be referred to as petitioner or by his proper name. Respondent, the State of Florida, the appellee in the First District, will be referred to as Respondent or the State.

The symbol "R" will refer to the record on appeal. Pursuant to Rule 9.210(b), FLA.R.APP.P. (1997), this brief will refer to the volume number. The symbol "T" will refer to the trial transcripts. The symbol "IB" will refer to the petitioner's initial brief. Each symbol is followed by the appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts Petitioner's statement of the case and facts with the following additions:

The trial took place on 16 October 1997. (Vol. III, 91). At the conclusion of the state's case, defense counsel made a boilerplate motion for judgment of acquittal which was immediately denied. (Vol. III 188). Immediately thereafter, during recess, jury instructions were discussed and defense counsel requested that the standard jury instruction on entrapment be given. The state responded that no evidence of entrapment had been introduced and, until the defense's case was completed, it could not be determined if the instruction should be given. (Vol. III, 194-195). The trial court stated there was no evidence of entrapment to that point but, if any was introduced, the court was subject to persuasion on whether the entrapment instruction should be given. (Vol. III, 195-197).

After recess, the defense announced that the defendant would testify and the entrapment defense was briefly discussed. (Vol. III, 197-201). Defendant's testimony is at volume III, pages 201-230. The defendant testified on direct examination that he had been addicted to crack cocaine for ten years. (202). On the day of the offense, the defendant testified he had been using drugs with his stepfather at his stepfather's house. Afterwards, he approached the car of the undercover policemen and initated contact with them. They asked if defendant could obtain cocaine for them, to which he replied that he would find it for them if they gave him a piece of

it. (207-208). He then took them to his stepfather's house to obtain the drugs but was unable to do so. (214). He took them to another site and purchased the cocaine for them and was arrested after he gave them the cocaine. The police did not give him a piece of the cocaine but he testified in response to a direct question that he would not have helped them if they had not promised him a piece of the cocaine. (214-217). On cross examination, defendant testified he was only a drug user, not a dealer. (220). The prosecutor then elicted from him that he had three previous convictions for sale or delivery of crack cocaine on which he had not been entrapped. He claimed he had been entrapped on the present offense because the police agreed to give him a piece of the cocaine obtained as he had requested. He admitted that he had not been forced to do anything. (221).

At the charge conference, defense counsel asked for a jury instruction on entrapment using the pre-1987 instruction. When it was pointed out that this instruction was outdated, it was agreed that the current instruction would be given. (Vol. III, 234, 242-244).

The jury was instructed as follows on entrapment and the parties' burdens of proof:

> The defense of entrapment has been raised. The defendant was entrapped if, one, he was for the purposes of obtaining evidence of the commission of a crime induced or encouraged to engage in criminal conduct constituting the crime of sale of cocaine, and,
> two, he engaged in such conduct as the direct result of such inducement or encouragement and, 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 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 the one who was ready to commit it, and five, Zachery Romero Holiday was not a person who was ready to commit the crime. It is not entrapment if Zachery Romero Holiday had the predisposition to commit the crime of sale of cocaine. Zachery Romero Holiday had the predisposition if before any law enforcement officers or any person acting for the officer persuaded, induced, or lured Zachery Romero Holiday he had a readiness or willingness to commit the crime of sale of 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, A, provided the defendant the opportunity, means and facilities to commit the offense, which the defendant intended to commit and would have committed otherwise, B, used tricks, decoys or subterfuge to expose the defendant's criminal acts, and 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 preponderance of the evidence that his criminal conduct occurred as a result of entrapment.

The State must prove the crime was committed on or between on June 14, 1997.

It must be proved only to a reasonable certainty that the alleged crime was committed in Duval County.

The defendant has entered a plea of not guilty. This means you must presume or believe that the defendant is innocent. The presumption stays with the defendant as to each material allegation in the information, through each stage of the trial unless 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 crime with which the defendant is charged was committed, and the defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything.

Whenever the words reasonable doubt are used you must consider the following: A reasonable doubt is not a mere possible doubt, speculative,

> imaginary, or 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.

Section 777.201, Florida Statutes (1997), which creates the entrapment defense, reads as follows:

777.201. Entrapment

> (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 or she 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 the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

SUMMARY OF ARGUMENT

The trial court did not commit fundamental error when it instructed the jury on entrapment, as requested by the defendant, using the standard jury instruction in effect at the time of trial. The district court below did not err in holding pursuant to Sochor v. State that there is no fundamental error when the jury is instructed without objection on an affirmative defense.

Although not relied on or addressed by the district court below, the trial court did not commit **any** error by instructing the jury as requested. The entrapment statute, §777.201, as interpreted and upheld by this Court in Herrera and Munoz, constitutionally places the burden on defendants to prove by a preponderance of the evidence that they were entrapped. More specifically, defendants must show by a preponderance of the evidence that an agent of the government "induced" the accused to commit the offense, and, assuming that "inducement" is shown, that there was **no** predisposition on the part of the accused to commit the crime prior to the inducement. Here, the defendant alleged and testified only that the officer promised him a portion of the illegal contraband for his use, a "bump", if the defendant obtained the illegal contraband for the officer. The officer testified to the contary but, even if this alleged invitation to commit one crime, cocaine use, is treated as an inducement to commit another crime, cocaine sale, there was no evidence of a lack of predisposition, nor could there be in light of the defendant's extensive criminal history in drugs. Thus, there was no basis for giving the entrapment jury

instruction, pursuant to Munoz, because it can be said as a matter of law that there was no evidence of a lack of predisposition for the jury to consider, and no shift in the burden of proof to the state. The instruction, as given, accurately stated the burden of the defendant to prove by a preponderance of the evidence that he had been induced to commit the crime and had no predisposition to do so.

Lastly, the error, if any, was harmless. Petitioner, even under the recently adopted version of the entrapment instruction adopted in July 1998[1], has the burden of establishing a lack of predisposition. Petitioner has six prior convictions, three of which are for sale or delivery of cocaine. Petitioner did not and could not establish lack of predisposition. Given petitioner's criminal history and his ready commission of the instant crime, the evidence shows beyond a reasonable doubt that petitioner was predisposed to commit the crime. Thus, the "error" could not have affected the jury's verdict of guilty which rejected the entrapment claim.

[1] Standard Jury Instructions in Criminal Cases, 23 Fla. L. Weekly S407 (Fla. 16 July 1998).

ARGUMENT

ISSUE

DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY INSTRUCTING THE JURY ON ENTRAPMENT, AS REQUESTED BY THE DEFENDANT, USING THE STANDARD JURY INSTRUCTIONS IN EFFECT AT THE TIME OF TRIAL? (Restated)

FUNDAMENTAL ERROR

The jury was instructed on entrapment using the then current standard jury instruction as requested by the defendant. There was no request for a special instruction pursuant to Munoz v. State, 629 So.2d 90 (Fla. 1993). The district court did not err in holding that an unpreserved claim of jury instruction error on an affirmative defense was not fundamental error and could not be raised for the first time on appeal.

Jury instructions are subject to the contemporaneous objection rule[2] and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. Archer v. State, 673 So.2d 17, 20 (Fla. 1996). Fundamental error is "error which reaches 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." Because the fundamental error doctrine is a special exception that allows a defendant to obtain a reversal of

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[2] Floride Rule of Criminal Procedure 3.390(d):

> No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matters to which the party objects and the grounds of the objection.

his conviction without objecting in the trial court, only rare errors are classified as fundamental.

This Court has dealt with the issue of jury instructions and fundamental error on numerous occasions. In Smith v. State, 521 So.2d 106 (Fla. 1988), this Court held that an error in the standard jury instruction on the affirmative defense of insanity was not fundamental error. The prior standard jury instruction on insanity, which had been adopted by the Court and utilized for approximately a decade, did not completely and accurately state that law with respect to the burden of proof in insanity cases. Yohn v. State, 476 So.2d 123 (Fla. 1985). The Court in Yohn decided that the insanity instruction was not sufficiently clear on the burden of proof and when it shifted from the defendant to the state. However, neither of the defendants in Smith objected to the use of the standard insanity instruction at trial. The Smith Court reasoned that while the standard insanity instruction was erroneous, the error was not of constitutional magnitude because it was not a denial of due process to place the burden of proof of insanity on the defendant. Despite any shortcomings, the old standard jury instructions on insanity, as a 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. Peele v. State, 20 So.2d 120,122 (Fla. 1945)(Jury instructions must be read in their entirety.)

Here, as in Smith, the error was not of fundamental magnitude because it is not a constitutional denial of due process to place

the burden of proof of entrapment on the defendant. Herrera v. State, 594 So.2d 275 (Fla. 1992)(finding no violation of due process where the jury instruction placed the burden of proof of the affirmative defense of entrapment on the defendant). The standard jury instruction on entrapment in effect until July 1998 did not deprive defendants of a fair trial because the state was still required to prove the elements of the crime beyond a reasonable doubt. Thus, here, as in Smith, petitioner's due process rights were not violated by the burden shifting error in the entrapment instruction.

In State v. Delva, 575 So.2d 643 (Fla. 1991), this Court held that the failure to instruct the jury on whether the defendant knew that the substance was cocaine was not fundamental error. The original standard jury instruction on trafficking in cocaine did not contain an element of knowledge of the nature of the substance. In State v. Dominguez, 509 So.2d 917 (Fla. 1987), this Court held the state must prove that the defendant knew the substance was cocaine and amended the standard jury instructions to reflect this additional element. However, Delva's trial occurred prior to the decision in Dominguez. Delva neither objected to the then standard instructions given, nor requested a special instruction. This Court held that failing to instruct on an element of the crime over which there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal. See Laboo v. State, 715 So.2d 1034, 1035-36 (Fla. 1st DCA 1998)(holding that, while the standard instruction on perjury erroneously directed the

trial court rather than the jury to decide materiality, an objection was required to preserve the error for appellate review because the issue of materiality was never disputed, and therefore, was not fundamental error); Jordan v. State, 707 So.2d 816 (Fla. 5th DCA 1998)(stating that failure to instruct on an element of a crime about which there is no dispute, does not rise to the level of fundamental error).

In Sochor v. State, 619 So.2d 285 (Fla. 1993), this Court held that the trial court's failure to instruct the jury on the affirmative defense of involuntary intoxication was not fundamental error. Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. Voluntary intoxication is an affirmative defense to kidnapping; it, as with all eight of the affirmative defenses created under jury instruction 3.04, is not an element of the offense. Because the disputed instruction went to Sochor's defense and not to an essential element of the charged crime, this Court held that an objection was necessary to preserve the issue on appeal. *See* Muteei v. State, 708 So.2d 626 (Fla. 3d DCA 1998)(holding, in reliance on "the clear and unequivocal language of the supreme court in Sochor v. State, 619 So.2d 285, 290 (Fla. 1993)", that the trial court's failure to give the self-defense instruction was not fundamental error because the jury instruction went to an affirmative defense, and not to an essential element of the crime; and therefore, the defendant was required to request the instruction to preserve the issue).

Here, as in Sochor, the claimed error in the jury instructions related to an affirmative defense, the claimed error was not in the jury instructions dealing with the elements of the crime. Thus, here, as in Sochor, petitioner was required to request an entrapment instruction that reflected the holding in Munoz to preserve this issue.

Only errors in jury instructions related to disputed elements of the crime are fundamental error. Johnson v. State, 632 So.2d 1062 (Fla. 5th DCA 1994)(holding a misstatement of a disputed element of the offense charged is fundamental error); Fundora v. State, 573 So.2d 454 (Fla. 3d DCA 1991)(holding the trial court's failure to instruct the jury on the material and disputed elements of intent and knowledge is fundamental error); State v. Jones, 377 So.2d 1163 (Fla. 1979)(concluding that it was fundamental error to fail to instruct the jury on the underlying crime of robbery in a felony-murder prosecution because the crime of robbery was an essential part of the felony-murder).

CERTIFIED CONFLICT WITH MILLER V. STATE

In Holiday v. State, 24 FLA.L.WEEKLY D982 (Fla. 1st DCA April 13, 1999), the First District, in reliance on this Court's opinion in Sochor, reasoned that because the error in the jury instruction involved an affirmative defense rather than an essential element of the crime, no fundamental error occurred when the trial court give the prior version of the entrapment jury instruction at trial. The First District affirmed petitioner's conviction but certified

conflict with the Fourth District's decision in Miller v. State, 723 So.2d 353 (Fla. 4th DCA 1998)[3].

In Miller v. State, 723 So.2d 353 (Fla. 4th DCA 1998), the Fourth District held that it was fundamental error to instruct the jury that the defendant must prove entrapment by a preponderance of evidence. The Miller Court cited to Archer v. State, 673 So.2d 17, 20 (Fla. 1996) as support. Archer held that it was not fundamental error to fail to define reasonable doubt or to fail to give a jury instruction on the law of principals. Thus, Archer supports the respondent's position here, not that of the Miller court. The Miller court concluded that the standard jury instruction in use until July 1998 did not comport with the dictates of Munoz or correctly state the law on entrapment. However, the Miller Court did not explain why the "error" was so egregious as to deny due process. The Miller court seems to reason that error in a jury instruction is automatically fundamental error. This type of reasoning negates the contemporaneous objection rule and is contrary to the controlling case law above holding that errors in affirmative defenses are not fundamental error. Smith, **et al** are simply ignored.

Petitioner's reliance on Vazquez v. State, 700 So.2d 5 (Fla. 4th DCA 1997), *appeal dismissed*, State v. Vazquez, 23 FLA.L.WEEKLY S428 (Fla. Aug. 27, 1998), is also misplaced. Vazquez was not a fundamental error case, the error claimed on appeal was also raised

[3]Miller is being reviewed in this Court under case no. 94,916.

in the trial court. The Fourth District reversed and remanded for a new trial because cross examination had been improperly restricted. The Fourth District unnecessarily undertook to address an entrapment issue to provide guidance to the trial court on retrial. Id. at n.2. If the trial court chooses to give the entrapment instruction at the new trial, it should give the current jury instruction. Vazquez does not address the issue of whether the failure to give an entrapment instruction that contains the burden shifting language of Munoz is fundamental error. Thus, Vazquez is inapposite.

Petitoner's reliance on Vazquez, and that of the district court in Miller, is misplaced as a matter of law. This Court refused to entertain review of a certified question on entrapment from Vasquez on the ground that the district court had not addressed the entrapment issue and this Court would not do so. That being so, Vasquez does not furnish authority on the entrapment jury instruction.

In summary, this Court has held that claims of error involving affirmative defenses are not claims of fundamental error and will not be addressed for the first time on appeal. This ruling is consistent with, e.g., §924.051(3), Florida Statutes (1997), which was upheld and implemented by this Court in Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103(Fla. 1996). Neither the trial court nor the district court erred here. However, Miller is clearly erroneous in holding that unpreserved claims of

error in instructing the jury on affirmative defenses are fundamental error cognizable for the first time on appeal.

MERITS

As shown above, this claim of error is not fundamental and should not be addressed for the first time on appeal. Even if addressed, however, petitioner has not shown that the jury instructions in their entirety, without objection, denied petitioner a fair trial.

Standard of Review

Whether a jury instruction properly states the law of entrapment is a pure question of law subject to *de novo* review. United States v. Haslip, 160 F.3d 649, 654 (10th Cir. 1998)(conducting a *de novo* review to determine whether, as a whole, the jury instructions correctly stated the applicable law). Petitioner argues that the version of the standard entrapment instruction in effect until July 1998 improperly shifted the burden of proof from the state to the defendant. Thus, the standard of review is *de novo*.

Entrapment in Florida

The entrapment statute, § 777.210, FLA. STAT. (1997), provides:

> (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 or she 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 the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

The entrapment statute was first enacted in Florida in 1987 in response to this Court's decision in Cruz v. State, 465 So.2d 516 (Fla. 1985). Laws of Fla. ch. 87-243, § 42. The entrapment statute has always placed the burden on the defendant to establish all elements of any entrapment defense by a preponderance of the evidence. The entrapment statute regarding the burden of proof has not changed; only that of the jury instruction. The standard jury instruction on entrapment which existed prior to the enactment of the entrapment statute provided:

> On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped.

Munoz v. State, 629 So.2d 90, 97 n.2(Fla. 1993). Thus, prior to the enactment of the entrapment statute, the burden was on the state to prove that the defendant was not entrapped and the standard of proof was beyond a reasonable doubt.

In 1989, the standard jury instruction on entrapment was amended to reflect the newly enacted entrapment statute. The new instruction, 3.04(c)(2), which was used here and until 1998, provided:

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

The language of this jury instruction exactly tracked the language of the entrapment statute.

However, the current version of the standard jury instruction on entrapment, 3.04(c)(2), which was recently amended, purportedly to reflect this Court's decision in Munoz v. State, 629 So.2d 90 (Fla. 1993), 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 charges. 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.

Standard Jury Instructions in Criminal Cases, 23 FLA. L. WEEKLY S415-16 (Fla. July 16, 1998). Because the current jury instruction was not amended until after the petitioner's trial here, the version of the standard instruction in effect from 1989 to 1998 was given. That instruction has been upheld against the claim which petitioner now raises, that it unconstitutionally shifts the burden of proof to the defendant.

In Herrera v. State, 594 So.2d 275 (Fla. 1992), this Court held that the entrapment statute, § 777.201, did not unconstitutionally shift the burden of proof to the defendant to prove entrapment. At trial, Herrera requested the pre-section 777.201 standard jury instruction which stated: "the State must

convince you beyond a reasonable doubt that the defendant was not entrapped" rather than the jury instruction written to comply with section 777.201 which stated: "the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of entrapment". Herrera claimed that shifting the burden to him violated due process. The State argued that the instruction and statute are constitutional because they shift only the burden of an affirmative defense, not the burden of proving the elements of the crime charged. The Court noted that, over the years, Florida courts have gone back and forth on which side must produce evidence regarding the defendant's having been entrapped. But the Herrera Court noted that the enactment of the entrapment statute evidenced the legislature's intent that the defendant should prove entrapment instead of requiring the State disprove it. The Court reasoned 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. Thus, the state may constitutionally place the burden of proof on an affirmative defense on the defendant.

Two months after Herrera, the United States Supreme Court in Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992), addressed the defendant's burden of proof in establishing an entrapment defense **under federal law**. The Court held that the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. Jacobson, 503 U.S. at

549, 112 S.Ct. at 1540. The focus of Jacobson, however, was not who has the burden and what the standard of proof should be; rather, the focus was the definition of predisposition. The Court explained that a defendant's predisposition should be determined independent of the government's actions.[4] The disposition to commit the crime should not be solely the product of the government's actions.

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[4] Florida's current entrapment instruction and some federal cases discuss predisposition as determined "prior to" the government contact. But predisposition, in fact, does not contain a temporal aspect as both the Jacobson majority and the dissent make clear. The "ready commission of the criminal act amply demonstrates the defendant's predisposition." Jacobson, 503 U.S. at 550, 112 S.Ct. at 1541. Had the agents simply provided Jacobson with the opportunity to commit a crime and he had "promptly availed" himself of the opportunity, then he would not have been entitled to a jury instruction on his entrapment defense. Jacobson, 503 U.S. at 550, 112 S.Ct. at 1541. The concern in Jacobson is that predisposition be independent of government action, not timing. United States v. Vaughn, 80 F.3d 549, 552 (D.C. Cir. 1996)(holding that the phrase the government must prove a defendant's disposition "prior to first being approached by Government agents," means only that the government must prove that the defendant's disposition was "independent and not the product of the attention that the Government" directed at the defendant); United States v. Aibejeris, 28 F.3d 97 (11th Cir. 1994)(stating that "the crucial holding of Jacobson is that predisposition must be independent of government action."); United States v. Gifford, 17 F.3d 462, 469 (1st Cir. 1994)(disposition to commit the crime should not be the product of the government's actions, however a ready response itself shows predisposition); United States v. Byrd, 31 F.3d 1329, 1335 (5th Cir. 1994)(noting that when an undercover agent merely offers a person the opportunity to break the law, and the person eagerly does so - as in a typical illegal drug sting - the person's ready commission of the crime amply demonstrates predisposition and the defendant is usually not entitled to a jury instruction on the entrapment defense). Thus, the state suggests, a correct statement of the law regarding the holding of Jacobson would not contain any language discussing "prior to" only language discussing "independent of".

In Munoz v. State, 629 So.2d 90, 99 (Fla. 1993), this Court examined Jacobson and §777.201 and explained the meaning of the statute:

> Given the history of the entrapment defense, we find that the legislature, in establishing a legislatively-created entrapment defense through section 777.201, codified the subjective test delineated by the United States Supreme Court as the means for determining the application of that defense. As indicated under the federal cases discussed above, the application of the subjective test is the test articulated by Judge Hand in Sherman, as further explained by the United States Supreme Court in Jacobson. Three principles arise under this test. The first two involve questions of fact and differing burdens of proof, and the third addresses whether the issue of entrapment must be submitted to the jury or whether the issue can be decided by the judge as a matter of law.
>
> 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, 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. In rebutting the defendant's evidence of lack of predisposition, the prosecution may make "an appropriate and searching inquiry" into the conduct of the accused and present evidence of the accused's prior criminal history, even though such evidence is normally inadmissible. However, admission of evidence of predisposition is limited to the extent it demonstrates predisposition on the part of the accused both prior to and independent of the government acts. Further, care must be taken in establishing the predisposition of a defendant based on conduct that results from the inducement. The United States Supreme Court, in its majority opinion in Jacobson, explained how this type of evidence may properly be used as follows:

> Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.
>
> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition.

Id.

Accordingly, pursuant to statute and Munoz, the accused has the burden of proof and must establish inducement by a preponderance of the evidence. If inducement is established and the defendant presents any evidence showing a lack of predisposition, the burden of proving predisposition shifts back to the prosecution to overcome the defendant's showing beyond a reasonable doubt. Id. at 99. Predisposition is whether he was ready and willing, without persuasion, to commit the offense. In rebutting the defendant's evidence of lack of predisposition, the prosecution may make "searching inquiry" including presenting evidence of the defendant's prior criminal history, even though such evidence is normally inadmissible. However, the evidence of predisposition is limited to demonstrating the defendant's predisposition both "prior to and independent of" the government's

actions. The jury instruction on entrapment was purportedly changed to incorporate Munoz.

The Munoz Decision

The defendant here was not entitled to any entrapment instruction because he produced no evidence of improper inducement or lack of predisposition. An entrapment instruction should be given only if there is some evidence of the defendant's lack of predisposition. The defendant here is hardly the innocent citizen on the street. He has three prior convictions for sale or delivery of cocaine. Even if the officer did offer the defendant a "bump", this is not inducement. State v. Ryan, 582 A.2d 1217 (Me. 1990)(holding that no entrapment instruction should be given where the officers provided the defendant with small amounts of drugs or cash to obtain drugs for them); United States v. Ford, 918 F.2d 1343, 1349-50 (8th Cir. 1990)(holding undercover officer's providing defendant, who was known addict, with small quantities of drugs to enhance undercover relationship was not entrapment); United States v. Williams, 873 F.2d 1102, 1104 (8th Cir. 1989)(rejecting entrapment defense where defendant claimed he was drug user, not a drug dealer); United States v. Resnick, 745 F.2d 1179 (8th Cir. 1984)(rejecting an entrapment defense based solely on the defendant's addiction to cocaine). The officer's action did not constitute inducement as a matter of law.

Nor is it outrageous misconduct to provide a known addict small quantities of drugs in order to facilitate the progress of an

undercover operation. See United States v. Ford, 918 F.2d 1343, 1349-50 (8th Cir. 1990)(holding undercover officer's providing defendant, who was known addict, with small quantities of drugs to enhance undercover relationship was not outrageous conduct); United States v. Nunez, 146 F.3d 36 (1st Cir. 1998)(rejecting an outrageous police misconduct claim based on Nunez's claim that he was an addict because "[t]o put matters bluntly, the appellant cannot strip himself of all moral agency by virtue of his drug addiction."); United States v. Harris, 997 F.2d 812, 817 (10th Cir. 1993)(noting that sale of narcotics to a known addict is not outrageous conduct and any such holding would "severely inhibit" undercover operations); United States v. Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991)(holding no outrageous misconduct where the defendant was allowed to keep two ounces from each kilo of cocaine as his payment and for his personal use). Thus, the due process based "outrageous misconduct" or "egregious law enforcement conduct" part of Munoz is not at issue in this case. Munoz v. State,629 So.2d 90, 98 (Fla. 1993). The trial court did not determine as a matter of law that the law enforcement officer's conduct violated the petitioner's due process rights in this case and petitioner made no such claim in the First District or in his initial brief to this Court.

The Munoz Court, quoting Jacobson, specifically addressed the issue of undercover drug transactions, such as here, and noted that such transactions are not entrapment. Thus, both the United States Supreme Court and this Court have concluded that where a defendant

is simply offered the opportunity to commit a crime, as defendant was here, and he promptly avails himself of this opportunity, he is not entitled to a jury instruction on the defense of entrapment. Munoz, 629 So.2d at 99-100. This was a prototype undercover drug operation where the street vendor approached the undercover police and promptly availed himself of the opportunity to sell drugs; he was clearly predisposed to sell drugs as shown by his prior record and his conduct here.

The facts here are that the officers simply provided petitioner with the opportunity to commit a crime and his "ready commission of the criminal act amply demonstrates" his predisposition. Holiday approached the undercover officers while they were parked outside a store. The undercover officer did not address petitioner; he addressed them by asking what they were looking for. (T. Vol. III 119). The officer said that he "was looking for 20." (Vol. III 120). Petitioner, unable to obtain the crack on the scene, got in the back seat of the officers' car and directed them to a supplier. They were unable to purchase crack at the first house. (Vol. III 126). The officer thanked the petitioner for his help, whereupon, petitioner "insisted" on going to another location. (Vol. III 126). Petitioner led them to a second location to obtain the drugs. At the second location, petitioner successfully obtained $20.00 worth of crack. (Vol III 127). Thus, the facts of the drug transactions itself show that the defendant was predisposed to commit the offense. His argument that he was a drug addict and thus susceptible to an offer of drugs

is not a defense to a crime. He could not, and did not, argue or otherwise show that he was not predisposed. His prior convictions for sale and delivery defeat that claim immediately. United States v. Ramsey, 165 F.3d 980, 985 (D.C. Cir. 1999)(rejecting a claim of entrapment as a matter of law because the defendant was predisposed to commit a drug offense as shown by his history of drug dealing); United States v. Santiago-Godinez, 12 F.3d 722, 730 (7th Cir. 1993)(stating that the defendant's recent prior criminal drug conviction corroborate corroborte his predisposition to commit the charged drug crime).

The jury instruction given by the trial court in this case, which were in effect from 1989 to 1998, did not incorrectly state the law of entrapment in Florida. Florida's codified entrapment defense differs significantly from the federal entrapment defense which has not been codified. The law of entrapment in Florida is governed by the entrapment statute as this Court recognized in Herrera. The jury instruction given at trial quotes verbatim the entrapment statute and therefore, correctly states the law of entrapment in Florida. To see why this is so, see the discussion of entrapment under federal and Florida law[5].

Federal vs. Florida Entrapment

[5]The state reiterates that there is no hint of egregious state behavior which creates a due process claim. Thus, the analysis in Munoz pertaining to outrageous state behavior is irrelevant here.

Entrapment first developed in state courts in the last century but it was not until this century that the federal courts recognized the defense. O'Brien v. State, 6 Tex.Ct.App. 665 (1879)(reversing a conviction for bribery of a deputy sheriff because the deputy first suggested his willingness to accept a bribe to release a prisoner from jail because the case is not within the provision of the bribery statute); Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). While the United States Supreme Court had suggested such a defense in prior cases, it was not until 1932 in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932), that the Court formally recognized the entrapment defense.

The entrapment doctrine has a unique origin. It is not a common law defense, nor is it constitutionally mandated. It is based on the intent of Congress and therefore statutory principles. But the defense is not based on any particular statute; rather, the doctrine is part of all statutes. It is an assumption underlying all criminal statutes based on the reasoning that Congress did not intend for those "lured" into violating the statute to be punished. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819, 821, 2 L.Ed.2d 848 (1958)(stating: "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations"). Congress has never codified the entrapment defense. Thus, there is no federal entrapment statute.

Because the entrapment defense is not a common law defense, the legislature may readily abolish it. Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)(because the defense of voluntary intoxication did not exist at common law, the legislature may abolish it). Additionally, a legislature may codify a defense and define the elements differently from previous judicial formulations of the defense. Normally, in the absence of a statute, the state must rebut any defense raised beyond a reasonable doubt. United States v. Talbott, 78 F.3d 1183, 1186 (7th Cir. 1996)(because Congress has not enacted a self-defense statute which placed the burden on the defendant to prove self-defense, the burden is on the prosecution). However, the legislature may enact statutes that shift the burden of proof to the defendant to prove an affirmative defenses. United States v. Gaudin, 515 U.S. 506, 525, 115 S.Ct. 2310, 2310, 132 L.Ed.2d 444 (1995)(Rehnquist, C.J., concurring)(federal and state legislatures may reallocate burdens of proof); Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987)(imposing a burden on defendant to prove self defense by a preponderance of the evidence does not violate due process); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)(placing the burden on the defendant of proving by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional distress). Although the legislature may enact statutes shifting the burden of proof to the defendant on affirmative defenses, courts do not have that authority. United States v. Talbott, 78 F.3d 1183, 1186 (7th Cir.

1996). When the defense is not codified by statute or when a statute does not reallocate the burden of proof of an affirmative defense to the defendant, then the prosecution has the burden not only of proving beyond a reasonable doubt the elements of the charged offenses but also of negating beyond a reasonable doubt the affirmative defense raised. However, the legislature may not only place the burden of proof on the defendant, it may also change the standard of proof of an affirmative defense to a preponderance of the evidence. Indeed, the main reason to shift the burden of proof to the defendant is so that the state will not have to rebut it beyond a reasonable doubt.

In Jacobson, the United States Supreme Court was interpreting the federal entrapment doctrine which has not be codified. Traditionally, courts place the burden on the State to rebut any defense beyond a reasonable doubt. The holding in Jacobson reflects this general policy by placing the burden to prove predisposition beyond a reasonable doubt on the government. However, because Florida's entrapment doctrine has been codified, unlike the federal version, Jacobson is, at most, merely persuasive authority in Florida courts.

Florida has enacted an entrapment statute and the statute shifts the burden of proof from the state to the defendant and establishes the standard of proof as a preponderance of the evidence. The Florida legislature has directly addressed where the burden of proof is to be placed and what the standard of proof will be. As the Herrera Court noted, the enactment of the entrapment

statute evidences the legislature's intent that the defendant should prove entrapment instead of requiring the State to disprove it. The Munoz Court approved Jacobson in dicta, but, in doing so, overlooked the terms of the entrapment statute; its prior holding in Herrera, and the fundamental differences between the federal entrapment defense established by case law and Florida's codified entrapment defense. The shifting of the burden to the state and raising the standard of proof to beyond a reasonable doubt in the jury instruction is directly contrary to the statute.[6] With these issues now directly before it, this Court should reaffirm Herrera and §777.210 by making it crystal clear that a defendant who admits committing a crime but claims entrapment has the burden of showing by a preponderance of the evidence that he was improperly induced by the state to commit the crime and that he was not predisposed to commit the crime. Both sides will be heard on the entrapment issue

[6] While the prior version of the jury instruction may have been incomplete in detailing when the burden shifts to the State, the prior version was at least accurate regarding the standard of proof and who had the burden to establish inducement and lack of predisposition - the defendant. Of course, all jury instructions are "incomplete". All jury instructions, by necessity, leave out major parts of the law. They cannot possibly include all related concepts and still be jury instructions; rather, they would be tomes on the law and incomprehensible to a layman. United States v. Vadino, 680 F.2d 1329, 1337 (11th Cir. 1982)(upholding the entrapment instruction against a challenge that instruction should specifically state that the burden of proof because such a detailed, complex instruction would confuse not aid the jury).

The current version of the entrapment instruction, while more detailed, does not accurately reflect the statutory language which unequivocally places the burden on the defendant, using a preponderance of the evidence test, to shown entrapment in that he was both induced and not predisposed.

but a jury instruction is not appropriate unless the defendant introduces evidence tending to show both improper inducement by the state and a lack of predisposition on his part to commit the crime.[7]

Federal entrapment pattern instructions

The federal practice of instructing on entrapment under Jacobson is instructive. Even the Federal Circuit courts, who are required to follow Jacobson, do not include this burden shifting language in their jury instructions. For example, the Seventh Circuit's pattern instruction, 4.04, contains no language about

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[7] For example, a more detailed but correct jury instruction that includes the burden shifts to the State could read as:

> The defendant must prove both that he was induced by the government into committing the crime and that he lacked the predisposition to commit the crime by the greater weight of the evidence. Greater weight of the evidence means that evidence which is more persuasive and convincing.
>
> The State may rebut this evidence by either establishing that there was no improper inducement or that the defendant was predisposed to commit the crime. The defendant's predisposition should be determined independent of the government's inducement. If the State establishes either that there was no inducement or the defendant's predisposition by the greater weight of the evidence, you should find no entrapment.
>
> If, however, the greater weight of the evidence establishes both inducement and lack of predisposition, then you should acquit the defendant.

either burden shifting or the standard of proof.[8] Other federal circuit pattern jury instructions, while containing the statement that the government must prove beyond a reasonable doubt that the defendant was not entrapped, clearly place the burden to establish both inducement and lack of predisposition on the defendant.[9] The

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[8] The Seventh Circuit Criminal Instruction 4.04 provides:

> One of the issues in this case is whether the defendant was entrapped. A defendant who has been entrapped must be found not guilty.
>
> If the defendant had no prior intention or predisposition to commit the offense charged and was induced or persuaded to do so by law enforcement officers or their agents, then he was entrapped. If, however, the defendant had a prior intent or predisposition to commit the offense charged, then he was not entrapped even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, or even participated in acts essential to the offense.
>
> In determining whether the defendant had a prior intent or predisposition to commit the offense charged, you may consider the personal background of the defendant as well as the nature and degree of any inducement or persuasion of the defendant by law enforcement officers or their agents.

[9] The Fifth Circuit pattern jury instruction § 1.28, provides:

> The defendant asserts that he was a victim of entrapment.
>
> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment, and the law as a matter of policy forbids that person's conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact

pattern instructions have been challenged and upheld under Jacobson. United States v. Benitez, 92 F.3d 528, 534 n.5 (7th Cir. 1996)(rejecting a challenge to the pattern instruction because it did not contain the sentence from Jacobson that: "the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents" under the plain error doctrine); United States v. Hernandez, 92 F.3d 309, 311 (5th Cir. 1996)(rejecting a preserved challenge to the pattern instruction because it did not

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> that government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction.
>
> If, then, you should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find the defendant not guilty.
>
> The burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped.
>
> You are instructed that a paid informer is an "agent" of the government for purposes of this instruction.

explain that predisposition had to exist prior to and independent of government action).

The Eleventh Circuit has also rejected a Jacobson challenge to its pattern jury instruction on entrapment. United States v. King, 73 F.3d 1564 (11th Cir. 1996). The government argued that the pattern entrapment instruction was a sufficient statement of the law and the Eleventh Circuit agreed. The King Court seemed to conclude that a jury instruction that detailed all of the United States Supreme Court's holding in Jacobson would confuse the jury rather than enlighten it. Id. *citing* United States v. Vadino, 680 F.2d 1329, 1337 (11th Cir. 1982)(upholding the entrapment instruction against a challenge that instruction should specifically state that the burden of proof because such a detailed, complex instruction would confuse not aid the jury).

Thus, the federal courts do not consider it necessary to include in their jury instructions a shift of the burden of proof to the government.

Harmless Error

The error, if any, regarding the burden of proof in the prior entrapment instruction was harmless in this case. Errors in jury instructions are trial error subject to harmless error analysis. See California v. Roy, 519 U.S. 2, 117 S.Ct. 337, 339, 136 L.Ed.2d 266 (1996)(instruction that erroneously defined the crime held to be trial error rather than a structural error); Pope v. Illinois, 481 U.S. 497, 502-03, 107 S.Ct. 1918, 1921-22, 95 L.Ed.2d 439

(1987)(applying harmless error analysis to jury instructions that misstated an element of a crime). Even if the current version of the jury instruction on entrapment had been given, the verdict would have remained the same. Assuming that the jury found promising a drug user some of the drugs for selling drugs to the undercover officer to be inducement, petitioner still would have to produce some evidence of lack of predisposition. His three prior convictions for selling drugs and his ready commission of the offense defeat the claim even using beyond a reasonable doubt as the standard of proof. No reasonable jury instruction would lead a jury to find that a person with petitioner's criminal record who approached undercover officers on the street with a query on what they wanted was not predisposed to commit a drug crime. Thus, the error, if any, was harmless.

CONCLUSION

The First District's decision in Holiday v. State, 24 FLA.L.WEEKLY D982 (Fla. 1st DCA April 13, 1999) should be affirmed and the Fourth District's decision in Miller v. State, 723 So.2d 353 (Fla. 4th DCA 1998) disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF has been furnished by U.S. Mail to Michael A. Wasserman, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 20th day of July, 1999.

_____
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