IN THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT
IN AND FOR THE STATE OF FLORIDA

JOAQUIN D. BLANCO,

Appellant,

Case No.: 3D14-2622
L.T. No.: 08-41616

v.

STATE OF FLORIDA,

Appellee.
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APPELLANT'S MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION

Appellant, Joaquin D. Blanco, (hereinafter "Appellant"), pursuant to Rules 9.330 and 9.331(d), Florida Rules of Appellate Procedure, respectfully requests this Court consider a rehearing or rehearing *en banc* of its Opinion (hereinafter "Opinion") filed on January 4, 2017. Appellant respectfully states that the Court overlooked or misapprehended points of law, and therefore, a rehearing is appropriate. In the alternative, a rehearing *en banc* is appropriate to maintain uniformity in the Court's decisions and because this case is of exceptional importance. Finally, this Court should certify that the Opinion is in conflict with an opinion of a different district court of appeal and certify a question of great public importance for the following reasons:

I. A Rehearing Is Appropriate Because The Court Overlooked Or Misapprehended Legal Issues

In the Opinion, the Court held that Appellant's trial counsel was not ineffective for failing to file a motion to dismiss on the grounds Appellant was subjectively entrapped as a matter of law. *Blanco v. State*, 3D14-2622, 2017 WL 36265 (Fla. 3d DCA Jan. 4, 2017). Appellant respectfully submits this Court has overlooked or misapprehended three legal points in the Opinion that warrant a rehearing. Fla. R. App. P. 9.330(a).

First, the Court overlooked or misapprehended the standard to determine whether the State has met its burden to rebut a defendant's lack of predisposition. Second, the Court overlooked or misapprehended a legal issue when it did not determine if the evidence offered by the State was legally sufficient to establish a lack of predisposition and thereby lessened the burden on the State to rebut a defendant's lack of predisposition based on proof beyond a reasonable doubt. Third, the Court overlooked or misapprehended a legal issue when it held that the State may rebut a defendant's lack of predisposition based solely on post inducement conduct. Based on these three issues, Appellant respectfully requests this Court consider a rehearing.

(1) The Court overlooked or misapprehended the standard to determine whether the State has met its burden to rebut a defendant's lack of predisposition with evidence beyond a reasonable doubt.

The following is the standard for determining whether a defendant has been subjectively entrapped based on the Florida Supreme Court's decision in *Munoz v. State*, 629 S0. 2d 90 (Fla. 1993), and as identified by this Court in the Opinion:

> First, did an agent of the government induce the defendant to commit the offense? *Id.* at 99. This step places the burden on the defendant to prove inducement by a preponderance of the evidence. *Id.*
>
> Second, was the defendant predisposed to commit the offense? *Id.* This step places the initial burden on the defendant to establish a lack of predisposition. *Id. If the defendant produces evidence of a lack of predisposition, the burden then shifts to the prosecution to rebut this evidence by proof beyond a reasonable doubt. Id.* "The state may prove predisposition with evidence of the defendant's prior criminal activities, his reputation for such activities, reasonable suspicion of his involvement in such activity, or his ready acquiescence in the commission of the crime." *Jones*, 114 So.3d at 1126 (quotation and citation omitted). "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." Munoz*, 629 So.2d at 99.
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> Third, should the question of subjective entrapment be submitted to the jury? *Id.* at 101. Generally, this defense should be submitted to the jury because the issues of inducement and predisposition "ordinarily present questions of disputed facts to be submitted to the jury as the trier of fact. *Id.* at 100. However, *there are cases where the trial court can rule that the defendant was entrapped as a matter of law. This occurs when "the factual circumstances of a case are not in dispute."* "the accused establishes that the government induced the accused to commit the offense charged," *and "the State is unable to demonstrate sufficient evidence of predisposition prior to and independent of the government conduct at issue." Id.*

Blanco, 2017 WL 36265 at *3 (emphasis added) (footnotes omitted).

Under this standard, the burden on the State to prove a lack of predisposition is significant because the State must "rebut the evidence by proof beyond a reasonable doubt0". *Munoz*, 629 So. 2d at 99. This burden is even greater because the evidence the State may rely upon is limited in two ways. *Id.*

First, the State is limited to specific types of evidence that fall within well-defined categories. *See Jones v. State*, 114 So. 3d 1123, 1126 (Fla. 1st DCA 2013) ("The state may prove predisposition with evidence of the defendant's prior criminal activities, his reputation for such activities, reasonable suspicion of his involvement in such activity, or his ready acquiescence in the commission of the crime.") (quotation and citation omitted). Second, the evidence relied upon to prove predisposition that falls within one of these categories must "demonstrate[ ] predisposition on the part of the accused *both prior to and independent of the government acts*." *Munoz*, 629 So.2d at 99 (emphasis added). Based on *Munoz* and its progeny, the evidence relied upon must then (1) fall within one of these well-defined categories of evidence *and* (2) have occurred prior to and independent of the government acts. *Id.* Appellant submits the Court's Opinion overlooked or misapprehended legal points regarding this standard to establish a lack of predisposition when it decided the Opinion.

The Opinion never affirmatively stated that the "drug-trade jargon" used by Appellant (during the drug transaction Appellant was eventually charged and convicted of) rebutted Appellant's evidence of a lack of predisposition beyond a reasonable doubt, nor identified conclusively whether this evidence, or other evidence (*i.e.*, Blanco's political discussion) demonstrate predisposition both prior to and independent of government influence. Rather, the Opinion focused on Appellant's argument regarding whether this evidence is relevant and admissible to establish a lack of predisposition. *Blanco*, 2017 WL 36265 *4 ("Blanco argues that his use of drug-trade jargon during the drug transaction is *irrelevant* to prove predisposition because it occurred after the government induced him to commit the offense … Blanco is misreading *Munoz* … post-inducement evidence can be *admissible* if it tends to show that the defendant was predisposed to commit the crime before the government induced him.") (emphasis added). Whether this evidence is relevant and whether it rebuts the lack of predisposition beyond a reasonable doubt are two different questions with two different standards.

Relevance is a "prerequisite to the admissibility of evidence". *Wright v. State*, 19 So. 3d 277 (Fla. 2009). Thus, a threshold question for any evidence offered is whether the evidence is relevant to the issue it is being offered for by the movant. *Id.* "To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons." *See Sims v. Brown*, 574 So. 2d 131, 134 (Fla. 1991). Once the evidence offered by the State is deemed relevant, and thus admissible, the court must weigh the sufficiency of this evidence against the standard of proof at issue, *i.e.*, beyond a reasonable doubt.

The determination of whether evidence is legally sufficient to support a conviction, or in this case, rebut evidence of a lack of predisposition, is a question of law for the court to determine. *See, e.g., Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'*, 457 U.S. 31 (1982); *Munoz*, 629 So. 2d at 101. A finding that the evidence is legally insufficient is equivalent to a determination that the prosecution has failed to prove the defendant's guilt or failed to rebut the lack of predisposition evidence beyond a reasonable doubt. *See, e.g., Tibbs*, 397 So. 2d at 1123; *Munoz*, 629 So. 2d at 99-100; *State v. Smyly*, 646 So. 2d 238, 241 (Fla. 4th DCA 1994) ("Trial and appellate courts are equally capable of making the legal judgment whether the evidence is legally sufficient to allow the state's case to go to the jury and support a verdict. Legal sufficiency means that the state has adduced a bundle of evidence that, if believed by the jury, would constitute proof beyond a reasonable doubt on every element of the offense charged. The failure to produce legally sufficient evidence exonerates the defendant and requires his dismissal.") (internal citations omitted). Here, the Court acknowledged that "Because Blanco established a prima facie case of inducement, the burden shifted to the State to present *sufficient* evidence of predisposition." *Id.* at *4 (emphasis added).

Although there is no definitive statement for identifying what constitutes "reasonable doubt", the usual test to determine whether the State has established their case beyond a reasonable doubt is whether, after a consideration of all the evidence, there is an abiding conviction to a moral certainty that the charge is true. *See Witherspoon v. State*, 76 Fla. 445, 80 So. 61 (1918). Where evidence raises a mere probability, or even a strong probability of guilt, or that raises only a suspicion that the accused is guilty, the evidence is insufficient. *Alleyne v. State*, 961 So. 2d 198 (Fla. 2007).

Based on the above standards, the State may offer evidence that a court deems relevant and admissible for showing a lack of predisposition; however, the State's offered evidence may still fail to sufficiently demonstrate beyond a reasonable doubt that it has rebutted the defendant's lack of predisposition. *See Farley v. State*, 848 So. 2d 393, 396 (Fla. 4th DCA 2003). The standard for conduct to be relevant is much lower than the standard for establishing that the conduct rebuts the lack of predisposition beyond a reasonable doubt. The Court did not address this issue or distinction expressly in the Opinion. Rather, the Court focused on the fact that post inducement conduct *may* be relevant (thus admissible) to establish a defendant's lack of predisposition. *Blanco*, 2017 WL 36265 at *4 (citing *Jones*, 114 So. 3d at 1123).

This does not conclusively mean that the relevant admissible evidence offered by the State satisfies the legal sufficiency requirements of proof beyond a reasonable doubt. This is a different issue all together.

The standard put forth by *Munoz* and its progeny requires the evidence offered by the State to rebut the defendant's lack of predisposition to rise to the level of establishing proof beyond a reasonable doubt, not merely to demonstrate that it is relevant and thus probative of the material issue of whether the defendant was predisposed to commit the charged offense. *Munoz*, 620 So. 2d at 99-100. As such, the Court's focus on the relevancy of post inducement conduct, without ever addressing whether the State's evidence rebutted the defendant's testimony beyond a reasonable doubt, overlooks or misapprehends the standard at issue and warrants a rehearing.

(2) The Court overlooked or misapprehended a legal issue when it did not determine if the evidence offered by the State was legally sufficient to establish a lack of predisposition and thereby lessened the burden on the State to rebut a defendant's lack of predisposition.

The burden on the State to rebut the lack of predisposition is a question regarding the sufficiency of the evidence and whether the conduct in and of itself demonstrated predisposition. *See e.g., Morgan v. State*, 112 So. 3d 122, 124–25 (Fla. 5th DCA 2013) ("If the factual circumstances are not in dispute and the accused establishes that the government induced him or her to commit the offense charged, *and if the State is unable to demonstrate sufficient evidence of predisposition*, then the trial court has the authority to rule on the issue of predisposition as a matter of law and dismiss the charges.") (citing *Munoz*, 629 So. 2d at 100) (emphasis added). The conduct offered by the State must meet the two requirements as identified in both *Munoz* and *Jones*; specifically, the conduct must fall within one of the well-defined categories *and* have occurred prior to and independent of government influence. *Munoz*, 629 So. 2d at 99; *Jones*, 114 So. 3d at 1126. Baring meeting this standard, the evidence does not sufficiently demonstrate proof beyond a reasonable doubt. *Farley*, 848 So. 2d at 396.

This Court held Appellant was induced as a matter of law, and therefore, had to establish he was not predisposed by a preponderance of the evidence. *Blanco*, 2017 WL 36265 at *3. After he met his burden of establishing a lack of predisposition, the burden then shifted to the State. *Id.* In the State's Response to Rule to Show Cause, the State clearly articulated its argument for how it rebutted Appellant's lack of predisposition:

> *Thus, in order to establish predisposition to commit a crime and defeat the entrapment defense, the State may demonstrate simply defendant's willingness to commit the charged crime.* That was what the State did in Appellant's case by establishing his readiness to commit the drug transaction when Det. Villano offered him the opportunity. *His predisposition to sell drugs was demonstrated by his familiarity with the drug terminology as the record reflects.*
>
> To the extent, however, Appellant argues that the State needs to produce evidence of predisposition before it began its investigation in

> this case, the claim fails. *The State need not produce evidence of predisposition prior to its investigation, as predisposition may be demonstrated simply by a defendant's ready commission of the charged crime*, as previously argued.

Id. at 26-27 (internal citations omitted) (emphasis added).

This argument demonstrates the State's sole reliance on this as the conduct to rebut Appellant's lack of predisposition. The State never argued this post inducement conduct occurred prior to or independent of government influence, and as noted by the dissent, this was the sole basis for establishing a lack of predisposition. *Blanco*, 2017 WL 36265 at *6 (Suarez, C.J., dissenting) ("Despite its correct recitation of the law of entrapment, the majority relies on certain language—used by Blanco only during the transaction and only after inducement by the state to enter into a single drug transaction—as **the sole** evidence that Blanco was allegedly predisposed to commit the offense.") (emphasis maintained). The only category this evidence could conceivably fall into as a basis to rebut the lack of predisposition is Appellant's "ready acquiescence in the commission of the crime." *See Jones,* 114 So. 3d at 1126. Appellant submits the Court has overlooked or misapprehended a legal issue regarding what the State must establish to demonstrate a sufficient basis of evidence to rebut a defendant's claim of a lack of predisposition.

First, Appellant submits that if the sole basis to rebut a lack of predisposition is a defendant's "ready acquiescence in the commission of the crime", then by definition, this can only have occurred during the commission of the crime and can only be based on observable conduct post inducement. If that is the case, then the conduct itself could not have occurred preinducement of the government acts. While a defendant's "ready acquiescence in the commission of the crime" may be *relevant* to assist in rebutting a defendant's lack of predisposition, it cannot be the sole basis of a establishing a lack of predisposition since it can never occur prior to government influence.

Second, here, it is undisputed the confidential informant assisted Appellant with the gaining this purported knowledge of drug-trade jargon. *Blanco*, 2017 WL 36265 at *6 (Suarez, C.J., dissenting). Based on this fact, while this use of drug-trade jargon may be relevant, this conduct does not sufficiently demonstrate a lack of predisposition beyond a reasonable doubt because the type of evidence relied upon by the State to rebut a lack of predisposition falls within a category that may only be observed post inducement ("ready acquiescence") and did not occur "prior to" or independent of government influence. As such, this conduct is not sufficient to meet the requirements of *Munoz* and *Jones* as a matter of law. *See Smyly*, 646 So. 2d at 241 ("Legal sufficiency means that the state has adduced a bundle of evidence that, if believed by the jury, would constitute proof beyond a reasonable doubt on every element of the offense charged. The failure to produce legally sufficient evidence exonerates the defendant and requires his dismissal.").

Appellant respectfully submits that the Opinion overlooked or misapprehended a point of law and therefore lessened the burden on the State to rebut a subjective entrapment defense by eliminating the requirement that the State must rebut a defendant's evidence of a lack of predisposition beyond a reasonable doubt with sufficient evidence based on the requirements of *Munoz* and *Jones*. In turn, this holding creates a greater burden on the defendant in establishing a subjective entrapment defense making it virtually impossible to overcome any rebuttal from the State, as such, Appellant respectfully requests a rehearing.

(3) The Court overlooked or misapprehended a legal issue when it held that the State may rebut a defendant's lack of predisposition based solely on post inducement conduct.

The Court held that *Munoz* and its progeny allows that post inducement conduct *may* be relevant to demonstrate a defendant's predisposition. *Blanco*, 2017 WL 36265 at *2 (citing *Munoz*, 629 So. 2d at 99). However, Appellant submits the Court overlooked or misapprehended a legal issue when it held that post inducement conduct can *solely* be the basis to establish predisposition, particularly when the conduct at issue arises from post inducement activity undisputedly influenced by government conduct. *Blanco*, 2017 WL 36265 at *6 (Suarez, C.J., dissenting); *see also Farley*, 848 So. 2d at 396.

In the undersigned's review of the cases cited by the majority opinion to establish this point, both cases demonstrate that while the conduct post inducement may be relevant, there is also always a finding of some form of *additional* conduct that demonstrates predisposition independent of this post inducement conduct. *See Jones*, 114 So. 3d at 1126 (defendant had three prior felonies for the sale of drugs); *Sallomi v. State*, 629 So. 2d 969 (Fla. 5th DCA 1993) (use of reference to his supplier indicating prior drug deals independent of government influence). In the Opinion, no such conduct was offered by the State against Appellant.

Additionally, in the undersigned's review of case law throughout the State of Florida, he is unable to locate any opinion that holds post inducement conduct alone is sufficient to demonstrate predisposition without some reliance on preinducement conduct or knowledge. More to the point, he could not identify any case wherein post inducement conduct that was undisputedly influenced by the government, was solely used as a basis to establish the defendant's predisposition. *See Blanco*, 2017 WL 36265 at *6 (Suarez, C.J., dissenting). The Opinion's holding that post inducement conduct is relevant is in line with *Munoz* and its progeny; however, the extension of this holding to include post inducement conduct as its sole basis for establishing predisposition, where the conduct or knowledge at issue is undisputedly influenced by government conduct, overlooks or misapprehended the line of cases from *Munoz* forward.

Appellant requests this Court rehear the matter, holding that Appellant was subjectively entrapped as a matter of law, and his counsel was ineffective for failing to file a motion to dismiss. In the alternative, Appellant requests this matter be considered on a rehearing *en banc*.

II. A REHEARING EN BANC IS APPROPRIATE BECAUSE IT IS "NECESSARY TO MAINTAIN UNIFORMITY IN THE COURT'S DECISIONS"

A rehearing *en banc* of the Court's Opinion is appropriate because "such consideration is necessary to maintain uniformity in the court's decisions". Fla. R. App. P. 9.331(d)(1). In the past, the Third District has reviewed matters *en banc* it deems to create a lack of uniformity in its precedents. *See e.g.*, *Carroll v. State*, 497 So. 2d 253, 261 (Fla. 3d DCA 1985). Specifically, in this case, the Opinion is in conflict with the Third District's prior decision of *State v. Ramos*, 632 So. 2d 1078 (Fla. 3d DCA 1994). The issue in both the Opinion and in *Ramos* dealt with the application of *Munoz*. Prior to the decision in *Munoz*, the Third District initially decided *State v. Ramos*, 608 So. 2d 830 (Fla. 3d DCA 1992), and then later quashed and remanded the decision for reconsideration in light of *Munoz*. *State v. Ramos*, 629 So. 2d 103 (Fla. 1993).

In *Ramos*, Lorenzo Diaz, and two other defendants (including Ramos) was charged with trafficking in cocaine. *Ramos*, 608 So. 2d at 830. Diaz filed a motion to dismiss alleging he was entrapped, and later the two other defendants joined this motion. *Id.* Initially, pre-*Munoz*, the *Ramos* case was reviewed under the standard put forth in *Cruz v. State*, 465 So. 2d 516, 522 (Fla. 1985) [1], *cert. denied*, 475 U.S. 905 (1985). Diaz alleged he was entrapped because

> there "was no history, information, or intelligence known to law enforcement of any involvement by these Defendants in any narcotics activities of drug 'rip-offs' before the confidential informant brought the Defendants into the scheme." This finding is supported by the evidence. The confidential informant contacted Diaz fifteen or sixteen times in an attempt to convince Diaz to get involved in the drug transaction. When the confidential informant contacted Diaz, Diaz was not involved in any "specific ongoing criminal activity."

Ramos, 608 So. 2d at 830. However, after being contacted and agreeing to participate, Diaz was directed to go to a warehouse in furtherance of the drug deal, provided a firearm by the confidential informant, and later met with and spoke to an undercover officer in furtherance of a drug deal. *Id.* Based on the *Cruz* analysis, the Third District dismissed the case against Diaz[2], holding he was objectively entrapped as a matter of law. *Ramos*, 608 So. 2d at 832.

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[1] "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity."

[2] The two other defendants were held not to be entrapped. *Ramos*, 608 So. 2d at 832 ("As to Francisco and Jose, it was Diaz who induced them to commit a crime, not the confidential informant. "When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense." Accordingly, we reverse the portion of the trial court's order dismissing the charges against Francisco and Jose and remand for further proceedings.") (internal citations omitted).

Following the Third District's decision, the Florida Supreme Court accepted and decided *Munoz*. After *Munoz*, the Third District's *Ramos* decision was quashed and remanded to review the portion of the opinion dismissing the charges against Diaz under a subjective entrapment analysis. *Ramos*, 629 So. 2d at 103. On remand, the Third District once again affirmed the trial court's order dismissing charges against Diaz; however, this time based on the subjective entrapment defense. *Ramos*, 632 So. 2d at 1079. Specifically, in affirming the dismissal, the Third District stated:

> In the instant case, Diaz met his burden of proving by a preponderance of the evidence that a government agent induced him to commit the crime charged. The unrebutted evidence showed that the confidential informant contacted Diaz approximately fifteen or sixteen times in order to convince him to get involved in the drug transaction.
>
> Since the above question was answered in the affirmative, *the next inquiry is whether the defendant was "predisposed to commit the offense charged." Id. As to this issue, Diaz met his burden of establishing lack of predisposition ... the confidential informant had to contact Diaz approximately fifteen or sixteen times in order to persuade him to commit the offense. Moreover, the trial court found that there "was no history, information, or intelligence known to law enforcement of any involvement by [Diaz] in any narcotics activities or drug 'rip-offs' before the confidential informant brought [Diaz] into the scheme."*

Id. (emphasis added).

The Third District acknowledged that, generally, subjective entrapment should be submitted to the jury, however, "when the factual issues above are not in dispute, 'then the trial judge has the authority to rule on the issue of predisposition as a matter of law.'" *Id.* (citing *Munoz*, 629 So. 2d at 100). In this case, the Third District held the issue of entrapment did not have to be submitted to the jury, and, "under the subjective test, Diaz was entrapped as a matter of law." *Id.* at 1079.

Here, Appellant submits that *Ramos* and the Opinion are in conflict regarding whether a defendant's post inducement conduct may be the sole basis for the State to rely on when rebutting a defendant's lack of predisposition to commit the charged offense. After the defendant was induced in *Ramos*, he followed the confidential informant's directions to go to a location in furtherance of a drug transaction, was provided a firearm by the confidential informant, and then met with an undercover officer in furtherance of completing a drug transaction. *Id.* at 830. Although it is not explicitly stated in the opinion, Diaz's interaction with the government at the meeting was convincing enough to prosecute him for drug trafficking, much like the conversation that Appellant had with an undercover officer in which he used drug-trade jargon. However, even with this conduct, the *Ramos* court found that Diaz's conduct did not rise to the level of establishing Diaz's predisposition to commit the charged offense.

Based on the Opinion, Appellant submits Diaz's conduct in *Ramos* would likely demonstrate a "ready acquiescence" to participate in the charged offense. This creates a conflict within the district court. In both *Blanco* and *Ramos* the defendants repeatedly refused when asked to participate in the charged crime. In both cases, the only basis to establish predisposition was the defendant's "ready acquiescence in the commission of the crime”, *Jones*, 114 So. 3d at 1123, because, in neither case, was there any proof of prior criminal acts, a reputation for such activities, or reasonable suspicion of involvement in such activities. *Id.* As such, Appellant respectfully requests a rehearing *en banc* to resolve this conflict and to ensure uniformity in the district. As an additional basis, Appellant respectfully submits a rehearing *en banc* is appropriate due to the exceptional importance of this case.

III. A REHEARING EN BANC IS APPROPRIATE BECAUSE THE CASE AND ISSUE ARE OF “EXCEPTIONAL IMPORTANCE”

A rehearing *en banc* of the Opinion is appropriate because “the case or issue is of exceptional importance.” Fla. R. App. P. 9.331(d)(1). As this Court has set forth, a case is exceptionally important if:

> (1) the outcome of the case (or its notoriety) is of greater moment or impact within the community rather than its effect upon the law of the state, **and** either (a) the case is important beyond the effect it will have on the litigants or (b) will affect the ability of other potential litigants to seek their own remedies, **or** (2) the outcome of the case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.

Univ. of Miami v. Wilson, 948 So.2d 774, 791 (Fla. 3d DCA 2006) (Shepherd, J., concurring) (emphasis in original); *see also Fla. Dep't of Agric. & Consumer Servs. v. Lopez–Brignoni*, 114 So.3d 1135, 1136 (Fla. 3d DCA 2013) (Logue, J., dissenting) (emphasis maintained). As discussed below, this case is exceptionally important and this standard is satisfied here.

(1) The outcome of the case is of great impact within the community because anyone in the community who is a law-abiding citizen and then is unlawfully induced into committing a crime has a greater burden to establish he or she was not predisposed to commit the charged offense.

This decision is of great impact to any law-abiding citizen who finds him or herself ensnared in law enforcement's grasp after being induced to commit a crime. Following this Opinion, to show predisposition, the State need not show the defendant had a prior criminal history, a reputation for such activities, or there was reasonable suspicion of his or her involvement in such activities. Rather, all the State needs to do to rebut a defendant's lack of predisposition, or at least create a question of fact for a jury, may be based on whether the defendant's conduct post inducement showed a "ready acquiescence in the commission of the crime." *Jones*, 114 So. 3d at 1126.

In Appellant's case, it was undisputed that Appellant's use of drug-trade jargon was solely "provided by the informant during the transaction at issue[.]" *Id.* at *6 (Suarez, C.J., dissenting). The State did not rely on any other conduct specifically related to criminal activity to rebut his lack of predisposition.[3] Based on

[3] Although the State relied upon Appellant's fervent political discussion prior to the use of drug trade jargon, this was used as evidence of his strong will and does not have a causal connection to a crime. *Blanco*, 2017 WL 36265 at *7 (C.J., Suarez, dissenting) ("To address that dearth of evidence, the majority somehow conflates a reference to a political discussion as proof that Blanco was 'not one easily influenced' with the notion that post-inducement use of jargon is proof of predisposition. First, there is simply no precedent for the notion that holding strong

this Opinion, law enforcement may be able to expand this holding to its logical conclusion, that if its confidential informants, or its undercover officers, elicit statements from suspects in the form of drug trade jargon (or similar language depending on the charged offense) then they can at least rebut a defendant's lack of predisposition for the subjective entrapment defense to be submitted to the jury. The burden on the State to rebut a defendant's lack of predisposition beyond a reasonable doubt has been considerably lessened, and thus, a defendant's burden considerably heightened to show a lack of predisposition, which has a great impact to any law-abiding citizen in the community.

(a) The case is important beyond the effect it will have on the litigants because it lessens the burden on the State in presenting sufficient evidence to rebut a defendant's lack of predisposition.

Based on the Opinion, a defendant's conduct post inducement alone may be a basis for the State to rebut a defendant's lack of predisposition to commit a charged offense. This will undoubtedly impact other defendant throughout the Third District,

political opinions is somehow proof that one is predisposed to commit a crime, and such a concept should be easily discarded. More importantly, where there was absolutely no proof of any prior involvement in any sort of criminal activity, Blanco's use of jargon—which was undisputedly provided by the informant during the transaction at issue—simply does not satisfy the requirements of *Munoz v State*, 629 So.2d 90 (Fla. 1993)").

and even the State of Florida, as it reduces the protection against law enforcement's entrapment of a person induced to commit a crime by the government.

(b) The Opinion will affect the ability of other potential litigants to seek their own remedies because it limits the subjective entrapment defense for a defendant who otherwise has no criminal history and is entrapped by law enforcement as a matter of law.

When a defendant demonstrates he or she has been subjectively entrapped as a matter of law, the remedy is dismissal. *Jimenez v. State*, 993 So. 2d 553, 556 (Fla. 2d DCA 2008). Here, the Opinion will affect the ability of other potential litigants to seek their own remedies because the burden on the State to rebut an alleged lack of predisposition as a matter of law has been lessened, while the defendant's burden has been heightened. As such, the Opinion will affect the ability of other potential litigants to rely on the subjective entrapment defense in the future.

(2) The outcome of this case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.

Appellant submits the dissenting opinion's cited authority demonstrates the concern that the "outcome of this case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice." *Wilson*, 948 So. 2d at 788-792. Chief Judge Suarez's dissenting opinions quoted *Cruz* for the proposition that "the violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court not matter by whom or at what stage of the proceedings the facts are brought to its attention." 465 So. 2d at 520 (quoting *Sorrels v. United States*, 287 U.S. 435, 457 (1932) (Robert, J., in a separate opinion)). Appellant submits the implication of this quote indicates the concern that finding Appellant's counsel was not ineffective results in a "violation of the principles of justice" because the court should step in "what[ever] state of the proceedings the facts are brought to its attention[.]" *Id.* Additionally, the dissent cited *to Jacobson v. United States*, "for the rule which should be applied in this case: 'when the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.'" 503 U.S. 533 (1992); *see Blanco*, 2017 WL 36265 at *8 n. 6. Based on the language used within the Opinion, this case is appropriate to be heard *en banc* because the outcome of this case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.

IV. THE COURT SHOULD ALSO CERTIFY THAT THE OPINION IS IN DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN *FARLEY* AND PASSES UPON A QUESTION OF GREAT PUBLIC IMPORTANCE

Appellant requests the Court certify that the Opinion is in conflict with a decision from the Fourth District and certify a question of great public importance.

(1) The Opinion directly conflicts with *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2003), and this Court should certify this conflict.

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi) allows discretionary jurisdiction of the Florida Supreme Court to review decisions of district courts of appeal that "are certified to be in direct conflict with decisions of other district courts of appeal." As alluded to in the Opinion, and particularly in Chief Judge Suarez's dissent, there is a conflict between the Opinion and the Fourth District's decision in *Farley*, 848 So. 2d at 393. This decision is materially similar to the case at bar and relates to the same question of law. Essentially, the legal question at issue in the Opinion and *Farley* regards the issue of whether the government can rely solely on the defendant's post inducement conduct to rebut the defendant's lack of predisposition to commit the charged offense beyond a reasonable doubt. The Opinion is in direct conflict with the Fourth District's decision in *Farley* for four factual reasons and the conflict arises because of both courts' conflicting holdings.

First, in both decisions, the defendants were not known for a reputation of criminal activity. *Blanco*, 2017 WL 36265 at *4 ("He also provided evidence of a lack of predisposition based on his testimony that he had no criminal record or history of distributing drugs"); *Farley*, 848 So. 2d at 395–96. Second, in both cases, the defendants had no prior criminal history related to the offense at issue. *Blanco*, 2017 WL 36265 at *4; *Farley*, 848 So. 2d at 396 ("In the present case, there is no evidence that Farley was predisposed to possess child pornography. No evidence was adduced that Farley had ever purchased such pornography nor were any other pornographic materials found in his home. Additionally, Farley had never been arrested for anything in his life, let alone a child pornography offense."). Third, in both cases, the courts found the government induced the accused to commit the offense charged as a matter of law. *Blanco*, 2017 WL 36265 at *4 ("Blanco's testimony established a prima facie case of inducement."); *Farley*, 848 So. 2d at 395–96. Fourth, in both cases, the conduct relied upon by the government to establish predisposition related to conduct that occurred solely post inducement. *Blanco*, 2017 WL 36265 at *6; *Id.* at 396 ("The State contends the fact that Farley ordered the videos indicates that he had a predisposition to possess child pornography. However, this view overlooks even the common connotation of the word '*pre* disposition.' The prefix pre-indicates that the disposition must exist before first contact with the government.").

Legally, the conflict arises between the cases because, in the Opinion, the Court held post inducement conduct alone is sufficient in and of itself to constitute a basis for demonstrating a defendant is predisposed to commit the offense charged, *Blanco*, 2017 WL 36265 at *6, while the Fourth District in *Farley* held the reliance on the post inducement conduct to establish predisposition "overlooks even the common connotation of the word '*pre* disposition.' The prefix pre-indicates that the disposition must exist before first contact with the government." *Farley*, 848 So. 2d at 396 (internal citations omitted). The Fourth District's decision and the Opinion are diametrically opposed.

Appellant requests this Court certify that its opinion is in direct conflict with the Fourth District's decision in *Farley*[4]. *See* Fla. R. App. P. 9.030(a)(2)(A)(vi); Fla. Const. art. V, §3(b)(4). In addition, Appellant requests this Court certify a question of great public importance regarding this issue.

(2) The Opinion passes upon a question of great public importance and this question should be certified.

Florida Rule of Appellate Procedure 9.030(a)(2)(v) allows discretionary jurisdiction of the Florida Supreme Court to review decisions of district courts of appeal that "pass upon a question certified to be of great public importance." Appellant humbly requests this Court certify the following (or a similar) question of great public importance:

> WHERE A DEFENDANT RELIES ON A SUBJECTIVE ENTRAPMENT DEFENSE, MAY THE GOVERNMENT RELY SOLELY ON A DEFENDANT'S POST INDUCEMENT CONDUCT AS THE SOLE BASIS TO ESTABLISH THE DEFENDANT'S PREDISPOSITION TO COMMIT THE CHARGED OFFENSE?

[4] Appellant also submits that Chief Judge Suarez's dissent has identified several other cases that could equally be in conflict with the Opinion. *See Blanco*, 2017 WL 36265 at *7–8, *see e.g.*, *Nadeau v. State*, 683 So. 2d 504 (Fla. 4th DCA 1995); *Jimenez*, 993 So. 2d at 556; *Madera v. State*, 943 So. 2d 960 (Fla. 4th DCA 2006); *Curry v. State*, 876 So. 2d 29, 31 (Fla. 4th DCA 2004); *Dial v. State*, 799 So. 2d 407, 409 (Fla. 4th DCA 2001); *Robichaud v. State*, 658 So. 2d 166, 168 (Fla. 2d DCA 1995); *State v. Anders*, 596 So. 2d 463, 468 (Fla. 4th DCA 1992).

This is an issue that can have consequences on defendants throughout the State of Florida and impact these defendants' fundamental constitutional rights, and because this question has far-reaching consequences for defendants facing a loss of a constitutional protection from entrapment, certification of this question is appropriate. *See, e.g. Smith v. State*, 497 So. 2d 910, 912 (Fla. 3d DCA 1986) (certified the question of whether the trial court's standard instruction concerning the burden of proof on the insanity defense constituted fundamental error because of the "far-reaching possible consequences" of a holding that would expose many previously final criminal convictions to collateral attack).

Conclusion

WHEREFORE, for the foregoing reasons, Appellant, Joaquin D. Blanco, respectfully requests this Court grant a rehearing, or a rehearing *en banc,* or in the alternative, certify that (1) the Opinion is in direct conflict with the Fourth District's decision in *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2003); and (2) the Opinion passes upon a question of great public importance. *See* Fla. R. App. P. 9.030(a)(2)(A)(vi); Fla. Const. Art. V, §3(b)(4).

Required Statement Under Rule 9.331(d)(2)

I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance, and, that the Court decision is contrary to the following decision of this court: *State v. Ramos*, 632 So. 2d 1078 (Fla. 3d

DCA 1994), and that a consideration by the full court is necessary to maintain uniformity of decisions in this court between *Blanco* and *Ramos*.

Respectfully submitted,

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail to the Office of the Attorney General at crimapptlh@myfloridalegal.com on this 30th day of January 2017.

Respectfully submitted,

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III, ESQ.