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IN THE SUPREME COURT OF FLORIDA

JOAQUIN D. BLANCO,

Petitioner,

Case No.: SC17-1042
L.T. Case No.: 3D14-2622

v.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Third District
State of Florida

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Florida Statutes

Rules

Constitutional Provisions

Other Authorities

STATEMENT OF THE CASE

The issue before this Court regards the proper interpretation and application of the subjective entrapment defense. *See* § 777.201, Fla. Stat. (2010). At issue is whether the State may rely solely on a defendant's post-inducement conduct, that was influenced by the government, as its basis to establish a defendant's predisposition to commit a charged offense. The conflict arises from this Court's decision in *Munoz v. State*, 629 So. 2d 90 (Fla. 1993) and the Fourth District's decision in *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2003).

STATEMENT OF THE FACTS

Petitioner was charged with one count of trafficking in methamphetamine to an undercover police officer. Petitioner claimed he was induced into making the sale by his former romantic partner who was acting as a confidential informant. The confidential informant (hereinafter "CI") was a convicted drug trafficker and was under a plea agreement that required him to produce trafficking level cases for the State. Petitioner was a real estate agent. At one point in their relationship, Petitioner sold the CI's home. The CI was not satisfied with the amount of money he received from the sale and called Petitioner asking for his assistance in arranging a drug deal in Miami so that Petitioner could prove his love to the CI and to make amends for the money lost on the sale of the home. After repeated refusals, Petitioner eventually relented and agreed to facilitate the sale.

The CI contacted his police handler who referred him to an undercover narcotics agent. The CI informed the narcotics agent that Petitioner would sell him methamphetamine. The narcotics agent spoke to Petitioner on the telephone. The telephone call to Petitioner was recorded and played for the jury. During the telephone call, the CI and Petitioner engaged in a political discussion and then the Petitioner used coded language. The narcotics detective testified this coded language is the type used to avoid detection. However, Petitioner testified at trial that because he was unfamiliar with the code being used he was simultaneously in communication with the CI to receive instructions when he was speaking to the narcotics detective.

Following this telephone call, Petitioner and the narcotics detective agreed to meet. Prior to the meeting the CI had someone deliver a white envelope to Petitioner that Petitioner later turned over to the narcotics agent for the amount of cash previously agreed upon. After the exchange, the contraband was confiscated and Petitioner was immediately arrested. A search of Petitioner's home and car revealed no other drugs. It was undisputed that Petitioner never took illegal drugs, and had never before, or since this occurrence, sold drugs.

Petitioner proceeded to a jury trial where he presented his entrapement defense. Following a trial, Petitioner was convicted as charged. A direct appeal followed, and the Third District Court of Appeal affirmed Petitioner's convictions on direct appeal. *Blanco v. State*, 89 So. 3d 933 (Fla. 3d DCA 2012), *rev. denied*,

105 So. 3d 518 (Fla. 2012). Thereafter, Petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 alleging several claims. Among these claims, he alleged that his trial counsel was ineffective for failing to move to dismiss the charges based on his subjective entrapment defense. The trial court denied this claim and Petitioner appealed to the Third District.

On January 4, 2017, the Third District Court of Appeal affirmed the trial court's denial and issued its opinion with a dissenting opinion by Chief Judge Suarez. *Blanco v. State*, 2017 WL 36265 (Fla. 3d DCA Jan. 4, 2017). The Third District's relied on this Court's decision in *Munoz v. State*, 629 So. 2d 90 (Fla. 1993) when evaluating Petitioner's claim that he was subjectively entrapped:

> 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.
>
> 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.

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

The Third District held that Petitioner established a *prima facie* case that he was induced to commit the offense and that he lacked predisposition to commit the offense. *Id.* at *8. Thus, the burden appropriately shifted to the State to present sufficient evidence of Petitioner's predisposition beyond a reasonable doubt. *Id.*

The State had previously relied on two facts as its basis to show Petitioner's predisposition: (1) Petitioner had a political discussion with the undercover officer prior to using the drug trade jargon which allegedly demonstrated that he was not an individual easily influenced, and (2) Petitioner's use of the drug trade jargon. Petitioner, relying on *Munoz*, argued that this did not rebut his argument as a matter of law because "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 act*"* which did not occur here. *Munoz*, 629 So. 2d at 99. The Third District disagreed and affirmed the trial court, even though it was undisputed the confidential informant assisted Petitioner with use of of drug-trade jargon. *Id.* Chief Judge Suarez authored a dissenting opinion. [1]

[1] Chief Judge Suarez's dissenting opinion, critically, focused on this fact as the decisive point for why he would have reversed the trial court. *Blanco*, 2017 WL 36265 at *14 (Suarez, C.J., dissenting) ("Despite its correct recitation of the law of

On January 30, 2017, Petitioner filed his Motion for Rehearing, Rehearing *En Banc*, and Certification. On June 1, 2017, this Motion was denied. However, in this denial, Chief Judge Suarez noted he would have granted the Motion for Rehearing and Certification and dissented to the denial of Petitioner's Motion for Rehearing *En Banc*. On June 1, 2017, Petitioner filed his Notice to Invoke Discretionary Jurisdiction of this Court.

SUMMARY OF ARGUMENT

Jurisdiction exists because the decision of the Third District Court of Appeal is in express and direct conflict with this Court's decision in *Munoz v. State*, 629 S0. 2d 90 (Fla. 1993) and the Fourth District Court of Appeal's decision in *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2003) on the same question of law. This Court should accept review.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION AND REVIEW THE THIRD DISTRICT'S DECISION THAT IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISION AND THE FOURTH DISTRICT COURT OF APPEAL'S DECISION.

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entrapment, the majority relies on certain language – used by Blanco 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. … The majority's conclusion in this case is inconsistent not only with the cases it cites, but with due process.") (emphasis maintained) (internal citations omitted).

A. Jurisdictional Criteria

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or this Court on the same point of law. *See* Art. V, § 3 (b) (3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

B. Discussion

The decision below expressly and directly conflicts with this Court's decision in *Munoz v. State,* 629 So. 2d 90 (Fla. 1993) and the Fourth District's decision in *Farley v. State,* 848 So. 2d 393 (Fla. 4th DCA 2003).

This Court can exercise its jurisdiction where a district court's opinion "expressly and directly conflicts with the decision of another district court of appeal, or with the supreme court on the same issue of law", Fla. Const. Art. V, 3 (b)(3), and the conflict appears on the face of the opinion. *Reaves v State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision."). There is no requirement that the district court opinion must explicitly identify conflicting decisions because the "legal principles which the court applied supplies a sufficient basis for a petition for conflict review." *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). Therefore, conflict jurisdiction can be based on the same or closely similar controlling facts. *See Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992) ("Because the court below in the instant case reached the opposite result on controlling facts

which [were substantially] identical, ... we concluded that a conflict of decisions existed that warranted accepting jurisdiction.").

This Court has held the "concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985). This concern is demonstrated in this case because the two conflicts at issue result from the Third District's misinterpretation of the correct law.

First, the Third District Court of Appeal's decision in this case conflicts with this Court's decision in *Munoz* because it misapplies this controlling precedent by erroneously extending its holding. *See* Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 518 (2005) ("'Erroneous extension' cases are those in which the district court correctly states a rule of law but then proceeds to apply the rule to a set of facts for which it was not intended. In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two."). In this case, the Third District relied solely upon the Petitioner's post-inducement use of "drug-trade jargon" when speaking with the undercover officer to complete the drug transaction at issue as its basis to demonstrate Petitioner was predisposed to commit the charged offense, even though it was undisputed the CI assisted Petitioner with gaining the knowledge of drug-

trade jargon. *Blanco*, 2017 WL 36265. Critically, the *Munoz* decision requires the State to demonstrate "s*ufficient evidence of predisposition prior to and independent of the government conduct at issue." Id.* Because it was undisputed the confidential informant assisted Petitioner with the gaining the knowledge of drug-trade jargon, the Third District's decision misapplied *Munoz* and erroneously extended its holding to allow post inducement conduct, not independent of government influence, to be the sole basis for establishing predisposition. Therefore, this Court has jurisdiction to accept the case for review.

As a second basis, the holdings of the Third District Court of Appeal and the Fourth District Court of Appeal's decision in *Farley* are irreconcilable, thus creating a reviewable conflict. *See The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. at 516 (explaining that "holding conflict" exists when "[t]he majority opinion below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court") In *Farley*, the defendant was charged with the possession of child pornography. 848 So. 2d at 393. He was first contacted by law enforcement because his name and contact information were found through another unrelated investigation. After repeated electronic solicitations by the government in the form of direct emails from an undercover officer, he purchased three VHS cassettes. These cassettes were delivered to his home and Farley accepted the cassettes and paid cash as agreed upon

during the prior conversations with the undercover officer. He was arrested twenty minutes later. Farley had no prior criminal history and there was no other evidence that he had ever purchased child pornography before. Farley filed a motion to dismiss alleging he was subjectively and objectively entrapped as a matter of law. This motion was denied, and he reserved his right to appeal.

On appeal, the Fourth District found that Farley was induced as a matter of law and there was "no evidence that Farley was predisposed to possess child pornography." *Id.* at 396. The State argued that the fact Farley ordered the videos indicated that he had a predisposition to possess child pornography. *Id.* However, the Fourth District 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**." *Id.* (emphasis added) (internal citations omitted). The Fourth District reversed the trial court's denial of his motion and remanded to the trial court. *Id.*[2]

The Third District and Fourth District's decisions are in conflict because both defendants were induced to commit the charged offense as a matter of law and both defendants demonstrated they were not predisposed to commit the charged offense.

[2] The Fourth District also found that this conduct amounted to objective entrapment as well.

Blanco, 2017 WL 36265 at *4; *Farley*, 848 So. 2d at 395–96. Critically, in both cases, the conduct relied on by the government to establish predisposition related to conduct that occurred solely post inducement was influenced by the government. *Blanco*, 2017 WL 36265 at *6; *Id.* at 396. However, the holdings reach the opposite conclusions making these decisions irreconcilable. Based on the foregoing, this Court may accept jurisdiction to resolve this conflict.

Ultimately, this Court should review this case because the issue has significant and far reaching consequences for defendants throughout the State of Florida. The Third District's decision lessens the burden on the State when presenting sufficient evidence to rebut a defendant's lack of predisposition because it can simply rely on post inducement conduct supplied by its own agents. This decision limits defendant's ability to rely on the subjective entrapment defense because the burden on the State to rebut an alleged lack of predisposition has been lessened, while the defendant's burden has been heightened, and now is seemingly impossible to overcome.

CONCLUSION

This Court has the discretionary jurisdiction to review the Third District's decision in this case. Based on the foregoing, this Court should exercise its discretion to consider the merits of Petitioner's arguments.

Respectfully submitted,

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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 Assistant Attorney General Magaly Rodriguez at Magaly.Rodriguez@myfloridalegal.com and the Office of the Attorney General at crimapptlh@myfloridalegal.com on this 12th day of June 2017.

Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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

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APPENDIX

I. *Blanco v. State*, 42 Fla. L. Weekly D136 (Fla. 3d DCA Jan. 4, 2017)

II. *Munoz v. State*, 629 So. 2d 90 (Fla. 1993)

III. *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2003)