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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. 77,834

vs.

FRANCISCO HERNANDEZ,

Respondent.


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**FILED**

SID J. WHITE

MAY 26 1991

CLERK, SUPREME COURT

By  Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

DOUGLAS N. DUNCAN  
Counsel for Respondent

WAGNER, NUGENT, JOHNSON,  
ROTH, KUPFER & ROSSIN, P.A.  
Flagler Center Tower, Suite 300  
505 South Flagler Drive  
P.O. Box 3466  
West Palm Beach, Florida 33402  
Tele: 407-655-5200  
Fla. Bar #309672

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PRELIMINARY STATEMENT

In this Jurisdictional Brief, the parties will be referred to as they appear before this Honorable Court, Petitioner and Respondent. The Petitioner was the Appellee and the Respondent was the Appellant in the court below, Hernandez v. State, 575 So.2d 1321 (Fla. 4th DCA 1991). In the trial court, the Petitioner was the State and the Respondent was the Defendant.

References to those portions of the lower court's decision filed herewith and attached as Respondent's Appendix to the instant Brief will be symbolized by "RA" followed by the appropriate Appendix number. In this Brief, all emphasis will be supplied by Respondent, unless otherwise indicated.

### STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts, with the following additions:

The Fourth District Court of Appeal stated the following:

We also conclude that the trial court committed fundamental error in failing to correctly reinstruct the jury on lewd assault. The State concedes that the trial court's initial instruction incorrectly combined both lewd act and lewd assault. But, the defense counsel waived an objection to the initial instruction and requested the trial court not to re-instruct the jury. However, after the initial instruction, the jury requested a re-instruction on lewd assault. Thereafter, the trial court instead of instructing the jury as to lewd assault instructed them only as to lewd act...In the instant case, the trial court's initial instruction was misleading as evidenced by the jury's request for a re-instruction. In re-instructing the jury, the trial court compounded its error with an inaccurate instruction. Since an inaccurate instruction is both fundamental and reversible error, we reverse the trial court and remand for a new trial. (R.A., p. 3).

In conclusion, we hold that the cumulative effect of the errors presented denied Appellant a fair trial and accordingly warrants a new trial. (citations omitted). (R.A., p. 3).

### SUMMARY OF THE ARGUMENT

The Opinion of the Fourth District Court of Appeal, Hernandez v. State, 575 So.2d 1321 (Fla. 4th DCA 1991), is factually distinguishable from this Court's decisions in Roman v. State, 475 So.2d 1228 (Fla. 1985), and Armstrong v. State, \_\_\_So.2d\_\_\_ (Fla. May 9, 1991), 16 FLW S308 and hence there is no conflict between these decisions.

The Fourth District held that the trial court erred when it incorrectly and incompletely re-instructed the jury on lewd assault. In contrast, Roman v. State, involved failure of a defendant to request an instruction, and his contention later on appeal that such instruction should have been given.

In Armstrong v. State, defense counsel specifically requested an instruction, but later on appeal contended it was error to have given the requested instruction. This Court held the error had been waived. Likewise, the Fourth District found that defense counsel had waived the trial court's error in giving a misleading initial instruction on lewd assault. However, the Fourth District held that the Court's re-instruction was incomplete and inaccurate. As to this instruction, there had been no waiver. Thus, the Fourth District's Opinion is in accord with Armstrong.

In reference to the Petitioner's argument that the Fourth District's Opinion conflicts with Bergin v. State, 552 So.2d 262 (Fla. 2d DCA 1989), the Fourth District denied the Petitioner's request to certify the conflict and this Court should respectfully do likewise. If conflict is found, this Court should exercise its discretion, and deny review. The Fourth District awarded the

Respondent a new trial based upon several errors, only one of which concerns the Bergin issue. The new trial should not be delayed so as to review this one (1) isolated issue.

## ARGUMENT

### POINT

THIS COURT SHOULD NOT ACCEPT JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT IN HERNANDEZ V. STATE, 575 So.2d 1321 (Fla. 4th DCA 1991).

This Honorable Court in Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962), held that if the two (2) cases alleged to be in conflict with each other are distinguishable "in controlling factual elements," then there is no conflict jurisdiction. See, also, Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983); Wilson v. Southern Bell Telephone and Telegraph, 327 So.2d 220 (Fla. 1976).

In suggesting that the Fourth District's Opinion conflicts with Roman v. State, 475 So.2d 1228 (Fla. 1985) and Armstrong v. State, \_\_\_So.2d\_\_\_(Fla. May 9, 1991), 16 FLW S308, the Petitioner has overlooked the significant factual differences between the cases. In Roman, the defendant argued on appeal that the trial court had erred in failing to give a jury instruction that he had not even requested be given. This Court concluded and has consistently held that failure to request an instruction precludes a later contention that such instruction should have been given. See, also, Adams v. State, 412 So.2d 850 (Fla.), cert. den., 459 U.S. 882, 103 S.Ct. 182 (1982). However, the Fourth District's decision did not involve the failure to give an instruction. Instead, the Court concluded that the trial court erred when it inaccurately and incompletely re-instructed the jury on the crime charged. (R.A., p. 3). In Rojas v. State, 552 So.2d 914 (Fla. 1989), this Court reversed a second degree murder conviction



wherein the trial court failed to give a complete manslaughter instruction notwithstanding the lack of an objection by the defendant. The Fourth District's Opinion is consistent with this Court's decisions and is not in conflict with Roman v. State.

In Armstrong v. State, supra, this Court recently held that defense counsel's affirmative request for the abbreviated (short form) version of the standard instruction on excusable homicide waived his subsequent claim on appeal that the trial court erred in giving the requested instruction. A close examination of the Fourth District's Opinion clearly establishes that it is not in conflict with Armstrong. The Fourth District wrote:

We also conclude that the trial court committed fundamental error in failing to correctly re-instruct the jury on lewd assault. The State concedes that the trial court's initial instruction incorrectly combine both lewd act and lewd assault. But, the defense counsel waived any objection to the initial instruction and requested the trial court not to re-instruct the jury. However, after the initial instruction, the jury requested a re-instruction on lewd assault. Thereafter, the trial court instead of instructing the jury as to lewd assault instructed them only as to lewd act...the failure to give a complete and accurate instruction is fundamental error, reviewable in the absence of an objection. (citation omitted), (R.A.,p. 3).

The Opinion demonstrates that the Fourth District applied the waiver concept as to the trial court's initial inaccurate and incorrect instruction. However, the Court went on to find that the trial court's re-instruction was inaccurate and incomplete. As to the re-instruction there was no express waiver by defense counsel. Thus, the Fourth District correctly concluded "that the trial court committed fundamental error in failing to correctly re-instruct the

jury." These facts ignored by the Petitioner demonstrate that the Fourth District's Opinion is in accord with the decision announced in Armstrong v. State.

Lastly, the Petitioner alleges express and direct conflict between the Fourth District's Opinion and Bergin v. State, 552 So.2d 262 (Fla. 2d DCA 1989). The same argument was advanced by the Petitioner in her Motion for Rehearing wherein the Fourth District was requested to certify the conflict of decisions. (R.A., p. 7). The Fourth District denied the request. (R.A., p. 9). The Respondent respectfully urges this Court to accept the Fourth District's decision and reject the Petitioner's argument for conflict jurisdiction.

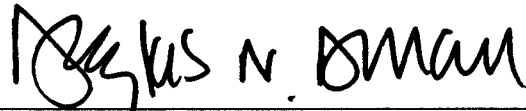
If this Court finds that the Fourth District's Opinion conflicts with Bergin v. State, supra, this Court should nonetheless exercise its discretion and decline review. The Fourth District awarded the Respondent a new trial based upon a number of errors, only one of which involves the Bergin v. State issue. The Respondent's new trial should not be delayed to review this one isolated issue.

CONCLUSION

Based upon the reasons and authorities cited herein, the Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari Review.

Respectfully submitted,

WAGNER, NUGENT, JOHNSON, ROTH,  
KUPFER, & ROSSIN, P.A.  
Flagler Center Tower, Suite 300  
505 South Flagler Drive  
P.O. Box 3466  
West Palm Beach, Florida 33402  
Tele: (407)-655-5200



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DOUGLAS N. DUNCAN  
Fla. Bar #309672

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Joan Fowler, Esquire and Sarah B. Mayer, Esquire, Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 24 day of May, 1991.



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DOUGLAS N. DUNCAN