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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 8 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT LEE DOZIER,

Respondent.

Case No. 86,956

**RESPONDENT'S BRIEF ON THE MERITS**

On petition for review from
The District Court of Appeal, Fourth District

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## PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River county, Florida and the appellant in the Fourth District Court of Appeal. Petitioner was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

R = Record on Appeal

T = Transcript of pre-trial, trial, post-trial and sentencing proceedings

A = Respondent's Appendix A

B = Respondent's Appendix B

## STATEMENT OF THE CASE AND FACTS

Respondent Robert Lee Dozier accepts Petitioner's Statement of the Case and Facts, subject to the following additions and clarifications which are essential to a full and fair determination of this case.

Respondent was charged by two-count information filed April 6, 1994 with burglary of a structure (count I) and petit theft (count II) (R 4-5). Prior to trial, Respondent moved to disqualify the trial judge due to lack of jurisdiction (R 32-37). This motion was denied (R 38-39).[1] Trial before jury was held June 27, 1994 and June 30, 1994. Respondent unsuccessfully renewed his motion to disqualify the trial judge during trial (T 13, R 68).

At trial, Petitioner charged Respondent with stealing a weedeater from a trailer (A-2). Dozier's employer, state witness Donald Abernathy, owned a landscaping and law maintenance company (T 33-34). Abernathy testified that his business used a pick-up truck with a trailer which contained equipment for yard work (T 35, R-Index, state evidence exhibit #1). The photograph of the truck and trailer introduced into evidence depicts a trailer attached to the pick-up. The trailer, like the truck, has wheels (R-Index, state evidence exhibit #1). On the date of the incident, Tracy Barrett, Abernathy's employee, drove the work truck and trailer to his work site, a residence and parked across the street (T 38). Dozier defended on Petitioner's inability to prove that the burgled trailer was a structure (T 167-168, 183, 209, 223-224).

At the close of the state's case Respondent unsuccessfully moved for judgment of acquittal (T 148-149). This motion was denied (T 149). The jury returned verdicts finding Respondent guilty as charged in the information as to each count (R 57, T 217-218). He was so adjudicated (R 72-73, T 232). Respondent's motions in arrest of judgment and for new trial were denied (R 84-85, T 58-60, 61-63, 233-224). On July 20, 1994, the trial judge imposed

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[1] In the interim trial counsel took a petition for writ of prohibition to the Fourth District Court of Appeal which was denied June 21, 1994 (T 3).

a habitual offender sentence on count I: ten years imprisonment, with credit for twenty-three days time served (R 74-76, T 232-234). The judge sentenced Respondent to one year on count II, concurrent (R 77-80, T 234).

Dozier timely appealed to the Fourth District Court of Appeal (R 100). There he argued that County Court Judge Wild lacked jurisdiction to preside over the felony prosecution because the judicial assignment to the circuit bench was not temporary. Additionally, Dozier raised a due process challenge to his conviction for burglary of a structure contending there was a failure of proof of the essential element of "structure". Finally, Dozier challenged the trial court's deviation from the standard jury instruction as to "structure" in response to a jury question.

The District Court issued its opinion November 1, 1995. That court voted to reverse the conviction based on the jurisdictional issue (A-1). In its opinion, the District Court ruled adversely on Respondent's additional challenged (A-2-4). On November 22, 1995, the District Court denied Petitioner's motions for stay and rehearing (A-5). On December 13, 1995, the District Court's mandate issued (A-6).

## SUMMARY OF ARGUMENT

I.

Respondent's convictions must be reversed where County Court Judge Wild lacked jurisdiction to preside over the instant felony prosecution because his assignment to half of the felony cases in Indian River County was not temporary. Moreover, the other half of the felony cases were assigned to County Court Judge Balsiger which in effect permanently usurped the circuit court work within the county. Thus, Mr. Dozier had no chance of having his case heard by a duty elected circuit judge since jurisdiction over all felony cases had been unconstitutionally placed in the hands of two circuit court judges.

Respondent further maintains that this Court's holding in Wild v. Dozier, 21 Fla. L. Weekly S57 (Fla. Feb. 8, 1996) must apply to this "pipeline" case. To hold otherwise would be to deny Mr. Dozier a remedy for this wrong-despite his strict observance of the proper and recognized procedure for challenging Judge Wild's authority in effect at the time of his trial and direct appeal. Such a result is barred by principles of fairness and equal treatment embodied in the due process and equal protection provisions of Article I, sections 9 and 16 of the Florida Constitution.

II.

Respondent's judgment of conviction and sentence for burglary of a structure cannot stand because the state failed to prove "structure", an essential element of the offense. The fatal variance between the offense alleged and the proof at trial which violated Respondent's rights to due process was fundamental error.

Respondent was fatally prejudiced by the failure of the state's proof. The Fourth District's mistaken conclusion that Respondent was not misled by this failure of proof is not supported by the record. On the contrary Respondent defended on the state's inability to prove the essential element "structure". The Fourth District further erred in its conclusion that Respondent could not be subject to reprosecution for burglary of a conveyance. Because

Respondent was convicted for an offense that is unsupported by the evidence, reversal is mandated.

III.

Prejudicial reversible error occurred where the trial court improperly and inaccurately reinstructed the jury as burglary of a structure. The reinstruction effectively relieved the state of its burden on the essential element of "structure" and left the jury with unbridled discretion as to the law they must apply. The District Court, finding error, improperly held that the error was not reversible. Because the incorrect instruction relieved the state of its burden of proof as to the contested issue below, Respondent was fatally prejudiced by this error. Thus, reversal is mandated.

## ARGUMENT

## POINT I

THE SUCCESSIVE ASSIGNMENTS OF COUNTY COURT JUDGE WILD WERE NOT PROPER TEMPORARY ASSIGNMENTS UNDER ARTICLE V, § 2(B) OF THE FLORIDA CONSTITUTION AND FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.050(B)(4).[2]

A. Jurisdiction

The jurisdictional issue is presented in a summary form in recognition that the majority of this Court has specifically or impliedly rejected this jurisdiction challenge in Wild v. Dozier, 21 Fla. L. Weekly S57 (Fla. Feb. 8, 1996) and thus detailed briefing would be futile. However, Respondent does urge reconsideration of these arguments as well as those set forth in Justice Kogan's cogent and succinct partial dissent.

Dozier maintains that under the facts and circumstances of this particular case, the decision of the Fourth District Court of Appeal which reversed his convictions must be affirmed. Dozier v. State, 662 So. 2d 382 (Fla. 4th DCA 1995) (A-1). Circuit Court Judge Wild lacked jurisdiction to preside over the instant felony prosecution because his assignment to half of the felony cases in Indian River County was not temporary. The other half of the felony cases at the time were assigned to County Court Judge Balsiger. Consequently, Dozier had no chance of having his case heard by a duly elected circuit judge since the jurisdiction of all felony cases had been unconstitutionally placed in the hands of two circuit court judges.

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[2] Article V, Section 2(b) of the Florida Constitution provides that the Chief Justice of the Supreme Court may delegate to the Chief Judge of a judicial circuit the power to assign judges "temporary duty" to any court for which they are qualified in their respective circuit. Article V, section 10(b) states, in pertinent part:

> 10(b) Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.

Florida Rule of Judicial Administration 2.050(b)(4) recognizes that an assignment is "temporary" if it is not permanent. See Crusoe v. Rawls, 472 So. 2d 1163, 1165 (Fla. 1985).

Wild v. Dozier, 21 Fla. L. Weekly S57, 59 (Fla. Feb. 8, 1996) (Kogan, J. concurring in part and dissenting in part).

The present cause was set before the Honorable Joe Wild, one of two county court judges successively and repeatedly assigned by the Chief Judge of the Circuit to circuit court duties in the Nineteenth Judicial Circuit, Indian River County (R 32-37). Prior to trial,Dozier moved to disqualify Judge Wild, alleging that his assignment was improper (R 32-37). Judge Wild entered an order denying the motion to disqualify which is virtually identical to that entered by Judge Wild and invalidated by the Fourth District Court sitting en banc in Dozier v. Honorable Joe A Wild (Case No. 94-1104), 659 So. 2d 1105 (Fla. 4th DCA 1995) (R 38-39). Trial counsel petitioned for writ of prohibition to the Fourth District Court of Appeal which was denied June 21, 1994 (T 3).[3] Dozier unsuccessfully renewed his motion to disqualify the trial judge based on lack of jurisdiction at the commencement of the trial proceedings and in the motion for new trial (T 13, R 61-63). On direct appeal to the Fourth District, Dozier challenged Judge Wild's jurisdiction. Until this Court's February 8, 1996 decision in Wild v. Dozier, supra, this was the recognized procedure for challenging a trial judge's authority. See Crusoe v. Rawls, 472 So. 2d 1163 (Fla. 1985); Payret v. Adams, 500 So. 2d 136 (Fla. 1986). See also Livingston v. State, 441 So. 2d 1083 (Fla. 1983).[4] The Fourth District held the appointment order to be invalid and, based on Dozier's timely objection, ordered a new trial. Dozier v. State, supra (A-1). In arguing that the Fourth District Court of Appeal did not have the authority to consider Respondent's challenge to Judge Wild's jurisdiction, Petitioner contends, in effect, that this Court has precluded Respondent from any remedy to the present constitutional violation (Petitioner's Brief on the Merits at 6-

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[3] Those proceedings are not part of the record sub judice.

[4] In Livingston this Court considered Livingston's motion to disqualify on direct appeal despite the fact that it had previously denied the writ without opinion. This Court recognized that Livingston was entitled to have his motion for disqualification considered based upon the circumstances of his case. Like Livingston, Dozier renewed the motion for disqualification during subsequent hearings, unquestionably preserving the issue for review on direct appeal.

7). Dozier maintains that the new procedural rule for challenging judicial appointments fashioned in Wild v. Dozier, supra, must not be retroactively applied to Respondent.[5] The retrospective application of this rule will deny relief to Respondent who properly challenged the trial judge's authority via a writ of prohibition to the Fourth District and objection and argument on appeal (B-Appellant's Initial Brief pp. 8-16; Appellant's Reply Brief pp. 4-10).

Such a result would deny Dozier due process of law under the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution and would constitute an *ex post facto* violation under the Article I, section 9 (3) of the United States Constitution and Article I, Section 10 of the Florida Constitution. See Miller v. Florida, 482 U.S. 423 (1987) (retrospective application of sentencing guidelines violates ex post facto clauses); Weaver v. Graham, 450 U.S. 24 (1981) (ex post facto clauses prohibited retrospective application of statute reducing availability of gain time); Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) (ex post facto law extended to judicial enlargements of criminal statutes which alter the situation of a party to his disadvantage).

In Dugger v. Williams, 593 So. 2d 180 (Fla. 1991), this Court dealt head on with the question whether a procedural change may offend the prohibition against *ex post facto* laws:

> In Florida, a law or its equivalent violates the prohibition against ex post facto laws if two conditions are met: (a) It is

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[5] The following paragraph of Wild v. Dozier pertains to the new procedural rule:

> However, we cannot ignore the fact that County Judge Balsiger has now been assigned the other half of the felony cases in Indian River County. To permit this practice to continue would have the effect of permanently usurping a major segment of circuit court work within the county. Therefore, we direct chief Judge of Indian River County to make the appropriate judicial reassignments in order that the county judges not be assigned to more than half of the felony cases within the county. However, in view of the fact that Judge Wild and Judge Balsiger have each been sitting on felony cases pursuant to valid orders, this directive shall not be construed to mean that they have been without jurisdiction to hear these cases. (Emphasis supplied).

Id., 21 Fla. L. Weekly at S58.

> retrospective in effect; and (b) It diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. There is no requirement that the substantive right be "vested" or absolute, since the ex post fact provision can be violated even by the retroactive diminishment of *access* to a purely discretionary or conditional advantage (citations omitted) (Emphasis in original).

Id. at 181.

Dugger v. Williams went on to observe:

> As is obvious from this discussion, it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an ex post facto violation also is possible, even though the general rule is that the ex post facto provision of the state constitution does not apply to purely procedural matters.

Id.

Dugger v. Williams concluded that the test for violation of a procedural change is whether there is a "substantial substantive disadvantage that is being retrospectively applied". Beyond question, the retrospective application of the new procedural rule would leave Dozier at a substantial substantive disadvantage. Simply put, he would be without any remedy.

More recently, this Court has applied principles of due process of law to determine the extent of retroactivity. See State v. Brown, 655 So. 2d 82, 84 (Fla. 1995) (applying fairness test to determine extent of retroactivity) and State v. Snyder, 21 Fla. L. Weekly S70 (Fla. February 15, 1995). In Snyder, supra, this Court held that the defendant was entitled to rely on existing case law that he was not a "convicted felon" for purposes of section 790.23 while his predicate felony was pending on appeal. During the pendency of the appeal, this Court judicially enlarged the scope of liability under the statute which would include the defendant if retroactively applied. This Court concluded that retroactive application of this judicial enlargement would violate Snyder's due process rights. State v. Snyder, supra, 21 Fla. L. Weekly at S70-71. See also Bouie v. City of Columbia, supra.

Turning to the present case, the same principles of due process of law this Court applied to Brown and Snyder must be applied to Dozier. Dozier did everything he could to assert his constitutional right to be tried by a duly qualified circuit court judge. At trial and on direct

appeal, he utilized every available vehicle in effect at the time to enforce this right. The record indisputably establishes that Dozier property asserted his right under existing case law. To apply this Court's unforeseeable procedural rule change to him would disadvantage Dozier substantially because he would be denied the substantive right to enforce his constitutional right to a duly qualified circuit court judge. Dozier urges this Court not to apply its procedural rule retroactively to him and to reject Petitioner's suggestion to do so. Principles of fairness and due process demand nothing less.

Respondent next takes issue with Petitioner's alternative claim that even if the District Court had jurisdiction, the pre-trial denial of Dozier's writ of prohibition should have precluded relief on plenary appeal (Petitioner's Brief on the Merits at 8, fn. 2). This Court's own decision in Livingston v. State, supra, discussed above, as well as Barwick v. State, 660 So. 2d 685 (Fla. 1995) upon which Petitioner mistakenly relies, indicate otherwise.[6]

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[6] In Barwick, supra, this Court held that because the order by this Court did not indicate on what grounds a petition for writ of prohibition was denied, it was not a decision on the merits. Moreover, this Court clearly indicated that it did not intend that a denial of a petition for a writ of prohibition, without more, serve as a ruling on the merits. Similarly, since the denial of Dozier's writ of prohibition in the Fourth District was without opinion, it could not serve as a ruling on the merits. Indeed, the Fourth District itself rejected Petitioner's argument, raised sub judice, that the denial with a citation to Wallace v. State, 609 So. 2d 64 (Fla. 4th DCA 1992) was a ruling on the merits. In Dozier v. Wild, 659 So. 2d 1103, 1104 (Fla. 4th DCA 1995), the Fourth District specifically addressed the issue as follows:

> Paragraph 7 of Judge Wild's order apparently refers to comments made in a special concurring opinion Wallace v. State, 609 So. 2d 64, 65 (Fla. 4th DCA 1993) (Anstead, J., concurring). It should be noted that Judge Wild was the lower court judge whose decision was reviewed in Wallace; it is understandable that he would ascribe the effect he gave to the majority's per curiam opinion in that case. The majority opinion in Wallace, however, was silent on the issue concerning the assignment of the county judge; a reader of that opinion would have no clue that the issue had ever been raised.
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> It is axiomatic that a special concurring opinion has no binding effect as precedent and represents only the person views of its author. [citations omitted]. The majority opinion is authority only for the issues raised and discussed within it. See, Greene v. Massey, 384 So. 2d 24 (Fla. 1980).

In light of the foregoing, Barwick, supra, does nothing to further Petitioner's claims. Likewise, Petitioner's citation to Arp v. State, 547 So. 2d 212 (Fla. 4th DCa 1989) is factually and procedurally distinguishable. Arp, supra, involved the granting of a writ of prohibition

Petitioner's final claim in the alternative that even if the District Court had jurisdiction to consider Respondent's claims Petitioner failed to timely present this issue, rings hollow in light of the clear record to the contrary.[7] Petitioner's reliance upon Card v. State, 497 So. 2d 1160 (Fla. 1986) and Stein v. Foster, 557 So. 2d 861 (Fla. 1980) in this regard is misplaced. In neither Card, supra, nor Stein, supra, did the defendant as here, timely challenge the jurisdiction of the presiding trial judge. Card, supra, 497 So. 2d at 1173; Stein, supra, 557 So. 2d at 882.

Nor do any of the additional cases cited by Petitioner support its idea Judge Wild somehow had jurisdiction over the instant cause because he was a de facto judge (Petitioner's Brief on the Merits at 8-10). E.g. Willie v. State, 600 So. 2d 479 (Fla. 1st DCA 1992); Kruckenberg v. Powell, 422 So. 2d 479 (Fla. 1st DCA 1992); Grossman v. Selewacs, 417 So. 2d 728 (Fla. 1980); In Re Peterson, 364 So. 2d 98 (Fla. 4th DCA 1978); In Re Bentley, 342 So. 2d 1045, 1046 (Fla. 4th DCA 1977); Banker's Life and Casualty Co. v. Gaines Construction Co., 191 So. 2d 478 (Fla. 3d DCA 1966); Dade County v. Transportes Aereos Nacionales, 298 So. 2d 570, 572 (Fla. 3d DCA 1974). Not one of the foregoing cases involves a county court judge sitting as a circuit court judge. Rather, these cases involve such matters as the divisional assignments of particular duly authorized elected or appointed circuit court judges, e.g., Peterson, supra, Grossman, supra; Kruckenberg v. Powell, supra; or the necessity to exhaust administrative remedies in absence of a timely raised challenge to tax assessments, e.g., Dade County, supra. Such circumstances are readily distinguishable from

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and written order remanding the case for a hearing. Unlike Arp, in this case there was neither a written opinion on the merits or an order granting the writ and setting forth the nature of the relief. This case is thus inapposite as well.

[7] Petitioner's patina of "void" versus "voidable" notwithstanding, its position is really that Dozier failed to timely raise and litigate this jurisdictional challenge, citing Card v. State, 497 So. 2d 1169, 1173 (Fla. 1987) (stating an objection to avoid judgment may be lodged at any time while an objection to a voidable judgment must be made immediately) (Petitioner's Brief on the Merits at 8-10). This is a non-issue, since Dozier, beyond question immediately and timely objected to the jurisdiction of Judge Wild and asserted his right to be tried by a duly elected or appointed circuit court judge under the existing case law. Crusoe v. Rawls, supra; Payret v. Adams, supra.

those at bar. Unlike the duly authorized circuit court judges in the foregoing cases, Judge Wild was not a duly elected or appointed circuit court judge. Given this critical distinction, Petitioner's claim remains unavailing.

The fact remains that the record sub judice establishes that two county court judges, Judge James Balsiger and Judge Wild, have been designated by the chief judge of the circuit to preside over all felony cases in Indian River County in 1994 (R 35-37). In his order, Judge Wild states that he has been assigned to handle one half of all Indian River felony cases since July 1, 1990, through eight successive assignments (R 38). It is relevant for this Court to recognize that Judge Balsiger had also been successively and repeatedly appointed to handle entire classes of circuit court cases since January 1, 1994. Both Judge Wild and Judge Balsiger had regular circuit court caseloads. These county judges were not assisting the circuit court on an "as needed" or "temporary" basis. The county judges had effectively served as circuit court judges for the entire class of cases to which they were appointed.

Respondent contends that the assignments at issue here suffered the same constitutional deficiencies as those disapproved by this Court in Payret v. Adams, 500 So. 2d 136 (Fla. 1986).[8] In Payret, this Court held invalid successive and repetitive assignments that individually were valid but effectively created a de facto permanent circuit judge by administrative order. Id., 500 So. 2d at 138. (Wild v. Dozier, supra, at S59 (Kogan, J. concurring in part and dissenting in part). Similarly the assignment at issue here is a de facto permanent assignment of a county court judge to circuit judge duties in violation of article V,

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[8] In considering this difference, the Fourth District, in Dozier v. Wild, 659 So. 2d 1103, 1105 (Fla. 4th DCA 1995) stated:

> It would require of us similar judicial legerdemain to characterize as temporary these virtually indistinguishable continuous assignments of county judges to preside over all felony cases in Indian River County for what appears to be longer that the last four (4) years. We see no validation in the notion that two county court judges have been used rather than one, or that the assignments have been in six (6) month periods rather than one (1) year. Dividing the operative facts in Payret by two simply does not avoid its essential holding and thus yield validity.

sections 2(b) and 10(b) of the Florida Constitution. Id.[9] The appointment of a second county judge to preside over the other half of felony cases effectively redesignated circuit jurisdiction by administrative order, in violation of Crusoe v. Rawls as well as Rules 2.050(b)(4), Rules of Judicial Administration.

Significantly, this Court in Dozier v. Wild, supra, acknowledges this deficiency stating that to "permit this practice to continue would have the effect of permanently usurping a major segment of circuit court work within the county." Dozier v. Wild, supra, 21 Fla. L. Weekly at S58.

Applying this Court's analysis in Wild v. Dozier to the present case, the decision of the Fourth District must be affirmed. This remedy is proper because at the time Dozier's felony case was assigned, he had no chance of having it heard by a duly elected circuit judge. Instead, jurisdiction over all felony cases rested - unconstitutionally - in the hands of two county court judges. Consequently, the decision of the Fourth District reversing the denial of Dozier's motion to disqualify must be affirmed.

In addition, this remedy is proper under the particular facts and circumstances of this case. Wild v. Dozier, supra, involves the same county court judge, Judge Wild, the same defendant, Robert Lee Dozier, the same administrative orders, the same period of time involved in the temporary successive assignments of Judge Wild and Judge Balsiger to circuit court, and virtually identical orders denying the motion to disqualify (R 32-39). In Wild v. Dozier, this Court denied the petition for prohibition and directed the chief judge to ensure that county judges not be assigned to more than half of the felony cases within the county. Consequently, the administrative order which unconstitutionally redesignated felony jurisdiction in each of Dozier's cases will not be operative when Wild v. Dozier is remanded to the trial court. Thus, when Dozier returns to the trial court in that case, he will not be denied the

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[9] As recognized by the dissenters in Wild v. Dozier, while the successive assignments were limited to the six-month terms suggested by this Court in Crusoe v. Rawls, supra, the fact that they were automatic effectively gave a county court judge jurisdiction over half of all felony cases arising in Indian River County for at least four years. Wild v. Dozier, supra, 21 Fla. L. Weekly at S59 (Kogan, J. concurring in part and dissenting in part).

chance of having his case heard by a duly elected circuit judge. Given the fact that the very same invalid administrative order, the very same trial judge, and the very same time frame occurred in this case, the same result must obtain for Dozier in the present case. Wright v. State, 604 So. 2d 1248, 1249 (Fla. 4th DCA 1992) (stating that diametrically opposite results involving similarly situated defendants are "manifestly unjust, unfair and confounds our search for uniformity.") Accordingly, the decision of the Fourth District must be affirmed so that Dozier can return to the trial court for a new trial with the same opportunity to have his case heard by a duly elected circuit judge that he will have as a result from this court's decision in Wild v. Dozier. Any other remedy would be manifestly unjust.

B. Remedy

In Wild v. Dozier, all seven members of this Court recognize that the administrative orders in effect between January 1, 1994 and the issuance of its February 8, 1996 were illegal. As the majority opinion states:

> ...[W]e cannot ignore the fact that County Judge Balsiger has now been assigned the other half of the felony cases in Indian River County. To permit this practice to continue would have the effect of permanently usurping a major segment of circuit court work within the county. Therefore, we directed the Chief judge of Indian River County to make the appropriate judicial reassignments in order that county judges not be assigned to m ore than half of the felony cases within the county. However, in view of the fact that Judge Wild and Judge Balsiger have each been sitting on felony cases pursuant to valid orders, this directive shall not be construed to mean that they have been without jurisdiction to hear these cases.

Id., 21 Fla. L. Weekly at S58 (emphasis added).

Similarly, the dissent states:

> [T]he assignment at issue here...is a de facto permanent assignment of a county court judge to circuit judge duties, in violation of Article V, sections 2(b) and 10(b) of the Florida Constitution.
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> * * *
>
> ...Moreover as of January 1994, when a second county judge was assigned to preside over the other half of felony cases arising in Indian River County, circuit court jurisdiction over felony cases

> effectively was redesignated by administrative order contrary to this court's decision in Crusoe. The majority recognizes as much when it states that 'to permit this practice to continue would have the effect of permanently usurping a major segment of circuit court work within the county.' Majority op. at 10.

Wild v. Dozier, supra, 21 Fla. L. Weekly at S59 (Kogan, J. dissenting in part).

The remedy pronounced in Wild v. Dozier requires that the chief judge of the Nineteenth Judicial Circuit discontinue the illegal assignments placing half of the felony cases in the hands of Judge Wild and half of the felony cases in the hands of Judge Balsiger. Consequently, Dozier will return to the trial court where he will benefit from this holding. He will have the opportunity to be tried by a duly constituted circuit court judge.

However, in the present case, Dozier will be denied this opportunity because this Court has decided that Judge Wild was "not without jurisdiction" to hear his case. Such an application of this Court's decision in Wild v. Dozier would effectively deny any remedy to Respondent despite the fact that he timely objected and properly preserved his jurisdictional challenge under the recognized procedure pre-trial, during trial, post-trial, on direct appeal to the Fourth District and now before this Court. See Smith v. State, 598 So. 2d 1063, 1067 (Fla. 1992). To deny Dozier a remedy in this case would violate his rights to equal protection and due process of law. Article I, § 9, 16, Fla. Const.

Such principles of fairness and equal treatment under the law embodied in the due process and equal protection clauses of the Florida Constitution have compelled this Court to adopt an even-handed approach with respect to retrospective application of decisions to nonfinal cases. As this Court stated in Smith v. State, supra:

> Any rule of law that substantially affects the life, liberty or property of criminal defendant must be applied in a fair and evenhanded manner. Art. I, sec. 9, 16, Fla. Const. "[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review." Griffith, 479 U.S. at 323, 107 S. Ct. at 713. Moreover, "selective application of new rules violates the principle of treating similarly situated defendants the same" because selective application cases "'actual inequity'" when the Court "'chooses which of many similarly situated defendants should be the chance beneficiary' of its new rule." Id. [citation omitted].

Smith v. State, supra, 598 So. 2d at 1067.

In Smith this Court held "...any decision of this Court announcing a new rule of law or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final....To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review. Id., (citations omitted). This Court recently reaffirmed the principles of Smith in State v. Brown, 655 So. 2d 82 (Fla. 1995). In Brown, this Court extended the rule announced in Smith to Brown in light of the ability of similarly situated defendants in the direct appeal "pipeline" to take advantage of the new rule of law. See also State v. Snyder, supra and Bouie v. City of Columbia, supra. The same principles of fairness this Court applied in Brown and Snyder must be extended to Dozier here.

To extend the remedy announced in Wild to Dozier can only reinforce the integrity of the judicial process by ensuring uniformity and fairness to similarly situated defendants. Such an extension of the holding in Wild to pipeline cases would affect only a limited number of defendants. Only that small minority of defendants who at trial and on appeal properly challenged the January 1994 through February 8, 1996 administrative orders whose cases were in the direct appeal "pipeline" would be able to take advantage of the holding in Wild. Smith v. State, supra; State v. Brown, supra.

Respondent urges this Court to extend its holding in Wild v. Dozier to his case so that he is not denied a remedy for the recognized jurisdictional deficiency here. The fact remains that Dozier did not have the chance to be tried by a circuit court judge. This is the very wrong this Court in Wild corrected. Dozier is entitled to the same remedy in this case.

Accordingly, the decision of the Fourth District reversing the case for a new trial must be affirmed.

## ARGUMENT

## POINT II

RESPONDENT'S CONVICTION FOR BURGLARY OF A STRUCTURE VIOLATES DUE PROCESS WHERE THAT OFFENSE IS UNSUPPORTED BY THE EVIDENCE.

### A. Introduction

Respondent was tried for and convicted of the offense of burglary of a structure in violation of Section 810.2(1), Fla. Stat. (1993) (R 4-5, 57; T 72-73, 232). Because the proof adduced by the state indisputably demonstrates that the burglary occurred in a conveyance and not a structure (R-Index, state's exhibit #1), Respondent maintains that his adjudication and sentence for burglary of a structure is a violation of due process of law. In the Interest of C.T., 582 So. 2d 1245 (Fla. 4th DCA 1991); Rose v. State, 507 So. 2d 630 (Fla. 5th DCA 1987). The Fourth District erroneously concluded that the disparity between allegations and proof could not have misled Respondent nor subjected him to reprosecution (A 4). This conclusion is incorrect. Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948); Rose v. State, supra; In the Interest of C.T., supra. In so concluding, the District Court's reliance upon Grissom v. State, 405 So. 2d 291 (Fla. 1st DCA 1981) and Barber v. State, 243 So. 2d 2 (Fla. 2d DCA 1971) is misplaced.

Before discussing the merits of the due process attack, Respondent first submits that this Court has jurisdiction over both this challenge as well as his challenge to the jury instruction given in response to a jury question [Point III, infra], notwithstanding the fact that this Court's jurisdiction was based upon the certified question of great public interest presented in Dozier v. Wild, 659 So. 2d 1103 (Fla. 4th DCA 1995) which involves only the constitutional issue. [Point I, supra]. This Court has long held that once its jurisdiction is invoked from the district court of appeal by certified question or otherwise, this Court has discretionary review jurisdiction not merely over the certified question of great public importance but of the entire decision of the district court of appeal. Zirin v. Charles Pfizer V. & Co., Inc., 128 So. 2d

594, 596 (Fla. 1961); see also Feller v. State, 637 So. 2d 911 (Fla 1994); Jacobson v. State, 476 So. 2d 1282 (Fla. 1985).

More recently, this Court has expanded upon its discretionary review jurisdiction once that jurisdiction has attached on any of the constitutional bases triggering its review jurisdiction ab initio. In Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982), this Court stated:

> We have jurisdiction, and, once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case.

Citing Zirin, this Court in Savoie explained "why, once it has jurisdiction, this Court should exercise its jurisdiction and dispose of the entire cause when the issues are properly before it." 422 So. 2d at 312. Among the factors favoring the exercise of jurisdiction to review other issues are the avoidance of piecemeal determination of a case, the fact that the other issues have been briefed and argued in the court below, and the issue sought to be reached would be "dispositive of the case." 422 So. 2d at 312. It is submitted that these factors are present in the case at bar. For example, the other issues[10] were briefed and argued below by the parties and the issue sought to be reached would be dispositive. [B-Appellant's Initial Brief at 16-24; Appellee's Answer Brief at 9-14; Appellant's Reply Brief at 10-19).

Moreover, in its opinion the Fourth District thoroughly considered these issues, mindful of this Court's review (A 1-4). In reversing Dozier's conviction based upon his challenge to Judge Wild's jurisdiction, the Fourth District stated:

> We therefore reverse his conviction, but since we are mindful that our supreme court may disagree, we address Dozier's other arguments.

Dozier v. State, 662 So. 2d 382 (Fla. 4th DCA 1995) (A 1-2). Respondent urges this Court to review these two issues raised below, in the Fourth District's opinion and at bar.

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[10] See Point II and Point III infra.

B. Merits

Respondent submits that the Fourth District erred in rejecting his due process challenge to the sufficiency of proof to support his conviction of burglary of a structure. (A 2-4). Respondent was specifically charged in Count I with burglary of a structure (R 4-5). The state's information alleges, in pertinent part:

> ...ROBERT LEE DOZIER on or about March 20, 1994...did unlawfully enter or remain in a structure, the property of Donald Abernathy...with the intent to commit an offense therein...

(R 4).

Evidence at trial established that site of the burglary was a pick-up truck with a trailer which contained landscape maintenance equipment (T 35). Abernathy, the owner of the company, Barrett, the employee who drove the pick-up (trailer attached) to the scene, and Vanzonneveld, the witness, all of whom testified for the prosecution, specifically referred to a trailer (e.g. T 35, 38, 51-52). The prosecutor did so as well in both opening and closing argument (T 22, 175). A photograph in the record sub judice depicts a pick-up truck with attached trailer on wheels (R-Index, state exhibit #1). Nonetheless, the state proceeded on the theory that the trailer was a structure (T 181). At the close of the state's case defense counsel unsuccessfully moved for judgment of acquittal (R 148-149).

During the charge conference, defense counsel again challenged the sufficiency of the evidence:

> MR. GARLAND [defense counsel]: Your Honor, the defense position...is that we're charged with burglary of a structure, the information was never amended at any point, and we suggest that the proof had to conform with the allegations and this case goes to the jury on the allegations which are burglary of a structure, and I have authority to support that.
>
> THE COURT: Well let me ask you about it, I mean burglary of--it says burglary in the statute, and then it just defines what you can break into either a structure or a conveyance. Why couldn't you just substitute conveyance for structure, as you would any other charge that has alternatives?
>
> MR. GARLAND: Well, because the state elects one of multiple ways to commit an offense, then by implications they're not alleging the others, and the state's ability to convict is limited to the allegations.

(T 167-168) (emphasis added).

* * *

> THE COURT: ...I think, of course, the...question being, even if they convict him of burglary of a structure, is that even going to hold up anyway?
>
> MR. GARLAND: Well, that's a different question, there's certainly no evidence to support it.

(T 209) (emphasis added).

In closing argument to the jury, defense counsel vigorously contested the sufficiency of proof of a structure and argued that the jury must not convict Respondent of an offense which wasn't charged (T 183). The state argued to the jury that the trailer was a structure, referring to it as a "mobile shed" with a roof over it (T 181). Post-trial, Respondent moved in arrest of judgment, maintaining that the state failed to prove that a structure had been burglarized (T 223-224). The trial judge denied the motion while noting that "...in the opinion of the Court it was more properly burglary of a conveyance." (T 224). This was prejudicial error.

As stated by the United States Supreme Court in Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 517, 92 L. Ed. 644 (1948):

> No principle of procedural due process is more clearly established than that notice of the specific charge and the chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal...
>
> * * *
>
> ...It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

See also Perkins v. Mayo, 92 So. 2d 641 (Fla. 1957). Moreover, as the courts have recognized, conviction of a crime not charged constitutes fundamental reversible error. In the Interest of C.T., supra; see also Rose v. State, supra.

It is axiomatic that where an offense may be committed in various ways, the evidence must establish it was committed in the manner alleged in the information. Long v. State, 92

So. 2d 259, 260 (Fla. 1957). Here, Respondent was charged with burglary in violation of Section 810.02(1), Fla. Stat. (1993).[11] The statute in pertinent part, provides that the offense can be committed in one of two ways: by "...entering or remaining in a structure..." or by "...entering or remaining in a conveyance...." Id. The state charged Respondent with burglary of a structure (R 4-5). By his plea of not guilty, Respondent exercised his right to put the state to its proof.

When the jury was sworn, jeopardy attached to the crime of burglary of a structure (T 15). Respondent was not placed in jeopardy of a conviction of burglary of a conveyance, and Respondent should not have been convicted of that uncharged crime. Respondent maintains that the proof adduced by the state indisputably demonstrates the burgled locale was indeed a conveyance (R-Index, state exhibit #1). The trial court's mistaken idea that this distinction was harmless cannot be squared with the fundamental principles of due process of law. Cole v. Arkansas, supra. Respondent is presumptively prejudiced by conviction of a crime for which he was not charged. Article I, s. 16, Fla. Const.; Amendments V, VI, XIV, United States Constitution. Rose v. State, supra.

Likewise, Petitioner's position at trial and on appeal that evidence supports proof of a structure is eviscerated by the plain language of Section 810.011(3), Fla. Stat. (1993) (T 181). (B-Appellee's Answer Brief at 11).

Section 810.011, Fla. Stat. (1993), includes the following definitions:

> (1) "Structure" means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof.
>
> * * *
>
> (3) "Conveyance" means any motor vehicle, ship vessel, railroad car, trailer, aircraft, or sleeping car...

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[11] The jury was instructed as to burglary of a structure (T 201-202). Point III, infra.

The plain language of section 810.11(3) states that a trailer is a conveyance. A trailer, like a motor vehicle, sleeping car, or railroad car, may have a roof,[12] yet it is encompassed within the statutory definition of conveyance. Thus, the plain meaning of the statute precludes the state's interpretation below. Van Pelt v. Hilliard, 75 Fla. 792, 798-799 (1918) ("...[t]he [l]egislature must be understood to mean what it plainly expressed"); see also Adams v. Culver, 111 So. 2d 665 (Fla. 1959) (holding the specific statute controls over the more general).

A burglary of a conveyance is a distinctly different event and offense from a burglary of a structure. E.g. Palmer v. State, 416 So. 2d 878 (Fla. 4th DCA 1982) aff'd in part, rev'd in part, 438 So. 2d 1 (Fla. 1983) (robbery of thirteen different mourners are separate crimes); Jacob v. State, 651 So. 2d 147 (Fla. 2d DCA 1995) (conviction of a different crime than that charged in the information against certain named victim where evidence at trial referred to a different named victim fundamental error because evidence does not conform to proof); Rose v. State, supra; see also Brennan v. State, 651 So. 2d 244 (Fla. 3d DCA 1995) and Ferguson v. State, 633 So. 2d 1183 (Fla. 4th DCA 1994).

Here, the state charged burglary of a structure. Proof of a structure is an essential element the state is required to prove. Fla. Stnd. Jury Instr. (Crim). However, the state adduced evidence as to burglary of a conveyance. Simply put, the prosecution alleged a crime and at trial failed to prove it. Otherwise stated, the allegata and probata sub judice do not correspond. This constitutes a fatal insufficiency in proof and the motion for judgment of acquittal and/or the motion in arrest of judgment should have been granted. See e.g. Rose v. State, supra (reversing conviction for attempted robbery where state did not prove offense as to originally named victim and was erroneously permitted to amend the information; appellate court finds that there was a fatal variance between the original allegations and proof); In the Interest of C.T., supra (reversing conviction of disorderly intoxication where petition alleged

[12] A trailer is defined by Webster's New World Dictionary (2d ed.), in pertinent part, as "...a cart, wagon or large van, designed to be pulled by automobile, truck or tractor for hauling freight, animals a boat, etc...."

attempted battery on a law enforcement officer; finding disorderly intoxication was not within the scope of the petition and error was fundamental); Warren v. State, 635 So. 2d 122 (Fla. 1st DCA 1994) (reversing conviction for grand theft where it was not clear what property, an essential element of grand theft, was taken, finding the state did not prove the allegations in the information); Jacob v. State, supra.

The foregoing cases clearly govern at bar. The District Court's reliance upon Grissom v. State, supra, and Barber v. State is misplaced. In contrast to the cause at bar, these two cases involved variances between allegations and proof which did not mislead the defendant or subject him to reprosecution. For instance, the charge in Grissom was unlawful taking of a "cow" yet proof at trial showed the unlawful taking of a male calf. There, the defendant in contrast to Respondent, admitted the taking and Grissom's counsel repeatedly referred to the male calf as a "cow". The First District concluded there was no prejudice to the defense. Similarly in Barber v. State, supra, the proper address of a burglary was shown in the information as well as in a letter to the defense following the bill of particulars but a different address was shown in the bill of particulars. Testimony at trial conformed to the information and letter. Unlike the present case, there was no indication that Barber was prejudiced in the preparation or presentation of his case. Therefore, the Second District found no prejudice. Neither Barber nor Grissom defended upon the discrepancy between the charge and proof. In contrast, Respondent was fatally prejudiced here because his theory of defense hinged on the state's inability to prove the offense charged (T 183, 223-224).

The District Court's conclusion that Respondent did not show prejudice from the failure of the state's proof ignores the fact the Respondent defended on the state's inability to prove that the burgled trailer was a structure (T 167-168, 183, 209, 223-224). Beyond question, Respondent had the right to hold the state to its burden of proof. See Stang v. State, 421 So. 2d 147 (Fla. 1981) (holding it was prejudicial error to allow the state to amend the statement of particulars after trial commenced). In Stang, supra, this Court recognized the defendant's right to hold the state to its burden and the resulting prejudice where the state was permitted

to circumvent this right. Quoting with approval then Judge Anstead's dissent in the Fourth District opinion, this Court stated:

> "...In essence, the state was allowed to allege one date...and then, after proving a different date, was allowed to amend the date to conform to the evidence. And the defendant, having in essence already advised six jurors that his only defense would be the state's inability to prove the date specified, was sent back out to face those same six jurors, his "defense" now obviously in shreds..." (Anstead, J., dissenting).

Id. 421 So. 2d at 151. Here, as in Stang, supra, Respondent's right to due process cannot be violated to cover the state's mistakes. Id., 147 So. 2d at 151 (Ehrlich, Justice, specially concurring).

The violation of Respondent's constitutional rights to due process and his right to be informed of the nature and cause of the accusation against him is fundamental error and is presumptively prejudicial. Rose, supra. Accordingly, Respondent's convictions must be reversed.

## ARGUMENT

## POINT III

THE TRIAL COURT ERRED IN ITS SPECIAL REINSTRUCTION TO THE JURY AS TO STRUCTURE BECAUSE IT WAS INACCURATE AND RELIEVED THE STATE OF ITS BURDEN OF PROOF ON AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED.

Respondent maintains that the trial court's elaboration upon the standard jury instruction of a structure was improper because it relieved the state of its burden of proof as to structure and gave the jury unbridled discretion as to the law they must apply. Because Respondent's defense was predicated upon the state's inability to prove this element of the offense charged, the resulting prejudice was harmful error.

Respondent was charged with an convicted of burglary of a structure in count I of the information (R 4-5, 57, T 217-218). Section 810.02, Fla. Stat. (1993), provides in pertinent part:

> (1) "Burglary" means entering or remaining in a structure of a conveyance with the intent to commit an offense there....

(emphasis added).

Section 810.011, Fla. Stat. (1993), includes the following definition:

> (1) "Structure" means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof....

The Florida Standard Jury Instruction for the offense of burglary incorporates the statutory definition in a more expanded definition:

> Definitions; give as applicable, F.S. 810.011(1)
>
> "Structure" means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.

During the charge conference, the judge stated "...the state has charged burglary of a structure, it sounds like its burglary of a conveyance" (T 167), and wanted to substitute "conveyance" for "structure" (T 168). The defense asserted its right to hold the state to proof of its allegations (T 167) (Point II, supra). The state at no point during the proceedings moved

to amend the information and requested that the trial judge instruct the jury pursuant to the standard instruction on "structure" (T 202). The jury was then instructed as to burglary of a structure (T 201-202).

Shortly after retiring to deliberate, the jury sent out the question, "Is a mobile shed a structure?" (T 206). After some discussion about how to respond, the trial judge indicated that he would read the instruction again and then add that the jury should apply the common every day definition of a building (T 209). The defense objected because it gave the jury discretion absent proper guidelines (T 210-211). The following colloquy occurred:

> THE COURT: Well, that's what they're asking, that's their question, and I think I can answer it by saying just your--there's no special definition special legal definition for building, it's what you normally perceive a building to be.
>
> MR. GARLAND: Judge, the only problem with that is that it gives the jury some discretion, which brings into question the constitutionality of that kind of definition.
>
> THE COURT: Well, I mean if you have a definition of what building is.
>
> MR. GARLAND: Well, I can define in terms of what it's not and the statute tells us what it's not and this is covering the same ground I just covered, I don't want to do that, but it brings up an issue which is we just can't let them go in there and reach any decision they want, we've got to give them proper guidelines.

(T 210-211) (emphasis added). After the court asked the jury for clarification of their question the foreperson "[is] there a definition that is more encompassing than what Your Honor gave?" (T 213). During a brief sidebar, the judge stated:

> I think what I said first, just tell them, read the definition again and tell them that it should be taken as (indiscernible) it's not common sense is not specially definition [sic], we already talked about.
>
> You made your points on the record....

(T 214). The judge then reinstructed the jury as follows:

> THE COURT: Let me answer it this way, and just remind you before I do that, and basically I am in charge of giving you the law, and explaining that to you, so if you have specific questions about that, I will be happy to answer that for you.

> As far as the factual, making a factual determination, that's what you all have to do, you know, and apply it to the law.
>
> Let me read to you what structure means again pursuant to the Florida Statutes.
>
> Structure means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.
>
> That's the legal definition of structure. The other words in that definition, such as building which it says, structure means any building, should be taken in the normal every day common sense meaning of that term. In other words, there's no special legal definition for building, so you should take building to mean what is normally associated with the term in your every day life.

(T 214-215) (emphasis added). The jury retired to deliberate and its request for a dictionary was denied (T 215-217). The jury then returned a verdict finding Respondent guilty as charged of burglary of a structure (T 217-218).

The trial judge's elaboration upon the standard instruction here is improper because it effectively relieves the state of its burden of proof as to structure and gives the jury unbridled discretion as to the law they must apply. Guzman v. State, 644 So. 2d 996, 1000 (Fla. 1994); Yanes v. State, 418 So. 2d 1247 (Fla. 4th DCA 1982).

To be sustained on appeal, jury instructions must include a "...sufficient statement of the statutory elements of the substantive offense charged to enable the jury to arrive at a verdict based upon an accurate statement of the law they are to apply to the evidence before them." Shimek v. State, 610 So. 2d 632, 638 (Fla. 1st DCA 1992) (citations omitted) (emphasis added). See also Sigler v. State, 590 So. 2d 18 (Fla. 4th DCA 1991). In deviating from the standard jury instruction, the trial judge here failed to accurately instruct the jury. See Rule 3.985, Fla. R. Crim. P.

Rule 3.985, Fla. R. Crim. P., provides in pertinent part, as follows:

> RULE 3.985. THE STANDARD INSTRUCTIONS
>
> The forms of Florida Standard Jury Instructions in Criminal Cases published by The Florida Bar pursuant to authority of the court may be used by the trial judges of this state in charging the jury in every criminal case to the extent that the forms are applicable, unless the trial judge shall determine that an applicable form of instruction is erroneous or inadequate, in which event the judge

> shall modify or amend the form or give such other instruction as the judge shall determine to be necessary to instruct the jury accurately and sufficiently on the circumstances of the case; and, in such event, the trial judge shall state on the record or in a separate order the respect in which the judge finds the standard form erroneous or inadequate and the legal basis of the judge's finding.

(emphasis added).

In deviating from the standard instruction defining "structure," the trial court in the case at bar gave no reason whatsoever, either "on the record or in a separate order" setting forth "the respect in which the judge finds the standard form erroneous or inadequate and the legal basis of the judge's finding." (emphasis added). While the standard instructions are not cast in stone, as is indicated in Rule 3.985, Fla. R. Crim. P., it has been observed in the notes accompanying the Standard Jury Instructions in Criminal Cases that the "instructions are intended as a definitive statement of the law on which a jury is required to be instructed." No principled reason was articulated by the trial judge here for deviating from the standard instruction defining "structure" nor did the trial judge set forth any legal basis for his finding. This deviation deprived Respondent of a fair trial and due process of law.

This Court recently albeit in the context of a death penalty case, cautioned trial courts against any deviation from the standard instructions without compliance with Rule 3.985, Fla. R. Crim. P. In Guzman v. State, 644 So. 2d 996, 1000 (Fla. 1994), this Court stated:

> By this opinion, we direct that trial judges fully instruct death penalty juries on all applicable jury instructions set forth in the Florida Standard Jury Instructions unless a legal justification exists to modify an instruction. If a legal need to modify an instruction exists, that need should be fully reflected in the record in accordance with Florida Rule of Criminal Procedure 3.985.

In non-death penalty cases, the requirement to adhere to Rule 3.985's command that the trial judge state on the record or in a separate order the respect in which the judge finds the standards to be erroneous or inadequate, is "mandatory" and failure to comply with the rule can be reversible error. Moody v. State, 359 So. 2d 557, 560 (Fla. 4th DCA 1978). This is especially so in the case at bar where deviation from the Standard Jury Instruction concerned an essential element of the crime charged, and by relieving the state of its burden to prove the

element of "structure" the trial judge effectively relieved the state of its burden of proof on the essential element of the charged offense. See Sarduy v. State, 540 So. 2d 203, 204 (Fla. 3d DCA 1989) (instruction given violated defendant's due process rights "by excusing the state from its burden of proving beyond a reasonable doubt each element of the charged offense.")

Moreover, this deviation by the trial judge from the standard charge calls into question the efficacy of the fact-finding process. Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986); Rodriguez v. State, 462 So. 2d 1175 (Fla. 3d DCA), pet. rev. denied 471 So. 2d 44 (Fla. 1985); see also McKinney v. State, 640 So. 2d 1183 (Fla. 2d DCA 1994). Cummings v. State, 648 So. 2d 166 (Fla. 4th DCA 1994). In telling the jury that there was no special legal definition of a "building", the judge effectively relieved the state of its burden of proof as to "structure", an essential element of the offense. In directing the jury to apply the meaning that is "normally associated with the term in your every day life..." (T 215), rather than the statutory definition the court, however, unwittingly, invited the jury to apply their own definition to a legal term.

As this Court recognized in Hamilton v. State, 574 So. 2d 124 (Fla. 1991), this is the very reason the use of unauthorized materials by the jury is prohibited. In Hamilton, supra, this Court found prejudicial error where the jury was permitted to rely on the common dictionary definition of legal terms. The improper instruction at bar was just as prejudicial, if not more so. Permitting each juror to rely on a "common sense" definition of an essential element gave the jury here unbridled discretion absent any common guidelines. See also Yanes v. State, supra (reversing where an entire book of jury instructions was sent to the jury; finding the jury had access to a number of irrelevant instructions which may have prejudiced the case); and Grissinger v. Griffin, 186 So. 2d 58, 59 (Fla. 4th DCA 1966) (reversing because the jury may have used the dictionary "to torture the words in the court's charge from their true meaning").

Similarly, Respondent was fatally prejudiced because the court's improper instruction essentially left the jury to its own speculation in evaluating whether the state proved the

essential element of "structure". As a result, the factfinding process was undermined and reversible error occurred. Guzman v. State, supra; Hamilton v. State, supra.

Noting "...it may have been better for the trial court to have adhered to the standard instructions under these circumstances," the District Court implicitly recognized that the trial court's deviation from the standard instruction was improper. The District Court nonetheless erroneously concluded that Respondent did not show prejudice from the failure of the state's proof. This conclusion ignores Respondent's argument at trial and on appeal that his legal theory of defense hinged on the state's inability to prove that the burglarized trailer was a structure (T 167-168, 183, 209, 223-223) (B-Appellant's Initial Brief at 24-25; Appellant's Reply Brief at 18-19). Respondent vigorously contested the state's proof as a "structure" in closing argument. Because the trial court's deviation from the standard instruction effectively relieved the state of its burden of proof on the contested element charged, Respondent was fatally prejudiced. It cannot be said beyond a reasonable doubt that the erroneous instruction here did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

Accordingly, this case must be reversed for a new trial.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the decision of the Fourth District reversing for a new trial.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melynda Melear, Assistant Attorney Generals, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 6th day of March, 1996.

ELLEN MORRIS
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