ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,467

THE STATE OF FLORIDA,

Petitioner,

-vs-

LUIS MANUEL ESTEVEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

INTRODUCTION

The respondent, Luis Manuel Estevez, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court. In this brief, the symbol "R" will be used to designate the record on appeal, the symbol "TR" will be used to designate the transcripts of the proceedings, and the symbol "A" will be used to designate the appendix attached to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Luis Estevez was charged with trafficking 400 grams or more of cocaine (R. 1). At trial, Mr. Estevez asserted the affirmative defense of entrapment (TR. 367-371, 404). At the conclusion of the evidence at trial, the judge instructed the jury regarding the elements of trafficking in cocaine as follows:

> Before you can find the defendant guilty of Trafficking in cocaine, the state must prove the following *four elements* beyond a reasonable doubt: 1) LUIS M. ESTEVEZ knowingly purchased or possessed a certain substance, 2) The substance was cocaine or a mixture containing cocaine, 3) *The quantity of the substance involved was 28 grams or more,* 4) LUIS M. ESTEVEZ intended to purchase or possess cocaine.

(TR. 401). Thus, the jury was instructed that the offense of trafficking in cocaine required proof that the quantity involved was at least 28 grams. The jury was then instructed to 1) determine whether Mr. Estevez was guilty of trafficking in cocaine, and 2)if the defendant was found guilty of trafficking, to thereafter *specifically determine* the quantity of the contraband involved as follows:

> What the attorneys and I just did, we went over there and it didn't read well. And we crossed out one sentence to make it easier for you to understand.
>
> Count One reads:
>
> We the jury find as follows: The defendant in this case, and check on one of two things. The defendant is guilty of Trafficking in Cocaine. That's Count One in the information.

> Or the defendant is not guilty. Those are the two choices here.
>
> *And now if you believe that he is guilty of trafficking in cocaine as charged, then you will check A, more than four hundred grams, or B, more than two hundred grams, but less than four hundred grams, or C, more than twenty eight grams but less than two hundred grams...*

(TR. 415).[1] The jury was then provided a verdict form that listed the categories of amounts in grams, with a space next to each category in order for the jury to determine the quantity of cocaine involved in the commission of the offense(R. 65).

The jury returned a verdict finding Mr. Estevez guilty as charged of trafficking in cocaine (R. 65). However, the jury failed to determine the amount of cocaine involved in the commission of the offense, leaving blank all of the lettered spaces listing the different ranges of amounts (R. 65).

The verdict was first received by the trial judge, at which time the judge stated, "[T]he verdict is such that there are no errors or omissions in filling out the verdict form." (TR. 420). The clerk then announced that the defendant was found guilty of trafficking in cocaine, and the jury was dismissed(TR. 420-422). Neither the state nor defense counsel saw the actual verdict form

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[1]In addition to these instructions delivered by the trial judge, the prosecutor also explained the verdict form by arguing during his summation that the jury must 1) find the defendant guilty of trafficking, and *then* 2) determine the amount of cocaine involved by checking off the letter "A" for more than 400 grams, as opposed to the other lettered choices indicating different amounts (TR. 386).

until *after* the jury was discharged, during the sentencing proceedings, when the trial judge realized for the first time that the jury had failed to make a determination as to the amount of cocaine(TR. 423-424). At this time, the prosecutor urged that Mr. Estevez nevertheless be sentenced to the 15 year minimum mandatory term that applies when there is a finding that the defendant is guilty of trafficking 400 grams or more of cocaine (TR. 424). Defense counsel objected and maintained that the ambiguous verdict could not support imposition of the minimum mandatory term (TR. 424-425). Over defense counsel's objection, Luis Estevez was sentenced to serve the minimum mandatory term of 15 years in state prison (TR. 425-426).

On appeal, the Third District Court of Appeal reversed Estevez's 15 year sentence (A. 1-4). Specifically, the District Court held that the trial court erred in imposing the minimum mandatory term in the absence of a jury finding that the amount involved was 400 grams or more (A. 2). However, the District Court certified the following question as a matter of great public importance:

> DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT IS GUILTY OF TRAFFICKING COCAINE IN AN AMOUNT OF 400 GRAMS OR MORE, IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE AMOUNT AT ISSUE EXCEEDED 400 GRAMS, PRECLUDE IMPOSITION OF A MINIMUM MANDATORY SENTENCE UNDER SECTION 893.135?

SUMMARY OF ARGUMENT

In *State v. Hargrove,* this Court established that the jury, not the judge, must make all factual determinations necessary for the imposition of a minimum mandatory sentence, regardless of whether those facts were disputed at trial. Therefore, the certified question in this case-- whether the absence of a jury finding regarding the predicate fact for minimum mandatory sentencing in a trafficking case precludes imposition of the minimum mandatory sentence in the face of uncontroverted evidence- must be answered in the affirmative.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE DEFENDANT'S SENTENCE WHERE THE TRIAL COURT IMPOSED THE MINIMUM MANDATORY SENTENCE FOR TRAFFICKING IN COCAINE IN THE AMOUNT OF 400 GRAMS OR MORE IN THE ABSENCE OF A FINDING BY THE JURY THAT THE QUANTITY INVOLVED WAS 400 GRAMS OR MORE.

The petitioner argues that "a mandatory minimum sentence should not be precluded where uncontroverted evidence supports such a sentence." (Brief of Petitioner at 9). Thus, the petitioner maintains that in prosecutions for trafficking in cocaine, if the evidence at trial "is such that there is no dispute as to the quantity of contraband involved," then the jury need not determine the factual question of quantity (Brief of Petitioner at 14-15). Rather, the petitioner suggests that under these circumstances, the determination as to the element of quantity may be made by the trial judge, who may then impose the applicable minimum mandatory penalty under §893.135, Fla. Stat. (1997), in accordance with his or her finding as to quantity. The government's argument in this case flies in the face of the fundamental constitutional principle that a criminal defendant has the right to demand "that a *jury* find him guilty of *all the elements* of the crime with which he is charged." *U.S. v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)(holding that the jury, *not* the judge, must determine the element of materiality in prosecutions for perjury). Moreover, this Court held in *State v. Weller,* 590 So. 2d 923, 926 (Fla. 1991), that

"the *jury*...must determine from the evidence adduced at trial the quantity of contraband involved" in prosecutions for trafficking. Finally, and most significantly, the very same argument advanced by the government in this case was specifically rejected by this Court in *State v. Hargrove,* 694 So. 2d 729 (Fla. 1997).

Hargrove is indistinguishable from the present case. Hargrove was charged with murder by shooting the victim with a firearm. At trial, Hargrove asserted the affirmative defense of insanity and did not dispute the fact that he committed murder using a firearm. The jury found Hargrove guilty of second degree murder, but did not make a specific finding as to whether the defendant used a firearm. The trial court imposed the minimum mandatory sentence that applies for use of a firearm under §775.087(3)(a), Fla. Stat. (1997) in the absence of a jury finding. The Fourth District Court of Appeal "reluctantly reversed" the mandatory minimum sentence because of the jury's failure to determine that a firearm was used. The District Court relied on *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984), where this Court held that the jury, *not* the judge, was required to make a finding that the defendant used a firearm in order for the judge to impose the mandatory minimum sentence for use of a firearm. However, the District Court found its holding to be "irrational" in light of the uncontroverted evidence at trial that a firearm was used. *See Hargrove v. State,* 675 So. 2d 1010, 1012 (Fla. 4th DCA 1996). Therefore, the Fourth District certified the

following question as one of great public importance: "When defendant is charged with committing a crime with the use of a firearm but does not contest its use and instead defends on the ground that he was insane when he used the firearm, and the record is clear beyond any doubt that defendant did actually use the firearm, must the sentencing judge impose the mandatory minimum sentence?" *Id.*

This Court answered the rephrased certified question in the negative. Specifically, this Court held as follows:

> Our decision in *Overfelt* encompasses cases where the evidence of use of a firearm is unrebutted. There must be a specific finding by the jury. Even where the use of firearm is uncontested, the overriding concern of *Overfelt* still applies: the jury is the fact finder, and use of a firearm is a finding of fact.

State v. Hargrove, 694 So. 2d 729, 730 (Fla. 1997).

The issue that this Court faced in *Hargrove* is the very same issue presented in this case. The mandatory sentencing provision of the trafficking statute, §893.135(1)(b)1, Fla. Stat. (1997), mirrors the mandatory sentencing provision of the firearm statute, §775.087(3)(a), Fla. Stat. (1997). Both statutes require an additional factual finding relating to the criminal episode at issue as a predicate for the imposition of a mandatory minimum sentence. Specifically, in order to impose the applicable mandatory term, the trafficking statute requires a predicate finding that the amount involved in the commission of the trafficking offense exceeded 400

grams, while the firearm statute requires a predicate finding that the commission of an enumerated offense involved the use of a firearm.[2] Just as in *Hargrove,* the District Court of Appeal in this case "reluctantly reversed" the minimum mandatory sentence imposed by the trial court, due to the absence of a jury finding as to the predicate fact for minimum mandatory sentencing, where the predicate fact was admitted by the defense at trial (A. 1-4). Just as in *Hargrove,* the District Court of Appeal in this case certified the question of whether a jury finding is necessary where uncontroverted evidence supports the minimum mandatory sentence. Just as in *Hargrove,* the government again argues to this Court that a trial judge may make the predicate factual determination for minimum mandatory sentencing in cases where the predicate fact was not in dispute at trial. This argument was rejected in *Hargrove* and must likewise be rejected in this case.[3]

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[2]Section 775.087(3)(a) states that if a defendant is convicted of one of several enumerated crimes--including murder, robbery, and burglary-- and during the commission of that offense the defendant possessed a firearm, then the defendant *shall be* sentenced to a mandatory minimum term of imprisonment of 8 years. Similarly, the trafficking in cocaine statute, §893.135(1)(b)1, Fla. Stat. (1997), states that if a defendant is convicted of trafficking-- which is defined as the sale, purchase, manufacture, delivery, or possession of 28 grams or more of cocaine-- and the commission of that offense involved 400 grams of cocaine or more, then the defendant *shall be* sentenced to a mandatory minimum term of imprisonment of 15 years.

[3]The government also makes a related secondary argument that the jury's finding of guilt in this case for the offense of trafficking in cocaine necessarily encompassed a finding that the amount involved exceeded 400 grams (Brief of Petitioner at 11).

Hargrove clearly establishes that *all* factual matters concerning the criminal episode at issue must be determined by the jury, *regardless* of whether these facts were disputed at trial. To allow a judge to determine facts that relate to the criminal episode, in order to apply mandatory sentencing provisions, "would be an invasion of the jury's historical function..." *Overfelt,* 457 So. 2d at 1387. Therefore, the certified question in this case-- "Does the absence of a specific finding by the jury...that the defendant is guilty of cocaine trafficking in an amount of 400 grams or more, in the face of uncontroverted evidence that the amount at issue exceeded 400 grams, preclude imposition of a minimum mandatory sentence..." -- must be answered in the affirmative.

This argument is flawed in three respects: 1) the jury was specifically instructed that the offense of trafficking in cocaine only required a finding that the amount involved was at least 28 grams (TR. 401), 2)the jury was also told to specifically determine, as a separate matter, the quantity of cocaine involved in the offense (TR. 415), and 3) the verdict form itself separately listed different choices as to quantity of cocaine, under the initial inquiry as to whether the defendant was guilty of trafficking in general (R. 65). Therefore, the jury in this case was clearly made aware that a finding of guilt as to the offense of trafficking in cocaine would *not* encompass a finding as that the amount of cocaine exceeded 400 grams.

CONCLUSION

Based on the foregoing facts, authorities and arguments, Respondent respectfully requests that the certified question be answered in the affirmative, and that the decision of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Maya Saxena, Assistant Attorney General, Office of the Attorney General, Appellate Division, 110 S.E. 6th Street - 9th Floor, Ft. Lauderdale, Florida, 33301, this 18th day of September, 1998.

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