IN THE SUPREME COURT OF FLORIDA

KEVIN COYNE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,012

PETITIONER'S BRIEF ON THE MERITS

On review from the Circuit Court
of the Fifteenth Judicial Circuit,
In and For Palm Beach County, Florida
[Criminal Division].

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal, "T" the transcript.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with felony driving under the influence and possession of marijuana less than twenty grams. R6, 43-44. 67-68. Petitioner was convicted as charged on the DUI and pled to a lesser of possession of marijuana less than twenty grams. R74; T226-230. He was sentenced to five years drug offender probation on the DUI, one year concurrent on the marijuana charge, with special conditions, including completion of the long track drug farm. R93-94.

On appeal, the Fourth District affirmed *per curiam*, citing Harbaugh v. State, 711 So. 2d 77 (Fla. 4th DCA 1998), *rev. granted*, 718 So. 2d 1234 (Fla. 1998). Coyne v. State, 732 So. 2d 455 (Fla. 4th DCA 1999). Petitioner sought jurisdiction of this case under Jollie v. State, 405 So. 2d 418 (Fla. 1981), because the Fourth District cited as controlling authority its own decision which is presently pending review before this Court, State v. Harbaugh, 711 So. 2d 77 (Fla. 4th DCA 1998)(certifying question), *review granted*, 718 So. 2d 934 (Fla. 1998). In *Harbaugh*, the Fourth District certified the following question:

> Where a defendant requests that the jury determine the existence of prior DUI convictions in a felony DUI trial, should the bifurcated procedure of *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991), be amended in

light of *United States v. Gaudin*, 515 So. 2d 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)?

Harbaugh, 711 So. 2d at 83. As set forth in the statement of facts, this case presents the identical issue, as well as one other. This Court granted jurisdiction in this case on October 15, 1999. Coyne v. State, No. 96,012 (Fla. Oct. 15, 1999).

Before trial petitioner moved to dismiss, contending the information only charged a misdemeanor in that petitioner had not previously been convicted of four DUI's. R26-29. The state opposed the motion, R35-42, and after argument it was denied. Both before and during trial, petitioner sought a jury determination of the prior convictions. R 53-54, T317, 339-40. The court denied the motion, instead making a determination in a hearing after trial of the existence of three prior DUI convictions.

The facts of the case are that petitioner was at Boston's on the Beach drinking the evening of January 2, 1998, when the bartender ordered he not be served any more drinks. T65. The bartender noticed unsteadiness in walking. T63. He appeared to be under the influence. T68. He advised an officer who was working there to keep an eye on him as he did not want him driving, and to offer him a free cab. T67. Petitioner advised him he was not driving. T68. He saw petitioner speak with the officer as he went

out the front door. T69.

The officer testified to his experience in DUI detection. T87. On this evening he was working as an officer providing security for the bar, wearing a full police uniform. T85-6. The bartender asked him to observe petitioner and when he left offer him a cab ride home. T90. As petitioner left, the officer offered him the cab but petitioner said he wasn't driving. T91. He smelled alcohol on him. His balance was unsteady. T93. The officer followed him up the street out of concern for his safety. T95. He saw petitioner in the driver's sear of his vehicle, shutting the door, and ran up to him. T100. He heard the vehicle start and as it started to pull into the road he pulled his gun and ordered him out. T101-02; 125. He called for assistance. T104. His opinion was petitioner was under the influence of alcohol. T107.

Another officer, Mahovich, responded and has had DUI training. T138. Petitioner told him he had been drinking, and he could smell the fairly strong odor. T142. He had him perform the roadside tasks, and based on the officer's observations of his performance, which he described for the jury, he believed he was under the influence of alcohol, and arrested him. T144-52. Petitioner refused a breath test. T157.

Officer Kelly corroborated the other officer's testimony that petitioner appeared under the influence in his handling of the roadside tasks. T198-202. The breath test operator brought in a video of petitioner at the station which was played for the jury. T220.

The state rested and motion for judgment of acquittal was denied. T225.

Petitioner's son testified on his behalf. He was with his father at a couple places earlier in the evening and does not recall him drinking anything. T239-40. The truck was in the same spot where they had parked it previously. T243. Petitioner testified he had back and leg injuries from an on the job accident. T246. This affects his balance, as did the wind that evening. T247. He had not been unsteady that evening, he was just dancing with himself on the dance floor. T249. He might have had two drinks a lot earlier that evening. T250. In the three hours before the arrest he had only one. T250. He had a full meal earlier.

When the officer talked to him earlier he could not hear him due to the noise, though he understood about the cab. T253, 255. He decided to go to his car and roll a joint. T255. When he got in someone was banging on his window with a gun and he thought he

was being carjacked. T256-7. The inclined sidewalk and blowing wind made performing the roadside tasks difficult. T260. He did not drive the vehicle and did not ever intend to. T262.He was not under the influence so that his normal faculties were impaired. T262. He'd had a couple drinks and a couple beers over the course of six hours. T262. He thinks to some degree his conduct that night was due to drinking alcohol. T269.

SUMMARY OF THE ARGUMENT

Point 1.

On this felony DUI charge, where the existence of prior felonies are an element of the offense, petitioner was entitled to have a jury determine the existence of those prior felonies.

Point 2.

The language of the felony DUI statute, read strictly and according to the rule of lenity, requires four prior misdemeanor convictions before the circuit court gains jurisdiction to hear a felony DUI.

ARGUMENT

Point I

THE LACK OF A FINDING BY THE JURY THAT THERE WAS SUFFICIENT PROOF OF PRIOR CONVICTIONS IS ERROR

Petitioner requested a jury determination of the existence of the prior DUI convictions. Instead, the court made that determination. This procedure violated petitioner's rights to have the jury determine all elements of the offense.

The parties followed the procedure for trying a felony DUI set forth in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991), requiring proof of the previous DUI's to be shown outside the presence of the jury:

> . . .. We conclude that if a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of the single incident of DUI at issue without allowing the jury to learn of the alleged prior DUI offenses. If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions. All evidence of the prior DUI convictions must be presented in open court and with the full rights of confrontation, cross-examination, and representation by counsel. The trial court must be satisfied that the existence of three or more prior DUI convictions has been proved beyond a reasonable doubt before entering a conviction for felony DUI.

Rodriguez, 575 So. 2d at 1266.

Pursuant to *Rodriguez*, the jury was not instructed it had to determine the existence of prior DUI convictions. See T298-307. In this case, only the court made the determination whether there were sufficient prior felony DUI's for this one to qualify as a felony. T340-50. This determination is an element of the offense, State v. Woodruff, 676 So. 2d 975, 977 (Fla. 1996), which the Fourth District has suggested must be found by a jury unless that right is waived, in Harbaugh v. State, 711 So. 77 (Fla. 4th DCA 1998).

In *Harbaugh*, the Fourth District found constitutional tension in Florida's *Rodriguez* procedure. While *Rodriguez* finds the separate judicial determination of prior DUI convictions necessary to preserve the presumption of innocence, such a procedure deprives the defendant of a jury determination of that element of the offense. "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 522-23 (1995). The Fourth District suggests *Rodriguez* unlawfully forces a defendant to choose between the rights to trial by jury and to be presumed innocent, and concludes that "Expediency should not cause one constitutional

right to be sacrificed for another." Harbaugh, 711 So. 2d at 83. The Fourth District did not reverse on this ground, recognizing it was bound by this Court's precedent, but wrote:

> We address Harbaugh's final point because it may arise on retrial. He contends that he is entitled to have a jury decide the fact issue of whether he has three prior convictions of driving under the influence, which would make him guilty of a third degree felony under section 316.193(2)(b), Florida Statutes (1995). Resolution of this issue requires consideration of *Rodriguez*, in light of *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), subsequently decided by the United States Supreme Court.
>
> In *Rodriguez*, the supreme court addressed the method of handling a defendant's prior convictions in the context of a felony DUI trial. The supreme court recognized that due process mandated that the prior convictions be specified in the information, but that preservation of a defendant' presumption of innocence required that the prior convictions not infect the defendant's trial. 575 So. 2d at 1265. To balance these competing interests, the supreme court devised a procedure to be used in a felony DUI jury trial. The trial judge first conducts `a jury trial on the elements of the single incident of DUI at issue without allowing the jury to learn of the alleged prior DUI offenses.' Id. at 1266. If the jury returns a guilty verdict as to that single DUI incident, then the trial court conducts `a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions.' Id.
>
> The crime at issue in *Gaudin* was the making of a material false statement in a matter within the jurisdiction of a federal agency, contrary to 18 U.S.C. Sec. 1001. In submitting the case to the jury, the trial judge removed the issue of materiality from the jury's

> consideration, by instructing them that `the statements charged in the indictment are material statements.' Gaudin, 515 U.S. at 508, 115 S.Ct. at 2312. The government conceded that `materiality' was an element of the offense that the government was required to prove to obtain a conviction. The Supreme Court held that the Fifth and Sixth Amendments of the United States Constitution `require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' Id. at 509, 115 S.Ct. at 2313; see id. at 522-23, 115 S.Ct. at 2319-20. Gaudin affirmed the circuit court's decision reversing the convictions and remanding for new trial, because of the failure to submit the element of `materiality' to the jury.
>
> For a charge of felony DUI under section 316.193(2)(b), Florida Statutes (1995), it is clear that the existence of three or more prior DUI convictions is an element of the crime. *State v. Woodruff*, 676 So. 2d 975, 977 (Fla. 1996). Where a defendant requests that a jury determine the occurrence of the prior convictions, *Gaudin* requires that element of the crime to be submitted to the jury. The procedure established in *Rodriguez* calls for submission of this element to the trial court. 575 So. 2d at 1266; see also *Standard Jury Instructions -- Criminal Cases* No. 92-1, 603 So. 2d 1175, 1197-98 (Fla. 1992) (adopting felony DUI instruction in accord with *Rodriguez*). Harbaugh's request to have the jury determine the issue of prior convictions did not amount to a waiver of the bifurcated procedure of *Rodriguez*; the prejudice of having a jury hear of prior convictions would still compromise the presumption of innocence. Expediency should not cause one constitutional right to be sacrificed for another.

Harbaugh, 711 So. 2d at 82-83.

In the case at bar, petitioner specifically sought a jury trial on the prior conviction element of the offense. R53-54; T11-

12. He continued to press this issue throughout the trial, and prior to the court making the determination on this element of the offense. T317; 339-40. The court denied the motion. T340. The court followed *Rodriguez* without any waiver or inquiry, so the failure to have a jury determination of the element of proof of the prior DUI convictions is error. This court should so hold. If it is error to impose a mandatory minimum sentence in the absence of a jury finding of possession of a firearm, *See* State v. Hargrove, 694 So. 2d 729 (Fla. 1997), or the amount of drugs, *See* Estevez v. State, 713 So. 2d 1039 (Fla. 3d DCA 1998), *rev. granted*, 719 So. 2d 893 (Fla. 1998), surely it is error to enter conviction on a felony without a finding on one of the elements of the offense by the jury.

The error is harmful. This and other courts have repeatedly held "failure to give a complete or accurate instruction constitutes fundamental error if it relates to an element of the charged offense. *See State v. Delva*, 575 So. 2d 643 (Fla. 1991); *Scott v. State*, 710 So. 2d 60 (Fla. 4th DCA 1998); *Nutter v. State*, 679 So. 2d 1245 (Fla. 5th DCA 1996); *Jones v. State*, 666 So. 2d 995 (Fla. 5th DCA 1996)." Dowling v. State, 723 So. 2d 307, 308 (Fla. 4th DCA 1998). *Accord*, Taylor v. State, 695 So. 2d 1293, 1294

(Fla. 4th DCA 1997)(finding fundamental error where trial court inadvertently failed to define premeditation "as it was an essential element and material to the crime for which petitioner was charged"). In Sullivan v. Louisiana,508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182(1993), the Court held a constitutionally defective reasonable doubt instruction cannot be harmless error. However, that court recently held *Gaudin* error is not a "structural defect" in the proceeding which renders a trial fundamentally unfair, while conceding "[i]t would not be illogical to extend the reasoning of *Sullivan* from a defective `reasonable doubt' instruction to a failure to instruct on an element of the crime," in Neder v. United States, 119 S.Ct. 1827 (1999). Instead, the Court found such error to be of a constitutional dimension requiring harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). *Neder*, 119 S.Ct. at 1837. The state has not met its burden of showing harmless constitutional error here.

An on the record colloquy is essential for there to be a waiver of the right to a jury determination of the prior convictions element of the offense. This is the holding in Brown v. State, 719 So. 2d 882 (Fla. 1998). There, this Court held that the defense offer to stipulate to the fact of a prior violent

felony conviction must be accepted in a prosecution for possession of a firearm by a convicted felon. For such a stipulation to be effective, however, the trial court must first question the defendant and determine such a waiver of the right to have the state prove the element is knowing, intelligent and voluntary:

> . . .. We also agree with the State that, out of the jury's presence and after consultation with counsel, the defendant should be required to personally acknowledge the stipulation and his voluntary waiver of his right to have the State otherwise prove the convicted felony status element beyond a reasonable doubt. *See Blair v. State*, 698 So. 2d 1210, 1217-19 (Fla. 1997)(requiring criminal defendant's waiver of constitutional right to six-person jury to `be done knowingly, intelligently, and voluntarily and that a record be made to demonstrate this fact.').

Brown, 719 So. 2d at 889. There was no inquiry here into waiver of the right to a jury determination of all elements, and petitioner affirmatively objected to such a procedure.

The conviction violates petitioner's rights to due process, equal protection, effective counsel, a fair trial, compulsory process, confrontation and cross examination of witnesses, presentation of a defense, to be free from cruel and unusual punishment, and other rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22, Florida Constitution, and Florida law. This Court must reverse.

Point 2

THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS FOR LACK OF CIRCUIT COURT JURISDICTION

The Information and amended Information charged only three prior DUI convictions as a predicate for pursuing this felony charge of driving under the influence. R6, 58-59, 67-68. Petitioner filed a motion to dismiss pretrial arguing four convictions are required before the circuit court gains jurisdiction. R26-29. The denial of the motion, T3-6, 332-39, is an improper application of the law.

Petitioner was charged with a felony driving under the influence pursuant to Section 316.193(2)(b), Fla. Stat. (1998), which provides:

> Any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084; however, the fine imposed for such fourth or subsequent violation may be not less than $1,000.

The statutory language thus requires a person be *convicted* of, not merely charged with, a fourth DUI before they may be exposed to a felony punishment in circuit court.

Section 775.021(1), Florida Statutes (1997), sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Both the principle of strict construction and the rule of lenity apply to guide the construction of a criminal statute. Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992). As the Fourth District has held:

> Where a statutory term is susceptible of two different interpretations in a criminal case, the rule of lenity requires that it be construed in the manner most favorable to the accused. *See Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991); *Arthur v. State*, 391 So. 2d 338 (Fla. 4th DCA 1980); 2 775.021(1), Fla. Stat. (1995). As the Supreme Court observed in *Rogers v. Cunningham*, 117 Fla. 760, 158 So. 430, 4432 (1934), if doubt exists as to the construction of a statute `prescribing punishment and penalties . . . it is the duty of the court to resolve such doubt in favor of the citizens and against the state.'

Almanza v. State, 711 So. 2d 253, 254 (Fla. 4th DCA 1998).

The principle of strict construction is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 100

S.Ct. 2247, 65 L.Ed.2d 205 (1980); Trotter v. State, 576 So.2d 691, 694 (Fla.1990).

Application of these rules to construction of the felony DUI statute leads to the conclusion that the circuit court has no jurisdiction until there is a fourth DUI conviction. This Court has indicated as much in State v. Woodruff, 676 So. 2d 975, 977 (Fla. 1996):

> Notwithstanding, a conviction of the felony DUI charge in the instant case would be impossible to obtain. Under section 316.193(2)(b), Florida Statutes (1991), a felony DUI conviction is obtained by proving a misdemeanor DUI conviction on the present charge and proof of three or more prior misdemeanor DUI convictions.

The Fourth District has held to the contrary. State v. Swartz, 734 So. 2d 448 (Fla. 4th DCA 1999); *Harbaugh*, 711 So. 2d at 78.

It is the state's burden to establish jurisdiction once it has been challenged.[1] State v. King, 282 So. 2d 162 (Fla. 1973); Wright v. State, 600 So. 2d 1248, 1249 (Fla. 5th DCA 1992)(statute of limitations); Boyd v. State, 699 So. 2d 295, 297 (Fla. 1st DCA 1997), *approved*, 717 So. 2d 524 (Fla. 1998)(timely commencement of probation violation proceedings). *See* Anderson v. State, 526 So. 2d 106, 107 (Fla. 1988)("[W]e have recognized that one does not

[1] Count 2, possession of marijuana, was originally charged as a felony, R6-7, but was amended to a misdemeanor count prior to trial. R43-44; 58-59.

confer jurisdiction of the subject matter by consent, acquiescence or waiver if none exists"). The state did not meet its burden here, as it did not allege (and did not prove) the existence of four DUI convictions in the Information. R6-7, 43-44, 58-59.

This court should reverse with directions to discharge on the felony DUI conviction and enter judgment on a misdemeanor DUI conviction only. The conviction violates petitioner's rights to due process, equal protection, effective counsel, a fair trial, compulsory process, confrontation and cross examination of witnesses, presentation of a defense, to be free from cruel and unusual punishment, and other rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22, Florida Constitution, and Florida law.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court reverse the judgment of the District Court or grant such other relief it deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Gentry Denise Benjamin, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 9th day of November, 1999.

STEVEN H. MALONE
Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

KEVIN COYNE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96,012
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

711 So.2d 77
23 Fla. L. Weekly D955
(Cite as: 711 So.2d 77)

Robert HARBAUGH, Appellant,
v.
STATE of Florida, Appellee.

No. 97-0298.

District Court of Appeal of Florida,
Fourth District.

April 15, 1998.

Defendant was convicted in the Circuit Court, Broward County, Paul L. Backman, J., of felony driving under the influence (DUI), and he appealed. The District Court of Appeal held: (1) written set of guidelines did not need to be issued prior to roadblock set up to secure a crime scene; (2) attorneys' playing of videotape for jury during deliberations was part of the trial at which the circuit judge's presence was mandatory; and (3) defendant's request to have the jury determine the issue of prior DUI convictions did not amount to a waiver of the bifurcated procedure.

Affirmed in part, reversed in part, and remanded. Question certified.

Gross, J., concurred specially with opinion.

[1] ARREST ⇐63.5(6)
35k63.5(6)
Written set of guidelines did not need to be issued prior to roadblock set up to secure a crime scene so that evidence of a criminal act was not destroyed and to detain any suspect matching the description of the shooter; brief stop for those reasons required only limited police contact with a person detained and obviated the need for written guidelines to rein in an officer's exercise of discretion to restrain and interrogate citizens, and exigency of situation was distinguishable from driving under the influence (DUI) or traffic safety roadblocks.

[2] AUTOMOBILES ⇐349(9)
48Ak349(9)
As with all warrantless searches and seizures, courts determine the constitutionally of driving under the influence (DUI) roadblocks by balancing the legitimate government interests involved against the degree of intrusion on the individual's fourth amendment rights; balancing test involves three considerations: (1) the gravity of the public concern that the seizure serves; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. U.S.C.A. Const.Amend. 4.

[3] CRIMINAL LAW ⇐634
110k634
Attorneys' playing of videotape for jury during deliberations was part of the trial at which the trial judge's presence was mandatory, and judge's failure to be present amounted to fundamental error.

[3] CRIMINAL LAW ⇐1166.21
110k1166.21
Attorneys' playing of videotape for jury during deliberations was part of the trial at which the trial judge's presence was mandatory, and judge's failure to be present amounted to fundamental error.

[4] CRIMINAL LAW ⇐634
110k634
Trial judge is required to be present at any aspect of the trial where the lawyers or the parties are in extended contact with the jury, unless the defendant himself makes a sufficient waiver on the record of the judge's presence.

[5] AUTOMOBILES ⇐359
48Ak359
Defendant's request to have the jury determine the issue of prior convictions in felony driving under the influence (DUI) prosecution did not amount to a waiver of the bifurcated procedure in which jury first determines guilt of single DUI incident, and then second proceeding is held to determine whether defendant had three prior DUI convictions. West's F.S.A. § 316.193(2)(b).

[6] AUTOMOBILES ⇐332
48Ak332
For a charge of felony driving under the influence (DUI) the existence of three or more prior DUI convictions is an element of the crime. West's F.S.A. § 316.193(2)(b).

*78 Alan T. Lipson of Essen, Essen, Susaneck, Canet & Lipson, P.A., Aventura, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David M. Schultz, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

On January 5, 1996, a Fort Lauderdale policeman was shot in the line of duty. While the suspect was still at large, the police set up a perimeter around the general area where the shooting had occurred and around the crime scene itself. The southern boundary of the perimeter was 17th Street from U.S. # 1 east to the intracoastal waterway; the eastern boundary was the intracoastal; the northern boundary was Davie Boulevard from the intracoastal waterway to U.S. # 1; and the western boundary was U.S. # 1 from Davie Boulevard to 17th Street.

Deputy Sheriff Steven Casserly responded to assist in maintaining the perimeter around the crime scene. He was positioned at Southeast 16th Court and U.S. # 1, just north of the 17th Street Causeway, inside the outer boundaries of the perimeter. Casserly blocked 16th Court with his police car to prevent traffic from coming onto U.S. # 1. The crime scene was located on U.S. # 1 just north of Casserly's position. Casserly was orally instructed to keep vehicles and pedestrians from entering the crime scene; there were still shell casings and blood on the roadway and the police had not yet completed a crime scene investigation. A police sergeant briefly described the shooting suspect. Casserly assumed he was to be on the lookout for him.

Casserly saw appellant, Robert Harbaugh's vehicle traveling west on 16th Court approaching the intersection of U.S. # 1. The deputy signaled for the car to stop. Upon seeing the deputy, Harbaugh stopped his car. Casserly walked up to the driver's window so he could tell him to turn around. The deputy noticed that Harbaugh's speech was slurred and he detected the odor of an alcoholic beverage. When he asked to see a driver's license, Harbaugh fumbled around before producing it. Casserly called Deputy Andrew Taylor of the sheriff's DUI task force to conduct a DUI investigation.

Ultimately, the state charged Harbaugh with felony driving under the influence in violation of section 316.193(2)(b), Florida Statutes (1995); the information specified three prior DUI convictions from New Jersey. *79 Harbaugh moved to suppress and dismiss, arguing that the initial stop occurred at a roadblock not in compliance with the guidelines required by State v. Jones, 483 So.2d 433 (Fla.1986). The trial judge denied the motion, distinguishing between a roadblock and the crime scene perimeter involved in this case.

The case went to trial before a jury. One of the evidentiary exhibits was a videotape of Harbaugh taken shortly after the stop. As a result of the trial judge's ruling on a motion in limine, portions of the videotape were not shown to the jury. Before the jurors retired to deliberate, the trial judge advised them that since a portion of the videotape had been excluded, the videotape would not be sent back to the jury room with them; if the jury requested to view it again, the trial judge indicated that he would bring them back to the courtroom and follow the same procedure that had been used to show the videotape during trial.

During deliberations, the jury sent out a note asking to see the videotape again. Once the jury came back into the courtroom, one juror asked whether the playback could be paused, so that the jurors could talk among themselves about a particular point, and then be restarted. The trial judge asked the jury to retire to the jury room. The trial judge expressed concern about the jury deliberating in open court. The trial judge decided that since the videotape was in evidence, and would have been sent back to the jury room but for the redacted portions, both the prosecutor and defense counsel could go into the jury room to play the segments of the videotape in evidence; when the jury wanted to discuss some matter, the trial judge instructed that both lawyers were to leave the room. Defense counsel expressed concern that the jury might ask them a question without a court reporter being present. The trial judge said that he would instruct the jury that there could be no conversation of any kind with the lawyers, that all questions had to be addressed to the court, and that the jury could only ask the lawyers to play back desired portions of the videotape. The trial judge then said that after the playback was completed, the two lawyers were to report on the record what had transpired in the jury room. Defense counsel said that he had no problem with that procedure.

When the jurors returned to the courtroom, the trial judge instructed them on the procedure he had devised for viewing the videotape, which included the following:

[T]here are only two things that you can say to the lawyers. One, if you have a desire to see a part

again, would you please rewind it, play it again. That's okay. Or, if you want to discuss some aspect of what it is you have seen, you will simply ask the lawyers to excuse you, they will remove themselves from the jury room.
So that you are aware of it, they will be taking the tape with them when they exit. And when you are finished and wish to see further portions of the tape, you will simply ring the buzzer, indicate that you are ready for them to come back, they will come back and we'll continue with that process.
What I cannot permit you to do, and this has to be very clear, is as it's being played, you can't make a comment with regard to anything that you are seeing in their presence, you can't ask them a question. If there is any type of a question that needs to be addressed, it has to be done in the same procedure that we have employed before. You need to write it down and it needs to be addressed to me.

Before the lawyers went into the jury room, the trial judge asked them if there was any objection to his colloquy with the jury. Neither objected. When the lawyers returned from the jury room, defense counsel said that he did not perceive any problems with what had transpired in the jury room.

The jury returned a verdict of guilty on the charge of misdemeanor driving under the influence. Before the jury was discharged, defense counsel renewed an earlier request that the trial judge modify the procedure set forth in State v. Rodriguez, 575 So.2d 1262 (Fla.1991), and allow the jury to decide the factual issue of Harbaugh's prior convictions. The trial judge denied the motion and discharged the jury.

*80 [1] Harbaugh first argues that he was stopped at a roadblock that must comply with the requirements of Campbell v. State, 679 So.2d 1168 (Fla.1996), and Jones, to pass constitutional muster. These cases concerned the propriety of warrantless temporary roadblocks established to catch persons driving while under the influence of alcohol or to check for traffic and safety violations, without any articulable suspicion of illegal activity to justify any stop. Among other things, Campbell and Jones require a written set of guidelines to be issued prior to a roadblock to "ensure that the police do not act with unbridled discretion in exercising the power to stop and restrain citizens who have manifested no conduct that would otherwise justify an intrusion on a citizen's liberty." Campbell, 679 So.2d at 1172. Without written guidelines, there is a risk that some officers, for their own subjective reasons, might extensively detain citizens without any legal basis.

The roadblock in this case was different than that involved in Campbell and Jones. Its purpose was not to ferret out potentially criminal activity inside an automobile or to ensure that a vehicle complied with statutory safety standards. The narrow focus of Deputy Casserly's roadblock was to secure a crime scene so that evidence of a criminal act might not be destroyed. A secondary purpose was to detain any suspect matching the description of the shooter. A brief stop for these reasons required only limited police contact with a person detained and obviated the need for written guidelines to rein in an officer's exercise of discretion to restrain and interrogate citizens. To accomplish these objectives, an officer need only glance in a car and say a few words to the driver. Also, the exigency of this type of situation distinguishes it from a DUI or traffic safety roadblock, which can be planned in detail and in advance. The procedures specified in Campbell and Jones are inapplicable to the roadblock in this case.

[2] The police conduct here at issue is more properly evaluated under the three considerations of the balancing test of Brown v. Texas, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 2640-41, 61 L.Ed.2d 357 (1979), that is described in Jones:

> As with all warrantless searches and seizures, courts determine the constitutionally of DUI roadblocks by balancing the legitimate government interests involved against the degree of intrustion (sic) on the individual's fourth amendment rights. [Citations omitted]. This balancing test involves three considerations: (1) the gravity of the public concern that the seizure serves; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty.

Jones, 483 So.2d at 435. The stopping of Harbaugh's automobile was related to the criminal act of the shooting of the police officer. Society has a great interest in the apprehension of those who criminally shoot people. The stop advanced the public interest by preserving the integrity of the crime scene. [FN1] But for the evidence of Harbaugh's inebriation, the detention would have been minimal--- long enough for the deputy to tell a

driver to turn around. There was no constitutional violation in this aspect of the case.

FN1. Because we find the roadblock in this case was authorized to preserve the crime scene, we do not address whether it was permissible on the theory that it was a lawful perimeter set up for the purpose of stopping all persons leaving the perimeter to see if they matched the descriptions of perpetrators of a just committed crime. See Scott v. State, 629 So.2d 238 (Fla. 3d DCA 1993).

[3][4] Harbaugh next contends that the procedure used by the trial judge to play the videotape amounted to fundamental error. We agree. Existing precedent compels the conclusion that a trial judge is required to be present at any aspect of the trial where the lawyers or the parties are in extended contact with the jury, unless the defendant himself makes a sufficient waiver on the record of the judge's presence.

In Bryant v. State, 656 So.2d 426 (Fla.1995), the trial judge left the courtroom during a readback of testimony, with the agreement of both the prosecutor and the defense attorney. There was no allegation "that anything happened during the read-back that required the judge's presence or caused *81 harm" to the defendant. Id., at 430 (Wells, J., concurring in part, dissenting in part). Nonetheless, the supreme court reversed the defendant's conviction, explaining its holding as follows:

> The presence of a judge, who will insure the proper conduct of a trial, is essential to the state and federally guaranteed rights of trial by an impartial jury. Although this right can be waived under some circumstances, such waiver must be "by a fully informed and advised defendant, and not by counsel acting alone." Waiver of the trial judge's presence cannot be implied because of a defendant's failure to make a timely objection. Although defense counsel and the state attorney agreed to the judge's absence in this case, the defendant Bryant did not because he was not consulted about this procedure by his attorney or the trial court. Thus, Bryant did not knowingly, intelligently, and voluntarily waive the trial judge's presence during the readback. As this court explained in [Brown v. State, 538 So.2d 833 (Fla.1989)], "the presence of a judge during trial is a fundamental right." ([E]mphasis added). Thus, the trial court's absence during the readback of testimony without a valid waiver constitutes reversible error.

Id. at 428-29 (citations and footnote omitted).

Bryant relied heavily on Brown v. State, 538 So.2d 833 (Fla.1989). In that case, the jury requested to see transcripts of witnesses' testimony after the trial judge had left the courthouse. The attorneys consulted with the trial judge by telephone. Counsel and the trial judge agreed that the judge would not return to the courthouse, that the lawyers would tell the jurors that they could not have the transcripts, and that they would have to rely on their memories. The lawyers followed this agreed-upon procedure, the defendant was convicted, and the supreme court reversed, holding that "communications from the jury must be received by the trial judge in person and that the absence of the judge when a communication is received and answered is reversible error." Id. at 836. The court noted that the presence of the trial judge is essential to the guarantee of a trial by an impartial jury under the state and federal constitutions. Id. at 834-35.

The fifth district applied Brown in Maldonado v. State, 634 So.2d 661 (Fla. 5th DCA 1994). There, the jury requested a readback of three witnesses' testimony. Both attorneys and the trial judge agreed to send the court reporter into the jury room, alone, to read the transcript. Even though there was no objection at trial to this procedure, the fifth district found that with no evidence of a waiver by a fully informed and advised defendant, the procedure violated Brown. Id. at 662-63. The supreme court cited Maldonado with approval in Bryant, 656 So.2d at 429.

The state argues that Bryant and Brown are distinguishable because both cases involved readbacks of testimony, a situation controlled by Florida Rule of Criminal Procedure 3.410. That Rule indicates that after the jurors retire to consider their verdict, if they request "to have any testimony read to them they shall be conducted into the courtroom ... and the court ... may order the testimony read to them." While the Rule does not explicitly require the judge's presence, Bryant does require the judge to be present during readbacks, absent a valid waiver. The state contends that this case did not involve a readback of testimony, but a playback of a videotape that had been entered in evidence. Such items are properly taken into the jury room under Florida Rule of Criminal Procedure

3.400(a)(4).

This distinction is unavailing, since the latter Rule does not contemplate that the lawyers would be in the jury room with the jurors handling the evidentiary items to which the rule applies. In Brown and McCollum v. State, 74 So.2d 74 (Fla.1954), the supreme court discussed the reasons behind the requirement that the trial judge be present at every stage of the trial. In Brown the defendant claimed on appeal that the prosecutor did most of the talking when the lawyers went into the jury room and that "he told them that he did not want any more questions." Brown, 538 So.2d at 836. As the basis for its ruling, the supreme court wrote:

> *82 We do not know what tone of voice this might have been said in, nor do we know the prosecutor's demeanor and manner in dealing with the jury. The prosecutor's statements and conduct, indeed this whole procedure, might well have had a chilling effect on the jury's deliberations. No one can say at this point that the judge's absence did not have a detrimental effect on the jury's deliberations. The possibility of prejudice is so great in this situation that it cannot be tolerated.
>
> Id.

Similarly, in McCollum, the supreme court explained how a rule requiring the trial judge's presence at every stage of a criminal proceeding insured the integrity of the process:

> During such absence [of the trial judge] grave errors or abuses of privilege may occur, and this court may be left to the conflicting affidavits of overzealous attorneys or parties in interest to determine what in fact took place ... It avails not to say that error must be affirmatively shown. This is true, but, where the trial court has disabled itself from informing us as to what occurred, how is error to be shown save by affidavit? ... We feel that we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way to dangerous abuses, and break down one of the most valuable safeguards to litigants.
>
> 74 So.2d at 77 (quoting Smith v. Sherwood, 95 Wis. 558, 70 N.W. 682, 683 (1897)).

These perceived dangers which justified the holdings in Brown and McCollum are equally applicable to the procedure used in this case. As the supreme court observed in these two cases, there is great potential for abuse when attorneys have extensive contact with the jury outside the presence of the court. There is just as much risk of a compromise in the trial process during the lawyers' playback of a redacted videotape as there is in a court reporter's readback of trial testimony.

We do not see any meaningful distinction between this case and Bryant. Like this case, Bryant did not involve an allegation that any impropriety occurred while the trial judge was absent. There was just as much risk that the trial would be compromised during the court reporter's readback in Bryant as there was during the lawyers' playback of the videotape in this case. The supreme court has adopted a bright line rule requiring the physical presence of the trial judge at all aspects of the trial. The attorneys' playing of the videotape for the jury was a part of the trial at which the trial judge's presence was mandatory.

There is nothing in this record to indicate that the defendant made the "fully informed and advised" waiver contemplated by Brown, and not simply a waiver by counsel acting alone. Brown, 538 So.2d at 835. This issue is not susceptible to a harmless error test. See Bryant; Glee v. State, 639 So.2d 1092 (Fla. 4th DCA 1994); Ferrer v. Manning, 682 So.2d 659 (Fla. 3d DCA 1996).

[5] We address Harbaugh's final point because it may arise on retrial. He contends that he is entitled to have a jury decide the fact issue of whether he has three prior convictions of driving under the influence, which would make him guilty of a third degree felony under section 316.193(2)(b), Florida Statutes (1995). Resolution of this issue requires consideration of Rodriguez, in light of United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), subsequently decided by the United States Supreme Court.

In Rodriguez, the supreme court addressed the method of handling a defendant's prior convictions in the context of a felony DUI trial. The supreme court recognized that due process mandated that the prior convictions be specified in the information, but that preservation of a defendant's presumption of innocence required that the prior convictions not infect the defendant's trial. 575 So.2d at 1265. To balance these competing interests, the supreme court devised a procedure to be used in a felony DUI jury

trial. The trial judge first conducts "a jury trial on the elements of the single incident of DUI at issue without allowing the jury to learn of the alleged prior DUI offenses." Id. at 1266. If the jury returns a guilty verdict as to that single DUI incident, then the trial *83 court conducts "a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions." Id.

The crime at issue in Gaudin was the making of a material false statement in a matter within the jurisdiction of a federal agency, contrary to 18 U.S.C. § 1001. In submitting the case to the jury, the trial judge removed the issue of materiality from the jury's consideration, by instructing them that "the statements charged in the indictment are material statements." Gaudin, 515 U.S. at 508, 115 S.Ct. at 2312. The government conceded that "materiality" was an element of the offense that the government was required to prove to obtain a conviction. The Supreme Court held that the Fifth and Sixth Amendments of the United States Constitution "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. at 509, 115 S.Ct. at 2313; see id. at 522-23, 115 S.Ct. at 2319-20. Gaudin affirmed the circuit court's decision reversing the convictions and remanding for a new trial, because of the failure to submit the element of "materiality" to the jury.

[6] For a charge of felony DUI under section 316.193(2)(b), Florida Statutes (1995), it is clear that the existence of three or more prior DUI convictions is an element of the crime. See State v. Woodruff, 676 So.2d 975, 977 (Fla.1996). Where a defendant requests that a jury determine the occurrence of the prior convictions, Gaudin requires that element of the crime to be submitted to the jury. The procedure established in Rodriguez calls for submission of this element to the trial court. 575 So.2d at 1266; see also Standard Jury Instructions---Criminal Cases No. 92-1, 603 So.2d 1175, 1197-98 (Fla.1992) (adopting felony DUI instruction in accord with Rodriguez). Harbaugh's request to have the jury determine the issue of prior convictions did not amount to a waiver of the bifurcated procedure of Rodriguez; the prejudice of having a jury hear of prior convictions would still compromise the presumption of innocence. Expediency should not cause one constitutional right to be sacrificed for another.

However, this court is not free to disregard the binding precedent of the supreme court. See Hoffman v. Jones, 280 So.2d 431, 434 (Fla.1973). The supreme court is the appropriate forum for determining whether the procedure set forth in Rodriguez should be revisited. Accordingly, we certify the following question for its consideration:

WHERE A DEFENDANT REQUESTS THAT THE JURY DETERMINE THE EXISTENCE OF PRIOR DUI CONVICTIONS IN A FELONY DUI TRIAL, SHOULD THE BIFURCATED PROCEDURE OF STATE v. RODRIGUEZ, 575 So.2d 1262 (Fla.1991), BE AMENDED IN LIGHT OF UNITED STATES v. GAUDIN, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)?

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GLICKSTEIN and POLEN, JJ., concur.

GROSS, J., concurs specially with opinion.

GROSS, Judge, concurring specially.

I concur with the majority's reversal on the second point only because I find that such a result is required by Bryant v. State, 656 So.2d 426 (Fla.1995), and Brown v. State, 538 So.2d 833 (Fla.1989). But for Bryant, it would seem that harmless error analysis would appropriately apply in this case. However, the supreme court reversed in Bryant even though defense counsel stipulated that the trial judge could absent himself from the court reporter's readback and there was no claim that anything prejudicial to the defendant had occurred while the judge was not present. This court has held that a trial judge's absence from a part of trial, without an adequate waiver, is per se reversible. See Glee v. State, 639 So.2d 1092 (Fla. 4th DCA 1994).

When faced with other types of constitutional errors, the supreme court has receded from a per se reversal approach and adopted a harmless error test. See State v. DiGuilio, 491 So.2d 1129, 1134-35 (Fla.1986); State v. Marshall, 476 So.2d 150

(Fla.1985). Adoption *84 of such a method of review would not do violence to the bright line rule drawn by the supreme court for this area; a harmless error approach would apply only when the defendant did not timely claim that anything improper had occurred during the judge's absence. In the face of any objection, reversal would be required, because the trial judge had disabled himself from creating a proper record for the appellate court. See McCollum v. State, 74 So.2d 74, 77 (Fla.1954). From a practical standpoint, trial judges would still be aware that their presence at all stages of the trial was mandatory and that absenting themselves, even briefly, was high risk conduct that could jeopardize the entire trial on appeal.

In all other respects, I concur with the majority opinion.

END OF DOCUMENT

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1999

KEVIN COYNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 98-3245

Opinion filed May 12, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Mary E. Lupo, Judge; L.T. Case No. 98-1826 CFA02TD.

Richard L. Jorandby, Public Defender, and Steven H. Malone, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Gentry Denise Benjamin, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED. *See State v. Harbough*, 711 So. 2d 77 (Fla. 4th DCA 1995), *review granted* 718 So. 2d 934 (Fla. 1998).

WARNER, STEVENSON and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

KEVIN COYNE

Appellant(s),

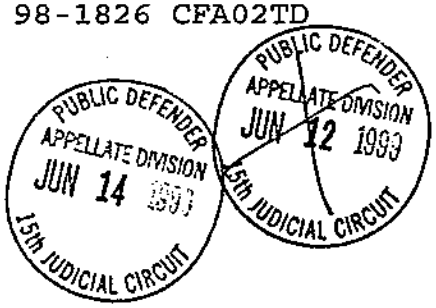
vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 98-03245

L.T. CASE NO. 98-1826 CFA02TD
PALM BEACH



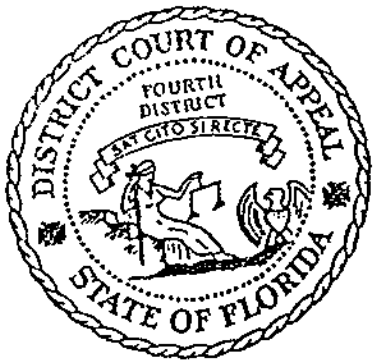
June 11, 1999

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed May 17, 1999, for rehearing or certification is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BRUTTENMULLER
CLERK



cc: Public Defender 15
Attorney General-W. Palm Beach

/CH

5m

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

KEVIN COYNE, Appellant, vs. STATE OF FLORIDA, Appellee. _____	)	CASE NO. 98-3245

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is given that the appellant/petitioner Kevin Coyne invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this court of May 12, 1999, which was rendered June 11, 1999, upon denial of motion for rehearing or certification. The decision passes on a question certified to be of great public importance, citing State v. Harbough, 71 So. 2d 77 (Fla. 4th DCA 1998), *review granted*, 718 So. 2d 934 (Fla. 1998), which is presently pending review before the Florida Supreme Court. *See* Jollie v. State, 405 So. 2d 418 (Fla. 1981).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Gentry Benjamin, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Floor, West Palm Beach, Florida, 33401 by courier this 28th day of June, 1999.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appendix has been furnished by courier to Gentry Denise Benjamin, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 9th day of November 1999.

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