IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,012

KEVIN COYNE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

****

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
BUREAU CHIEF, WEST PALM BEACH
Florida Bar No. 656879

GENTRY DENISE BENJAMIN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0093180
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court below and the appellant in the Fourth District Court of Appeal and will be referred to herein as "Petitioner." Respondent, the State of Florida, was the prosecution in the trial court below and the appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State." Reference to the record on appeal will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to Petitioner's brief will be by the symbol "IB," followed by the appropriate page numbers.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

GENTRY DENISE BENJAMIN
Assistant Attorney General

CELIA TERENZIO
Bureau Chief, West Palm Beach

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts for purposes of this action, subject to the additions, corrections, and/or clarifications which follow both here and in the brief:

SUMMARY OF THE ARGUMENT

POINT I

The trial court did not err in determining the existence of prior convictions, rather than submitting the issue to the jury. This procedure comports with current decisional law of this State. Finally, the procedure of having the trial court determine the existence of the prior convictions necessary to convict of felony DUI is what makes the statute constitutional, since with this type of statute, Petitioner's presumption of innocence and right to have notice of the charge against him must both be protected.

POINT II

The trial court properly denied Petitioner's motion to dismiss for lack of circuit court jurisdiction. The plain language of Florida Statute §316.913(2)(b) mandates circuit court jurisdiction over Petitioner, a fourth DUI offender. He is charged with a third degree felony and subject to the enhanced penalties dictated by the statute that can only be imposed by the circuit court. Legislative history and controlling case law from this Court and the Fourth District Court of Appeal compellingly support this position. This Court should uphold the District Court's affirmance of the trial court's denial of the motion to dismiss.

ARGUMENT
POINT I

IT WAS NOT ERROR TO REFUSE TO SUBMIT TO THE JURY THE ISSUE OF WHETHER THERE WAS SUFFICIENT PROOF OF PRIOR CONVICTIONS

Petitioner argues that the trial court erred in refusing his request for a jury determination of the existence of the prior DUI convictions. Petitioner contends that the procedure violated Petitioner's right to have the jury determine all elements of the offense. However, the State disagrees and contends that the trial court did not err in refusing to submit to the jury the issue of the existence of prior DUI convictions. In fact, the trial court and the District Court of Appeal followed established procedure as set forth by this Court in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991); See also Shafer v. State, 583 So. 2d 417 (Fla. 5th DCA 1991) (presumption of innocence of defendant charged with felony driving under the influence (DUI) must be protected by withholding from jury any allegations or facts about alleged prior DUI offenses).

In Rodriguez v. State, 575 So. 2d 1262 (Fla. 1991), this Court addressed the method of handling a defendant's prior convictions in the context of a felony DUI trial. This Court has consistently held that the combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI as defined by section 316.193(1), (2)(b). Following State v.

Harris, 356 So. 2d 315 (Fla. 1978), this Court explained that to comply with general principles of law, evidence of the prior convictions must be presented in the separate proceeding when a statute elevates a misdemeanor count to a third-degree felony upon the third or subsequent conviction of prior DUI convictions. Rodriguez, 575 So. 2d at 1266. A procedure was devised to protect the defendant's interest in such cases as follows:

> We conclude that if a defendant charged with felony DUI elects to be tried by jury, [f.n.o] 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 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.

575 So. 2d at 1266.

However subsequently, in U.S. v. Gaudin, 515 U.S. 506 (1995) the United States Supreme Court held that the constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. The Gaudin Court decided a case where the defendant was charged with

violating 18 U.S.C. § 1001 by making false statements on Department of Housing and Urban Development (HUD) loan documents.[1] In Gaudin the statements had to be "material" to the governmental inquiry, and "materiality" was an element of the offense that the government had to prove.

The trial court in Gaudin instructed the jury that to convict the defendant the government was required to prove that the alleged false statements were material to HUD's activities and decision, that the issue of materiality was a matter for the court to decide rather than the jury, and that the statement in question was material. The Supreme Court rejected this procedure and held that the trial judge's refusal to submit the question of "materiality" to the jury was unconstitutional. The Court held that the defendant was entitled to have this element of the crime determined by the jury.

In turning our attention to the instant case, and the impact

---

[1]Section 1001 of Title 18 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent "statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

vel non of Gaudin, it is obvious that the trial court followed the dictates of this Court in refusing to submit to the jury the issue of whether there was sufficient proof of prior convictions. Therefore, Petitioner erroneously contends that the trial court's actions in this instance were error.

In affirming the lower court's ruling, the Fourth District Court of Appeal again recognized in a recent decision that Rodriguez is the controlling law in Florida on this issue. See Harbaugh v. State, 711 So. 2d 77 (Fla. 4th DCA), rev. granted, 718 So. 2d 1234 (Fla. 1998). In Harbaugh, the district court stated that:

> [f]or 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. Where a defendant requests that a jury determine the occurrence of the prior convictions, Gaudin requires that element of the crime be submitted to the jury. The procedure established in Rodriguez calls for submission of this element to the trial court. Harbaugh's request to have the jury determine the issue of prior convictions did not amount to a wavier 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.

Id. at 83 (citations omitted). Therein the fourth district certified the following question, as one of great public importance:

> 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(1995)?

The State notes that Harbaugh is presently before this Court. State v. Harbaugh, Case no. 93,037. This Court has accepted jurisdiction in the instant case based on the very same question. See also Decker v. State, 718 So. 2d 934 (Fla. 4th DCA 1998) (court recognized that issue of whether jury should determine the existence of prior convictions is on review in Florida Supreme Court).

The state contends that the certified question should be answered in the negative. In Gaudin, the defendant was charged with making a false statement to a federal agency, where materiality is an element of the offense, and the issue was whether the defendant was entitled to have this element determined by the jury. Gaudin merely held, as a general statement of the law, that the jury is to determine guilt of every element of the crime charged. However, Gaudin is clearly distinguishable from this and similar cases. As was pointed out in Rodriguez and Harris, since the existence of prior DUI convictions is an essential element of felony DUI, it necessarily follows that the requisite notice of these convictions must be given in the charging document. However, due process also requires that a defendant's presumption of innocence be preserved. This presumption of innocence would be compromised if jurors were to become aware of prior similar

convictions. Due to the overlap of these two due process concerns, this Court construed this and similar statutes in a manner to make them constitutional and dictated the procedure, whereby the trial court in a separate proceeding determines the existence of the prior convictions. It is this very procedure, that appellant complains of, that makes this and similar criminal statutes constitutional. However, the procedure adopted in Rodriguez strictly inures to the benefit of the defendant.

Because Gaudin merely held that a defendant is entitled to have the jury determine every element of the crime with which he was charged, Gaudin did not address a situation such as in this case where in order for a jury to decide an element of the crime, it must hear evidence which destroys his presumption of innocence. Therefore, Gaudin does not apply to this case. Gaudin was not a case where there was a need to balance a defendant's competing interests. In Gaudin there was no detriment to the defendant that the jury heard and decided materiality.

In contrast, the Rodriguez's bifurcated procedure protects the defendant's presumption of innocence, while not relieving the state of the burden of proving every element of the crime beyond a reasonable doubt. Therefore, Gaudin is distinguishable and does not apply to this particular case.

While the state agrees that a defendant may waive even a fundamental and constitutional right, see Torres-Arboledo v.

State, 524 So. 2d 403, 410 (Fla. 1988), respondent's suggested procedure (at trial) is not a viable alternative. If a defendant waives his due process right to have a felony DUI charge tried under the bifurcated procedure set forth in Rodriguez, the defendant would then be tried by one jury who would hear evidence on all elements of the crime, *including* the three prior DUI convictions. E.g. Weaver v. State, 1997 WL 703057 (Miss. Nov. 13, 1997)(trial court denied defendant's request for a bifurcated trial for a felony DUI and the state was allowed to publish to the jury the prior convictions); Williams v. State, 1998 WL 133809 (Miss. March 26, 1998)(no requirement that the prosecution for a felony DUI comply with the guidelines for bifurcation found in URCCC 11.03). Faced with this prospect, the state does not believe any defendant would choose to waive the Rodriguez procedure safeguards.

This is because persons charged with felony DUI cannot have piecemeal litigation as to the different elements of the crime. The jury cannot be given some evidence as to one element and then after deciding the defendant is guilty of that element, come back to hear the evidence on the remaining elements of the crime. Further, the trial court in this case was bound by Rodriguez and by Rule of Fla. R. Crim. P. 3.430, which states:

> After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence. [e.s.]

Thus, once the jury deliberated on the misdemeanor DUI, the court cannot call them back to determine the fourth element of felony DUI. At that point the jury's role is completed.

In the case at bar, it is obvious that the trial court properly followed the dictates of this Court and the Fourth District Court of Appeal in refusing to submit to the jury the issue of the existence of prior DUI convictions.

Accordingly, Petitioner's reliance upon State v. Hargrove, 694 So. 2d 729 (Fla. 1997) and Estevez v. State, 713 So. 2d 1039 (Fla. 1998) is misplaced. Neither Hargrove nor Estevez concerns the issue of presumption of innocence, as does the Florida Supreme Court's decision in Rodriguez. Similarly, Petitioner's reliance upon Brown v. State, is misplaced as it is distinguishable and inapplicable to the instant case facts.

Moreover, in light of the foregoing, Petitioner has failed to demonstrate that the trial court violated his rights to due process, equal protection, effective counsel, a fair trial, compulsory process, confrontation and cross-examination of witnesses, prosecution of a defense, to be free from cruel and unusual punishment, and other rights under 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. In fact, the procedure set forth in Rodriguez requires a full trial on the issue of the existence of prior convictions, including

notice. Rodriguez, 575 So. 2d at 1266. Hence, Petitioner has been afforded full rights to confrontation, cross-examination, and representation by counsel, due process and equal protection, etc. Consequently, this Court must affirm Petitioner's conviction and sentence.

In sum, the state contends that Gaudin does not apply to cases such as the case before this Court. Gaudin stands for the general proposition that a defendant is entitled to have the jury decide every element of his crime. Further, if this Court disagrees and holds that Gaudin applies to this case, then the state contends that in such a situation, the defendant may waive his right to have the Rodriguez bifurcated procedure, and the jury must be given *all* the evidence at once to decide the felony DUI, otherwise, rule 3.430 would have to be amended.

In any event should this court determine that Gaudin does apply to these facts, this Court's decision would be prospective with respect to this case. See Boyett v. State, 688 So. 2d 308 (Fla. 1996)(unless the court explicitly states otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced).

POINT II

PETITIONER'S MOTION TO DISMISS FOR LACK OF CIRCUIT COURT JURISDICTION WAS PROPERLY DENIED

In the proceedings below, defense counsel filed a motion to dismiss for lack of circuit court jurisdiction. (R- 26-29). In essence, Petitioner argued that the trial court lacked jurisdiction because a fourth DUI "conviction" is necessary for circuit court jurisdiction over a felony DUI charge. (R- 26-29). However, the trial court properly denied Petitioner's motion, as his position is specifically rebutted by the plain language of Florida Statute §316.193(2)(b), its legislative history, and current case law from the Fourth District Court of Appeal and this Court.

The District Court has held:

> 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.

Harbaugh v. State, 711 So. 2d 77, 83 (Fla. 4th DCA 1998) (emphasis added). Only three prior DUI convictions are necessary to prosecute an offender for felony DUI. State v. Haddix, 668 So. 2d 1064, 1066 (Fla. 4th DCA 1996). The trial court's denial of defense counsel's motion is in harmony with the Fourth District Court of Appeal's holdings requiring only three prior DUI convictions for the prosecution of felony DUI. The trial court's ruling is in accord with the established case law, and furthers the purpose of the felony DUI statute: to subject a fourth DUI

offender (one with three prior DUI convictions) to harsher penalties. See State v. Swartz, 734 So. 2d 448 (Fla. 4th DCA 1999).

This Court has held numerous times that the existence of three prior DUI convictions is an element of the substantive offense of felony DUI, over which the circuit court has jurisdiction. See State v. Woodruff, 676 So. 2d 975 (Fla. 1996); State v. Rodriquez, 575 So. 2d 1262 (Fla. 1991); Hlad v. State, 585 So. 2d 928 (Fla. 1991). The trial court's order denying the motion to dismiss, and recognizing that Petitioner only needed three prior DUI convictions to qualify for a felony DUI conviction properly follows those holdings.

A. PLAIN MEANING OF FLORIDA STATUTE §316.913(2)(b).

Florida Statute §316.193 provides the elements and penalties for the crime of driving under the influence (DUI). A person is guilty of DUI if driving a vehicle under the influence of alcohol or a controlled substance to the extent that the person's normal faculties are impaired. Florida Statute §316.913(1)(a).

Florida Statute §316.913(2)(a) sets forth the penalties for an offender's first three DUI convictions. The penalties, which include fines and imprisonment, increase in severity from the first to the third offense, but all offenses under this section remain misdemeanors under the jurisdiction of the county court.

Florida Statute §316.193(2)(b) provides the penalty for a person convicted of a fourth DUI, elevating the crime to a felony

of the third degree under the jurisdiction of the circuit court. It states that

> [a]ny 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 not be less than $1,000.

Florida Statute §316.913(2)(b).

The plain meaning of §316.913(2)(b) bestows circuit court jurisdiction over this case wherein Petitioner is charged with a fourth DUI offense. "[T]he plain meaning of statutory language is the first consideration of statutory construction." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). There is no room for alternative construction if the meaning of a statute is plain on its face. State v. Harvey, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997).

Florida Statute §316.913(2)(a) provides the penalties for up to three DUI convictions, the greatest penalty being a $2,500 fine and 12 months in prison. The penalty restraints require the State to prosecute these offenses as misdemeanors under the jurisdiction of the county court. See Florida Statute §34.01; Jurisdiction of county court.

However, the penalty for a fourth DUI conviction is separately stated in §316.913(2)(b). This independent section subjects a fourth DUI offender to the penalties of a third degree felony. The

offender must be convicted and sentenced in circuit court to be subject to the penalties that accompany a third degree felony. See Florida Statute §26.012; Jurisdiction of circuit court. A county court cannot sentence a fourth DUI offender to the penalties afforded a third degree felony offender.

The plain meaning of Florida Statute §316.193(2)(b) commands a fourth DUI offender to be punished as a third degree felony offender. To receive these mandated penalties, a third degree felony offender must be prosecuted in circuit court pursuant to Florida Statute §26.012. The circuit court must have jurisdiction to accomplish the plain meaning of the statute: To subject a fourth DUI offender to the penalties afforded a third degree felony offender.

The trial court's denial of the motion to dismiss properly allowed Petitioner, a fourth DUI offender, to be tried pursuant to a statutorily mandated third degree felony conviction, and the enhanced penalties that accompany it. The court's denial of Petitioner's motion to dismiss comports with the plain meaning of the statute that a fourth DUI offender suffer enhanced penalties. The county court cannot mete out the enhanced penalties intended by the statute for a fourth DUI offender.

The penalty for a fourth DUI offense (a third degree felony pursuant to Florida Statute §316.193(2)(b)) can only be issued by the circuit court. To enforce the plain meaning of the statute--

that a fourth DUI offense result in enhanced penalties by elevating the crime to a third degree felony--Petitioner must be tried, convicted, and sentenced in the circuit court. The trial court's denial of the motion to dismiss was in harmony with the statute's plain meaning because neither the county court (due to its limited penalty authority) nor the circuit court (because of its purported lack of jurisdiction) could implement the fourth DUI offender penalties dictated under the statute.

Florida Statute §316.192(2)(a) plainly states that a fourth DUI offender commits a third degree felony, and Florida Statute §26.012 mandates that the circuit court retain jurisdiction over all felony cases. The court's denial of the motion to dismiss was correct in that, the opposite result would have, in essence, compelled the State to prosecute Petitioner (a third degree felony offender under the statute) in a county court misdemeanor proceeding, directly circumventing the directives of these statutes. Petitioner would have escaped prosecution for a third degree felony (and avoided the enhanced penalties), because he could not be charged with this felony in county court. Petitioner was correctly prosecuted as a third degree felony offender in circuit court, so that he was properly subject to the enhanced penalties provided by the statute.

B. LEGISLATIVE HISTORY

The State asserts that Florida Statute §316.193(2)(b) is clear

and unambiguous. See Mancini v. Personalized Air Conditioning & Heating, Inc., 702 So. 2d 1376, 1378 (Fla. 4th DCA 1997) (language of statute is clear and unambiguous conveying clear and definite meaning, no occasion to resort to rules of statutory interpretation to alter plain meaning); T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996) (language of the statute plain and unambiguous, no need for judicial interpretation). However, if this Court finds the statute ambiguous, it may refer to the legislative history.

Florida Statute §316.193(2)(b) was enacted by the Florida legislature on July 11, 1986. See H.B. No.8-B, Chapter 86-296, 1986 Laws of Florida, Vol. 1, Part 2, p. 2219. The preamble to this bill clearly and succinctly states the legislature's intent: "increasing the penalty for a fourth or subsequent violation of provisions relating to driving under the influence[.]" Id.

The legislature accomplished this by escalating a fourth DUI offense from a misdemeanor to a third degree felony. Only the circuit court can convict and sentence a third degree felony offender. Certainly, the legislature intended for the circuit court to have jurisdiction over a fourth DUI offender prosecution, so that the intended penalty increase would result.

The legislature's intent, as clearly stated in the preamble, was to enhance the penalties for a fourth DUI offender. To allow Petitioner to be tried, convicted, and sentenced in county court, (the result of the dismissal in the case at hand), where he would

not be subject to enhanced penalties, manifestly contradicts the clear intent of the legislation. Jurisdiction must lay in the circuit court to effect the enhanced penalties intended by the legislature for Petitioner, a fourth DUI offender.

C. CASE LAW

Case law affirms the State's claim that the circuit court has jurisdiction over the prosecution of a fourth DUI offender. In State v. Rodriquez, 575 So. 2d 1262, 1263 (Fla. 1991), the defendant was charged with felony DUI under Florida Statute 316.193(2)(b). The defendant moved to dismiss or transfer the matter to county court asserting that the information did not adequately set forth the defendant's three prior misdemeanor DUI's, therefore he could not be charged with a felony and the circuit court had no jurisdiction Id.

This Court held that "the information properly invoked the jurisdiction of the circuit court." Id. at 1264. "[T]he combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI as defined by section 316.193(1), (2)(b)." Id. (emphasis added). To arrive at this conclusion, this Court compared the elements of the felony DUI statute to the felony petit larceny statute.

> This conclusion necessarily follows the reasoning in State v. Harris, 356 So. 2d 315 (Fla. 1978), where the Court construed the felony petit larceny statute, section 812.021(3) of the Florida Statutes (1975). Section 812.021(3) elevated the second-degree

> misdemeanor of petit larceny to the status of a third degree felony upon the third or subsequent conviction of petit larceny. Like the felony DUI statute in this case, and virtually all other substantive criminal statutes, the felony petit larceny statute authorized punishment as provided in sections 775.082 (penalties), 775.083 (fines), or 775.084 (habitual offender penalties) of the Florida Statutes (1975). Justice Hatchett concluded for the Court that the felony petit larceny statute "creates a substantive offense and is thus distinguishable from [s]ection 775.084, the habitual offender statute." Harris, 356 So. 2d at 316. The felony DUI statute is indistinguishable in this regard. Section 316.193(2)(b) of the Florida Statutes (Supp. 1988) requires that "[a]ny person who is convicted of a fourth or subsequent [DUI violation] is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." As in Harris, we conclude that the existence of three or more prior DUI convictions is an essential fact constituting the substantive offense of felony DUI.

Id. at 1264-65 (emphasis added). This Court noted that its reading of the felony DUI statute is consistent with the penalty provisions set by the legislature, "including its intent to apply the penalty enhancement provisions of the habitual felony offender statute" for a fourth or subsequent DUI violation. Id. at 265, n.4.

This Court repeatedly confirmed that a fourth DUI offender was subject to prosecution for felony DUI under circuit court jurisdiction.

> [T]he logic supporting our jurisdictional holding above also supports the conclusion that three prior DUI convictions combine as an essential element of felony DUI. The circuit court has jurisdiction only because the

> offense is a felony. It is a felony only by virtue of the fact that the defendant has been convicted of three or more prior DUI violations. It follows that because this fact is essential to the definition of the crime of felony DUI, it is an essential element that must be noticed and proved beyond a reasonable doubt. Art. I, Secs. 9, 16, Fla. Const.

Id. at 1265 (emphasis added). See Hlad v. State, 585 So. 2d 928 (Fla. 1991) (fourth DUI conviction enhanced to felony because of three prior DUI convictions).

In State v. Woodruff, 676 So. 2d 975, 977 (Fla. 1996), this holding was reaffirmed that "[f]elony DUI requires proof of an additional element that misdemeanor DUI does not: the existence of three or more prior misdemeanor DUI convictions." "Felony DUI is a completely separate offense from misdemeanor DUI, not simply a penalty enhancement." Id.

The Fourth District Court of Appeal has consistently held that "[f]or 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." Harbaugh v. State, 711 So. 2d at 83 (Fla. 4th DCA 1998) (emphasis added).

> It is well settled that the existence of three or more prior DUI convictions is an essential element of felony DUI and therefore must be asserted in the document charging felony DUI. . . . [T]he felony DUI statute creates a substantive offense. Like the felony petit larceny statute, the existence of three or more prior DUI convictions elevates the degree or level of the crime.

State v. Haddix, 668 So. 2d 1064, 1066 (Fla. 4th DCA 1996). See

Hauss v. State, 592 So. 2d 783 (Fla. 4th DCA 1992) (felony DUI conviction in circuit court requires three previous DUI convictions alleged in information). See also Brown v. State, 647 So. 2d 214 (Fla. 2d DCA 1994) (prosecution for felony DUI requires three prior convictions for DUI).

In Hope v. State, 588 So. 2d 255, 256 (Fla. 5th DCA 1991), the defendant was charged with DUI in county court, after which the State discovered that he had three previous DUI convictions. The State moved to transfer the case to the circuit court, "alleging jurisdiction pursuant to section 316.193(2)(b)". Id. "The county court ordered the transfer." Id.

The defendant pled nolo contendere to the felony DUI charge, without reserving the right to appeal. Id. The defendant appealed, contesting the jurisdiction of the circuit court. Id. The appellate court held that the circuit court had jurisdiction. Id.

> [T]he important fact is that [the defendant] was charged with a felony, even if inadequately, under a statute which included felony DUI based on three previous convictions and which defined such substantive charge and recited the facts which would support a conviction. It is evident that the information alleges some felony--hence circuit court jurisdiction.

Id. at 257 (emphasis added).

Florida Statute §26.012(2)(d) bestows jurisdiction of all felonies in the circuit court. See Fike v. State, 455 So. 2d 628,

629 (Fla. 5th DCA 1984) (circuit court jurisdiction to try felonies). County courts have jurisdiction of only misdemeanors pursuant to Florida Statute §34.01(1)(a). See Rogers v. State, 336 So. 2d 1233, 1236 (Fla. 4th DCA 1976) (county court jurisdiction for only misdemeanor cases).

The case law clearly supports the State's contention that Petitioner's three prior misdemeanor DUI convictions invoked the jurisdiction of the circuit court for his fourth DUI offense. The existence of Petitioner's three prior convictions is an element of felony DUI. State v. Rodriquez, 575 So. 2d at 1263; State v. Woodruff, 676 So. 2d at 977. Therefore the trial court properly denied defense counsel's motion to dismiss, as the trial court's decision is within agreement with the Florida Supreme Court holdings in Rodriquez and Woodruff.

The State charged Petitioner with felony DUI because it was a separate offense (a third degree felony) from misdemeanor DUI, not simply a penalty enhancement. Woodruff at 977. The trial court's denial of Petitioner's motion to dismiss ensure that jurisdiction lay within the proper forum, the circuit court. Rodriquez at 1265.

The Fourth District Court of Appeal has invariably held that the existence of three prior DUI convictions is an element of felony DUI, Harbaugh v. State, 711 So. 2d at 83; State v. Haddix, 668 So. 2d at 1066; Hauss v. State, 592 So. 2d at 783, and elevates the fourth DUI offense to a substantive third degree felony

offense. Haddix at 1066. The trial court denial's of the motion to dismiss, acknowledging that four prior DUI "convictions" are not necessary to prosecute Petitioner for felony DUI under the jurisdiction of the circuit court, is in accord with the established case law in this district.

Because of his three previous DUI convictions, the State charged Petitioner with felony DUI, a crime within the jurisdiction of the circuit court. Hope v. State, 588 So. 2d at 257. The trial court's denial of Petitioner's motion to dismiss properly ensured the circuit court of its statutorily mandated jurisdiction over this felony. See Florida Statute §26.102(2)(d) (jurisdiction of felonies in circuit court).

The plain language of Florida Statute §316.913(2)(b), the legislative history, and current case law prove the circuit court's jurisdiction in the case at hand. Finally, Petitioner has failed to demonstrate that his conviction violated his 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. As such, the trial court properly denied Petitioner's motion to dismiss for lack of jurisdiction.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this honorable Court AFFIRM Petitioner's convictions and sentences below.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

_____
CELIA TERENZIO
BUREAU CHIEF, WEST PALM BEACH
Florida Bar No. 656879

_____
GENTRY DENISE BENJAMIN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0093180
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(561) 688-7759
Counsel for Respondent

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished to: Steven H. Malone, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on March 24, 2000.

_____

Of Counsel