DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

QUINTARIUS DACQUISTO ROZIER, Petitioner, v. THE HONORABLE DAWN M. BERGIN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest.	No. 1 CA-SA 12-0184 DEPARTMENT C Maricopa County Superior Court No. CR2011-144258-002 SE **DECISION ORDER**

This special action was considered by Presiding Judge Philip Hall and Judges Peter B. Swann and Maurice Portley during a regularly scheduled conference held on September 19, 2012. After consideration, and for the reasons that follow,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action and denies relief.

In September 2011, a grand jury indicted Petitioner for possession of marijuana for sale and conspiracy to commit possession of marijuana for sale. Petitioner filed a motion to remand the indictment for a redetermination of probable cause,

arguing that the grand jury should have been instructed on the defense of entrapment. The state responded that a remand was not appropriate because the grand jurors had been instructed on entrapment in the initial instructions read to them when they convened in July 2011. After hearing oral argument, Judge Samuel A. Thumma denied the motion for remand. Judge Thumma, relying on *O'Meara v. Gottsfield*, 174 Ariz. 576, 851 P.2d 1375 (1993), explained that the length of the gap between the reading of the entrapment instruction and the presentment of Petitioner's case to the grand jury did not require a remand.

Petitioner filed a petition for special action in this court, and we declined jurisdiction. He next filed a petition for special action (which was treated as a petition for review) in the supreme court. In the briefing to the supreme court, the state acknowledged for the first time that its previous assertion regarding the reading of the instruction on entrapment to the grand jury in July 2011 was inaccurate. Based on that concession, the supreme court granted review and remanded the matter to the superior court for reconsideration.

Judge Dawn M. Bergin was assigned to the case on remand. Explaining that "Judge Thumma did not address whether the State *was required* to read the entrapment instruction since the State represented that it had done so[,]" Judge Bergin concluded that the facts did not require a reading of the instruction and

therefore denied Petitioner's motion for remand. This special action followed.

We accept jurisdiction because the denial of a motion to remand an indictment is generally reviewable only by special action. *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995). We review the denial of a motion to remand for an abuse of discretion. *Francis v. Sanders*, 222 Ariz. 423, 426, ¶ 10, 16, 215 P.3d 397, 400 (App. 2009).

Petitioner first contends that Judge Bergin's de novo consideration of whether the facts required an entrapment instruction was error because Judge Thumma's ruling was the "law of the case" regarding whether the facts required an entrapment instruction. We disagree. The law of the case doctrine does not apply where "the issue was not actually decided in the first decision or the decision is ambiguous." *Martinez v. Indus. Comm'n*, 192 Ariz. 176, 179, ¶ 14, 962 P.2d 903, 906 (1998) (citation omitted). Further, an implied determination cannot be found merely because the court *could* have made the determination. *Dancing Sunshines Lodge v. Indus. Comm'n*, 149 Ariz. 480, 483, 720 P.2d 81, 84 (1986). Here, Judge Thumma's ruling did not unambiguously decide whether the grand jury was required to be instructed on the entrapment defense. By contrast, his ruling focused on the length of time between the then-alleged July 2011 reading of the entrapment statute and the

grand jury's consideration of Petitioner's case. Judge Thumma's ruling was not "law of the case" regarding whether the facts supported an entrapment instruction, and Judge Bergin's de novo consideration of that issue was therefore appropriate.

Petitioner next contends that Judge Bergin erred by concluding that an entrapment instruction was not required. Again, we disagree. The state should accurately instruct the grand jury on entrapment where that defense is applicable to the facts of the case. *Francis*, 222 Ariz. at 427, ¶¶ 13, 16, 215 P.3d at 401. The defense requires proof of three elements:

> (1) The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
>
> (2) The law enforcement officers or their agents urged and induced the person to commit the offense.
>
> (3) The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

A.R.S. § 13-206(B).

Here, the evidence presented to the grand jury -- the accuracy and completeness of which Petitioner does not challenge -- was that a police informant made contact with a broker who represented marijuana buyers, and at that time negotiated a per-pound purchase price with the broker and provided the broker with a sample of the drug. Later, the broker (who was not an

agent of law enforcement) contacted the informant to advise him that a buyer was ready, and the two arranged a meeting to exchange the drugs and money. Police set up hidden recording devices at the meeting location and provided an undercover vehicle containing marijuana. The broker arrived at the meeting accompanied by Petitioner and one other man. The men inspected the marijuana and moved it to a repackaging station police had set up at the meeting location. The informant then asked for payment, and Petitioner stated that he had not brought enough money to purchase all of the marijuana. When Petitioner announced how much money he had brought, the broker stated that his fee was included in that amount. Petitioner was in the process of counting out the money when police entered and arrested him.

Judge Bergin did not abuse her discretion by concluding that these facts did not present a "classic" case of entrapment that required an entrapment instruction with respect to the charges against Petitioner. There is no evidence that, with respect to *Petitioner*, police initiated the idea of committing the offenses or urged and induced Petitioner to commit the offenses. The police informant dealt only with the broker in setting up the meeting. The broker independently contacted Petitioner. Further, there is no evidence that the informant

said or did anything to induce Petitioner to make the purchase once the parties met.

Because Judge Thumma did not decide whether the facts of Petitioner's case required an entrapment instruction and because Judge Bergin did not abuse her discretion by deciding that the facts did not require the instruction, we deny Petitioner's request for relief.

/s/

PETER B. SWANN, Judge