IN THE SUPREME COURT OF FLORIDA

JOHNNY RAY OWENS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

CASE NO. 64,980

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON MERITS

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PRELIMINARY STATEMENT

JOHNNY RAY OWENS will be referred to as the "Petitioner" in this brief. THE STATE OF FLORIDA will be referred to as the "Respondent". The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

ARGUMENT

ISSUE

WHETHER AN INFORMATION WHICH ALLEGES THAT A DEFENDANT "CARRIED" A FIREARM IS SUFFICIENT TO ALLEGE AN ESSENTIAL ELEMENT OF AGGRAVATED ASSAULT, AN OFFENSE THAT IS STATUTORILY DEFINED BY SECTION 784.021(1)(a) AS AN ASSAULT WITH A DEADLY WEAPON.

(As stated by the Petitioner).

Prior to commencing argument, the Respondent will first bring to this court's attention the fact that the certified question before the court is quite narrow and does not involve the question of what is or is not a necessarily lesser included offense, nor does it involve Fla. Stat. 812.13 (2)(b) or (c). The specific issue properly before the court deals with Fla. Stat. 812.13(2)(a) and the determination of the meaning of the word "carried". This also requires an examination of Fla. Stat. 784.021 and the word "with" which the Petitioner and the Respondent agree is to be read "uses". The examination of this statute is limited to (1)(a) and does not involve (1)(b) or (2).

The Petitioner would have the court believe that there is a conflict between the interpretation of the First District Court of Appeal in the case of Blow v. State, 386 So.2d 872 (Fla. 1st DCA 1980) and the interpretation by the Second District Court of Appeal in Vitko v. State, 363 So.2d 42 (Fla. 2DCA 1978) and

Owens v. State, So.2d (Fla. 2DCA 1984)(See Appendix A-1). An examination of the history of Blow, supra shows that it has not been relied on by other district courts in this state and more importantly, when the First District Court of Appeal in the case of Cherry v. State, 389 So.2d 1201 (Fla. 1st DCA 1980) refers to it's previous decision in Blow, supra, it states as follows:

> "Similarly, in Blow v. State, 386 So.2d 872 (Fla. 1st DCA 1980), Judge Booth, writing for the Court, held that in the absence of an objection by the defendant, the trial court properly charged on aggravated assault."
>
> (Emphasis added page 1201).

It is important to note that when the First District Court of Appeal is relying on thier own decision in Blow, they recognize a distinction and use it for the proposition that aggravated assault was properly charged in the absence of an objection. This same distinction was noted by the Second District Court of Appeal in its decision in Owens, supra.

Perhaps most importantly, however, is for the Respondent to challenge the Petitioner by bringing to the Court's attention that the petition provides this Honorable Court with no cases directly on point. At page 5 of the Petitioner's brief, the Petitioner asks that common sense be applied. The Respondent herein will also plead that common sense be applied and will additionally supply case authority later in this brief. If this Honorable Court were to hold that "carried" is the same as "used" then there will be an agreement between the allegata and the

probata sub judice; the consequences, however, of such a ruling would be that in the event of a robber carrying a firearm in his pocket, ready to withdraw it at a moments notice to kill, he could not be charged with the enhanced robbery statute. If one applies common sense, one must come to the conclusion that the legislature did not want firearms in the hands of robbers during the commission of a robbery whether they be in their hand, pocket, in a paper bag or otherwise. Carrying alone must activate the statute and "use" is not automatically anticipated by the word "carried".

Applying the common sense interpretation as to whether "carried" means the same as "used" the Respondent will pose this question: If the information in the case sub judice were shown to an individual having no knowledge of the evidence in this case - that is to say, the allegata standing alone - and ask that individual if from the information, which alleges "carried", whether the defendant "used" the gun as well; the answer would clearly have to be that the allegata does not show that the gun was "used".

The Respondent will not ask this court to rely on common sense alone, however, but to examine later cases in this state which have relied on the doctrine in Vitko, supra. In the case of Baker v. State, 431 So.2d 263 (Fla. 5DCA 1983), the court at page 264 states:

> "However, Baker was not charged with simple assault and robbery, but with

> aggravated assault and armed robbery. To accomplish an armed robbery, it is sufficient that the robber has merely "carried" the deadly weapon. To the contrary, in the charged species of aggravated assault, the assault must be made "with" the deadly weapon. In the offense of aggravated assault, the deadly weapon must be used and be the instrumentality by which the assault is accomplished. Therefore, the word "with" in the aggravated assault offense is not the equivalent of the word "carried" in the robbery statute. Vitko v. State, 363 So.2d 42 (Fla. 2DCA 1978). The word "with" in the aggravated assault offense requires conduct not required in the armed robbery offense. This conduct constitutes an element of aggravated assault that is not an element of the armed robbery offense and this element prevents aggravated assault from being a true and necessarily lesser included offense of armed robbery."
>
> (In pertinent part emphasis added). Page 264.

It is interesting to note that in that case, that while there was a dissent, it was not as to this particular point. The following is quoted from the dissent:

> "I agree with Vitko that aggravated assault with a deadly weapon requires conduct that is not required by the armed robbery offense and therefore it follows that aggravated assault is not a true lesser included offense of armed robbery."
>
> (In pertinent part emphasis added). Page 266.

Additionally, the Respondent will refer this Honorable Court to Torrence v. State, 440 So.2d 392 (Fla. 5DCA 1983). The Respondent will not quote lengthy passages from that case but will recommend it as not only correct in its reasoning regarding the words "carried" and "used" but also as to its well-reasoned analysis of the entire arena.

The Respondent in summary will state that the case of Blow, supra has not been followed by other courts in this state, and even when followed by the First District Court of Appeal is relied on for a concept that distinguishes it from Vitko, supra. Also, the Respondent would argue that this Honorable Court must determine that the word "carried" and the word "used" are not to be construed as meaning the same thing, and that determination may be arrived at by the application of common sense, pragmatism and the cases of Baker, supra and Torrence, supra.

CONCLUSION

The reasoning of the Second District Court of Appeal in Owens and Vitko must be approved by this Honorable Court.

Respectfully submitted,

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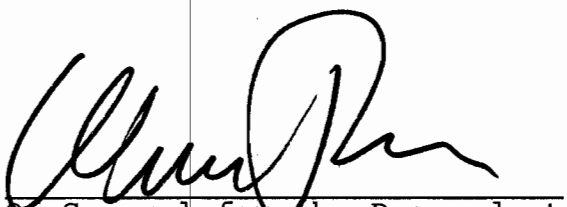
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Regular U.S. Mail to Karla J. Staker, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830 on this day of April, 1984.



Of Counsel for the Respondent