IN THE SUPREME COURT
STATE OF FLORIDA

In the Interest of:

L.S., a Juvenile,

Appellant, Petitioner,

vs.

THE STATE OF FLORIDA,

Appellee, Respondent.

CASE NO. 65,183
(Third DCA Case No. 83-2076)

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APPLICATION FOR CONSTITUTIONAL CERTIORARI
TO THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

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BRIEF OF PETITIONER ON JURISDICTION

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, L.S., a juvenile, seeks to have reviewed a decision of the District Court of Appeal, Third District, dated March 13, 1984 (Said opinion is contained in the Appendix at p.4.). The petitioner herein was the original respondent below and the appellant before the District Court of Appeal. The respondent herein, the State of Florida, was the original petitioner in the trial forum and was the appellee before the District Court of Appeal.

L.S., a fourteen year old child, was charged on June 15, 1983 in a two-count Petition for Delinquency for (1)"theft" and (2)"burglary" in violation of §812.014 and 810.02, Fla. Stat. (1981), respectively. (R.1).

Count I charged L.S. with grand theft, i.e., knowingly, unlawfully and feloniously obtaining, using or endeavoring to obtain or use certain property of Ms. Hortense Robinson with the intent of either temporarily or permanently depriving her of the property, pursuant to §812.014, Fla. Stat.

Count II charged L.S. with burglary, i.e., unlawfully entering or remaining a dwelling without consent and with the intent to commit an offense therein, to wit: THEFT, in violation of §810.02, Fla. Stat. [Emphasis added.] (Said Petition is contained in the Appendix at p.2.)

L.S. was tried without jury before the Honorable Seymour Gelber, judge of the Eleventh Judicial Circuit In and For Dade County, Florida, Juvenile Division, on July 28, 1983. A plea of denial was entered.

At trial, with regard to the burglary charge, the state relied

upon the presumption provided by §810.07, Fla. Stat.,[1] and took the position that it need not prove that the juvenile had the intent to commit any specific offense even though the charging document specifically alleged that he had the intent to commit theft when he broke and entered.

The trial court found that the evidence supported both allegations in the petition, and therefore adjudicated L.S. delinquent and sentenced him to the custody of HRS.

Petitioner, L.S., a juvenile, timely appealed to the District Court of Appeal, Third District. On appeal, the state conceded that there was insufficient evidence to support an adjudication for the count of theft.

In its opinion of March 13, 1984, the District Court of Appeal, Third District, accordingly reversed as to the count of theft, but upheld the burglary adjudication, acknowledging that the court had come to an opposite conclusion from that of another District Court concerning the same factual and legal question. See, Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983). (Said opinion is contained is the Appendix at p.7). The trial court order was therefore reversed in part, and affirmed in part.

L.S. timely filed a Notice to Invoke the Discretionary Jurisdiction of this court to determine the express and direct conflict between two district courts of appeal on the same point of law.

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[1]Section 810.07, Fla. Stat., provides:

> In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof shall be prima facie evidence of entering with intent to commit an offense.

QUESTION PRESENTED

WHETHER IN A TRIAL ON A CHARGE OF BURGLARY, PROOF OF THE FACTUAL ELEMENTS SET OUT IN §810.07, FLA. STAT., IS INSUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF INTENT WHERE THE CHARGING DOCUMENT SPECIFICALLY ALLEGES THAT THE ACCUSED BROKE AND ENTERED A STRUCTURE OR DWELLING WITH THE INTENT TO COMMIT THEFT?

ARGUMENT

IN A TRIAL ON A CHARGE OF BURGLARY, PROOF OF THE FACTUAL ELEMENTS SET OUT IN §810.07, FLA. STAT., IS INSUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF INTENT WHERE THE CHARGING DOCUMENT SPECIFICALLY ALLEGES THAT THE ACCUSED BROKE AND ENTERED A STRUCTURE OR DWELLING WITH THE INTENT TO COMMIT THEFT.

In State v. Waters, 436 So.2d 66 (Fla. 1983), this court held that an information charging burglary need not always specify the offense the defendant is alleged to have committed, although it must always allege intent to commit an offense. See also, Rosier v. State, 436 So.2d 73 (Fla. 1983). This court, however, left open the question of whether the state may avail itself of the presumption of §810.07, Fla. Stat., where the charging document alleges that the accused broke and entered with the intent to commit the specific offense of theft.

In Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983), the District Court of Appeal, Second District, considered a set of facts almost identical to the ones in the instant case. In Bennett the state charged the accused with burglary, alleging in the charging document that he broke and entered with the intent to commit theft.

The District Court of Appeal for the Second District, relying upon this court's decision in Waters, supra., held that since §810.07, Fla. Stat., only applies when no specific offense is alleged in the information charging burglary, the state cannot rely on the presumption contained in that statute since in Bennett the state alleged a burglary with the intent to commit the specific

offense of theft. Bennett, supra., at 1036.

The District Court of Appeal, Second District, interpreted Waters to stand for the following propositions:

> We read Waters to stand for three separate, though interrelated, propositions. First, when the state, either by indictment or by information, charges someone with burglary, the state need not allege that the accused intended to commit a specific offense after the breaking and entered with the intent to commit an offense therein, to wit: sexual battery. Second, if the state does not allege that the accused intended to commit a specific offense, section 810.07 may be used as an alternative method to prima facie establish that a defendant has the intent to commit an unspecified offense after the breaking and entering occurs. Third, if the state charges that a defendant did intend to commit an unspecified offense after the breaking and entering occurs. Third, if the state charges that a defendant did intend to commit a specific offense after the breaking and entering occurs, then the state must prove that the defendant did intend to commit this offense. Furthermore, when the state doses so charge, the proof must be established without the benefit of section 810.07.

Bennett v. State, 438 So.2d at 1035. [Emphasis added.]

The District Court of Appeal, Second District also based its reasoning upon this court's decision in Justus v. State, 438 So.2d 358 (Fla. 1983). There this court held that the state is not required to set forth a specific felony that is intended to be committed or facilitated by means of the kidnapping pursuant to §787.01(1)(a)(2), Fla. Stat. (1977).

The same point of law as considered in Bennett, supra., was involved in the instant case. Here the District Court of Appeal, Third District, when faced with the same facts as the Second District Court of Appeal in Bennett, held that the state may avail

itself of §810.07, Fla. Stat., even when it charges that a defendant did intend to commit a specific offense after the breaking and entering. The Third District Court of Appeal expressly held:

> We disagree with our sister court in Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983), to the extent that it holds otherwise.

L.S. v. State, No. 83-2076, slip. op. at 3.

Here, just as in Bennett, supra., the State's petition for delinquency charged in count II that L.S., a juvenile, "did unlawfully enter or remain in a certain structure, to wit: a dwelling...with the intent to commit an offense therein, to wit: THEFT..." Thus, the State specifically alleged that L.S. intended to commit a specific offense once the breaking and entering occurred. Here, the only evidence linking petitioner to the offense was his fingerprints found just inside the windowsill. There were no eyewitnesses. No property belonging to the owner of the dwelling was found to be within the possession or control of petitioner. Therefore, petitioner could have intended to commit any number of offenses after the breaking and entering or had any legitimate reason to enter. For example, he could as easily have broken and entered the structure to commit arson or merely to use the telephone. The State cannot rely on the presumption contained in §810.07, Fla. Stat., since it alleged a burglary with the intent to commit the specific offense of theft.

Two district courts of appeal have decided an important point of law in express and direct opposition to each other. Thus the procedure by which defendants and juveniles are criminally prosecuted differs depending upon whether they are tried in the northern or

southern part of the state of Florida. This court should therefore exercise its discretionary jurisdiction in order to resolve this conflict of laws.

CONCLUSION

The portion of the decision of the District Court of Appeal, Third District, that the petitioner, L.S., a juvenile, seeks to have reviewed is in express and direct conflict with the decision of the District Court of Appeal, Second District, in the case of Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983). Because of the reasons and authorities set forth in this brief it is submitted that the decision in the present case affirming petitioner's adjudication on the burglary count is erroneous and that the conflicting decision of the District Court of Appeal of the Second District is correct and should be approved by this court as the controlling law of this state, thus clarifying this court's opinion in Waters v. State, 436 So.2d 66 (Fla. 1983).

The petitioner, L.S., a juvenile, therefore, requests this court to grant constitutional certiorari and to enter its Order quashing the decision and Order pertaining to the burglary adjudication hereby sought to be reviewed, approving the conflicting decision of the District Court of Appeal of Florida, Second District, as the correct decision on the point of law, and thereby vacating the adjudiction of delinquency and sentence imposed upon petitioner, L.S., a juvenile.

Respectfully submitted,

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By Sharon B. Jacobs
SHARON B. JACOBS, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of April, 1984, to G. Bart Billbrough, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128.

By Sharon B. Jacobs
SHARON B. JACOBS, ESQ.