IN THE *SUPREME* **COURT OF THE STATE OF FLORIDA**

HERVEY LAREAU,	)	
	)	
Petitioner,	)	
	)	
	)	
vs.	)	**CASE NO. 75,385**
	)	
STATE OF FLORIDA,	)	
	)	
Respondent,	)	

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court and Respondent, the State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with attempted murder, but entered a negotiated plea to the reduced charge of aggravated battery as defined in Section 784.045 (1)(a), Florida Statutes, that is, by causing great bodily harm. A firearm had been used during commission of the offense. The plea negotiations entered into by Petitioner contemplated that the State would contend at sentencing that Petitioner's sentence could be enhanced by operation of Section 775.087 (1), Florida Statutes, which provides:

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, ... the felony for which the person is charged shall be reclassified as follows:
>
> (b) In the case of a felony of the second degree, to a felony of the first degree.

(Emphasis added.) The trial court agreed with the State and enhanced Petitioner's conviction from a second degree felony to a first degree felony, and it sentenced him according to a recomputed guidelines range based on the enhanced conviction.

On appeal, Petitioner challenged the enhancement of his conviction, arguing that aggravated battery is already an enhanced battery, so that it is not subject to further enhancement pursuant to Section 775.087 (1). In its decision of December 28, 1989, the Fourth District Court of Appeal rejected that contention, holding that the use of a deadly weapon was not an element of aggravated battery as charged in this case. Thus, the court upheld the enhanced sentence imposed by the trial court. However, the

appellate court noted "possible conflict" with language contained in Bradfield v. State, 438 So.2d 1005 (Fla. 2d DCA 1983), which directly supported Petitioner's position that enhancement for the use of a firearm was precluded for any aggravated battery.

Petitioner's notice seeking this Court's discretionary review of the decision of the Fourth District Court of Appeal in this cause was filed on January 25, 1990. This jurisdictional brief follows.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in the present cause directly and expressly conflicts with the decision of the Second District Court of Appeal on the issue of whether an aggravated battery may be enhanced from a second degree felony to a first degree felony when a firearm is used in committing it.

ARGUMENT

POINT: THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THE SECOND DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER AN AGGRAVATED BATTERY MAY BE ENHANCED FROM A SECOND TO A FIRST DEGREE FELONY WHEN A FIREARM IS USED TO COMMIT IT.

Pursuant to an agreement with the State, Petitioner pled nolo contendere to committing aggravated battery by causing great bodily harm by use of a firearm. Aggravated battery is a second degree felony, section **784.045**, Florida Statutes. But Petitioner's guidelines sentence was based on a conviction for a first degree felony as a result of the utilization of Section **775.087 (1)(b)**, which provides for the enhancement of a second degree felony to a first degree felony if a weapon or firearm is used in committing it, "except a felony in which the use of a weapon or firearm is an essential element."

Petitioner objected to the reclassification of his conviction on the basis of Bradfield v. State, **438** So.2d **1005** (Fla. 2d DCA **1983)**. That case held:

> The appellant appeals only the imposition of his sentence of thirty years imprisonment for the offense of aggravated battery with a firearm. Utilizing section 775.087(1), Florida Statutes (1981), the trial judge enhanced the appellant's aggravated battery conviction because of his use of a firearm from a felony of the second degree, punishable by a maximum sentence of fifteen years imprisonment, to a felony of the first degree, punishable by a maximum sentence of thirty years imprisonment.
>
> We agree with all of our sister courts in holding that aggravated battery is already an enhanced penalty offense not subject to being further enhanced by the use of section 775.087(1). Webb v. State, **410** So.2d **944**

(Fla. 1st DCA 1982); Reeder v. State, 399 So.2d 445 (Fla. 5th DCA 1981); Blanton v. State, 388 So.2d 1271 (Fla. 4th DCA 1980); Kniaht v. State, 374 So.2d 1065 (Fla. 3rd DCA 1979).

Accordingly, we reverse the appellant's sentence to thirty years imprisonment and remand to the trial court to impose a sentence not to exceed fifteen years for the aggravated battery. The imposition of the minimum mandatory three years pursuant to section 775.087(2) was proper.

REVERSED AND REMANDED.

(Emphasis added.)

Although the Fourth District Court of Appeal recognized that under Bradfield, Petitioner's reclassified conviction would have to be reversed, it refused to follow the course mandated by that decision, and instead it upheld the enhanced sentence in this case. Consequently, the decision of the Fourth District Court of Appeal below is in direct and express conflict with the decision of the Second District Court of Appeal in Bradfield.

The conflict between these decisions must be resolved by this Court. The issue involved here is certainly one of major importance to defendants charged with aggravated battery, who will find themselves prosecuted for a first degree felony if they are charged in the Fourth District, while others in the Second District will only face the significantly lesser penalties for a second degree felony. Such disparity in treatment is obviously not consistent with the goals of uniformity in the criminal justice system exemplified, for instance, by the sentencing guidelines, as well as fundamental principles of due process and equal protection. Therefore, this Court should exercise its discretion and accept

jurisdiction of this cause to resolve the conflict between these two cases.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to exercise its discretion and accept jurisdiction to resolve the conflict created by the decision of the Fourth District Court of Appeal below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to PATRICIA G. LAMPERT, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 7th day of February, 1990.

Of Counsel