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IN THE SUPREME COURT OF FLORIDA

JERRY RAY ROBINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,876

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecuting authority in the trial court and appellee below and will be referred to herein as "the State" or "Respondent." Petitioner, Jerry Ray Robins, was the defendant in the trial court and appellant below and will be referred to herein as "Petitioner." References to the record will be by the symbol "R" and references to the transcripts will be by the symbol "T" followed by the appropriate page number(s).

## JURISDICTIONAL STATEMENT

The Supreme Court of Florida has jurisdiction to review a decision of the district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. **Fla. Const.** art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

## STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as relatively accurate. However, Respondent adds the following relevant facts:

1. The victim, Norma McCullough, testified that she thought Petitioner was the man, although she was not one-hundred percent sure, that sat on top of her, choked her, and told her that he was going to kill her and either "bust" or "pluck" her brains out. (T 24, 31).

2. Willie Thompson, a witness, testified that his truck broke down near the field where the victim was first attacked. His female companion heard the victim scream for help, and they walked toward the field. He did not get very close, but he saw a white woman on the ground and two white men kneeling over her. (T 66-67). He asked if everything was all right, and one of the men told him that they could handle it, that it was their business. (T 59-60). Mr. Thompson went back to his truck to get a tire iron or jack handle or something, and returned to the field. (T 61). When he returned, his companion told him that the two men had taken the victim to another field across the street. (T 61). As he was walking over there, his friend, John Parker, arrived to help him with his truck. He told Mr. Parker what had happened and asked him if he had any weapons. Mr. Parker retrieved two loaded handguns from his glove compartment, and the two men walked to the second field. (T 61). When they approached, he saw the victim lying on the ground, one man kneeling over her, and the other man standing over her. (T 70-

71). Mr. Parker confronted the two men, fired his gun once, and hit one of the men with the gun. (T 74). The police arrived within minutes. He never saw either man snatch the victim's necklaces from her neck, and he never saw either man with a weapon. (T 85).

3. Mr. Parker, the other witness, testified that when he and Mr. Thompson approached the second field where the victim was screaming, he saw Petitioner kneeling on the victim. (T 107-08). When he approached Petitioner and asked him what he was doing, Petitioner pushed him and said, "Nigger, you don't tell me what to do." (T 108, 111). Petitioner came after him, and he fired the gun once in the air. When Petitioner continued to approach, Mr. Parker grabbed him and hit him with the gun on the left side of the face. (T 108-09, 111). They wrestled over the gun until the police arrived a few minutes later. (T 109, 111). While they were struggling, Mr. Parker noticed that the other white man was over by the victim and that he had a small-caliber gun in his hand. (T 112, 117, 120). When the police arrived, the man ran away with the gun in his hand. (T 112).

4. Officer Leon Broadnax testified that when he arrived on the scene, he "saw a white male standing close to the sidewalk with his hands up in the air and apparently he had a gun in his hand." (T 130). When he saw the officer, "he took off running." (T 130-32). The officer gave chase, but lost the suspect shortly thereafter. (T 130-32).

5. Petitioner presented the testimony of his sister, Christine Gillespie, who stated that she lived with Petitioner in

an apartment near the field where the victim was attacked. (T 146-47). On the night in question, the victim stood on her porch and knocked on her window. (T 147). The victim was scared and shaking when she told Petitioner's sister that "two colored people tried to rape her." (T 147-48). She tried to comfort the victim while the police arrived. (T 148). When the police arrested Petitioner, they "throwed him on the car." (T 148-49). On cross-examination, Ms. Gillespie admitted that she referred to African Americans as "colored people," and that "[t]hey live in their world and I live in mine." (T 150).

6. Petitioner also presented the testimony of his landlord, Russell Thomas, who was also the boyfriend of another sister of Petitioner. (T 161, 166). He testified that early in the morning he heard loud voices in the field next to the apartment. (T 162). At one point, he heard someone shout, "Shoot the mother fucker. Shoot the mother fucker." (T 162). He then heard one shot. (T 162). Shortly thereafter, he heard the victim beating on the window on the side of the apartment. He and Ms. Gillespie went outside, and when Ms. Gillespie asked, "What in the fuck is going on?", the victim said, "Help, help, . . . two niggers are trying to rape me." (T 163). He immediately called the police. (T 163). On cross-examination, Mr. Thomas testified that the white man with Petitioner said, "[F]uck the police. . . . I don't care if they know I got a gun." (T 169). The man then ran when the police arrived. (T 169). He also testified that after the police arrived he heard the victim tell the police that the two black men tried to help her, and that Petitioner tried to attack her. (T 173).

7. Petitioner, a seven-time convicted felon, testified in a narrative form that he went to Nadine's Place, a nearby bar, about 7:00 p.m., had a few beers, and then went home around 10:00 or 11:00 p.m. (T 176-78). As he was entering his apartment, the victim and a black male approached him and asked him if he had any money, to which he said no. She then asked him if he could get her some crack cocaine. (T 178). Assured that she was not an undercover officer, Petitioner left her with the white male and went to buy some crack with the money she gave him. (T 179). He came back and the white male was gone.[1] (T 179). She then asked him if he had anything from which to smoke the crack, to which he replied that he did not, but that he would make her a pipe from a beer can. (T 179). At that point, two black males ran up with guns in their hands, and one yelled and fired a gun, grabbed Petitioner by the shirt, and hit him on the head. (T 179). On cross-examination, Petitioner denied signing a statement of rights form or making any statement to Detective Barwick at the police station that night. (T 182-83).

8. The State called Detective Barwick as a rebuttal witness, who testified that Petitioner was informed of his constitutional rights and signed a waiver of rights form. (T 188-90). The court admitted the form into evidence without objection. (T 190-91). Detective Barwick also stated that Petitioner gave a voluntary statement. (191). Petitioner told him that he had been in the Shamrock Bar around 11:00 p.m. when a

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[1] The change in race of the victim's companion can only be attributed to an obvious inconsistency in Petitioner's version of events.

white female, the victim, walked in with a white male. (T 191, 192). After a few minutes, she walked over to Petitioner, they had a few beers, and then left the bar without her male companion. (T 191). She asked if he could buy some crack cocaine, so they met two white males and bought some. While walking back to his apartment, two black males walked up and started an argument, and then eventually the police arrived. (T 191).

## SUMMARY OF ARGUMENT

Petitioner was convicted of kidnapping and armed robbery under a principal theory. Since he was credited with constructively possessing the handgun during the commission of the kidnapping, the State reclassified the offense pursuant to **Fla. Stat.** § 775.087(1) (1989). The First District affirmed Petitioner's sentence, finding that when the sentencing statute and the principal statute are read *in pari materia*, reclassification is proper. Since the intent of § 775.087 is to deter the use of weapons during the commission of a felony offense, and since the intent of the principal statute is to treat each perpetrator as if he had done all of the things that the other perpetrators did, reclassification is appropriate even though Petitioner never physically possessed the firearm.

## ARGUMENT

### ISSUE I

WHETHER THE RECLASSIFICATION PROVISION OF FLA. STAT. § 775.087(1) (1989) APPLIES TO ONE CONVICTED UNDER A PRINCIPAL THEORY OF A CRIME INVOLVING A FIREARM ALTHOUGH HE DID NOT PHYSICALLY POSSESS THE FIREARM (Restated).

Section 775.087 of the Florida Statutes has two subsections. Subsection (1) provides for the reclassification of a felony offense when the defendant, during the commission of the offense, "carries, displays, uses, threatens, or attempts to use any weapon or firearm."[2] Subsection (2), on the other hand, provides for mandatory minimum terms of imprisonment when the defendant "had in his possession" certain firearms or destructive devices. Petitioner is challenging his sentence based on subsection (1), because his conviction for kidnapping was reclassified from a first-degree felony punishable by life to a life felony, which resulted in a guidelines score one cell higher.

The pith of Petitioner's complaint is that he was never in actual physical possession of the firearm. Rather, his accomplice had sole possession of the firearm during the commission of the kidnapping and armed robbery. Thus, according to Petitioner, even though he was convicted of those offenses based on a principal theory, that same theory cannot be applied

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[2] The use of a weapon or firearm cannot be an essential element of the offense.

to reclassify the kidnapping offense and increase his punishment. **Pet.'s Initial Brief on Merits** at 9-13.

In the First District's opinion below, the court harmonized § 775.087 with § 777.011, which provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

(emphasis added). After noting that the obvious intent of § 775.087 "is to deter the use of firearms and other weapons during the commission of criminal offenses," Robins v. State, 587 So.2d 581, 582 (Fla. 1st DCA 1991), the district court determined that, when both statutes are read *in pari materia*, the application of the reclassification provision is proper. Id. at 383. In so holding, the First District specifically rejected holdings by other districts that actual physical possession of the weapon is required for reclassification. Id. (acknowledging conflict with Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989), rev. denied, 548 So.2d 663 (Fla. 1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989); and State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), rev. pending, case no. 77,859).[3]

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[3] The court in Ngai merely adopted the reasoning in Willingham and reversed the reclassification without comment.

In Willingham, the defendant and two others sold cocaine to an undercover police officer. As the officer drove off, the defendant grabbed one accomplice's gun and shot at the officer. The defendant was later convicted of possession of cocaine with intent to sell, without a firearm, and sale of cocaine, with a firearm. In reversing the reclassification of the sale of cocaine offense, the Second District believed a plain reading of subsection (1) would require that the defendant actually possess a firearm during the commission of the offense. 541 So.2d at 1242. Since the sale of the cocaine had been completed when the defendant grabbed the gun and began shooting, he did not possess the weapon during the commission of the offense. Thus, the reclassification provision was inapplicable. Id. at 1241.

The facts in Willingham are so different from the facts in the present case that any analogy between the two is strained at best. Moreover, the State would submit that Willingham was wrongly decided. The plain language of subsection (1) does not require actual possession of the weapon. Rather, subsection (1) requires only that the person carry, display, use, threaten, or attempt to use a weapon during the commission of a felony in which the use of a weapon is not an essential element. As the First District stated, "[T]he key factor to be considered for application of section 775.087(1) is whether the defendant had the advantage of the presence of a weapon during the commission of an offense in which he took an active part and relied upon the weapon at least in part in the furtherance of the offense." Robins, 587 So.2d at 383.

The mere presence of a weapon or firearm during the commission of a felony triggers the application of the reclassification provision to any person found to be a principal to the crime. After all, the whole concept behind the principal theory is that each person is treated as if he had done all of the things that the other person did. See Hough v. State, 448 So.2d 628, 629 (Fla. 5th DCA 1984) ("There was sufficient evidence presented at trial to find appellant guilty of the crime charged because, despite a dispute in the evidence as to which of the three participants actually had possession of the single gun employed in the robbery, if any one of them carried the firearm during the commission of the crime, all of them are guilty as principals."); Williams v. State, 479 So.2d 227, 228 (Fla. 3d DCA 1985) (finding an accomplice's possession of a firearm during a robbery sufficient to support the jury's verdict of guilt against the defendant). To uphold a conviction based on the principal theory and then deny the application of the reclassification provision to one person found equally culpable would be without logic and would contravene the intent of § 777.011.

In State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), the defendant was leading the police on a high-speed chase, while his accomplice was shooting at them. Under a principal theory, the defendant was convicted of attempted first-degree murder, which was reclassified under subsection (1).[4] The Third District

[4] In the direct appeal, the defendant challenged his conviction under the principal theory, but the Third District affirmed. Rodriguez v. State, 528 So.2d 1373 (Fla. 3d DCA 1988). The defendant did not raise the reclassification issue.

agreed with the trial court on post-conviction review, however, that actual possession of the firearm was required. Significantly, the Third District certified on rehearing the following question to this Court:

> Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a co-perpetrator?

582 So.2d at 1191.

The State submits that Rodriguez was also wrongly decided and that this certified question must be answered in the affirmative, if the statute is to be given its intended effect, and if the statute is to be harmonized with § 777.011. As a principal, Petitioner is as guilty of armed robbery and kidnapping as his accomplice, regardless of who possessed the weapon. Consequently, Petitioner was properly sentenced accordingly, which required application of the reclassification provision of section 775.087(1).

Petitioner urges this Court to apply some basic principles of statutory construction which would mandate reversal of the First District's decision. First, Petitioner begs this Court to apply the plain meaning rule. Quoting the pertinent part of subsection (1), Petitioner emphasizes that the defendant must "carr[y], display[], use[], threaten[], or attempt[] to use any firearm or weapon." However, Petitioner assumes that the list of verbs *a fortiori* connotes actual physical possession. Quite the

contrary, one could easily display or threaten to use a weapon without ever touching it. Thus, Petitioner's selective choice for application of the plain meaning rule does not benefit his position.

Petitioner also urges this Court to apply the rule of lenity and to resolve any doubt about the applicability of subsection (1) in his favor. The controlling rule of statutory construction, however, is to carry out the legislative intent of the statute. As shown above, the purpose of subsection (1) is thwarted if it is not applied to principals. Thus, before the rule of lenity is applied, the intent of the legislature must be effectuated.

In selectively choosing the rules of statutory construction that he wants applied, Petitioner has ignored the very rule of statutory construction that the First District properly used to affirm his sentence. When two statutes seemingly cover a situation, "[t]he courts' obligation is to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both." Carawan v. State, 515 So.2d 161, 168 (Fla. 1987). This is precisely what the First District did in the present case. As a result, Petitioner was properly punished as if he had actually committed the offense with the weapon in hand. Since the First District did not err in reaching this result and in affirming Petitioner's sentence, this Court should affirm the district court's decision.

## ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ARMED ROBBERY COUNT (Restated).

Petitioner seeks review in this Court based on conflict jurisdiction. As discussed in Issue I, supra, the only basis raised by Petitioner in his jurisdictional brief rested on the enhancement of Petitioner's sentence due to his accomplice's possession of a firearm during the kidnapping and robbery of the victim. Although the First District affirmed the trial court's denial of Petitioner's motion for judgment of acquittal on the armed robbery count, Petitioner did not seek review in this Court based on conflict between that holding and the decision of this Court or another district court. Rather, Petitioner sought review only on the enhancement issue.

This Court should note that its discretionary jurisdiction to review conflict cases is routinely being abused by parties who (1) sometimes ignore entirely the issue in conflict and argue unrelated issues, (2) perfunctorily argue the issue in conflict and then argue various other unrelated issues, or (3) argue the issue in conflict, but then burden the judicial system, and the parties, with arguments, such as here, which have no relevance to the issue in conflict, and which the district court below summarily rejected. Increasingly, this abuse of the system tends to transform this Court's jurisdictional responsibilities under the Florida Constitution into error review of district court decisions, a result completely contrary to the constitutional

scheme, particularly as it was amended in 1980 to eliminate abuses which had crept into the system. The State urges this Court to address this problem and to make clear that such arguments are strongly disfavored. See, for example, this Court's recent decision in Stephens v. State, 572 So.2d 1387 (Fla. 1991), which indicates the Court's awareness of the problem and suggests a resolve to end the abuse.

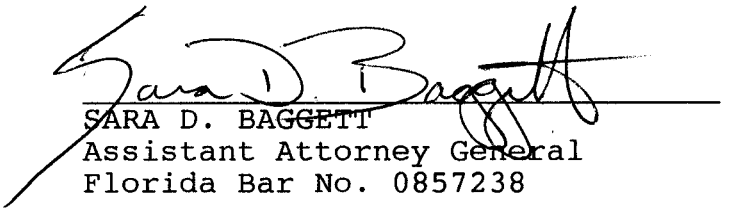
As for the merits of Petitioner's argument that a judgment of acquittal should have been granted despite the overwhelming evidence that he was a principal in the armed robbery of the victim, the State relies on the record evidence which persuaded the jury beyond a reasonable doubt and satisfied both the trial and district courts.

## CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully asserts that this Honorable Court should approve Robins, disapprove Willingham, Ngai, and Rodriguez, and affirm Petitioner's conviction and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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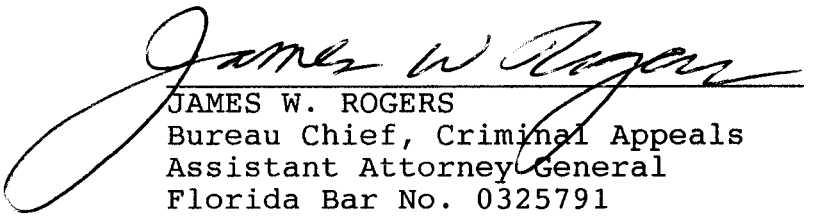

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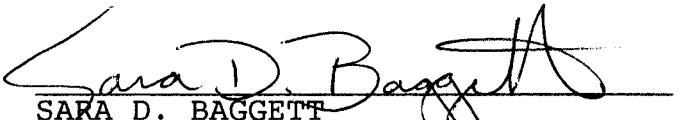
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Abel Gomez, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of March, 1992.



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