IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 83,502

JOHN EDWARD HOUCK, JR.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT AND THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The Defendant, John Edward Houck, Jr., was tried in Orange County, Florida based upon an amended information charging him with committing second degree murder in connection with the death of a George Tommie Carter. (R 3, 66) The amended information alleged that the Defendant had used a weapon -- pavement or a hard surface -- to inflict trauma to the victim's head, causing death. Reclassification was sought via §775.087(1), Fla. Stat. (1991) regarding the "use" of a weapon.

The trial court instructed the jury as to the offenses of second degree murder with a weapon, second degree murder without a weapon, manslaughter with a weapon, and manslaughter without a weapon. (R 532) The Defendant objected to standard instruction 3.05(b), which required the jury to factually determine whether a weapon was used in the commission of the offense. However, the trial court ultimately gave said instruction. (R 526,527) Additionally, the trial court refused to give an aggravated battery instruction which was requested by the Defendant. (R 402, 487)

Defendant was found guilty of manslaughter with a weapon and sentenced pursuant to the aforementioned reclassification for the use of weapon. A timely appeal was filed. After oral argument, the three judge panel unanimously ruled to uphold the conviction. A motion for rehearing was filed by the Defendant and, in an *en banc* proceeding, the remaining four judges formed a 4-3 majority which reversed the earlier opinion. Both decisions certified the "asphalt as a weapon" issue as one of great public importance. The state timely sought the discretionary review of this

Court.

STATEMENT OF THE FACTS

The victim, George Tommie Carter, died from blunt force trauma to the head outside Anthony's Lounge in Orlando, Florida. Sharon Carter, the victim's sister-in-law, worked as a bartender in Anthony's Lounge. She testified that at approximately 1:30 am on November 16, 1991 she heard a sound like a pool cue stick breaking and thereafter noticed that the Defendant had a broken cue stick in his hand. The Defendant was escorted to the door when he cursed and swung at her husband, Jerry Carter, the victim's brother. (R 100) A fight involving a number of people ensued in the street outside the bar. (R 100-101)

Jerry Carter testified that after the fight spilled out into the street, he spent most of his time fighting with a person other than the Defendant. (R 149-150) Terry Howell, the victim's nephew, testified that he had a clear view of the Defendant leaning over the victim, shaking him. (R 185,189) He further observed the Defendant being pulled off the victim by Norman Rush. The victim looked "pretty well" unconscious at that time. (R 183-185)

Alexander Hiller also saw the Defendant on top of the victim, shaking the decedent and "smashing" the decedent's head against the asphalt pavement "several times." (R 196-198, 205-206) When pressed to be more specific about the number of times the victim's head was smashed against the pavement, Hiller stated that it was "in between five and ten" times. (R 211) Hiller testified that it was he who was responsible for getting the Defendant off of the victim. (R 198,199)

Cocktail waitress Tammy Anderson stated that she heard Terry Howell yell, "Hey, man, you hurt my uncle." She further heard the Defendant reply "Come out here, and I'll fucking hurt you, too." (R 218-219) Duey Lee also witnessed the Defendant push the victim to the ground, straddle him, and saw him "pounding" the victim's head against the pavement "at least" three or four times. (R 231, 233-235) He also heard the Defendant say that he was not going to "let [the victim] go." (R 238)

Bruce Brunsom, M.D., a neurological surgeon, testified as to the serious head injuries suffered by the victim and expressed his opinion that the head injuries received by the victim led to his death. (R 317-321) The pathologist who conducted the autopsy testified that the victim died of blunt force trauma causing head injuries consistent with the victim's head being knocked "at least three times" or "on several occasions" against a hard, flat surface. (R 379-380)

The Defendant and Jason Shuster testified that they went to the bar together and that they were both involved in altercations that evening. (R 421, 449-450) Both denied any knowledge of or responsibility for the victim's injuries.

SUMMARY OF THE ARGUMENT

The finding that the Defendant used the asphalt as a weapon was supported by the evidence, caselaw, jury instructions, and the verdict. A weapon is defined as any object that could be used to cause death or great bodily harm. It is the intended use of the item or object which characterizes whether or not it is a weapon. There is no controlling formula which could possibly define a "weapon" for all future cases. This issue is a question of fact for the jury to determine. The district court opinion holding otherwise should be reversed.

ARGUMENT

THE DEFINITION OF THE WORD "WEAPON" AS USED IN §775.087(1), FLA. STAT. (1991) PROPERLY ALLOWS THE JURY TO FIND THAT A PAVED SURFACE CONSTITUTES A DEADLY WEAPON WHERE THE DEFENDANT CAUSES THE VICTIM'S DEATH BY REPEATEDLY SMASHING THE VICTIM'S HEAD AGAINST THE PAVEMENT.

In its opinion, the Florida Fifth District Court of Appeal first analyzed §775.087(1), Fla. Stat. (1991). That statute reclassifies a second degree felony to a first degree felony if the defendant "carries, displays, uses, threatens, or attempts to use any weapon or firearm." (emphasis supplied) However, the word "weapon" is not defined within said statute or chapter. The District Court therefore turned to a dictionary definition in concluding that a paved surface is not commonly understood to be an instrument for combat, i.e., a weapon.

The court ignored the more expansive definitions found in other dictionaries. Webster's New Collegiate Dictionary, 3rd Edition, defines a weapon as "anything used or usable in injuring, destroying, or defeating an enemy or opponent." Black's Law Dictionary, (6th ed. 1990) defines weapon as "an instrument of offensive or defensive combat, or anything used ... in ... injuring a person. (all emphasis supplied) Black's defines "dangerous weapon" as

> any article which, in the circumstances in which it is used ... is readily capable of causing death or other serious bodily injury. [citation omitted] What constitutes a 'dangerous weapon' depends not on nature of the object but on its capacity, given manner of use, to endanger life or inflict great bodily

> harm. [citation omitted] As the manner of use enters into the consideration as well as other circumstances, the question is often one of fact for the jury, but not infrequently one of law for the court. (emphasis supplied)

Similarly, the same source defines a "deadly weapon" as "any ... device, instrument, material or substance, whether animate or inanimate, which in the manner it is used ... is known to be capable of producing death or serious bodily injury."

As indicated by the above definition, the question of whether an item is a weapon can be either a matter of law or fact. The District Court clearly erred in determining that it is purely a question of law. More frequently, it is a factual matter to be decided by a jury. In Streeter v. State, 416 So. 2d 1203, 1205-6 (Fla. 3rd DCA 1982) the court held that the instant question is one, like the felony charge itself, which must be made by the jury beyond a reasonable doubt. Accord U.S. v. Barnes, 569 F.2d 862 (5th Cir. 1978); Goswick v. State, 143 So. 2d 817 (Fla. 1962); State v. Nixon, 295 So. 2d 121 (Fla. 3rd DCA 1974); State v. Fleming, 606 So. 2d 1229 (Fla. 1st DCA 1992).

Certainly, a brick, rock or piece of pavement can be a deadly weapon when it is wielded by an assailant. So it is not the substance or chemical makeup of the paved surface which would prevent a parking lot or street from functioning as a weapon. The focus therefore centers upon whether pavement can be a weapon when it is **used**, not carried. This point was cogently raised by Judge Harris in his dissent:

> [s]ection 775.087(1) uses the terms 'carry' and 'use' in the disjunctive. This indicates

> that the legislature is concerned not only with how the weapon gets to the site of the assault but also with the fact that a weapon, even if it is found at the assault site, is used to injure or kill another. And there is no basis for inferring that the legislature intended to preclude a brick or a 2" x 4" from being a weapon merely because they were designed for the benign purpose of construction.

In the instant case, the Defendant was able to achieve the death of the victim solely through the use of concrete or pavement. The Defendant would not likely have been able to inflict the same damage in the same amount of time with his fists alone. It is clear that the pavement accelerated the victim's injuries resulting in death; and there is no question that the Defendant used the asphalt to that end. The majority decision below finds that the legislature intended only to prohibit crimes committed with those items "commonly" considered to be weapons. This conclusion is contrary to established law and effectively rewrites the applicable statutes.

It is improper to judicially limit the definition of the word weapon to those weapons considered dangerous at the time the law was enacted. See Fall v. Esso Standard Oil Co., 297 F.2d 411 (5th Cir.), certiorari denied 371 U.S. 814, 83 S.Ct. 24, 9 L.Ed.2d 55 (1962) Advances in science and technology demand a case by case analysis by the fact finder. The standard jury instructions which were approved by this Court are consistent with the state's argument:

> A "weapon" is legally defined to mean **any object** that could be used to cause death or great bodily harm.

An object is variously defined as anything placed before the senses or the totality of

external phenomena; Webster's Third International Dictionary (1985) anything that is visible or tangible and is relatively stable in form. Random House Dictionary, 2d Edition (1983) Clearly, pavement can be considered an "object;" the jury's determination comported with the approved jury instructions.

Automobiles were not designed or manufactured to be weapons; nor are they commonly referred to as weapons. Yet there is no doubt that cars can effect an intentional death. Similarly, a plate glass window is not a weapon -- unless perhaps a carotid artery is sliced open after an assailant pushes a victim through the glass. The question is whether the injuries were sustained as a result of an intentional act or happenstance. This is purely a question of fact, not of law.

Florida would not stand alone in deciding that a concrete or asphalt surface can be a weapon. See People v. Galvin, 65 N.Y.2d 761, 492 N.Y.S.2d 25, 481 N.E.2d 565 (1985); State v. Reed, 101 Or. App 277, 790 P.2d 551, review denied 310 Or. 195, 795 P.2d 554 (1990). The Defendant will no doubt argue that the rule of lenity applies. However, that is so only if the statute is ambiguous. U.S. v. Culbert, 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978). The plain meaning of both the statute and the jury instruction is clear. Moreover, a statute should never be construed so strictly as to defeat the obvious intention of the legislature or to override common sense. See Barrett v. U.S., 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976); U.S. v. Moore, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975).

The holding in Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984) is instructive. While acknowledging that a criminal statute must be strictly construed,

the decision states:

> [w]e hold that whether or not an object is a deadly weapon is a question of fact to be determined by the jury from the evidence, taking into consideration its size, shape and material and the **manner in which it was used**. (Duba at 1169, emphasis supplied)

This holding focuses upon the "use" of an "object" and is in direct conflict with the court's opinion under review.

The district court correctly notes that this question is one of first impression at the appellate level and one which may impact future cases and jury instructions. Its impact is already present for it is in conflict with the jury instructions. Under the district court's decision, a defendant who removes a loose brick from a cobblestone street and uses it to beat the victim to death would be eligible for reclassification. If that same brick was *en situ* and the defendant instead beat the victim's head into it, the defendant would not be subject to reclassification. Smashing a skull against a brick or a brick against a skull should not result in any criminal disparity. This distinction is farcical and must not be given the imprimatur of this Court.

The question presented is one of great public import and impact. Jurisdiction should be granted and the district court's opinion reversed.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays that this Honorable Court accept jurisdiction and reverse the decision of the district court, affirming the judgment and sentence of the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing initial brief on the merits in case number 83,502 has been furnished by U.S. Mail to David A. Henson, Esq., 1150 Louisiana Avenue, Suite 1, P.O. Box 2728, Winter Park, FL 32709 and to Irby Pugh, Esq., 218 Annie Street, Orlando, FL 32806, this 9th day of May, 1994.

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