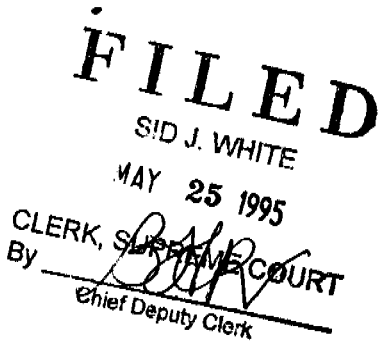
IN THE SUPREME COURT OF FLORIDA

CASE NO.: 85,444



JONATHAN SIMMONS,
Petitioner,

-VS-

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

REPLY BRIEF ON THE MERITS

By: Jonathan Simmons
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ARGUMENT I

JURISDICTIONAL STATEMENT

Although this Court issued an order postponing jurisdiction and ordered that the briefs and Reply Briefs on the MERITS are to be submitted - In the Respondent's REPLY BRIEF ON THE MERITS, he has argued Jurisdiction, in exception to merits and thus, the Petitioner's Jurisdictional Statement.

The Petitioner contends that the Jurisdiction of this Court should be invoked in the Interest of Justice, in that the end of Justice would not be served unless this Court chose to dispose of this case in the proper manner.

The District Court has, by definition, Expressly addressed the issues raised by the Petitioner in his Motion on Appeal. The Supreme Court defined the term "Expressly" by its ordinary dictionary meaning: "in an express manner." The dictionary meaning of the term "express" is: "to represent in words or "to give expression to." **JENKINS V. STATE**, 385 So.2d 1356 (Fla. 1980).

Although the respondent chose to expound on the latter definition - the District Court's opinion conforms with the first definition (To represent in words).

Secondly, the Trial Court is bound by decisions of Supreme Courts just as District Courts of Appeal to follow controlling precedents set by Supreme Court. **STATE V. LOTT**, 286 So.2d 565 (1973) certiorari denied 94 S.Ct. 2613, 417 U.S. 913, 41 L.Ed. 2d 217.

District Court of Appeal may not intentionally render a decision which is in conflict with a Supreme Court precedent. **HOFFMAN V. JONES**, 280 So.2d 431 (Fla. 1973). The Third DCA was well aware of this Court's Decision in the case of **WASHINGTON V. STATE**, 19 Fla.L.Weekly S647 (Dec. 9, 1994) when it made its ruling on the Petitioner's Appeal; however, the DCA chose to render a ruling in conflict with this Court's opinion anyway.

Thirdly, the Respondent in this cause has also invoked the discretionary review of this Court. It is well settled law that once the Supreme Court accepts jurisdiction over cause in order to resolve legal issue in conflict, it may, in its discretion, consider other issues properly raised and argued before Supreme Court. **SAVOIE V. STATE**, 422 So.2d 308 (1982).

Argument and Citations of Authority

It is a well-established Rule of Statutory Construction that the Express mention of one thing in Statute implies exclusion of another. **PW VENTURES, INC., V. NICHOLS**, 533 So.2d 281 (Fla. 1988); **THAYER V. STATE**, 335 So.2d 815 (Fla. 1976).

The law clearly requires that the legislative intent be determined primarily from the language of the statute because a statute is to be taken, construed and applied in the form enacted. **VAN PELT V. HILLIARD**, 75 Fla. 792, 78 So. 693 (1918); **VOCELLE V. KNIGHT BROS. PAPER CO.**, 118 So.2d 664 (Fla. 1st DCA 1960). The reason for this rule is that the Legislature must be assumed to know the meaning of words and to have expressed

its intent by the use of the words found in the statute.

In § 775.084(1)(b)1, Fla.Stat. (1988 Supp.), the Legislature made direct references to the prior offense conviction(s) which supports habitualization as a violent habitual offender. In those instances the following language appears:

> **1. The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:...**
>
> **c. Robbery, . . .**

§ 775.084(1)(b)1c., Fla.Stat.(1988 Supp.).

If the Legislature intended to authorize the use of a prior ARMED ROBBERY to be used as basis for classification of a habitual violent felony offender, then they would not have chose the word ROBBERY, and instead used the word ARMED ROBBERY. This is evident in that the crime of ARMED BURGLARY is enumerated in "j." of the above. The Legislature must be assumed to know the meaning of words and to have expressed its intent by use of words found in statute. **THAYER V. STATE**, 335 So.2d 815 (Fla. 1976).

The Petitioner argues that the expressed, clear and plain language of the legislature only authorizes a prior conviction of ROBBERY to be used to support habitualization as a violent habitual felony offender. Thus, the Legialature's intent is clear.

Once the Legislature chose to mention the word Robbery in the above Section of Florida Statutes (1988 Supp.), they Expressly excluded the word ARMED ROBBERY. SEE: **PW VENTURES,**

INC., V. NICHOLS, 533 So.2d 281 (Fla. 1988).

The Respondent has attempted to interpret this Court's rationale behind their reversal of the habitual offender sentence in WASHINGTON; however their interpretation does not appear in this Court's opinion handed down in WASHINGTON. There's no case law supporting the Respondent's interpretation that the crime listed as robbery includes all enhanced forms of robbery including armed robbery to support habitualization.

In the First District Court of Appeal's decision of **WATKINS V. STATE**, the Court ruled on the same rationale of the instant case. WATKINS was found to be a Habitual Violent Felony Offender (HVFO), based on a prior conviction of DUI MANSLAUGHTER, which was not one of the qualifying offenses enumerated in HVFO statute. **WATKINS**, 622 So.2d 1148 (Fla. App. 1 Dist. 1993).

The Court held:

> **[4-7] Although manslaughter is within the enumeration of prior felonies, DUI Manslaughter is not specifically included; therefore, we conclude that the Court erred in imposing a HVFO sentence based thereon.**
>
> **One of the fundamental principles of Florida law is that penal statutes must be construed according to their letter. (Citations ommitted).**
>
> **Thus, if the legislature defines a crime in specific terms, courts are without authority to define it differently. (Citations omitted).**
>
> **Criminal statutes are to be construed strictly in favor of the accused. (Citations omitted).**
>
> **WATKINS**, supra.

It is evident that the Legislature, being fully cognizant of the difference between ARMED ROBBERY and ROBBERY, when enacting § 775.084(1)(b)1c., Fla.Stat. (1988 Supp.), didn't intend for a prior conviction or ARMED ROBBERY to be used to support habitualization.

The Court has extended the statutes beyond its breadth when they included ARMED ROBBERY in the plain language of the legislature, and failed to construe the Statute in favor of the accused.

ARGUMENT II

The Respondent claims the trial court found count twelve to be a separate criminal episode since it was removed in time and distance from the other charges stemming from the home invasion robbery. In support of this argument the respondent relys on their Appendix N.

The order of the trial court in which the Respondent relys on is on appeal in the Third DCA at this time, and cannot support their contention in that there was never an evidentiary hearing held to decide whether count twelve stemmed from a separate criminal episode.

In the Court's order, and the order the respondent rely on (Appendix N), the Court misinterpret the second degree felony murder to be a second degree murder. That is where the problem lies. When rendering that decision, the trial court misconstrued the conviction for second degree felony murder, which has to occur in the same criminal episode of the underlying felony, to be a second degree murder, committed separate.

There is no way for a conviction of second degree felony murder to stand unless it occurrs in the commission of the underlying felony, and thus, being a single criminal episode.

ARGUMENT III

As previously stated, in Argument I, concerning the Jurisdictional Statement. The Petitioner repeats and realleges those facts as if fully set forth herein.

The law is clear that a defendant is guaranteed his Constitutional Rights to Confrontation and Cross-Examination. § 775.-084(3)(c), Fla.Stat. (1988 Supp.) makes this clear.

The Court violated this section of law and thus the Habitual offender proceeding which were held in this cause is void and to no force and effect. The Petitioner's sentence and status of habitual violent felony offender must be reversed.

CONCLUSION

Based on the foregoing arguments and citations of authority the Petitioner respectfully request that this Court enter an order accepting jurisdiction and rule on the merits of the Petitioner's Arguments.

The Petitioner also asks that this Court consider the ruling in **WASHINGTON V. STATE**, 19 Fla.L.Weekly S647 (Dec. 9, 1994); and **WATKINS V. STATE**, 622 So.2d 1148 (Fla. App. 1 Dist. 1993), and reverse his habitual violent felony offender sentence, based on the fact that the legislature did not specifically list the prior crime of Armed Robbery to support habitualization.

The Petitioner asks that this court find that the second degree felony murder conviction, in count XII occurred in a single criminal episode, and that the Confrontation Clause was violated in the instant case during the habitual offender sentencing hearing.

This Court should enter an order for the trial court to impose a guideline sentence upon the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF ON THE MERITS was furnished by mail to: Office of the Attorney General; 401 N.W. Second Avenue; Miami, Florida 33128, on this 23rd day of May, 1995.

Jonathan Simmons

Jonathan Simmons, Pro'se