ORIGINAL

In the Supreme Court of Florida

CASE NO. 87,686

KENNETH B. ROBINSON,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This matter is before the court on discretionary review from an opinion by the First District Court of Appeal dated March 27, 1996, in Case No. 94-3177.

Citations in this brief to designate record references are as follows:

"R. ___" — Record on Direct Appeal, Vol. I;

"T. ___" — Transcripts of proceedings in trial court, Vols. II and III;

"ST. ___" — Supplemental transcript of hearing on motion for severance of trials, Supplemental Vol. I;

"App. ___" — Appendix, attached.

All other citations will be self-explanatory or will otherwise be explained. Respondent, State of Florida, was the plaintiff in the trial court and appellee in the First District Court of Appeal, and will be referred to as "respondent" or the "state." Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal, and will be referred to as "petitioner" or as the "defendant" or by name.

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STATEMENT OF JURISDICTION

Respondent invoked discretionary jurisdiction in this Court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi) to review the decision of the First District Court of Appeal rendered on March 27, 1996, in Case No. 94-3177. The First District Court certified that its decision in this case was in conflict with decisions from the Second and Third District Courts of Appeal. *See*, e.g., *Goldsmith v. State*, 573 So. 2d 445 (Fla. 2d DCA 1991); *R.P. v. State*, 478 So. 2d 1106 (Fla. 3d DCA 1985), *rev. denied*, 491 So. 2d 281 (Fla. 1986); *A.J. v. State*, 561 So. 2d 1198 (Fla. 3d DCA 1990); *Walker v. State*, 546 So. 2d 1165, 1167 (Fla. 3d DCA 1989); *S.W. v. State*, 513 So. 2d 1088 (Fla. 3d DCA 1987). Relying primarily on *Andre v. State*, 431 So. 2d 1042 (Fla. 5th DCA 1983), the First District Court disagreed with the Second and Third Districts in concluding that "the degree of force used in snatching someone's purse or other property from their person even where the person does not resist and is not injured, is sufficient to satisfy the force or violence element of robbery in Florida," upholding the trial court's finding that a Georgia robbery "by sudden snatching" conviction qualified as a predicate offense for the purpose of habitualizing Mr. Robinson as a habitual felony offender, slip op. 6 & 7 [*see* App. 23-24]. This Court has jurisdiction pursuant to Art. V, Sec. 3(b)(4), Fla. Const. The decision of the First District Court of Appeal in this case is also in direct conflict with this Court's decision in *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922), wherein this Court held: "All the force that is required to make the offense a robbery is such force that is actually sufficient to overcome the victim's resistance." This Court may also exercise jurisdiction in this case pursuant to Art. V, Sec. 3(b)(3), Fla. Const.

STATEMENT OF THE CASE AND THE FACTS

1. The History of the Georgia Case

Mr. Robinson was charged in a "Special Presentment" in Sumter County, Georgia, with the crime of "robbery by sudden snatching." [R. 53, App. 50]. The "Special Presentment" alleged:

> . . . that the said KENNETH ROBINSON on the 6th day of September, 1990 in the County aforesaid, did then and there unlawfully with intent to commit theft, take property, to-wit: United States currency, the property of the Suwannee Swifty Store, *from the immediate presence of Veronica Alford, by the use of sudden snatching.*

[R. 53](*italics* added).

On October 2, 1990, Mr. Robinson entered a plea of guilty to the offense as charged and was sentenced to a term of 8 years consecutive to any previously imposed sentence, with the sentence suspended, and he was placed on probation for that period. He was ordered to pay restitution in the amount of $20.00 as a condition of probation. [R. 52].

2. The History of the Present Proceedings

On January 5, 1994, Mr. Robinson was charged by Information with two counts of armed robbery, in violation of §§ 812.13 and 775.087, Fla. Stat. Both offenses were alleged to have occurred on December 19, 1993. [R. 9]. Concurrently, the state filed a Notice of Intent to Prosecute Defendant as a Career Criminal [R. 8]. A Notice of Intent to Classify Defendant as a Habitual Felony Offender and a Notice of Intent to Classify Defendant as a Habitual Violent Felony Offender were filed by the state on January 30, 1994 [R. 15, 16].

An Amended Information was filed May 20, 1994, again alleging the same two counts of armed robbery. Mr. Robinson was jointly charged with Reginald Monroe (aka Rickie Rich) and Robert P. Blake of robbery with a firearm (a handgun) of a Subway restaurant on Atlantic Boulevard in Count 1. Count 2 jointly charged the same parties with armed robbery with a firearm (a handgun) of a Subway restaurant on Mayport Road, allegedly occurring the same date as the offense alleged in count 1. [R. 18].

Mr. Robinson moved for severance of his trial on Count 2 from that of the co-defendants, which was granted [R. 20-21]. On May 25, 1994, following a separate trial on count 2 only, Mr. Robinson was found not guilty on that count [R. 28].

On August 3, 1994, following a joint trial with his co-defendant, Blake, on Count 1, Mr. Robinson was found guilty of robbery. The jury made a further finding that petitioner had in his possession a deadly weapon. [R. 40; T. 318].[1]

Mr. Robinson filed a Motion for New Trial on August 15, 1994 [R. 45-47]. The motion was denied on August 23, 1994 [R. 48; T. 322].

On August 31, 1994, Mr. Robinson was sentenced as a habitual felony offender on the crime of robbery with a deadly weapon to a term of 15 years. The degree of the offense is shown in the judgment as a life felony. [R. 54-59]. The sentencing court contemporaneously filed a written habitual felony offender sentencing order [R. 60-65].

A Sentencing Guidelines Scoresheet resulted a recommended sentence of 7 to 9 years incarceration with a permitted range of 5½ to 12 years [R. 66].

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[1]Mr. Blake, the co-defendant, was also found guilty of robbery with a deadly weapon [T. 318].

Petitioner filed a timely notice of appeal on September 22, 1994 [R. 73]. He was found to be indigent and the public defender was appointed to represent him on appeal [R. 72]. Thereafter, the Public Defender of the Second Judicial Circuit was designated to represent Mr. Robinson on appeal.

3. **Sentencing**

Following rendition of a jury verdict of robbery with a deadly weapon following a trial, sentencing of Mr. Robinson was conducted on August 23, 1994. The state relied upon a prior conviction in Sumter County, Georgia, in Case No. 90R-382, for "robbery by snatching" to qualify Mr. Robinson as a habitual felony offender. [T. 327; R. 52-53

Counsel objected to the use of the Georgia conviction for "robbery by sudden snatching" to establish that Mr. Robinson qualified for a habitual violent offender sentence [T. 326]. The objection was that the Georgia offense was not substantially similar in both elements and penalties to a felony offense in Florida, and that this offense, counsel argued, was a "glorified shoplifting" which Georgia treated as a robbery by snatching. Counsel asserted that the offense was actually a petty theft under Florida law, but not a felony petty theft. [T. 327-328]. Counsel stated: "In this case, because the clerk was present, not that it was taken from her or any force or intimidation was used to take it from her, but rather just her very presence there when he snatched something off of the counter and ran out made it a felony and there is nothing in Florida law that equates to that so as to make this a qualifying offense for the purposes of the habitual violent felony offender statute." [T. 328]. Defense counsel asserted that there is no felony analogous in Florida Statutes to "robbery by sudden

snatching" and that no force other than necessary to obtain the property is required; no resistance, no threats. [T. 346].

The state provided the court with a copy of the statute, §16-8-40, O.C.G.A., together with Georgia cases[2]. The court noted that based upon *Hickey v. State*, 125 Ga. 145, 53 S.E. 1026 (Ga. 1906), "no force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession." The trial court also noted that one of the Georgia cases involved a defendant going into the back room of a store and taking a money bag, in which the Georgia court distinguished that circumstance from situations where a pick-pocket occurs but the victim is not aware it has happened [T. 344-345].

The court trial concluded that the Georgia conviction for "robbery by sudden snatching" was not a crime of violence and did not qualify as a predicate offense to permit sentencing under the habitual violent felony statute [T. 329]. Defense counsel stated that she would have to agree that for the purposes of the HO statute the robbery by snatching and the forgery would appear to qualify him [T. 330]. At the time counsel made this statement, she was laboring under the erroneous misapprehension that the state had given no notice of intent to classify Mr. Robinson as a habitual felony offender [T. 330].

At a subsequent hearing, counsel again argued that there was nothing analogous

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[2]The following Georgia cases are referred to by the state in the transcripts of the sentencing: *Hickey v. State*, 53 S.E. 1026 (Ga. 1906) [*see* SR. 86-87]; *Moore v. State*, (Ga. App. 1917) [*see* SR. 84]; *Dotson v. State*, 160 Ga. App. 898, 288 S.E.2d 608, 609 (Ga. App. 1982) [*see* SR. 82-83]. [T. 341-342].

in the Florida statutes to robbery by sudden snatching, asserting that it was not a qualified offense for habitual violent felony offender sentencing [T. 346].

Based upon the Georgia convictions for forgery (Case No. 93-R-285) and for "robbery by sudden snatching" (Case No. 90R-382), the trial court found that Mr. Robinson qualified as, and the court sentenced Mr. Robinson as, a habitual felony offender to 15 years incarceration [T. 349; R. 54, 57-58].[3]

The trial court entered a restitution order on September 14, 1994 in the sum of $44.00 in favor of the Subway on Mayport Road [R. 68]. This judgment relates to the alleged victim of Count 2, an offense of which petitioner was acquitted. *See* R. 28.

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[3]A Sentencing Guidelines Scoresheet was prepared and filed under Category 3 [R. 66]. As prior record, the Georgia conviction of forgery was scored as a "burglary," a 3d degree felony (10 points). The Georgia conviction of "robbery by sudden snatching" was scored as robbery, a 2d degree felony. An additional 25 points were added for the Georgia conviction of "robbery by sudden snatching" as a same category prior. As scored, the scoresheet resulted in a recommended range of 7 to 9 years and a permitted range of 5½ to 12 years.

SUMMARY OF ARGUMENT

ISSUE I — This is the issue upon which the First District Court of Appeal certified that its decision was in conflict with decisions of sister districts. A Georgia conviction of "robbery by sudden snatching," as defined by subsection (1)(c) of the Georgia statute, is not analogous to any Florida felony and is not a "qualified offense" for use as a predicate for habitual felony offender sentencing. Given the definition of the offense by Georgia courts as to its "force" elements and given that the offense was simple larceny or theft at common law prior to its inclusion in the statute as a robbery by sudden snatching in 1903, the offense is the equivalent of common-law larceny and is a simply theft in Florida. The statutory offense retained all of its common law elements and has been held not to constitute a robbery by force by the Georgia courts. Further, robbery "by sudden snatching" has been held to be a lesser included offense to robbery by force, which is separately defined by subsection (1)(a) of the Georgia statute. Consequently, robbery by sudden snatching is an offense different than robbery by force in Georgia. All of the elements of robbery in Florida are fully encompassed by the statutes defining robbery by force and robbery by putting in fear. Robbery by force in Florida, as it does in Georgia, requires sufficient actual force to overcome the victim's resistence; but, robbery by sudden snatching does not. Robbery by sudden snatching does not contain the kind of force element necessary to constitute robbery by force in Florida (or in Georgia). The court erred in qualifying and sentencing appellant as a habitual felony offender based upon this Georgia conviction.

ISSUE II — The prosecutor intentionally circumvented a ruling of the court which was intended to eliminate the prejudicial affect of the introduction of a mug shot of the appellant. The court had ordered the photograph cropped so that it would not appear like a mug shot to the jury. The prosecutor then specifically elicited testimony that the photograph had been altered and that it originally had a side-shot, creating the very prejudice to the appellant which the trial court had sought to eliminate.

ISSUE III — The court enhanced appellant's conviction of robbery with a deadly weapon to a life felony as shown on the judgment and then sentenced appellant as a habitual felony offender. Sentences on life felonies may not be enhanced under the habitual felony offender statute.

ISSUE IV — The trial court entered two judgments of restitution. One of the judgments is for restitution on a robbery count on which appellant was acquitted. It must be stricken.

ARGUMENTS

ISSUE I

THE TRIAL COURT ERRED IN FINDING THAT PETITIONER WAS QUALIFIED FOR SENTENCING AS A HABITUAL FELONY OFFENDER BASED UPON A GEORGIA CONVICTION FOR "ROBBERY BY SUDDEN SNATCHING." THAT OFFENSE DOES NOT CONTAIN THE SAME ELEMENTS OF ROBBERY OR OF ANY OTHER SIMILAR OR ANALOGOUS FELONY UNDER FLORIDA LAW. RATHER, THE ELEMENTS OF THAT OFFENSE ARE ANALOGOUS TO PETIT THEFT IN FLORIDA, A MISDEMEANOR OFFENSE.

Pursuant to §775.084(1)(a)1, Fla. Stat., a person convicted of a felony offense in Florida is only eligible for enhanced punishment as a habitual felony offender if "[t]he defendant has previously been convicted of any combination of *two or more felonies in this state* ***or other qualified offenses***" (emphasis added). Section 775.084(1)(c) provides:

> "Qualified offense" means any offense, ***substantially similar in elements and penalties to an offense in this state***, which is in violation of a law of any other jurisdiction . . ., that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

(Emphasis added).

In determining whether a conviction of a crime in another state is a "qualified offense, the elements of the other state's crime are determinative of whether there is a Florida statute similar to or analogous to the out-of-state crime. Section 775.084(1)(c), Fla. Stat.; *O'Neill v. State*, 661 So. 2d 1265, 1268 (Fla. 5th DCA 1995) (out-of-state statute need not mirror Florida statute, but must be substantially similar in elements and penalties to be qualified offense). *Cf., Dautel v. State*, 658 So. 2d 88 (Fla. 1995)(guideline sentencing); *Forehand v. State*, 537 So. 2d 103 (Fla. 1989); *Collier*

v. State, 535 So. 2d 316 (Fla. 1st DCA 1988); *Mohammed v. State*, 561 So. 2d 384 (Fla. 1st DCA 1990); *accord*, *Aleman v. State*, 535 So. 2d 342 (Fla. 2d DCA 1988). However, a consideration of the facts underlying the foreign offense is also appropriate in determining whether the foreign conviction is a "qualified offense." *See Abner v. State*, 566 So. 2d 594, 595 (Fla. 1st DCA 1990) ("*Testimony taken during sentencing* supports Mr. Robinson's contention that his prior Alabama offense is the functional equivalent in Florida of aggravated battery.") (emphasis added). In a like manner, it would be proper, if not essential, to consider how the foreign offense was pled, including the pleading of facts, in determining the elements of the foreign offense. The elements of the offense in this case, as charged in a "Special Presentment," are:

> with intent to commit theft, take property, to-wit: United States currency, the property of the Suwannee Swifty Store, ***from the immediate presence of Veronica Alford, by the use of sudden snatching***.

[R. 53](emphasis added). The date of this conviction was October 2, 1990 [R. 52]. The second Georgia conviction was for forgery on September 16, 1993, also in Sumter County, Georgia, Case No. 93R-285 [R. 50-51]. The first, but not the second conviction, is the issue in this case.[4]

Georgia's crime of "robbery by sudden snatching" does not contain elements similar to any *felony* offense in this state; thus, "robbery by sudden snatching" does not constitute a "qualified offense" for the purpose of the imposition of a either a habitual

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[4]The "till tapping" case, discussed *infra*, amply illustrates that the clerk only need be present somewhere in the room and aware that the till is being tapped, quite distinguishable from a taking from the person or the person's immediate custody.

violent felony offender sentence or a habitual felony offender sentence While the trial court properly concluded that the Georgia crime was not one of violence, the trial court committed reversible error in finding Mr. Robinson qualified for a habitual felony offender sentence on the basis of that Georgia conviction. The court therefore erred in sentencing Mr. Robinson to an enhanced habitual felony offender sentence, and the enhanced sentence is illegal. *Watkins v. State*, 622 So. 2d 1148 (Fla. 1st DCA 1993), *disapproved on other grounds*, *White v. State*, (Fla. 1996). Mr. Robinson should have been sentenced under the guidelines, with the Georgia offense properly scored, and it was reversible error not to do so.

A. <u>The Nature of the Georgia Offense of "Robbery by Sudden Snatching"</u>

Georgia Statute 16-8-40, O.C.G.A., defines robbery in that state as follows:

> 16-8-40. Robbery.
>
> (a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another ***from the person or the immediate presence of another***:
>
> (1) **By use of force**;
>
> (2) **By intimidation**, by use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; ***or***
>
> (3) ***By sudden snatching***.

(Emphasis added).

The robbery offenses defined by the first two subsections of the Georgia statute are well familiar. Combined, they are identical to and envelop all of the statutory

elements of robbery in Florida as those elements, derived from common law, have been codified in this state. § 812.13(1), Fla. Stat. Subsection (1)(a) of the Georgia statute is a Florida robbery a committed by force. Subsection (1)(b) of the Georgia statute is a Florida robbery committed by intimidation or assault, more commonly known as "putting in fear." *Rivers v. State*, 169 S.E. 260, 261 (Ga. App. 1933)("Robbery by intimidation by our code is the same as "putting in fear" at common law. Robbery by actual force implies violence."). *Compare* subsections (1)(a) and (b) *with* § 812.13(1), Fla. Stat., which provides:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of taking there is the use of force, violence, assault, or putting in fear.
>
> * * *
>
> [3](b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

§ 812.13, Fla. Stat. Subsections (1)(a) and (1)(b) of the Georgia statute encompass and totally subsume within its elements the entirety of the elements of the offense known as robbery as defined by the Florida Statute.[5]

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[5]General common and statute laws of England in existence on July 4, 1776, remain in force in this state unless inconsistent with the Constitution and laws of the United States or with the acts of the Florida legislature. § 2.01, Fla. Stat. (1995); *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993).

> The presumption is that no change in the common law is

(continued...)

The third means by which the crime denominated as "robbery" may be committed in Georgia under subsection (1)(c) of its statute — "by sudden snatching" — has no equivalent elements in the robbery statute in Florida. Nor does that offense have elements equivalent to the common-law elements of robbery. The elements of this offense, however, give rise to an equivalent or analogous crime in Florida law — petit theft, a misdemeanor offense.[6]

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[5](...continued)

> intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.

Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990)(citations omitted).

Section 812.13(3)(b), however, is repugnant to, and a derogation of, the common law principle that force must be used prior to or contemporaneously with the taking. *See Royal v. State*, 490 So. 2d 44 (Fla. 1986). Thus, force used to retain possession of the property taken after a simple petit theft shoplifting will convert the petit theft or shoplifting to a robbery. *See, e.g., Lemus v. State*, 641 So. 2d 177 (Fla. 5th DCA 1994); *Santilli v. State*, 570 So. 2d 400 (Fla. 5th DCA 1990); *Rumph v. State*, 544 So. 2d 1150 (Fla. 5th DCA 1989).

[6]Section 812.014(1), Fla. Stat., provides in pertinent part:

> A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit therefrom.
>
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.

(continued...)

Prior to 1903, the offense now codified in Georgia as "robbery by sudden snatching" was not a robbery at all, but constituted a misdemeanor offense known as "larceny from the person." The history and the elements of the offense now called "robbery by sudden snatching" are revealed in the first case to address the new statutory offense, *Hickey v. State*, 125 Ga. 145, 53 S.E. 1026 (Ga. 1906). There, the Georgia Supreme Court stated:

> It was pointed out in Burke's Case, 74 Ga. 372, and in Spencer's Case, 106 Ga. 692, 32 S.E. 849, that "suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner or injury to the person, does not constitute robbery." A theft under these circumstances amounted only to larceny from the person. It was suggested to the General Assembly in Doyle's Case, 77 Ga. 513, that a theft of money or other thing of value from the person, accomplished by a sudden snatching, be made robbery and punished as such. This suggestion was carried out by the act approved August 6, 1903 (Acts 1903, p. 43), amending Pen. Code 1895 § 151 . . .
>
> ***The effect of this amendment was to declare that the offense which was previously known as larceny from the person***, and which was ***committed by the sudden snatching, taking, or carrying away of money or valuables from the owner without his consent***, is robbery. ***It is not necessary that the taking be accomplished by force or intimidation***, so as to involve some show of resistance. The snatch thief, by this amendment, is no longer a petty offender; his crime is a felony, and he is classed as a robber. The distinguishing characteristics between larceny from the person and

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[6](...continued)
Pursuant to §812.014(2)(d), petit theft is a second degree misdemeanor if the property taken is valued at less than $300.00. The common term "shoplifting" is now more specifically defined by statute as "retail theft," as a separate, but related, offense to theft in Florida. *See* §812.015, Fla. Stat.

> robbery, as defined in the act of 1903, is the stealthiness of the act. If the taking be secret, stealthy, and without the knowledge of the owner, it is larceny from the person; but if the taking is done with the knowledge of the victim, but without his consent, and by a sudden snatching, the act is robbery. The differentiation between the sneak thief, who secretly purloins, and the bold snatch thief, who takes his victim on surprise and possesses himself of his booty by suddenly snatching his money or other valuables, is perfectly clear from the act of 1903. ***No force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession***.

Id. (emphasis added). The court described the events in *Hickey*: Two men selected the victim, who was about to enter a train. Because of the crowd and the haste in getting on and off the train, one man pressed the victim against his accomplice. The victim felt the hand of one of them entering his pocket. The hand was quickly withdrawn, and with it his purse. The victim was aware his pocket was being picked. This was found to be "robbery by sudden snatching." *Hickey*, at 1027. Notably in *Hickey*, the victim's purse was not taken by the use of any force greater than that necessary to slip the purse from the pocket. The property was not taken by the use of force as it has been defined and applied at common law (and as the notion of force is still applied in Florida), nor was the purse taken by intimidation ("putting in fear") of the victim.

The nature of the elements of the offense of "robbery by sudden snatching" are further illustrated by the facts in *Byrd v. State*, 391 S.E.2d 460 (Ga. App. 1984). There the defendant was ostensibly shopping for a diamond ring. The sales clerk removed a number of diamond rings from the display case so the defendant could examine them. The defendant had two of them in his hand, and took another out of the clerk's hand

as if to examine it. He then simply walked out of the store, saying, "I believe I'll take all three of them." The clerk stated that the rings were not snatched from her and she was only aware something was amiss when Byrd started for the door. The conviction of "robbery by sudden snatching" was affirmed. "Robbery by sudden snatching," the court held, "is where no other force is used than is necessary to obtain possession of the property from the owner, who is off his guard, and where there is no resistance by the owner or injury to his person." *Id.*, at 462. *See also, Rivers v. State*, 169 S.E. 260, 261 (Ga. App. 1933). When the rings were entrusted to the custody of Byrd, the *legal* possession was not changed from the sales clerk, the court stated. As the defendant exited the store, the clerk became conscious that something was being taken from her possession and she was unable to prevent it, and thus robbery "by sudden snatching" was committed. *Byrd*, at 461-62.

Another case also illustrates that neither the use of force nor putting in fear (intimidation) is required for "robbery by sudden snatching." In *Whitehead v. State*, 339 S.E. 2d 365 (Ga. App. 1985), the court described the case as a "bungled till-taping" case in which the defendant was convicted of attempted robbery by sudden snatching. The evidence was that a co-defendant tossed coins on the floor while paying for some merchandise. When the clerk bent over to pick them up, the defendant reached for the opened money tray of the cash register. He was observed with his hand in the tray where $20 bills were kept by another clerk. When the defendant noticed he was being observed by another clerk, he closed the tray, taking nothing. The conviction was affirmed.

Distilling the Georgia cases, it can be seen that "robbery by sudden snatching" has as its essential elements: (1) the taking of property of another with the intent to commit theft, (2) by the use of no more force than is necessary to gain possession of the property, (3) without resistance by the victim, and (4) the victim must be present and aware of the taking of the property.

A primary feature distinguishing and defining Georgia's statutory offense of "robbery by sudden snatching" is the force element. The offense requires "no other force . . . than is necessary for the thief to obtain possession of the property." *Pride v. State*, 53 S.E. 1026 (Ga. 1906); *Dotson v. State*, 288 S.E.2d 608 (Ga. App. 1982); *Byrd v. State*, 319 S.E.2d 460 (Ga. Ct. App. 1984); *King v. State*, 447 S.E.2d 645, 647 (Ga. App. 1994), *cert. denied*, No. A94A0809 (Nov. 18, 1994). And more specifically, *the crime does not required the use of force which is sufficient to overcome or prevent resistance of the victim*. *Hickey v. State*, 125 Ga. 145, 53 S.E. 1026 (Ga. 1906). This distinguishes the sudden snatching offense from robbery by force as defined by subsection (1)(a).

The second distinguishing feature is that the offense may be committed by taking property which is merely in the presence of the victim. The victim need only be aware of the taking at the time in order to constitute a robbery by sudden snatching. Again, no resistance need be overcome; the force necessary is no more than that required to take physical possession of the property. If the victim is unaware,

albeit present, the crime is simple larceny or theft.[7] *See Hickey v. State*; *Crosby v. State*, 150 Ga. App. 555, 258 S.E.2d 264 (Ga. App. 1979). *See also*, *McNearney v. State*, 210 Ga. App. 582, 436 S.E.2d 585 (Ga. App. 1993), in which McNearney reached out of a car window as it drove by and snatched the victim's purse from a cart of groceries while the victim was loading groceries into her car. The victim only became aware of the crime when another person alerted her to it. The conviction for robbery by sudden snatching was reversed on those facts.

The Georgia robbery statute contains two separate subsections defining two separate offenses of robbery, which taken together contain all of the elements of statutory robbery in Florida: Subsection (1)(a), the use of actual force (which requires sufficient force to overcome or prevent resistance of the victim, *Hickey v. State*, 125 Ga.

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[7]It has also been held in Florida that if the victim is not aware of the taking at the time, it cannot be a taking by force or putting in fear. *Harris v. State*, 589 so. 2d 1006, 1007 (Fla. 4th DCA 1991). This is entirely consistent with the differentiation made by the Georgia court in *Hickey*, when it said:

> The distinguishing characteristics between larceny from the person and robbery, as defined in the act of 1903, is the stealthiness of the act. If the taking be secret, stealthy, and without the knowledge of the owner, it is larceny from the person; but if the taking is done with the knowledge of the victim, but without his consent, and by a sudden snatching, the act is robbery.

Nevertheless, because a taking by force or by putting in fear are defined separately as robbery in subsections (1)(a) and (b), by statutory construction, both force and putting in fear are necessarily excluded as elements of robbery by sudden snatching, which is prohibited separately by subsection (1)(c). Clearly, neither force nor putting in fear are stated as elements in the subsection defining the separate offense of robbery by sudden snatching.

145, 53 S.E. 1026 (Ga. 1906), which is actual force implying violence, *Rivers v. State*, 169 S.E. 260, 261 (Ga. App. 1933), and subsection (1)(b), robbery by intimidation, which is the same as "putting in fear" at common law, *Rivers v. State*. The robbery offenses defined by section (1)(a) and (1)(b) of the Georgia statute, as previously noted *supra*, are identical to and include all of the elements of the statutory crime known as robbery in Florida.

Under the doctrine of statutory construction *expressio unius est exclusio alterius*, the express mention of one thing means the exclusion of another. *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n, Inc.*, 658 So. 2d 922, 926 (Fla. 1994); *Moonlit Waters Apartments, Inc. v. Joseph J. Cauley*, 1996 WL 26552, (Fla. 1996); *Bergh v. Stephens*, 175 So. 2d 787 (Fla. 1st DCA 1965). When Georgia amended its statute in 1903 to add subsection (c) to the robbery statute, making what had been a misdemeanor larceny (or theft) a robbery, the Georgia legislature clearly intended robbery "by sudden snatching" to be something other than that already encompassed within and defined by subsections (1)(a) and (b). Further, given the authoritative judicial interpretation and treatment of larceny by sudden snatching by the courts prior to the amendment of the robbery statute, "It is an accepted rule of statutory construction that the legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." *Ford v. Wainwright*, 451 So. 2d 471 (Fla. 1984).

The premise that robbery by sudden snatching is a different offense than robbery by force is further supported by the fact that robbery by sudden snatching is

a lesser included offense of robbery by force in Georgia. *Edwards v. State*, 224 Ga. 684, 164 S.E.2d 120 (Ga. 1968). A lesser included offense axiomatically must differ from the greater offense in at least one of its essential elements. The difference here lies in the nature of the force elements involved in the two offenses. *Hickey*; *Edwards v. State* ("Robbery by sudden snatching is where no other force is used than is necessary to obtain possession of the property from the owner, who is off his guard, and where there is no resistance by the owner or injury to his person. Rivers v. State, 46 Ga.App. 778(2), 169 S.E. 260.").[8]

Thus, "sudden snatching" as a robbery offense statutorily defined in Georgia is not the same as robbery by force in Florida, nor, indeed, is it the same as robbery by

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[8]The facts in *Edwards* were stated as these:

> The only evidence as to the occurrence of the alleged robbery was the testimony of the victim who testified in substance as follows: She rode the bus home from work on the night of the robbery. She was carrying a basket-type pocketbook on her arm. After getting off the bus, she proceeded along a tree- lined street toward her home. The darkness made her uncomfortable, so she tried to keep in the lighted areas. As she was approaching an intersection, where there was a filling station, she suddenly heard footsteps behind her. She turned and saw the defendant approaching her and almost upon her. She started to run, but as she reached the filling station, some ten or twelve feet distant, **she was struck from behind by the defendant which caused her to lose her balance. She fell forward, breaking her left arm and causing her pocketbook to fly off her arm.** Her glasses remained on as she fell, and she got a second close look at the defendant as he took her pocketbook which had landed near a gas pump, and fled.

(Emphasis added).

force in Georgia, but rather a lesser included offense in Georgia. This offense does not contain the kind of force element necessary for robbery by force required under either the Florida or Georgia statutes, i.e., it lacks force sufficient to overcome a victim's resistance. *See Edwards v. State*, 224 Ga. 684, 164 S.E.2d 120 (Ga. 1968). Robbery by force is encompassed solely within section (1)(a) of the Georgia statute. *Compare with* §812.13(1), Fla. Stat.

The Georgia courts have clearly and repeatedly distinguished between the kind of force required for robbery by force as proscribed by section (1)(a) and the different kind of force inherent in robbery by "sudden snatching" under section (1)(c). "Sudden snatching" in Georgia was not robbery by force or intimidation in that state, but was the misdemeanor offense of larceny from the person prior to its inclusion in the Georgia "robbery" statute as subsection (1)(c) in 1903.[9] *See Hickey v. State*, 125 Ga. 145, 53 S.E. 1026 (Ga. 1906). Following the inclusion of this offense in the robbery statute in 1903, there remains the same distinction between the elements of "robbery by sudden snatching" and the elements of robbery by force which existed prior to the statute's amendment. Robbery by force requires sufficient force to overcome a victim's resistance, while "sudden snatching" does not. *Hickey*. *Compare Hickey* with *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922)("All the force that is required to make

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[9]Under that statute, what had been a petit larceny from the person was apparently expanded to include a taking from the person of the victim as well as a taking cone in *the immediate presence of the victim*. This latter facet of the offense known as "robbery by sudden snatching" is significant in exploring the nature of the relationship this offense has with robbery by force considering that Mr. Robinson was charged and found guilty of "robbery by sudden snatching" which did not allege or involve a taking from the person, but a taking in the immediate presence of the alleged victim.

the offense a robbery is such force that is actually sufficient to overcome the victim's resistance.")

Most importantly, given the authoritative definition of the kind of force required for "robbery by sudden snatching" applied by the Georgia courts — "*No force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession*," *Hickey* — that offense remains no more than simple theft in Florida because Florida courts have also similarly defined such limited force as theft, not as robbery.

B. The Distinction Between Robbery and Theft in Florida

Several district courts, including the First District Court of Appeal, have repeatedly distinguished robbery in Florida from simple theft on precisely the same basis that Georgia distinguishes robbery by force from robbery "by sudden snatching" — that where the force used was shown to be only (or no more than) that actually necessary for the perpetrator to take or acquire possession of the property of another, the crime is a theft in Florida, not robbery. *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993); *Goldsmith v. State*, 573 So. 2d 445 (Fla. 2d DCA 1991); *Walker v. State*, 546 So. 2d 1165 (Fla. 3d DCA 1989); *R.P. v. State*, 478 So. 2d 1106 (Fla. 3d DCA 1985), *rev. denied*, 491 So. 2d 281 (Fla.).

On the other hand, our statute defining robbery by force has been held by this Court to require the use of force that is actually sufficient to overcome the victim's resistance, *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922). *See also Johnson v. State*,

612 So. 2d at 690-91.[10] Robbery by sudden snatching does not require resistance or the kind of force necessary to overcome it. That alone distinguishes that offense from the Georgia offense of robbery in section (1)(a) and from robbery by force in Florida.

This Court has held that the only element that distinguishes robbery from larceny or theft is that the property must have been taken from the person or custody of another by means of force, violence, assault or putting in fear. *Royal v. State*, 490 So. 2d 44, 46 (Fla. 1986), *receded from on other grounds*, *Taylor v. State*, 608 So. 2d 804 (Fla. 1992).

Critically, "force" — as the term is used to distinguish larceny from robbery in Florida — is applied as the means by which property must be taken to constitute a robbery. "Force" relative to robbery by force is a word of art connoting causation, meaning that some force is used to acquire property taken from an unwilling victim, however slight that force may be to accomplish that purpose. *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922). History amply supports this principle. The historical perspective is well illuminated by Judge Cowart in his scholarly dissent which appears in *Foster v. State* found at 596 So. 2d at 1103-1113. We adopt it here as our argument for it cannot be improved upon. What Judge Cowart wrote about the relationship of

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[10]The facts in *Johnson* were that "Elizabeth Wilson, the victim, held in her closed right fist $240.00 while she waited to purchase a bus ticket at the Gainesville Greyhound station. Johnson approached from her right, reached across her shoulder, "raked" her hand and grabbed the money. In the process of taking the cash, Johnson used sufficient force to tear a scab off Ms. Wilson's finger. Johnson made no statements during the transaction, and touched Ms. Wilson only during the process of taking the money."

robbery and the element of force is as follows:[11]

> *The scope of an element in a criminal offense is delineated by the reason for that element; therefore, logical analysis must focus on the purpose of the force element in the robbery offense.*
>
> * * *
>
> Some historic perspective may be helpful to understanding. In the beginning there were but two basic offenses, one against the person — homicide, and one against property rights — stealing. Common law and statutory crimes can be logically classified many different ways but two of the most basic and common categories or directories are (1) crimes against persons and (2) crimes against property. Homicide, while still the most serious, is now but one degree offense within the larger category of offenses against the person. Stealing, larceny or theft, however defined, is still the basic or core offense against property rights. Since Old Testament time the most significant change of substance has been the creation of offenses against the person other than homicide. There is now a whole class of criminal offenses against hurting or harming of the individual, which category includes assault, battery, attempted murder, rape, mayhem, false imprisonment, kidnapping, etc.
>
> Simple larceny is still *the* nuclear crime against property with almost all other property crimes being created by using the elements of common law simple larceny as a nucleus, or core group of elements to which are universally added various ancillary elements. These auxiliary or satellite elements are added for the purpose of creating, and providing different levels of punishment for, special or aggravated forms or degrees of larceny, and are not ele-

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[11]Footnotes appearing in Judge Cowart's dissenting opinion in *Foster* and retained here are numbered as in the original, and are printed in 12 point Optimum font to distinguish them from footnotes provided by undersigned counsel, which are printed in the same font used for the body of the brief. All footnotes provided by counsel are number sequentially. The quote from Judge Cowart's dissent is argument and is not asserted as legal authority, although the authorities cited therein are asserted as authorities for the propositions stated.

ments of the core offense itself.

> In the development of the early English common law, there came into existence two mixed or compound larcenies which had all of the properties of simple larceny but were accompanied by one, or both, of the aggravations of the felonious taking of personal property from one's house or from one's person. Each of these two compound or double offenses was in effect the combining of two offenses — one against property and the other against a dwelling or a person — into one greater offense with more punishment provided for the one greater than that provided for the conviction of *both* of the lesser included offenses.[6]
>
> * * *
>
> Larceny from the person was at first of two types, of which one — stealing by open and violent assault, was called robbery. Blackstone[10] states that "open and violent larceny from the person, or robbery, is the felonious and forcible taking from the person of another of goods or

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[6]It still works like that: a simple assault (§ 784.011, Fla.Stat.) and a petty theft (§ 812.014(2)(d), Fla.Stat.) are each second degree misdemeanors subject each to but 60 days confinement (§ 775.082(4)(b), Fla.Stat.). However, use a simple assault to commit a petty larceny and — zip — by joining and merging the two severable events into a double-based factual criminal "episode" or "transaction" the result becomes in law the compound offense of robbery (§ 812.13, Fla.Stat.) punishable at least as a second degree felony punishable by 15 years confinement (§ 775.082(3)(c), Fla. Stat.). When the presence of another "aggravating" element is involved (the use of a firearm or deadly weapon), the result is a first degree felony offense (armed robbery) (§ 812.13(2)(a), Fla.Stat.) punishable by [a term of years not exceeding] life imprisonment. Any offense involving the use, or threat of use, of force or violence against a person in order to take property from the presence of that person causes the same result: the two lesser offenses are merged factually and in legal contemplation into the one greater offense — robbery. The far greater punishment for the one greater "compound" offense is the answer to all qualms as to judicial decisions holding that constitutional double jeopardy prohibits trials and convictions for both the "greater" offense and some lesser offense included in the greater offense when both are factually based on the same misdeed.

[10]Blackstone, *Commentaries on the Laws of England,* Vol. 4, Ch. 17 p. 241.

money of any value by violence or putting him in fear"[11] and that, as in larceny, there must be a taking, otherwise there is no robbery, and that the taking must be *by force* or a *previous putting in fear* which makes the violation of a person more atrocious than a stealing; for according to the maxim of the civil law, "qui vi rapuit, fur improbior esse videtur." Blackstone explains that this "*previous*" force or putting in fear is the criterion that distinguishes robbery from other larcenies and that if one *steals* money from the person of another, and afterwards keeps it by putting him in fear, there is no robbery because the fear was subsequent to the taking and did not result from it. Dr. William Draper Lewis, in his footnote commentaries on Blackstone's *Commentaries*, cites (page 1640, N. 32) Mr. Justice Ashurst, 1 Hale 534, as explaining "the true definition of robbery is the stealing or taking from the person of another, or in the presence of another, property of any amount ***with such a degree of force or terror as to induce the party unwillingly to part with his property***. . . . The principle ingredient in robbery is a man's *being forced* to part with his property. . . ." [Emphasis added.]

These basic principles of the purpose, and therefore the scope, of the force element in robbery were recognized long ago by the Supreme Court of Florida in *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922); and much more recently in *Royal v. State*, 490 So.2d 44 (Fla. 1986), *quashing* 452 So.2d 1098 (Fla. 5th DCA 1984). *See also, Milam v. State*, 505 So.2d 34 (Fla. 5th DCA 1987); *Flarity v. State*, 499 So.2d 18 (Fla. 5th DCA 1986); *Hogan v. State*, 493 So.2d 84 (Fla. 4th DCA 1986); *Kelly v. State*, 490 So.2d 1383 (Fla. 5th DCA 1986); Annot. *Use of Force or Intimidation in Retaining Property or In Attempting to Escape, Rather Than in Taking Property, as Element of Robbery*, 94 A.L.R.3d 643 (1979).

* * *

. . . . The degree or amount of force or violence necessary to constitute such robbery is immaterial. ***Whenever force***

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[11]At common law, robbery was defined as "the felonious taking of money or goods of value from the person of another, or in his presence, against his will, by violence, or putting him in fear." *Williams v. Mayo*, 126 Fla. 871, 172 So. 86, 87 (1937); 2 Burdick at § 591.

> ***or violence is employed to obtain possession of the property or overcome resistance to its taking it is robbery, regardless of how great or how slight the force used.***
>
> *That degree of force or violence or threat against a person which is calculated to be sufficient to forcefully wrestle property from an unwilling victim, or to cause an unwilling possessor to surrender property in order to prevent a threatened harm, is the "force" element in a robbery* [e.s.] and, independent of the larceny itself, that force invariably constitutes one or more of the many present day criminal offenses against the person — either an accomplished or attempted assault or battery, of some degree or another, or extortion or some other offense against the person.

Quoted from Judge Cowart's dissent in *Foster v. State*, 596 So. 2d, at 1103-1113 (italics in original, except where noted [e.s.]; some original footnotes omitted; the original footnotes retained are numbered as in original text).

Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922), appears to be a seminal case on the subject of robbery and the nature of the force required in Florida to constitute robbery by force. *McCloud v. State*, 335 So. 2d 257 (Fla. 1976), upon which the district court so heavily relied in reaching its decision, in turn relied directly on this Court's earlier decision in *Montsdoca*. The district court, in reaching its conclusion in the instant case, relied primarily on a statement quoted from *McCloud* that "[a]ny degree of force suffices to convert larceny into robbery." *McCloud*, 335 So. 2d at 258-59, said:

> In *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922), the 'nice' distinction between robbery and larceny was explained to be the addition to mere taking of a contemporaneous or precedent force, violence, or of an inducement of fear for one's physical safety. Any degree of force suffices to convert larceny into a robbery.

> Where no force is exerted upon the victim's person, as in the case of a pickpocket, only a larceny is committed. *See Colby v. State*, 46 Fla. 112, 35 So. 189 (1903). The facts developed at McCloud's trial indicate that he gained possession of his victim's purse not by stealth, but by exerting physical force to extract it from her grasp. McCloud's victim carried her handbag by a strap which she continued to hold after the purse had been seized by McCloud. She released the strap only after she fell to the ground. Furthermore, there was evidence the jury could believe which showed that McCloud attempted to kick his victim while she lay on the ground and after the purse had been secured.

However, what this Court actually had said in the seminal case of *Montsdoca*, upon which *McCloud* relied, about the kind of force required for robbery went substantially further in defining the nature of the force. There, this Court said:

> The degree of force used is immaterial. **All the force that is required to make the offense a robbery is such force that is actually sufficient to overcome the victim's resistance.** See 34 Cyc. 180; Tones v. State, 48 Tex. Cr. 373, 88 S.W. Rep. 217, 122 Am. St. Rep. 759, 1 L.R.A. (N.S.) 1024.

Id., 84 Fla. at 86-88 (emphasis in **bold** added).

There is nothing in *McCloud*, or in any of this Court's cases, that have expressly or inherently rejected or disapproved the holding in *Montsdoca* that the force required for robbery "is such force that is actually sufficient to overcome the victim's resistance." The First District Court, directly contrary to *Montsdoca*, reached the opposite conclusion in this case when it stated "the degree of force used in snatching someone's purse or other property from their person, even where that person does not resist and is not injured, is sufficient to satisfy the force or violence element of robbery in Florida." Slip op. at 6. Equally significant is that the district court failed to recognize that it had itself

previously held to the contrary in *Johnson v. State*, 612 So.2d 689 (Fla. 1st DCA 1993), in which it had also said: "Robbery is distinguished from larceny by the perpetrator's use of force. "The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.", citing *Montsdoca v. State* and *McCloud v. State*, 335 So. 2d 257 (Fla. 1976). Yet on *McCloud* alone (but without recognizing the clearly stated principle in *Montsdoca*), the same court reached the opposite conclusion in the instant case.

More significantly, and distinguishing the instant case, the robbery by sudden snatching in this case was **not** one of a snatching from the person, a fact the district court failed to recognize or grapple with in its opinion. The district court only considered situations wherein property is taken directly from the victim. The snatching in the instant case, however, was alleged to be *in the presence of* the victim, not from the person of the victim according to the Presentment. According to counsel during arguments to the trial court on the issue, money was snatched from a counter in the presence of a clerk, a "glorified shoplifting." Mr. Robinson entered a guilty plea to the offense [R. 52]. A plea of guilty admits all the facts charged. *Steinhauser v. State*, 228 So. 2d 446 (Fla. 2d DCA 1969). *Cf, Stewart v. State*, 586 So. 2d 449, (Fla. 1st DCA 1991); *Vinson v. State*, 345 So. 2d 711 (Fla. 1977)(a plea of nolo contendere admits the facts for the purpose of the pending prosecution).

This Court's expression in *Montsdoca* regarding the kind of force required for robbery provide sound support for decisions of the Second and Third District Courts of

Appeal which have held that when the force used is no more than actually necessary to gain possession of the property, it is insufficient for robbery. Rather, "[T]he force that is required to make the offense a robbery is such force that is actually sufficient to overcome the victim's resistance." *Montsdoca*; *Johnson*.

However, contrary to *Montsdoca* and its own decision in *Johnson*, the district court concluded in this case that any force, even that which is unnecessary to overcome any resistance, is sufficient for robbery in Florida. This holding inherently poses the danger that even the slightest force needed to pick up a victim's dollar bill from a counter or table, if the victim is aware of the taking, will convert such a simple theft into a robbery notwithstanding there is no force used to overcome any resistance. Similarly, in a situation wherein a thief suddenly snatches a bicycle lying on a lawn and rides off on it while the owner is sitting on the front porch of the house and observes the taking, the holding of the district court poses the danger that this act would be held to be a robbery although no force was used to overcome any resistance and the force actually used was only that necessary to take possession of the bicycle. Clearly, such an act would only constitute a theft in Florida under *Montsdoca*'s requirement that "the force that is required to make the offense a robbery is such force that is actually sufficient to overcome the victim's resistance." However, such an act in Georgia would constitute a robbery "by sudden snatching."

The district court overlooked entirely the causal connection recognized at common law, and still recognized today in both Georgia and Florida, between use of force and the taking as a causal element, a causal element the court itself recognized in *Johnson*,

as had this Court in *Montsdoca*. As Judge Cowart observed: "Dr. William Draper Lewis, in his footnote commentaries on Blackstone's *Commentaries*, cites (page 1640, N. 32) Mr. Justice Ashurst, 1 Hale 534, as explaining 'the true definition of robbery is the stealing or taking from the person of another, or in the presence of another, property of any amount *with such a degree of force or terror as to induce the party unwillingly to part with his property*. . . . The principle ingredient in robbery is a man's *being forced* to part with his property. . . .'" [Emphasis added.]

Andre v. State, 431 So. 2d 1042 (Fla. 5th DCA 1983), upon which the district court relied, is distinguishable factually because the case clearly involved force to overcome the victim's resistance, a requirement for robbery by force which the *Andre* court recognized:

> While appellant is correct in his statement that the initial taking was done without violence, he is incorrect when he concludes that the only crime proved was larceny. Appellant is wrong for two reasons. First, because the definition of robbery does not limit itself to "violence" but also includes "force;" the act of "snatching" the money from another's hands is force and that force will support a robbery conviction. *McCloud v. State*, 335 So.2d 257 (Fla.1976). In *McCloud*, our supreme court said "[a]ny degree of force suffices to convert larceny into robbery." The court expressed the distinction between larceny and robbery by saying that a pickpocket commits larceny but a purse-snatcher commits robbery. The court pointed out that the robber "gained possession of his victim's purse not by stealth, but by exerting physical force to extract it from her grasp." *In the instant case, appellant also used physical force to extract the money from his victim's grasp, albeit not the same amount of force as in McCloud.* The second reason appellant is wrong when he asserts the jury could not legally find him guilty of robbery is because the statutory definition of robbery includes not only the act of forcibly taking, but it also includes the use of force "in flight after . . . the commission."

> A person commits the crime of robbery if it is proved he used any degree of force (or violence, or assault, or putting in fear) against another in order to wrongfully take money (or any property which is the subject of larceny). Appellant did this by snatching the money, by striking the victim shortly thereafter, and by beating the victim after the taking and while leaving with the money.

(Emphasis added). Still, the court in *Andre* clearly recognized the causal connection between force and the taking ("in order to take money").

In *Harris v. State*, 589 So. 2d 1006 (Fla. 4th DCA 1991), the robbery charge was founded on the victim's discovery, subsequent to the sexual battery and after the perpetrator had left, that her money and jewelry were missing. The sexual battery occurred in the victim's bedroom. On the night of the attack the money was taken from a purse in the living room. She realized that the jewelry was missing from her dresser two days later. "Clearly," the court concluded, "there is no evidence in the record linking the taking of the money and jewelry with any force or threat of force used in the commission of the sexual battery. To distinguish the offense of robbery from the offense of theft, force or threat must be used in an effort to obtain or retain the victim's property. *Cf. State v. Baker*, 540 So. 2d 847 (Fla. 3d DCA 1989). Where the victim, at the time, is not even aware of the taking, it is not a taking by force or putting in fear" citing *S.W. v. State*, 513 So. 2d 1088 (Fla. 3d DCA 1987). Again, the court in *Harris* recognized that there must be a causal connection between the use of force sufficient to overcome resistance and the taking to constitute a robbery. In *Harris*, the causal connection was found absent.

Similarly, in *Simmons v. State*, 551 So. 2d 607 (Fla. 5th DCA 1989), the

undisputed facts were that the defendant hid certain merchandise on her person and left a department store without paying for such merchandise. The defendant was stopped outside the store and escorted back inside by two store employees. Once inside, the defendant removed the merchandise from her person and threw it to the floor. The defendant was then instructed to accompany the two store employees to the store's security office. Only then did the defendant begin to resist and she struggled with one of the employees. The court in *Simmons* concluded, "Here, however, the taking was completed without any use of force and the property abandoned before any force was employed. *There was no relationship between the force used and the taking as required by the statute*. . . . These undisputed facts do not establish a robbery but do establish the necessarily lesser included offense of petit theft." (Emphasis added). *See also State v. Baker*, 540 So. 2d 847 (Fla. 3d DCA 1989)("the controlling fact in the case at hand is that the defendant took the property without any use of force and abandoned the property before he used force to flee from the security guards"); *Rumph v. State*, 544 So. 2d 1150 (Fla. 5th DCA 1989).

Parker v. State, 478 So. 2d 813 (Fla. 2d DCA 1985), upon which the district court also relied, does not support the district court's conclusion that the force used to snatch property where the victim does not resist is sufficient to satisfy the force or violence element of robbery in Florida. The issue in *Parker* was the scoring of victim injury points. *Parker* stated:

> The state argues that physical contact and/or injury is

> an element of robbery under rule 3.701(d)(7) if the charging document alleges that the robbery was accomplished by "force" or "violence," and the physical contact and/or injury was used to show the taking was by force or violence. We disagree. Physical contact or victim injury may accompany or be incidental to force or violence, but neither [physical contact nor injury] is necessarily a part of the proof of force or violence. Consequently, we adhere to our prior holding that victim injury points should not be scored under the guidelines for the crime of robbery. Accord Brown v. State, 474 So.2d 346 (Fla. 1st DCA 1985). When victim injury is not an element of a crime at conviction, it may be used as a reason to depart from the guidelines. See Hendrix v. State, 474 So.2d 346 (Fla.1985). Hence, victim injury may be used as a reason to depart from the guidelines in a robbery conviction.

(Bracketed material in third sentence added]. This case does not stand for the proposition for which it was cited by the district court. Its holding is not inconsistent with *Montsdoca* or the first district court's decision in *Johnson* that the force used, however slight, must overcome a victim's resistance to the taking of the property. It simply held that the state need not prove either physical contact or injury in order to prove the use of force.

The state has argued that the language in *Hickey*, at 1026 — "if in the effort to take the money or valuables by sudden snatching, some degree of resistance is made by the owner, while the act may be robbery by force . . . it is also robbery by sudden snatching" — shows that robbery by sudden snatching is also robbery by force in Georgia and, thus, robbery in Florida. The state's reliance is misplaced because that language does not hold that force sufficient to overcome resistance is an necessary element of the

offense of "robbery by sudden snatching." The Georgia court have always clearly stated to the contrary. That, of course, is entirely consistent with the principle of statutory construction that the express mention of one thing means the exclusion of another. This language in *Hickey* clearly connotes the idea that where the force used overcomes the resistance of the victim such that the offense would become robbery by force under section (1)(a) (as it would be in Florida). Because the force is shown to have been greater than that required for sudden snatching, sudden snatching was also necessarily proven as a lesser included offense. That, however, does not support the state's argument that it is the other way around. If there is no resistance to overcome, or if the force used is only so much as necessary to gain possession of the property but not to overcome any resistance, only the lesser offense of sudden snatching would have been proven, but not robbery by force because that offense requires proof of greater force, just as it does in Florida.

The proposition that "[n]o force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession" has been consistently adhered to by the Georgia courts in defining robbery "by sudden snatching" since the principle was first articulated by the Georgia Supreme Court in *Hickey* in 1906. It is thus readily apparent that a taking "by sudden snatching" as a robbery is strictly a creature of the Georgia legislature and, as "robbery," constitutes a clear departure from the essential elements of the crime of robbery as it was known at common law and as embodied in subsections (1)(a) and (b) of the Georgia statute, while at the same time retaining the same elements "sudden snatching" possessed when it was

previously classified under Georgia law (and common law) as a petit larceny.

What is also critical to observe is that the Georgia cases as well as the statute defining sudden snatching robbery fall generally into two separate and sharply-defined fact patterns. The first group of cases are those in which the property is taken directly from the victim's person by the use of only that amount of force sufficient to gain possession of the property. A number of Florida cases, where the charge and conviction was for robbery, have dealt with factual circumstances which are identical or very similar to those in the Georgia cases of "sudden snatching" from the person where the force used was shown to be only (or no more than) that actually necessary for the perpetrator to take or acquire possession of the property of another.

In *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993), the district court held that robbery is distinguished from larceny by the use of force. All the force that is required to make the offense of robbery in Florida, the court said, is such force as is actually sufficient to ***overcome the victim's resistance*** to the taking. *See also Montsdoca v. State.* By comparison, subsection (1)(c) of the Georgia statute is violated without any resistance by the victim whatsoever or the use of force to overcome any resistance. The offense is committed by the use of only that amount of force sufficient to gain possession of the property. *See*, *Byrd v. State*, 391 S.E.2d 460 (Ga. App. 1984).

In *Goldsmith v. State*, 573 So. 2d 445 (Fla. 2d DCA 1991), the Second District Court determined that the slight force used in snatching a $10 bill from the victim's hand, without touching the person, was insufficient to constitute robbery. The

defendant's action instead constituted only petit theft.[12] The factual scenario in *Goldsmith* is precisely that which constitutes Georgia's crime of "robbery by sudden snatching" from the person. The force used in the case in Florida was not sufficient to constitute robbery in this state, but would be sufficient to constitute the statutory offense of "robbery by sudden snatching" in Georgia. Thus, "robbery by sudden snatching" is analogous to theft in Florida, and no more.

Similarly, *Walker v. State*, 546 So. 2d 1165 (Fla. 3d DCA 1989), held that "force" within the meaning of the robbery statute was not used in taking a gold chain from the victim's neck where the force used was so slight that the victim never realized that the chain was missing until the defendant left. Likewise, in *S.W. v. State*, 513 So. 2d 1088 (Fla. 3d DCA 1987), the defendant's removal of a child's bracelet from her wrist by a slight pull that snapped the thread holding the bracelet together was not done with "force" within the meaning of the robbery statute and therefore constituted no more than a petit theft.

R.P. v. State, 478 So. 2d 1106 (Fla. 3d DCA 1985), *rev. denied*, 491 So. 2d 281 (Fla.), held that picking a pocket or snatching a purse is not robbery if no more force or violence is used than is necessary to remove the property from a person who does not resist. *Compare* the facts and that definition of force *with* the facts and the definition

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[12]This, we suggest, is precisely what larceny from the person was in Georgia. The facts perhaps represent the outer limit of the offense of petit theft or larceny, because the same offense can also be committed in Georgia, as in Florida, where the taken property is not actually in the possession of the victim. The victim need only be present in Georgia, as in the same room when money is picked up from a table, for example.

of force in *Hickey v. State*, 125 Ga. 145, 53 S.E. 1026 (Ga. 1906); *Rivers v. State*, 169 S.E. 260, 261 (Ga. App. 1933); and *Byrd v. State*, 391 S.E.2d 460 (Ga. App. 1984), all of which held that the crime of robbery "by sudden snatching" requires proof of no more force than is necessary to take possession of the property from the person on in the person's presence. Given the authoritative definition by the Georgia courts of the very limited nature of elements required for the commission of "robbery by sudden snatching" in that state, particularly the nature of the "force" element and the absence of force as a causal element in the taking, that crime constitutes no more than a theft under Florida law. *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993); *Goldsmith v. State*, 573 So. 2d 445 (Fla. 2d DCA 1991); *Walker v. State*, 546 So. 2d 1165 (Fla. 3d DCA 1989); *S.W. v. State*, 513 So. 2d 1088 (Fla. 3d DCA 1987); *R.P. v. State*, 478 So. 2d 1106 (Fla. 3d DCA 1985).

The second group of Georgia cases deal with fact scenarios in which property is taken not from the victim's person, but is taken in the victim's presence. Prime illustrations of this are the bungled "till taping" case, *Whitehead v. State*, 339 S.E. 2d 365 (Ga. App. 1985), and the case in which the victim voluntarily handed the perpetrator the property and then the perpetrator walked off with it, e.g., *Byrd v. State*, 391 S.E.2d 460 (Ga. App. 1984). *See also Diggs v. State*, 208 Ga. App. 875, 432 S.E.2d 616 (Ga. App. 1993).[13]

Significantly, the charge in Georgia in the present case was that money was taken

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[13]Diggs snatched money from an open cash register drawer and ran out of the store. His conviction of robbery by sudden snatching was affirmed.

"from the immediate presence of Veronica Alford, by the use of sudden snatching." [R. 53]. There is no allegation — essential to allege robbery by force in either Georgia or in Florida — that the taking was by force from the person of the victim. *See* §812.13(1), Fla. Stat. The Georgia "till tapping" case amply illustrates that the owner or possessor of the properly need only be present somewhere in the room and aware when the till is tapped, quite distinguishable from a taking from the person or from the person's immediate custody through the use of force or putting in fear as the means to gain possession of the property.

Such cases may be essentially shoplifting cases in which the perpetrator picks up merchandise in a store and departs without paying for it, the taking having been observed by a clerk. Shoplifting of this kind would constitute "robbery by sudden snatching" in Georgia due to the presence of a clerk who observed the taking. The same act would only constitute petit theft in Florida (assuming a value less than $300). This graphically illustrates that the conviction in the instant case was no more than a petit theft.[14] The property of Suwannee Swifty Store was specifically alleged to have been taken "from the immediate presence of Veronica Alford, by the use of sudden snatching" [R. 53]. Facially, these facts describe no more than a shoplifting or a simply theft in Florida.

C. Errors in the Guidelines Scoresheet

It must also be noted that a Sentencing Guidelines Scoresheet under Category 3

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[14]The PSI records that restitution of $20.00 was ordered in the Georgia case [R. 52]. Presumably, no more than $20.00 was taken.

was prepared and filed [R. 66]. As scored, the scoresheet had a recommended range of 7 to 9 years and a permitted range of 5½ to 12 years. Mr. Robinson should have been sentence according to the guidelines. He was not legally qualified by reason of the Georgia conviction for "robbery by sudden snatching" for sentencing as a habitual felony offender. *See Watkins v. State*, 622 So. 2d 1148 (Fla. 1st DCA 1993), *disapproved on other grounds*, *White v. State*, (Fla. 1996); *Gahley v. State*, 605 So. 2d 1309 (Fla. 1st DCA 1992); *Trott v. State*, 579 So. 2d 807 (Fla. 5th DCA 1991).

However, the original scoresheet was also incorrectly scored.[15] The sentencing guidelines scoresheet contained significant, prejudicial errors. At the outset, the Georgia conviction of "robbery by sudden snatching" was scored erroneously as robbery, a second-degree felony, rather than as a petit theft. *Dautel v. State*, 658 So. 2d 88 (Fla. 1995). Further, an additional 25 points were also added for the "robbery by sudden snatching" as a "same category prior." Because the Georgia conviction of "robbery by sudden snatching" should have been scored as a misdemeanor petit theft, the scoresheet and the resultant sentencing ranges were grossly erroneous. The Georgia offense was incorrectly scored and additional points should not have been added as a "same category prior."

If the Georgia "robbery by sudden snatching" were scored as the equivalent of a misdemeanor petit theft, the scoresheet would have totalled 117 points, not 182 points. This would have placed Mr. Robinson in the 5th cell (102-121 points) with a recom-

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[15]The Georgia conviction of forgery, we note, was erroneously listed and scored as "burglary," a third-degree felony, instead of forgery, which is also a third-degree felony (10 points).

mended range of 4½ to 5½ range and a permitted range of 2½ to 5½ years. These are well below the original guideline recommendations[16] and substantially below the sentence of 15 years actually imposed (particularly considering the denial of gain-time because the sentence was as a habitual felony offender).

D. Conclusions

Because the nature of the elements of the Georgia offense of "robbery by sudden snatching" constitute but a theft in Florida, the Georgia conviction was not a "qualified offense" and did not qualify Mr. Robinson for sentencing as a habitual felony offender. The Georgia presentment also failed to alleged, and none of the documents relating to that offense establish, that the property taken exceeded $300 in order to constitute a felony theft in Florida. *Mitchell v. State*, 596 So. 2d 1275 (Fla. 1st DCA 1992).

The trial court committed reversible error and petitioner was clearly prejudiced by the error. He was sentenced to 15 years as a habitual felony offender. He should have been sentenced under the guidelines.

For the foregoing reasons, this Court must reverse and remand for a new sentencing under the guidelines with a scoresheet appropriately corrected to score the Georgia offense of "robbery by sudden snatching" as the equivalent of a misdemeanor petit theft and to delete the improper "same category prior" points.

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[16]Which were a recommended range of 7 to 9 years with a permitted range of 5½ to 12 years.

The following issues, although not the basis for the district court's certification of inter-district conflict, also may be reviewed by this Court.

ISSUE II

THE STATE ENGAGED IN PREJUDICIAL MISCONDUCT AND CIRCUMVENTED A PREVIOUS RULING OF THE TRIAL COURT WHEN, OVER OBJECTION, THE PROSECUTOR SPECIFICALLY ELICITED FROM A WITNESS THAT A PHOTOGRAPH OF PETITIONER HAD BEEN ALTERED AND THAT THE WITNESS HAD TAKEN A "SIDE-VIEW ALSO"

Mr. Robinson's counsel objected to the introduction of a photograph of the accused because it was a mug shot and unduly prejudicial to Mr. Robinson [T. 130]. The trial court agreed, and to eliminate the prejudice of the "mug shot," the judge directed the clerk to "amputate" the side position photographs, leaving only the full front photo. [T. 129].

Thereafter, during the state's examination of Gregory Strickland, a detective with the Robbery Division of the Jacksonville Sheriff's Office, Strickland testified he photographed both of Blake and Robinson on the date of their arrest. [T. 205]. He identified Exhibit 2 [the cropped photograph] as a photograph of Mr. Robinson. When asked by the prosecutor if there had been any material changes in the photograph, he answered, "I actually took a side-view also." Counsel objected, but the court allowed the testimony to stand [T. 206].

The prosecutor was well aware that the court had ordered the photograph cropped to eliminate the prejudice to Robinson by the use of the photograph that was a mug shot. The court's determine that the uncropped photograph would be prejudicial

must be presumed to be correct in the absence of a clear abuse of discretion. The prosecutor then specifically elicited evidence of the change in the photograph, which had been made at the court's order, and put before the jury that the photograph had contained a side shot, thus revealing to the jury that the photograph was originally a mug shot. By specifically eliciting this response from the witness, the prosecutor intentionally circumvented the court's ruling and the effort of the trial court designed to eliminate the prejudicial effects of introduction into evidence of a mug shot by cropping the photograph so it would not look like a mug shot. The prosecutor thus interjected the very same prejudice which the trial court had sought to eliminate.

The burden now lies upon the state to show beyond a reasonable doubt that its misconduct could not in any way have contributed to the verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

> The focus is upon the effect on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139. The defendant is entitled to a new trial even though properly admitted evidence was sufficient to support the jury verdict where the court could not say beyond a reasonable doubt that the erroneously admitted evidence did not affect the verdict. If the court cannot say beyond a reasonable doubt that the erroneous admission of evidence did not affect the verdict, the error is by definition harmful. *State v. Lee*, 531 So. 2d 133 (Fla. 1988). The district court rejected this issue without discussion.

This Court must reverse and grant Mr. Robinson a new trial due to the state's unduly prejudicial misconduct.

ISSUE III

THE TRIAL COURT CLASSIFIED PETITIONER'S CONVICTION OF ROBBERY WITH A DEADLY WEAPON AS A LIFE FELONY. A LIFE FELONY IS NOT SUBJECT TO FURTHER ENHANCED SENTENCING UNDER THE HABITUAL FELONY OFFENDER STATUTE. THUS, IT WAS REVERSIBLE ERROR TO SENTENCE PETITIONER AS A HABITUAL FELONY OFFENDER

In this case, petitioner was convicted of robbery. The jury made a further finding that he possessed a deadly weapon during the commission of that offense. [R. 43].

Pursuant to §812.13(2)(a), Fla. Stat., "If in the course of committing the robbery the offender carried a firearm or other *deadly weapon*, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084." (Emphasis added). However, pursuant to §775.087(1)(a), Fla. Stat., if, during the commission of a felony, the defendant carries, displays, uses, threatens, or attempts to use *any weapon* or firearm, a first degree felony is then reclassified to a life felony.

The judgment in this case shows that Mr. Robinson was convicted of robbery with a deadly weapon, an offense which is shown on the judgment to have been reclassified by the trial court as a "life" felony [R. 54]. The evidence was that a weapon was displayed, used, threatened, going beyond mere being carried during the offense.

In *Jordan v. State*, 637 So. 2d 361 (Fla. 1st DCA 1994), this Court held,

> Robbery with a firearm is a first-degree felony, see Sec. 812.13(2)(a), Fla. Stat (1991), which is reclassified as a life felony by operation of section 775.087(1)(a), Florida Statutes (1991).

Following the holding in *Jordan*, because the offense in this case was reclassified as a life felony due to the possession, use and display of a deadly weapon, it was then error for the court to sentence Mr. Robinson as a habitual felony offender on a life felony. The enhanced sentencing provisions of the habitual felony offender statute do not apply to life felonies. *Lamont v. State*, 610 So. 2d 435 (Fla. 1992); *Johnson v. State*, 616 So. 2d 130 (Fla. 1st DCA 1993). Consequently, it was reversible error to sentence petitioner under the habitual offender statute after reclassifying the offense as a life felony, as the judgment reflects. Following *Jordan*, this Court must reverse the sentence and remand for sentencing under the guidelines under a properly scored sentencing guidelines scoresheet.

Petitioner must acknowledge that the clear and unequivocal holding of this Court in *Jordan*, quoted above, appears to be in direct conflict with a number of other cases decided by this Court as well as by other appellate courts which have held that a first-degree felony — such as robbery with a deadly weapon, robbery with a firearm, armed robbery, or armed burglary — which is punishable by a term of years not exceeding life, is subject to enhancement of the sentence under the habitual felony offender statute. *See*, e.g., *Henry v. State*, 596 So. 2d 661 (Fla. 1992) (armed robbery); *Tucker v. State*, 595 So. 2d 956 (Fla. 1992) (robbery with firearm); *Burdick v. State*, 594 So. 2d 267 (Fla. 1992) (armed burglary, a first-degree felony punishable by term of years not exceeding

life). *See also, Bryant v. State*, 599 So. 2d 1349 (Fla. 1st DCA 1992) (robbery with deadly weapon); *Glover v. State*, 596 So. 2d 1258 (Fla. 1st DCA 1992) (robbery with firearm), *approved*, 610 So. 2d 439 (Fla. 1992) (a first-degree felony punishable by term of years not exceeding life eligible for habitual offender sentence); *Sheffield v. State*, 585 So. 2d 396 (Fla. 1st DCA 1991) (robbery with firearm), *approved*, 595 So. 2d 37 (Fla. 1992); *Hayes v. State*, 598 So. 2d 135 (Fla. 5th DCA 1992) (armed robbery).

In view of these cases, the holding in *Jordan* may be anomalous. If that is the case, then it was either error to enhance petitioner's conviction to a life felony, as it is reflected in the judgment, or it was error to reflect the degree of the offense as a life felony. In either case, relief should be granted.

If, however, *Jordan* is a correct analysis and statement of the law, then the enhanced habitual felony offender sentence in this case was illegal, and the sentence should be reversed and the case remanded for sentencing under the guidelines. The district court viewed the matter as one of a scrivener's error and directed that the judgment be corrected accordingly.

ISSUE IV

THE TRIAL COURT ERRED IN IMPOSING A JUDGMENT/RESTITUTION ORDER RELATIVE TO AN OFFENSE OF WHICH PETITIONER WAS ACQUITTED.

On May 25, 1994, following a separate trial on Count 2, the Mr. Robinson was found not guilty that count (which related to the alleged robbery of the Mayport Road Subway] [R. 28]. Following sentencing on Count 1, the trial court entered a restitution

order on September 14, 1994 in the sum of $44.00 in favor of the Subway on Mayport Road [R. 68]. This judgment relates to Count 2, of which petitioner was acquitted. *See* R. 28.

A defendant cannot be ordered to pay restitution for damages as to an offense of which the defendant has been acquitted. *Carter v. State*, 640 So. 2d 1237 (Fla. 1st DCA 1994); *Barkley v. State*, 585 So. 2d 418 (Fla. 1st DCA 1991); *Hardman v. State*, 584 So. 2d 649 (Fla. 1st DCA 1991). *See also*, *DeLong v. State*, 638 So. 2d 1054 (Fla. 2d DCA 1994); *Jackson v. State*, 634 So. 2d 1102 (Fla. 4th DCA 1994).

The order of restitution in favor of the Mayport Road Subway must be stricken because Mr. Robinson was acquitted of the alleged charge of robbery of that establishment (Count 2). The district court correctly reversed and directed the trial court to vacate the order of restitution to the victim of the acquitted charge.

CONCLUSION

Petitioner, KENNETH B. ROBINSON, based on all of the foregoing, respectfully urges the Court to vacate his conviction and sentence, to remand the case for a new trial and/or for resentencing, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

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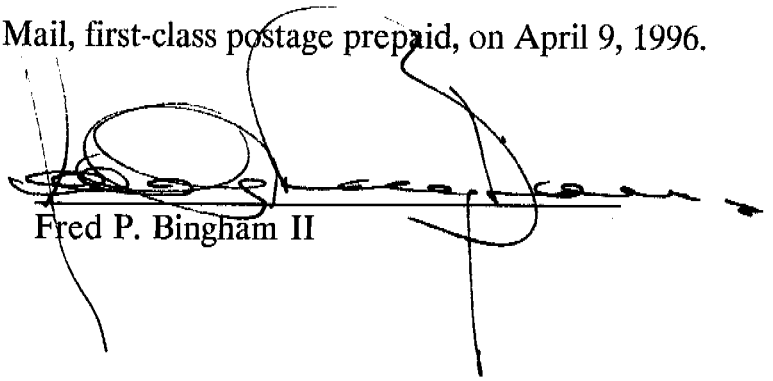
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing together with a copy of the Appendix was furnished by delivery to: Thomas Crapps, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Petitioner by U.S. Mail, first-class postage prepaid, on April 9, 1996.



Fred P. Bingham II