IN THE FLORIDA SUPREME COURT

DEXTER MITCHELL,

Petitioner,

v. Case No. 91,107

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE SECOND DISTRICT COURT OF APPEAL

# MERITS BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa

WENDY BUFFINGTON
Assistant Attorney General
Florida Bar No. 0779921
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

## TABLE OF CONTENTS

PAGE NO.

## TABLE OF CASES

## OTHER AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts and those set forth in the District Court's opinion.

## SUMMARY OF THE ARGUMENT

Because there is no basis upon which to treat an unloaded/nonoperable BB gun differently from an unloaded/nonoperable firearm, and because each object is an instrument "which will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design and construction", the state need not prove a BB pistol is loaded and operational in order for it to constitute a deadly weapon.

## ARGUMENT

### ISSUE I

**IF THE STATE FAILS TO PROVE THAT A BB PISTOL IS LOADED AND OPERABLE AT THE TIME OF AN OFFENSE, CAN IT BE CLASSIFIED AS A DANGEROUS OR DEADLY WEAPON WHEN THE DEFENDANT'S ACTIONS CAUSE THE VICTIM TO REASONABLY BELIEVE THAT THE BB PISTOL IS LOADED AND OPERABLE.**

As set forth in the District Court opinion and Petitioner's statement of facts, the instant charges arose from Petitioner's confronting his estranged wife, her friend and subsequently others, with a BB pistol, which they thought was a firearm. Petitioner threatened to kill his wife and her friend with the pistol and demanded money of them. The wife managed to get away from Petitioner, and he pursued her into an office building (chiropractic office). During this pursuit, he confronted several other persons with this BB pistol, threatening them by word or act with being shot if they did not tell him where his wife had fled. After catching up with his wife and beating her in the head with the butt of the BB pistol, Petitioner fled to a nearby mobile home which he entered under the pretense of being a police officer. He did not threaten with the BB pistol the elderly couple who lived in the home, but he did threaten to kill himself with it.

As a result of these acts, Petitioner was convicted of:

robbing his wife with a deadly weapon; attempting to rob her friend with a deadly weapon; two counts of **trespass** with a dangerous weapon (one count for entering the chiropractic office; one count for entering the couple's mobile home); aggravated battery upon his wife with a deadly **weapon,** (for beating her with the butt of the BB pistol); two counts of aggravated assault with a deadly weapon, (for threatening people **at** the chiropractic office); and four counts of simple assault (for threatening people at the chiropractic office).

The issue on appeal was whether the BB pistol could constitute a deadly or dangerous[1] weapon to support these various charges when the state did not offer evidence the pistol **was** loaded or operable **at the** time Petitioner used it to threaten the victims of these crimes, The current case law makes this a jury question in each case. See Gooch v. State, 652 So.2d 1189, 1191 (Fla. 1st DCA), review denied, 659 So.2d 1086 (Fla.1995), (whether . . . an air or gas operated gun is a deadly weapon depends on the manner in which it is used, and whether it will be classified as a deadly weapon is a question for the jury.) In the instant case, Petitioner argued to

[1]The District Court found **'no** basis to require a different analysis in determining whether the BB pistol in this case was a 'dangerous" or "deadly" weapon." District Court opinion at page 10. Likewise, Respondent addresses them together in the, instant brief.

the jury that the state had not proven his BB pistol was a deadly weapon because the state had not proven it even worked. (T322-326) The jury, however, rejected this argument, as it applied to several of the counts. Petitioner seeks for this Court to hold as a matter of law that a BB pistol which the state has not proven to be loaded and operable is not a deadly weapon.[2]

To do so, this Court would have to recede from its approval in Bentley V. State, 501 So. 2d 600 (Fla. 1987), of Bass v. State, 232 So. 2d 25 (Fla. 1st DCA 1970), for its analysis that an unloaded gun[3] constitutes a "deadly weapon" under the aggravated assault statute, the same statute at issue in two of Petitioner's convictions, because it is an instrument likely to produce death or great bodily injury. This Court would also have to hold that the state must prove a BB pistol used during the commission of a crime is loaded and operational in order for it to constitute a "deadly weapon" contrary to this Court's holding that the state need not

---

[2]Respondent points out the evidence in the instant case did not establish the BB pistol was not loaded and operational; Rather, the evidence failed to address these issues either way except to the extent the BB pistol itself was introduced into evidence to be examined by the jury during their deliberations. (T20; T156)

[3]The opinion represents the weapon was an unloaded gun or pistol. It does not refer to it as a firearm, though presumably, it was.

prove a firearm is loaded and operational in order for a defendant to be convicted of a firearm charge and suffer the associated stiffer penalties attached to such a conviction. See Bentley v. State, 501 So. 2d 600 (Fla. 1987), an unloaded firearm constitutes a firearm and requires imposition of the three-year minimum mandatory sentence; citing with approval Watson v. State, 437 So.2d 702, 705 (Fla. 4th DCA), approved in part, disapproved in Dart, 453 So.2d 810 (Fla.1984): the legislature did not intend to require a finding that a handgun be operational in order to uphold a conviction of robbery with a firearm because of concerns about the perception of the victim. Bentley at 602.[4] A review of the definitions of "firearm" and "deadly weapon" reveals they should be treated alike.

A firearm is defined as any weapon . . . which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; . . . s. 790.001(6), Fla. Stat. (1993). Though there is no statutory definition of "deadly weapon", a weapon is defined as:

---

[4]Inconsistent with this Court's holding in Bentley is the Second District's opinion in Stewart v. State, 672 So. 2d 865 (Fla. 2d DCA 1995), which Respondent asks this Court to disapprove, that a defendant's waving an unloaded, holstered firearm in the air does not constitute deadly force despite the fact an unloaded, inoperable firearm constitutes a deadly weapon as a matter of law.

> .., any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or any other deadly weapon except a firearm or common pocketknife.

s. 790.001(13), Fla. Stat. (1993)

In Depasquale v. State, 438 So. 2d 159 (Fla. 2d DCA 1983), the Second District found the evidence supported a finding the BB gun used in that case was a deadly weapon. In so doing, the District Court relied upon the following definition of "deadly weapon":

> any instrument that, when used in the ordinary manner contemplated by its design and construction, will or is likely to cause death or great bodily harm.

In Butler v. State, 602 So.2d 1303, 1306 (Fla. 1st DCA 1992), the First District noted the term "deadly weapon" as used in s. 790.001(13), Florida Statutes (1989), though not statutorily defined, has been judicially defined as either an "instrument which will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design and construction," or an object which is used or threatened to be used during a crime in such a way that it would be likely to cause death or great bodily harm. Butler relied on the Fifth District's opinion in Robinson v. State, 547 So.2d 321, 323 (Fla. 5th DCA 1989) for

this definition[5]. Accord E.J. v. State, 554 So.2d 578 (Fla. 3d DCA 1989), (a deadly weapon is 1. any instrument which, when it is used in the ordinary manner contemplated by its design and construction, will or is likely to cause death or great bodily harm, or 2. any instrument likely to cause great bodily harm because of the way it is used during a crime.) In In Interest of T.C., 573 So. 2d 121 (Fla. 4th DCA 1991), the Fourth District noted the lack of a statutory definition of "deadly weapon", but pointed out that case law provides an object is a deadly weapon "if, by its use or threatened use, death or great bodily harm is likely to be produced." This definition comes from McCray v. State, 358 So. 2d 615 (Fla. 1st DCA 1978), where the First District found McCray's use of a cigarette lighter shaped like a gun during commission of a robbery did not constitute robbery with a weapon (or deadly weapon)[6] concluding, "Although a cigarette lighter might be so

---

[5]The issue in Robinson was whether a razor constituted a deadly weapon pursuant to s. 790.001(3), Fla. Stat. (1987). That section defines a "concealed weapon" identically to a "weapon" in 790.001, (13), Fla. Stat. (1993), as 'any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or any other deadly weapon" with the additional element it must be concealed.

[6]Though charged with robbery with a firearm, McCray was found guilty of robbery with a weapon as a lesser included offense. Because a cigarette lighter is within the definition of "weapon" only if it constitutes "any other deadly weapon", the court

classified if, by its use or threatened use, death or great bodily harm is likely to be produced", the evidence in McCray did not establish the cigarette lighter was used in this way. Similarly, the standard jury instruction for aggravated assault directs:

> A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm.

Fla. Std. Jury Instr. (Aggravated Assault)

Therefore, under the plain language of the instruction, a deadly weapon need not be a weapon which is used in a way likely to cause death or great bodily harm, it need only be ***threatened*** to be used in such a way. Clearly, in this case, Petitioner threatened by word and deed to shoot his wife and the several victims,[7] thus threatening to use the weapon in a way likely to produce death or great bodily harm.

It was irrelevant that the BB pistol may not have been able to inflict the threatened harm if it was either unloaded or not operational because these are not elements of the definition of a

---

concluded it was neither a deadly weapon nor a weapon on the facts of that case.

'See the record at Tll-13; 17; **40-41**; **56-57**; **70**; **74-75**; **81**; **83**; 96; 98; and 109 for Petitioner's threats with the BB pistol to his wife and others and his threats to others he was going to kill his wife; See T 44 and 128-129 where Petitioner threatened to kill himself with the BB pistol.

deadly weapon. Under Robinson, Butler and E.J., a BB pistol is an "instrument which will likely cause death or great bodily harm when *used in the ordinary and usual manner contemplated by its design and construction.* " Emphasis added. This definition, relying on the instrument's design and construction, is similar to the statutory definition of firearm which defines a firearm as a weapon *designed* to expel a projectile by the action of an explosive. Just as it is not required for the state to prove the firearm **was** loaded and operational to sustain a firearm conviction, it is not required for the state to prove **a** BB pistol is loaded and operational to sustain a deadly or dangerous weapon conviction.

Not only do the definitions of firearm and deadly weapon mandate they be treated alike on these facts, but there is no logical basis to require the state to prove a BB pistol is loaded and operational for it to constitute a deadly weapon where the state need not prove a firearm is loaded or operational for it to constitute a firearm or deadly weapon[8]. In each case, though the victim may fear imminent death or great bodily harm, unless the

---

[8]It is only when the object is not a firearm per se that the state must prove it may readily be converted to expel a projectile. See Charley v. State, 590 So. 2d 5 (Fla. 1st DCA 1991), a starter pistol is not designed to expel a projectile; consequently, it was the state's burden to prove the starter gun could either expel a projectile or be readily converted to do so.

weapon is used as a bludgeon, (as it was against the wife in the instant case), it is not capable of hurting the victim. Yet, the defendant has used the weapon to threaten the victim and accomplish his crime. By the nature of each weapon, it is a deadly weapon, which, if operational and loaded, is capable of causing death or great bodily harm. However, under Petitioner's theory, a distinction would be drawn. Petitioner asks this Court to hold that where a BB pistol, (which the defendant is threatening to use as a firearm and which may look identical to a firearm to the victim), is unloaded and nonoperational, it would not constitute a 'deadly weapon" as a matter of **law** because it is not capable in its condition of inflicting death or great bodily harm. If it is not **a** 'deadly weapon", it is likewise, not a weapon at all because it only comes within the definition of "weapon" because it qualifies as a 'deadly weapon". See McCray, above, where the cigarette lighter was deemed neither a weapon nor deadly weapon where it was not one of the listed 'weapons" in s. 790.001(13), Fla. Stat. (1976 Supp.)I and therefore, only constituted **a** "weapon" if it was an "other deadly weapon". Therefore, a robber committing a robbery by use of an unloaded, nonoperational BB pistol would be guilty of simple robbery; whereas if the robber used an unloaded, nonoperational firearm, he would be guilty of robbery with a

firearm and subject to enhanced penalties and a mandatory prison term pursuant to his use of a firearm which was not capable of harming the victim unless used as a bludgeon. In each case, the victims would have suffered the identical harm of fearing imminent death or great bodily harm. Likewise, in each case, the defendant would have known the victim was not going to be hurt by the unloaded, nonoperational firearm or BB pistol. Yet, these two defendants would receive significantly different punishments. There is no basis upon which to make the distinction between these two cases which Petitioner requests.

Petitioner alleges the District Court in the instant case improperly applied a subjective test in determining whether the BB pistol was a deadly weapon based on the subjective belief of the victims the pistol was a firearm. Petitioner claims the court should have applied an objective test looking to "the nature and actual use of the instrument and not to the subjective fear of the victim or intent of the perpetrator." Petitioner's brief at page 10.

Respondent agrees it is not the victim's perception which determines whether an instrument is a weapon or deadly weapon. [9]

[9]However policy considerations of a victim's perception contribute to the status of the law that the state need not prove whether a

Rather, it is the design and construction of the instrument or its actual or threatened use which determines whether an instrument is a deadly weapon. See Robinson, Butler and E.J., above.

Therefore, while a cigarette lighter (shaped like a gun) is not "likely to cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design and construction", it may be a deadly weapon if it is "used or threatened to be used during a crime in such a way that it would be likely to cause death or great bodily harm", i.e., if it is used as a bludgeon. See McCray, above. However, a BB pistol is "likely to cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design and construction". Unlike the cigarette lighter which is designed to light cigarettes and when used in the ordinary and usual manner contemplated by its design and construction is not likely to cause death or great bodily harm, a BB pistol is designed to expel a lead or steel projectile.[10] When used in the ordinary and usual manner

---

firearm is loaded and operable for a firearm conviction to stand. See Bentley, above, at 602, relying on Watson for the proposition the legislature did not intend to require a finding that a handgun be operational in order to uphold a conviction of robbery with a firearm because of concerns about the perception of the victim.

[10] See Lynn v. State, 567 So. 2d 1043 (Fla. 5th DCA 1990) (pellet pistol and pellet rifles both discharge a pellet through the use of

contemplated by its design and construction, a BB gun is likely to cause death or great bodily harm.[11] A recent study reflects 30,000 people are treated at hospital emergency rooms each year for BB gun related injuries.[12] The legislature's intent in protecting the public from BB gun injuries is reflected in s. 790.22, Fla. Stat. (1993) which proscribes children under the age of 16 from using these devices without adult supervision.

The nature of the BB pistol distinguishes the instant case from the cases relied on by Petitioner, cases wherein the defendants have used objects such as a soda bottle to simulate a firearm, [Blanco v. State, 679 So. 2d 792 (Fla. 3d DCA), review

---

air pressure); Jn the Interest of W.M., 491 So.2d 1263 (Fla. 4th DCA 1986) (BB and pellet guns typically expel metallic shot, lead or projectiles by operation of air or gas); Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984) (air pistol in question was designed to expel small, round metal pellets or shot, commonly known as B.B.'s, by the release of gas from a small container or cartridge of compressed, carbon dioxide gas); Depasquale v. State, 438 So.2d 159 (Fla. 2d DCA 1983) (a BB gun is an air or gas operated gun designed to expel lead or other metallic shot).

[11] Cf. Barfield v. Langley, 432 So. 2d 748 (Fla. 2d DCA 1983), a civil suit brought after the plaintiff's son received a permanent injury to his eye from a BB gun pellet; Williams v. Youngblood, 152 so. 2d 530 (Fla. 1st DCA 1963) where a civil action was brought after a child lost his eye from a BB gun injury.

[12] See BB and Pellet GunRelated Injuries United States, June 1992-May 1994, <http://ch.nus.sg/MEDNEWS/jan96/hicn9027_7.html> (visited September 5, 1997) for this information.

granted 687 So. 2d 1305 (Fla. 1997)]; a plastic-like substance identified as a bomb but with no explosive capability, [Streetman v. State, 455 So. 2d 1080 (Fla. 2d DCA 1984)]; a cigarette lighter in the shape of a gun, [McCray v. State, 358 So. 2d 615 (Fla. 1st DCA 1978)]; and a toy gun which looked like a real firearm to the victim who had 26 years military experience and an "expert" rifle rating; [I.O. v. State, 412 So. 2d 42 (Fla. 3d DCA 1982)]

Also in this category of cases is this Court's recent opinion in State v. Houck, 652 So. 2d 359 (Fla. 1995). In Houck, this Court addressed s. 775.087(1), Fla. Stat. (1991), a statute enhancing a crime for use of a weapon. In finding the defendant's repeatedly slamming the victim's head into the pavement did not constitute the crime of manslaughter with a "weapon" because the pavement, as a matter of law, was not a weapon, this Court relied on the dictionary definition of "weapon" as "an instrument of attack or defense in combat, as a gun or sword ... ." This Court agreed with the Fifth District in concluding "pavement" is not commonly understood to be an instrument for combat against another person. By contrast, in the instant case, a BB pistol is such an instrument of combat. See also Bates v. State, 561 So.2d 1341 (Fla. 2d DCA 1990) where Bates held a nut driver under a rag and represented it to be a gun during a robbery. Because the nut driver

"when used for its designed purpose would not cause death or great bodily harm", the Second District held it was not a deadly weapon, but cautioned that if Bates had used it as a bludgeon or threatened to use it as such, it could have constituted a deadly weapon. In Robinson v. State, 547 So.2d 321 (Fla. 5th DCA 1989), a straight edged razor was deemed not to constitute a deadly weapon for purposes of the carrying a concealed weapon statute because "a razor blade was not designed or constructed with the purpose of causing death or great bodily harm and the ordinary contemplated social use is constructive." Neither was the razor used as a deadly weapon in that case.

In the following cases, common objects were actually used as weapons but were deemed not to be deadly weapons based on the evidence: Rogan v. State, 203 So.2d 24 (Fla. 3d DCA 1967)[13] (evidence did not establish flower pot was a deadly weapon where evidence did not establish the material of which the pot was made; flower pot was not introduced into evidence; and the flower pot which was thrown at the victim through a window, though breaking the glass, did not go through the screen); and Williams v. State,

[13]For further cases where common objects have been reviewed to determine whether they constituted a 'deadly weapon", see Roam at ftnt. 1.

651 So.2d 1242 (Fla. 2d DCA 1995) (evidence did not establish hot coffee thrown at victim was a deadly weapon where there was no evidence the victim's injuries constituted "great bodily harm" where he received no medical treatment for his injuries). In each **case,** however, the courts noted that these objects, under different circumstances, could constitute deadly weapons, but the evidence failed to establish this on the facts of these cases. Accord D.C. v. State, 567 So.2d 998 (Fla. 1st DCA 1990) (state failed to present evidence that spraying deodorant on person's body at close range was likely to cause death or great bodily harm even where particular victim suffered some harm and received medical treatment).

The other class of **cases** relied on by Petitioner are the starter pistol cases. This line of cases [Brooks v. State, 605 So. 2d **874** (Fla. 1st DCA), reversed on other grounds, 630 So. 2d 527 (Fla. 1993); Ridley v. State, 441 So. 2d 188 (Fla. 5th DCA 1983); Harpham v. State, 435 So. 2d 375 (Fla. 5th DCA 1983); and M.M. v. State, 391 So. 2d 366 (Fla. 1st DCA), review denied 411 So.2d 384 (Fla.1981);] hold that where the state failed to prove the starter pistol could expel a projectile, it had failed to prove it was **a** firearm (Ridley); weapon (Brooks); firearm or weapon (Harpman); or deadly weapon (M.M.).

The basis for these decisions is found in the definition of "firearm" which defines a firearm as "any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; s. 790.001(6), Fla. Stat. (1993) Because a starter gun is not designed to expel a projectile,[14] the issue in these cases is whether the starter gun will or may readily be converted to expel a projectile. If not, it is not a firearm. Ridley; Harpman.

Likewise, it is not a "weapon" or "deadly weapon" because when "used in the ordinary and usual manner contemplated by its design and construction" it is not likely to cause death or great bodily harm, (Butler; Robinson), because all it does is detonate a blank. Because it is not designed to cause death or great bodily harm, it can only be a "weapon" or "deadly weapon" if it is used or threatened to be used in a way to cause such harm; i.e., if used or threatened to be used as a bludgeon. Because the starter pistol in Brooks was not used or threatened to be used as a bludgeon, it was

---

[14] See Charley v. State, 590 So. 2d 5 (Fla. 1st DCA 1991), a starter pistol is designed to detonate small gunpowder explosives or blanks, and therefore, is not designed to expel a projectile; Accord M. R. R. v. State, 411 So.2d 983 (Fla. 3d DCA 1982), because a starter gun is not designed to fire a projectile, it was the State's burden to prove that the starter gun could expel a projectile by the action of an explosive, or that it could readily be converted to do so.)

not a deadly weapon. Accord M.M. noting, "It is the nature of the weapon that characterizes the assault as 'aggravated'; The standard Jury Instruction on aggravated assault defines a deadly weapon as "any weapon which, in the manner in which it is used or threatened to be used, is likely to produce death or great bodily harm." Because the starter pistol was not capable of firing a projectile, it was not a firearm nor a deadly weapon. In Harpman, the court noted that pistols are excluded from the definition of weapons and concluded the starter pistol could not be a firearm where it was not capable of expelling a projectile.

The only case cited by Petitioner which does not fall into either of the above categories (innocent objects represented to be weapons; starter pistols) is Heston v. State, 484 So. 2d 84 (Fla. 2d DCA 1986) wherein the District Court found a crossbow without an arrow was not a deadly weapon because without arrows, the weapon, as it was intended to be used, could not have inflicted injury upon another. A crossbow, when 'used in the ordinary and usual manner contemplated by its design and construction" is likely to cause death or great bodily injury. It is unlike the common objects which can be used contrary to their design and purpose, as deadly weapons. Respondent believes Heston was wrongly decided when viewed against the definition of "deadly weapon" and the above

outlined cases. The fact that the crossbow should have been deemed a deadly weapon based on its design and the ordinary purpose for which it is used is evidenced by the harm caused in Heston when this crossbow **was** pulled on the victim. He crashed the vehicle he was driving. Why? Because he was confronted with a cocked crossbow raised as if to shoot at him, i.e., a deadly weapon. If the defendant had pulled a soda bottle, plastic-like substance, cigarette lighter, flower pot, cup of coffee or can of deodorant on the victim, he likely would not have become so startled so as to crash his vehicle.[15] Like the unloaded BB pistol, the crossbow is analogous to the unloaded firearm. All three constitute deadly weapons by their design and intended purpose. Heston was wrongly decided and should be disapproved by this Court.

Contrary to Petitioner's contention at page 14 of his brief, it is not the victim's perception which determines whether an object is a deadly weapon, it is the object's design, or threatened or actual use. As in Heston, when the object is designed to cause death or great bodily harm when 'used in the ordinary and usual

---

[15]Though a toy gun and cigarette lighter shaped like a gun may have produced the same result if they were sufficiently "real" looking, the victim's perception of these objects which are not likely to cause death or great bodily harm when used in the ordinary and usual manner contemplated by their design and construction, does not transform them into deadly weapons.

manner contemplated by its design and construction", it is a deadly weapon. The victim perceives it as a deadly weapon because it is one. Respondent agrees with Petitioner that the fact a victim perceives an object (i.e., nut driver under a rag or a toy gun) as a deadly weapon, does not make it one.

Additionally, if this Court adopts Petitioner's position, similarly situated defendants will be treated differently as far as the proof required at trial. As pointed out by the District Court in the instant case, because there is no requirement for the state to prove a firearm is loaded or operational, a defendant may be convicted of a firearm crime based on witness testimony that what they saw appeared to be a firearm.[16] If the defendant discards the weapon used so that it is not offered into evidence at trial, the defendant may be convicted for using a firearm based on the witness testimony, (even though the weapon which was discarded may have in fact been a BB pistol. See District Court opinion at page 7.) If Petitioner in the instant case had discarded his BB pistol before

---

[16] Likewise, the state may prove that a defendant carried, displayed, used, threatened, or attempted to use a weapon during the commission of a felony by means of circumstantial evidence. See Smith v. State, 645 So.2d 124, 126 (Fla. 1st DCA), review denied 654 So. 2d 920 (Fla. 1995), and cases cited therein for this proposition.

he was apprehended, he likely would have been convicted of firearm charges based on the witnesses' testimony to their perception the weapon was a firearm and Petitioner's use of this weapon in threatening to shoot and kill with it. It is fair to conclude that it is only because the weapon was recovered and determined to be a BB pistol that Petitioner was not charged with committing these crimes with a firearm. By contrast, if Petitioner had discarded his BB pistol before he was apprehended, and he was charged with using a deadly or dangerous weapon in committing these crimes (based on evidence other than an examination of the actual weapon that the weapon was in fact a BB gun and not a firearm). Petitioner could be convicted only of simple assault, robbery and trespass because the state could not prove the unrecovered BB pistol was loaded and operable.

Under Petitioner's theory, a defendant will never be convicted of a deadly or dangerous weapon charge based on his use of a BB pistol if the weapon is not recovered and proven to be operable and loaded. This result will be contrary not only to the firearm cases which can be proven by circumstantial evidence, but with the other weapon and deadly weapon cases which can be proven by circumstantial evidence. See Smith v. State, 645 So.2d 124, 126 (Fla. 1st DCA), review denied 654 So. 2d 920 (Fla. 1995), where the

Court noted the evidence was sufficient to establish Smith used a deadly weapon in assaulting the victim and escaping from the state prison where defendant held "some type of sharp object" against the victim's neck while threatening to kill the victim if he did not be quiet. The victim never saw the object. On appeal, Smith claimed the trial court erred in denying his motions for a judgment of acquittal to the charges charging he used a "weapon" or "deadly weapon" because the evidence was insufficient to establish a weapon or deadly weapon was used. Rather, Smith claimed the 'sharp object" could have been a fingernail, pen cap or pencil. The First District found the evidence legally sufficient to sustain Smith's convictions for kidnaping and escape with a weapon and aggravated assault with a deadly weapon. Smith, unlike the instant case, is a sufficiency of proof case. Respondent cites it only for the point that to adopt Petitioner's position would create a separate class of weapon, the BB pistol, the use of which can never be proven by circumstantial evidence (unlike firearms and other weapons) because the state must prove the pistol was loaded and operational.

Though acknowledging there was no evidence whether the BB gun which was deemed a deadly weapon in Depasquale v. State, 438 So. 2d 159 (Fla. 2d DCA 1983) was loaded or operable, Petitioner distinguishes the cases of Dale v. State, 669 So. 2d 1112 (Fla. 1st

DCA), review granted 678 So. 2d 337 (Fla. 1996)[17]; Gooch v. State, 652 So. 2d 1189 (Fla. 1st DCA) review denied 659 So. 2d 1086 (Fla. 1995); Lynn v. State, 567 So. 2d 1043 (Fla. 5th DCA 1990); and Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984) wherein BB guns were found to be deadly weapons on the ground in each of those cases, there was some evidence the BB gun was operable.

Firstly, as set forth in the foregoing analysis, Respondent maintains any review as to the operability of a BB gun is not relevant to determining whether a BB gun is a deadly weapon. Secondly, in Duba, there was no evidence the BB gun was operable. Rather, the opinion reflects it was unloaded and nonoperable when recovered. The court in Duba held whether the BB gun was a deadly weapon on these facts was a question for the jury and that the trial court erred in refusing to allow the defense to argue the BB gun was not a deadly weapon where it did not contain a CO2 cartridge and was nonoperative when subsequently fitted with one. Likewise, the BB gun in Gooch was unloaded when recovered, but there is no evidence in the opinion as to its operability. The defense in Gooch argued to the jury the BB gun was not a deadly weapon because it was not loaded, but this argument was rejected by

[17]This case is currently pending before this Court in case number 87,691.

the jury. Dale is the only case where there was evidence the BB gun was operable. Though the BB gun in Dale was found unloaded and without a CO2 cartridge, the state did introduce evidence it **was** operational and could be spring loaded with BBs. The court in Dale used this factor as a means of distinguishing Brooks v. State, *605* So. 2d 874 (Fla. 1st DCA 1992), reversed on other grounds *630 So.* 2d 527 (Fla. 1993), wherein the state failed to prove the *starter pistol* had a capability to injure. As set forth above, the starter pistol cases are distinguishable from the BB gun cases because starter pistols are not likely to cause death or great bodily harm when used in the ordinary and usual manner contemplated by their design and construction. Therefore, the First District's comparing the BB gun in Dale to the starter pistol in Brooks is unsound.

Petitioner attempts to distinguish Shelby v. state, 541 so. 2d 1219 (Fla. 2d DCA 1989) on the ground the sexual battery statute proscribes merely threatening the victim with a deadly weapon. As set forth above, the standard jury instruction for aggravated assault defines a deadly weapon as one which is used *or threatened to* be *used* in a way likely to cause death or great bodily harm. Therefore, Shelby is not distinguishable upon this ground. Petitioner further distinguishes Shelby because the weapon was not recovered. This factor makes it a sufficiency of proof case such as

Smith v. Though in Smith the victim was able to testify some sharp object was held against his throat, in Shelby, the victim never saw any gun but relied on Shelby's threat he had one. As in Smith where the court found the evidence sufficient to establish use of a deadly weapon, the court in Shelby found the evidence sufficient to establish the threatened use of a deadly weapon.

Because there is no basis upon which to treat unloaded/nonoperable BB guns differently than unloaded/nonoperable firearms, and because both objects are instruments "which will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design and construction.", the state need not prove a BB pistol is loaded and operational in order for it to constitute a deadly weapon.

## CONCLUSION

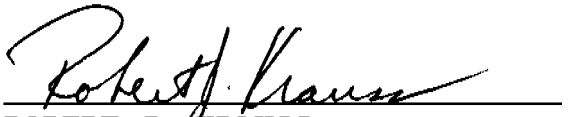
Based upon the foregoing, the State asks this Court to answer the certified question

> **IF THE STATE FAILS TO PROVE THAT A BB PISTOL IS LOADED AND OPERABLE AT THE TIME OF AN OFFENSE, CAN IT BE CLASSIFIED AS A DANGEROUS OR DEADLY WEAPON WHEN THE DEFENDANT'S ACTIONS CAUSE THE VICTIM TO REASONABLY BELIEVE THAT THE BB PISTOL IS LOADED?**

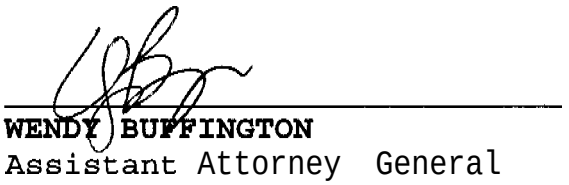
in the affirmative.

Respectfully submitted,

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**



**ROBERT J. KRAUSS**
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 028538



**WENDY BUFFINGTON**
Assistant Attorney General
Florida Bar No. 0779921
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739
**COUNSEL FOR** RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to CAROLYN J. Y. WILSON, Assistant Public Defender, Criminal Justice Center, 14255 49th Street North, Clearwater Florida, 33762 this 12th day of September 1997.

COUNSEL FOR RESPONDENT

**IN THE FLORIDA SUPREME COURT**

**DEXTER MITCHELL,**

**Petitioner,**

**v.** **Case No. 91,107**

**STATE OF FLORIDA,**

**Respondent.**

---

**NOTICE OF SIMILAR ISSUE PENDING IN CASE NUMBER 87,691, DALE V. STATE**

Appellee hereby gives this Court notice that Dale v. Smith, currently pending before this Court in case number 87,691, raises an issue similar to the issue raised in the instant case, and as grounds therefore states:

1. In Dale v. State, 669 So. 2d 1112 (Fla. 1st DCA), review granted 678 So. 2d 337 (Fla. 1996), the First District certified the following question to this Court:

> CAN A JURY PERMISSIBLY FIND A BB GUN TO BE A DEADLY WEAPON AND A DEFENDANT GUILTY OF ARMED ROBBERY WHEN THE EVIDENCE SHOWS THAT THE BB GUN WAS FOUND UNLOADED, WITHOUT A CO2 CARTRIDGE, AND NO EVIDENCE WAS PRESENTED THAT THE BB GUN WAS LOADED AT THE TIME OF THE OFFENSE, WHERE THE DEFENDANT STATED SIMPLY 'I HAVE A GUN" DURING THE COMMISSION OF THE ROBBERY?

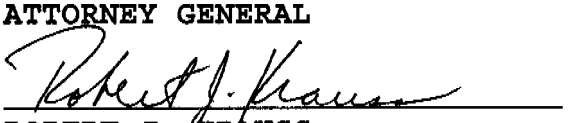
2. In the instant case, the Second District Court of Appeal certified the following question to this Court:

> IF THE STATE FAILS TO PROVE THAT A BB PISTOL IS LOADED AND OPERABLE AT THE TIME OF AN OFFENSE, CAN IT BE CLASSIFIED AS A DANGEROUS OR DEADLY WEAPON WHEN THE DEFENDANT'S ACTIONS CAUSE

THE VICTIM TO REASONABLY BELIEVE THAT THE BB PISTOL IS LOADED?

3. Wherefore, Respondent gives this Court notice of the similarity of the above pending issues.

Respectfully submitted,
ROBERT A. BUTTERWORTH
**ATTORNEY GENERAL**

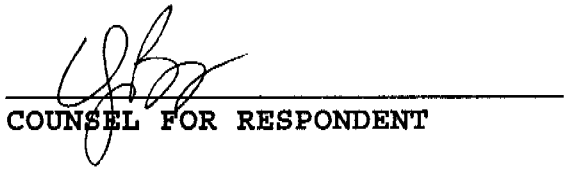


**ROBERT J. KRAUSS**
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 028538

**WEN[redacted]UFFINGTON**
Assistant Attorney General
Florida Bar No. 0779921
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607-2366
(813) 873-4739
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to CAROLYN J. Y. WILSON, Assistant Public Defender, Criminal Justice Center, 14255 49th Street North, Clearwater Florida, 33762 this 12th day of September 1997.



**COUNSEL FOR RESPONDENT**