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JUL 27 1991

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JEREMIAH BUTLER,

Respondent.

CASE NO. 93,499
DCA CASE NO. 96-04871

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	<u>PAGE(S)</u>	
TABLE OF CONTENTS	i	
TABLE OF CITATIONS	ii	
PRELIMINARY STATEMENT	1	
STATEMENT OF THE CASE AND FACTS	1	
SUMMARY OF ARGUMENT	3	
ARGUMENT	4	
<u>ISSUE</u>		
WHETHER THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND <u>GARVIN V. STATE</u> , 685 SO. 2D 17 (FLA. 3D DCA 1996).		4
CONCLUSION	8	
CERTIFICATE OF SERVICE	9	

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Brown v. State</u> , 430 So. 2d 446 (Fla. 1983)	3, 6
<u>Butler v. State</u> , 23 Fla. L. Weekly D1038 (Fla. 1st DCA April 17, 1998)	1, 3, 4, 5
<u>Butler v. State</u> , 23 Fla. L. Weekly D1495 (Fla. 1st DCA June 17, 1998)	1, 2, 6
<u>Garvin v. State</u> , 685 So. 2d 17 (Fla. 3d DCA 1996)	3, 4, 5, 6
<u>Laster v. State</u> , 23 Fla. L. Weekly D790 (Fla. 1st DCA March 24, 1998), <u>rev. pending</u> , Case No. 92,864 (Fla. April 30, 1998)	6
<u>Reaves v. State</u> , 485 So. 2d 829 (Fla. 1986)	4
 <u>OTHER</u>	
Article V, § 3(b)(3), Fla. Const.	4
Fla. R. App. P. 9.030(a)(2)(A)(iv)	4

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (District Court) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Jeremiah Butler, the Appellant in the District Court and the defendant in the trial court, will be referenced in this brief as Respondent or proper name.

This brief is typed in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Butler v. State, 23 Fla. L. Weekly D1038 (Fla. 1st DCA April 17, 1998), and the opinion on rehearing, Butler v. State, 23 Fla. L. Weekly D1495 (Fla. 1st DCA June 17, 1998), are attached as an appendix.

Respondent was convicted of armed burglary, two counts of armed robbery, and attempted second degree murder. Butler, 23 Fla. L. Weekly at D1038. In its initial opinion, the First District reversed Respondent's burglary conviction. Id. The court wrote,

[Butler] argues on appeal that the trial judge should have granted his motion for judgment of acquittal on the burglary charge because the only evidence at trial concerning the convenience store at the time of his entry was that it was open to the general public, and that one entering the premises under such circumstances cannot be convicted of burglary. We agree. Id.

On rehearing, the First District reversed one of Respondent's convictions for armed robbery because there was a single victim "only one robbery occurs, notwithstanding the fact that the property taken belonged to different owners." Butler, 23 Fla. L. Weekly at D1495.

SUMMARY OF ARGUMENT

In Butler v. State, 23 Fla. L. Weekly D1038 (Fla. 1st DCA April 17, 1998), the First District held that Respondent could not be convicted of burglary because the convenience store he robbed was open to the public at the time of the robbery. This holding conflicts with the Garvin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996), holding that a burglary can be committed in a business open to the public if the consent to remain in the business has been revoked. This Court should accept jurisdiction to resolve this conflict.

Further, the First District's opinion holds that only one robbery is permitted if there is only one victim. In Brown v. State, 430 So. 2d 446 (Fla. 1983), this Court explained that the dispositive question of whether there is more than one robbery is whether there are separate takings and a separate intent for each transaction. Under Brown, multiple robberies of the same victim are permitted under some circumstances. The First District's blanket pronouncement conflicts with Brown. This Court should also accept jurisdiction to resolve this conflict.

ARGUMENT

ISSUE

WHETHER THERE IS EXPRESS AND DIRECT CONFLICT
BETWEEN THE DECISION BELOW AND GARVIN V. STATE,
685 SO. 2D 17 (FLA. 3D DCA 1996).

The District Court's holding that Respondent cannot be convicted of burglary because the convenience store was open to the public when the crimes took place directly conflicts with the Third District's holding in Garvin v. State, 685 So. 2d 17 (Fla. 3d DCA 1996), that a burglary can be committed in a business open to the public if the consent to remain in the business has been revoked. This Court should accept jurisdiction to resolve the conflict between the District Courts of Appeal.

This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

There is direct conflict between the opinion below and Garvin. Butler was convicted of armed burglary, two counts of armed robbery, and attempted second degree murder. Butler, 23 Fla. L. Weekly at D1038. The First District reversed Butler's burglary conviction, writing:

[Butler] argues on appeal that the trial judge should have granted his motion for judgment of acquittal on the burglary charge because the only evidence at trial concerning the convenience store at the time of his entry was that it was open to the general public, and that one entering the premises under such circumstances cannot be convicted of burglary. We agree. Id.

Butler holds that one who enters a store that is open to the public cannot be convicted of burglary.

In Garvin, the Third District held the opposite. Garvin and his accomplices entered a McDonald's restaurant during the lunch hour and robbed the restaurant, employees, and customers.

Garvin, 685 So. 2d at 18. After being convicted of burglary, among other crimes, Garvin argued on appeal that he could not be convicted of burglary because the restaurant was open to the public at the time of the crimes and he is "exempt" from the burglary charge. Id. The court rejected Garvin's argument:

It is undisputed that the restaurant was open to the public at the time of the invasion. It was the middle of the lunch hour and members of the public were there eating. **However, pursuant to the burglary statute, once a consensual entry is made, a consensual "remaining in" begins.** Here, the question for the jury to resolve was whether Garvin remained in the premises with the intent to commit an offense therein after the consent to remain in the restaurant had been withdrawn. Id. (emphasis added).

The court found there was evidence to show any consent that Garvin had to be in the building had been withdrawn and affirmed the burglary conviction. Id.

Butler holds that a defendant cannot be convicted of burglary if the premises are open to the public when the defendant enters. Garvin holds that a defendant can be convicted of burglary after entering a business open to the public if the jury can find that

the consent to be in the business was withdrawn. In Laster v. State, 23 Fla. L. Weekly D790 (Fla. 1st DCA March 24, 1998), rev. pending, Case No. 92,864 (Fla. April 30, 1998), the First District reversed the burglary conviction of Butler's co-defendant and certified conflict with Garvin. Laster, 23 Fla. L. Weekly at D790. Like Laster, this case conflicts with Garvin. This Court should accept jurisdiction to resolve the conflict.

On rehearing, the First District reversed one of Respondent's armed robbery convictions, holding that since there was a single victim, only one conviction for robbery is permitted even though the property taken belonged to different owners. Butler, 23 Fla. L. Weekly at D1495. The holding here conflicts with this Court's opinion in Brown v. State, 430 So. 2d 446 (Fla. 1983). In Brown, this Court affirmed two convictions for robbery when Brown robbed two employees' cash registers even though only one entity owned the money in the registers. Brown, 430 So. 2d at 446-447. Brown explained:

Actual ownership of the money obtained is not dispositive of the question of whether multiple robberies have been committed. **What is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction.** Brown, 430 So. 2d at 447. (emphasis added).

The First District's holding that a single victim means that only one robbery conviction is permitted conflicts with Brown. Under Brown, a defendant could rob the same victim if there is a separate and independent intent for each transaction. The First District's opinion in Butler holds that, in all cases, only one

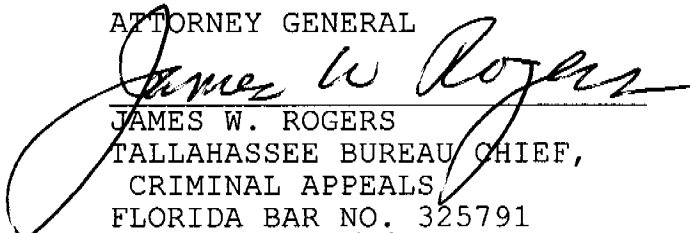
conviction is permitted. This Court should accept jurisdiction to resolve the conflict.

CONCLUSION

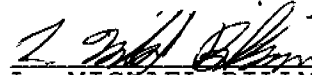
Based on the foregoing reason, the State respectfully requests this Honorable Court exercise its discretionary jurisdiction to review the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF PETITIONER has been furnished by U.S. Mail to Phil Patterson, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of July, 1998.



L. Michael Billmeier
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\98108133\BUTLERBJ.WPD --- 7/26/98, 9:50 pm]