ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STEVE LAMONT JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,234

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

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

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State rejects Petitioner's statement of the facts. Petitioner's statement of the facts cites portions of the record not discussed in the opinion below, such as arguments made in his motion for rehearing. (PJB at 2). This Court has stated that it is "pointless and misleading to include a comprehensive recitation of the facts not appearing in the decision below, with citations to the record, as petitioner provided here." Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986). As Petitioner has provided exactly the same kind of pointless recitation of the facts in his brief, the State rejects Petitioner's statement,

urges this Court to reject it, and submits the following statement of the facts.

The relevant facts are set out in the First District's opinion, Johnson v. State, 24 Fla. L. Weekly D1138 (Fla. 1st DCA May 5, 1999), attached as Appendix A. The First District recited the relevant facts of Petitioner's crimes:

> In need of bail money for his girlfriend, appellant and his co-defendant, with masked faces and guns drawn, entered a convenience store that was open for business. While holding a gun on Mr. Goswami, one of the store owners, appellant followed him behind the check-out counter where the cash register was located, heedless of the other store owner's command that appellant was not permitted in that area. After appellant entered the prohibited area, he turned and fired twice at Mrs. Goswami, wounding her hand. Mr. Goswami immediately began to struggle with appellant's co-felon, and when appellant began striking her husband, Mrs. Goswami fought with appellant. During the fray, Mrs. Goswami obtained the gun she and her husband kept in their shop. Having armed herself, she held the gun on appellant, told the two perpetrators to leave her husband alone, and shot appellant's cohort.

Johnson, 24 Fla. L. Weekly at D1139.

Petitioner was convicted of attempted armed robbery while wearing a mask, attempted second degree murder, and causing bodily injury during the commission of a felony, specifically burglary. Johnson, 24 Fla. L. Weekly at D1138. Petitioner argued that his conviction for causing bodily injury during the commission of a burglary should be reversed because the State did not prove a burglary occurred because the convenience store was open to the public when the entry took place. Id. at D1138-1139. The First District rejected Petitioner's argument:

> We recognize that the supreme court has recently held that "if a defendant can establish that the

> premises were open to the public, then this is a complete defense" to a burglary charge. Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999). It is undisputed that in the instant case the store was open to the public when appellant entered. The area behind the cash-register counter was not, however, an area open to the public. This point was clearly made to appellant by an owner of the store before appellant forced the other owner to the cash register at gunpoint and followed him into the prohibited area. We thus affirm appellant's conviction for causing bodily injury during the commission of a burglary. See Dakes v. State, 545 So. 2d 939, 940 (Fla. 3d DCA 1989)("We hold that although the store itself was open to the public, the closed storeroom to which access was clearly restricted was not part of the premises open to the public, within the scope of section 810.02."); Florida Standard Jury Instructions in Criminal Cases, Burglary § 810.02 (July 1997).

Id. at D1139.

SUMMARY OF ARGUMENT

The First District's opinion in this case follows well-established law and holds that a defendant can be convicted of burglary if he or she enters an area of a business that is not open to the public with the intent to commit an offense. Here, Petitioner entered an area of the business that he was specifically told by the owner not to enter with the intent to commit a crime so the State proved burglary. Nothing in Miller, Laster, and Butler indicate that the defendants in those cases entered areas of the business that were not open to the public. Accordingly, there is no conflict between those decisions and the decision here. This Court should decline to exercise jurisdiction.

ARGUMENT

ISSUE

WHETHER THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND MILLER V. STATE, 733 SO. 2D 955 (FLA. 1998), STATE V. LASTER, 24 FLA. L. WEEKLY S203 (FLA. APRIL 29, 1999), AND STATE V. BUTLER, 24 FLA. L. WEEKLY S203 (FLA. APRIL 29, 1999)? (Restated)

There is no conflict between this case and this Court's decisions in Miller v. State, 733 So. 2d 955 (Fla. 1998), State v. Laster, 24 Fla. L. Weekly S203 (Fla. April 29, 1999), and State v. Butler, 24 Fla. L. Weekly S203 (Fla. April 29, 1999). In this case, the First District applied well-established law that allows a business owner to designate which areas of the establishment are open to the public and held that the area of the store in which Petitioner entered was not open to the public. Miller, Laster, and Butler did nothing to change that law. Business owners are still permitted to designate areas of their stores that the public cannot enter. If criminals enter or remain in that area with the intent to commit an offense, they can properly be convicted of burglary. There is no conflict between these cases so this Court should decline to accept jurisdiction.

Petitioner contends that this Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 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). Here, there is no conflict between the decisions.

In Johnson, the First District held that the State had proved burglary because the area behind the counter was not an area open to the public. Johnson, 24 Fla. L. Weekly at D1139. Here, when Petitioner attempted to go behind the counter, he was specifically told that he could not go there. Id. Accordingly, the First District held that the area was not open to the public since Petitioner was told he could not go there and affirmed the burglary conviction. Id. The court relied on Dakes v. State, 545 So. 2d 939, 940 (Fla. 3d DCA 1989), where the Third District affirmed a burglary conviction after Dakes entered a storeroom of a retail store during business hours and attempted to steal several hundred dollars worth of merchandise. The Dakes court explained that although the store was open to the public, the storeroom was clearly marked "authorized personal only." Dakes, 545 So. 2d at 940. Here, like Dakes, Petitioner was specifically told that he could not go behind the counter. The First District's opinion simply follows Dakes.

This Court implicitly approved Dakes when it approved the following language in the standard jury instruction on burglary:

> A person may be guilty of this offense ... if he or she entered into or remained **in areas of the premises**

which he or she knew or should have known were not open to the public.

Standard Jury Instructions in Criminal Cases, 697 So. 2d 84, 90 (Fla. 1997). (emphasis added).

The comment to this instruction explained:

> The committee believes that the additional language is necessary in certain factual situations. See Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989).

Id. at 90-91.

The First District in Johnson did nothing more than follow well-established law and hold that business owners can designate areas of their business that the public cannot enter. The Third District recently followed Dakes and reached a similar result. See Thomas v. State, 24 Fla. L. Weekly D1760 (Fla. 3d DCA July 28, 1999)(explaining that Miller only applies if the area where the burglary takes place is open to the public). Nothing in the cases cited by Petitioner changed this law.

In Miller, this Court held that if a defendant can establish that the premises are open to the public, it is a complete defense to burglary. Miller, 733 So. 2d at 957. In Miller, there was no indication that any part of the store was not open to the public. Here, Petitioner was specifically told not to go behind the counter. Johnson, 24 Fla. L. Weekly at D1139. Miller did not address a situation, like here, where the defendant was specifically told that he could not go behind the counter. Under Petitioner's interpretation of Miller, if any part of the premises is open to the public, the entire premises is open to the public. Such an interpretation is absurd. Certainly this

Court did not intend in Miller to prohibit businesses from designating which areas are open to the public and which areas are not. This case and Miller do not conflict.

In Laster and Butler, this Court rejected the State's argument that the area behind the counter was not open to the public in those cases. Laster, 24 Fla. L. Weekly at S203-S204; Butler, 24 Fla. L. Weekly at S203. Once again, those cases do not mention whether or not the defendants had been told that they could not go behind the counter. Laster and Butler were specifically limited to their facts. Each case said, "We do not find any merit to the State's argument **in this case** that the area behind the counter was not open to the public." Butler, 24 Fla. L. Weekly at S203; Laster, 24 Fla. L. Weekly at S204. (emphasis added). Like Miller, Laster and Butler do not prohibit business from designating areas that are closed to the public. Those cases do not conflict with Johnson.

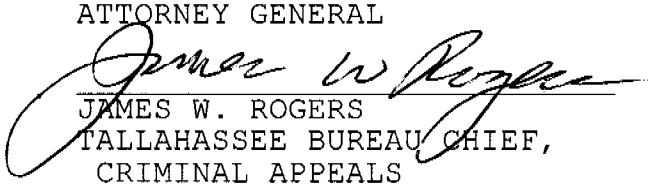
There is no conflict between the First District's opinion in Johnson and this Court's opinions in Miller, Butler, and Laster. This Court should decline to exercise jurisdiction.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Glenna Joyce Reeves, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of August, 1999.

L. Michael Billmeier
Attorney for the State of Florida

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Appendix

required to use her leave, rather, she opted to use it. Moreover, they point out that for the period of time in dispute, claimant received 100% of her salary which is all that she is entitled to. *See Escambia County Sheriff's Dep't v. Grice*, 692 So. 2d 896 (Fla. 1997); *Brown v. S.S. Kresge Co., Inc.*, 305 So. 2d 191 (Fla. 1974).

The paramount consideration in the instant case is the statutory requirement that workers' compensation benefits are payable for an injury which occurs in the course and scope of employment. Section 440.09(1), Florida Statutes (1987), provides that compensation *shall* be paid, except for the situations enumerated in that section, none of which are applicable here. As recently recognized in *Williams v. City of Fort Walton Beach*, 691 So. 2d 580, 581, n.2 (Fla. 1st DCA 1997), section 440.21 exists "to redress employers' misapplication of other employee entitlements in (legally ineffective) efforts to discharge workers' compensation obligations." *See also Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989); *Jewel Tea Co., Inc. v. Florida Indus. Comm'n*, 235 So. 2d 289 (Fla. 1969); *Marion Correctional Inst. v. Kriegel*, 522 So. 2d 45 (Fla. 5th DCA 1988); *Chancey v. Florida Pub. Utils.*, 426 So. 2d 1140 (Fla. 1st DCA 1983).

We cannot agree with the employer/carrier's characterization of the circumstances of the instant case. While it is true that the employer/carrier did not literally compel claimant to use her sick and vacation leave rather than receive the statutorily mandated workers' compensation benefits, the employer/carrier offered her an illusory choice. The claimant could elect to receive her regular compensation or an amount less than one-half of her regular pay in workers' compensation benefits.[2] This is no real option. Accordingly, we agree with the claimant that section 440.21(2) was violated in this case. *Id.*

Further, we distinguish the facts of the instant action from a circumstance in which the employer allows an injured employee to use another benefit, such as sick leave or personal leave, to cover the difference in the amount between the workers' compensation benefits and the employee's full compensation. Our holding here is not a barrier to such a policy. *See, e.g.*, Fla. Admin. Code R. 60K-5.031.

Amount of Benefits

While under section 440.09(1) an employer may not avoid paying workers' compensation benefits by offering alternative benefits, pursuant to section 440.20(15), Florida Statutes (1987):

> an injured worker, except where expressly given such a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage.

See Grice, 692 So. 2d at 898.

Thus, to the extent that the combination of claimant's compensation received while on leave and the workers' compensation benefits exceed her average weekly wage, the employer is entitled to offset the amounts paid under the leave plans by the amount the aggregate payments exceed claimant's average weekly wage. *See also Barragan v. City of Miami*, 545 So. 2d at 254. In addition, however, if the employer receives such an offset, the employer "should be allowed to charge [the claimant] with . . . leave time only in proportion to the amount of benefits it paid [claimant]." *Chancey v. Florida Pub. Utils.*, 426 So. 2d at 1141. Otherwise, the employer would be benefitting from any offset, while charging the employee for the full use of her leave.

Thus, on remand, the JCC shall award claimant workers' compensation disability benefits for the period of January 11, 1989 to April 26, 1989, when the employer/carrier failed in its statutory obligation to pay benefits for a work-related injury. Further, the employer may seek to offset against the leave compensation paid to claimant the amount by which the aggregate of leave compensation and workers' compensation benefits exceeds claimant's average weekly wage. *Grice*, 692 So. 2d 898. Finally, in the event the employer requests the JCC to make such an offset, the JCC has jurisdiction to reinstate claimant's sick leave and vacation leave benefits in proportionate amounts to the offset taken by the employer. *See Marion Correctional Inst. v. Kriegel*, 522 So. 2d at 47.

REVERSED and REMANDED for proceedings consistent with this opinion. (BOOTH AND PADOVANO, JJ., CONCUR.)

[1]Pursuant to Delta's accident leave policy, employees who suffered an on-the-job injury were automatically entitled to have their full salaries continued for a maximum of 13 weeks following the injury. Accident leave was not chargeable against the employee's sick leave time. Claimant was paid her full pay pursuant to this accident leave policy for the period beginning October 12, 1988 and ending January 10, 1989.

[2]Claimant's salary exceeded the statewide average weekly wage, and she was subject to the statutory cap of section 440.12(2), Florida Statutes (1987). Thus, for the period of time that she received workers' compensation benefits, she was paid less than half of her usual monthly salary.

* * *

Prohibition—Jurisdiction

JAMES A. CAMPBELL, Petitioner, v. GREGORY F. LUNGSTRUM, USAA CASUALTY INSURANCE COMPANY, a foreign corporation doing business in the State of Florida, Respondents. 1st District. Case No. 99-1493. Opinion filed May 4, 1999. Petition for Writ of Prohibition—Original Jurisdiction. Counsel: Timothy F. Burr and W. David Jester of Galloway, Johnson, Tompkins & Burr, Gulf Breeze, for petitioner. No appearance for respondents.

(PER CURIAM.) Inasmuch as petitioner has failed to show that the jurisdictional argument being presented to this court has first been presented to the trial court for its consideration, the petition for writ of prohibition is denied. (DAVIS, BENTON and PADOVANO, JJ., concur.)

* * *

Criminal law—Sentencing—Error to deny parties opportunity to present evidence or submissions relevant to sentencing

JERRY WHITLOW, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 97-2690. Opinion filed May 5, 1999. An appeal from the Circuit Court for Leon County. J. Lewis Hall, Judge. Counsel: Lynn A. Williams, Tallahassee, Attorney for Appellant. Robert A. Butterworth, Attorney General, and J. Ray Poole, Assistant Attorney General, Tallahassee, Attorneys for Appellee.

(PER CURIAM.) The trial court erred in denying the parties an opportunity to present evidence or submissions relevant to sentencing before imposing Whitlow's sentence, as required by rule 3.720(b), Florida Rules of Criminal Procedure. Accordingly, we REVERSE and REMAND for re-sentencing. (ERVIN, BOOTH and BENTON, JJ., CONCUR.)

* * *

Criminal law—Defendant properly convicted of causing injury during commission of felony based on injuries caused during burglary of convenience store—Although convenience store where incident occurred was open to public, area behind cash register was not public area, a point which was clearly made to defendant by owner of store before defendant forced the other owner to the cash register at gunpoint and followed him into prohibited area

STEVE LAMONT JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 98-165. Opinion filed May 5, 1999. An appeal from the Circuit Court for Duval County. William Wilkes, Judge. Counsel: Nancy A. Daniels, Public Defender; Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; L. Michael Billmeier, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant raises three issues in the instant appeal. We affirm on all three issues raised, but we write to address only one.

Following trial by jury, appellant was convicted as charged of attempted armed robbery while wearing a mask, attempted second degree murder, and causing bodily injury during the commission of a felony, specifically burglary. Appellant contends that his conviction for causing bodily injury during the commission of a felony cannot stand because the state did not establish an essential element of this crime, *i.e.*, commission of the felony of burglary as charged. The state is correct that this specific claim was not preserved for appeal, but as appellant points out, a conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law. *See Harris v. State*, 647 So. 2d 206, 208 (Fla. 1st DCA 1994); *K.A.N. v. State*, 582 So.

2d 57, 59 (Fla. 1st DCA 1991) ("[A] conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below."). We therefore review the issue to determine whether fundamental error exists.

In the instant case, appellant argues that under the burglary statute, entry into premises open to the public is excluded from the definition of burglary. *See* § 810.02(1), Florida Statutes (1995). He thus claims that because the convenience store was open to the public when he entered, the state failed to establish that a burglary occurred. As the facts of this case demonstrate, however, appellant's claim fails.

In need of bail money for his girlfriend, appellant and his co-defendant, with masked faces and guns drawn, entered a convenience store that was open for business. While holding a gun on Mr. Goswami, one of the store owners, appellant followed him behind the check-out counter where the cash register was located, heedless of the other store owner's command that appellant was not permitted in that area. After appellant entered the prohibited area, he turned and fired twice at Mrs. Goswami, wounding her hand. Mr. Goswami immediately began to struggle with appellant's co-felon, and when appellant began striking her husband, Mrs. Goswami fought with appellant. During the fray, Mrs. Goswami obtained the gun she and her husband kept in their shop. Having armed herself, she held the gun on appellant, told the two perpetrators to leave her husband alone, and shot appellant's cohort.

We recognize that the supreme court has recently held that "if a defendant can establish that the premises were open to the public, then this is a *complete* defense" to a burglary charge. *Miller v. State*, 24 Fla. L. Weekly S155 (Fla. April 1, 1999). It is undisputed that in the instant case the store was open to the public when appellant entered. The area behind the cash-register counter was not, however, an area open to the public. This point was clearly made to appellant by an owner of the store before appellant forced the other owner to the cash register at gunpoint and followed him into the prohibited area. We thus affirm appellant's conviction for causing bodily injury during the commission of a burglary. *See Dakes v. State*, 545 So. 2d 939, 940 (Fla. 3d DCA 1989) ("We hold that although the store itself was open to the public, the closed storeroom to which access was clearly restricted was not part of the premises open to the public, within the scope of section 810.02."); *Florida Standard Jury Instructions in Criminal Cases, Burglary* § 810.02 (July 1997). (JOANOS, MINER and DAVIS, JJ., CONCUR.)

* * *

Prohibition—Order of reference to special master without consent of opposing parties was contrary to rule 1.490(c)—Prohibition granted to prevent further enforcement of order of reference

JACK DANIELS, Petitioner, v. FLORIDA PUBLIC EMPLOYEES COUNCIL 79, AFSMCI, AND OTHERS, Respondents. 1st District. Case No. 98-1309. Opinion filed May 5, 1999. Petition for Writ of Prohibition—Original Jurisdiction. Counsel: William S. Graessle of Winegeart & Graessle, Jacksonville, for petitioner. Jerry G. Traynham of Patterson & Traynham, Tallahassee, for respondents.

(PER CURIAM.) The order of reference to a special master without consent of opposing parties was contrary to Florida Rule of Civil Procedure 1.490(c). For this reason, prohibition is granted so as to prevent respondents from further enforcing the order of reference. *Meenan v. Newman*, 662 So. 2d 1320 (Fla. 3d DCA 1995). We assume issuance of a formal writ will not be necessary.

RELIEF AWARDED. (WOLF, LAWRENCE and BROWNING, JJ., concur.)

* * *

Separation of powers—No error in dismissing prisoner's civil complaint for failure to comply with case management order requiring prisoner to file information showing activity in prisoner bank/trust account pursuant to his request for indigency status—Section 57.085, which concerns waiver of prepayment of court costs and fees for indigent prisoners, is substantive—Procedural aspects of statute are minimal and do not void the statute—No merit to prisoner's contention that homestead exemption rights are offended by statute—Constitutional protection of homestead has no connection with, and offers no shelter to, a prison inmate who has no dependents, no expenses, and no debts

JAMES ROBERT KALWAY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 98-1390. Opinion filed May 5, 1999. An appeal from the Circuit Court for Leon County. N. Sanders Sauls, Judge. Counsel: James Robert Kalway, Appellant, Pro Se. Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) James Robert Kalway (Kalway) has appealed an order of the trial court dismissing Kalway's civil complaint for failure to comply with a case management order. The case management order required Kalway to file information showing activity in his prisoner bank/trust account pursuant to his request for indigency status. Kalway asserts, *inter alia*, that the requirement made necessary by section 57.085, Florida Statutes, is procedural and thus unconstitutional, because it violates the Florida constitutional requirement of strict separation of powers. Kalway further asserts that subjecting the funds in his prisoner trust account to be used for payment of court costs and fees violates his homestead exemption rights under Article X, section 4, of the Florida Constitution. We affirm.

The thrust of section 57.085 is undoubtedly substantive. The parties agree that the right of indigents to proceed without payment of court costs and fees is a matter of substantive law properly defined by the legislature. *See Amos v. Department of Health & Rehabilitative Services*, 416 So. 2d 841, 842 (Fla. 1st DCA), *review dismissed*, 421 So. 2d 517 (Fla. 1982). A decision whether to subject a prisoner's trust account to payment of court costs and fees is clearly a subjective determination appropriately made by the legislature.

Nevertheless, we do find that section 57.085 contains directives, which are not binding on the supreme court, concerning the manner in which the substantive objectives are to be reached. Under the Florida Constitution, only the Florida Supreme Court has the power to adopt rules for the practice and procedure in all courts of this state. *See* Art. II, § 3, Fla. Const.; *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978). The procedural aspects of the law under examination in this case are minimal and do not void the statute, because they are intended to implement the substantive provisions of the law. *See Smith v. Department of Insurance*, 507 So. 2d 1080, 1092 (Fla. 1987). That is, the procedural portions of section 57.085 do not appear to conflict with any existing court rule or procedure, and most especially they do not conflict with rule 2.030(b)(3) of the Florida Rules of Judicial Administration, or rule 9.430 of the Florida Rules of Appellate Procedure, as urged by appellant. If the procedural elements of the statute were found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures. Further, the legislative provisions do not bar the Florida Supreme Court's future adoption of specific rules designed to carry out the substantive goals of section 57.085. In short, we do not view the subject legislative enactment as an intrusion into the practice and procedure of the Florida judiciary.

Moreover, we find no merit in Kalway's argument that his homestead exemption rights are offended by the statute. Suffice it to say that Florida's constitutional protection of the homestead of its citizens has no connection with, and offers no shelter to, a prison inmate who has no dependents, no expenses, and no debts.

Accordingly, we affirm in all respects the trial court's ruling concerning Kalway's indigency status. (JOANOS, MINER and DAVIS, JJ., CONCUR.)

* * *

Criminal law—Possession of cocaine with intent to sell—Constructive possession—Evidence insufficient to prove that defendant knew of presence of drugs—Error to deny motion for judgment of acquittal

TERRIUS VONCHAY WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 98-1540. Opinion filed May 5, 1999. An appeal from the Circuit Court for Escambia County. Terry D. Terrell, Judge. Counsel: Nancy A. Daniels, Public Defender; Joel Arnold, Assistant Public Defender,