IN THE SUPREME COURT OF FLORIDA

TIMOTHY ANDERSON,

Petitioner,

v. CASE NO. SC18-1059

STATE OF FLORIDA,

Respondent.

_____/

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

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

TIMOTHY ANDERSON,	:	
Petitioner,	:	
VS.	:	CASE NO. SC18-1059
STATE OF FLORIDA,	:	
Respondent.	:	
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JURISDICTIONAL BRIEF OF PETITIONER

I STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal. Anderson v. State, ____ So.3d ____ (no. 1D15-5433)(Fla. 1st DCA May 25, 2018).

Petitioner was charged with aggravated assault with a deadly weapon. The evidence was undisputed that the deadly weapon was a motor vehicle. Anderson's girlfriend left a club in her car with some friends. Anderson followed in his truck, "driving erratically at times and eventually hitting his girl-friend's car." Slip op. at 1. His defense was that, while he did drive recklessly, he did not intentionally hit the girl-friend's car. Id. His request for the jury to be instructed on the lesser-included offense of reckless driving was denied; he was convicted of aggravated assault; the First District Court affirmed on appeal.

The First District disagreed with the analysis of the Fourth District Court in Piggott v. State, 140 So. 3d 666 (Fla. 4th DCA 2014), on whether reckless driving is a permissive

lesser offense, and certified conflict with Piggott.

II SUMMARY OF THE ARGUMENT

Certifying conflict with the decision of the Fourth District in Piggott, infra, the First District ruled that reckless driving was not a lesser-included offense of aggravated assault with a motor vehicle, because the information did not explicitly charge that petitioner, Timothy Anderson, was driving the truck. Petitioner contends, to the contrary, that a deadly weapon must be "used" in a manner likely to cause death or great bodily harm, and driving is the most common way of "using" a motor vehicle. Thus, reckless driving is a valid lesser-included offense.

Aggravated assault requires the threat to use a deadly weapon. When a motor vehicle is the deadly weapon charged, it must be used or threatened to be used in a manner likely to cause death or great bodily harm. That does not infer an element, as in Von Deck, infra. Rather, the information broadly charged "using" the motor vehicle, if only to threaten. The state did not specify the manner in which the vehicle was "used," but that manner of charging expanded rather than narrowed the possible lesser-included offenses.

III ARGUMENT

ISSUE PRESENTED

THE FIRST DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT IN PIGGOTT V. STATE, 140 SO.3D 666 (FLA. 4TH DCA 2014); THE FIRST DISTRICT CERTIFIED CONFLICT; THE COURT ALSO MISAPPLIED THIS COURT'S DECISION IN STATE V. VON DECK, 607 SO.2D 1388 (FLA. 1992).

Petitioner, Timothy Anderson, was convicted at jury trial of aggravated assault with a deadly weapon, a motor vehicle. The trial court refused to give a requested jury instruction on reckless driving as a lesser-included offense. The jury convicted Anderson as charged, and the First District Court affirmed, disagreeing with and certifying conflict with the Fourth District opinion in Piggott v. State, 140 So.3d 666 (Fla. 4th DCA 2014).

The First District Court said:

> Noticeably absent from the information is an allegation that Anderson was driving the vehicle, an essential element of reckless driving. See State v. Lappin, 471 So.2d 182, 183 n.1 (Fla. 3d DCA 1985). . . Anderson nevertheless contends that all the statutory elements of reckless driving are subsumed in the aggravated assault charge because it is not possible to commit aggravated assault with a motor vehicle without driving the vehicle. For support, he relies primarily on Piggott v. State, 140 So.3d 666, 669 (Fla. 4th DCA 2014), which held that reckless driving is a permissive lesser-included offense of aggravated battery with a deadly weapon when the weapon is a motor vehicle.
>
> The information in Piggott charged the defendant with striking the victim "with a deadly weapon, to wit: a Kia Sephia. . .automobile." Id. The court concluded that the first condition of the test for a permissive lesser-included offense was met because the charging document alleged "all the statutory elements of reckless driving." On rehearing, and in response to the State's post-opinion argument that the information failed to include the element of

> driving, the court reasoned that "our interpretation of the information, when viewed at the time of the charge conference, cannot ignore the undisputed evidence that the defendant was driving the automobile which is alleged to have been the instrument of the alleged aggravated battery with a deadly weapon upon the victim." Id. at 671 n.1. (footnote omitted)

Anderson, slip op. at 1-2. The court continued:

> We disagree with the analysis of Piggott and conclude that the first condition of the test for a permissive lesser-included offense is not met in this case as the facts alleged in the information are not "such that the lesser included offense cannot help but be perpetrated once the greater offense has been." Anderson v. State, 70 So.3d 611, 613 (Fla. 1st DCA 2011) (alteration omitted) (quoting Williams v. State, 957 So.2d 595, 598 (Fla. 2007)).

Id.

In Piggott, the Fourth District said the information and the undisputed evidence of driving made reckless driving a lesser-included offense. The First District disagreed. It did not matter to the First that the evidence that Anderson, like Piggott, was driving was undisputed. The key to the First District's disagreement with Piggott is its misapprehension or misapplication of this court's decision in State v. Von Deck, 607 So.2d 1388 (Fla. 1992).

In Von Deck, this court held that the elements of an offense cannot be "established by mere inference." 607 So.2d at 1389, quoted in Anderson, at 3. Von Deck was charged with attempted premeditated murder of a law enforcement officer with a firearm; the state requested an instruction on aggravated assault as a lesser, and Von Deck was convicted of aggravated assault. This court held that the information did not charge all the elements of aggravated assault, in particular, the

putting in fear element. The state argued the element could be inferred from the shooting; this court rejected that argument.

In contrast, one element of aggravated assault is the use or threat to use a deadly weapon. Where the deadly weapon used or threatened to be used is a motor vehicle, reckless driving would usually be a lesser-included offense, depending on the facts. Driving is **not** an "inferred" element; rather it is one manner - and the most common manner - in which a motor vehicle is "used" to commit aggravated assault. Where, as here, the facts are undisputed that the accused was driving, and his defense was that, while he did drive recklessly, he did not intend to threaten anyone, reckless driving is a permissive lesser, which the trial court was required to give when it was requested.

Putting in fear is an essential element of aggravated assault; the crime cannot be committed without it. In contrast, putting in fear is not an essential element of attempted murder. Von Deck. Attempted murder can be committed without the victim knowing it is about to happen; therefore, aggravated assault is not a proper lesser offense of attempted murder, unless all the elements were charged in the information. Von Deck, supra.

Unlike Von Deck, Anderson was charged with aggravated assault, not attempted murder. Using a deadly weapon is an essential element of aggravated assault; every essential element must be charged in every case. The charge must include what the deadly weapon is; the information would fail to put

the defendant on notice if it did not charge what the weapon was. The state could not, for example, charge a motor vehicle was the deadly weapon, fail to prove it, and then introduce evidence that some other weapon was used.

Aggravated assault requires proof of 1) a threat by word or act to do violence; 2) imminence of the threat; 3) creating in the victim a well-founded fear; 4) making the assault - i.e., the threat - with a deadly weapon. The standard jury instructions provide this definition:

> 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 Inst. - Crim. 8.2.

To sum up, aggravated assault requires a threat to use a deadly weapon. When a motor vehicle is the deadly weapon charged, it must be used or threatened to be used in a manner likely to cause death or great bodily harm; using the motor vehicle would include driving it. That does not infer an element, as in Von Deck, supra. Here, the information broadly charged "using" the motor vehicle, if only to threaten. The state did not specify the manner in which the vehicle was "used," but charging the crime broadly expanded rather than narrowed the possible lesser-included offenses.

In addition to the certified conflict with Piggott, petitioner seeks review on the basis of misapplication conflict with the controlling precedent of Von Deck. See generally Acensio v. State, 497 So.2d 640, 641 (Fla. 1986)("Based on the conflict created by [the] misapplication of law, we have

jurisdiction"); State v. Stacey, 482 So.2d 1350, 1351 (Fla. 1985) (exercising jurisdiction because the district court "misapplied controlling case law to the facts of the case"); see also Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1254 (Fla. 2006)(jurisdiction based on misapplication of prior caselaw).

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order briefing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail, by agreement of the parties, to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and by mail to Mr. Timothy Anderson, 2302 S. Calhoun, Tallahassee, FL 32301, this day, July 5, 2018.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

/s/
KATHLEEN STOVER