IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-43

JOHNNIE WILMER CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Citations in this brief to designate the one volume record references will be "R," followed by the relevant page number(s). The trial transcript will be referred to as “T.” Citations to the respondent’s answer brief will be “AB.”

Pursuant to Administrative Orders of this Court, counsel certifies that this brief is printed in 12 point Courier New Font, and that a disk containing the brief in WordPerfect 6.1 is submitted herewith.

ARGUMENT

THE LOWER TRIBUNAL ERRED IN HOLDING THAT AGGRAVATED BATTERY WITH A MOTOR VEHICLE OCCURRED WHEN PETITIONER STRUCK THE VICTIM'S TRUCK AND SPUN IT AROUND, BUT CAUSED NO BODILY HARM TO THE VICTIM, BECAUSE THE VEHICLE CANNOT BE CONSIDERED TO BE AN EXTENSION OF THE VICTIM'S PERSON AS A MATTER OF LAW.

Petitioner was convicted of aggravated battery with a deadly weapon by striking Cecil Lynn's truck with a motor vehicle, causing the victim's truck to spin around. Respondent makes the same mistake the lower tribunal did -- it assumes that the victim suffered some touching by petitioner's vehicle (AB at 14). The lower tribunal borrowed from tort law and erroneously held that the victim's truck was an extension of his person, so that petitioner could be convicted of aggravated battery for striking the victim's truck.

Respondent sees no problem with criminal law borrowing from tort law, for respondent seems to equate civil tort law with criminal common law (AB at 7). There are different policy concerns addressed by criminal law and tort law (Initial Brief at 15-16). Respondent has neither addressed these differences nor shown why they should be viewed as equals.

Petitioner does not know if there was a rule of lenity at common law, but our state has expressly adopted one for our citizens in §775.021(1), Fla. Stat. (1997). Respondent has

totally failed to address petitioner's argument (Initial Brief at 16) that if the aggravated battery statute is capable of differing constructions, it mandatory to first look to the statutory rule of lenity and principles of strict statutory construction before relying on tort law or out-of-state decisions.

In discussing strict construction of criminal statutes in State ex rel. Lee v Buchanan, 191 So. 2d 33, 36 (Fla. 1966), this Court tied the rule of lenity to due process:

> Statutes criminal in character must be strictly construed. *Reynolds v. Cochran*, Fla. 1962, 138 So.2d 500; *State ex rel Cooper v. Coleman,* 1939, 138 Fla. 520, 189 So. 691; 9 Fla. Jur., Criminal Law, section 17, pages 27--28. In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance. If such statutes, in defining criminal offenses, omit certain necessary and essential provisions which serve to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiencies or undertake to make the statutes definite and certain. 16 Am. Jur. 2d, Constitutional Law, Section 552, pages 952--954.

See also Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) (strict statutory construction "ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited") ; and Logan v. State, 666

So. 2d 260, 261 (Fla. 4th DCA 1996) (“lenity involves due process”).

Respondent relies heavily on Malczewski v. State, 444 So. 2d 1096 (Fla. 2nd DCA), *appeal dismissed,* 453 So. 2d 44 (Fla. 1984), in which the court held that a money bag being clutched by a person was an extension of the person, so that a defendant who stabbed the money bag with a knife had committed an aggravated battery on the person (AB at 10-11). Petitioner has no quarrel with this principle, but it does not apply when a person is sitting inside of a vehicle.

If respondent wishes the statute to apply when victims suffer bodily injuries, then respondent must allege in the information and prove at trial that the victim suffered some bodily harm. Then respondent may then successfully obtain a conviction for aggravated battery with great bodily harm, as opposed to aggravated battery with a deadly weapon. But here, because the state failed to allege bodily harm in its information, and failed to elicit any testimony whatsoever from the victim that he was harmed by petitioner’s actions, the trial judge properly ruled that this alternative form of aggravated battery would not be submitted to the jury.

The only logical way to strictly construe the aggravated

battery statute is to hold as a matter of law that no aggravated battery with a deadly weapon occurs where a person is seated inside of a vehicle and is struck by another vehicle.

Petitioner demonstrated in his Initial Brief at 11-12 that the case relied on by the lower tribunal and respondent (AB at 13), State v. Townsend, 865 P.2d 972, 124 Idaho 881 (1993), is distinguishable on two grounds: the victim in Townsend was "jostled around," and the Idaho statute is much broader than Florida's. Here, there is no evidence -- only an assumption -- that the victim was "jostled around" by petitioner's actions.

Respondent relies on the ancient case of People v. Moore, 3 N.Y.S. 159 (Sup. Ct. 1888), for the proposition that an assault occurred when the defendant grabbed the reigns from Snyder, the driver of a horse-drawn sleigh (AB at 13). This case is not on point for three reasons. First, it involved an assault, not a battery. Second, the opinion clearly states that "Snyder did receive bodily harm." *Id.* at 160. Here, there was no evidence of bodily harm to the victim. Third, the opinion relates that the defendant's testimony showed that he intended to harm the victim. Here, we have no such testimony.

Thus, People v. Moore may be equated with the Oklahoma, Tennessee and Texas cases cited in the Initial Brief at 12-14,

which hold that a person seated in a vehicle who suffers some bodily injury has been the victim of a battery. But here, there was no evidence of bodily harm to the victim.

A case from Louisiana is in accord. In State v. Dauzat, 392 So. 2d 393 (La. 1980), the court found no evidence of aggravated battery with a dangerous weapon where the defendant shot a gun into the door of a car in which the victim was seated, but the victim was not injured.

Respondent has wisely chosen not to rely on the civil case, Espinosa v. Thomas, 472 N.W.2d 16, 189 Mich. App. 110 (1991), cited by the lower tribunal, because it is not on point, as demonstrated by the Initial Brief at 14-15.

This Court must approve Williamson v. State, 510 So. 2d 335 (Fla. 4th DCA 1987), and hold as a matter of law that a vehicle is not an extension of a person's body, and no aggravated battery can be charged unless the victim suffers some physical injury. The proper remedy is to reverse the judgment and sentence for aggravated battery with a deadly weapon, and remand the case for resentencing on the unarmed robbery with a proper scoresheet.

CONCLUSION

Petitioner, based on all of the foregoing, as well as the

arguments expressed in his Initial Brief, respectfully urges the Court to disapprove the decision of the First District, approve the position of the Fourth District, vacate the aggravated battery conviction, and remand the case for resentencing on the unarmed robbery with a proper scoresheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to James W. Rogers and Sherri Tolar Robinson, Assistant Attorneys General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to petitioner, #314632, Walton Work Camp, 301 World War II Veterans Lane, DeFuniak Springs, Florida 32433, by U.S. Mail, on this ____ day of February, 2000.

_____
P. DOUGLAS BRINKMEYER

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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