IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC02-984
	)	
STEVEN DARST,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case, with the following additions:

Steven Darst's offense of aggravated assault, Section 784.07(2)(c), Florida Statutes (1999), was reclassified from a third degree felony to a second degree felony because it was committed against a law enforcement officer. § 784.021, Fla. Stat. (1999). It also was subject to the three-year minimum mandatory provision of Section 784.07(2)(c), Florida Statutes (1999). The trial court sentenced Darst to the least prison time that it could, imposing the three-year minimum mandatory prison term, plus added five years probation, imposing a downward departure sentence due to the defendant's remorse, the fact it was an isolated incident while

Darst was undergoing a temporary stressful time in his life, and the unsophisticated manner in which it was committed; all based on and supported by the factual basis for the plea, the court-ordered psychological report, and testimony from the defendant's family. (2262R Vol. I, T183-184)

On appeal to the District Court of Appeal, Fifth District, the appellate court upheld the downward departure sentence, with which ruling the state does not take issue in this Court. ***Darst v. State***, 816 So.2d 680, 681 (Fla. 5th DCA 2002); Petitioner's Initial Brief on the Merits, p. 1. The district court also held that the use of the 1.5 multiplier for aggravated assault on a law enforcement officer was a double enhancement impermissibly using the exact same factor or addressing the exact same evil. ***Id***. at 683. Although the downward departure sentence to the mandatory minimum three-year prison term would not be affected by the reduction in sentencing points, the court added, the defendant was still entitled to a corrected scoresheet. ***Darst v. State***, ***supra***.

Since the district court's decision, Darst has completed the incarcerative portion of his sentence and is now on probation. (***See*** Appendix A)

SUMMARY OF ARGUMENT

The decision of the district court does not directly and expressly conflict with decisions of this Court and other district courts of appeal on the same issue of law. The decisions of the first district and this Court in ***Mills v. State***, 773 So.2d 650 (Fla. 1st DCA 2000), and ***Mills v. State***, 27 Fla. L. Weekly S593 (Fla. June 20, 2002), dealt with the completely different issue of whether a person could be convicted and sentenced both to the reclassified felony offense and the broad-reaching and dissimilar habitual offender enhancement, not the issue here of reclassification and enhancement based on the same conduct, fact, and evil.

Since both the reclassification of the offense of aggravated assault from a third degree felony to the more severe punishment of a second degree felony if the victim is a law enforcement official and the enhancement of the multiplier address and seek to protect against the same evil and punish the identical conduct and factor (that the victim was indeed a law enforcement officer), there exists an impermissible double "enhancement." Further, since the legislature, in Section 775.0823(10), Florida Statutes (1999), specifically mentions *only* "aggravated assault as described in s. 784.021," and not the reclassified "new" offense of Section 784.07(2)(c), which already provides separately for an increase in punishment, it must be assumed that the legislature did not intend, and it is

constitutionally impermissible, for a double enhancement of a defendant's sentence because of the singular fact that the victim was a law enforcement officer.

ARGUMENT

THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***DARST V. STATE***, 816 So.2d 680 (Fla. 5th DCA 2002), IS NOT CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL, AND CORRECTLY STRUCK THE ENHANCEMENT MULTIPLIER POINTS WHERE THE DEFENDANT'S SENTENCE HAD ALREADY BEEN ENHANCED ONCE FOR THE SAME FACTOR, CONTRARY TO THE LEGISLATIVE INTENT AND THE PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTION.

The opinion of the Fifth District in the instant case vacated the 1.5 multiplier points on the sentencing scoresheet, ruling that the conviction and sentence for the aggravated assault had already been reclassified to a second degree felony (thereby increasing his sentence) for the sole fact that the victim had been a law enforcement officer, pursuant to Section 784.07(2)(c), Florida Statutes (1999). To allow for multiple increases in the sentence based on the same conduct and evil, the court concluded, violated double jeopardy and could not be authorized by Section 775.0823, Florida Statutes, allowing for a sentence enhancement for an aggravated assault, where the victim is a law enforcement officer. This holding does not expressly and directly conflicts with cases from this Court and other district courts,

which cases specifically dealt with the different issue of double enhancement for both the fact that the victim was a police officer and the totally different general broad-based habitual offender enhancement which is based on, and intended to protect society from defendants with, certain prior crimes within a certain time frame.

The district court certified conflict with the first district's decision in ***Mills v. State***, 773 So.2d 650 (Fla. 1st DCA 2000). Since then, this Court has issued its opinion in that case, ***Mills v. State***, 27 Fla. L. Weekly S593 (Fla. June 20, 2002), which, the appellant speculates, the state is salivating over, eagerly waiting to cite it in their reply brief. But, the appellant submits, this Court's ***Mills*** decision is not the end-all, controlling factor in the instant case; ***Mills*** did *not* deal with the issue presented here of (1) a reclassification, plus (2) a second, additional enhancement, where both are based on the singular fact that the victim was a police officer – the same conduct, fact, and evil already addressed by the reclassification by Section 784.07(2)(c). Instead ***Mills*** dealt with the completely different issue of whether a person could be convicted and sentenced both to the reclassified felony offense against a police officer and the broad-reaching and totally dissimilar habitual offender enhancement provision. Undersigned counsel has got to believe that this distinguishing factor means the ***Mills*** decision is not controlling here and there

exists no direct conflict between the instant case and ***Mills***, much the same as this Court found that its decision in ***Merritt v. State***, 712 So.2d 384 (Fla. 1988), dealing with a different issue, did not, as the Court interpreted it,, conflict with ***Mills***: "Upon further analysis, as discussed *infra,* we conclude that the apparent conflict arises in statutory construction, and that, when the proper construction is made, the appearance of conflict is resolved." ***Mills v. State***, 27 Fla. L. Weekly at S593.

Since both the reclassification of the offense of aggravated assault from a third degree felony to the more severe punishment of a second degree felony if the victim is a law enforcement official and the enhancement of the multiplier address and seek to protect against the same evil and punish the identical conduct and factor (that the victim was indeed a law enforcement officer), there exists here, unlike in ***Mills,*** an impermissible double "enhancement." As the district court noted below, Section 921.0024(1)(b), Florida Statutes creates a multiplier of 1.5 if the primary offense "is a violation of" section 775.0823(9) or (10)." But, section 775.0823(10) does not set forth the specific substantive crime of "aggravated assault on a law enforcement officer," rather only referencing and enhancing the crime of simple aggravated assault, pursuant to Section 784.021, when it happens to be committed on a police officer. ***See Matthews v. State,*** 774 So.2d 1, 3 (Fla. 2d DCA) (*en banc*), ***rev. denied,*** 779 So.2d 272 (Fla.2000). Instead, this statute is a

penalty enhancement statute, which, by its very terms provides an "increase and certainty of penalty" for crimes committed against law enforcement officers and other specified persons and prescribes a sentence pursuant to the Criminal Punishment Code for aggravated assault as described in section 784.021. ***See Id.;*** Fla. Stat. § 775.0823(10). The intent of Section 775.0823 is to impose increased punishment by the use of a multiplier in an effort to protect all law enforcement officers and other government officials charged with enforcing, prosecuting, and judging criminal activity from violent offenses when they are acting in an official capacity. As this Court said in ***Mills***, ***supra***,

> Thus, although in ***Merritt*** we characterized the statute as an "enhancement statute" to emphasize that it resulted in greater penalties for already-enumerated offenses which qualified under the statute, rather than itself creating new offenses, there is a qualitative difference between a statute which reclassifies enumerated offenses committed against law enforcement officers and enhancement statutes such as the habitual offender statute, "which cut across some or all criminal statutes." ***State v. Brown***, 476 So.2d 660, 662 (Fla.1985) (holding that a penalty could not be enhanced under section 775.087(1) for a crime in which the use of a deadly weapon was an essential element, because that statute by its express terms did not apply to such felonies).

Here, we are not dealing with a different type of enhancement, such as habitual offender status which depends on a different factor, to-wit: the defendant's criminal history for certain types of crimes, and "cuts across some or all criminal

statutes. Rather, we are dealing with a double increase in the severity of the sentence for the single fact that the victim was a police officer.

As the district court correctly stated in this case,

> Darst is entitled to relief because his scoresheet was enhanced twice-first when his crime of aggravated assault on a law enforcement officer was reclassified from a third to second degree felony and second when the 1.5 multiplier was applied under section 921.0024 for a violation of 784.021 by committing aggravated assault against a law enforcement officer. As long as different purposes are being served by the enhancements or the elements causing the enhancement are not the same, multiple enhancements are allowed. ***See State v. Whitehead,*** 472 So.2d 730 (Fla.1985); ***see also Spann,*** 772 So.2d at 39 (affirming sentence as a Prison Release Reoffender and reclassification under section 784.07). Double enhancements are only allowed if two different harms are addressed by each enhancement. In the instant case, both enhancements arose from the fact that the victim was a law enforcement officer and, therefore, constituted an impermissible double enhancement.

Similarly, in ***Mills***, this Court noted that the same evil or conduct cannot be used to doubly increase punishment, but double enhancement can occur only when the legislature was addressing different evils or different conduct, such as is the case with reclassification to a felony and habitual offender status, since the legislature there obviously intended for both different factors, one increase in punishment based on the instant crime and one based on prior record, to apply at the same time. ***Mills v. State***, 27 Fla. L. Weekly at S595 [distinguishing ***State v. Crumley***, 512

So.2d 183 (Fla. 1987) for dealing with "a single underlying act"].

The legislative intent in the instant situation is not at all clear when dealing with the double increases in sentence here. The legislature, in adopting Sections 775.082(10) and 921.0024(1)(b), Florida Statutes, specifically stated that the multiplier was to apply to Section 784.021, simple non-reclassified aggravated assault. The doctrine of *expressio unius est exclusio alterius,* "the express inclusion of items in a statute means that those not listed are excluded," must be applied to the instant case. As the district court stated in ***Jordan v. State***, 801 So.2d 1032, 1035 (Fla. 5th DCA 2001),

> Embodied in section 775.021(1), Florida Statutes (2001), and enunciated many times by appellate courts, ***see e.g., Wallace v. State,*** 724 So.2d 1176 (Fla.1998), is the general rule of statutory construction that when criminal legislation is susceptible to more than one meaning, it must be strictly construed in favor of the accused. ***See also State v. Camp,*** 596 So.2d 1055 (Fla.1992). In addition, *expressio unius est exclusio alterius,* which means that the express inclusion of items in a statute means that those not listed are excluded, must be applied to the instant case. ***See Thayer v. State,*** 335 So.2d 815, 817 (Fla. 1976) ("It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius."); ***see also McFadden v. State,*** 737 So.2d 1073 (Fla. 1999).

Thus, it appears, by the very language of the statute, that the legislature intended only a single, alternative reclassification or enhancement for an aggravated assault

where the victim is an officer, alternatively either conviction of simple aggravated assault under Section 784.021 and use of the 1.5 multiplier, ***or*** conviction of an aggravated assault of a law enforcement officer, pursuant to 784.07(2)(c), with no multiplier on the scoresheet.

In conclusion, then, the legislature did not intend for a double increase in penalty for this single factor, and the doubling here of that singular factor is improper under double jeopardy considerations. Just as this Court indicated that ***Merritt***, ***supra***, was not in conflict with the decision in ***Mills***, ***supra***, "when the proper construction is made, the appearance of conflict" here between the instant decision and ***Mills*** "is resolved." ***Mills v. State***, 27 Fla. L. Weekly at S593 and 595. This Court should decline jurisdiction because there exists no express and direct conflict, or, at the least, should affirm the district court's holding that the double increase for the single factor was improper.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court decline jurisdiction or approve the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Steven Darst, 5001 Olive Branch Road, Plain City, OH 43064, this 9th day of July, 2002.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

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APPENDIX A