IN THE SUPREME COURT OF FLORIDA

CASE NO.

DAVID DWAYNE BROWN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Brown v. State*, 32 Fla. L. Weekly D1941 (Fla. 3d DCA August 15, 2007), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as "A," followed by the page number(s).

STATEMENT OF THE CASE AND FACTS

David Brown was arrested on July 26, 2003 and charged by indictment with two counts of first degree felony murder (A. 2). Brown filed a demand for speedy trial on March 25, 2004 (A. 2). During jury selection proceedings on May 20, 2004, the prosecutor indicated to the trial judge that the indictment did not charge Brown with first degree premeditated murder (A. 2). The prosecutor asked the trial judge for additional time to obtain a new indictment, and this request was granted (A. 2). On May 25, 2004, after the expiration of the speedy trial time period, the State filed a new indictment charging two counts of first degree premeditated murder (A. 2). Brown was arraigned on the new indictment, the trial proceeded to conclusion with a different jury, and Brown was convicted of first degree murder as charged in the new indictment (A. 2).

On appeal to the Third District Court of Appeal, the court recognized that Brown never waived his right to a speedy trial and that it was undisputed that the indictment which added the charges of premeditated murder was filed by the State after the speedy trial period had expired (A. 2). The court further recognized that if the charges of premeditated murder were new charges, then the amended indictment was time barred under this Court's decisions in *State v. Naveira*, 873 So.2d 300 (Fla.2004) and *State v. Williams*, 791 So.2d 1088 (Fla.2001).

However, the district court of appeal concluded that the charges of first degree premeditated murder in the amended indictment were not "truly 'new' charges" because the previously filed indictments "stated that counts one and two against Brown were for first degree murder, and cited to section 782.04(1), Florida Statutes (2003), which section encompasses the specific element of premeditation." (A. 3, 4). Based on this language in the original indictments, and based on the same citation to section 782.04(1) in the new indictment adding the allegations of premeditation, the district court of appeal concluded that the new indictment did not charge a new offense of first degree premeditated murder (A. 4-5).[1]

[1] The district court of appeal went on to reverse one of the two first degree murder convictions and a conviction for attempted murder based on the trial court's error in modifying the standard jury instructions on those charges (A. 5-7). The State has filed a notice seeking discretionary review of that ruling, and that case (State v. Brown, SC07-2247) is presently pending in this Court.

A notice invoking this Court's discretionary jurisdiction was filed by Mr. Brown on December 6, 2007.

SUMMARY OF ARGUMENT

In *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977), the First District Court of Appeal ruled that an indictment which only alleges first degree felony murder does not by implication also allege the crime of premeditated first degree murder just because both offenses are defined in section 782.04(1). In its decision in this case, the Third District Court of Appeal ruled that an indictment which only alleges first degree felony murder also alleges by implication the crime of premeditated first degree murder because both offenses are defined in section 782.04(1). Thus, the decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of the First District Court of Appeal in *Ables v. State*.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977).

In *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977), the defendant was charged by indictment with one count of first degree felony murder under Section 782.04(1)(a), Fla. Stat. (1975). *Ables*, 338 So.2d at 1096. "No charge was made that the unlawful killing was 'perpetrated from a premeditated design to effect the death' of the victim, which is proscribed by the same statute." *Id*. Over objection, the trial court charged the jury that the defendant could be convicted of first degree murder if the jury found either that the defendant killed the victim from a premeditated design or that the defendant killed the victim while perpetrating a felony. *Id*. On appeal, the First District Court of Appeal held that such an instruction was error because an indictment which only alleged first degree felony murder did not charge the offense of first degree premeditated murder:

> The court's charge thus potentially exposed appellant to a jury determination of his guilt on a charge not made by the indictment. That was error, for an accused is entitled to have the charge proved substantially as laid; he cannot be charged with one offense and convicted of another, even though the offenses are of the same character and carry the same penalty. *See Perkins v. Mayo*, 92 So.2d

641 (Fla.1957); *Penny v. State*, 140 Fla. 155, 191 So. 190 (1939); Art. I, s 16, Florida Constitution.

Id. Thus, in *Ables*, the First District Court of Appeal ruled that an indictment which only alleges first degree felony murder does not by implication also allege the crime of premeditated first degree murder just because both offenses are defined in section 782.04(1).

In the present case, the Third District Court of Appeal held that an indictment which only alleges first degree felony murder also alleges by implication the crime of premeditated first degree murder because both offenses are defined in section 782.04(1). David Dwayne Brown was originally charged by indictment with two counts of first degree felony murder (A. 2). The original indictment did not allege that Brown committed the offense of premeditated first degree murder (A. 2). When the prosecutor realized that the indictment did not charge Brown with premeditated first degree murder, he obtained a new indictment which charged Brown with two counts of premeditated first degree murder (A. 2).

On appeal, Brown claimed that the charges of premeditated first degree murder in the new indictment were time barred because the speedy trial period for those charges had expired prior to the date of the filing of the new indictment (A. 2-3). The Third District Court of Appeal recognized that the speedy trial period had expired prior to the date the new indictment was filed (A. 2). However, the district court of appeal held that the charges of premeditated first degree murder in

the new indictment were not "new" charges because the original indictment charged the offenses of first degree premeditated murder by implication:

> The original indictment of September 2003 and the amended indictment of November 2003, without tracking statutory language precisely, stated that counts one and two against Brown were for first degree murder, and cited to section 782.04(1), Florida Statutes (2003), which section encompasses the specific element of premeditation. The new, post-speedy indictment filed on May 25, 2004, adding the specific element of premeditation similarly did not track the statutory language exactly but included the same citation to section 782.04(1). Thus, under a [*DuBoise v. State*, 520 So.2d 260 (Fla.1988)] analysis, the statute cited in the original and amended indictments was sufficient to apprise Brown of the element of premeditation. It follows that the new, post-speedy indictment did not charge a "new" offense, rather, it merely more specifically elucidated the elements of the originally charged offense. Additionally, as we read the record, the defense was aware prior to expiration of the speedy trial period that the state intended to charge both premeditated and felony murder. Thus, we find that as the original indictment sufficiently apprised Brown of the premeditation element of the murder charges against him prior to expiration of the speedy trial period, there was no prejudice to him in proceeding under the May 25, 2004, indictment. See Pezzo v. State, 903 So.2d 960 (Fla. 1st DCA 2005)("The state may amend an information after the speedy trial period expires so long as the amendment does not result in new charges.")[e.s.]; State v. Clifton, 905 So.2d 172 (Fla. 5th DCA 2005) ("Filing an amended information that contains a new charge based on the same criminal episode as the previously filed charges is certainly prejudicial.") [e.s.]. We affirm on this issue.

(A. 6-7)(footnote omitted). Thus, in its decision in this case, the Third District Court of Appeal ruled that an indictment which only alleges first degree felony murder also alleges by implication the crime of premeditated first degree murder because both offenses are defined in section 782.04(1).

This Court's decision in *Duboise v. State*, 520 So.2d 260 (Fla.1988) does not support the Third District's holding that an indictment which alleges only first degree felony murder also by implication charges first degree premeditated murder. The defendant in *Duboise* claimed that his indictment was fundamentally defective for failure to charge the crime of sexual battery using actual physical force because the indictment failed to include an allegation of the essential element of the use of actual physical force. This Court rejected this argument because the count of the indictment charging the defendant with sexual battery cited to section 794.011(3), Florida Statutes, which specifically defined the offense of sexual battery using actual physical force. Thus, *Duboise* is a case where the indictment charged a single specific crime; the indictment cited to the specific statutory section which defined that single specific crime; and the indictment failed to allege one of the essential elements of that specific crime.

The critical distinction between *Duboise* and the instant case is that under section 782.04(1) two completely different offenses are defined: premeditated first degree murder is defined in section 782.04(1)(a)1 and first degree felony murder is defined in section 782.04(1)(a)2. Thus, an indictment citing section 782.04(1), which defines both the offense of premeditated first degree murder and the offense of first degree felony murder, but only alleges the elements of first degree felony

murder, does not charge the crime of first degree premeditated murder, as held by the First District Court of Appeal in *Ables*.

As the decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of the First District Court of Appeal in *Ables*, it is respectfully submitted that this Court should exercise its discretionary jurisdiction to review the decision of the district court of appeal in this case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 13th day of December, 2007.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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HOWARD K. BLUMBERG
Assistant Public Defender