IN THE SUPREME COURT OF FLORIDA

ERIC MARCELL YOUNG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC11-2151
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

The defendant was was convicted of burglary of a dwelling with an assault or battery with a dangerous weapon, of robbery with a weapon, and of carjacking with a weapon, for entering a house which was being totally remodeled and robbing a construction worker. The court adjudicated the defendant guilty and sentenced him to twenty years on each of the three counts, to run concurrently with each other.

On appeal to the District Court of Appeal, Fifth District, the defendant argued that he could only be convicted of burglary of a structure since the building that he was convicted of burglarizing was being restored and had been completely

gutted, thus causing the structure to lose its former status as a dwelling.[1] The defendant relied upon the holding in *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), virtually identical to the instant case, wherein the Second District held that due to extensive renovations to the house in question, the property no longer met the definition of a dwelling under the burglary statute. In so ruling, the *Munoz* court had relied on language from this Court's case of *Perkins v. State*, 682 So.2d 1083, 1084 (Fla. 1996), wherein it noted that an empty house was still a dwelling, provided "its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people." *Munoz*, *supra* at 688.

The Fifth District, however, chose not to follow the *Munoz* decision, instead affirming the defendant's conviction for burglary of a dwelling. *Young v. State*, 2011 WL 5109533, 36 Fla. L. Weekly D2338 (Fla. 5th DCA October 21, 2011). In doing so, it certified conflict with *Munoz v. State*. *Young*, *supra*.

Notice to Invoke Discretionary Review was timely filed. This brief on jurisdiction follows.

[1] The defendant also argued in a separate point on appeal that the force used inside the building was separate from the taking of the vehicle outside of the building, hence he could only be convicted of grand theft of the vehicle. This issue was not addressed by the District Court in its opinion.

SUMMARY OF THE ARGUMENT

The opinion of the District Court of Appeal, Fifth District, in affirming the defendant's conviction for burglary of a dwelling, certified conflict with *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), a case virtually identical to this case wherein the Second District Court of Appeal had reduced the conviction to burglary of a structure. The trial court here erroneously adjudicated the defendant guilty of burglary of a dwelling, when the building had been gutted, was undergoing extensive renovation, and, in its current state, was thus not suitable for occupancy. Under the correct analysis in *Munoz*, the defendant can only be found guilty of burglary of a structure.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION WHERE THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, CERTIFIED THAT ITS DECISION IN *YOUNG V. STATE*, 2011 WL 5109533, 36 Fla. L. Weekly D2338 (Fla. 5th DCA October 21, 2011), CONFLICTS WITH THAT OF ANOTHER DISTRICT COURT OF APPEAL.

The evidence presented to the trial court was insufficient here to convict the defendant of burglary of a dwelling, only of the lesser offense of burglary of a structure.

This case is virtually identical to that of *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), wherein the Second District held that due to extensive renovations to the house in question, the property no longer met the definition of a dwelling under the burglary statute. In so ruling, the court relied on language from the Florida Supreme Court case of *Perkins v. State*, 682 So.2d 1083, 1084 (Fla. 1996), wherein it noted that an empty house was still a dwelling, provided "its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people." *Munoz*, *supra* at 688. In *Munoz*, as here, the former residence had been undergoing extensive renovations and was not longer suitable for lodging by people. Here, the entire interior had been gutted and thus could not be lived in.

However, the Fifth District refused to follow *Munoz* and instead affirmed the conviction and certified conflict to this Court. In addition to rejecting this argument in the instant case and in refusing to follow the *Munoz* decision here, the Fifth District Court had previously decided a case involving the same issue. *Michael v. State*, 51 So.3d 574 (Fla. 5th DCA 2010). There, the panel recognized that to follow *Munoz* would require a reduction of the conviction to burglary of a structure; however, the panel decided instead to adopt the dissenting opinion in *Munoz*, affirmed the conviction for burglary of a dwelling, and certified conflict with *Munoz*.[2]

Michael interpreted the *Munoz* opinion as "add[ing] an additional element to the plain language of the statute," requiring the State to prove that the structure was habitable as a dwelling on the date of the offense. This interpretation is incorrect. The *Munoz* court was not adding an additional element; it was merely interpreting the definition of "dwelling" within the statute, relying on the language of the Florida Supreme Court in *Perkins v. State*, *supra*, which noted that a structure previously considered a dwelling may lose that status if "its character is . . . substantially changed or modified to the extent that it becomes unsuitable for lodging by people . . . ." *Perkins*, *supra* at 1084. Hence, the *Perkins* Court ruled

[2] Apparently, Munoz did not pursue discretionary review in this Court from his DCA decision, hence this conflict has not yet been resolved.

that an empty house, which is still suitable for lodging, is nevertheless extended the same protection as one presently occupied. Here, however, as in *Munoz*, the character of the building had been changed by the total gutting of its interior for major renovations; it was no longer suitable for dwelling in its present state.

As the majority in *Munoz* recognized, the legislature has specifically provided a single exception, extending the definition of a dwelling where a structure has become unsuitable for lodging because of substantial changes occurring during a state of emergency. §810.011(2), *Fla. Stat.*

> The state of emergency exception is the only one in the statute. . . . [T]he state of emergency exception is unnecessary for houses bereft of walls during a state of emergency because such houses are still designed for lodging. The state of emergency exception makes sense only if, as suggested by *Perkins*, the definition of dwelling requires that the structure is both designed for lodging by people and suitable for lodging by people. *See State v. Goode*, 830 So.2d 817, 824 (Fla. 2002) (noting that it is also a basic rule of statutory construction that "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless"). The legislature specifically protected houses made unsuitable for lodging during states of emergency; it did not provide the same protection for houses unsuitable for lodging for other reasons, for instance because of reconstruction or renovation. According to section 810.011 and *Perkins*, if the character of the house is substantially changed to the extent that it becomes unsuitable for lodging for some reason other than during a state of emergency, there is no statutory exception and the house no longer qualifies as a dwelling.

Munoz v. State, 937 So.2d at 688. Since the legislature chose to extend dwelling status only for a "state-of-emergency" caused change in the character of a dwelling, but not one changed by other means, it therefore did not intend to maintain the dwelling definition to one changed by other means, such as reconstruction of the house under the canon of statutory construction of *expressio unius est exclusio alterius*. Had the legislature intended for a dwelling to remain a dwelling when under reconstruction, it would have said so, rather than only saying that it remained a dwelling when its character was changed due to damage during a state of emergency. Thus, the statutory definition of dwelling intended by the legislature does not include a former dwelling undergoing massive renovations, such as that here.

The *Munoz* court decided the issue correctly. This Court should accept jurisdiction to resolve the conflict with the Fifth District and rule that the defendant's conviction for burglary of a dwelling must be reduced to burglary of a structure.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, and remand with instructions to reduce the offense to burglary of a structure.

Respectfully submitted,
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_____

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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 Pamela Jo Bondi, Attorney General, 444 Seabreeze Blvd, Fifth Floor, Daytona Beach, Florida, 32118; and mailed to Mr. Eric Young, Inmate # X70905, Hamilton Annex, 11419 S.W. County Road 249, Jasper, FL 32052, this 9th day of November, 2011.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER