IN THE SUPREME COURT OF FLORIDA

ADAM LLOYD SHEPARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-1952

DCA Case No. 1D15-3836

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

CASES **PAGE#**

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Shepard, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of thirty-one volumes. Each volume will be referenced using the volume number, followed by the page number. "IB" will designate Petitioner's Initial Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as generally supported by the record, subject to the following supplementation and corrections:

In *Shepard v. State,* 227 So. 3d 746, 746 (Fla. 1st DCA 2017) Petitioner was convicted of manslaughter and leaving the scene of a crash after Petitioner got into a fight with the victim in a bar on January 22, 2011. Petitioner was kicked out of the bar. (R19: 3228). After the fight, the victim received a phone call from Petitioner. Petitioner said that he had gone to the victim's home and put the victim's dog outside in the street. (R19: 3228-3229). The victim rushed home to find his dog, calling his girlfriend as he traveled home, explaining what was happening and asking for her help in finding his pet. (R19: 3228). The victim's girlfriend went outside and located the victim's dog, which had been set loose, just as Petitioner said. (R19: 3228). A witness saw Petitioner's car parked near the victim's apartment during this time. (R19: 3133). When the victim arrived home, Petitioner's car flashed its lights and the victim approached the car. *Id.* When the victim approached the vehicle, Petitioner drove the car into the victim, striking and killing him. *Id.*

Petitioner was convicted of manslaughter with a weapon, and leaving the scene of a crash causing death. Pursuant to Fla. Stat. 775.087(1), Petitioner's convictions were enhanced one degree

because during the commission of the felonies, Petitioner used his car as a weapon.

Petitioner filed a motion to suppress on July 02, 2012. (R1: 96-98). In the motion, Petitioner alleged that law enforcement wrongfully seized and searched his vehicle. (R1: 96-98) A hearing was held on January 24, 2014. (R19: 2964).

Commander Evans of the Jacksonville Beach Police Department testified at the hearing that after the victim was struck and killed, he responded to the scene and attempted to contact Petitioner. (R19: 3111). Commander Evans testified that Petitioner answered his phone and confirmed that he had been in an altercation with a person. (R19: 3112). Commander Evans stated that he did not describe what happened, but told Petitioner that an incident was under investigation, and that the State Attorney's Office was involved. (R19: 3112). Petitioner told the officer that he would be there in person in thirty minutes to discuss what happened. (R19: 3112). Commander Evans waited for several hours, but Petitioner did not show up. (R19: 3113).

Jerry Viera testified that he was employed as Deputy United States Marshal in the Topeka Kansas District. (R19: 2974-75) He said that he has worked in law enforcement for approximately seventeen years. (R19: 2975). Deputy Viera testified that he responded to Mr. Lyden's house on January 28, 2011. (R19-2976). Mr. Lyden is Petitioner's grandfather. Deputy Viera spoke with

Petitioner's mother and Mr. Lyden when he arrived, and asked them if he could search the home. The Deputy testified that Mr. Lyden told him that he needed to speak with his attorney. (R19: 2976) After speaking with his attorney, Mr. Lyden allowed the marshals into his house to search for Petitioner. (R19: 2976). Deputy Viera testified that the next day, on January 29, 2011, he set up a meeting with Mr. Lyden's attorney and Mr. Lyden. (R19: 2977-78) During the meeting, the Deputy learned that Petitioner's vehicle was in Mr. Lyden's possession through Mr. Lyden's attorney. (R19: 2978-79).

Deputy Viera testified that after this information came to light, an immunity agreement was reached with Mr. Lyden, Petitioner's mother Janet Shepard, and the U.S. Attorney's Office regarding the circumstances surrounding Mr. Lyden's acquisition of the vehicle. (R19: 2979). Deputy Viera testified that that after speaking with Mr. Lyden, Mr. Lyden allowed him to go onto his property and seize the vehicle. (R19: 2979). Deputy Viera said that Mr. Lyden unlocked all the doors to the building and allowed them to enter. (R19: 2980). The Deputy stated said that at no point did Mr. Lyden express a desire for the agents not to enter his property. (R19: 2981). Once he arrived on the property and saw the vehicle, the Deputy verified the tag number and seized the vehicle. (R19: 2982).

The State played an audio interview with Petitioner's grandfather Billy Lyden. (R19: 3021). Mr. Lyden stated that Petitioner was his grandson. (R19: 3024). He said that Petitioner never lived at his residence, and never vacationed with him. (R19: 3024) He said that he couldn't remember the last time Petitioner was at his residence. (R19: 3024). He said that Petitioner had no ownership interest in his property, which consisted of seventeen acres, two outbuildings and a house. (R19: 3026). One of the outbuildings was called the Morton building, where the car was eventually discovered. (R19: 3026).

Mr. Lyden said that Petitioner did not have any property in the Morton building. (R19: 3027). He said in January of 2011, Petitioner's mother asked him to retrieve Petitioner's vehicle from her home. (R19: 3029). The vehicle was parked in Petitioner's mother's driveway. (R19: 3031). He said that he took the vehicle, brought it to his property and secured it inside the Morton building, and the building was locked. (R19: 3033).

Mr. Lyden testified that he allowed the officers into his house to search for Petitioner the first time that they came to the home. (R19: 3050). Mr. Lyden said that he believed that Petitioner would retrieve the vehicle at some point in the future, and that to his knowledge, the car still belonged to Petitioner. (R19: 3059) He admitted that he never spoke with Petitioner about the vehicle, that Petitioner never asked him to retrieve the car on his behalf,

and that Petitioner never told him that he would be back to retrieve the vehicle. (R19: 3059-60).

Janet Shepard testified that she is Petitioner's mother. (R19: 3063). She said that in January 2011, Petitioner lived in Jacksonville, Florida, and the last time Petitioner visited Mr. Lyden was in December 2010. (R19: 3064-65). She said that on January 23, 2011 Petitioner contacted her and told her he was coming to Kansas. (R19: 3069). He did not tell her why he was coming, how long he would stay, and she said that she was not expecting him. (R19: 3068-69). She said that he drove the white Acura to her house, and that he did not stay for long. (R19: 3070-71).

Petitioner's mother testified that Petitioner put the white Acura in her garage and closed the garage door when he arrived. (R19: 3070). She said that fifteen minutes after Petitioner arrived at her house, they went to a hotel, and he later left in her car. (R19: 3074). Ms. Shepard testified that when Petitioner left the hotel in her car she did not know where he was going. (R19: 3074). She said that she gave Petitioner approximately one thousand dollars. (R19: 3075).

Ms. Shepard testified repeatedly that she did not remember what she spoke about with Petitioner, and that they went immediately to a hotel instead of her house because she wanted to. (R19: 3071). Ms. Shepard stated that she did not remember if Petitioner told

her that the car was involved in an incident in Florida. (R19: 3078). She said that she had conversations with Petitioner about what to do with the vehicle, but she couldn't remember what was discussed. (R19: 3083-84).

Mrs. Shepard called Mr. Lyden to have Petitioner's vehicle removed from her property, after she was contacted by a detective in Florida. (R19: 3078). Ms. Shepard testified that Petitioner never returned to her house in the days before he was arrested. (R19: 3087). Ms. Shepard testified that she doesn't recall if Petitioner said he would come back for his car, that there were conversations about the car between she and Petitioner, but that she cannot remember what they were. (R19: 3079).

Ms. Shepard confirmed that the day the US Marshals arrived, she and her father gave permission for them to search the house. (R19: 3090). Ms. Shepard confirmed that permission was given for the marshals to seize the car. (R19: 3097).

Petitioner was arrested in Chicago on February 4, 2011, two weeks after the incident. (R29: 1484). U.S. Marshal Diego Grimaldo testified that he and team of six marshals arrested Petitioner at a Red Roof Inn in Chicago. (R29: 1484). Deputy Grimaldo testified that when Petitioner was arrested he had items on his person including cards to make fake identifications, a phone number for a store called Ultimate Hairpiece, paperwork on how to activate a prepaid cell phone, handwritten notes saying "get I.D. Look into

a wig. Check on new phone. Do cash back at Walmart. Find potential work. Find I.D. and Social—Social Security…" (R26: 1521).

While Petitioner was eluding authorities he called one of his acquaintances, Brandon Gifford, and made references to the movie "The Fugitive." (R26: 945). Petitioner told his Mr. Gifford to go to his house and take whatever he wanted, and to take care of his cat, indicating he did not intend to return. (R26: 946).

The trial court entered an order denying Petitioner's motion to suppress. (R2: 315-320).

SUMMARY OF ARGUMENT

ISSUE I

Petitioner's conviction for manslaughter was enhanced based on his use of a car as a weapon to kill the victim during the offense, pursuant to section 775.087(1), *Florida Statutes*. Section 775.087(1), *Florida Statutes* allows for felony offenses to be reclassified one degree higher if "during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm." Fla. Stat. §775.087(1) (2011). The statute does not include a definition of "weapon." The First and Fifth District have held that an object is a weapon when it is actively used as a weapon. This definition is in accord with this Court's prior rulings in *Houck*, which distinguishes between actively used weapons and passive objects, and is the proper standard with which to define weapon under the reclassification statute.

ISSUE II

The trial court did not err in denying Petitioner's motion to suppress the seizure of the vehicle. Petitioner did not have standing to challenge the seizure. After being contacted by law enforcement who wanted to speak to him about the incident, Petitioner drove the vehicle to Kansas, and left it with his mother, who had the vehicle transferred and stored on her father's property. In doing so, Petitioner abandoned the car, and no longer

had an expectation of privacy in the vehicle. After being abandoned, the vehicle was stored in the "Morton building" on Petitioner's grandfather's property. Petitioner had never resided in the building and had never stored property there. Petitioner had no reasonable expectation of privacy in the Morton building, and so has no basis to object to the US Marshals entering the building in the process of seizing the car. As such, the motion to suppress was properly denied.

ARGUMENT

ISSUE I: WHETHER AN AUTOMOBILE IS A WEAPON UNDER FLORIDA'S RECLASSIFICATION STATUTE (RESTATED)

STANDARD OF REVIEW

Because this case involves judicial interpretation of a statute, it is subject to de novo review. *Williams v. State*, 186 So. 3d 989, 991 (Fla. 2016); *Johnson v. State*, 78 So. 3d 1305, 1310 (Fla. 2012).

JURISDICTION

This Court has jurisdiction based on a conflict between the First District's decision in *Shepard v. State*, 227 So. 3d 746, (Fla. 1st DCA 2017) and the Second District's decision in *Gonzalez v. State*, 197 So. 3d 84 (Fla. 2nd DCA 2016).

MERITS

Petitioner's conviction for manslaughter was enhanced based on his use of a car as a weapon to kill the victim during the offense, pursuant to section 775.087(1), *Florida Statutes*. Section 775.087(1), *Florida Statutes* allows for felony offenses to be reclassified one degree higher if "during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm." The statute does not include a definition of "weapon." Petitioner argues that the enhancement was erroneous because a car is not a weapon. Petitioner looks to the Second District, which stated in *Gonzalez* that an object can only be a weapon when its commonly recognized purpose

is as an instrument of combat. The State respectfully disagrees. The First and Fifth District have held that an object is a weapon when it is actively used as a weapon. This definition is in accord with this Court's prior rulings in *Houck*, which distinguishes between actively used weapons and passive objects.

A. The Definition of "Weapon:" *State v. Houck*

This court defined "weapon" in *State v. Houck*, 652 So. 2d 359, 359 (Fla. 1995). In *Houck*, the defendant was convicted of manslaughter with a weapon after banging the victim's head against the pavement, causing his death. The defendant's conviction was reclassified based on the use of the pavement as a weapon. *Id*. This Court used a dictionary definition of "weapon" to determine that pavement did not qualify as a weapon. *Id*. The definition that this Court relied on states that a weapon is "1. An instrument of attack or defense in combat, as a gun or sword... 3. A means used to defend against or defeat another." *Id*. at 360. This Court concluded that pavement is a passive object not used in combat, and did not qualify as a weapon. *Id*.

As noted by the Court in *Houck*, in enacting section 775.087, the legislature intended to provide harsher punishments for those who use instruments during the commission of a felony. *Houck*'s definition of weapon includes objects of combat that are traditionally considered weapons, and objects "used to defend against or defeat another." *Id.* The inclusion of the second portion

explicitly opens the definition to include objects that are not traditional weapons, but that are used as weapons during a crime. While *Houck* found that pavement was not an instrument of combat, this Court made a key point distinguishing between actively used objects and passive items:

> We specifically point out that if pavement or a hard surface is to be considered a weapon under section 775.087, then the legislature should amend the statute so that pavement and similar passive objects are defined to come within its coverage. Moreover, if the word "weapon is to be given a meaning other than the common dictionary definition set forth in this opinion, it is within the province of the legislature to provide that definition.
>
> *Id.* at 360.

Not only does this statement show the necessity of considering both elements of the dictionary definition when defining weapon, it indicates that the *Houck* court was distinguishing between actively and passively used objects during a crime. Other parts of the opinion support this interpretation. The Court specifically quoted the en banc majority of the Fifth District, noting that they were concerned about overzealous prosecutors making any object a weapon:

> For example, would the ground be transformed into a weapon merely because it was the point of impact for a person pushed from a cliff or high building? Would the water become a weapon if the victim as pushed overboard from an ocean liner?

Id. at 360.

These examples illustrate that this Court's concern is not a situation where a car, baseball bat or kitchen knife are classified as a weapon, but when passive objects such as the ground and water are categorized as such. This Court's explicit use of the full dictionary definition of weapon—including "3. A means used to defend against or defeat another" was not an accident. *Id.* at 360. It opens the door to non-traditional instruments of combat being classified as weapons, so long as they are not passive objects. A car used to strike and kill another person is certainly not a passive object.

In this case, Petitioner used the car against the victim to attack or defeat him. Petitioner specifically drove the car into the victim in a manner that was likely to cause death or great bodily harm. Moreover, although a car may not be a traditional weapon, it has become a modern weapon of choice for a variety of criminals, including those who use it to try to strike people or police officers, and terrorists who use cars as a bomb or a weapon of mass destruction to mow down pedestrians on a sidewalk.

B. The Inapplicability of the Robbery Statute: *State v. Burris*

Petitioner attempts to limit this Court's definition of weapon in *Houck* by looking to *State v. Burris*, which held that a car is not a weapon pursuant to the robbery statute. The State disagrees with this application of *Burris*. The robbery statute provides for a limitation on the use of a weapon, which is specific to the

robbery statute. *Burris* explicitly notes that a car is not a weapon pursuant to the definition contained in the robbery statute. The specific intent of the enhancement statute is different than the intent of the robbery statute, and supports the definition of weapon in *Houck* and *Shepard*.

In *State v. Burris*, 875 So. 2d 408 (Fla. 2004), the definition of "weapon" was analyzed in the narrow context of section 812.13(2)(A), *Florida Statutes*, the robbery statute. The robbery statute provides: "If in the court of committing the robbery, the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree..."

In *Burris*, this Court stated "the narrow issue before this Court is whether an automobile may be "carried" as a deadly weapon under section 812.13(2)(a) of the robbery statute so as to allow an enhanced conviction." *Id.* at 410. This Court held that a car was not a weapon under the robbery statute, because the robbery statue says that a weapon must be "carried" and not "used." *Id.* at 413. This Court held that this was clear legislative intent "to deter the commission of robberies by persons carrying firearms or other deadly weapons. However, there is no clear indication that the Legislature intended to deter robbers from bringing automobiles to crime scenes." *Id.* The express language of the robbery statute prevented the classification of a car as a weapon in this case.

Both Petitioner and the Second District in *Gonzalez v. State*, 197 So. 3d 84 (Fla. 2d DCA 2016) attempt to use the holding in *Burris*, made solely in the context of the robbery statute, and apply it to the reclassification statute. Petitioner and *Gonzalez* point to the following language in *Burris* to support their position that a car is not a weapon under section 775.087:

> Similar to our reasoning in *Houck*, it is not clear that the Legislature's intent to deter the presence of firearms or other deadly weapons during the commission of robberies extends beyond those objects commonly recognized as weapons. Like the pavement used by the offender in *Houck*, an automobile is not commonly understood to be an instrument for combat against another person. Though certainly capable of inflicting death or bodily injury, as with the pavement in *Houck*, the ordinary purpose of automobiles is not as instruments for combat.
>
> *Id.* at 413

This dicta analyzes the use of car as a weapon under the robbery statute, and compares it to the use of pavement as a weapon under the reclassification statute. It does not stand for the proposition that a car can never be a weapon. This statement only analyzes a car as a weapon under the robbery statute, and not under the full definition of weapon set out in *Houck*. Further, the State does not dispute that the ordinary purpose of a car is not for combat, although as previously argued, the car is rapidly becoming the modern weapon of choice for many criminals and terrorists. The fact that a car's first use is not as a weapon does not mean that, under the definition in *Houck*, a car cannot qualify as a weapon.

In fact, the *Burris* court explicitly notes that cars have been properly held to be weapons in other criminal statutes that focus on the use of the weapon and the underlying offense. *Id.* at 413.

The language in section 775.087 can be read as one of those statutes *Burris* describes wherein a car can be properly considered a weapon. In 775.087, the description of when a weapon triggers reclassification is broad: "...during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm..." Fla. Stat. 775.087. The legislature seems intent on encompassing and penalizing the use of "any" weapon.

Petitioner acknowledges that the "common use" definition of weapon that he advocates for would result in many objects that are frequently used in acts of violence no longer qualifying as weapons. (IB-21). Kitchen knives, tire irons, crowbars, baseball bats—any number of objects that are used violently against others would no longer qualify for an enhancement. This interpretation creates a perverse incentive for the savvy criminal to use one of these weapons as part of their crimes instead of a gun or knife. This contravenes the entire purpose of 775.087, which this Court recognized in *Houck* was the punishment and deterrence of the use of dangerous weapons.

The expansive definition of weapon and recognized intent of the statute strongly support the First District's interpretation of

weapon. Penalizing an object actively used in a violent manner against another satisfies the intent of the statute, and addresses the concerns of over criminalization of passive objects described in *Houck*.

C. The Legality of the "As Used" Standard

The common thread throughout the caselaw used to define a weapon pursuant to the reclassification statute is the term "use." The reclassification statute states that its application includes situations where a defendant "uses, threatens to use, or attempts to use any weapon or firearm..." Fla. Stat. §775.087. The definition of weapon that *Houck* applies to determine what qualifies as a weapon under the reclassification statute includes the phrase: a means "used to defend against or defeat another." *Houck*, 652 So. 2d at 360. As argued by the First District, repetition of the word "use" supports their decision to call the car, which was used to strike and kill the victim, a weapon. *Shepard*, 27 So. 3d at 749. This also supports a definition of a weapon based on how an object is actively used against another.

The term "use" in the reclassification statute sets it apart from the robbery statute in *Burris*, which calls for the enhancement of a penalty when a weapon is carried, not used. Fla. Stat. §812.13(2)(a). As noted by the Fifth District in *Hurd v. State*, 229 So. 3d 876, 879 (Fla. 5th DCA 2017), *Gonzalez* does not address this key difference between the robbery statute and the

reclassification statute, and it is this discrepancy that causes the Second District's argument to fail. *Burris* is focused on the robbery statute, which is in turn focused on carrying a weapon. *Houck* and the First District focus only on the intent of the reclassification statute, which is concerned with the use of any weapon. Under this properly focused analysis, a car actively used to strike and kill an individual would certainly qualify as a weapon for purposes of the enhancement statute.

Petitioner argues that the rules of lenity and stare decisis prohibit this Court from applying an "as used" standard. The State disagrees. The rule of lenity, embodied in section 775.021(1), *Florida Statutes* states that criminal statutes "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorable to the accused." As previously argued, the reclassification statute requires enhancement when a defendant "**uses**, threatens to **use**, or attempts to **use any weapon** or firearm..." (emphasis added) Fla. Stat. §775.087 (2011). A plain reading of the statute supports the "as used" position of the First District, and does not require undergoing an analysis involving *Burris* and the robbery statute to reach the "commonly recognized purpose" position advocated by Petitioner.

Nor does this position violate stare decisis. The decision in the First District is entirely in compliance with *Houck*. *Houck*

lays out a specific definition of weapon to be applied when analyzing enhancement under the reclassification statute that includes the language "used to defend against or defeat another." *Id.* The inclusion of the language explicitly allows the inclusion of objects, which may not be traditional weapons, but that are used to attack another. This language was expressed by *Houck* to be part of the definition of weapon to be applied in cases such as this. Further, as previously argued, the concern expressed in *Houck* is about classifying passive objects that are merely present during a crime, versus instruments that are actively used as part of a crime. That concern is not at issue here. The First District's classification of a car as a weapon is in complete accord with *Houck*.

Houck provided a clear definition of a weapon under the reclassification statute. The First District properly applied that definition when determining that the car used to kill the victim in the current case was a weapon. The "as used" standard not only complied with the definition of weapon in *Houck*, it is in accord with the express legislative intent of the statute. In contrast, *Burris* analyzes the robbery statute. In adopting *Burris's* language, *Gonzalez* fails to account for the difference between the robbery and reclassification statute, and so the "common use" definition of a weapon must fail. As such, the State asks this Court to reject the Second District's "common use" analysis.

ISSUE II: WHETHER PETITIONER'S VEHICLE WAS PROPERLY SEIZED WITHOUT A WARRANT (RESTATED)

STANDARD OF REVIEW

The United States Supreme Court has stated that mixed questions of law and fact that ultimately determine constitutional rights are to be reviewed by the appellate courts applying a two-step approach. Deference is to be shown to the trial court on questions of historical fact, but *de novo* review of the application of a constitutional standard to the facts in a case is proper. *See United States v. Bajakajian*, 524 U.S. 321 (1998); *State v. Christman*, 838 So. 2d 1189, 1191 (Fla. 2d DCA 2003)(review of denial of suppression involves mixed question of law and fact).

JURISDICTION

Jurisdiction in this case stems from the first issue, the classification of a car as a weapon. The State acknowledges that once this Court accepts jurisdiction in a case, it can consider other issues properly raised and argued. *See Savoie v. State*, 422 So. 2d 308 (Fla. 1982). Although the court can consider any issue, the State urges the Court not to take up this specific issue. The lower court's ruling on suppression was based on overwhelming evidence and well settled law, and review by this Court is not necessary.

MERITS

Petitioner argues that his vehicle was unlawfully seized without a warrant. The State disagrees. Petitioner does not have standing

to challenge the seizure of his vehicle. After striking the victim with his vehicle, Petitioner drove his vehicle to Kansas and left the car with his mother, who moved the car to a building on Petitioner's grandfather's property. Petitioner abandoned the vehicle, and as such surrendered his standing to challenge the search. To hold otherwise would allow a defendant to force others to be an accomplice in their criminal endeavor by leaving property related to the criminal act with a third party and requiring them to conceal the property from law enforcement.

Further, Petitioner did not have an expectation of privacy in the building where the car was stored. The building was on his grandfather's property, and he had no connection to the property. Because Petitioner did not have standing to challenge the seizure or a reasonable expectation of privacy in the building where the car was, the trial court properly denied the motion to suppress.

A. Shepard Does Not Have Standing to Challenge the Search and Seizure of the Vehicle Because He Abandoned the Car

Petitioner contends that he had standing to challenge the seizure of the vehicle because he did not abandon it. The State respectfully disagrees. Petitioner's intent to abandon the vehicle was clear based on the circumstances of the abandonment and the testimony of his mother and other family members.

The party moving to suppress evidence bears the burden of proving he has a standing to contest the search or seizure of the property. *Rakas v. Illinois*, 439 U.S. 128, 131–32 (1978); *Ellerbee*

v. State, 87 So. 3d 730, 746 (Fla. 2012) (for the premise that "[t]he law is clear that for a defendant to have standing to challenge a search, he or she must show a proprietary or possessory interest in the area of search or that there are other factors which create an expectation of privacy which society is willing to recognize as reasonable."). A defendant who fails to meet this burden is not entitled to suppression. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *State v. Bostick*, 745 So. 2d 496, 497 (Fla. 1st DCA 1999)(holding the defendant's "argument incorrectly reverses the burden of proof. A defendant who moves to suppress evidence because it was seized in violation of the Fourth Amendment has the burden of establishing that he or she has standing to object to the seizure."). "No matter how egregious a violation of privacy may have been, the court will not even listen to a complaint unless it comes from one [who has standing]." *State v. Hutchinson*, 404 So. 2d 361, 365-66 (Fla. 2nd DCA 1981).

This court has said that

> A person who claims the protection of the [Fourth] Amendment [must have] a legitimate expectation of privacy in the invaded place. Although warrantless searches and seizures are generally prohibited by the Fourth Amendment to the United States Constitution and article I, section 12 of the Florida Constitution, police may conduct a search without a warrant if consent is given or if the individual has abandoned his or her interest in the property in question.

Carballo v. State, 39 So. 3d, 1234, 1244-45 (Fla. 2010).

As such, abandoned property is not protected by the Fourth Amendment. Determining if property is abandoned requires determining if the Petitioner in this case voluntarily left behind or relinquished his interest in the property, such that Petitioner no longer had a reasonable expectation of privacy in the property when it was searched. *See State v. Williams*, 119 So. 3d 544, 546 (Fla. 1st DCA 2013). In deciding if a defendant abandoned the property, and therefore relinquished the standing to challenge a search of the property, the question is to determine Petitioner's "intent, to be inferred from the words and actions of the parties and other circumstances surrounding the purported abandonment." *Kelly v. State*, 536 So. 2d 1113, 1114 (Fla. 1st DCA 1988).

Petitioner cites to *State v. Parker*, 399 So. 2d 24 (Fla. 3d DCA 1981), for the proposition that to constitute abandonment, the property must be discarded in a place where the person has no expectation of privacy, such as an open field or public street. However, this is not the case. Property can be abandoned anywhere. *See e.g.*, *State v. Fosmire*, 135 So. 3d 1153 (Fla. 1st DCA 2014) (Holding that the defendant lacked standing to challenge seizure of two cellular phones, even though phones were in defendant's home). Determining if property is abandoned focuses on: "(1) whether the defendant voluntarily relinquished or discarded the property; and (2) whether the property was relinquished or discarded in an area where the defendant had no claim to privacy."

Strawder v. State, 185 So. 3d 543, 546 (Fla. 3d DCA 2016). "No search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the latter has no reasonable expectation of privacy." *Twilegar v. State*, 42 So. 3d 177, 193 (Fla. 2010). If this Court were to hold otherwise, it could allow a defendant to force a person to become an accomplice to their crime. If a defendant asked a third party to hold a package and the third party later discovered the package contained drugs, the third party would become an accomplice unless they turned that package over to police.

The facts from the suppression hearing show that Petitioner abandoned the vehicle with his mother as he fled the police, and simultaneously abandoned his legal standing to challenge the search and seizure. At the suppression hearing, Commander Evans testified that on the night of the incident he called Petitioner, told him that the police and State Attorney's Office were investigating an incident, and asked him to come in and speak to them about what happened. (R19: 3111). Petitioner confirmed he had been involved in an altercation, and told Commander Evans he would be there in thirty minutes to speak to the police. (R19: 3112). Commander Evans waited for several hours, but Petitioner did not show up. (R19: 3113). Instead, the evidence from the hearing showed that Petitioner drove through the night to Kansas, knowing that the police and State Attorney's Office wanted to speak to him.

Petitioner's mother, Janet Shepard testified that Petitioner showed up at her home in Kansas unexpectedly, put his white Acura in her garage and closed the garage doors. (R19: 3070). She said that fifteen minutes after Petitioner arrived at her house, they went to a hotel, and he later left in her car after she gave him one thousand dollars. (R19: 3074). Ms. Shepard testified repeatedly that she did not remember what she spoke about with Petitioner. (R19: 3071). Ms. Shepard testified that she did not know where Petitioner was going, and she did not see him again after he left. (R19: 3074). She said that she gave Petitioner approximately one thousand dollars. (R19: 3075). Ms. Shepard stated that she did not remember if Petitioner told her that the car was involved in an incident in Florida. (R19: 3078). She said that she had conversations with Petitioner about what to do with the vehicle, but she couldn't remember specifically what was discussed. (R19: 3083-84). Ms. Shepard testified that Petitioner never returned to her house in the days before he was arrested. (R19: 3087). Ms. Shepard later called Mr. Lyden to have Petitioner's vehicle removed from her property, after she was contacted by a detective in Florida about her son. (R19: 3078). The vehicle was stored on Petitioner's grandfather's property until it was seized a week later.

Petitioner did not return to Florida or to his mother's house after leaving in her car. He was arrested two weeks after the

incident in Chicago, Illinois. (R29: 1484). Deputy Grimaldo, the U.S. Marshal who arrested Petitioner, testified at trial that when Petitioner was arrested he had items on his person including cards to make fake identifications, a phone number for a store called Ultimate Hairpiece, paperwork on how to activate a prepaid cell phone, handwritten notes saying "get I.D. Look into a wig. Check on new phone. Do cash back at Walmart. Find potential work. Find I.D. and Social—Social Security…" (R26: 1521). More explicitly, while Petitioner was eluding authorities he called one of his acquaintances, Brandon Gifford and told his Mr. Gifford to go to his house and take whatever he wanted, and to take care of his cat, indicating he did not intend to return. (R26: 946). These items and notes show that Petitioner had no intent to return to Florida or to Kansas, and was trying to establish a new identity to hide from law enforcement.

Based on the facts, the trial court properly denied Petitioner's motion to suppress. By voluntarily giving his mother his car, Petitioner relinquished possession, custody, and control of the vehicle to a third person in another state. Petitioner's mother had exclusive possession and control of the car, as evidenced by the fact that after Petitioner left, she had the vehicle moved to another location.

This case is comparable to *J.W. v. State*, 95 So. 3d 372 (Fla. 3d DCA 2012). In *J.W.*, the defendant appealed the denial of a

motion to suppress, claiming that he had a reasonable expectation of privacy in a pouch seized by police. At the suppression hearing, an officer testified that when driving by a house, he saw the defendant walk into the front yard of a house and hand a black pouch to another person, who put the pouch underneath the house. *Id.* The officer found cocaine in the pouch after seizing it.

The Court affirmed the trial court's denial, finding that the defendant had voluntarily given the pouch to another person, and in doing so, the defendant relinquished possession, custody and control of the pouch to a third person, who then had exclusive possession, custody and control over the object and its contents. *Id.* at 376. The Court ruled that by voluntarily relinquishing the pouch, the defendant abandoned his reasonable expectation of privacy in the pouch and its contents, including his legal standing to challenge the search and seizure of the pouch by law enforcement. *Id.* This is comparable to the current case, where Petitioner voluntarily gave the car to his mother, thus ending Petitioner's reasonable expectation of privacy in the vehicle.

Petitioner cites numerous cases for the proposition that he did not abandon the vehicle. In *Hackett v. State*, 386 So. 2d 35 (Fla. 2d DCA 1980), the defendant appealed the denial of his motion to suppress. *Id.* at 36. The defendant and his family rented a hotel room. *Id.* After the family checked out, they partially paid the hotel bill and left behind several pieces of luggage as collateral

for the remaining portion of the bill. *Id.* The key distinction between the case at bar and *Hackett* is that the defendant explicitly told the hotel owners that he was going to get the rest of the money and return to the hotel. *Id.* at 36. After the defendant failed to pay the bill, the owner called the police, who searched the luggage. *Id.* The appellate court held that the trial court erred in denying the motion to suppress because the defendant "at all times exhibited an intention to return for his luggage as soon as he had obtained the funds to pay his outstanding bill; he had in effect left his luggage as collateral, which he intended to redeem." *Id.* at 36. In this case, Petitioner manifested no intent to return for the car. The only testimony about what Petitioner said regarding the car came from his mother, who stated that she could not remember what they conversed about. Regardless of what Petitioner told or did not tell his mother, the actions of Petitioner in fleeing the State and trying to establish a new identity show that he had no intention to return.

Likewise, in *United States v. Basinski*, 226 F. 3d 829 (7th Cir. 2000), the defendant gave a locked briefcase to a friend, who in turn promised to burn the briefcase. *Id.* at 832. In holding that the defendant did not abandon the briefcase, the Court reasoned that the defendant locked the briefcase prior to giving it to his friend, and exhibited a continued privacy interest by asking his friend to keep the case hidden until he asked that it

be destroyed. *Id.* at 837. Again, in the case at bar Petitioner did not demonstrate he continued to maintain a privacy interest in the vehicle. The evidence shows that Petitioner left the car, took his mother's vehicle and fled, and no evidence was presented that he said he would ever return for the vehicle.

As such, the cases relied on by Petitioner are factually distinguishable. Petitioner did not demonstrate that he maintained a reasonable expectation of privacy in the vehicle after he left it with his mother. Therefore, the trial court properly found that Petitioner did not establish that he had standing to challenge the search and seizure of the vehicle.

B. Petitioner Had No Reasonable Expectation of Privacy in the "Morton Building"

Not only did Petitioner abandon his reasonable expectation of privacy in his car, he similarly had no reasonable expectation of privacy in the Morton building where his mother stored the car. The Fourth Amendment is inapplicable unless an individual has a reasonable expectation of privacy in the area searched. Since Petitioner had no reasonable expectation of privacy, no "search" occurred under the Fourth Amendment.

The Fourth Amendment is inapplicable unless an individual demonstrates a reasonable expectation of privacy in the area searched. *Shapiro v. State*, 390 So. 2d 344, 348 (Fla. 1980). A reasonable expectation of privacy has two elements. *Bond v. United States*, 529 U.S. 334, 338 (2000). First, a defendant must establish

he had an actual, subjectively held, expectation of privacy. *Id.* Second, his subjectively held expectation of privacy must be "one that society is prepared to recognize as reasonable." *Id.* In other words, the expectation of privacy must be "objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 40 (1988).

Petitioner failed to demonstrate a reasonable expectation of privacy in the Morton building where the car was seized because Petitioner failed to establish he had a subjective expectation of privacy. A search does not occur for Fourth Amendment purposes if an individual does not possess a subjective expectation of privacy in the area searched. *Id.* The proponent of a motion to suppress bears the burden of establishing a subjective expectation of privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). Whether an individual possesses a subjective expectation of privacy is a question of fact. *Strachan v. State*, 199 So. 3d 1022, 1024 (Fla. 4th DCA 2016). A subjective expectation of privacy may be implied when a defendant takes clear, express steps to exclude the public from the area, *Brown v. State*, 152 So. 3d 619, 624 (Fla. 3rd DCA 2014) (holding two layers of fences surrounding the curtilage and posted no trespassing signs exhibited a subjective expectation of privacy).

Here, Petitioner failed to establish a subjective expectation of privacy at trial, and as such, no search occurred pursuant to the Fourth Amendment. Petitioner's grandfather, who owns the

building in Kansas where the car was found, stated that Petitioner never lived at his residence, and never vacationed with him. (R19: 3024) Mr. Lyden said that he couldn't remember the last time Petitioner was at his residence. (R19: 3024). He said that Petitioner had no ownership interest in his property, which consisted of seventeen acres, two outbuildings and a house. (R19: 3026). One of the outbuildings was where the car was eventually discovered. (R19: 3026). Mr. Lyden said that Petitioner did not have any property in the Morton building, and did not store any property inside. (R19: 3027). Petitioner's mother testified that at the time of the incident, Petitioner lived in Jacksonville, Florida and last visited his grandfather in Kansas in December of 2010. (R19: 3064-65).

None of the evidence suggests that Petitioner had a subjective expectation of privacy in a building that did not belong to him, that he never lived in or visited. Further, there is no evidence to suggest that Petitioner knew his mother moved the vehicle, or even knew where it was. Petitioner appears to concede in his brief that he did not have a privacy interest in his grandfather's Morton building, where the vehicle was being stored. (IB-32). Petitioner acknowledges that he was never a guest in the Morton building, but contends that he still has an expectation of privacy citing *United States v. Delgado*, 903 F. 2d 1495 (11th Cir. 1990).

In *United States v. Delgado*, 903 F. 2d 1495 (11th Cir. 1990), the defendant challenged the seizure of a shirt found inside a warehouse where he had hidden. *Id.* The court found that the defendant did not have a reasonable expectation of privacy in the warehouse because he did not have any private space in the warehouse, or any possessory interest. *Id.* at 1501. The court held that the defendant did have standing to challenge the seizure of the shirt. *Id.* However, there is a clear distinction between Delgado and the case at bar. There is no issue of abandonment in Delgado. In Delgado, the defendant was found shirtless after fleeing into the warehouse, and his shirt was found near where he was apprehended on a forklift. *Id.* Abandonment was not argued and not analyzed by the court.

This is distinctly different from the case at bar where Petitioner gave the car to another person in another state and made no attempt to reclaim the car, thus triggering an abandonment analysis. As previously argued, under an abandonment analysis Petitioner abandoned his reasonable expectation of privacy in the property at the time he relinquished it to his mother. Therefore, Petitioner had no expectation of privacy in the car. Similarly, Petitioner had no reasonable expectation of privacy in the Morton building, which he did not own, did not live in, did not visit, and did not store property in. Because there was no reasonable expectation of privacy, the Fourth Amendment did not apply to the

search of the Morton building and the motion to suppress was properly denied by the trial court.

C. Officers Had Voluntary Consent to Seize the Vehicle

Petitioner argues that law enforcement did not obtain proper consent to enter the Morton building and seize the vehicle. (IB-36). The State respectfully disagrees. The evidences shows that Petitioner does not have standing to challenge this search, based on the abandonment of the vehicle and the fact that he had no reasonable expectation of privacy in the building. However, assuming *arguendo* that he did have standing, the evidence shows that Mr. Lyden gave consent for the officers to enter the building and seize the car.

The law is well settled that a search conducted without a warrant is per se unreasonable, unless the search falls within an exception. *Ferrer v. State*, 113 So. 3d 860, 861-62 (Fla. 2d DCA 2012). Consent has long been held as an exception to the warrant requirement. *Norman v. State*, 379 So. 2d 643, 646 (Fla. 1980). "[C]onsent may be in the form of words, gesture, or conduct." *State v. Smith*, 172 So. 3d 993, 998 (Fla. 1st DCA 2015). Whether express or implied, consent to search must be given freely and voluntarily. *Id.* To conclude that a consent to search was involuntary, a court would be obligated to find that a person's "will was overborne and his capacity for self-determination critically impaired." *Cox v. State*, 975 So. 2d 1163, 1168 (Fla. 1st DCA 2008) (*quoting*

Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)). Thus, in determining whether the consent to search was voluntarily given, courts use a totality of the circumstances test. *Luna-Martinez v. State*, 984 So. 2d 592, 598 (Fla. 2d DCA 2008). Where law enforcement officers have not engaged in illegal conduct, the voluntariness of consent must be shown by a preponderance of the evidence. *Id.* at 598.

Deputy Viera from the U.S. Marshal's testified that on January 29, 2011, he set up a meeting with Mr. Lyden's attorney to meet with Mr. Lyden. (R19: 2977-78) During the meeting, the Deputy learned of the location of the white Acura TL and learned that the vehicle was in Mr. Lyden's possession through Mr. Lyden's attorney. (R19: 2978-79).

Deputy Viera testified that after this information came to light, an immunity agreement was reached with Mr. Lyden, Janet Shepard, and the U.S. Attorney's Office regarding the circumstances surrounding the vehicle coming in Mr. Lyden's possession. (R19: 2979). Deputy Viera testified that Mr. Lyden allowed him to go onto his property and seize the vehicle. (R19: 2979). Deputy Viera said that Mr. Lyden unlocked all the doors to the building and allowed them to enter and seize the vehicle. (R19: 2980). The Deputy stated said that at no point did Mr. Lyden express a desire for the agents not to enter his property. (R19:

2981). Once he arrived on the property and saw the vehicle, Deputy Viera verified the tag number and seized the vehicle. (R19: 2982).

Applying the previously discussed legal principles, and if Petitioner has standing, the trial court properly denied the motion because consent was voluntarily given by Mr. Lyden. No facts from the hearing suggested that Mr. Lyden's was forced to turn over the vehicle. The totality of the circumstances—including a negotiated and signed immunity agreement, and the fact that Mr. Lyden voluntarily unlocked and opened all the gates and buildings—show that the consent to enter the property and seize the vehicle was freely given.

Petitioner raises several arguments in his brief that he claims support the argument that consent was not freely given. First, Petitioner argues that the officer's statement, "obviously we're going to have to go over and take custody of the car at some point today," is proof that Mr. Lyden merely acquiesced to law enforcement. The State disagrees. Petitioner cites *Smith v. State*, 864 So. 2d 1141 (Fla. 1st DCA 2003) to support this argument. In *Smith*, officers entered a home where they believed dogfighting was occurring. Id. at 1143. An officer told a woman in the home, "we need[] to treat the house as a crime scene and we need[] to look in the house for evidence." *Id*. The First District held that the officer's statement was not a request for consent, but a statement that the police planned to look in the house. *Id*. Based on the

nature of the statement, the woman did not voluntarily consent to the search, but instead acquiesced to the officer's authority. *Id.* at 1144.

Smith is distinguishable from the current case because the officer's statement that Petitioner alleges deprived Mr. Lyden of his ability to consent was made after the meeting between the officers, Mr. Lyden, and the attorneys and after representations were made that the vehicle would be relinquished. As such, *Smith* is not applicable to the current case.

Petitioner next argues that the actions of the federal agents made Mr. Lyden believe that he did not have the option to refuse the search or seizure. This is rebutted by Mr. Lyden's own actions. When the marshals arrived searching for Petitioner, Mr. Lyden denied them access to the property until he consulted with his attorney, and then only let a few agents into his house to search for Petitioner. (R19: 2976; 3050). Contrary to Petitioner's assertions, Mr. Lyden was clearly not intimidated by the marshals, and understood he had the right to consult an attorney, and had the right to refuse to allow the agents to enter his property.

Petitioner's reliance on *State v. Watana*, 50 So. 3d 92 (Fla. 4th DCA 2010) is misplaced. In *Watana*, it was unclear if the defendant gave consent for a search, leading the Fourth District to uphold the trial court's granting of the defendant's motion to suppress. *Id.* at 95. In *Watana*, the trial court found the defendant

more credible than the officers, and the Fourth District upheld the ruling, recognizing the trial court's superior vantage point in judging the credibility of witnesses. Id.

Although Mr. Lyden later testified that he did not give the agent's permission to enter his property and seize the vehicle, like the court in *Watana*, the trial court had a superior vantage point in judging the credibility of the witness. The trial court ultimately decided that the deputy was more credible that Mr. Lyden, especially given the negotiations regarding the immunity agreement, Mr. Lyden's prior refusal to admit agents to his property, and the testimony of his daughter. During her testimony, Ms. Shepard confirmed that permission was given for the marshals to seize the car. (R19: 3097). Based on the reasoning of *Watana*, the trial court was free to deny Petitioner's motion to suppress based on a credibility finding.

CONCLUSION

Based on the foregoing argument, the State respectfully requests this honorable Court affirm the enhancement of Petitioner's conviction for manslaughter with a weapon, based on the finding that a "weapon" under the reclassification statute is an object actively used in an act of violence against another as described by the First District in *Shepard* and the Fifth District in *Hurd*.

The State further requests this Court affirm the First District's and trial court's denial of Petitioner's motion to suppress. Petitioner does not have standing to challenge the search and seizure of the vehicle. Petitioner abandoned his reasonable expectation of privacy in the car when gave it to his mother in Kansas. Petitioner had no reasonable expectation of privacy in the Morton building on his grandfather's land from which the car was eventually seized. The denial of the motion to suppress was proper, and should be affirmed by this court.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by email on March 23, 2018 to Matthew Kachergus, Esq. sheplaw@sheppardwhite.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12-point font.

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