IN THE
SUPREME COURT OF FLORIDA

CASE NO.: SC17-1952

ADAM LLOYD SHEPARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Review from the District Court of Appeal,
First District of Florida

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Appellant, Adam Lloyd Shepard, will be referred to herein by name, as "Defendant" or as "Appellant." Appellee, State of Florida, will be referred to herein as the "State" or as "Appellee." References to the record on appeal will be designated by reference to the relevant portions of the record on appeal volume (by Roman numeral) and page number, as set forth in brackets. Example: [R. I, 1].

STATEMENT OF THE CASE AND FACTS

Appellant, Adam Lloyd Sheppard, was charged by Indictment with one count of First Degree Murder with a Weapon and one count of Leaving the Scene of a

Crash Involving Death. [R. I, 28]. Shepard entered a plea of not guilty to all charges. [R. I, 10]. Shepard proceeded to trial on April 9, 2014, and a mistrial was declared as a result of a hung jury. [R. IX, 1419]. Thereafter, Shepard proceeded to a second trial on June 2, 2015. [R. XXIII, 365].

A. Events Surrounding Spencer Schott's Death

Shepard's criminal charges arose from events that occurred during the evening of January 22, 2011, after Shepard and the decedent, Spencer Schott, visited a sports bar near Schott's apartment in Jacksonville Beach to watch a University of Kansas basketball game. [R. XXIV, 585]. At the time of the incident, Shepard had only known Schott for approximately one week, but the two of them began to form a friendship because of their mutual interest in the University of Kansas' basketball team. [R.XXIV, 501]. While watching the game, Shepard and Schott also invited two other patrons to join them who were also cheering for the University of Kansas, Matthew and Ashley Deel. [R. XXIV, 588].

As the night progressed and the University of Kansas lost the game, the amicable relationship between Schott and Shepard began to deteriorate. [R. XXIV, 595]. Following the game, Shepard was speaking into Schott's ear when Schott grabbed Shepard by his neck, pushed him down, and slammed his head into the bench. [R. XXIV, 595–96; R. XXV, 688–92]. A tussle between the two ensued and,

as a result of the altercation, Shepard was escorted away from Schott and outside the establishment. [R. XXIV, 588–89].

Shortly thereafter, Schott received a call informing him that his dog had gotten out of his apartment. [R. XXV, 702]. At this point, several witnesses who were around Schott that night testified that he became upset after receiving the call. [R. XXIV, 508; R. XXV, 605, 702]. Schott then left the bar, got in his car, and returned to his apartment complex with the Deels following behind him in their own vehicle, as the couple had previously agreed to go to Schott's residence. [R. XXV, 692]. Mr. Deel testified that Schott's driving pattern became aggressive while en route to his apartment; he sped around a van and ran a stop sign. [R XXV, 691–92].

As Schott sped in the direction of his apartment complex, Ashley Deel testified she saw the lights flash on a vehicle parked in the rear of a shopping complex across the street from the entrance of Schott's apartment complex. [R. XXXV, 610]. The vehicle had backed into a parking space and sat adjacent to two tractor trailers, which would obscure the driver's view to the right. *Id.* Rather than returning home, where he was purportedly concerned about the wellbeing of his dog and girlfriend, Schott pulled into the entrance of the shopping center, and stopped, blocking the entrance/exit of the parking lot. [R. XXV, 611]. Schott then exited his vehicle, left the engine on, and began running toward the area where the vehicle was parked behind the two tractor trailers, taking off his jacket as if to fight. [R. XXV,

611, 646-67]. This was to the right of the position of the driver of the vehicle. [R. XXV, 613]. As Schott came around the back of the tractor trailers, the car began to accelerate[1] forward. [R. XXV, 615]. In doing so, the vehicle struck Schott as Schott was running towards the vehicle. [R. XXV, 613]. The vehicle then sped away.

At trial, the State's theory of prosecution was that Shepard intentionally ran over Schott with his vehicle [R. XXXI, 1751]. Shepard's theory of defense was that Schott was accidentally struck by the side of the vehicle as Shepard was attempting to get away from Schott, who was charging at the vehicle in an attempt to harm Shepard. [R. XXXI, 1808]. Following the second trial, the jury returned a verdict finding Shepard guilty of the lesser included offense of manslaughter. [R. XXXI, 1882].

B. The State's Seizure of Shepard's Vehicle from his Grandfather's Building.

Immediately after the incident, Shepard drove to the home of his mother, Janet Shepard, in Topeka, Kansas. [R. XXXVII, 1105]. Ms. Shepard testified that her son arrived at her home in Topeka, Kansas on January 24, 2011, two days after the event. [R. XXVII, 1103–05]. During this time Shepard left his car in his mother's

[1] Shepard presented the expert testimony of a traffic accident reconstructionist, Michael Knox. Mr. Knox testified that the speed of the vehicle at impact was between 10 mph and 17 mph and that the vehicle was not accelerating at its maximum capability. [R. XXX, 1590-91, 1597-98]. Mr. Knox testified that the vehicle made impact with Schott on the passenger side of the vehicle between the front and rear tires, contrary to the State's theory that Shepard intentionally ran over Schott. [R. XXX, 1596-1600, 1658-61].

garage and closed the garage door. [R. XIX, 3070]. Shepard later left Kansas, departing in his mother's car. [R. XXVII, 1112]. He indicated to her that he would be returning to her residence at a later time. [R. XIX, 3072].

When Shepard left his mother, Ms. Shepard contacted her father, Billy Lyden, to come and remove the vehicle from her home and store it on his property. [R. XIX, 3085]. Mr. Lyden, moved the vehicle into a "Morton building," an enclosed structure resembling a barn or large shed, on property he owned. [R. XIX, 3026]. The building was enclosed by a six-foot, locked chain-link fence. [R. XIX, 3026–27].

When investigators learned that Shepard may have returned to Kansas, United States Marshals' deputies were sent to Mr. Lyden's house at 8:00 in the evening. [R. XIX, 3001, 3048]. Mr. Lyden testified that they arrived at his house wearing fatigues with pistols and billy clubs strapped to their sides. [R. XIX, 2976, 3048–49]. One of the marshals, who was approximately six-foot-tall and three hundred pounds, approached Mr. Lyden's home. [R. XIX, 3050]. At this time, Mr. Lyden asked the deputies to speak with his attorney. [R. XIX, 2977]. After speaking to Mr. Lyden's attorney, the deputies subsequently received permission to search the home for Shepard from Mr. Lyden. [R. XIX, 2978]. Approximately six to eight of the marshals entered the home and performed a thorough sweep of its basement, garage, house, and office. [R. XIX, 3050–51].

The next day, the marshals met with Mr. Lyden, Ms. Shepard and their

attorneys to discuss the whereabouts of Mr. Shepard. [R. XIX, 3050]. During such discussion, law enforcement authorities learned that the vehicle was located on Mr. Lyden's premises. [R. XIX, 2978]. Without obtaining a warrant or consent to search the premises from Mr. Lyden, three to four marshals went to Mr. Lyden's property to search the Morton building.[2] [R. XIX, 3004, 3052]. The Deputies never asked Mr. Lyden for permission to search the building. Rather, they simply told Mr. Lyden "obviously we're going to have to go over and take custody of that car at some point today." *Id.* Mr. Lyden testified that given the way in which the agents advised that they were going to seize the property, he did not feel as if he had any choice to resist their order. [R. XIX, 3052].

After arriving at the property, the marshals instructed Mr. Lyden to open the gate and the door of the Morton building, wherein they took photographs of Shepard's vehicle and towed it back to the local law enforcement agency. [R. XXVII, 1141]. From a vehicle bay at the agency, deputies seized a fragment of a hair from a screw on the undercarriage of the car, as well as tissue from a half-moon shaped plate by the rear passenger tire. [R. XXVII, 1140, 1175]. DNA analysis of

[2] The trial court found persuasive the fact that Mr. Lyden's attorney represented the U.S. Marshals could take custody of Shepard's vehicle. [R. II, 319; R. XIX, 3006]. However, Mr. Lyden was not present during the conversation where the attorney alluded to the fact that Mr. Lyden would relinquish possession of the car, nor did the agents ever confirm with Mr. Lyden whether he agreed to the seizure. [R. XIX, 3007-08].

the hair and tissue disclosed a match to Schott. [R. XXVII, 1160-61]. As a result of the search, Shepard filed his Third Motion to Suppress challenging the warrantless seizure of his vehicle from Mr. Lyden's property. [R. I, 96]. The circuit court denied this motion, finding Shepard abandoned the vehicle, and, thus, he did not have standing, as well as finding that Mr. Lyden gave implicit consent to search his property. [R. II, 315-17]. The First District affirmed the denial, without addressing this ground in its opinion.

C. The Jury's Verdict and Weapon Enhancement

In addition to the instruction for first degree murder, the trial court also instructed the jury on the lesser included offenses of second degree murder and involuntary manslaughter. [R. XVI, 2560-63]. On each of the lesser included offenses, including the manslaughter charge, the jury was instructed to determine whether Shepard had used a "weapon" in committing the offense. [R. XVI, 2561, 2563]. Even though there was no testimony regarding the presence of conventional weapons, such as guns or knives, during the commission of the crime, the jury was instructed that a "weapon" is "defined to mean any object that could be used to cause death or inflict serious bodily injury." [R. XVI, 1043]. Counsel objected to the jury being instructed regarding the weapon enhancement. [R. XVI, 2594].

The jury returned a verdict finding Shepard guilty of the lesser included offense of involuntary manslaughter with a weapon as to Count One and a verdict

of guilty of leaving the scene of a crash involving a death as to Count Two. [R. XVI, 2583]. The circuit court entered judgment against Shepard and sentenced him to the maximum, thirty years' imprisonment on the manslaughter with a weapon count and fifteen years on the leaving the scene of a crash involving death count, with such sentences to run consecutively. [R. XXI, 3405–06].

D. Proceedings Below

Following his conviction, Shepard appealed his conviction to the First District Court of Appeal. [R. XVIII, 2889–91]. Shepard raised multiple grounds on appeal, including *inter alia*: (1) that the trial court improperly allowed Shepard's manslaughter conviction to be reclassified to a first-degree felony pursuant to §775.087 for using a weapon, where the "weapon" that Shepard used was his vehicle; (2) that the trial court erred in denying Shepard's motion to suppress evidence obtained from Shepard's vehicle seized from inside his grandfather's Morton building without consent or a search warrant, and; (3) that the trial court erred in considering Shepard's lack of remorse during sentencing. On October 5, 2017, the First District issued its opinion affirming and reversing in part Shepard's judgment and conviction. *See Shepard v. State*, 227 So.3d 746 (Fla. 1st DCA 2017).

Addressing the first issue, the court held the circuit court properly reclassified Shepard's manslaughter conviction to a first-degree felony due to the use of a weapon, where the weapon used was a car. *Id.* at 749. The court certified conflict

with the Second District Court of Appeal's opinion in *Gonzalez v. State*, 197 So.3d 84 (Fla. 2d DCA 2016), which was decided while Shepard's appeal was pending and held that an automobile, as a matter of law, is not a "weapon" under §775.087. *Id.* The court affirmed the circuit court's denial of Shepard's motion to suppress without comment in the opinion, although the court questioned the parties regarding the issue at oral argument. However, the court reversed and remanded the case back to the circuit court for a resentencing due to the circuit judge's consideration of Shepard's lack of remorse during sentencing. *Id.*

On November 3, 2017, Shepard filed his notice of intent to invoke this Court's discretionary jurisdiction based on the First District certifying conflict with *Gonzalez v. State* and the fact that the decision conflicted with this Court's prior decision in *State v. Houck,* 652 So.2d 359 (Fla. 1995). On January 4, 2018, this Court accepted jurisdiction of this case.

SUMMARY OF THE ARGUMENT

This Court previously held that the "obvious legislative intent" underlying § 775.087(1) is to deter criminals from using "instruments commonly recognized as having the purpose and intent to cause serious bodily injury upon other persons." *State v. Houck*, 652 So.2d 359, 360 (Fla. 1995). Based upon such analysis, the Second District Court of Appeal held that an automobile could not be considered a weapon under the reclassification statute. *See Gonzalez v. State,* 197 So.3d 84,85

(Fla. 2d DCA 2016). It reached this conclusion by noting that the "ordinary purpose of automobiles is not as instruments for combat." *Id.* (*quoting State v. Burris*, 875 So.2d 408, 413 (Fla. 2004)).

Contrary to this established line of precedent, the First District Court of Appeal below found that an automobile *could* be considered a weapon when used in a manner to inflict harm. *Shepard*, 227 So.3d at 748. Shortly thereafter, the Fifth District Court of Appeal in *Hurd v. State*, 229 So.3d 876 (Fla. 5th DCA 2017) applied the same "as used" standard to likewise rule that an automobile could be considered a weapon under the reclassification statute. Both decisions have certified conflict with *Gonzalez*.

This Court should resolve this split of authority in accordance with its prior binding precedent and followed by Second District in *Gonzalez*. Analyzing the reclassification statute by reference to an object's commonly recognized purpose comports with plain meaning of the term "weapon" and the legislative intent of the reclassification statute. Furthermore, the novel "as used" standard advanced by the First and Fifth Districts imposes an unworkable, arbitrary distinction between "passive" and "active" objects that would upset this previously settled area of the law and allow creative prosecutors to extend the reclassification statute far beyond its intended scope.

Furthermore, this Court should reverse the trial court's order denying Shepard's motion to suppress the seizure of Shepard's vehicle from his grandfather's Morton building. Because Shepard retained a possessory interest in the vehicle and the vehicle was seized from his grandfather's building without a warrant, consent or any other exception to the warrant requirement, the trial court erred in denying Shepard's motion to suppress.

ARGUMENT

I.

AN AUTOMOBILE IS NOT A WEAPON UNDER FLORIDA'S RECLASSIFICATION STATUTE.

A. Standard of Review

Questions of statutory interpretation are subject to *de novo* review. *Burris*, 875 So.2d at 410.

B. This Court's Binding Precedent Establishes that Automobiles are Not Weapons under the Reclassification Statute.

Florida's reclassification statute provides that most felony offenses may be reclassified to a felony of one degree greater if "during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm...." § 775.087(1) Fla. Stat. (2011) (emphasis added). The statute does not define "weapon."

1. *Houck* controls what objects may be considered a "weapon" under the reclassification statute.

This Court addressed the meaning of "weapon" in *State v. Houck*, 652 So.2d 359 (Fla. 1995), where it set forth a clear and intelligible principle for interpreting the reclassification statute. *Houck* involved a defendant who was convicted of manslaughter following a parking lot brawl, where the defendant killed his victim by repeatedly banging the victim's head against the pavement. *Id.* at 359. The court reclassified the offense to a first-degree felony via section 775.087(1) for the use of a "weapon," to wit: the pavement.

Approving the *en banc* decision of the Fifth District, this Court found that reclassifying the defendant's conviction based on his use of the pavement as a "weapon" was improper. *Id.* at 360. It first held that whether an object constitutes a weapon under the reclassification statute is an issue of law for the court to determine, rather than an issue of fact submitted to the jury. *Id.* In deciding whether an object is a "weapon" under the statute, the trial court must rely on the common and ordinary meaning of the word. *Id.*

This Court then pointed to the dictionary definition of "weapon" from the *American Heritage College Dictionary*: "An instrument of attack or defense in combat, as a gun or a sword . . . 3. A means used to defeat or attack another." *Id.* Furthermore, it noted "[t]he obvious legislative intent reflected by section 775.087 is to provide harsher punishment for, and hopefully deter, those persons who use

instruments commonly recognized as having the purpose to inflict death and serious bodily injury upon other persons." *Id.* (quoting *Houck v. State*, 634 So.2d 180 (Fla. 5th DCA 1994)). Ultimately, this Court found that a paved surface is not commonly understood to be an instrument for combat against another person. *Id.* Therefore, it held that the use of pavement could not be considered a "weapon" to reclassify the offense. *Id.*

While *Houck* specifically applied the reclassification statute to pavement, its analysis left a clear test for future courts to apply. If an object's commonly recognized purpose is for combat, then that object is a weapon under the reclassification statute. Under this simple test, a motor vehicle cannot be considered a weapon, because its commonly recognized purpose is not as an instrument of combat.

2. *Burris* confirmed that the commonly recognized purpose of an automobile is not to cause harm.

This Court expounded upon the above reading of *Houck* in *State v. Burris*, 875 So.2d 408 (Fla. 2004). *Burris* addressed whether an automobile could be considered a "deadly weapon" which could be "carried" under Florida's robbery statute, § 812.13(2)(a) (Fla. Stat. 2003). *Id.* This Court applied the reasoning from *Houck* to refute one of the State's arguments that the legislature intended motor vehicles to fall within the definition of "deadly weapon." *Id.* Specifically, this Court

found that—like the reclassification statute— the robbery statute was similarly motivated by a legislative intent to deter criminals from bringing to a crime scene instruments that had the purpose of causing death or serious bodily injury. *Id.* at 412. It went on to observe:

> 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 (emphasis added).

In short, this Court has made clear that: (a) the reclassification statute only applies to instruments commonly understood as having the purpose of inflicting death or serious bodily injury to others; and (b) that an automobile is not an instrument commonly understood as having such a purpose. Thus, to the extent not already apparent from *Houck*'s analysis, *Burris* explicitly stated that a vehicle cannot be considered a weapon under the reclassification statute.

3. *Houck* and *Burris* mandate that a vehicle is not a weapon under the reclassification statute.

The Second District, when expressly confronted with this issue in *Gonzalez v. State*, 197 So.3d 84 (Fla. 2d DCA 2016), applied the *Houck* standard correctly.

The facts of *Gonzalez* parallel those here. The state charged the defendant with manslaughter and leaving the scene of an accident where he ran over the victim in his car and then ran her over again by backing over her. *Id.* at 84. The trial court reclassified the defendant's offense from a second-degree to first degree felony because he used a "weapon" during the commission of the felony; to wit: his automobile. *Id.* at 84. The Second District reversed, holding that the decision in *Houck*, as expounded upon by *Burris*, controlled the issue and mandated that—as a matter of law—a motor vehicle was not a weapon under the reclassification statute. *Id.* at 85.

Under this precedent, Shepard's conviction was improperly reclassified. There was no indication that Shepard used any objects commonly recognized to have the purpose of causing great bodily harm, such as a gun or knife. Rather than apply the *Houck* decision's commonly recognized purpose analysis, the trial court instead submitted the issue to the jury. Specifically, over defense objection, it instructed that a weapon is "legally defined to mean any object that could be used to cause death or serious bodily harm." [R. XVI, 2563].

The trial court was required to determine whether the object Shepard used constituted a weapon under the reclassification statute, rather than submit the issue to the jury. Under *Houck* and *Burris's* clear guidelines, Shepard's vehicle could not be considered a weapon because the commonly recognized purpose of a vehicle is

for transportation, not as an instrument of combat. Therefore, the trial court erred in reclassifying Shepard's manslaughter conviction to a first-degree felony.

C. The "As Used" Definition of Weapon Developed by the Court Below Contravenes Florida's Reclassification Statute.

Rather than adhere to the precedent set by this Court in *Houck* and continued in *Burris,* the First District crafted a new test to analyze whether an object may be considered a "weapon" that does not focus on the object's commonly recognized purpose. Rather, the First District held courts could consider how the objects were used; an "as used" test. According to the First District, an automobile, when used in a manner to inflict harm, could be considered a weapon under the common and ordinary meaning of the word. *Shepard*, 227 So.3d at 748. In adopting this new test, the First District still claimed that it was distinguishing, rather than departing from, *Houck* because "there is a distinct difference between an immobile object, such as the pavement in *Houck*, and a movable object, such as the car used by appellant." *Id.* at 149.

After the lower court's decision in this case, the Fifth District Court of Appeal also adopted this test in *Hurd v. State*, 229 So.3d 876 (Fla. 5th DCA). *Hurd* held that an automobile could be considered a "weapon" where the defendant attempted to use his vehicle as a battering ram against an officer. *Id.* at 879. The *Hurd* decision

likewise attempted to distinguish its facts from *Houck* by pointing to the fact that, unlike concrete, a vehicle is not a "passive object." *Id.*

While both decisions claimed that their holdings conformed with this Court's prior precedent, they departed both from *Houck*'s holding and the statutory interpretation that undergirded its analysis. For reasons described in further detail below, affirming the district court's decision would require upending established law and expanding the reclassification statute far beyond its intended scope.[3]

1. The "as used" standard ignores the plain meaning of the word "weapon."

A fundamental tenet of statutory construction requires that courts give statutory language its plain and ordinary meaning, unless the words are defined by the statute or by the clear intent of the legislature. *Green v. State*, 604 So.2d 471, 473 (Fla. 1992) (holding, under burglary tool statute, that the plain meaning of the term "tool" did not encompass items of apparel such as gloves, even if they were used to conceal fingerprints during a burglary). The plain and ordinary meaning of the word can be ascertained by reference to a dictionary. *Id.* As previously noted, the *Houck* decision relied in part on the dictionary definition of the term weapon: "1.

[3] For conciseness, Petitioner hereinafter refers to the holding of *Houck*, as interpreted by this Court in *Burris* and the Second District in *Gonzalez*, as the "commonly recognized purpose" standard and the rule set forth by the First District below and the Fifth District as the "as used" Standard.

An instrument of attack or defense in combat, as a gun or a sword . . . 3. A means used to defeat or attack another." *Houck*, 652 So.2d at 360.

This definition, like that of other dictionaries, makes specific reference to items commonly understood to have the purpose of harming others, like guns or swords. Similarly, *Merriam-Webster's Collegiate Dictionary* 1417 (11th ed. § 2003) defines a weapon as "1: something (as a club, knife, or gun) used to injure, defeat, or destroy 2: a means of contending against another." (emphasis added). The *Collins English Dictionary* (Online ed. § 2018) also defines a weapon as "an object such as a gun, knife, or a missile, which is used to kill or hurt people in a fight or war." (emphasis added).

The references to guns, knives, swords, and similar implements in these definitions demonstrate that the plain meaning of "weapon" encompasses objects designed to maim or kill. Indeed, the Fifth District's *en banc* decision in *Houck* pointed to the definition of "weapon" found in Chapter 790, which reads: "any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon, or device, or other deadly weapon, except a firearm or common pocket knife." *Houck*, 634 So.2d at 182 (quoting §790.001(13), Fla. Stat. (1991)). The court applied the principles of *ejusdem generis*, which states that where an enumeration of specific things is followed by some more general words, the general words will usually be construed to refer to things of the same kind or species as those specifically enumerated. *Id.* It

noted that a paved surface was not in the same general class as the types of handheld devices mentioned by the statute, and, therefore, was not a weapon under the statute. *Id.*

The exemplar lists featuring guns, knives, and other similar implements that define the term weapon support *Houck*'s "commonly recognized purpose" standard. Like pavement, an automobile is not a member of the same species as a gun, knife, sword, billie club, or any other object commonly referenced in both legal and dictionary definitions of the term. The common element shared by these objects is that they were designed with the specific purpose to inflict harm, a quality that automobiles do not share. Therefore, the commonly recognized purpose standard is supported by plain meaning of the term weapon.

The First District below similarly contended that its "as used" standard comported with the dictionary definition provided by *Houck*. *Id.* at 748. Specifically, it found that motor vehicles fell within the second, broader definition cited by *Houck*: "a means used to defend against or defeat another." *Id.* at 749. Per the district court, Shepard's automobile could be considered a weapon because he "used" his vehicle to defeat Schott. *Id.*

The problem with such analysis is that *anything* used to cause harm to another person—even the pavement in *Houck*—would be a weapon under this broad definition. The *Merriam-Webster* dictionary defines the verb "use" as "to put into

action or service." *Merriam-Webster Collegiate Dictionary* 1378 (11th ed. 2003). A flat surface could certainly be put into service to cause harm to others. For instance, the phrase "use a cutting board to cut the vegetables" is proper, and no one hearing this command would believe that its speaker is asking the listener to pick up a cutting board and strike the vegetables simply because the person chose the word "use." Thus, it would be proper to say that the defendant in *Houck* "used" the pavement to defeat his victim. As such, the First District's sole reliance on the second dictionary definition cited in *Houck* is logically inconsistent with its subsequent assertion that stationary surfaces are excluded from its "as used" definition of weapon. Furthermore, the district court is required to interpret "weapon" in a manner most favorable to Shepard under the rule of lenity. *See, infra*, Pt. I(c)(3).

2. The "as used" standard extends the reclassification statute beyond the legislature's intended scope.

The *Houck* Court's decision rested largely on its finding that "the obvious legislative intent" in enacting the reclassification statute was "to provide harsher punishment for, and hopefully deter, those persons who use instruments commonly recognized as having the purpose to inflict death and serious bodily injury upon other persons." *Houck*, 652 So.2d at 360 (quoting *Houck v. State*, 634 So.2d 180, 184 (Fla. 5th DCA 1994)). In doing so, this Court noted concern that prosecutors would attempt to reclassify objects that fell outside its intended scope if juries were

permitted to determine what constitutes a weapon. Specifically, this Court endorsed the *en banc* Fifth District's observation that:

> The failure of the statute to broadly define the term "weapon" cannot be cured by jury speculation. As Houck contends, [to do so] would open a veritable "Pandora's Box" and allow a creative prosecutor, in conjunction with the jury, to turn any intentional injury into one caused by a weapon.

Id. (quoting *Houck v. State*, 634 So.2d 180 (Fla. 5th DCA 1994)).

The district court's nebulous "as-used" approach would pry wide open that box *Houck* sought to close by allowing convictions to be reclassified for the use of objects the legislature did not intend to penalize. Both the district court below and the Fifth District's *Hurd* decision emphasized that the "commonly recognized purpose" standard would prohibit reclassification where defendants used kitchen cutlery or baseball bats to commit crimes. *See Shepard,* 227 So.3d at 749 ("Many objects commonly understood to be weapons, such as kitchen knives or baseball bats, would not be classified as weapons under the *Gonzalez* court's approach because their ordinary purpose is not for combat."); *Hurd,* 229 So.3d at 879 ("Just as the automobile's primary purpose is for transportation, the primary purpose of a steak knife or baseball bat is for use as cutlery or sporting equipment.").

While not the issue before this Court, the "commonly recognized purpose" standard *would* likely exclude some instruments from the reclassification statute's

definition of "weapon." However, this outcome is far from the parade of horribles that the lower court suggests. Rather, it flows logically from the "obvious legislative intent" underpinning the legislature's inclusion of the word "weapon" in the statute. *Houck*, 652 So.2d at 360. *Houck* found that the legislature wanted to prevent the proliferation and use of guns, knives, and similar implements; not baseball bats, candlesticks, automobiles, or any other myriad objects that could become improvised tools to harm. With this purpose in mind, the exclusion of baseball bats and cutlery from the definition of "weapon" is entirely principled.[4]

On the other hand, the "as used" approach requires drawing arbitrary distinctions that do not further *any* policy goals. Under the district court's approach, a defendant who fractures his victim's skull with a concrete cinder block could have his offense reclassified for using a weapon, while a defendant who inflicts the same injury by slamming his victim's head into a concrete sidewalk could not. Further, the "as-used" standard leaves no clear principle for determining what types of "uses" suffice to transform an ordinary object into a weapon. If a defendant kills a victim

[4] That is not to say that criminals who use baseball bats or kitchen knives to commit crimes are completely outside of the reach of the reclassification statute, as offenses can also be reclassified where the defendant commits an aggravated battery during the commission of a felony. § 775.087(1) Fla. Stat. (2017). An aggravated battery may occur where a person "intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement," regardless of the type of implement used. § 784.045(1)(a)(1) Fla. Stat. (2017).

by slamming his head against the hood of a parked motor vehicle, is the vehicle still a weapon or does it now become a fixed object under the facts of *Houck*? Drawing these distinctions serves no practical purpose. Rather, the metaphysical dichotomy between "stationary objects" and "mobile objects" is merely an (unsuccessful) attempt by the First and Fifth District to conform their new test to the facts of *Houck*.

The "as-used" standard also poses problems for convictions that do not require proof that a defendant acted willfully or intentionally. For an ordinary item to be considered a weapon, presumably a defendant would need to intend to use it as such. This inquiry would necessarily require a factual determination regarding the defendant's intent to use the object as a weapon and thus encroach on the court's role of determining whether an object constitutes a weapon under the statute. *See Clark v. State*, 783 So.2d 967 (Fla. 2001) (finding that whether defendant intentionally drove his truck into an occupied vehicle created a jury question on aggravated battery charge). Such a result permits the problem referenced by *Houck* of "creative prosecutors" acting in conjunction with juries to turn any offense into one caused by a weapon.[5]

[5]One need look no further than the facts of this case to see how the issue of intent could recreate *Houck*'s Pandora's Box problem. Specifically, the jury rendered "not guilty" verdicts on the charged First- and Second-Degree Murder counts. [R. XVI, 2583]. This verdict indicates the jury credited Shepard's theory of defense that he did not intend to kill Schott when he exited the parking lot but nevertheless found Shepard guilty of manslaughter because he did so in a culpably negligent manner.

The "commonly recognized purpose" standard avoids these arbitrary distinctions and analytical quagmires. It sets forth a rule that is simple to apply and consistently delivers results in accordance with the legislative intent recognized by *Houck*. Therefore, the "commonly recognized purpose" test adopted by in *Houck* should continue to control the definition of "weapon" under the reclassification statute.

3. The "as used" standard violates the rule of lenity.

Even if the "commonly recognized purpose" standard were not the interpretation better supported by the reclassification statute's plain meaning and legislative intent, this Court would be compelled to follow it under the rule of lenity. It is well established that a defendant may not be subject to a criminal penalty unless the words of the statute plainly impose it. *United States v. Campos Serrano*, 404 U.S. 293, 297 (1971). "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used." *United States v. Resnick*, 299 U.S. 207, 209 (1936). "[B]efore a man can be

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However, the jury was instructed that a "weapon" was legally defined as "any object that could be used to cause death or serious bodily harm." [R. XVI, 2563] (emphasis added). Even if the jury found Shepard "used" his vehicle during the commission of the offense, but did not willfully hit Schott, the trial court's "as used" standard still required them to find that Shepard's vehicle was a "weapon," as it *could be used* to cause death or serious bodily harm.

punished; his case must be plainly and unmistakably within the statute." *Todd v. United States*, 158 U.S. 278, 282 (1895).

Florida law explicitly codifies this principle in § 775.021(1), which states "the provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Put differently, "if there is a reasonable construction of a penal statute favorable to the accused, the court must employ that construction." *Wallace v. State*, 860 So.2d 494, 497–98 (Fla. 4th DCA 2003). This rule is "one of the most fundamental principles of Florida law." *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991). It applies both to criminal provisions relating to guilt as well as provisions enhancing a defendant's sentence. *See Clines v. State*, 912 So.2d 550, 560 (Fla. 2005).

This Court has frequently employed the rule of lenity to resolve criminal statutes in favor of the accused, even in the face of reasonable interpretations offered by the State. *See, e.g., Kasiche v. State*, 991 So.2d 803 (Fla. 2008) (applying rule of lenity in interpreting sex offender probation statute and quashing district court's opinion below that acknowledged that the statute was "undeniably subject to multiple, conflicting interpretations."); *Polite v. State*, 973 So.2d 1107, 1111 (Fla. 2007) (applying rule of lenity to find that resisting officer with violence statute required defendant to have knowledge of victim's status as police officer); *Clines*,

912 So.2d at 560 (applying rule of lenity to recidivist offender statute to find that multiple recidivist categories could not be applied to a single criminal sentence).

At a minimum, the "commonly recognized purpose" standard is a reasonable interpretation of an ambiguous statute. Rejecting this standard would not only require this Court to disapprove of the second-district's well-reasoned opinion in *Gonzalez*, but also *its own* reading of the reclassification statute in *Burris*. *See Burris*, 875 So.2d at 413.[6] Indeed, like in *Kasich*, the district court below conceded the reasonableness of the interpretation that it rejected. *See Shepard*, 227 So.3d at 749 ("The Second District's holding in *Gonzalez* is not unreasonable based on its reliance of the quote from *Burris*.").

Further, affirming the decision below would require this Court to choose a broad definition of weapon at the expense of an equally-valid, narrower definition. *See Shepard*, 227 So.3d at 748 ("we conclude that an automobile falls within the second definition of a weapon, a 'means used to defend against or defeat another.'"). The Fourth District was confronted with a similar issue in *Wallace*, where a defendant was charged and convicted of arson and possession of a destructive

[6] Regardless of whether *Burris*'s analysis of the reclassification statute is considered dicta, there is no question that it applied the "commonly recognized purpose" standard when doing so. *Id.* ("like the pavement used by the offender in *Houck*, an automobile is not commonly understood to be an instrument for combat against another person."). Under the rule of lenity, adopting the "as used" standard would require a finding that this analysis was unreasonable.

device. *See Wallace*, 860 So.2d at 495, 497–98. Evidence suggested that the defendant had thrown a bottle of ignitable liquid with a rag used as a wick, but the device failed to explode. *Id.* at 495. The trial court felt obligated to sentence the defendant to twenty years in prison under Florida's 10/20/Life statute, which provides a twenty-year mandatory sentence for defendants who "discharge" a destructive device. *Id.*

The Fourth District reversed, finding that the destructive device did not "discharge." Importantly, the court looked to *Merriam-Webster's Collegiate Dictionary* for the definition of discharge, which read as follows: "1) to relieve of a charge, load or burden; 2) to shoot or give an outlet or vent; 3) to throw off or deliver a load, charge or burden; 4) to put forth fluid or other contents." *Id.* at 497. The court recognized that there was no common definition of the word discharge. *Id.* However, it noted that under the rule of lenity, the court was required to adopt a definition that required the device to explode. *Id.*

Here, when faced with multiple competing definitions of the word "weapon," the district court was required to engage in the same type of analysis as the *Wallace* court and apply the rule of lenity to select the definition that most favored the accused—to wit: an instrument of combat such as a gun or knife. However, it in effect did the opposite. Rather than select the definition that most favored the accused, the district court instead selected a definition that best suited the State.

Given that—at a minimum—the reclassification statute is subject to multiple reasonable constructions, the rule of lenity mandates that the construction most favorable to Shepard apply.

4. Adopting the "as used" standard would conflict with this Court's prior holding in *Houck* and violate the principles of stare decisis.

A core tenet of this Court's jurisprudence is the doctrine of stare decisis. *Puryear v. State*, 810 So.2d 901, 904 (Fla. 2002). "It is an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scale of justice even and steady ant not liable to waiver with every new judge's opinion . . ." *Tyson v. Mattair*, 8 Fla. 107, 124 (1858). "Stare decisis does not yield based on a conclusion that a precedent is merely erroneous but that an error is of sufficient gravity to justify departing from precedent where the prior decision is unsound in principle or unworkable in practice." *Roughton v. State*, 185 So.3d 1207, 1221 (Fla. 2016).

The court below stated that its test complied with *Houck*, finding there was "a distinct difference between an immobile object, such as pavement, and a movable object, such as Shepard's vehicle." *Shepard*, 227 So.3d at 749. This finding applied an overly narrow reading of *Houck*'s holding. As previously noted, the *Houck* decision rested on a finding that the legislature intended to prohibit the use of objects

commonly understood to have the purpose of causing harm. *Houck*, 652 So.2d at 360. Under this rationale, an object's "mobility" is an irrelevant consideration.[7]

As a Justice Canady once stated, "[a] judicial decision-making process in which the stated rationales of prior decisions are set aside on the basis of immaterial factual distinctions is a decision-making process that will inevitably be characterized by ad hoc determinations and *ipse dixit* deliverances." *State v. Yule*, 905 So.2d 251, 260 (Fla. 2d DCA 2005) (Canady J. Concurring). The district court's opinion below followed *Houck* and *Burris* in only the most superficial sense. Affirming its decision would overrule this Court's longstanding precedent interpreting the reclassification statute.

It is true that stare decisis may "bend[] where there has been a significant change in circumstances since the adoption of [a] legal rule, or where there has been an error in legal analysis." *State v. J.P.*, 907 So.2d 1101, 1109 (Fla. 2004). However, those circumstances are not present here. The relevant provision of the reclassification statute has remained unchanged since *Houck*. The *Houck* decision invited the legislature to amend the reclassification statute if it disagreed with this

[7] Defining a weapon by its "mobility" also excludes objects historically thought of as weapons. Stationary implements of old designed to kill or torture like the guillotine or iron maiden would pass the "commonly recognized purpose" test but fail under the lower court's test. Likewise, stationary mortars or machine guns frequently used by the military are presumably not "weapons" under the lower court's test because they are immobile.

Court's interpretation; an invitation which the legislature has declined to accept for twenty-three years. Since that time, the legislature has modified the reclassification statute over ten times, five of which occurred after the *Burris* decision explicitly spelled out that a vehicle did not fall under the reclassification statute's definition of "weapon."[8] If the legislature found fault in this Court's application of the "commonly recognized purpose" test, surely it would have taken corrective action by now.

Houck provides a binding, intelligible principle for interpreting the reclassification statute. This is why the *Burris* Court tacitly applied *Houck*'s reasoning to interpret the armed robbery statute, which it determined was enacted with a similar legislative intent. Adopting the "as-used" standard would unjustifiably depart from this precedent and replace a well-established rule with one farther afield of the reclassification statute's intended purpose. Therefore, this Court should reject the First District's "as-used" test.

II.

[8] *See* ch. 95-184, § 19, Laws of Fla; ch. 95-195, § 9, Laws of Fla.; ch. 96-322, § 15, Laws of Fla.; ch. 96-388, § 55, Laws of Fla.; ch. 97-194, § 14, Laws of Fla.; ch. 99-12, § 1, Laws of Fla.; ch. 2000-158, § 88 Laws of Fla.; ch. 2000-320, § 5 Laws of Fla.; ch. 2005-128, § 11, Laws of Fla.; ch. 2011-200, § 4 Laws of Fla.; ch. 2012-74, § 1, Laws of Fla.; Ch. 2014-176, § 3, Laws of Fla.; ch. 2014-195, § 2, Laws of Fla. ch. 2016-7, § 1, Laws of Fla.

SHEPARD'S VEHICLE WAS UNLAWFULLY SEIZED WITHOUT A WARRANT[9]

A. Standard of Review

Review of a denial of a motion to suppress is a mixed question of law and fact. *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001) The standard of review for factual findings is whether competent and substantial evidence supports the judge's ruling. *Id.* The standard of review for the trial judge's application of the law to factual findings is de novo. *Id.*

B. Shepard Has Standing to Challenge the Search and Seizure of His Vehicle.

The standard to determine standing to contest an unlawful search or seizure is the same test that modern courts have traditionally used to determine whether a search or seizure has occurred for the purposes of applying Fourth Amendment protections. *See Katz v. United States*, 389 U.S. 347, 353 (1967). However, in *United States v. Jones*, 565 U.S. 400 (2012) the Supreme Court clarified that the *Katz* test is not the exclusive means for determining whether a search has occurred, but that a search may also occur where the government commits a trespass when seeking

[9]The basis for this Court's jurisdiction is the reclassification issue. However, once this Court has accepted jurisdiction over a case to resolve a legal issue in conflict, it may, in its discretion, consider other issues properly raised and argued before it. *Savoie v. State*, 422 So.2d 308 (Fla. 1982).

evidence. In *Jones* the Supreme Court found that a search occurred where police officers placed a GPS transponder on the defendant's automobile. *Id.*

Under this rationale, a defendant has standing to challenge a search or seizure when police interfere with a defendant's property interest, even where the premises searched do not belong to the defendant. *See, e.g., United States v. Delgado*, 903 F.2d 1495, 1501–02 (11th Cir. 1990). In *Delgado*, a defendant sought to challenge the seizure of items from the defendant's shirt pocket, which he had left inside a warehouse where he was employed. *Id.* at 1501. The court acknowledged that the defendant did not have any general expectation of privacy in the warehouse itself, or any private space therein from which he could exclude others. *Id.* at 1502. However, the court found that it was significant that the defendant's possessions were the object of the search, and, because of the fact that the defendant had a possessory interest in the shirt for which the police were searching, he had standing to challenge the search. *Id.*

The situation in *Delgado* is no different than the search at issue here. Rather than a warehouse, the United States Marshals entered a Morton building owned by Shepard's grandfather. While Shepard was not an overnight guest at the building and had no private space within it, he certainly had a possessory interest in the car being stored therein, as well as a privacy interest in the contents of the car itself. Further, as in *Delgado*, Shepard's personal possessions were the object of the government's

search of the building, since the agents were looking for Shepard's car. Thus, Shepard had a sufficient possessory and privacy interest in his vehicle to have standing.

C. The Trial Court Erred in Finding that Shepard Had Abandoned His Vehicle.

The trial court found that Shepard did not have standing to challenge the warrantless search and seizure on the ground that Shepard had abandoned the vehicle by relinquishing physical possession of the car to his mother. The Fourth Amendment does not prohibit an officer from retrieving property that a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy. *See Kelly v. State*, 536 So.2d 1113, 1114 (Fla. 1st DCA 1988). Abandonment in the context of property law is different from its definition under the Fourth Amendment. In essence, what is abandoned under the Fourth Amendment is not necessarily the property itself, but the defendant's expectation of privacy in the property. *Id.* (citing *LaFave, Search & Seizure* (2d ed.), § 2.6(b)).

Thus, to constitute abandonment under the Fourth Amendment, the property must be discarded in a place where the person has no expectation of privacy, such as an open field or public street. *State v. Parker*, 399 So.2d 24, 30 (Fla. 3d DCA 1981). In weighing the issue of abandonment, courts must determine the defendant's intent, inferred from words, actions and other circumstances. *Id.* The burden is on

the State to establish abandonment through proof consisting of "clear, unequivocal and decisive evidence." *Id.*; *O'Shaughnessy v. State,* 420 So.2d 377, 379 (Fla. 3d DCA 1982); *Freidman v. United States*, 347 F.2d 697 (8th Cir. 1965).

Courts have found that abandonment does not exist where a defendant entrusts a third-party with property and the third-party informs police officers that the defendant intends to return for the property. *See Hackett v. State*, 386 So.2d 35 (Fla. 2d DCA 1980). In *Hackett*, the defendant left his luggage in a motel room and informed the hotel owner that he would return to pick up his belongings after he picked up money to pay for his stay. *Id.* at 36. The hotel owner informed the officer that the defendant intended to return, but when the defendant did not return the police found the defendant and seized his luggage from the motel. *Id.* The court found that there was not sufficient evidence in the defendant's conduct to show that he had abandoned his luggage, since he displayed an intent to return as soon as he was able to pay his bill. *Id.*

Further, since the abandonment inquiry centers on a defendant's surrender of his privacy interest, rather than his physical custody of the item itself, abandonment is not present where a defendant expresses no intent to return for his possessions, but nevertheless expresses an intent not to surrender his privacy interest in them. A demonstration of this principle can be found in the Seventh Circuit's opinion in *United States v. Basinksi*, 226 F.3d 829 (7th Cir. 2000). In *Basinksi*, the defendant

entrusted a briefcase containing stolen goods to a friend and told him to burn the briefcase after learning that the police were investigating him for jewel thefts. *Id.* at 832. When confronted by investigators, the defendant's friend relinquished the briefcase. *Id.* The court determined that the defendant had not abandoned the briefcase because he had never disclaimed his privacy interest in it and never placed the briefcase in an area accessible to the public. *Id.* at 837.

To the contrary, the court found that the defendant had expressed an explicit intent to retain his privacy interest in the case by entrusting it to his friend for safekeeping. *Id.* It rejected the government's argument that the defendant had abandoned his interest in the case when he requested his friend to destroy it, rather it found that "by ordering Friedman to destroy the briefcase, Basinki did not invite all the world to rummage through the briefcase at will, as a defendant in an abandonment case essentially does. Rather, his command manifested a desire that nobody possess or examine the briefcase." *Id.* at 838.

Here, Shepard manifested an intent to retain his privacy interest over his car by entrusting it to his mother who believed he would return for it at a later date. As in *Hackett*, Shepard did not leave his vehicle out in a public space but entrusted it with a third party for safe-keeping, storing it in a closed garage. [R. XIX, 3070]. Additionally, as in *Hackett*, Shepard indicated that he intended to return for his possessions at a later time. [R. XIX, 3072]. The trial court discredited Ms. Shepard's

assertion that she believed Shepard intended to return, because she could not offer additional information to substantiate that belief. [R. II, 317]. However, in making this finding the court shifted the burden to Defendant, when in fact it was the State's burden to establish abandonment by clear and convincing evidence. Therefore, it was not incumbent on Ms. Shepard to show that Shepard would return, but on the State to show that he would not. The State failed to meet its burden.

D. The Officers Did Not Have Voluntary Consent to Enter Mr. Lyden's Morton Building and Seize Shepard's Vehicle.

The trial court also erred by finding that Mr. Lyden had given voluntary consent for police officers to enter his Morton building and seize Shepard's vehicle. A warrantless search pursuant to valid consent is constitutionally permissible. *See Reynolds v. State*, 592 So.2d 1082, 1086 (Fla. 2d DCA 1992). The state bears the burden of showing voluntary consent by a preponderance of the evidence. *Id.* The state fails to meet this burden where evidence shows that the person giving consent submitted or acquiesced to the apparent legal authority of a police officer to perform a search. *See Florida v. Royer,* 460 U.S. 491, 497 (1983).

1. The marshals' Statements to Mr. Lyden indicated that he did not have the option to refuse the search.

Whether consent is voluntary is a question of law to be determined from the totality of the circumstances. *See Reynolds v. State,* 592 So.2d at 1086. Where a defendant merely acquiesces to a statement by the police that they have authority to

search an area, courts have found that the resulting search is not the product of free and voluntary consent. *See Smith v. State*, 864 So.2d 1141, 1143 (Fla. 1st DCA 2003). In *Smith*, police entered a defendant's home in response to a complaint that illegal dogfighting was occurring inside. *Id.* When they arrived the officers heard what they believed to be dogfighting therein, so they entered the home to effectuate an arrest. *Id.* The police did not have a search warrant for the home, however, as they were removing the suspects, a young woman entered who they believed lived in the house. *Id.* At this point, the officers told the young woman "we need[] to treat the house as a crime scene and we need to look in the house for evidence." *Id.* The young woman allowed the police to search the home, after which they found further contraband supporting the conviction.

The state argued that the fruits of the search should not be suppressed because the young woman had allowed them to search the house. *Id.* The court disagreed, finding that the officer's statement to the young woman was not a request for consent, but merely a statement that the police planned to look in the house. *Id.* For this reason, it held that the resulting response from the young woman was not voluntary consent, but mere acquiescence to authority. *Id.* at 1144.

The agent's statement to Mr. Lyden prior to the search here—"obviously we're going to have to go over and take custody of the car at some point today"—is indistinguishable from the statement that the officers made to the young woman in

Smith. The agent did not phrase his request for consent in the form of a question, but merely articulated to Mr. Lyden that they intended to seize Shepard's vehicle. Like in *Smith*, Mr. Lyden's decision to allow the agents to enter his Morton building could not be interpreted as an act of consent because he was never asked for his consent. Rather, his actions were merely acquiescence to the statement by the agents of their "obvious" authority to search his vehicle.

2. The marshals' actions at Mr. Lyden's home would have led a reasonable person to believe that they did not have an option to refuse.

Further, even if Mr. Lyden had made an affirmative statement indicating that he consented to the search, that consent would not have been voluntary given the fact that the agents gave the impression that he could not refuse. Where an officer's affirmative acts indicate a defendant is not free to terminate an encounter, courts have found that an affirmative statement of consent that follows is not voluntary. *See State v. Wantana*, 50 So.3d 92, 95 (Fla. 4th DCA 2010).

In *Wantana*, a defendant was subject to a lawful traffic stop, following which the officer searched the defendant's person and found contraband. The record testimony was in conflict regarding whether the defendant actually gave consent, but it did indicate that the officer never asked the defendant for permission to perform the search. *Id.* The Fourth District found that even if the defendant had given consent, that consent was not voluntary. *Id.* It noted that there was nothing in the record to

indicate that the search of the defendant's person was anything other than an ordinary step in the ticket writing process. *Id.* Thus, it found that under a totality of the circumstances, a reasonable person would not have believed that he could have refused to cooperate. *Id.*

Here, by the same token, the officer's statements and actions did not give Mr. Lyden any reason to believe that he could refuse consent. First, the officers never explained to Mr. Lyden that he had the option to refuse. [R. XIX, 3052]. Quite the opposite, they affirmatively indicated to him that he was *not* allowed to refuse. *Id.* Indeed, given that Mr. Lyden was not privy to the conversation between the attorneys and the agents, the agents' statement that they were "obviously" going to have to seize the vehicle, took on a more coercive character due to his attorney's involvement. Just as the defendant in *Wantana* was led to believe that the search was a routine and necessary component of the traffic stop in that case, here, the officer's statements created a false impression to Mr. Lyden that he was legally obligated to grant them access to the vehicle in light of the prior conversation, to which he was not privy.

Further, the fact that during the agents' initial encounter with Mr. Lyden he was approached by eight agents, uniformed in fatigues, and visibly armed with pistols and billy clubs increased the coercive effect of the agent's statement to Mr. Lyden the next day. [R. XIX, 2976, 3048–49]. *See Miller v. State*, 865 So.2d 584,

588 (Fla. 5th DCA 2004) (finding three officers to be a "considerable show of authority" to "create the perception that a major criminal investigation was underway" and that such a "circumstance would cause a reasonable person to feel less inclined to rebuff the officer's requests"); *Gonzalez v. State*, 578 So.2d 729, 733 (Fla. 3d DCA 2004) (finding three officers at a door step and two in defendant's front yard to be a "truly frightening display of authority.")

3. Mr. Lyden's attorney could not provide consent to search the Morton building.

In finding that Mr. Lyden's consent was voluntary, the trial court was persuaded by the fact that the agents testified that they had obtained consent from Mr. Lyden's attorney. However, those statements did not render Mr. Lyden's alleged consent voluntary. No case has held that an attorney may unilaterally waive a client's Fourth Amendment rights. Indeed, where courts have addressed other fundamental rights in the criminal law context, they have emphasized that the ultimate decision of whether to invoke or waive the right lies with the client. *Fisher v. United States*, 425 U.S. 291, 398 (1976) (holding attorney could not assert Fifth Amendment self-incrimination privilege on behalf of client); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (noting that the decision to invoke the Sixth Amendment right to a jury trial and the right of a defendant to testify on his own behalf are fundamental decisions that belong to the client and not the attorney).

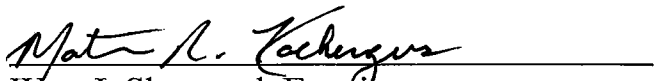
In the instant case, Mr. Lyden's attorney had no actual or apparent possessory interest over the Morton building or Shepard's vehicle to which he offered consent. Further, any argument that the agents believed that Mr. Lyden's attorney was merely conveying his client's wishes to them are belied by their statement to Mr. Lyden during his interview. If the agents were laboring under the impression that Mr. Lyden had already freely and affirmatively given his consent to take the vehicle, there would be no need to inform him that he was required to give up the vehicle. Further, the agents never verified with Mr. Lyden whether he was voluntarily consenting to the seizure, a question which they would have had ample time to ask given that it was Mr. Lyden himself, and not his attorney who took them to the vehicle. Therefore, the warrantless search of Mr. Lyden's Morton building and seizure of Shepard's vehicle was not carried out with consent or pursuant to any other valid exception to the Fourth Amendment's warrant requirement.

CONCLUSION

The court below improperly reclassified Shepard's manslaughter conviction, because an automobile is not a "weapon" under Florida's reclassification statute. The district court's decision relies on a new, nebulous "as used" standard that contravenes the plain meaning of the term "weapon," the clear legislative intent of the reclassification statute, the rule of lenity, and binding precedent this Court set forth in *Houck* and *Burris*.

Furthermore, Shepard's conviction was the result of evidence obtained from the unlawful, warrantless seizure of his vehicle from his grandfather's Morton building. Shepard had standing to challenge this seizure by his possessory interest in the vehicle and Shepard did not abandon that interest because he entrusted the care of the vehicle to his mother. Shepard's grandfather never gave consent to the search of the Morton building, and his attorney could not provide consent on his behalf. For these reasons, Shepard's convictions should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Kaitlin R. Weiss, Esquire** Assistant Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32322, by Electronic Mail, this 2nd day of February, 2018.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is Times New Roman 14-point.

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