IN THE SUPREME COURT OF FLORIDA

ADAM SHEPARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-1952

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

# JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA M. PATE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0045489

KAITLIN R. WEISS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 106130

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
crimapptlh@myfloridalegal.com
Kaitlin.Weiss@myfloridalegal.com
(850) 414-3300
(850) 922-6674 (FAX)
COUNSEL FOR RESPONDENT

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## 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.

"PJB" will designate Petitioner's Jurisdictional 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 pertinent history and facts are set out in the decisions of the lower tribunals, and this Court's prior decision, attached hereto. They can also can be found at *Shepard v. State,* 227 So. 3d 746, (Fla. 1st DCA 2017); *Gonzalez v. State,* 197 So. 3d 84 (Fla. 2d DCA 2016); *State v. Houck,* 652 So. 2d 359 (Fla. 1995).

## SUMMARY OF ARGUMENT

The operative facts, as contained within the "four corners" of the First DCA's decision reveals conflict with the Second DCA, but does not show any express and direct conflict with this Court.

## ARGUMENT

**WHETHER THE FIRST DISTRICT'S OPINION IN *SHEPARD V. STATE*, 227 SO. 3D 746 (FLA. 1ST DCA 2017) IS IN EXPRESS AND DIRECT CONFLICT WITH THE SECOND DISTRICT'S DECISION IN *GONZALEZ V. STATE*, 197 SO. 3D 84 (FLA. 2D DCA 2016) OR THIS COURT'S DECISION IN *STATE V. HOUCK*, 652 SO. 2D 359 (FLA. 1995)?**

A. Standard of Review.

The applicable standard of review for claims of direct and express conflict is de novo subject to the following criteria.

B. Jurisdictional Criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv), which parallels Article V, §3(b)(3), Fla. Const. The Florida Constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). *Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. *Reaves; Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a

dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," *Stallworth v. Moore*, 827 So.2d 974 (Fla. 2002). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins*, 385 So.2d at 1359.

In *Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

*Ansin* at 810.

C. The First DCA's Decision in *Shepard*

In *Shepard v. State,* 227 So. 3d 746, 746 (Fla. 1st DCA 2017) the Appellant was convicted of manslaughter and leaving the scene of a crash after Appellant got into a fight with the victim in a bar. After the fight, a witness saw Appellant's car parked near the victim's apartment, and Appellant's car flashed its lights when the victim approached. *Id.* When the victim advanced towards the vehicle, Appellant struck and killed the victim with his car. *Id.* Pursuant to Fla. Stat. 775.087(1), Appellant's convictions were enhanced to one degree greater because during the commission

of the felonies, Appellant used his car as a weapon. Fla. Stat. 775.087(1) does not provide a definition of weapon. The First DCA in *Shepard* agreed that the enhancement was correct because the automobile used by Appellant constituted a weapon. The First DCA concluded that the automobile was a weapon because of the way it was used by Appellant, and based their ruling on this court's previous holding in *State v. Houck*, 652 So. 2d 359, 359 (Fla. 1995). *Id.*

D. The Second Circuit's Decision in *Gonzalez*

In *Gonzalez v. State*, 197 So. 3d 84 (Fla. 2d DCA 2016) the defendant was convicted for failing to remain at the scene of a crash and manslaughter after he left the bar with the victim, and struck her twice with his car, resulting in her death. Like *Shepard*, his convictions were reclassified to one level higher based on the use of the car as a weapon pursuant to Fla. Stat. 775.087(1). The Second District relied on *State v. Burris*, 875 So. 2d 408 (Fla. 2004) in making their determination that the car was not a weapon because the "ordinary purpose" of a car is not to be a weapon. *Id.* at 86.

E. This Court's Decision in *Houck*

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

F. Why *Shepard* is not in express and direct conflict with the decision *Houck* but is in conflict with the decision in *Gonzalez*

The First DCA's opinion in *Shepard* appears to conflict with the Second DCA's opinion in *Gonzalez*. Both *Shepard* and *Gonzalez* deal with an identical issue with nearly identical facts. Both victims were killed after leaving bars and being deliberately struck by a car. Both defendants were convicted of manslaughter and leaving the scene of an accident. Both defendant's convictions were enhanced pursuant to Fla. Stat. 775.087(1). However, the Second DCA concluded that a car is not a weapon, and the First DCA concluded that a car is a weapon.

As previously noted, the Second DCA relied on *State v. Burris*, 875 So. 2d 408 (Fla. 2004) in making their determination that the car was not a weapon because the "ordinary purpose" of a car is not to be a weapon. *Id*. at 86. It appears that the Second DCA's reached this conclusion through an improper reliance on *Burris*. In *Burris* the definition of "weapon" was analyzed in the context of

Fla. Stat. 812.13(2)(A) (2001), which is the robbery statute. There is nothing in the four corners of the *Gonzalez* case that suggests a robbery occurred or that the robbery statute is relevant.

The robbery statute requires that the defendant "carried a firearm or other deadly weapon" for their conviction to be enhanced. This Court specifically noted in *Burris* that the "narrow issue before this Court is whether an automobile may be "carried" as a deadly weapon under section 812.12(2)(a) of the robbery statute so as to allow an enhanced conviction." *Id.* at 410. *Burris* addresses *Houck* and Fla. Stat. 775.087(1) only in the context of analyzing the legislative intent of words used in defining the term "weapon." *Id.* at 412-413.

The Second DCA's reliance on *Burris* is improper because the focus of both *Gonzalez* and *Shepard* is Fla. Stat. 775.087(1) which does not require "carrying" an object for it to be considered a weapon, like the robbery statute. Fla. Stat. 775.087(1) says that a weapon can anything that "the defendant carries, displays, **uses**, threatens to use, or **attempts to use**..." (emphasis added). Based on this definition, the language that *Shepard* relies on from *Houck* is that the way an item is used determines if it is a weapon in the context of the reclassification of an offense pursuant to Fla. Stat. 775.087(1).

While it appears that there is conflict with the Second DCA, there is no conflict between *Shepard* and this Court's decision in

*Houck*. In *Houck*, this Court explicitly defined "weapon" in the context of Fla. Stat 775.087(1) as an "1. An instrument of attack or defense in combat, as a gun or sword... 3. A means **used** to defend against or defeat another." *Houck*, 652 So. 2d at 360. (emphasis added). While the first part of the definition of a weapon from Houck is not relevant to this case, an automobile falls under the second part of the definition. The First DCA applied this definition directly to the car and determined that when a car is used to deliberately kill somebody, it is a weapon. This is not in conflict or opposition to *Houck*, but is the application of *Houck's* holding to reach a different conclusion about a different object being a weapon. The First DCA properly followed the holding in *Houck*, and as such there is no conflict between those cases.

## CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court review the merits of the conflict between the First DCA's decision in *Shepard* and the Second DCA's decision in *Gonzalez*, but decline to exercise jurisdiction regarding a conflict between *Shepard* and *Houck* because there is no express and direct conflict.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by email on November 29, 2017 to Matthew R. Kachergus, Esq. at sheplaw@sheppardwhite.com.

**CERTIFICATE OF COMPLIANCE**

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

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Trisha M. Pate
TRISHA M.PATE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0045489

/s/ Kaitlin R. Weiss
KAITLIN R. WEISS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 106130
Attorney for Respondent, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
crimapptlh@myfloridalegal.com
Kaitlin.Weiss@myfloridalegal.com
(850) 414-3300
(850) 922-6674 (FAX)

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