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

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Cont.)

Page

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont.)

Case(s) **Page**

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

On the evening of January 22, 2011, Adam Lloyd Shepard and the victim went to a sports bar to watch a college basketball game. Appendix ("App.") at 2.[1] While at the bar, the two men got into an altercation which led to Shepard being escorted out of the premises. *Id.* Thereafter, the victim began receiving phone calls from Shepard, answering one before leaving the establishment. *Id.* The victim left the establishment and proceeded towards his apartment. A witness followed in a separate car. *Id.* As the procession approached the apartment complex, the witness observed a white vehicle in the parking lot across the street. *Id.* As the victim's vehicle approached the apartment complex, the white vehicle flashed its lights. *Id.* Rather than pulling into his apartment complex, the victim pulled into the entrance of the parking lot, exited his vehicle, and advanced towards the white automobile while pulling off his jacket. *Id.* As the victim ran toward the white automobile, the vehicle advanced forward, striking the victim and, thereafter, left the parking lot. *Id.* The victim suffered trauma to his skull and died from the injuries the following day. *Id.* Shepard was arrested two weeks later in Chicago. *Id.*

Shepard was charged by Indictment with one count of first-degree murder and one count of leaving the scene of a crash involving death. Shepard proceeded

[1] The First District's Opinion in this case is attached hereto as Appendix "A."

to trial and the jury returned verdicts of guilty on the lesser included offense of manslaughter and leaving the scene of a crash involving death. App. at 3. Over Shepard's objection, the trial court permitted the manslaughter conviction to be reclassified from a second-degree felony to a first-degree felony upon the jury's finding that Shepard used a "weapon," *to wit:* an automobile, during the commission of the offense, pursuant to § 775.087(1), Fla. Stat. (2011).[2] App. at 2. As a result of the reclassification, the trial court sentenced Shepard to 30 years on the manslaughter conviction and 15 years, to run consecutive, on the leaving the scene of a crash involving death conviction.

On appeal, Shepard challenged the reclassification of the manslaughter conviction from a second-degree felony to a first-degree felony based upon the use of a "weapon," when the "weapon" was an automobile. While Shepard's appeal was pending, the Second District Court of Appeal decided *Gonzalez v. State,* 197 So.3d 84 (Fla. 2d DCA 2016), which held that an automobile was not a "weapon" under Florida's reclassification statute. App. at 2. Contrary to the Second District's

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[2] Section 775.087(1), Fla. Stat. provides that whenever a person charged with a felony carries, displays, uses, threatens to use, or attempts to use any "weapon" or firearm during the commission of the felony, the felony with which the person is charged shall be reclassified one degree higher. As Shepard was convicted of manslaughter, such felony was reclassified from a second-degree felony to a first-degree felony.

opinion in *Gonzalez*, the First District found that the offense could be reclassified. App. at 4. In so ruling, the First District certified conflict with *Gonzalez*.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that has been certified by it to be in direct conflict with a decision of another district court of appeal. *See* Art. V, Sec. 3(b)(4), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(vi). Additionally, the Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of either the Supreme Court or another district court of appeal on the same question of law. *See* Art. V, Sec. 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction of this case as the decision of the First District below certified conflict with the Second District in *Gonzalez v. State,* 197 So.3d 84 (Fla. 2d DCA 2016) on the question of whether an automobile may be considered a "weapon" for purposes of reclassification under § 775.087(1), Fla. Stat.

Furthermore, the First District's decision below expressly and directly conflicts with this Court's decision in *State v. Houck,* 652 So.2d 359 (Fla. 1995),

which found that pavement could not be considered a "weapon" for purposes of reclassification under § 775.087(1), Fla. Stat. This Court in *Houck* found that the obvious legislative intent of the reclassification statute was to deter persons who use instruments commonly recognized as having the purpose to inflict death and serious bodily injury upon other persons. *Id.* at 360. This Court further found that the common or ordinary meaning of the word "weapon" is an instrument for combat against another person, such as a gun or sword. *Id.* As an automobile is not commonly understood to be an instrument for combat against another person or commonly recognized as having the purpose of inflicting death and serious bodily injury, the First District's opinion below expressly and directly conflicts with this Court's decision in *Houck.* Accordingly, this Court should grant review on the basis of the certification of conflict, as well as the express and direct conflict which exists on this important issue.

ARGUMENT

I.

THE COURT SHOULD GRANT REVIEW BECAUSE THE FIRST DISTRICT CERTIFIED CONFLICT WITH THE SECOND DISTRICT IN *GONZALEZ*.

In *Gonzalez v. State,* 197 So.3d 84, 86 (Fla. 2d DCA 2016), the Second District held: "[a]s a matter of law, the automobile driven by Gonzalez was not a weapon under the general reclassification statute, § 775.087(1), and the second-degree manslaughter was improperly reclassified to a first-degree felony." In reaching its holding, the *Gonzalez* court relied upon this Court's opinion in *State v. Houck,* 652 So.2d 359 (Fla. 1995), which found that because the word "weapon" was not defined by statute, the term was subject to its common and ordinary meaning. *Id.* at 361. Relying on the *American Heritage College Dictionary,* this Court defined a weapon as: "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.* This Court concluded that the object alleged to constitute a "weapon" in the case, *to wit:* pavement, was "not commonly understood to be an instrument for combat against another person." *Id.* As a result, *Houck* affirmed the *en banc* opinion of the Fifth District finding that pavement could not be considered a "weapon" for purposes of reclassification under § 775.087(1), Fla. Stat.

Gonzalez also relied upon this Court's opinion in *State v. Burris,* 875 So.2d 408 (Fla. 2004), in concluding that an automobile cannot be considered a weapon for purposes of reclassification. *Gonzalez,* 197 So.3d at 85. In *Burris,* this Court addressed a related question as to whether one could "carry" an automobile as a "deadly weapon" under § 812.13(2)(a), Fla. Stat. (Florida's robbery statute), to provide for an enhanced sentence. *Burris,* 875 So.2d at 410. Specifically, the statute provided that: "if in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first-degree, punishable by [a maximum sentence of life in prison]...." Section 812.13(2)(a), Fla. Stat. As with "weapon," "carry" was not defined by the statute. *Burris,* 875 So.2d at 411. In *Burris*, this Court found that the Legislature's choice of the words "carried a firearm or other deadly weapon" under § 812.13(2)(a), Fla. Stat., logically indicated an intent focused on deterring robbers from bringing to a crime scene instruments designed for the purpose of inflicting injury or causing death. *Id.* at 412. Particularly, this Court noted:

> We recognized a similar intent in the general enactment statute. In *State v. Houck*, 652 So.2d 359 (Fla. 1995), this Court interpreted "weapon" in the context of section 775.087, Florida Statutes (1991), the general enactment statute. We stated that "[t]he obvious legislative intent . . . is to provide harsher punishment for and hopefully deter, those persons who use instruments commonly recognized

> as having the purpose to inflict death or serious bodily injury.

Id. at 412–413 (citation omitted). This Court went on to note: "[t]hough certainly capable of inflicting death or injury, as with the pavement in *Houck*, *the ordinary purpose of automobiles Is not as instruments of combat.*" *Id.* at 413 (emphasis added). Based upon the foregoing, the *Gonzalez* court held that: "[a]s a matter of law, the automobile driven by Gonzalez was not a weapon under the general reclassification statute, section 775.087(1), and the second-degree manslaughter was improperly reclassified to a first-degree felony." *Gonzalez,* 197 So.3d at 86.

The First District's decision below disagreed with the analysis of the Second District and this Court and adopted a "use" argument that would allow for reclassification, by defining a "weapon" as a "means used to defend against or defeat another." App. at 5, quoting *Houck,* 652 So.2d at 360. In so holding, it disagreed with the Second District's analysis, derived from *Houck* and *Burris,* that looked to the "commonly recognized purpose" of the object to determine whether it constitutes a weapon. App. at 6. Under the First District's analysis any object which could be used to defend against or defeat another would constitute a weapon so as to allow reclassification under § 775.087(1) Fla. Stat. In reaching its conclusion, the First District certified conflict with *Gonzalez.* App. at 7.

This is an important issue of law which recurs on a frequent basis throughout courts in the State. Just recently, the Fifth District weighed in, finding that a defendant convicted of manslaughter who used a automobile to commit the offense was properly subject to reclassification under § 775.087(1), Fla. Stat. *See Hurd v. State,* 42 Fla. L. Weekly D2293b, 2017 WL 4844904 (Fla. 5th DCA October 27, 2017). Accordingly, this Court should accept jurisdiction to review the decision below based upon the First District certifying a direct conflict with another district court of appeal. *See Mlinar v. United Parcel Service, Inc.,* 186 So.3d 997 (Fla. 2016); *Paul v. State,* 129 So.3d 1058 (Fla. 2013); *State v. Bowers,* 87 So.3d 704 (Fla. 2012).

II.

THE COURT SHOULD GRANT REVIEW TO RESOLVE THE FIRST DISTRICT'S EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S OPINION IN *HOUCK* REGARDING WHAT MAY BE CONSIDERED A "WEAPON" FOR PURPOSES OF RECLASSIFICATION.

The First District's decision below expressly and directly conflicts with this Court's decision in *Houck* regarding what may be considered a "weapon" for purposes of reclassification under § 775.087(1), Fla. Stat. In *Houck,* this Court approved the *en banc* decision of the Fifth District finding that pavement could not be considered a "weapon" for purposes of reclassification under § 775.087(1), Fla.

Stat. *Houck,* 652 So.2d at 360. As set forth *supra,* this Court resorted to the common and ordinary meaning of the word "weapon" in determining whether reclassification is permitted. *Id.* This Court agreed with the Fifth District's finding that: "[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, 184 (Fla. 5th DCA 1994)). This Court further found that: "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.*

The First District's decision below misapplied this Court's construction of what constitutes a "weapon" for purposes of reclassification under § 775.087(1), Fla. Stat. Rather than determining whether the object was commonly understood to be an instrument for combat against another person, the First District set forth an analysis that determines whether an object is a "weapon" based upon whether it is a "means used to defend against or defeat another." App. at 5. Such construction directly and expressly conflicts with this Court's decision in *Houck,* which instead focused on the commonly recognized purpose of the object.

Furthermore, the First District's construction of what constitutes a "weapon" completely disregards the rule of lenity, codified at § 775.021(1), Fla. Stat. *See Burris,* 875 So.2d at 415. As codified, the rule of lenity provides that criminal statutes: "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Section 775.021(1), Fla. Stat. As what may constitute a "weapon" is susceptible to different constructions, Shepard is entitled to a construction most favorable to him, which would exclude automobiles from the ambit of "weapons." *See Burris,* 875 So.2d at 415 (finding the rule of lenity supported in an interpretation of the statute that excluded automobiles as a "deadly weapon" that an offender may "carry"). As a result of the First District's express and direct conflict with and misapplication of this Court's decision in *Houck,* this Court should accept jurisdiction to review the decision below. *See Basulto v. Hialeah Automotive,* 141 So.3d 1145 (Fla. 2014); *Dorsey v. Reider,* 139 So.3d 860 (Fla. 2014); *Jaimes v. State,* 51 So.3d 445 (Fla. 2010); *Wallace v. Dean,* 3 So.3d 1035 (Fla. 2009).

CONCLUSION

For all the foregoing reasons, the Court should exercise its discretionary jurisdiction to review the merits of the issues on appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Robert J. Morris, III, Esquire** Assistant Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32322, by Electronic Mail, this 13th day of November, 2017.

ATTORNEY

CERTIFICATE OF COMPLIANCE

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

ATTORNEY

lr[shepard.adam.juris.brief]