**IN THE**
**SUPREME COURT OF FLORIDA**

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**CASE NO.: SC17-1952**

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**ADAM LLOYD SHEPARD,**

**Petitioner,**

**vs.**

**STATE OF FLORIDA,**

**Respondent.**

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

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# REPLY BRIEF OF PETITIONER

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## ARGUMENT

## I.

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

### A. The State's Strained Reading of *Houck* Contravenes this Court's Holding.

The State suggests that any object used to inflict harm may be considered a weapon under the reclassification statute so long as it is not a "passive object". (A.B. at 17). It advocates this reading by pointing to one passage of *Houck* that refers to concrete as a "passive object" and another passage where this Court forewarned the possibility of creative prosecutors using surfaces or water to justify reclassification of a conviction if the term "weapon" was read more broadly than its plain meaning. (A.B.at 15–16). The passages cited by the State, however, are not *Houck*'s holding. The holding of *Houck* is as follows:

> Thus, we approve the district court's decision that it is for the court to determine whether what is used in the commission of a felony is a weapon within the meaning of the statute. In making this decision, the trial court must use the common or ordinary meaning of the word. The word weapon is defined by American Heritage College Dictionary (3d ed. 1993), 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." A paved surface is

> not commonly understood to be an instrument for combat against another person.

*State v. Houck*, 652 So. 2d 359, 360 (Fla. 1995). Nothing in the holding asks courts to create an arbitrary distinction between "active" and "passive" objects. Quite the opposite, it asks courts to determine whether an object is a weapon by the term's plain meaning and the object's commonly recognized purpose.

The State's argument misconstrues the obvious legislative intent underpinning the reclassification statute. Its Answer Brief claims *Houck* said that "in enacting section 775.087 the legislature intended to provide harsher punishments for those who use instruments during the commission of a felony." (A.B. at 15). This paraphrasing of *Houck*'s finding suffers a pregnant omission. *Houck* did not find that the legislature wished to deter the use of "instruments" generally during a felony. Rather, the legislature's intent was to deter the use of "instruments *commonly recognized as having the purpose* to inflict death and serious bodily injury upon other persons." *Houck*, 652 So.2d at 359 (emphasis added). The fact *Houck*'s holding reiterated a paved surface "is not *commonly understood* to be an instrument for combat" further illustrates that the defining characteristic of a weapon is the object's commonly understood purpose, rather than merely its status as a mobile "instrument." *Id.* (emphasis added).

The State also misreads *Houck*'s application of the dictionary definition of "weapon." The State contends that Shepard's car was a weapon under the second definition, because the car was a "means used to defend against or defeat another." (A.B. at 17). This broad, nebulous definition is at odds with the State's prior contention that a weapon is defined by its mobility, since a passive surface could be "used" to defeat or defend against another. Arguably, the first definition's use of the word "instrument," better supports the State's passive-active dichotomy, but in order to make a consistent argument, the State would need to take the word "instrument" from the first definition while leaving behind that definition's limitation to objects that are like guns and swords.

The simpler, logically sound approach is not to treat these definitions as disjunctive, but to read the first definition as limiting the second. In other words, an object is a weapon if it is an instrument of attack or defense in combat, such as a gun or sword, that is used to defend against or defeat another. This appears to be the method that the *Houck* court used, since the second definition—read in isolation—would encompass *Houck's* pavement as much as it would Shepard's automobile.

The State's reading on *Houck* fixates narrowly on a single fact of that case without regard to the rule this Court fashioned and the reasons underlying it. Its reading asks this Court to ignore the obvious legislative intent underlying the

reclassification statute and surgically reconstruct the dictionary definition "weapon" into a form that is no longer recognizable.

### B. The State Ignores the Significance of *Burris's* Discussion of the Reclassification Statute.

The State further argues that *Burris* is inapplicable because that decision interpreted the armed robbery statute; specifically, a provision that only applies where a defendant "carries" a deadly weapon during the commission of a robbery. To be sure, *Burris*'s holding addressed a different statute that used different verbiage than the reclassification statute. However, *Burris's* relevance arises not because of its interpretation of the robbery statute, but because it compared the legislative intent underlying both the robbery and reclassification statutes.

The State claims that the "specific intent of the enhancement statute is different from the intent of the robbery statute. . ." (A.B. at 18). However, *Burris* held otherwise. *See State v. Burris*, 875 So.2d 408 (2004) ("like our reasoning in *Houck*, it is not clear that the Legislature's intent to deter the presence of firearms or other deadly weapons extends beyond those objects commonly recognized as weapons"). *Burris* found that, like the pavement used by the offender in *Houck*, an automobile is not commonly understood to be an instrument for combat against another person. *Id. Burris*'s reading of *Houck* and findings regarding the commonly

understood purpose of an automobile were not predicated on its analysis of the difference between "using" and "carrying" a deadly weapon found elsewhere in the opinion.[1] Therefore, the State's attempt to distinguish *Burris* from the instant case largely ignores its relevance in discussing what may be considered a weapon, separate and apart from the "using" / "carrying" analysis.

### C. The State Relies on Irrelevant Policy Arguments to Support Its Position While Ignoring the Legal Implications of Applying Its "As-Used" Standard to Shepard's Manslaughter Conviction.

The State contends that if this Court reaffirmed *Houck*'s commonly recognized purpose test, savvy criminals would opt to use kitchen knives, tire irons, and other everyday objects to commit their crimes and avoid reclassification. (A.B. at 20). Furthermore, the State laments that criminals who use their cars to strike people or police officers or terrorists who use cars "as a bomb or weapon of mass destruction" would escape enhanced punishment. (A.B. at 17). These arguments are not germane to the issue of statutory construction currently before this Court.

In construing a statute, a court is to "ascertain the meaning of the phrases and words used in a provision, not substitute [its] judgment for that of legislature."

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[1] In dismissing this discussion as dicta, the State also overlooks this discussion's relevance to Shepard's rule of lenity argument. (*See* Initial Brief at 24–27). To assert that the rule of lenity does not apply, the State must argue that this Court's discussion of the reclassification statute—in a unanimous opinion—was an unreasonable interpretation of that statute. *See Kasischke v. State,* 991 So.2d 803 (Fla. 2008).

*School Bd. of Palm Beach County v. Survivors Charter School, Inc.*, 3 So.3d 1220, 1228–29 (Fla. 2009). Further, "[t]he legislature is assumed to know the meaning of words in the statute and to have expressed its intent by the use of those words." *Overstreet v. State*, 629 So.2d 125, 126 (Fla. 1993). As *Houck* observed, if the legislature desires to provide for enhanced punishment for use of objects that are not commonly understood to be weapons, it is within the province of the legislature to provide such a definition. *Houck*, 652 So.2d at 360.

Additionally, the parade of horribles which the State posits is not realistic. First, violent crimes committed against law enforcement officers are subject to enhancement by virtue of § 775.0823, (Fla. Stat.). Second, if the State is referring to the terrorist act commonly referred to as "car bombing," its concerns are unfounded. This practice involves the use of a car as a delivery mechanism or booby trap for a conventional or improvised explosive device. GLOBAL SECURITY**,** *Vehicle-Borne IEDs* www.globalsecurity.org/military/intro/ied-vehicle.htm (last visited Apr. 8, 2018). Such a crime would be subject to reclassification under any definition of the statute due to the use of the underlying bomb. Third, crimes constituting terrorist acts are enhanced pursuant to § 775.30, (Fla. Stat.). Thus, adoption of the "as used" standard is not necessary for enhancement of crimes against law enforcement officers or committed by terrorists.

Furthermore, the "as used" standard urged by the State presupposes that a defendant intends to use a particular object as a weapon. Unlike traditional weapons, such as guns and knives where a court can infer the object's use was to cause harm by the nature of the object itself, such an inference is not so easily drawn for everyday objects. The jury's guilty verdict on the lesser-included offense of manslaughter rejected the State's argument that Shepard committed: (1) a premeditated killing of Schott (first degree murder) or (2) an unlawful killing of Schott by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life. [R. XVI, 2557, 2561]. In returning a guilty verdict on the lesser-included manslaughter count, the jury found that Shepard did not have the requisite intent to kill. Such a finding precludes Shepard having an intent to use his car as a weapon to inflict death. Therefore, even if the State's nebulous "use" standard applied, Shepard's conviction would not fall under it.

## II.

## SHEPARD'S VEHICLE WAS UNLAWFULLY SEIZED WITHOUT A WARRANT

### A. Shepard Did Not Abandon His Vehicle

Ordinarily, the burden is on the party seeking suppression to establish standing to assert a Fourth Amendment challenge. *See Rakas v. Illinois*, 439 U.S.

128, 131–132 (1978). Shepard's claim to standing here rests not on an expectation of privacy within his grandfather's Morton Building, but in the possessory interest he maintained in his vehicle stored therein. *See United States v. Delgado*, 903 F.2d 1495, 1502 (11th Cir. 1990) ("where defendant's possession was the object of the search, the defendant has standing to challenge the search even though he does not have an expectation of privacy in the premises searched."). The only argument offered by the State as to why *Delgado* does not apply is that Shepard abandoned his vehicle. (A.B. at 36). Contrary to its assertion otherwise, where abandonment is offered as the basis to contest standing, courts have generally held that it is the State's burden to prove that the Defendant relinquished his privacy interest in the items seized. *State v. Parker*, 399 So.2d 24, 30 (Fla. 3d DCA 1981); *O'Shaughnessy v. State*, 420 So.2d 377, 379 (Fla. 3d DCA 1982); *Freidman v. United States*, 347 F.2d 697 (8th Cir. 1965). Since the State's argument as to Shepard's lack of standing rests solely on his purported abandonment of the vehicle, the burden was on the State, and not Shepard, to come forward with evidence that the vehicle was abandoned.

The State, like the trial court's order, places undue emphasis on the fact that Shepard voluntarily relinquished his car to his mother for safekeeping. (A.B. at 30; R. II, 317]. The trial court specifically seized on the fact that Shepard "left behind"

the vehicle without indicating where he was going, how long he would be gone, or if he would ever return to reclaim the vehicle. *Id.* at 317–18. However, courts have made clear that abandonment in the constitutional context is not merely relinquishment of physical possession, but relinquishment of the defendant's expectation of privacy in the property. *See Kelly v. State*, 536 So.2d 1113, 1113 (Fla. 1st DCA 1988).

Framed in this way, there is no record evidence supporting the State's abandonment argument. Shepard's mother, Janet Shepard, testified that after Schott's death, Shepard brought the car to her home in Topeka, Kansas—a home where Shepard once resided. [R. XVIV, 3062–63, 3097]. Shepard, despite now living in Florida, visited his mother at the residence often. *Id.* at 3066. Janet Shepard did not remember the exact words but testified that there was a conversation where Shepard informed her that he would be returning to her residence for the vehicle. *Id.* at 3074.

Both the State and the trial court seize on Shepard's attempts to elude law enforcement as a basis to find that he abandoned his vehicle. The State contends this case is akin to *J.W. v. State*, 95 So.3d 372 (Fla. 3d DCA 2012), where the court held a defendant lacked standing the challenge the seizure of a pouch containing narcotics, where the defendant gave the pouch to an associate, who then placed it

underneath a house. *Id.* at 374. Notably, however, the court found that there was no evidence that the defendant was the actual owner of the pouch or that he gave the pouch to his associate for safekeeping or with directions to place the pouch in a specific location. *Id.* at 376, n.3 & 4.

The holding of *J.W.* rested on a lack of any evidence establishing a privacy interest that continued after the defendant relinquished physical possession of a pouch. Here, however, it is undisputed that Shepard was the owner of the car. Furthermore, Shepard's mother's testimony showed that Shepard had entrusted it to her for safekeeping and intended to return. The fact that Shepard had entrusted the vehicle to his mother while he was engaging in what the trial court found to be an attempt to evade law enforcement did not terminate his privacy interest in the vehicle itself.

To the contrary, ordering another person to hide or destroy evidence of a crime is "in essence the ultimate manifestation of privacy, not abandonment." *United States v. James*, 353 F.3d 606, 617 (8th Cir. 2003). In *James,* a defendant who was incarcerated and awaiting extradition to another state sent his friend a letter with discs that contained child pornography. *Id.* at 611. The defendant indicated that one of the discs had a virus on it and instructed the friend to be "sure to cut it up." The police later seized the discs with the consent of the defendant's friend. *Id.* At a

suppression hearing, the defendant argued that the discs were seized without a warrant or valid consent, while the government contended that the defendant had abandoned the discs. *Id.*

The Eighth Circuit held that a person does not abandon his property interest merely by giving it to someone else to store. *Id.* at 616. It noted that while a bailor does not retain physical possession of the object, they maintain title to that object and the right to instruct the bailee as to what to do with it, including returning it and destroying it. *Id.* Therefore, the court found that the plaintiff did not abandon his computer disks when he asked his friend to store them, nor did he abandon them when he gave the instruction to destroy them. *Id.*

Similarly, here, Shepard entrusting the vehicle to his mother and subsequent flight from the state does not suggest he intended to abandon his vehicle. Quite the opposite, it manifested Shepard's desire that the vehicle and its contents be kept out of reach from the law enforcement agents who were pursuing him. Therefore, it was improper for the trial court to conclude that Shepard abandoned his vehicle from these facts.

### B. Mr. Lyden Did Not Voluntarily Consent to the Search of the Morton Building and Seizure of Shepard's Vehicle.

As an initial matter, while Mr. Lyden owned the Morton building where the

car was stored, the officers could not have reasonably believed that Mr. Lyden had authority to consent to the seizure of Shepard's vehicle. As previously noted, Shepard's possessory interest in the vehicle is a distinguishable constitutional interest from the privacy interest in the Morton building where the vehicle was being stored. *See Delgado*, 903 F.2d at 1502; *James*, 353 F.3d at 614 (finding that to show validity of bailee's consent, the government was required to introduce evidence of authority beyond the mere act of storage). The evidence indisputably showed that Shepard was the owner of the car, not Mr. Lyden. [R. XVIV, 3011]. Since Shepard, the vehicle's owner, did not give his consent to seize the vehicle, the warrantless seizure was invalid regardless of the voluntariness of Mr. Lyden's consent.

Notwithstanding this fact, Mr. Lyden's consent was not voluntarily given. The State seizes on the fact that Mr. Lyden, through his attorney, reached an immunity agreement with the United States Marshals. (A.B. at 38–39). However, Deputy Viera's testimony at the suppression hearing was that this immunity agreement was regarding the *information* surrounding the location and the whereabouts of the car. [R. XVIV, 2979]. Following that meeting, Deputy Viera told Mr. Lyden, "obviously we're going to have to go over and take custody of that car at some point today." *Id.* at 3009. Nothing in the immunity agreement nor Mr. Lyden's words or actions following the meeting indicated that he had consented to the seizure of the vehicle.

Indeed, Mr. Lyden testified that he did not give such consent. [R. XVIV, 3035–3036].

The State also points to the fact that Mr. Lyden initially asked for his attorney when marshals arrived at his house on the day prior to seizing the car as evidence that Mr. Lyden's consent was voluntarily given. (A.B. at 40). However, the differences in Mr. Lyden's response on these two days are attributable to the difference in how the heavily armed law enforcement agents on each occasion approached Mr. Lyden.

On the day prior to the seizure, Deputy Viera testified that he informed Mr. Lyden that he "believed that Adam [Shepard] was there at the house, and I would like to search to look for him." [R. XVIV, 2993]. When Deputy Viera noticed that Janet Shepard was in the house, he similarly *asked* "could I speak to Ms. Janet Shepard." *Id.* at 2994. Unlike his prior efforts to gain consent, on the day of the seizure, Deputy Viera did not phrase his request in the form of a question or a request for permission. Instead, he merely told Mr. Lyden he was going to seize the vehicle. Mr. Lyden had no way of knowing that he had the choice to refuse consent or any reason to believe that the marshals would not forcibly seize the car if Mr. Lyden did not comply with their order.

Because Shepard did not abandon his privacy interest in the vehicle itself—and indeed manifested an intent to avoid having the vehicle seized by authorities—Mr. Lyden did not have authority to consent to the seizure of the vehicle. Even if he did, Mr. Lyden's consent was overborne by the show of force brought on by the marshals and Deputy Viera's statement to Mr. Lyden that did not leave him a choice but to comply with their orders. Therefore, the trial court erred in denying Shepard's motion to suppress the warrantless seizure of his vehicle.

## CONCLUSION

Considering the above, the district court erred in finding that Shepard's manslaughter conviction could be reclassified for the use of a weapon, when the "weapon" at issue was Shepard's automobile. In *Houck*, this Court found that whether an object is a weapon is determined by looking to the object's commonly recognized purpose. As this Court found in *Burris*, while certainly capable of doing so, an automobile does not have the commonly recognized purpose of causing harm. The State's urged interpretation of the reclassification statute is contrary to the reasoning of *Houck* and would ask courts to draw arbitrary distinctions between passive and active objects.

Furthermore, the district court erred in affirming the trial court's denial of Shepard's motion to suppress the warrantless seizure of his vehicle. Both the district

court and the State place undue emphasis upon Shepard's relinquishment of his physical possession in the vehicle without considering the continuing privacy interest maintained by Shepard in the car itself. The State failed to show Shepard relinquished such interest. Furthermore, as a mere bailee, Shepard's grandfather did not have actual or apparent authority to consent to the seizure of his vehicle. Even if he did, such consent was not give voluntarily given the show of force and statements by the marshals that "obviously" they were going to have to take the car. For all the foregoing reasons, the decision of the First District Court of Appeal should be reversed.

Respectfully submitted,

*/s/ Matthew R. Kachergus*

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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 12th day of April, 2018.

*/s/ Matthew R. Kachergus*
ATTORNEY

## CERTIFICATE OF COMPLIANCE

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

*/s/ Matthew R. Kachergus*
ATTORNEY