

PROVIDED TO HAMILTON C.I. ON

~~IN THE SUPREME COURT OF FLORIDA~~ - STATE OF FLORIDA

6-25-13

SAMUEL LEE GREEN II,  
(Petitioner/Petitioner)

v.

L.T. CASE NO: 2004CF-004392-01 XX

DCA CASE NO: 2D13-377

SUPREME COURT CASE NO: SC 13-1375

STATE OF FLORIDA,  
10<sup>th</sup> JUDICIAL CIRCUIT COURT  
SECOND DISTRICT COURT OF APPEAL

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF  
APPEAL, SECOND DISTRICT STATE OF FLORIDA

SAMUEL LEE GREEN II, Pro Se  
Hamilton Correctional Inst. - Annex  
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Jasper, Florida 32052-3735

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### STATEMENT OF CASE AND FACTS

On December 19, 2012, the 10<sup>th</sup> Judicial Court denied Petitioner his fundamental due process right to be resentenced to a second degree sentencing guise that is clearly established within the construction of Florida State Provision Laws of 812.13(2)(c) and 775.087(1) for Petitioner's charged and convicted offense of "Robbery with a Firearm". Where the jury found that Petitioner did not carry a firearm during the robbery. (See Exhibit A page 44 Appendix attached)

On December 5, 2012, Petitioner petitioned the 10<sup>th</sup> Judicial Court pro se by way of 3.800(a) Illegal Sentence Petition to correct his illegal life sentence. (See Exhibit A pgs. 13-42 Appendix attached)

Petitioner laid facts to the Circuit Court that in: In Criminal Case # CF04-004392-XX Green is charged by information with "Robbery with a Firearm". Where it was alleged that Green did carry the firearm to-wit: Commit a robbery in violations of Florida Statutes 812.13 and 775.087. (See Exhibit A page 30 Appendix attached)

The jury rendered a verdict that Green is guilty of "Robbery with a Firearm" and further found that during the course of the robbery Petitioner did not carry a firearm. (See Exhibit A page 37 Appendix attached)

Petitioner also laid facts that the Court, not the jury adjudicated Petitioner guilty as a principle to the crime. (See Exhibit A pgs 40-42 Appendix attached)

Petitioner clearly explained to the Circuit Court that his sentence has been illegally reclassified to a life sentence and it is illegal, as defined in Petitioner's charges as to Florida Robbery Section 812.13(2)(c) which mandates:

**“If in the course of committing the robbery the offender carried no firearm then the robbery is a felony of the second degree punishable as provided in 775.082, 775.083 or 775.084.” (See Exhibit A page 70 Appendix attached)**

And the Circuit Court did not apply the settled law rules correctly as constructed in Greens 10-20-Life charge of Florida Statute 775.087(1), which mandates:

**“That a second degree felony be reclassified as a first degree felony punishable by life when: [During commission of such felony the defendant carries, displays, uses, threatens to use or attempts to use any weapons or firearms...” (See Exhibit A page 71-72 Appendix attached)**

Because the jury determined an actual finding that Petitioner did not possess or carry the firearm during the robbery. (See Exhibit A page 37 Appendix attached)

Petitioner explained that even though he was determined guilty as a principle to the Robbery with a Firearm as a co-perpetrator, it is well established law by our Florida Supreme Court opinion in State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992) expressing that:

**“The Supreme Court explicitly rejected the idea that a defendant could be subject to reclassification under subsection 775.087 as a principle as the Florida Supreme Court rejected the State’s contention that Rodriguez’s sentence should be based on the conduct of the co-defendant.” (See Exhibit A page 79 Appendix attached)**

Also Petitioner laid facts that relevant established law in the case of Juarez v. State, 65 So. 3d 110 (4<sup>th</sup> DCA 2011) concluded recent established law based on (Rodriguez, supra) that:

**“When a defendant is charged with a felony involving the use of a firearm, a defendant’s sentence can not be enhanced under subsection 775.087, without evidence**



**establishing that defendant had personal possession of the weapon or firearm during commission of a felony.” (See Exhibit A page 77 Appendix attached)**

Petitioner displayed rule to show the Court that on the face of the record Petitioner had been given a 1<sup>st</sup> degree life sentence reclassification that is unauthorized by the construction intent of established law because Petitioner was charged under 812.13 and 775.087 and no firearm was found to be carried by Petitioner and designation as a principle participate is not an excuse for reclassification to a life sentence. (See Exhibit A pgs 13-42 Appendix attached)

Petitioner’s petition and rehearing was denied by the Circuit Court with a “Rubber Stamp” signature on December 19, 2012 and January 15, 2013 as Petitioner thus petitioned the Circuit Court on January 3, 2013, where the lower court failed to apply the essential construction of law in conformity to Petitioner’s claim again in rehearing efforts to correct the fundamental error of the Circuit Court. (See Exhibit A page 44 and page 89 Appendix attached). Petitioner petitioned the Second District Court for appeal on two issues and one certified question in DCA Case No. 2D13-377. (See Exhibit A pages A1-102 Appendix attached). Where Issue One of the appeal was:

**“Whether Circuit Court departed from clear established principle of law by not correcting Green’s illegal sentence reclassification which is now a manifest injustice and has violated Green’s due process rights to equal protection of the law.” (See Exhibit A page A9-A21 Appendix attached)**

And Issue Two of the appeal was:

**“Whether the Circuit Court afforded proper signed denial orders.” (See Exhibit A pages A22-A23 Appendix attached)**

And the proposed question to the District Court asked to be certified was:

**“Can persons charged with robbery with a firearm under Florida Statute 812.13 and 775.087 who are found guilty of that charge of robbery with a firearm as a principle, but who does not actually posses the weapon be reclassified on their sentencing portion from a second degree sentencing to a first degree sentencing due to a co-perpetrator’s possession of the weapon?” (See Exhibit A page A19 Appendix attached)**

On May 22, 2013, the Second District Court denied Petitioner’s appeal by way of opinioned cited case authority. (See Exhibit B page 104 Appendix attached)

On June 6, 2013, approximately 15 days from date of denial Petitioner submitted his Certification of a Written Opinion Motion (Seeking an express written opinion to explain the conflicting Florida Supreme Court case cite denial) (See Exhibit C page 106 Appendix attached)

On June 6, 2013, approximately 15 days from date of denial Petitioner submitted his Clarification Motion. (Seeking clarification of the conflicting case denial cite of the District Court) (See Exhibit D page 110 Appendix attached)

On June 6, 2013, approximately 15 days from date of denial Petitioner submitted his Rehearing Motion. (Alerting District Court of the conflict of the denial cited case authority of the Florida Supreme Court) (See Exhibit E page 122 Appendix attached)

On June 7, 2013, Petitioner submitted his Motion to Stay of Mandate, where the timely filed Rehearing, Clarification, and Certification motions should have tolled the issuance of a mandate until further review and decision of the motions which would have been a timely filling for Motion to Stay. (See Exhibit F page 148 Appendix attached)

On June 7, 2013, the Second District Court issued a mandate that was premature because the Second District did not receive the timely filed Motion for Rehearing to toll the rehearing time. (See Exhibit G page 152 Appendix attached)

As such on June 14, 2013, Petitioner filed his "Motion to Recall or Withdraw Mandate". Explaining to the Court that the mandate was issued prematurely because Petitioner did file his rehearing motions timely but they were not received by the Clerk on the 7<sup>th</sup> day of June. (See Exhibit H page 154 Appendix attached)

On June 21, 2013, Petitioner filed his "Notice to Invoke Discretionary Review" to the Second District Court of Appeal. (See Exhibit I page 206 Appendix attached)

Lastly, in compliance to the rule Petitioner files his "Jurisdictional Brief" to the Supreme Court within 10 days after filing his Notice to Invoke Jurisdiction, despite receiving any rulings on his previous filed motions in order to secure his right to timely filings in case the District Court does not comply with the Rehearing Motions, Motion to Recall or Withdraw Mandate, etc.

### **SUMMARY OF THE ARGUMENT**

The 10<sup>th</sup> Judicial Court and Second District Court of Appeal are relying on a "Principle Theory" of guilt to justify the illegal reclassification and enhancement of Petitioner's sentence from what should be a second degree sentencing to a first degree life sentence where Petitioner was charged with Florida Statute 775.087 in a felony involving the use of a firearm and Petitioner's evidence at trial coupled with the jury's special finding that Petitioner did not carry the firearm during the overt act involving a co-defendant that did carry the firearm.

The Second District Court's opinioned denial case cite reasoning to the (1971) Florida Supreme Court case of Roby v. State, 246 So. 2d 566, establishing a point of law that a person can be found guilty of a crime as a principle where the evidence at trial establishing such is contrary to and in conflict with Petitioner's standing argument support case cite to Florida Supreme Court case of Rodriguez v. State, 602 So. 2d 270 (Fla. 1992), where the Florida Supreme Court rejects the idea that a persons sentence can be enhanced or reclassified during an overt act in a crime involving the use of a firearm, despite that person being adjudicated guilty as a principle.

### **JURISDICTIONAL STATEMENTS**

The Florida Supreme Court has a lawful basis for asserting discretionary jurisdiction to review a decision of a District Court of Appeals that expressly and directly conflicts with another decision. The District Court decision under review must contain a citation effectively establishing a point of law upon which decision rests. Fla. R. App. P. 9.030; 9.100; 9.120; Fla. Const. Article I Section 2; Article I Section 9; Article V § 3(b)(3) and United States Constitutional Amendment 1, 5, and 14.

### **ARGUMENT**

**"The decision of the District Court of Appeal cited in this case expressly and directly conflicts with the decision of this Court (Florida Supreme Court) in Rodriguez v. State, 602 So. 2d 270 (Fla. 1992)."**

On May 22, 2013, the Second District Court of Appeal cited to the (1971) Florida Supreme Court case of Roby v. State, 246 So. 2d 566, which was used as the District Court's response opinion denial citation bases in DCA Case No. 2D13-377. (See Exhibit B page 104 Appendix attached)

The Florida Supreme Court holding in (Roby, supra) is contrary to and in conflict with the Florida Supreme Court case of Rodriguez v. State, 602 So. 2d 1270 (Fla. 1992), because in (Roby, supra) the high court seemingly established a point of law that:

**"A person can be found guilty of a crime as a principle where the evidence at trial establishes such." (See Exhibit J pages 226-229 Appendix attached)**

The Florida Supreme Court holding on this point of law is contrary to and conflicts with the established holding on a point of law in (Rodriguez, supra) that:

**"The Florida Supreme Court rejects the idea that a persons sentence can be enhanced or reclassified during an overt act in a crime involving the use of a firearm, despite that person being adjudicated guilty as a principle." (See Exhibit A page 79 Appendix attached)**

As these are two rulings of the Florida Supreme Court, a conflict has been created because the state courts are repeatedly enhancing and reclassifying persons sentences to 1<sup>st</sup> (first) degree punishment sentences based on "Principle Theories" disregarding persons found guilty of crimes involving the use of firearms and those persons found not to have actually possess the firearm but a co-perpetrator did posses the firearm during the overt act.

Directly departing from the established principle points of law in (Rodriguez, supra) because in (Rodriguez, supra) it was established that:

**"Section 775.087(1) does not by its terms allow for vicarious enhancement because of the action of a co-defendant because without evidence establishing that a defendant having personal possession of the weapon during commission of the felony." (See Exhibit A page 79 Appendix attached)**

The Second District Court's reliance on (Roby, supra) was a case opinion of law decided in (1971). (Rodriguez, supra) was a case opinion of law decided in (1992). If the Florida Supreme Court is saying that a person charged with 775.087 has to be sentenced to a 1<sup>st</sup> degree sentence for not having a firearm because his co-defendant had a firearm and just because the law of "Principles" as disguised in the case of (Roby, supra) dictates that persons must receive the same sentence as his co-defendant no matter who actually possessed the firearm or not, directly conflicts and is contrary to the established law of (Rodriguez, supra).

Petitioner's charge is a similar image of (Rodriguez, supra) only that Petitioner was charged with Robbery with a Firearm and Rodriguez was charged with Attempted First Degree Murder. Both felonies of which involve the use of a firearm. Both felonies charged Florida Statute 775.087. Both felonies involved a co-defendant actually possessing the firearm and Petitioner's and Rodriguez's evidence established that they did not carry the firearm. Both felonies revolve on the State Prosecutor relying on the "Principle Theory" of guilt as an excuse to sentence Petitioner to a 1<sup>st</sup> degree sentence, when Petitioner could not receive no more than a 15 year mandatory sentence under P.R.R., just as Rodriguez.

Due to Petitioner's unusual circumstances this case warrants the Florida Supreme Court to exercise its discretion to accept the case for review where there is a need for clarification between the established law of (Rodriguez, supra) and (Roby, supra) concerning sentencing persons who do not actually possess the firearm but the co-perpetrator (co-defendant) does. Additionally, where the person is charged with 775.087

due process would require this application of clarification to be resolved despite Petitioner's sentence being final because there is a great public importance urging uniformity to construe the two opinioned holdings by the Florida Supreme Court, where Petitioner is being prejudicially harmed by the District Court's reliance on cited Florida Supreme Court authority holding that is contrary to (Rodriguez, supra). Therefore, resulting in a complete manifest injustice and denial of Petitioner's protected guarantee due process rights to equal protection of the law and to be treated alike.

Petitioner asks in good faith and prayerfully that this Court (Florida Supreme Court) quash the contrary decision of the Second District Court below of the 21 year old cited case holding of (Roby, supra) and reaffirm the correct interpretation of the law as opinioned in (Rodriguez, supra) pertaining to sentencing person in Robbery with a Firearm cases as this Court correctly interpreted in (1992). Also, asking in good faith this Court deem any justice to Petitioner's situation that this Court sees that has not been corrected as Petitioner has no other available remedies or Court to petition his illegal injustice concerning violation of his Constitutional rights to the U.S. Const. 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendment and also Fla. Const. I, 2; I, 9.

### **CONCLUSION**

To prevent a manifest injustice this Court has discretionary jurisdiction to review the decision below due to the Second District Court's opinioned case cite denial being in conflict and total contrary in holdings of the Florida Supreme Court law, as the merits of Petitioner's argument is that of a Constitutional violation that is highly affected by the Florida Supreme Court's two contrary rulings. Also, Petitioner is seeking relief for this

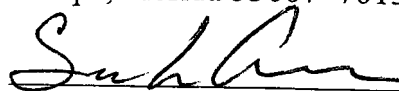
Court to certify by law on a question passed by the Second District Court to be of great public importance of how persons with Robbery with a Firearm cases involving co-defendants who possess the firearm and are charged with 775.087 are to be sentenced?

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this brief has been furnished to:

Florida Supreme Court  
500 South Duval Street  
Tallahassee, Florida 32399-1925

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013



Samuel Lee Green, DC # 370562

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Done and Ordered on JUNE Month of \_\_\_\_ Day of 2013.

**UNNOTARIZED OATH**

Under penalties of perjury I declare that I have read the foregoing Jurisdictional Brief and the facts stated in it are true and correct.



Samuel Lee Green, DC # 370562

Pro Se



IN THE SUPREME COURT OF FLORIDA – STATE OF FLORIDA

SAMUEL LEE GREEN II,  
(Appellant/Petitioner)

v.

L.T. CASE NO: 2004CF-004392-01 XX  
DCA CASE NO: 2D13-377  
SUPREME COURT CASE NO: SC13-1375

STATE OF FLORIDA,  
10<sup>th</sup> JUDICIAL CIRCUIT COURT  
SECOND DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

EXHIBIT

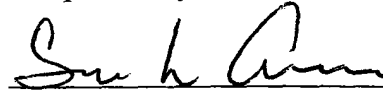
- A. Petitioner's 3.800(a) Illegal Sentence Brief filed to the Second District Court/Petitioner's Rehearing Motion filed to the 10<sup>th</sup> Judicial Court/Petitioner's 3.800(a) Illegal Sentence Petition filed to the 10<sup>th</sup> Judicial Court (All with Exhibits).....pgs. A1-102
- B. Petitioner's Denial Order with cited authority from Second District Court of 3.800(a) appeal.....pgs. 103-104
- C. Petitioner's Certification of a Written Opinion filed to the Second District Court.....pgs. 105-108
- D. Petitioner's Clarification Motion filed to the Second District Court.....pgs. 109-120
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Respectfully Submitted,



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# **EXHIBIT A**

## **Jurisdictional Brief**

PROVIDED TO HAMILTON C.I. ON

February 12<sup>th</sup> 2013 FOR MAILING

*Green*

IN THE DISTRICT COURT OF APPEAL  
—SECOND DISTRICT COURT—  
LAKELAND, FLORIDA

SAMUEL LEE GREEN II  
(Plaintiff)

v.

CASE NO: 2D13-77

L.T. CASE NO: CF04-004392-XX

STATE OF FLORIDA  
(Respondent)

\_\_\_\_\_ /

APPELLANT'S 3.800(A) BRIEF

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ON APPEAL FROM THE CIRCUIT COURT OF THE 10<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND OR POLK COUNTY, FLORIDA

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Samuel Lee Green  
Pro Se

A1 .

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### PRELIMINARY STATEMENT

In this brief the Appellant, Samuel Lee Green, will be referred to by name "Green" or as the Appellant. The Appellee will be referred to as the Circuit Court, or lower court, citations to the attached appendix or exhibits will be made by alphabetical order.

### SUMMARY OF THE CASE

As Green was charged with violation of Florida Statute 775.087 for an alleged crime of Robbery with a Firearm, a jury court found Green guilty of Robbery with a Firearm and during the course of committing the robbery the jury determined no firearm was carried by Green. Green was given a mandatory life sentence where the circuit court determined Green did not possess the firearm but that Green was guilty as a principle participate in the crime.

Through Green petitioning the circuit court by 3.800(a) of injury, expressing that Green were to receive no more than a second degree sentencing, the circuit court refused to apply the essential requirements of established law to said denial as the circuit court allowed the State Prosecutor to maliciously fabricate to the sentencing court that in the indictment Green wasn't charged with 775.087 and that Green wasn't carrying the firearm, which is all being put before this competent court seeking extraordinary relief to correct a clear manifest injustice.



### PROCEDURAL HISTORY FACTS

On December 19<sup>th</sup>, 2012, the 10<sup>th</sup> Judicial Court denied Green his fundamental due process rights to be resentenced to a second degree sentencing guise that is clearly established within the construction of Florida State provision laws of 812.13 (2)(c) and 775.087(1) for Green's charged and convicted offense of "Robbery with a Firearm". Where the jury found that Green did not carry a firearm during the robbery as the court decided Green guilty as a principle participate thereof, thereby this lower court violating essential established principle construction of Florida law.

On December 5<sup>th</sup>, 2012, Green petitioned the 10<sup>th</sup> Judicial Court Pro Se by way of 3.800(A) Illegal Sentence Petition to Correct His Illegal Life Sentence. (See Exhibit (A) pg. 13-42, Appendix Attached)

Green laid facts to the circuit court that in; in criminal case # CF04-004392-XX Green is charged by indictment with "Robbery with a Firearm". Where it was alleged that Green did carry a firearm to-witt: commit a robbery in violations of Florida Statutes 812.13 and 775.087. (See Exhibit (A) pg. 30 Appendix Attached).

Green clearly laid facts to the circuit court that the jury rendered a verdict that Green is guilty of "Robbery with a Firearm" and further found that during the course for the robbery Green did not carry a firearm. (See Exhibit (A) pg. 30 Appendix Attached).

Green also laid facts that the court, not the jury adjudicated Green guilty as a principle to the crime. (See Exhibit (A) pg. 39-42 Appendix Attached).

Within Green's 3.800(A) Petition Green clearly explained to the circuit court that his sentence has been illegally reclassified to a life sentence and it is illegal because the circuit court did not follow the correct application of the settled principle construction of established Florida law with what Green was charged with, as defined in Green's charges as to Florida Robbery Section 812.13 (2)(c) which mandates....

"If in the course of committing the robbery the offender carried no firearm then the robbery is a felony of the second degree punishable as provided in 775.082, 775.083 or 775.084".

(See Exhibit Rule (B) pg. 69-70 Appendix Attached)

And the circuit court did not apply the settled law rules correctly as constructed in Greens 10-20-Life charge of Florida Statute 775.087(1) which mandates....

**"That a second degree felony be reclassified as a first degree felony punishable by life when: [During commission of such felony the Defendant carries, display, uses, threatens to use or attempts to use any weapons or firearms...." (See Exhibit Rule (C) pg. 72-73 Appendix Attached)**

Because the jury determined an actual finding that Green did not possess or carry the firearm during the robbery. (See Exhibit (A) pg. 45 Appendix Attached).

Green then explained to the circuit court that even though Green was determined guilty as a principle to the Robbery with a Firearm as a co-perpetrator, it is well established law by our Florida Supreme Court opinion in State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992) expressing that....

**"The Supreme Court explicitly rejected the idea that a Defendant could be subject to reclassification under subsection 775.087 as a principle as the Supreme Court rejected the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant."**

**(See Exhibit Rule (F) pg. 75 Appendix Attached)**

Also Green laid facts that relevant established law in the case of Juarez v. State, 65 So. 2d 110 (4<sup>th</sup> DCA 2011) concluded recent established law that....

**"When a Defendant is charged with a felony involving the use of a firearm, a Defendant's sentence can not be enhanced under subsection 775.087, without evidence establishing that Defendant had personal possession of the weapon or firearm during commission of a felony."**

**(See Exhibit Rule (E) pg. 77 Appendix Attached)**

Green displayed to the circuit court in his 3.800(A) Petition recent established controlling precedents of law and principle rule to show the Court that on the face of the record Green had been given a 1<sup>st</sup> degree life sentence reclassification that is unauthorized by the construction intent of established law because Green was charged under 812.13 and 775.087 and no firearm was found to be carried by Green, as Green being designated as a principle participate does not

authorize the 1<sup>st</sup> degree life sentencing because the Florida Supreme Court ruled the principle is not an excuse for reclassification to a life sentence.

Green's Petition was denied by the circuit court with a "rubber stamp" signature on December 19<sup>th</sup> 2012 and Green thus petitioned the lower court again by Motion of Rehearing filed on January 3<sup>rd</sup> 2013, where the lower court failed to apply the essential construction of law in conformity to Green's claim again in efforts to correct the fundamental error of the circuit court, the Rehearing Petition was subsequently denied by another "rubber stamp" denial on January 15<sup>th</sup> 2013 on thereby Green thus petitioned the Second District for this enclosed appeal. (See Exhibit (A) pgs 1-68 appendix attached) (See Exhibit (J) pg. 90 appendix attached)

## **COMPLAINT/ARGUMENT**

### **ISSUE I**

#### **WHETHER CIRCUIT COURT DEPARTED FROM CLEAR ESTABLISHED PRINCIPLE OF LAW BY NOT CORRECTING GREEN'S ILLEGAL SENTENCE RECLASSIFICATION WHICH IS NOW A MANIFEST INJUSTICE AND HAS VIOLATED GREEN'S DUE PROCESS RIGHTS TO EQUAL PROTECTION OF THE LAW**

On December 19<sup>th</sup>, 2012 the Circuit Court refused to apply Green's clear colorful display of the Florida rule provisions and codes of essential principles & requirements of established state law in conformity to Green's 3.800(a) petition

claim of illegal sentence where the Circuit Court stated in a denial order of Green's claim that

**"Defendant claim that his life sentence is illegal as the jury found him guilty of robbery with a firearm but determined that the Defendant did not carry the firearm. The record indicates that the principle instruction was read to the jury. The jury determined that a robbery with a firearm occurred. That the Defendant was a principle. A similar claim was previously raised in a Rule 3.850 motion. The Court denied that claim in an order dated December 11, 2008. The Second District Court affirmed and issued a mandate on January 26<sup>th</sup>, 2012"**

**(See Exhibit (A) pg. 44 attached)**

The denial of Circuit Court above did not reply per Florida Statutory Law Rule. Where answer departed from guideline procedure of State Law Rule 812.13 and 775.087(1) the Circuit Court misconstrued legislatures construction intent of the robbery statute of 812.13 with which Green was charged of as the charge of "robbery with a firearm is actually an aggravating enhancement" within 812.13 and a reclassified 1<sup>st</sup> degree, other than second degree felony of robbery.

When necessary the plain and ordinary meaning of words [in a statute] can be ascertained by reference to a dictionary (Segrave v. State, 802 So.2d 281, 286 (Fla. 2001))

**Blacks Law Dictionary (1999) defines sentence as:**

**Enhancement – The act of augmenting > the state of being enhanced < the use of a deadly weapon led to an enhancement of the sentence. >**

The Circuit Court also departed from essential law principle where lower court failed to acknowledge that a special verdict form or actual firearm finding on a jury verdict form sheet in a felony case is only made for sentencing purposes.

**Blacks Law Dictionary (1999) defines sentence as:**

**Sentence – the judgement that a Court formally pronounces after a finding a Defendant guilty; the punishment imposed on a criminal wrongdoer <a sentence of 20 years in prison> sentence Ub**

Circuit Court's departure is shown from facts of the record as applied to the construction of statutory law rule that once the jury makes the actual finding that Green did not carry a firearm during the armed robbery, automatically classified Green for "sentencing" purposes under 812.13 2(c) "Second Degree Felony" punishment. Where as defined by law the specific intent of legislature construed the language in 812.13 2(c) robbery statute as:

**"If in the course of committing the robbery the offender carried no firearm, deadly weapon or other weapon then the robbery is a felony of the second degree, punishable as provided in 775.082, s. 775.083, or 775.084"**  
**(See Exhibit (B) pg 70 appendix attached)**

Blacks Law Dictionary (1999) defines the word punishable as:

**Punishable adj. 1. (of a person) subject to a punishment < there is no dispute that Jackson remains punishable for these offense > 2. (of a crime or tort) giving rise to a specified punishment < a felony punishable by imprisonment for up to 20 years.**

**Punishment a. sanction – such as fine, penalty, confinement or loss of property right, or privilege – assessed against a person who has violated the law. (the object of a sentence is to impose a punishment)**

The Circuit Court declared Green guilty as the principle participate in the crime and the Circuit Court convicted Green as to guilty of “robbery with a firearm as a principle”. As seen in the denial response. This is what the Circuit Courts base stance was below for not correcting the error.....

**“The record indicates that the principle instruction was read to the jury and the jury determined that the Defendant did not actually carry a firearm but that the Defendant was a principle” (See Exhibit (A) pg. 44 appendix attached)**

As seen above the Circuit Court’s response does not refute or reply on basis of per Florida statutory law rule to deny Green’s claim, where such denial is contrary to established law principle of Florida statute 812.13 2(c), Green clearly shows that yes he could be convicted as a principle to the robbery if that is what the court elect, however, as clearly established Florida statutory law provides in 812.13 2(c), the Circuit Court can not choose to “enhance” or “reclassify” Green’s [punishment] to the [sentence] over or outside of the prescribed 812.13 2(c) substance or legislative intent of a second degree felony [punishment] when the firearm was not carried by Green (refer to definitions). Where Green believes the Circuit Court errored by not applying established law of correcting Green’s sentence is that the Court did not construe the fundamental application of the States

substance specific language intent correctly with what Green was charged, found guilty of and then sentenced to. The Circuit Court is in mistaken belief that just because a Defendant is convicted as a unarmed principle participate to a felony, that a Defendant, for sentencing purposes must be punished to being enhanced or reclassified to a 1<sup>st</sup> degree sentence enhancement or 1<sup>st</sup> degree reclassification because of what a armed co-defendant may receive. This misapplication of the law is in clear contradiction to the essential principle language intent of Florida Statute 812.13 2(c) (*see State v. Sousa*, 903 So.2d 923, 928 (Fla. 2005)) (explains that the fundamental rule of construction in determining legislative intent is to first give effect to plain and ordinary meaning of the language used by the legislature.)

Furthermore the Circuit Court rest is stance on, "**Green being found guilty as a principle to the robbery with a firearm and finding Green possessed no firearm, thus showing Green's sentence to be legal**", is a statement clearly contrary to established settled law principle of our Florida Supreme Courts focused opinioned polestar guide in *Rodriguez v. State*, 602 So.2d 1270 (Fla. 1992). Where Appellant concedes that his charge is not that of an attempt murder as *Rodriguez* 602 So.2d 1270 (Fla. 1992), however the law is well settled in the landmark case that where *Rodriguez* was found guilty to a felony charge as a unarmed second degree principle participate with a co-defendant and charged in his indictment



under 775.087, a question was raised to our Florida Supreme Court where the law was not clear as to.....

**“Does the enhancement provision of subsection 775.087(1) Florida statues (1983) extend to persons who do not actually posses the weapon but who commit an overt act in the furtherance of its use by perpetrator?”**

Our Florida Supreme Court answer in the negative and settled the law to be applied as defined by express language that...

**“Section 775.087 does not by its terms allow vicarious “enhancement” because of the action of a co-defendant”  
(See Exhibit (F) pg. 78-79 attached)**

The Circuit Court did not apply the relevant record facts of Green’s claim in conformity to the established principle of law in the case of Rodriguez in which Rodriquez construction of the law intent applies in Green’s situation that the Circuit did not focus on. Regardless of what felony Green was charged with the facts show he was charged with a felony of 812.13 and 775.087 which involved the use of a firearm and that felony of 812.13 contained listed degree sentencing variables, precluding that a robbery charge can be reclassified or enhanced from second degree, to 1<sup>st</sup> degree, to life, pertaining to sentencing purposes. (See Exhibit (A) pg. 1-42 appendix attached)

**Blacks Law Dictionary 456 (8<sup>th</sup> Edition Ct 2004)**

**The term “degree” has a plain meaning in this context “a level based on the seriousness of an offense.”**

The Circuit Courts denial is silent to the record facts that clearly shows that Green was charged with 775.087, despite what the State Prosecutor maliciously perpetrated to the Court that Green wasn't charged with 775.087. Green also was charged as carrying the firearm during the robbery in his indictment which amounts to a felony involving the use of a firearm, just as described in (Rodriguez supra) (refer to Exhibit (A) pg 30 attached) and (Exhibit (F) pg 79 attached) Green was determined as a principle participate in his crime, just as (Rodriguez, supra) (refer to Exhibit (A) pg 40-42 attached) Green was determined not to have carried a firearm during the course of the crime, just as (Rodriguez, supra) (refer to Exhibit (A) pg 37 attached). Green's sentence was reclassified to a 1<sup>st</sup> degree life sentence, which by statute should have been a second degree sentencing, just as (Rodriguez, supra). As the Circuit Court totally failed to apply the principles of opined settled law of Florida Supreme Court Rule in (Rodriguez, supra) the denial answer clearly shows Green was not afforded his due process rights to equal protection of the law to be granted relief, just as (Rodriguez, supra).

The Circuit Court employed the wrong application of the law as the Supreme Court of Florida clearly constructed the language of the law to be applied by the inferior courts in Green's situations as....

**"When a Defendant is charged with a felony involving the use of a weapon his or her sentence can not be enhanced under subsection 775.087(1) without evidence establishing that the Defendant has personal possession of the weapon during**

commission of a felony.”

The Circuit Court’s reply answer failed to apply and define the law with specifics to Green’s case where our Florida Supreme Court’s mandate above which is still settled, current, recent law principle standing today as cited in Juarez v. State, 65 So.3d 110 (Fla. 4<sup>th</sup> DCA 2011), which shows the Supreme Court focused on the language of 775.087(1), which requires that a Defendant “carry” display, use, threaten, or attempt to use any weapon or firearm. Apparently applying the rule of lenity the Court still holds that although subsection 775.087 was substantially amended in 1999, the language of subsection (1) has not changed since the Florida Supreme Court construed it in (Rodriguez, supra).

It is clear that where Legislature has defined a crime in specific terms, the Court is without authority to define it differently. (See Jackson v. State, 526 So.2d 58, 59 (Fla. 1988)); citing State v. Graydon, 506 So.2d 393 (Fla. 1982). Criminal statutes should be construed liberally in favor of people charged with a crime. Application of the rule of lenity as codified by the Florida Legislature in § 775.021 Fla. Statute 2004 means that if there is a reasonable construction of the penal statute favorable to accused, the Court must employ that construction (See Wallace v. State, 860 So.2d , 494 (Fla. 4<sup>th</sup> DCA 2003); Thomas v. State, 741 So.2d 1246 (Fla. 2<sup>nd</sup> DCA 1988). More specifically § 775.021 Fla. Stat. 2004 is worded as follows:

### 775.021 Lenity

(1) 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 favorable to the accused.

Courts must resolve doubts in favor of lenity toward the accused. (Carwan v. State, 515 So.2d at 165; Rife v. State, 446 So. 2d 1157); When faced with an ambiguous statute, the Courts of this State are without power to construe an ambiguous statute, in a way which would extend, modify or limit its terms or its reasonable and obvious implication. To do so would be an abrogation of Legislative power. Citing State v. Cotton, 696 So.2d 435, 436 (Fla. DCA 1977) (quoting Holley v. State, 450 So.2d 217, 219 (Fla. 1984)).

The records show Green wasn't given the mandatory minimum portion of 775.087(2) during his sentencing because it didn't apply, however, Green's sentence was clearly reclassified/enhanced pursuant to the 775.087(1) portion beyond 812.13 2(c) second degree sentencing to a 1<sup>st</sup> degree felony sentencing because of the State's wrongful negligence of misapplication of the law concerning Green's determined principle participation in a felony, showing Green's sentence to be reclassified from what should have been only a second degree punishment to a 1<sup>st</sup> degree life sentence done without statutory authorization just as the Court

declared in the case of (Williams v. State, 656 So.2d 514 (Fla. 1<sup>st</sup> DCA 1995) (*See Exhibit (D)* pg. 75 attached). (*See Exhibit (K)* pg. 92-100 attached)

The Circuit Court denial response was an attempt to hide behind the principle participation of guilt theory of a conviction to evade the sentencing portions of the mandatory language of the principle Legislative intent of Florida Statute 812.13 2(c) and 775.087(1) which was specifically construed to be employed by the Courts. There is a reasonable construction of Florida Statute 812.13 2(c) that applies to all Defendants charged with 812.13 robbery, who's jury verdicts or evidence shows that a firearm was not carried during a robbery by the Defendant, the [punishment] or [sentence] has to be of a second degree felony. If the Court elects to convict the Defendant as a principle participate thereof where the Defendant was charged in addition to 775.087, then there is a reasonable construction of 775.087(1) also explaining that...

**"On sentencing portion of a felony that involved the use of a firearm, a Defendant's sentence can not be reclassified per subsection 775.087 1(b) from a second degree felony to a first degree felony punishable by life, during commission of such a felony the Defendant carries, displays, uses, threatens to use or attempts to use any weapon or firearm."**

In furtherance the Supreme Court explained and defined the Statutes reasonable construction to be applied in the case of Rodriguez v. State, 602 So.2d 1270 (Fla. 1992). As such the criminal statutes should have been construed liberally in favor of Green, as his facts of face record are in conformity with

established law. If there is any doubt between the statutes, the Circuit Court should have ruled in favor of lenity towards Greens claim.

As Appellant seeks this District Court's relief in the said clause, Appellant proposes a question where he is respectfully asking this Second District Court as the master builder to certify clarification of Legislature's construction of the statutes pertaining to 775.087 and 812.13 and how the Court should interpret the statutes application pertaining to persons/Defendants who are classified in the categories of arising conflicts as to their sentencing being illegal for reclassification from second degree to 1<sup>st</sup> degree for robbery with a firearm, where no firearm was possessed as a principle participate during an overt act, which would affect a great number of persons.

The following question is asked...

**"Can persons charged with robbery with a firearm under Florida Statute 812.13 and 775.087 who are found guilty of that charge of robbery with a firearm as a principle, but who does not actually posses the weapon be reclassified on their sentencing portion from a second degree sentencing to a 1<sup>st</sup> degree sentencing due to a co perpetrators possession of the weapon?"**

Appellant has only found two cases concerning illegal reclassification of a Defendant's sentence where persons was charged and found guilty with robbery with a firearm, as covering the additional charge of 775.087. Which are Ruth v. State, 949 So.2d 288, 290 (Fla. 1<sup>st</sup> DCA 2007); Tripp v. State, 642 So.2d 228 (Fla. 1994).

However, these cases do not clarify robbery with a firearm from a co-Defendant's principle participation point of view as constructed in Rodriguez v. State, 602 So.2d 1220. This is why Appellant feels that on this certain charge of robbery with a firearm this certified question is needed to clarify the legislatures specific construction of the Florida Statute and its applicability to Greens type circumstances.

As Green's rights to equal protection of the law and due process have been totally ignored by the lower court, the complained of error of the lower court further demonstrates a departure from established law where as noticed in the denial order of the Circuit Court said denial states....

**"A similar claim was previously raised in a Rule 3.850 motion" (See Exhibit (A) pg. 44 attached)**

As seen in Green's rehearing motion, Green explained to the Circuit Court that a claim was raised on his 3.850 motion involving "ineffective assistance of counsel" and that the error of counsel to object to the improper verdict form led to an inconsistent verdict." (See Exhibit (A) pg. 62-66 attached). This claim is not identical, not the same as Green's 3.800(a) claim because the ineffective assistance of counsel claim deals with counsels failure to object and the error went to the conviction. Green's instant 3.800(a) claim dealt with Green's sentence and the illegal reclassification of the sentence. Which are two opposite arguments. A close

comparison was demonstrated in Green's rehearing petition. (See Exhibit (A) pg. 1-68 attached)

The circuit courts defensive stance answer as a interpretation that Green raised his illegal sentence claim prior, is by law and facts, wholly misinterpreted, where by law, even if Green had raised a prior identical claim in his 3.850 postconviction motion, his 3.850 postconviction motion was subsequently per curiam affirmed on November 18<sup>th</sup> 2011, by this Second District Court of Appeal, which affords Green a equal protection right to file his subsequent claim on 3.800(a) illegal sentence petition, just as in the case of Harvey v. State, 28 So.3d 11, where the court allowed Harvey to file his subsequent claim on 3.800(a) illegal sentence where the District Court never addressed his claim on the merits by opinion on appeal. Harvey was allowed to raise his claim on 3.800(a). (See Exhibit (G) pg. 80-81 attached)

Moreover, the Circuit Court fails to recognize that Green's petition claim falls under the "manifest injustice doctrine" of McBride v. State, 848 So.2d 287 (Fla. 2003), where the error complained of must be corrected as a matter of law even if a claim has been raised prior, only if the claim warrants relief. (See Case Exhibit (A) pg 68 attached) and (See Exhibit (H) pg. 84-87 attached).



## ISSUE II

### WHETHER THE CIRCUIT COURT AFFORDED PROPER SIGNED

#### DENIAL ORDERS

The Circuit Courts judge Radabagh denied Green's 3.800(a) illegal sentence motion on December 19<sup>th</sup> 2012. As seen on the face of the record denial, there is no authentic handwritten signature "signed" by the Judge. Only a rubber stamped Judge's name. (See Exhibit (A) pg. 44)

Also on January 15<sup>th</sup> 2013, another rubber stamped name of Judge Michael E. Raiden was supplied on the face record of appellate's denial of rehearing. (See Exhibit (I) pg. 88-89 attached)

In order for appellate (Green) to properly preserve and protect his due process rights to perfect his appeal of his 3.800 and rehearing denial, he must bring this error to appellate courts attention where this Second District Court has past opined in State v. J.M.C., 714 So.2d 1173 (Fla. App. 2 DCA 1988), that when a situation occurred where an assistant of the Court had rubber stamped the Judge's name this Court deemed the written order was not "signed" for appellate purposes and this filing of such appeal time period could only start when such a written order was signed by the Trial Judge. (See West F.S.A. P. App. P. Rule 9.020(h))

As such Green ask this District Court to remedy the appropriate correction order by law, as to assure that Green has a proper legal appeal pursuant to (Sill v.

State, 718 So.2d 305 (Fla. App. 2 Dist 1998) (Circuit Court rubber stamp order denying Defendant's motion for postconviction relief was not appealable since such order was generally incapable of being rendered. Trial Court was order to respond to Sills motion for rehearing with a render order capable of being appealed).

Where Green is not sure if the Circuit Court Judge were the ones who reviewed the petitions or their assistants because a rubber stamp can be used by any employee of the courthouse, which leaves the official duty of the Circuit Judge abandon as to a question of **"was the petitions actually reviewed by the said stamped Judge's name?"**

### CONCLUSION

The harmful error that has caused Green injury complained of his so plain and obvious on the face of the record that Green is overwhelmed in disbelief that the lower courts denial answer ruling does not conform to the correct application of the Florida State essentials of established law principles.

The lower courts failure to do its duty in applying its own established statutory codes and law of Florida law principles to this harmful error is seemingly calculated to materially injure Greens due process rights equal protection of the law, to be treated fair and judged impartially from the very start of the error in 2005 up until 2013 of the discovery of the recent said error in his 3.800(a) illegal

sentence petition claim. Which such violations on the face of the record is so flagrant, that for the lower court not to correct is fundamental error of justice leaves Green with this unauthorized, illegal life sentence that has and still mentally shocked, tormented and anguished Green and his family for (7) long years.

This Court's giving of and not correcting this error of life sentencing has cause Green to suffer a long (7) year fear that his life is over as he would never see a date to be free from incarceration. Where he has been attacked several times by being placed in life offender housing dorms with inmates who care nothing of going home from legal trouble of their own.

Where Green has no help form his family who has lost hope and trust in the confidence of the Polk County judicial system. Where the error not being corrected leaves his family and Green to believe that there is no remedy available and constitutional rights and laws don't apply unless a person has a high priced attorney.

The unauthorized life sentencing is still not corrected by the lower court and Green is suffering everyday from the law not being applied correctly as congress intended. Which is seemingly irreparable because Green has petitioned the Courts Pro se of injury causing harm as he was suppose to do by rule and the lower court fails to apply established law to this error, Green has no other remedy available but to file this appeal and if this court allows a seeking of certiorari review in goodfaith

prayerfully asking this Court to correct or order the lower court to correctly apply the established law and resentence Green where the error is a manifest injustice.

Green prayerfully seeks this Honorable Court to:

- A) Review de novo, the enclosed papers**
- B) Review de novo, Green 3.800(a) petition**
- C) Review de novo, the face record claims, facts and established case law principles**
- D) Review de novo, the lower court's denial to the 3.800(a) petition**
- E) Review de novo, the established Florida Law Principles that the denial answer departs from.**
- F) Review de novo, the subsequent rehearing and the denial of such, judiciary noticing the established law that the Circuit Court departs from.**
- G) Answer the question of importance to certify the correct applicable law to be applied to persons with unique circumstances in their sentencing as Green's concerning robbery with a firearm, 775.087 and principle participation that affects reclassification of the sentence portion of a judgement.**

### **RELIEF**

Lastly, afford Mr. Green his due process rights of justice to order the lower court to correctly apply the law as established in his petition where upon a

thorough review of the above (A-G) sought references, Green seeks this Court of higher competent peers by law to deem the necessary jurisdiction of legal capabilities to grant relief and or certiorari review. As this pro se litigant had brought to the attention of the Courts in his most liberal manner a claim of a clear manifest injustice that has violated Green's constitutional rights, well being and safety. Asking this District Court to afford justice after a thorough review and grant of certiorari review or any other remedy to correct this error that has not been relieved since 2005.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read 'Sam L Green', is written over a horizontal line.

Samuel Green #B-370562

Hamilton Correctional Inst. – Annex

11419 SW County Road # 249

Jasper, Florida 32052-3735

**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this motion in the hands of Hamilton

Correctional Institution-Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

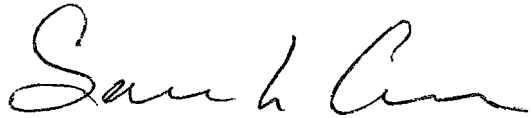
Done on this 13<sup>th</sup> day of FEBRUARY, 2013



Samuel Green #B-370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

**UNNOTARIZED OATH**

Under penalties of perjury I declare that I have read the foregoing 3.800(a)  
motion and the facts stated in it are true.



Samuel Green #B-370562

**IN THE DISTRICT COURT OF APPEAL  
—SECOND DISTRICT COURT—  
LAKELAND, FLORIDA**

**SAMUEL LEE GREEN II**  
(Plaintiff)

v.

**CASE NO: 2D13-77  
L.T. CASE NO: CF04-004392-XX**

**STATE OF FLORIDA**  
(Respondent)

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**APPENDIX OF EXHIBITS**

A. [All motions, exhibits, orders and discovery, filed under 3.800(a) petition] ...	1-68
B. [Chapter 812.13] .....	69-70
C. [Chapter 775.087] .....	71-73
D. Williams.....	74-75
E. Juarez. ....	76-77
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I. Rehearing Denial.....	88-89
J. DCA Case Acknowledgement.....	90-91
K. D.O.C Commitment.....	92-100

3.800 Brief  
EXHIBIT A



# EXHIBIT A

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA, 33830

SAMUEL GREEN,  
Plaintiff,

v.

CASE NO: CF04-004392-XX

STATE OF FLORIDA,  
Defendant.

MOTION FOR REHEARING/JUDICIAL NOTICE TO CLARIFY A  
MANIFEST INJUSTICE

COMES NOW, Plaintiff, Samuel Lee Green, Pro se, pursuant to Florida Rule of Criminal Procedure 3.800 (B) 1. (B) of Rule 3.800; Florida Constitution Article 1,2; and U.S. Const. Amend 1 submits said rehearing motion in good faith, where in denial response, this Court has departed from clear essential requirements of law and mistakenly interpreted a past 3.850 ineffective assistance of counsel claim as the "same" "identical" filing as his 3.800 (A) illegal sentence claim that were currently filed. In support thereof, Plaintiff states the following:

EXPLANATION OF FACTS FOR REQUEST OF REHEARING AND  
CLARIFICATION OF RECORD

In the interest of justice and to prevent a manifest injustice that has already occurred, from a miscarriage of justice of a fundamental error, this Honorable Court should rehear Plaintiff's (Green's) motion to correct illegal sentence where this Court's denial response to Green's 3.800 (A) claim is a clear departure of

established principles of law, insufficient, incorrect, inconclusive, not based on any legal authority and record attachments do not conclusively refute Green's claim by established law. This Court has overlooked Green's claim and points of law as that the 3.800 (A) claim is a true sentencing error that is different and of a new claim, other than any prior ineffective assistance of counsel claim or filing.

See Exhibits A, B, C, D and E (Attached)

On December 5<sup>th</sup>, 2012, Green filed this 3.800 (A) illegal sentence petition. (See Exhibit A Attached). On December 19<sup>th</sup>, 2012, this Court issued a denial response to said 3.800 (A) that was concluded as:

**“ Defendant claims that his life sentence is illegal as the jury found him guilty of robbery with a firearm but determined that the defendant did not carry the firearm. The record indicates that the principal instruction was read to the jury. The jury determined that a robbery with a firearm occurred. That the Defendant did not actually carry a firearm, but that the Defendant was a principal. A similar claim was previously raised in a Rule 3.850 motion. The Court denied that claim in an order dated December 11, 2008. The Second District Court affirmed and issued a mandate on January 26, 2012.”**

The Courts above order of denial method of Green's 3.800 (A) petition is the Court's failure to apply the correct law because if this court decides a denial based on a similar claim that has been raised in a prior 3.850 motion clearly shows a violation of established law pursuant to Harvey v. State, 78 So.3d 11, where Green's 3.850 claim had never been answered on the merits because his 3.850 motion was per curiam affirmed on November 18, 2011, and as such allows Green

to file a 3.800 (A) sentencing issue claim at anytime, just as the equal protection law allowed Harvey in his subsequent claim. (See Exhibit E attached).

In addition to this matter of denial concerning this discrepancy of issues filed, Green ask judicial notice of the Court to allow Green to clarify for the Court and record where this Court has wholly overlooked record facts that distinguishes Green's claim as this Court has misconstrued the facts and petitions case law.

Firstly, Green raised a past claim in his [3.850 motion of ineffective assistance of counsel] that his counsel never objected to an improperly worded jury from which led to an inconsistent verdict. This past 3.850 claim was based on case law of State v. Powell, 674 So.2d 731, 732 (Fla. 1996) and Gonzalez v. State, 440 So.2d 514, 515 (Fla. 4<sup>th</sup> DCA 1983), which relied on Green's counsels ineffectiveness, and the improper verdict form verbiage which caused an inconsistent verdict to require a conviction reversal. This past 3.850 claim could not be raised on the 3.800 illegal sentence motion. The claim did not argue Green's illegal sentencing enhancement or violation of 775.087 subsection that Green was charged. This claim could never be raised on a 3.800 (A) motion because it deal with the conviction and counsels ineffectiveness to properly object, seeking a new trial. (See Exhibit C attached.) As the attached record shows, the title of Green's 3.850 claim as:

**Trial court was ineffective for failing to object to the jury's true inconsistent verdict as counsel did not object to**

**the improperly worded jury verdict form.**

Secondly Green ask this Court to take judicial notice where it was overlooked on facts of record and established principles of laws that as for Green's instant [3.800 (A) sentencing error claim] is based solely on the basis of an illegal life sentence in violation of Fla. Statute Subsection 775.087 (1) (B). As the 3.800 sentence claim can not be raised on the 3.850 claim of ineffective counsel. As the attached record of the petition shows a clear claim that:

**Trial court committed plain reversible error during sentencing by reclassifying Green's sentence from a second degree sentencing to a first degree life sentence for the convicted offense of robbery with a firearm as a principle, where the jury did not find that Green carried a firearm in violation of subsection 775.087....(See Exhibit A attached)**

Thereby showing the Court misinterprets its denial order language response claiming that:

**Defendant claim that his life sentence is illegal because the jury found him guilty of robbery with a firearm but determined that the Defendant did not carry the firearm.....  
(See Exhibit B attached)**

The Circuit Court overlooked within the 3.800 (A) petition that Green specifically based his claim on, applied controlling established principles of Florida State Law in Fla. Statute 775.087 (1); Fla. Statute 812.13 (2) (c);

Rodriguez v. State, 602 So.2d 1270 (Fla. 1992); and Juarez v. State, 65 So.3d 110, specifically concluded that:

**“When a Defendant is charged with a felony involving the use of a firearm, a Defendant’s sentence can not be enhanced under subsection 775.087 without evidence that Defendant had personal possession of the weapon or firearm during commission of the felony.”**  
(See Exhibit A attached)

As of such established law above this Court did not apply or follow the essential principles of said law and additionally this Court overlooked the record petition facts that Green also specifically showed that the Judge and State’s assumption that Green was found guilty as a principle to the robbery does not authorize the Court to reclassify his sentence from a second degree to a first degree felony life sentence standpoint, as this Court overlooked the fact that Green was charged in his indictment under subsection “775.087” and the Court overlooked and failed to apply by procedure due process the settled established Florida Supreme Court Law that explicitly rejected the idea that a Defendant could be subject to reclassification under subsection 775.087 as a principle, as explained in Rodriguez v. State, 602 So.2d 1270 (Fla. 1992) which shows a clear violation of the established principle of law resulting in a miscarriage of justice.  
(See Exhibit D attached)

### IN SUMMARY

This Court's December 5<sup>th</sup> 2012, response denial of Green's 3.800 (A) claim has been wholly misplaced, misinterpreted and violated the essential requirements of law and due process by this Court's incorporated denial response attachments of a past 3.850 denial. Here, the Court's denial response states that:

**"A similar claim was previously raised in a rule 3.850 motion and that claim is denied in an order dated Dec. 11, 2008 and that the Defendant's life sentence is legal."**

As face record showing of the attached incorporated Exhibit of the 3.850 ineffective assistance of counsel claim and the Exhibit of the 3.800 (A) illegal sentence claim, it can be clearly distinguished that the two claims are of different arguments, seeking two different reliefs, under two different avenues of filings. Furthermore, the Court overlooked the established state law that Green's petition claim falls under the "manifest injustice doctrine" of McBride v. State, 848 So.2d 287 (Fla. 2003), where it is stated that:

**"Collateral estoppel is a judicial doctrine which in general terms prevents "identical" parties from relitigating the "same" issues that have been decided, under Florida Law collateral estoppel or issue preclusion applies when "identical issues" have been litigated between the same parties or there privies. In addition the particular matter must be fully litigated and determined in a contest that results in a full decision of a court of competent jurisdiction."**

**"American Heritage Dictionary"**

**Similar** (Sima-lar) Adj. Related to in appearance or nature; **alike though not the same**

**Identical** (I-denti-kel) Adj. 1. **Being the same.**

**Same** (Sam) Adj. 1. Being the very one; **Identical.**

As defined above, coupled with all the enclosed facts, a close comparison of the attached 3.800 (A) sentencing error claim is not "identical" nor the "same" as the attached 3.850 ineffective assistance of counsel claim. Though they may have a few "similar" facts, the issues and relief are not the "same" or "identical". Therefore, the Court's denial response that, "A [Similar] claim was previously raised in a rule 3.850 motion", must fail because a "similar" claim as defined above is not the "same" or "identical" as explained in, (Mcbride, Supra) and can not be barred for litigation. Therefore established facts and law of McBride, 848 So.2d 287 (Fla. 2003), establishes a principle of law that a Rule 3.800 allows a Court to correct a illegal sentence at "any time". Florida courts have held that the phrase "anytime" allows Defendant s to file successive motions under Rule 3.800. See Barnes v. State, 661 So.2d 71, 71 (Fla. 2<sup>nd</sup> DCA 1995)

**RELIEF**

Green in good faith ask this Court to rehear his 3.800 (A) illegal sentence petition. Ask this Court to take judicial notice to distinguish the facts of the record



where his 3.800 (A) claim of illegal sentence is not the same or identical claim as his 3.850 ineffective assistance of counsel claim and that this claim warrants judicial relief as the claim stands as argument on clearly established principles of law of:

Fla. Statute Subsection 775.087 (1)

Rodriguez v. State, 602 So.2d 1270 (Fla. 1992)

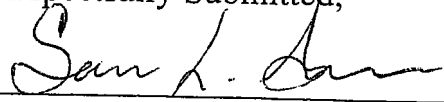
Juarez v. State, 65 So.3d 110 (Fla. App 4 DCA 2011)

Williams v. State, 656 So.2d 574 (Fla. 1<sup>st</sup> DCA 1995)

As the supplied denial answer is not based on any legal authority of state law and shows a clear departure from the established principles of law cited above that's within the 3.800 (A) motion, this Court must come to realize that a question has arose as to if this Circuit Court has afforded Green his Constitutional guarantees to his substantive due process protections to fundamental rights from governmental encroachment, where the said violations have resulted in a miscarriage of justice. As this Court is asked to rehear this substantial claim and if not, it would be a manifest injustice error, where the error is of a fundamental error which needs to be corrected, despite any law of the case doctrine, (See Lawton, Supra, 831 So.2d 60 (2<sup>nd</sup> DCA 1999)). In which this Court is obligated and entitled to relieve this error in any and every legal manner possible. (See Van Buren v. State, 500 So.2d 732 (2<sup>nd</sup> DCA 1988)) As this error is clear and identified on face

of the record which has been wholly overlooked, misconstrued, and misinterpreted. (See Johnson v. State, 60 So.3d 1045 (Fla. 2011)), where the law is clear, collateral estoppel will not be invoked to bar relief where the application would result in a manifest injustice. (McBride, Supra 848 So.2d 287 (Fla. 2003)).

Respectfully Submitted,

  
\_\_\_\_\_  
Samuel Green #370652

**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this motion in the hands of Hamilton

Correctional Institution-Annex officials for mailing to:

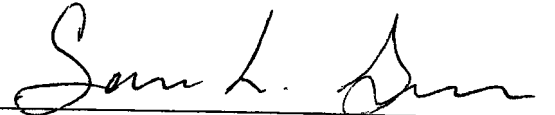
Polk County Courthouse  
Judge Chambers  
Judge Dick Prince  
255 N. Broadway Ave,  
Bartow, Florida 33831

Office of the State Attorney  
Polk County Courthouse  
2<sup>nd</sup> Floor  
255 N. Broadway Ave,  
Bartow, Florida 33831

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Lakeland, Florida 33801

Office of the Attorney General  
3507 Frontage Rd.  
Suite 200  
Tampa, Florida 33607-2013

On this 3rd day of January, 2012



Samuel Green #370652  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

**UNNOTARIZED OATH**

Under penalties of perjury I declare that I have read the foregoing 3.800 (A) motion and the facts stated in it are true.



Samuel Green #370652

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA 33830

SAMUEL LEE GREEN,  
Plaintiff,

v.

CASE NO: CF04-0004392-XX

STATE OF FLORIDA,  
Defendant.

\_\_\_\_\_ /

APPENDIX INDEX

Appendix	Document
Exhibit (A)	3.800 (A) Illegal Sentence
Exhibit (B)	Court's Denial Response
Exhibit (C)	3.850 Ineffective Counsel Claim
Exhibit (D)	Indictment
Exhibit (E)	Past 3.850 Mandate

# EXHIBIT A

3.800 (A) Illegal Sentence

DEC 5 2012

IN THE TENTH JUDICIAL CIRCUIT COURT, IN AND FOR  
POLK COUNTY, FLORIDA 33830

SAMUEL LEE GREEN,

Plaintiff,

vs.

STATE OF FLORIDA,

Defendant

) Case No.: CF04-004392-XX

) cc: Judge Dick Prince

MOTION TO CORRECT ILLEGAL SENTENCE 3.800(A)

COMES NOW, the Plaintiff, SAMUEL LEE GREEN, PRO SE PURSUANT to Florida Rules of Criminal procedure 3.800(A); Florida Constitution article 1,2; and U.S. Const. Amend 1, submits said motion in good faith to the hands of Honorable Judge Prince, requesting in the abundance of caution an independent, unbiased, fair and impartial review on the merits of the one enclosed claim/complaint violation under the sworn oath of Judicial officers to uphold and support the Florida Constitution (Article 11 section 5(B); U.S. Constitution and Florida Rule of Court. As such, requesting prayerfully this Honorable Court to correct the illegal sentence imposed in the above styled cause. In support thereof, Plaintiff states the following below:

NATURE OF RELIEF

The nature of relief Plaintiff seeks herein and below includes but is not limited to this Judicial Courts review of

1 his 3.800(A) Motion to correct illegal sentence presented to  
2 this Honorable Courts Judge Dick Prince and requests below:  
3 I. The prompt and immediate conducting of proceedings into  
4 Green's documented factual and legal basis of the one enclosed  
5 claim of illegal sentence which has prejudiced and deprived Mr.  
6 Green of:

7 (A) His mental thinking capabilities: Where Green has  
8 been mentally shocked, worried, depressed and dismayed for 8  
9 long years, living in dreaded fear that he would never be able  
10 to see a future date for himself to be released with this recent  
11 discovered illegal life sentence.

12 (B) Appetite: Green has not eaten comfortably to hold his  
13 food down, where he has not eaten solid meals which caused him  
14 to decrease in weight, as well as his health is poor, which all  
15 stems from worrying due to the unauthorized sentence of life  
16 imprisonment.

17 (C) Communication: During Green's life sentence, his  
18 family communication has been of lost efforts, where his family  
19 has lost hope, trust and confidence in the Polk County Judicial  
20 System. As the fate of Mr. Green looked dark, long and narrow,  
21 his friends have all vanished away also and..

22 (D) Prison Housing: Green has not enjoyed the benefit of  
23 getting a close adjustment transfer closer to his home because  
24 he was forced by the H-04 life sentence housing designation to  
25 wait 3-4 years to apply for a close to home transfer and that's

1 only applicable on good behavior. Green has been housed with H-  
2 04 close custody inmates with life sentences who care nothing of  
3 going home, which has subjected Green to be a victim of several  
4 violent brutal attacks since serving this unauthorized life  
5 sentence. Where this H-04/Housing made it harder for his closer  
6 to home transfer, Green has had no visits from family, nor  
7 friends while in prison for 7.5 years.

8 II. Directing the Department of Corrections, ET AL and its  
9 agents to transport and produce the body of Samuel Lee Green  
10 before the Tenth Judicial Circuit Court, Judge Dick Prince on or  
11 before a set and determined date and time for a full and fair  
12 evidentiary hearing/oral argument, represented by Counsel in  
13 order for Mr. Green to sustain if necessary his burden of proof  
14 and persuasive or in the alternative...

15 III. The application of construing of the current settled and  
16 controlling applicable Constitution, statutory and common law  
17 polices and decision to the uncontroverted and established  
18 record facts....

19 IV. Review of the said pleading under the Judges sworn oath to  
20 the Florida Constitution Article 2 Section 5(B).

21 V. The entrances of a legal sentence as a matter of law to a  
22 guideline sentence no more than a second degree felony,  
23 splitting the sentence to be served half on probation, where  
24 Green has already served (8) years, and such other relief as  
25 construction of law deems just and proper.



1 STANDARD OF REVIEW

2 Green asserts for the record a clear showing that the  
3 foregoing Motion facts are that of an Illegal Sentence Plain  
4 Error and the error must be corrected as a matter of law and in  
5 respects to the proper avenue for relief, Green files the  
6 forgoing claim under FLA.R.Crim.P.3.800(A) "Illegal Sentence  
7 Correction". Where this Court should recognize that there are  
8 three (3) types of sentencing errors:

9 1. An "Erroneous Sentence" which is correctable on Direct  
10 Appeal;

11 2. An "Unlawful Sentence", which is correctable only  
12 after an evidentiary hearing under rule 3.850;

13 3. An "Illegal Sentence" in which the error must be  
14 corrected as a matter of law in Rule 3.800 Proceeding. (Pursuant  
15 to Judge v. State, 596 So. 2d 73 (Fla. 2<sup>nd</sup> D.C.A. 1991)).

16 Moreover, this Court may at any time correct an illegal  
17 sentence imposed by it. This Court has an obligation to correct  
18 a sentence to comply with applicable statutory provisions (Van  
19 Buren v. State, 500 So.2d.732 (Fla. 2<sup>nd</sup> 1987)). Thus a motion to  
20 correct a sentence must assert that the Trial Court sentenced  
21 the Defendant without statutory authority. (Simmons V. State,  
22 579 So. 2d 874 (Fla. 1<sup>st</sup> 1991)).

23 To be illegal within the meaning of rule governing motions  
24 to correct, reduce, or modify illegal sentences, the sentences  
25 must import a kind of punishment that no Judge under the entire

Exhibit  
D9.16

1 body of sentencing statutes could possibly inflict under any set  
2 of factual circumstances. (State VS Atkins, 69 So.3d 261 (Fla.  
3 2011)).

4 Rule permitting a Court to correct an illegal sentence  
5 allows Defendants to Petition the Courts to Correct Sentencing  
6 errors that may be identified on the face of the record.  
7 (Johnson V. State 60 So. 3d 1045 (Fla. 2011)).

8 Where a sentencing error is so fundamental and endures, a  
9 Defendant is entitled to relief in any and every legal manner  
10 possible including by Direct Appeal, although not first  
11 presented to the Trial Court, by Post Conviction relief Pursuant  
12 to a Motion to Vacate, set aside, or Correct A Sentence or by  
13 extraordinary remedy. As to a fundamental sentencing error the  
14 Defendant is entitled to relief under an alternative remedy not  
15 withstanding that the Defendant could have but did not raise the  
16 error on Appeal. (Haynes V. State 598 So. 2<sup>nd</sup> D.C.A. 1988), and  
17 if the Order denying the Motion failed to Refute, either by  
18 attachment of Portions of the Record or otherwise, Defendant's  
19 claims. (Easterling V. State 596 So. 2d 103 (Fla. 2<sup>nd</sup> D.C.A.  
20 1997)).

21 Because a Motion to Correct a sentencing error involves a  
22 pure issue of law, the standard of Appellate Review is De Novo.  
23 (Kittles V. State 310 So. 3d 283 (Fla. 4<sup>th</sup> D.C.A. 2010)).

24 Additionally, noticing standard of review DE novo that  
25 reclassification of sentence under Fla. Statute Section

1 775.087(1) from a 2<sup>nd</sup> Degree Felony to a 1<sup>st</sup> Degree Felony under  
2 the principle theory for a Co-Defendants possession of a firearm  
3 during an armed robbery is inapplicable to the co-perpetrator  
4 who was convicted of robbery with a firearm and the Jury's  
5 verdict reflected a special Jury finding that Plaintiff (Green)  
6 "Co-perpetrator" did not possess the firearm during the armed  
7 robbery, a crime for which use of a weapon is an essential  
8 element. (Pursuant to:

9 JUAREZ V. STATE, 65 So. 3d 110 (Fla. App 4 D.C.A. 2011)

10 RODRIGUEZ V. STATE, 602 So. 2d 1270 (Fla. 1992)

11 WILLIAMS V. STATE, 656 So. 2d 574 (Fla. 1<sup>st</sup> D.C.A. 1995)

12 Lastly, reviewing the error as it contributed to the fatal  
13 breakdown of the judicial process, thereby violating Green's due  
14 process and equal protection rights, which severely prejudiced  
15 Mr. Green. In order to prevent a manifest injustice and a  
16 denial of due process, relief may be afforded even to a litigate  
17 raising a successive claim. (STEPHEN V. STATE, 974 So.2d 455,  
18 451 (Fla. 2<sup>nd</sup> D.C.A. 2005); See COCHRAN V. STATE, 899 So.2<sup>nd</sup> 490  
19 (Fla. 2<sup>nd</sup> D.C.A. 2005). (Reversing denial of a Rule 3.800(A)  
20 Motion, where sentence was illegal and Judgment did not require  
21 correction because it did not reflect Decree of Offense.

#### 22 STATE OF FACTS

23 On July 13, 2004, Plaintiff was charged by indictment on 1  
24 count of: Robbery with a Firearm. The date of the offense was  
25 June 22, 2004. On June 30, 2005, Plaintiff (Green) was

1 convicted as a principle for 1 count of robbery with a firearm  
2 by the Circuit Court of the Tenth Judicial for Polk County,  
3 Florida. On July 14, 2005, Plaintiff was sentenced to Life  
4 Imprisonment for 1 count of robbery with a firearm. The office  
5 of criminal conflict and regional Counsel, Second District  
6 Attorney at Law, Mr. Julius Aulisio, was designated to handle  
7 the Appeal. On April 9, 2007, The Second District of Appeal "Per  
8 Curiam Affirmed", Plaintiff's Direct Appeal, and the mandate was  
9 issued. Now Plaintiff files this Motion to Correct Illegal  
10 Sentence. Plaintiff is currently serving the sentence in  
11 Hamilton Correctional Institution, Annex, 10650 S.W. 46<sup>th</sup> Street,  
12 Jasper, Florida 32052-1360. (See Exhibit (A) Mandate).

13 CLAIM/COMPLAINT

14 "GREEN WAS DENIED HIS CONSTITUTIONAL RIGHT WHEN TRIAL COURT  
15 COMMITTED PLAIN REVERSIBLE ERROR DURING SENTENCING BY  
16 RECLASSIFYING GREEN'S SENTENCE FOR THE CONVICTED OFFENSE UNDER  
17 SUBSECTION 775.087, IN VIOLATION OF PLAINTIFF'S 6<sup>TH</sup> AND 14<sup>TH</sup>  
18 U.S.C.A. RIGHTS TO DUE PROCESS."

19 On June 23, 2004, Green was arrested and charged for the  
20 offense of robbery with a firearm that allegedly occurred on  
21 June 22, 2004. Green was sentenced by indictment for 1 count of  
22 robbery with a firearm. (See Exhibit (B) arrest warrant and  
23 charge information). On July 14, 2005, Green was sentenced to  
24 Life Imprisonment for 1 count of robbery with a firearm. (See  
25 Exhibit (C) Sentencing transcript).

1 Green claims that the Trial Court committed plain  
2 reversible error during sentencing by reclassifying Green's  
3 sentence for the convicted offense of robbery with a firearm  
4 under Section 775.087. Green asserts that the reclassification  
5 of the robbery with a firearm charge was plain error because the  
6 Jury found that Green didn't actually possess the firearm during  
7 the offense. (See Exhibit (D) Verdict form).

8 As applied to this Case, subsection 775.087 (1) (B),  
9 mandates that a second degree felony be reclassified as a first  
10 degree felony punishable by life when: "During the Commission  
11 of such felony the Defendant carries displays, uses, threatens  
12 to use or attempts to use any weapon or firearm."

13 Green additionally asserts that the Prosecutor for the  
14 State, Peter Sternlicht, deliberately misled the Court by stating  
15 that "We never charged Mr. Green with 10-20-Life" and that "we  
16 never asked for a finding of actual possession." (See Exhibit  
17 (E).) Where the record clearly shows State and Trial Judge  
18 conceding that the gun wasn't in Mr. Green's hand and that he  
19 doesn't get the minimum mandatory, coupled with the charging  
20 indictment information showing the enhancement section 775.087  
21 and the charging language information clearly charging Green to  
22 have carried the firearm during the robbery, proves states  
23 assertion in respects to what State claims they didn't charge or  
24 ask for, to be non-credible. Because it has been held that the  
25 burden is on the State to ensure that a special finding is made

1 and that a defendant does not waive the issue by not requesting  
2 a special form. (See ESTEVEZ V. STATE, 713 So. 2d 1039, 1040  
3 (Fla. 3d D.C.A. (Refer to Exhibits (E and B). Note: The verdict  
4 form shows the actual finding (See Exhibit (D)).

5 Furthermore, Green points out that the Prosecutor for the  
6 State also failed to establish during Trial that Green had  
7 personal possession of the firearm during commission of the  
8 offense. In JUAREZ VS. STATE, 65 So. 3d 110, It was concluded  
9 that "When a Defendant is charged with a felony involving the  
10 use of a firearm, a Defendant's sentence can not be enhanced  
11 under subsection 775.087, without evidence establishing that  
12 Defendant had personal possession of the weapon or firearm  
13 during commission of a felony."

14 However, Green contends that the record does not indicate  
15 that the Jury found Plaintiff (Green) guilty as a principle to  
16 the offense/et, the record does indicate the trial Judge Dennis  
17 P. Maloney and the Prosecutor assuming Green's conviction rested  
18 upon a principle finding of guilt to the Offense. (See Exhibit  
19 (E) Judges presumption of principle finding). In that respects,  
20 where the law dictates, the Florida Supreme Court "Explicitly  
21 rejected" the idea that a Defendant could be subject to  
22 reclassification under subsection 775.087 AS A PRINCIPLE. (See  
23 STATE V. RODRIGUEZ, 602 So. 3d 1270 (Fla. 1992)).

24 Moreover, "Section 775.087 (1) does not by its terms allow  
25 vicarious enhancement because of the action of a Co-Defendant".

1 Nevertheless, Green's robbery with a firearm sentence can not be  
2 reclassified under subsection 775.087(1), where the Jury  
3 specifically found " A FIREARM NOT IN HIS PHYSICAL POSSESSION WAS  
4 USED" in course of committing the offense. See WILLIAMS V.  
5 STATE, 656 So. 2d 574 (Fla. 1<sup>st</sup> D.C.A. 1995). In view of the  
6 Jury's specific finding, the reclassification of Green's offense  
7 under the Statute was improper. Therefore Green could not be  
8 reclassified for the offense for 1 count of robbery with a  
9 firearm as a principal, thus showing Trial Court sentenced Green  
10 without statutory authority.

11 Section 812.13 (2) (C) Mandates..."If in the course of  
12 committing the robbery the offender carried no firearm, deadly  
13 weapon, or other weapons, then the robbery is a felony of the  
14 Second Degree, punishable as provided in S.775.082.083, or  
15 775.084".

16 Lastly, Plaintiff asserts the error complained of herein is  
17 demonstrated on the face of the record regardless of the State  
18 Prosecutor trying to "Clean Up" the error, Green was sentenced  
19 to Life as a principle to robbery with a firearm and the Jury  
20 found ~~no~~ firearm carried by Plaintiff (Green), undisputably  
21 concluded "No enhancement as a principle under 775.087 can  
22 apply. (See sentencing transcript Exhibit (E)).

23 A sentence can only be legal if it was not authorized by  
24 Statute or it was imposed in violation of a Constitutional right.  
25 VALDEZ V. STATE, 765 So. 2d 774 (Fla. 1<sup>st</sup> D.C.A. 2000) as such

1 plain error by the record, Green has been severely prejudiced by  
2 receiving of an unauthorized life sentence and prejudice to him  
3 by not being afforded his full guarantee constitutional rights  
4 under the equal protection clause and his 6<sup>th</sup> and 14<sup>th</sup> U.S. C.A.  
5 Rights to due process, as well as his mental stability, closer  
6 to home transfer etc.

7 Wherefore, as the Trial Court was in error to conclude  
8 otherwise, a fundamental manifest injustice has been committed  
9 and Green seeks in the interest of Justice all relief requested  
10 in said motion and moves this Honorable Court Jude Dick Prince  
11 to correct the illegal sentence in accordance under a Second  
12 Degree felony sentence by applicable law, as this Court deems  
13 just and proper.

14 Green prayerfully pleads for mercy of this Honorable Court  
15 to set Mr. Green's new imposed sentence split to probation, in  
16 order for Mr. Green to rejoin society to become a positive  
17 leader and productive asset to his community, children, family  
18 and Church. Where Green asserts that in his (8) year prison  
19 stay between the ages of 30-38, he is fully aware of his  
20 situation before him, that he and his family would be very  
21 appreciative if this Court gives leniency to have mercy on Mr.  
22 Green, to give him a chance at regaining his life back. Where  
23 Mr. Green was a life long residential citizen of Polk County, a  
24 homeowner and working Father of two (2) children, Mr. Green  
25 consequently realizes a lot has been destroyed and lost due to



1 this terrible atrocity in his life, which for the better Green  
2 pushes harder than ever to pave his way back to success,  
3 leadership and make his family proud again, as well as his  
4 community of Polk County.

5 Again, Green requests this Honorable Court to split his new  
6 sentence to probation so that Mr. Green can get to work and  
7 rebuild a new future.

8 Respectfully Submitted,

9 *Samuel Lee Green II*  
Samuel Lee Green #B-370562

10 CERTIFICATE OF SERVICE

11 HONORABLE JUDGE DICK PRINCE

OFFICE OF THE STATE ATTORNEY

12 Judge Chambers

Polk County Courthouse

13 Polk County Courthouse

2<sup>nd</sup> Floor

14 255 N. Broadway Ave

255 N. Broadway Ave

15 Bartow, Florida 33881

Bartow, Florida 33831

16 SECOND DISTRICT COURT OF APPEAL

OFFICE OF THE STATE ATTORNEY

17 1005 East Memorial Blvd.

3507 E. Frontage Rd.

18 Lakeland, Florida 33802

Suite 200

19 Tampa, FL 33607-2013

20  
21 Done and mailed this 5<sup>th</sup> Day of DECEMBER, 2012

22 *Samuel Lee Green II*  
23  
24  
25

1 UNNOTORIZED OATH

2 Under penalties of perjury I declare that I have read the  
3 foregoing 3.800(A) Motion and the facts stated in it are true  
4 and correct.  
5  
6  
7

8 Sam Lee Green II

9 Samuel Lee Green #B-370562  
10

11 Cc: JUDGE DICK PRINCE  
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) Case No.: CF04-004392-XX

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## DOCUMENT

[Mandate]

[Arrest Warrant and charging Document]

[Sentencing Hearing]

[Jury Verdict Form]

[Jury's Oral Verdict/  
Judges Principle Finding/  
State's Misreading of charge  
and verdict]

EXHIBIT A  
[ MANDATE ]

# M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

OF POSTJUDICIAL

## SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL,  
AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS  
BE HAD IN SAID CAUSE , IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF  
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS  
ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF  
FLORIDA.

WITNESS THE HONORABLE CAROLYN K. FULMER CHIEF JUDGE OF THE  
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT,  
AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: April 9, 2007

SECOND DCA CASE NO. 2D05-3831

COUNTY OF ORIGIN: Polk

LOWER TRIBUNAL CASE NO. CF04-004392-XX

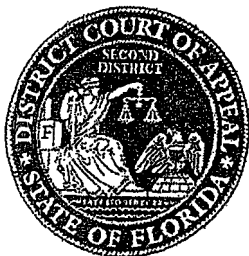
CASE STYLE: SAMUEL GREEN

v. STATE OF FLORIDA

Received By

APR 10 2007

Appellate Division  
Public Defenders Office



*James Birkhold*  
James Birkhold  
Clerk

cc: (Without Attached Opinion)

Samuel Green

Anne Sheer Weiner, A.A.G.

Julius Aulisio, A.P.D.

me

Exhibit  
pg 28

## EXHIBIT B

[ ARREST WARRANT ]  
AND

[ CHARGING INDICTMENT INFORMATION ]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

CASE #: 53-2004-CF-004392-01XX-XX

vs.

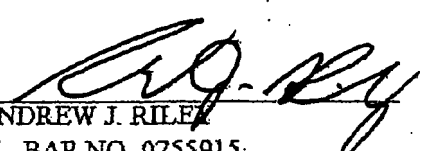
SAMUEL LEE GREEN, B/M, 04/09/1973, 589-05-7538

INFORMATION FOR:

1) ROBBERY WITH A FIREARM

In the Name and by Authority of the State of Florida:

JERRY HILL, State Attorney for the Tenth Judicial Circuit, by and through his undersigned Assistant State Attorney, charges that SAMUEL LEE GREEN on or about June 22, 2004, in the County of Polk and State of Florida, by force, violence, assault, or putting in fear, did knowingly take away money, of some value, from the person or custody of AJAY J PATEL, with the intent to permanently or temporarily deprive AJAY J PATEL of the property, and in the course of committing the robbery there was carried a firearm, contrary to Florida Statutes 812.13 and 775.087 (1 DEG FEL, PBL) (LEVEL 9)

  
ANDREW J. RILEY  
FL. BAR NO. 0755915  
Assistant State Attorney  
Polk County, Florida

IN THE CIRCUIT/COUNTY COURT OF THE TENTH JUDICIAL  
CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

AGENCY# PCSO#2004-105102

OBTS#

BOOKING

CASE# CF04-004392

ARREST WARRANT

IN THE NAME OF THE STATE OF FLORIDA:

TO: All and singular, the sheriff's of Florida and other authorized officers.

WHEREAS the Court has found probable cause from the sworn complaint affidavit or other testimony under oath to believe that the person named below committed:

1. ARMED ROBBERY WITH A FIREARM (F.S. 812.13(2A)) LIFE

YOU ARE HEREBY COMMANDED to arrest, instantler, the person named below for the crime(s) named above to be brought before the Court and dealt with according to the law.

Defendant SAMUEL LEE GREEN

Address 2995 WARFIELD DRIVE, BARTOW, FL.

Race/Sex B/M

DOB 04/09/73

Height 62"

Weight 200

Hair BLACK

Eyes BROWN

Social Security # 589-05-7538

Driver License # G650-792-73-129-0(FL.)

Place of Birth FLORIDA

Scars

Extradition

Alias

Marital Status SINGLE Occupation

Employer

Bail is set at: 1. NO BOND

, returned on demand.

GIVEN UNDER MY HAND AND SEAL THIS 23<sup>rd</sup> DAY OF June, 2004.

K. Swright  
JUDGE

RETURN

Received this warrant on the \_\_\_\_\_ day \_\_\_\_\_, 20\_\_\_\_, and executed same on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by arresting the above-named defendant.

\_\_\_\_\_  
Sheriff

By: \_\_\_\_\_

Exhibit  
12 49131



# EXHIBIT C

[ ~~SENTRY~~ HEARING ]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA

SAMUEL GREEN,

Defendant, Appellant,

vs.

STATE OF FLORIDA,

Plaintiff, Appellee.

CASE NO.: CF04-004392-XX



ORIGINAL

Sentencing Hearing  
July 14, 2005

Attorneys:

Peter Sternlicht, Esquire  
For the State

John E. Kirkland, Esquire  
For the Defense

**RECEIVED**  
CRIMINAL APPEAL SECTION

AUG 29 2005

RICHARD M. WEISS  
CLERK CIRCUIT COURT

1 penalty for which the jury convicted you. That's what  
2 he is saying and I just read the statute and he's right.

3 THE DEFENDANT: But I didn't understand I was under  
4 PRR because I didn't go back for a new charge. I went  
5 back for a CF92 charge to clean up the probation.

6 THE COURT: Well, Mr. Kirkland is going to have an  
7 opportunity to file a motion to vacate the sentence or  
8 for a new trial.

9 At this time you are adjudged guilty of robbery  
10 with a firearm. You are sentenced to life imprisonment.  
11 I'm appointing the Public Defender to represent you on  
12 the appeal of this matter.

13 MR. KIRKLAND: Thank you, Your Honor. I was going  
14 to address that and I will be filing the appropriate  
15 appellate documents as soon as I can.

16 THE COURT: Thank you.

17 MR. STERNLICHT: I assume that's as a PRR, Your  
18 Honor.

19 THE COURT: That is as a Prison Release Re-Offender.

20 MR. STERNLICHT: Thank you.

21 HEARING CONCLUDED  
22  
23  
24  
25

Exhibit  
Pg 34

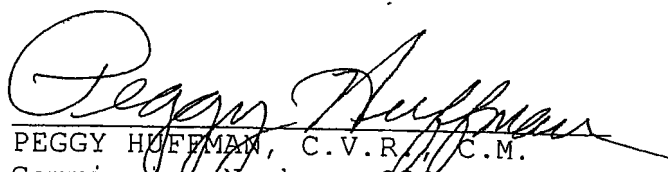
1 STATE OF FLORIDA )

2 COUNTY OF POLK )

3  
4 I, PEGGY HUFFMAN, Certified Verbatim Reporter, certify  
5 that I was authorized to and did transcribe the foregoing  
6 Sentencing Hearing and that the transcript is a true record  
7 of the proceedings.

8 I FURTHER CERTIFY that I am not a relative, employee,  
9 attorney, or counsel of any of the parties, nor am I a  
10 relative or employee of any of the parties' attorney or  
11 counsel connected with the action, nor am I financially  
12 interested in the action.

13 DATED this 27<sup>TH</sup> day of August, 2005.

14  
15  
16  
17   
18 PEGGY HUFFMAN, C.V.R., C.M.  
19 Commission Number: 00247004  
20 Expiration Date: 12/07/07



21  
22 Peggy Huffman  
23 MY COMMISSION # DD247004 EXPIRES  
24 December 7, 2007  
25 BONDED THRU TROY FAIN INSURANCE, INC.

Exhibit  
P335

# EXHIBIT D

[ JURY VERDICT FORM ]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL  
CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO: CF04-04392-XX

SAMUEL L. GREEN,

Defendant.

VERDICT

We, the Jury, find the Defendant, **SAMUEL L. GREEN:**

X

**GUILTY of Robbery With a Firearm**

and we further find in the course of committing the robbery  
there

                     was carried a firearm

X

                     was not carried a firearm

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                     was carried a deadly weapon

                     was not carried a deadly weapon

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                     was carried a weapon

                     was not carried a weapon

**GUILTY of Robbery Without a Weapon,**  
a lesser included offense

**GUILTY of Theft, A lesser included offense**

**NOT GUILTY**

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JUN 30 2005

RICHARD M. WEISS, CLERK

Exhibit  
p 9 37

**SO SAY WE ALL.**

*Laney A. Sparr*  
-----  
**FOREMAN/FOREWOMEN**

**DATED THIS 30<sup>TH</sup> DAY OF JUNE, 2005**

## EXHIBIT E

[ JURY'S ORAL VERDICT ]

[ JUDGE'S PRINCIPLE FINDING ]

[ STATES MISLEADING OF CHARGE AND VERDICT ]



1 Verdict, we the jury find the defendant,  
2 Samuel Green, guilty of robbery with a firearm, and  
3 we further find that in the course of committing  
4 the robbery, there was not carried a firearm. So  
5 say we all, Laney Spann, dated this 30th day of  
6 June, 2005.

7 Ms. Spann, is that your verdict?

8 MS. SPANN: Yes, sir.

9 THE COURT: Mr. Mobley, was that your verdict?

10 MR. MOBLEY: Yes, sir.

11 THE COURT: Ms. Smith, was that your verdict?

12 MS. SMITH: Yes, sir.

13 THE COURT: Mr. Lofquist, was that your  
14 verdict?

15 MR. LOFQUIST: Yes.

16 THE COURT: Ms. Montford, was that your  
17 verdict?

18 MS. MONTFORD: Yes.

19 THE COURT: Ms. O'Brien, was that your  
20 verdict?

21 MS. O'BRIEN: Yes, sir.

22 THE COURT: Okay, once again, I thank you very  
23 much. These people are not going to be, that is to  
24 say, the lawyers, are not going to have anything to  
25 say to you. They are not permitted to. Others may

1 question what went on in that jury room. You've  
2 got a right to talk to them if you want to. You  
3 have an absolute right to refuse to discuss went on  
4 in that jury room, and traditionally, in the  
5 American system of justice, the workings of a jury  
6 are secret. If you are approached and asked about  
7 it, I recommend that you decline to talk about it,  
8 but it's up to you.

9 Okay, again, thank you very much.

10 (The jury left the courtroom.)

11 (JURY OUT)

12 THE COURT: Well, what is the impact of that?  
13 I mean, how do you find him guilty of robbery with  
14 a firearm and then find that the firearm was not  
15 carried?

16 MR. STERNLICHT: I think that applies to  
17 10-20-life.

18 THE COURT: And by that, you mean?

19 MR. STERNLICHT: Well, he doesn't get a  
20 minimum mandatory because it wasn't in his hand.  
21 But still, as a principal, I think they found him  
22 guilty.

23 MR. KIRKLAND: That's exactly what --

24 THE COURT: That's the way you see it.

25 MR. KIRKLAND: That's the way I see it.

1 THE COURT: So guilty of robbery with a  
2 firearm as a principal, but he doesn't get the  
3 minimum mandatory because he didn't have the gun?

4 MR. KIRKLAND: No, he didn't have the gun.

5 MR. STERNLICHT: And we didn't allege it that  
6 way either, Your Honor. If you notice the way the  
7 information was charged, we never thought from the  
8 beginning Mr. Green had the gun, so we never  
9 charged him under 10-20-life. Because we didn't  
10 ask for a finding of actual possession.

11 THE COURT: Okay.

12 MR. STERNLICHT: Which I think you have to  
13 have for 10-20-life.

14 THE COURT: All right. You were telling me  
15 you're going out of town. When will you be ready  
16 for sentencing?

17 MR. KIRKLAND: Maybe next week, Your Honor.

18 MR. STERNLICHT: Judge, I won't be here at all  
19 next week. Can we postpone that?

20 THE COURT: How about if we set this matter  
21 down for sentencing on July the 12th, will that be  
22 possible? It's a Tuesday.

23 MR. KIRKLAND: It's a pretrial day, that's  
24 fine, Your Honor.

25 THE COURT: Oh, is that pretrial? I don't

①

EXHIBIT B  
Courts Denial Response

IN THE CIRCUIT COURT  
FOR THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: CF04-004392-XX

SAMUEL LEE GREEN,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE**

**THIS MATTER** came before the Court upon Defendant's *Motion to Correct Illegal Sentence*, filed on December 10, 2012, pursuant to Fla. R. Crim. P. 3.800(a). After review of the Motion, case files and applicable law, the Court finds as follows:

In his Motion, Defendant claims that his life sentence is illegal as the jury found him guilty of Robbery with a Firearm but determined that the Defendant did not carry the firearm. The record indicates that the Principal instruction was read to the jury. The jury determined that a robbery with a firearm occurred. That the Defendant did not actually carry the firearm, but that Defendant was a principal. A similar claim was previously raised in a Rule 3.850 Motion. The court denied that claim in an order dated December 11, 2008. The Second District Court of Appeal affirmed and issued a Mandate on January 26, 2012. *See attachments.* Defendant's life sentence is legal.

Based on the above, it is **ORDERED AND ADJUDGED** that Defendant's Motion is DENIED.

Any aggrieved party has thirty (30) days in which to appeal this Order to the Second District Court of Appeal.

**DONE AND ORDERED** in Bartow, Polk County, Florida on December 19, 2012.

/s/ JOHN RADABAUGH

JOHN RADABAUGH, Circuit Judge

cc:

- Samuel Green, DC#B-370562, Hamilton CI, 11419 SW CR#249, Jasper, FL 32052
- Brian D. Toreky, Esq., A.S.A.

JR/abw

Exhibit  
Pg 44

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL  
CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO: CF04-04392-XX

SAMUEL L. GREEN,

Defendant.

**VERDICT**

We, the Jury, find the Defendant, **SAMUEL L. GREEN:**

X

**GUILTY of Robbery With a Firearm**

and we further find in the course of committing the robbery  
there

                     was carried a firearm

X

                     was not carried a firearm

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                     was carried a deadly weapon

                     was not carried a deadly weapon

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                     was carried a weapon

                     was not carried a weapon

**GUILTY of Robbery Without a Weapon,**  
a lesser included offense

**GUILTY of Theft, A lesser included offense**

**NOT GUILTY**

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JUN 30 2005  
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Exhibit  
Pg 45

**SO SAY WE ALL.**

*Laney A. Sparran*  
**FOREMAN/FOREWOMEN**

**DATED THIS 30<sup>TH</sup> DAY OF JUNE, 2005**

Exhibit  
Pg 45

IN THE CIRCUIT COURT  
FOR THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: CF04-004392-XX

SAMUEL LEE GREEN,

Defendant.

**ORDER ON DEFENDANT'S MOTION FOR POST CONVICTION RELIEF**  
**and**  
**ORDER TO SHOW CAUSE**

**THIS MATTER** is before the Court upon *Defendant's Motion for Post-conviction Relief*, filed pursuant to Rule 3.850, Fla. R. Crim. P., Defendant's Motion for Good Cause Showing, and Memorandum of Law in Support of Motion for Postconviction Relief, all filed on June 18, 2008. After review of the Motion, case file and applicable law, the Court finds as follows:

Defendant alleges fifteen grounds for relief in his Motion listed as follows:

- 1) Trial counsel was ineffective for failing to object to the jury's true inconsistent verdict as counsel did not object to the improperly worded jury verdict form;
- 2) Trial counsel was ineffective for failing to object to the court's abuse of discretion in allowing an unqualified interpreter to translate for the alleged victim at trial;
- 3) Trial counsel was ineffective for failing to move to suppress the interrogation tape;
  - a.) Trial counsel was ineffective for failing to demonstrate that the Defendant was not Mirandized prior to giving a statement to police;
  - b.) Trial counsel was ineffective for failing to demonstrate that Defendant did not sign a written Miranda waiver or that Defendant waived his rights or that he understood waiving his rights;

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- 4) Trial counsel was ineffective for failing to preserve the court's denial of the Defendant's motion for appointment of expert investigator;
  - 5) Trial counsel was ineffective for failing to file a motion to suppress the illegal traffic stop as the BOLO and general description of the Defendant was vague;
  - 6) Trial counsel was ineffective for failing to subject the probable cause affidavit to an adversarial testing process where detectives made false statements;
    - a.) Trial counsel should have motioned to dismiss the charges based upon a witness linking Defendant to the crime and his falsities;
  - 7) Trial counsel was ineffective for failing to call and secure an alibi witness who admitted to committing the robbery;
    - a.) Trial counsel was ineffective for failing to secure an exculpatory witness;
  - 8) Trial counsel was ineffective by failing to prevent Defendant from being placed into jeopardy;
    - a.) Trial counsel was ineffective for failing to protect the Defendant's due process rights under the jeopardy clause;
    - b.) Trial counsel was ineffective for failing to demonstrate that Defendant was collaterally estopped from prosecution;
  - 9) Trial counsel was ineffective for failing to amend the charging information;
  - 10) Trial counsel was ineffective for failing to object to obvious errors;
    - a.) Failed to object to (cumulative) – not specific
    - b.) Failed to object to introduction of inadmissible/irrelevant evidence:
      - i.) Photo identification by Ms. Harden and Ms. Negron
      - ii.) Introduction of Black and Mild Cigars
    - c.) Failed to object to State's false improper comment to jury at closing;
      - i.) "I think its clear from testimony of Ms. Harden and Mr. Ha
- that Black and Mild were taken during that robbery."

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ii.) "They also took the cigars. It is no coincidence that Mr. Green's print is on that pack of black and mild. It matches the testimony of Ms. Harden and Negron that he was one of the men in that vehicle and he was one of the men that ran from the sheriff department."

iii.) In opening State falsely alleged that Joseph Hardy was going to testify that "he either knew or should have known both these men committed an armed robbery."

- d.) Failed to object to the gun introduced at trial;
- e.) Failed to object to the introduction of the black bag and all the items within it because it is not proven that a black bag was carried into the store;
- f.) Failed to object to a written statement of Defendant's introduced at trial as there was no oath nor was it attested to as a confession to crime;
- g.) Failed to object to coercive threat by detective to coerce Defendant to make an untrue statement;
- h.) Failed to object to the videotape interrogation being introduced as there was no oath;
- 11) Trial counsel was ineffective for failing to adopt Defendant's pro se motion or to inform the Defendant of his options to have it heard by the Court;
- 12) Trial counsel was ineffective for not motioning for a judgment of acquittal;
- 13) Trial counsel was ineffective for failing to motion for judgment of acquittal at end of trial;
- 14) Trial court judge abused his discretion in a conspired fraud to manipulate tax payer money by coercing Defendant to go to trial with an ineffective attorney;
- 15) Trial counsel's cumulative affect of deficient performance rendered prejudicial results.

As stated in Strickland v. Washington, in order for the Defendant to prevail on a claim of ineffective assistance of counsel, the Defendant must satisfy both prongs of a two-prong test. First, the Defendant must show that counsel's performance fell below an objective standard of reasonableness. Second, the Defendant must demonstrate prejudice, that but for counsel's unprofessional errors, there is a reasonable probability

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that the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). See Spencer v. State, 842 So.2d 52, 61 (Fla. 2003). The Defendant must demonstrate that both prongs of the test have been satisfied, otherwise "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

As to claim 1 that the verdict form was improperly worded, the Defendant's claim must fail. Defendant states that because the jury convicted him of Robbery with a Firearm, and then found that he did not carry the firearm in the course of the robbery, that these two jury findings are inconsistent. See verdict form. The jury was read the instruction of "Principal". It seems apparent from the jury verdict form that the jury found that an armed robbery took place, that the Defendant was a principal, but that Defendant did not actually carry the firearm.

Defendant argues that the verdict is inconsistent because if his codefendant carried a gun, then he must be found guilty of carrying a gun because of the nature of principals. However, the nature of principals does not call for the jury handing Defendant a minimum mandatory sentence for the gun possession when the Defendant did not actually possess the firearm. Therefore, pursuant to Strickland, the attorney's act of not objecting to the form does not fall outside the broad range of reasonable assistance and did not prejudice the Defendant. Strickland v. Washington, 466 U.S. 668 (1984). **Claim 1 is DENIED.**

In claim 2, Defendant argues that his trial counsel was ineffective for failing to object to the Court's abuse of discretion in allowing an unqualified interpreter to translate for the alleged victim, Ajay Patel, at trial. Defendant states that the Court, after the interpreter was excused, made a finding that the interpreter was incompetent. The record does not establish that the Court made such a finding. The Court merely acknowledged that the interpreter had some difficulty understanding English. Trial transcript(T.T.) p. 211. There is no proof from the record that the interpreter was unqualified to interpret for the alleged victim.

Even assuming that the interpreter was unqualified, Defendant cannot establish that he was prejudiced. At trial, it was established through Mr. Patel's testimony that

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Exhibit  
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Defendant was not identified as one of the robbers at a show-up at the Paradise Club. T.T. 194-195. Mr. Patel clearly established that a robbery took place. T.T. 177.

Defendant also argues that the interpreter gave the wrong color of the car in which Mr. Patel was transported to the Paradise Club. However, the record establishes that it was the alleged victim who gave the incorrect car color. T.T. 201-202. Defendant argues that proper impeachment could not be conducted concerning Mr. Patel watching the surveillance videotape with the police. Also, Defendant argues that proper impeachment could not be done concerning the coercive "measures to lead the victim to a falsified testimony by detectives" or by another witness Mike Amen. However, there is no mention of those lines of questioning in the record so the Defendant cannot be said to be prejudiced by incompetent translation if such facts were never addressed. Defendant lastly claims that testimony concerning the identification of Defendant by Mr. Patel is unreliable. However, the record shows that Mr. Patel consistently identified the Defendant as the other robber who came into the store with Benjamin McRoy. T.T. 206-209. Defendant was not prejudiced by the interpretation made at trial and therefore his counsel cannot be deemed ineffective for failing to make a meritless objection. Based on the above, **claim 2 is DENIED.**

In claim 3 Defendant argues that his counsel was ineffective for failing to properly attack an interrogation tape that was later shown at trial. Defendant argues that he unequivocally told the detectives to stop questioning. Defendant argues that without this tape, there would be no evidence linking the Defendant to the crime and so the charge would have to be dismissed. The record indicates that there was a suppression hearing held on March 21, 2005. However, the Defendant's claim that there was a Miranda violation was not an issue presented at the hearing or in the Motion. The Court does not find that the Defendant's statements to the detectives were an unequivocal request for them to stop the questioning. The dialogue from the interrogation is as follows from T.T. 483:

Detective Avery: Everybody makes mistakes. Listen to me. Now, listen to me.

Green: Stop this, stop this, stop this. You need to stop this, man.

Detective Avery: I want to get this out in the open. Okay?

Green: All right.

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P950

Defendant also cites to T.T. 501 which is as follows:

Detective Davis: Yesterday, on Rifle Range Road? Do you understand what video surveillance is? The parking lot video surveillance? I have on video surveillance people going into the Dollar Store on Rifle Range Road and buying quarts of oil, paying \$5 for the oil, putting it in a van in the parking lot, okay, because I've got parking lot surveillance, too. It sure looked like you to me.

Green: Man.

Detective Davis: Yeah, man.

Green: Y'all trying to -you got to stop.

Defendant must prove that he has a valid 4<sup>th</sup> amendment claim in order to succeed on this claim. Pursuant to State v. Owen, the Court held that a "suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation." State v. Owen, 696 So.2d 715, 718 (Fla. 1997), citing Davis v. United States, 512 U.S. 452 (1994). In Owen, the police were in the middle of an interrogation after defendant waived his Miranda rights, and during the interrogation he made two equivocal statements. The detectives asked Owen whether he had deliberately targeted the victim's house and Owen responded "I don't want to talk about it." Detectives asked Owen where he had put a bicycle. Owen again responded "I don't want to talk about it." The court in Owen held that the police need not ask clarifying questions if a defendant who has received and waived Miranda makes only an equivocal or ambiguous request to terminate an interrogation. Almeida v. State, 737 So.2d 520, 523 (Fla. 1999). In the instant case, the Defendant's statements are equivocal. It can not be ascertained whether the Defendant did not want to talk about a certain subject or why he was saying Stop. The detectives were under no duty to clarify the Defendant's request as the Defendant was made aware of his Miranda rights, as read to him by Detective Richard Davis. T.T. 43

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Exhibit  
Pg 51

Defendant did appear to understand his rights and did agree to speak with Detective Davis. T.T. 436.

As to subclaim A, that the counsel was ineffective for failing to demonstrate that the Defendant was not properly Mirandized before giving his statement, the Court conducted a suppression hearing on March 21, 2005, and the Court found, in an Order dated April 15, 2005, that the Defendant was properly Mirandized pursuant to a Sheriff's card. See attached Order.

In subclaim B, Defendant argues that trial counsel was ineffective for not proving that a Miranda waiver had not been signed by the Defendant and that the detectives did not secure whether the Defendant waived his rights. Defendant, in his Motion, states that he did review a Miranda waiver form and declined to sign it.

At the suppression hearing held on March 21, 2005, the following dialogue took place (T.T. 120):

State: Did you ask Mr. Green whether or not he understood his rights?

Detective Davis: Yes, I did.

State: What was his response?

Detective Davis: He did.

State: Did he appear to be under the influence of any alcohol or drugs?

Detective Davis: No.

State: Did you threaten, promise him, or coerce him?

Detective Davis: No, I did not.

State: Okay. Did he agree to speak with you without a lawyer being present?

Detective Davis: Yes, he did.

It is not necessary for the Defendant to sign a Miranda form as the form is not the only evidence that can be used to demonstrate that the Defendant understood and waived his Miranda rights. The record indicates that the Defendant did in fact understand and waive his Miranda rights and did give a statement to the Detectives. Trial counsel cannot be deemed deficient for failing to raise a meritless argument. Based on the above, claim 3 is **DENIED** in full.

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JANIS WEISS  
CRIMINAL DIVISION  
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Exhibit  
Pg 52

As to claim 4, Defendant claims defense counsel was ineffective for failing to object to the court denying the Motion to appoint a special investigator to find witnesses. Defendant claims that the appellate court was barred from reviewing this ruling because defense counsel did not object after the court's ruling. However, this claim must fail because the defense counsel is not required to "object" after the court rules on a motion in order to preserve the issue for appeal. Therefore, **claim 4** lacks merit and must be **DENIED**.

In claim 5, Defendant argues that trial counsel should have moved to Suppress evidence and testimony from other occupants, namely Ms. Negron, Mr. Hardy, and Ms. Harden, after an "illegal traffic stop" due to the "misleading, vague BOLO" and "General" description of the suspects. However, testimony from Ms. Negron, Mr. Hardy, and Ms. Harden shows that once the vehicle was stopped by law enforcement, the Defendant fled from the vehicle and was not arrested until the next day. As Defendant had abandoned the property that was found in the van, he is without standing to raise an objection to its seizure based upon the Fourth Amendment of the United States Constitution. See California v. Hodari D., 499 U.S. 621 (U.S., 1991), State v. A.M., 788 So. 2d 398 (Fla. 3d DCA 2001), State v. R.R., 697 So. 2d 181 (Fla. 3d DCA 1997), and State v. Wright, 662 So. 2d 975 (Fla. 2d DCA 1995). Also, the Defendant does not have standing to suppress the statements made by Ms. Negron, Ms. Harden or Mr. Hardy. Therefore, a Motion to Suppress such evidence and statements would have been without merit and would not have been granted by the Court. Therefore, the Defendant cannot show that he was prejudiced by such an omission. Based on the above, **claim 5** is **DENIED**.

As to claim 6, Defendant states that the probable cause affidavit contains falsities that should have been subject to an adversarial testing process and that his counsel was ineffective for failing to do so. In subclaim A, Defendant states that counsel should have moved to dismiss the probable cause affidavit as it was based on falsities committed by Detective Davis. Defendant primarily argues that Detective Davis wrote in the affidavit that Joseph Hardy "admitted to his involvement in the robbery. Hardy advised he remained in the vehicle while McRoy and Green went into the Chevron Gas Station and

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COUNTY COURT

Exhibit  
Pg 52

committed the robbery." As there is nothing in the record to refute the Defendant's claim, **a response from the State is warranted.**

As to claim 7, Defendant states that his counsel was ineffective for failing to secure an alibi witness, namely, his codefendant Benjamin McRoy. Defendant states that McRoy was subpoenaed and was available for a deposition or to testify and that McRoy admitted to the crime and did not specifically name Green as a codefendant. In order to prevail on this claim, the Defendant must allege "what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." Nelson v. State, 875 So.2d 579, 583 (Fla. 2004). That a witness would have been available to testify at trial is integral to the prejudice allegations. Id.

In this case, Defendant states that defense counsel should have called his codefendant, McRoy to testify at trial as McRoy had already admitted to committing the robbery. However, at the time of Defendant's trial, McRoy had not been sentenced for his part in the robbery. McRoy can not be said to have been available for the Defendant's trial as anything he said at Green's trial would have been used to incriminate him further in McRoy's own proceedings.

Also, Defendant alleges that McRoy would have admitted to committing the crime, thereby exonerating Defendant. However, that would not be the case. Defendant was charged as a principal in the robbery. Just because his codefendant admitted guilt does not mean that information would exonerate the Defendant and cause a not guilty verdict. Both Defendants could be convicted, and were in fact convicted, of taking part in the same crime. McRoy, in his interview with the detectives, would not disclose the names of his codefendants. He never exonerated the Defendant. McRoy did not say that he did not have codefendants. *See* attached police report. Based on the above, it cannot be said that McRoy was truly available to testify due to his own pending case. Additionally, the lack of testimony cannot be said to have prejudiced the Defendant.

In claim 7(a), Defendant claims that counsel was ineffective for failing to call the witness a Captain or Lt. who was present during the show-up identification process at the Paradise club. Defendant claims that this witness would have testified that the victim of the robbery did not identify the Defendant as committing the robbery, and

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Exhibit  
P953



Defendant was later released. This information was established at trial by several different witnesses. Ajay Patel testified that he did not identify the Defendant when Mr. Patel was driven to the Paradise Club. T.T. 194. Also State witness Mike Amin testified that Mr. Patel did not identify Defendant at the Paradise club. T.T. 221. Defense witness Lester Young testified that Defendant was removed from the Paradise club by the police but that Defendant later returned to the bar. T.T. 624. Juan James testified that Green left the bar with the police and then reentered the bar five minutes later. T.T. 649. Therefore, the trial counsel's failure to locate this witness to provide needlessly cumulative evidence cannot be said to constitute deficient performance. Therefore, **claim 7 is DENIED** in full.

As to claim 8(a), Defendant argues that double jeopardy attached when McRoy confessed to the crime since both Defendants were charged with the same robbery. Because McRoy pled first, Defendant argues that he should not have proceeded to trial as double jeopardy attached. In his Motion, Defendant seems to assume that two people cannot be charged with and convicted of committing the same crime. Defendant's assumption is incorrect. Defendant misapplies the double jeopardy clause.

As to claim 8(b), Defendant argues that trial counsel was ineffective for failing to demonstrate that the State was collaterally estopped from prosecuting the Defendant for the same reason cited in claim 8(a). The same reasoning applies as was detailed in 8(a). Based on the above, **claim 8 is DENIED** in full.

As to claim 9, Defendant argues that trial counsel was ineffective for failing to amend the Information. Defendant does not state what trial counsel should have amended the Information to include. Defendant points to such information as the victim not identifying him at the show up and that his codefendant McRoy pled or was found guilty of the crime. It seems as though the Defendant is again arguing that the Information should have been dismissed because McRoy pled. Defendant argues that by not motioning to amend the Information, trial counsel allowed Defendant to be tried and convicted on a crime that is Res Judicata. Such a motion to amend or dismiss Information would not have been granted based on the reasoning in claim 8. Therefore, trial counsel cannot be deemed ineffective for not raising a meritless argument. **is DENIED.**

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In claim 10(c)(ii), Defendant argues that trial counsel failed to object to State during closing saying "They also took the cigars. It is no coincidence that Mr. Green's print is on that pack of Black and Mild. It matches the testimony of Ms. Harden and Ms. Negron that he was one of the men in that vehicle and he was one of the men that ran from the sheriff department." Again, State is arguing facts in evidence.

In claim 10(c)(iii), Defendant argues that trial counsel was ineffective for not objecting during the State's opening when State falsely alleged that Joseph Hardy was going to testify that 'he either knew or should have known both these men committed an armed robbery.' In this case, State is only stating what they believe the evidence will show. Joseph Hardy did in fact testify for the State. This statement didn't warrant an objection so counsel's performance cannot be deficient.

In claim 10(d), Defendant argues that trial counsel failed to object to gun being introduced at trial as the State could not show that Green had control or possession of the gun. The testimony of the officers established that two people fled from the van and that a gun was found. It is not known who had possession of the gun but the fact that it was found in the van from which Defendant fled, and was used in a crime for which the Defendant was charged, makes it relevant and admissible. T.T. 254-259. Therefore, the objection would have been meritless and counsel's performance was not deficient.

As to claim 10(e), trial counsel was ineffective for failing to object to the introduction black bag and all items found in it as no evidence that bag carried into the store, the same argument made in 10(d) applies.

In claim 10(f), Defendant argues that trial counsel failed to object to a written statement made by Defendant as there was no oath or that it was attested to as a confession of the crime. However, officers established that Defendant wrote the statement. Trial transcript p. 587. Defendant also argues that he was not read his Miranda rights and that he did not sign a waiver. This argument has already been addressed in claim 3.

In claim 10(g), Defendant claims that he was coerced to make a statement and counsel was ineffective for failing to object to the statement due to this coercion. This argument has already been raised in Defendant's Motion to Suppress. An Order denying the Motion was issued by the Court on April 15, 2005. See attached Motion.

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In claim 10(h), Defendant argues that trial counsel was ineffective for failing to object to the videotape interrogation being introduced as there was no oath. There is no reason why the tape would have been sworn to or had an oath. The proper predicate was laid and the tape was admissible. T.T. 435-439. Based on the reasons stated above, **claim 10 is DENIED** in full.

As to claim 11, Defendant argues that counsel should have adopted his Motion to Suppress (filed 7/2/04) and Motion to dismiss (filed 7/14/04), that counsel should have told him that he could proceed pro se and have the motion heard, or that he could have counsel of his choice present the motions. *See* Motions. Defendant's main contention is that he was not aware of his right to dismiss counsel and represent himself and to argue his Motions. The record does indicate that the Defendant was aware that he could represent himself in his case. In a hearing held on December 3, 2004, the Court allowed Defendant's first attorney to withdraw and appointed a second trial attorney. At the hearing, the Court stated that "Mr. Kirkland is the last lawyer that I am going to appoint to represent you. You and Kirkland go to trial or you go alone. I mean if you guys can't get along and he has to move to withdraw, then I am going to treat that as a decision on your part to represent yourself." *See* Hearing Transcript p. 6. At a hearing held on November 18, 2004, Defendant was informed by the Court that "if you're represented by a lawyer you can't file motions on your own." *See* Hearing Transcript p. 4. Defendant was aware of the possibility that he could represent himself. Additionally, as the Court stated that this would be the last court appointed attorney that Defendant was going to get, Defendant's claim that he could have counsel of his choice present the motions is incorrect. Defendant's contention that his trial counsel was negligent in not adopting the Motions is not supported by the record. Defendant's Motion to suppress contains no evidence to be suppressed. Defendant's Motion to Dismiss contains allegations that would not warrant a dismissal of the charges from the Court. Defendant's arguments were that his co defendant McRoy had already pled to the crime, that Defendant did not possess the gun, and that the victim could not identify the Defendant at a show up. These issues have already been addressed in this Order. Defendant's claim is meritless and trial counsel's performance cannot be said to be deficient. Based on the above, **claim 11 is DENIED.**

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In claim 12, Defendant argues that trial counsel was ineffective for failing to move for a judgment of acquittal. Defendant argues that the State's evidence went un rebutted by trial counsel and therefore the court had no choice but to deny the motion for judgment of acquittal. The record does indicate that trial counsel moved for a judgment of acquittal. T.T 637. When trial counsel moved for a judgment of acquittal after the State rested its case, the defense had not had the opportunity to present any "exculpatory" evidence as the Defendant claims exists. Defense can only introduce exculpatory evidence in the form of witness testimony after the State has rested. Therefore, Defendant's assertion that trial counsel was ineffective for failing to present exculpatory evidence prior to arguing for a judgment of acquittal is meritless. Based on the above, **claim 12 is DENIED.**

In claim 13, Defendant argues that trial counsel was ineffective for failing to move for a judgment of acquittal at the end of trial. However, the record refutes the Defendant's claim. Trial counsel did renew his motion for judgment of acquittal and again the Court denied his Motion. T.T. 768. **Claim 13 is DENIED.**

In claim 14, Defendant argues that the trial judge abused his discretion in allowing Defendant to be represented by an incompetent lawyer. Defendant's claim of trial court error is not cognizable in a postconviction motion. Hodges v. State, 885 So. 2d 338 (Fla. 2004)(holding that claims of trial court error should be raised on direct appeal, not in a rule 3.850 motion.) **Claim 14 is DENIED.**

In claim 15, Defendant argues that the cumulative effect of trial counsel's ineffectiveness prejudiced the outcome of the trial. Based upon the Court's findings above, **claim 15 is DENIED.**

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# M A N D A T E

from

## DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL,  
AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS  
BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF  
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS  
ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF  
FLORIDA.

WITNESS THE HONORABLE MORRIS SILBERMAN CHIEF JUDGE OF THE  
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT,  
AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: January 26, 2012

SECOND DCA CASE NO. 2D10-1821

COUNTY OF ORIGIN: Polk

LOWER TRIBUNAL CASE NO. 2004CF-004392-01XX

CASE STYLE: SAMUEL GREEN

v. STATE OF FLORIDA



*James Birkhold*  
James Birkhold  
Clerk

cc: (Without Attached Opinion)  
Samuel Green

Anne Sheer Weiner, A.A.G.

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RICHARD M. WEISS, CLERK

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IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D10-1821

Opinion filed November 18, 2011.

Appeal from the Circuit Court for Polk  
County; John K. Stargel, Judge.

Samuel Green, pro se.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Anne Sheer Weiner,  
Assistant Attorney General, Tampa, for  
Appellee.

PER CURIAM.

Affirmed.

DAVIS, KHOUZAM, and BLACK, JJ., Concur.

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# EXHIBIT C

3.850 Ineffective Counsel Claim



ISSUE #1

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE JURY'S "TRUE" INCONSISTENT VERDICT WHICH WERE PERMITTED BY STATE'S UNOBJECTED TO IMPROPERLY WORDED JURY VERDICT FORM.

**SUPPORT:**

Pursuant to: State v. Powell, [3] 674 So. 2d 731,732 (Fla. 1996)(Verdicts are "legally" inconsistent when the charges against defendant are legally interlocking and the verdicts are "truly inconsistent. While factually inconsistent verdicts may stand legally inconsistent verdicts may not. Id at 732." Zacharie v. Franklin, 37 U.S. 151 (Verdict were inconsistent with it and with the action; and clearly showed that the verdict was contrary to law.) Coupe ETAL v. Royer ETAL, 155 S.Ct. 199. (Verdict was inconsistent with its subsequent action). U.S. v. Martinez-Gonzales, 89 F. Supp. 62[1] [2] (It is well settled principle of law that an indictment which charges more than one substantive offense in one count is bad for duplicity. A substantive offense is one which is complete of itself and not dependent upon another. A jury can not find a verdict of guilty as to a count in an indictment and not guilty as to another part of the same count. Nor can a judge.

**ARGUMENT FACTS AND CONCLUSION:** Green contends counsel failed to "object" to the State's "improperly worded jury form" which led to a "true inconsistent" verdict, thus not properly preserving the issue for merit of relief for appellate review. (Bernstein v. Olan, 77 Supp. 672 (S.D.N.Y. 1948) (new trial can not be sought on basis of inconsistency of verdict which was permitted by an instruction given without" objection.)

Counsel's non-tactical actions effectively denied Green his constitutional right to effective assistance of counsel in violation of guarantees of provided **Sixth and Fourteenth Amendments** of the **United States Constitution** and **Article 1 § 9, 16 and 21** of the **Florida**

Constitution.

Record reflects that Green was charged by State's information for **"Robbery with a Firearm Fla. Statues 812.13 and 775.087 (1<sup>st</sup> Degree Felony Punishable By Life) (Level 9)"**. Within the charging information it states that "Assistant State Attorney, Jerry Hill, charges that Samuel Lee Green on or about June 22, 2004, in the county of Polk and State of Florida, by force, violence, assault, or putting in fear, did knowingly take away money of some value, from the person or custody of Ajay Patel, with intent to permanently or temporarily deprive Ajay Patel of the property and **in the course of committing the robbery there was carried a firearm**" (R. 69). Green was charged as **sole (only)** perpetrator to the robbery, there was no mention of co-defendants or any aiding or abetting of others within this record reflected charge (R. 69).

Green was taken to trial on the same instant charges where State never **amended the information** prior to judge instructing jury of same above charge at voir dire, nor after jury was impaneled and sworn and began to hear evidence. (T.T. 6) (T.T. 130). The judge instructed the jury that **"It is your solemn responsibility to decide if the State proves its accusation against Mr. Green"**. (T.T. 130). The judge then comes back to instruct the jury that, "after the last witness has testified, we, that is the lawyer and I, sit down outside of your presence in what is referred to a charge conference where the jury instructions are discussed and I make the decisions I have to make and I tell them what it is going to be reading to you in the jury instructions". (T.T. 133). Judge further states, "All of the decisions regarding the law will be made by me. All of he decisions regarding the facts of the case will be made by you. (Jury) (T.T. 133). Last but surely judge instructs jury that, **Mr. Green is not responsible for those objections**" (T.T. 135)

The record reflects that during charge conference, the judge instructed that, **"I think that**

under the facts of this case, there is no reason to talk about deadly weapons or weapons. It either was a firearm or he didn't have anything to do with it." (T.T. 768).

The jury was instructed and given verdict form. The jury came back with a decision and found Green guilty of robbery with a firearm and further found in the course of committing the robbery there was not carried a firearm.

An "X" was placed on the verdict form in two places. The wording of the verdict form after the first "X" was as follows:

**"Guilty of Robbery with a Firearm and we further find in the course of committing the robbery there"**

This was followed by two blanks and wording as follows:

**"\_\_\_\_\_ was carried a firearm**

**X was not carried a firearm"**

As demonstrated above an "X" was placed on the second blank "was not carried a firearm". (R. 264)

Green contends that the wording of the verdict form resulted in a "truly inconsistent verdict" because the jury found that a firearm was not carried in the course of committing the robbery. (Confirming with what judge instructs at charge conference, "Its either a firearm or he didn't have anything to do with it".) (T.T. 768).

"Verdicts are legally inconsistent when charges against the defendant are legally interlocking and the verdicts are "truly inconsistent" State v. Powell, 674 So. 2d 731, 732 (Fla. 1996). While factually inconsistent verdicts may stand legally inconsistent verdicts may not. Id at 732."

Further, the verdict form was wholly improperly worded. A properly worded verdict form

would have stated:

**"And we further find in the course of committing the robbery**

**\_\_\_\_\_ The defendant carried a firearm**

**\_\_\_\_\_ The defendant did not carry a firearm"**

Green contends that he was prejudiced by the verbiage of the jury form as it was presented to the jury. Had the form been properly worded (as above the jury would have only found **"he did not carry a firearm during the robbery"** and the result could stand because a person can be convicted of armed robbery as a principle and not actually, carry a firearm.

In the instant case, the jury actually made a factual finding that **"In the course of committing a robbery there was not carried a firearm"**. Thus, the instant finding made by the jury is **legally inconsistent** because the information charges Green alone alleging:

**"And in the course of committing the robbery there was carried a firearm" (R. 69-71)**

**"True inconsistency" occurs when an acquittal on one count negates a necessary element for conviction on another count". Powell, supra, at 733 quoting Gonzalez v. State, 440 So. 2d 514, 515 (Fla. 4<sup>th</sup> DCA 1983)**

The specific finding by the jury that in the course of committing the robbery there was not carried a firearm negates an essential element of the crime and requires reversal of the conviction of robbery with a firearm. (Louberti v. State, 895 So. 2d 479 (Fla. 4<sup>th</sup> DCA 2005). Counsel could not have properly addressed this issue without **"objecting"** to the State's improperly worded jury form. Which counsel should have known because the State could not prove its burden. The State, as told by the judge to the jury, had to prove: 1) **that the crime with which Green was charged was in fact committed** and 2) **that Green was the person that**

committed it. (T.T. 854). The burden of the State was not legally proved.

In furtherance, Green contends that this issue should be deemed as meritable. The State could not have said that the jury found him guilty as a principle here because the only cognizable explanation for that if any, would have been for the jury to have only placed one "X" on the entire charge offense "Guilty of Robbery with a Firearm" only. As a principle, Green would have had to be treated as if he had done "all" the things as his co-defendant. Green's co-defendant was charged under the same charge, "Robbery with a Firearm". (See Benjamin McRoy v. State, case FC04-4479).

In the instant case, defendant (Green) could not be convicted or sentenced as a principle because his commitment sheets do not reflect anything of him being found guilty of the principle statute 777.011 in conjunction with 812.13 Robbery with a Firearm.

Legally, the highest offense Green could have been convicted of is robbery. An acquittal on the lesser offense would bar on double jeopardy grounds. A subsequent prosecution for a greater offense. Perkins v. Williams, 424 So. 2d 990 (Fla. 5<sup>th</sup> DCA 1983).

Since in effect Green was acquitted of robbery with a firearm the highest crime he could be retried for is robbery.

#### ISSUE #2

**COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S ABUSE OF DISCRETION IN ALLOWING AN UNQUALIFIED INTERPRETER TO TRANSLATE FOR ALLEGED VICTIM AT TRIAL.**

#### **SUPPORT:**

**PURSUANT TO §§ 90.606 (3), FLORIDA STATUTES (2004) AN INTERPRETER MUST "MAKE A TRUE INTERPRETATION OF THE QUESTIONS ASKED AND THE ANSWERS GIVEN..."**EICHEMENDIA V. STATE, 735 So. 2d 54 (Fla. 3<sup>rd</sup> DCA 1999) AT 556; ORTEGA V. STATE, 721 So. 2d 350, 351 (Fla. 2<sup>nd</sup> DCA 1998). HELD A TRIAL

# EXHIBIT D

Indictment

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

CASE #: 53-2004-CF-004392-01XX-XX

vs.


SAMUEL LEE GREEN, B/M, 04/09/1973, 589-05-7538

INFORMATION FOR:

1) ROBBERY WITH A FIREARM

In the Name and by Authority of the State of Florida:

JERRY HILL, State Attorney for the Tenth Judicial Circuit, by and through his undersigned Assistant State Attorney, charges that SAMUEL LEE GREEN on or about June 22, 2004, in the County of Polk and State of Florida, by force, violence, assault, or putting in fear, did knowingly take away money, of some value, from the person or custody of AJAY J PATEL, with the intent to permanently or temporarily deprive AJAY J PATEL of the property, and in the course of committing the robbery there was carried a firearm, contrary to Florida Statutes 812.13 and 775.087 (1 DEG FEL, PBL) (LEVEL 9)

  
ANDREW J. RILEY  
FL. BAR NO. 0755915  
Assistant State Attorney  
Polk County, Florida

# EXHIBIT E

Mandate



NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D10-1821

Opinion filed November 18, 2011.

Appeal from the Circuit Court for Polk  
County; John K. Stargel, Judge.

Samuel Green, pro se.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Anne Sheer Weiner,  
Assistant Attorney General, Tampa, for  
Appellee.

PER CURIAM.

Affirmed.

DAVIS, KHOUZAM, and BLACK, JJ., Concur.

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Pg 68(n)

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3.800 Brief  
EXHIBIT B

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812.13. Robbery

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) 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 imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

CREDIT(S)

Laws 1953, c. 28217, § 1; Laws 1955, c. 29930, § 1; Laws 1971, c. 71-136, § 839; Fla.St. 1973, § 813.011; Laws 1974, c. 74-383, § 38; Laws 1975, c. 75-298, § 29; Laws 1987, c. 87-315, § 1; Laws 1992, c. 92-155, § 1.

Current through Chapter 229 (End) of the 2012 Second Regular Session and the 2012 Extraordinary Apportionment Session of the Twenty-Second Legislature

775.087. Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense which is reclassified under this section is ranked one level above the ranking under s. 921.0022 or s. 921.0023 of the felony offense committed.

(2)(a) 1. Any person who is convicted of a felony or an attempt to commit a felony, regardless of whether the use of a weapon is an element of the felony, and the conviction was for:

- a. Murder;
- b. Sexual battery;
- c. Robbery;
- d. Burglary;
- e. Arson;
- f. Aggravated assault;
- g. Aggravated battery;
- h. Kidnapping;
- i. Escape;
- j. Aircraft piracy;

k. Aggravated child abuse;

l. Aggravated abuse of an elderly person or disabled adult;

m. Unlawful throwing, placing, or discharging of a destructive device or bomb;

n. Carjacking;

o. Home-invasion robbery;

p. Aggravated stalking;

q. Trafficking in cannabis, trafficking in cocaine, capital importation of cocaine, trafficking in illegal drugs, capital importation of illegal drugs, trafficking in phencyclidine, capital importation of phencyclidine, trafficking in methaqualone, capital importation of methaqualone, trafficking in amphetamine, capital importation of amphetamine, trafficking in flunitrazepam, trafficking in gamma-hydroxybutyric acid (GHB), trafficking in 1,4-Butanediol, trafficking in Phenethylamines, or other violation of s. 893.135(1); or

r. Possession of a firearm by a felon

and during the commission of the offense, such person actually possessed a "firearm" or "destructive device" as those terms are defined in s. 790.001, shall be sentenced to a minimum term of imprisonment of 10 years, except that a person who is convicted for aggravated assault, possession of a firearm by a felon, or burglary of a conveyance shall be sentenced to a minimum term of imprisonment of 3 years if such person possessed a "firearm" or "destructive device" during the commission of the offense. However, if an offender who is convicted of the offense of possession of a firearm by a felon has a previous conviction of committing or attempting to commit a felony listed in s. 775.084(1)(b)1. and actually possessed a firearm or destructive device

during the commission of the prior felony, the offender shall be sentenced to a minimum term of imprisonment of 10 years.

2. Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraphs (a)1.a.-q., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.

3. Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraphs (a)1.a.-q., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

(b) Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law in addition to the minimum mandatory sentence, or from imposing a sentence of death pursuant to other applicable law. Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not authorize a court to impose a lesser sentence than otherwise required by law.

Notwithstanding s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, and the defendant is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, prior to serving the minimum sentence.

(c) If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

(d) It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

(3) (a) 1. Any person who is convicted of a felony or an attempt to commit a felony, regardless of whether the use of a firearm is an element of the felony, and the conviction was for:

- a. Murder;
- b. Sexual battery;
- c. Robbery;
- d. Burglary;
- e. Arson;
- f. Aggravated assault;
- g. Aggravated battery;
- h. Kidnapping;
- i. Escape;

j. Sale, manufacture, delivery, or intent to sell, manufacture, or deliver any controlled substance;

k. Aircraft piracy;

l. Aggravated child abuse;

m. Aggravated abuse of an elderly person or disabled adult;

n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

o. Garjacking;  
p. Home-invasion robbery;  
q. Aggravated stalking; or  
r. Trafficking in cannabis, trafficking in cocaine, capital importation of cocaine, trafficking in illegal drugs, capital importation of illegal drugs, trafficking in phencyclidine, capital importation of phencyclidine, trafficking in methaqualone, capital importation of methaqualone, trafficking in amphetamine, capital importation of amphetamine, trafficking in flunitrazepam, trafficking in gamma-hydroxybutyric acid (GHB), trafficking in 1,4-Butanediol, trafficking in Phenethylamines, or other violation of s. 893.135(1);  
and during the commission of the offense, such person possessed a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun as defined in s. 790.001, shall be sentenced to a minimum term of imprisonment of 15 years.

2. Any person who is convicted of a felony or an attempt to commit a felony listed in subparagraph (a)1., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a semiautomatic firearm and its high-capacity box magazine or a "machine gun" as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.

3. Any person who is convicted of a felony or an attempt to commit a felony listed in subparagraph (a)1., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a semiautomatic firearm and its high-capacity box magazine or a "machine gun" as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

(b) Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law in addition to the minimum mandatory sentence, or from imposing a sentence of death pursuant to other applicable law. Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not authorize a court to impose a lesser sentence than otherwise required by law.

Notwithstanding s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, and the defendant is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, prior to serving the minimum sentence.

(c) If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

(d) It is the intent of the Legislature that offenders who possess, carry, display, use, threaten to use, or attempt to use a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun as defined in s. 790.001 be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

(e) As used in this subsection, the term:

1. "High-capacity detachable box magazine" means any detachable box magazine, for use in a semiautomatic firearm, which is capable of being loaded with more than 20 centerfire cartridges.

2. "Semiautomatic firearm" means a firearm which is capable of

firing a series of rounds by separate successive depressions of the trigger and which uses the energy of discharge to perform a portion of the operating cycle.

(4) For purposes of imposition of minimum mandatory sentencing provisions of this section, with respect to a firearm, the term "possession" is defined as carrying it on the person. Possession may also be proven by demonstrating that the defendant had the firearm within immediate physical reach with ready access with the intent to use the firearm during the commission of the offense, if proven beyond a reasonable doubt.

(5) This section does not apply to law enforcement officers or to United States military personnel who are performing their lawful duties or who are traveling to or from their places of employment or assignment to perform their lawful duties.

CREDIT(S)

Laws 1974, c. 74-383, § 9; Laws 1975, c. 75-7, § 1; Laws 1975, c. 75-298, § 3; Laws 1976, c. 76-75, § 2; Laws 1983, c. 83-215, § 51; Laws 1989, c. 89-306, § 3; Laws 1990, c. 90-124, § 2; Laws 1990, c. 90-176, § 2. Amended by Laws 1995, c. 95-184, § 19, eff. June 8, 1995; Laws 1995, c. 95-195, § 9, eff. July 1, 1995; Laws 1996, c. 96-322, § 15, eff. Oct. 1, 1996; Laws 1996, c. 96-388, § 55, eff. July 1, 1996; Laws 1997, c. 97-194, § 14; Laws 1999, c. 99-12, § 1, eff. July 1, 1999; Laws 2000, c. 2000-158, § 88, eff. July 4, 2000; Laws 2000, c. 2000-320, § 5, eff. Oct. 1, 2000; Laws 2005, c. 2005-128, § 11, eff. July 1, 2005; Laws 2011, c. 2011-200, § 4, eff. July 1, 2011; Laws 2012, c. 2012-74, § 1, eff. July 1, 2012.

Exhibit 99  
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EXHIBIT C

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EXHIBIT D

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Motion to correct sentence and scoresheet by defendant convicted of lesser included offenses of second-degree murder, and robbery and attempted robbery with firearm was denied by the Circuit Court, Duval County, Lawrence P. Haddock, J. Defendant appealed. The District Court of Appeal held that defendant's murder sentence was improperly reclassified to life felony based on use of weapon.

Remanded for resentencing.

West Headnotes

- [1] Sentencing and Punishment K 726(4)  
350H ----  
350HIV Sentencing Guidelines  
350HIV(B) Offense Levels  
350HIV(B)3 Factors Applicable to Several Offenses  
350Hk726 Dangerous Weapons or Destructive Devices  
350Hk726(4) Use.  
(Formerly 110k1208.6(2))

Second-degree murder conviction was improperly reclassified from first-degree felony punishable by life imprisonment to life felony based on defendant's use of weapon given that jury specifically found that firearm not in defendant's physical possession was used in course of committing murder and, thus, defendant was entitled to correction of sentence and scoresheet, as well as a resentencing. West's F.S.A. §§ 775.087, 782.04(2); West's F.S.A. RCrP Rule 3.800(a).

- [2] Criminal Law K 1192  
110 ----  
110XXIV Review  
110XXIV(U) Determination and Disposition of Cause  
110k1192 Mandate and Proceedings in Lower Court.

On remand for resentencing which followed when initial sentences were based on inaccurate scoresheet, trial court may consider imposition of any sentence which would have otherwise been permissible at initial sentencing hearing.

Joshua Williams, pro se, for appellant. Daniel A. Smith,  
Jacksonville, for appellant.

Robert A. Butterworth, Attorney General and Thomas Crapps,  
Assistant Attorney General, for appellee.

PER CURIAM.

[1] Joshua Williams (Williams) appeals the denial of his motion to correct his sentence and scoresheet pursuant to Florida Rule of Criminal Procedure 3.800(a). Williams was charged by indictment with committing one count of first-degree murder and two counts of armed robbery. A jury found him guilty of the lesser-included offense of second-degree murder, the lesser-included offense of attempted robbery with a firearm, and robbery with a firearm. On a special verdict form on each count, the jury expressly found "a firearm not in his physical possession was used." Williams was sentenced to a total of 40 years imprisonment. (FN1) Of the various issues raised in his rule 3.800(a) motion, we reverse on the issue of the trial court's reclassification of his second-degree murder conviction, and affirm, without discussion, all remaining issues.

Williams' second-degree murder conviction was reclassified from a first-degree felony punishable by life imprisonment to a life felony pursuant to the enhancement provisions of section 775.087(1), Florida Statutes (1989). (FN2) §§ 782.04(2), 775.087, Fla.Stat. (1989). Nevertheless, Williams' murder sentence cannot be enhanced under section 775.087(1) where the jury specifically found "a firearm not in his physical possession was used" in

the course of committing the murder. State v. Rodriguez, 602 So.2d 1270, 1272 (Fla.1992) ("when a defendant is charged with a felony involving the 'use' of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony"). In view of the jury's specific finding, the reclassification of Williams' murder sentence to a life felony under the statute is improper.

[2] Accordingly, we remand for resentencing on all counts, as correction of the enhancement error may affect the sentencing range under the scoresheet. However, since the initial sentences were based upon an inaccurate scoresheet, we note that the trial court may consider the imposition of any sentence which would have otherwise been permissible at the initial sentencing hearing. See Roberts v. State, 547 So.2d 129 (Fla.1989).

WEBSTER, MICKLE and LAWRENCE, JJ., concur.

(FN1.) He was sentenced to 40 years imprisonment on the murder charge, 15 years imprisonment on the attempted robbery charge, and 40 years imprisonment on the robbery charge, all sentences to run concurrently.

(FN2.) The enhancement presumably was done pursuant to subsection (1) of section 775.087 because subsection (2) expressly requires the defendant to have had a firearm in his possession and imposes a 3-year minimum mandatory term. The instant case meets neither requirement.



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EXHIBIT E

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65-So.3d 110  
36 Fla. L. Weekly D1383  
District Court of Appeal of Florida,  
Fourth District.  
Mario Lopez JUAREZ, Appellant,  
v.  
STATE of Florida, Appellee.  
No. 4D09-4464.  
June 29, 2011.  
Rehearing Denied July 26, 2011.

Background: Defendant was convicted in the Fifteenth Judicial Circuit Court, Palm Beach County, Jeffrey J. Colbath, J., of robbery with a firearm, grand theft, and false imprisonment and was sentenced to concurrent terms of 14 years in prison. Defendant appealed.

Holding: The District Court of Appeal, Gross, C.J., held that trial court could not reclassify the grand theft and false imprisonment convictions from third-degree felonies to second-degree felonies.

Affirmed in part, reversed in part, and remanded.

#### West Headnotes

Sentencing and Punishment K 79

350H ----

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk76 Weapons

350Hk79 Possession and carrying.

[See headnote text below]

Sentencing and Punishment K 81

350H ----

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk76 Weapons

350Hk81 Accomplices and co-participants.

Trial court could not reclassify defendant's convictions for grand theft and false imprisonment from third-degree felonies to second-degree felonies pursuant to statute providing for such reclassification when a weapon or firearm is involved in a criminal offense in certain ways; statute required the defendant himself, rather than a coperpetrator, to carry or use the weapon or firearm, and jury found that defendant did not actually possess a firearm during either offense. West's F.S.A. §§ 775.087(1), 787.02(2), 812.014(2)(c).

Carey Haughwout, Public Defender, and James W. McIntire, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Heidi L. Bettendorf, Assistant Attorney General, West Palm Beach, for appellee.

GROSS, C.J.

We reverse that portion of appellant's sentence reclassifying two third degree felonies as second degree felonies and otherwise affirm the convictions.

The State of Florida charged Mario Juarez with: (1) robbery with a firearm; (FN1) (2) possession of a firearm while committing grand theft; (FN2) and (3) possession of a firearm while committing false imprisonment. (FN3) Three others--Boris Alvarenga, Joel Vicente, and Henry Santos--were also involved in the robbery, but Juarez was the only one on trial. The jury found Juarez guilty of robbery with a firearm, but also found that he did not actually possess the firearm. Similarly, the jury found him guilty of both grand theft and false imprisonment, and also found that he did not have actual possession of a firearm during either offense. The trial court adjudicated Juarez guilty of the three felonies and sentenced him to three concurrent terms of 14 years in prison. In doing so, the court reclassified the grand theft and false imprisonment charges as second degree felonies.

Juarez correctly argues that the reclassification of the grand theft and false imprisonment charges was error because the jury found that he did not actually possess a firearm during either offense. The Supreme Court's construction of section 775.087(1) in *State v. Rodriguez*, 602 So.2d 1270 (Fla.1992), compels reversal.

Grand theft and false imprisonment are typically charged as third-degree felonies. See § 812.014(2)(c), Fla. Stat. (2008) (grand theft); § 787.02(2), Fla. Stat. (2008) (false imprisonment). However, section 775.087(1), Florida Statutes (2008), provides for reclassification of felonies when a weapon or firearm is involved in a criminal offense in certain ways. As applied to this case, subsection 775.087(1)(c) mandates that a third degree felony be reclassified as a second degree felony when "during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm." In *Rodriguez*, the Supreme Court construed this statutory language and answered this certified question in the negative:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?

602 So.2d at 1271. The Supreme Court focused on the language of subsection 775.087(1), which requires that "the defendant " carry, display, use, threaten, or attempt to use any weapon or firearm. Id. (emphasis in original). Apparently applying the rule of lenity, (FN4) the Court held that When a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony.

602 So.2d at 1272. The Court explicitly rejected the idea that a defendant could be subject to reclassification under subsection 775.087(1) as a principal. (FN5) Id.

Although section 775.087 was substantially amended in 1999, (FN6) the language of subsection (1) has not changed since the Supreme Court construed it in *Rodriguez*.

Applying *Rodriguez*, we reverse the grand theft and false imprisonment sentences and remand for resentencing as third degree felonies.

We briefly address the other points raised on appeal. The October 2008 date of the offense means that this case was "in the pipeline" when the Supreme Court decided *Valdes v. State*, 3 So.3d 1067, 1071-74 (Fla.2009). "Pipeline cases are those cases pending on direct appellate review or are otherwise not yet final at the time of a pertinent change in the law." *State v. Ruiz*, 863 So.2d 1205, 1209 n. 6 (Fla.2003). Thus, Juarez may not take advantage of the "core offense" double jeopardy analysis that the Supreme Court rejected in *Valdes*. See *Foster v. State*, 861 So.2d 434, 436 n. 1 (Fla. 1st DCA 2002). We find no fundamental error in the trial court's use of the "and/or" locution in a jury instruction. See *Garzon v. State*, 980 So.2d 1038, 1042 (Fla.2008); *Bryant v. State*, 30 So.3d 591 (Fla. 2d DCA 2010). We find no abuse of discretion in the trial court's admission in evidence of Juarez's statement, which contained statements by the interrogating detective. See *Eugene v. State*, 53 So.3d 1104 (Fla. 4th DCA 2011).

Affirmed in part, reversed in part and remanded.

HAZOURI and CIKLIN, JJ., concur.

(FN1.) §§ 775.082(2)(a)1., 812.13(1), (2)(a), Fla. Stat. (2008).

(FN2.) §§ 775.087(1), 812.014(1), (2)(c), Fla. Stat. (2008).

(FN3.) §§ 775.087(1), 787.02(2), Fla. Stat. (2008).

(FN4.) § 775.021(1), Fla. Stat. (2009) ("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.").

(FN5.) § 777.011, Fla. Stat. (2009).

(FN6.) See Ch. 99-12, § 1, Laws of Fla.

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Following affirmance, 528 So.2d 1373, of conviction for attempted first-degree murder, defendant sought postconviction relief. The Circuit Court for Dade County, Fredricka G. Smith, J., found that sentencing enhancement was illegal. State appealed. The District Court of Appeal, 582 So.2d 1189, affirmed and certified question of great public importance. The Supreme Court, Overton, J., held that felony defendant's sentence could not be enhanced based on "use" of weapon, absent evidence of his personal possession of weapon during commission of felony.

Certified question answered; District Court decision approved.

## West Headnotes

- [1] Sentencing and Punishment K 79  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk79 Possession and Carrying.  
(Formerly 110k1208.6(2))

When defendant is charged with felony involving the "use" of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. West's F.S.A. § 775.087(1).

- [2] Sentencing and Punishment K 81  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk81 Accomplices and Co-Participants.  
(Formerly 110k1208.6(2))

Defendant's sentence for attempted first-degree murder could not be enhanced on basis of codefendant's possession of rifle during commission of the crime. West's F.S.A. § 775.087(1).

Robert A. Butterworth, Atty. Gen., and Jorge Espinosa and Michael J. Neimand, Asst. Attys. Gen., Miami, for petitioner.

Bennet H. Brummer, Public Defender and Michel Ociacovski Weisz, Sp. Asst. Public Defender, Eleventh Judicial Circuit, Miami, for respondent.  
OVERTON, Justice.

We have for review State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified the following question as being of great public importance:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?

Id. at 1191.

We have jurisdiction (FN1) and answer the question in the negative, finding, in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant.

The relevant facts reflect that Rodriguez was charged with an attempt to commit murder in the first degree upon allegations that he and his codefendant fired a deadly weapon at Officer Kenneth Nelson, in violation of sections 782.04(1), 777.04(1), and 775.087, Florida Statutes (1983). The evidence established that, when the police attempted to pull over Rodriguez's vehicle, he fled at high speed. During the chase, a passenger in Rodriguez's car picked up a rifle and began shooting at the pursuing officers. Rodriguez and his codefendant were apprehended and charged by information as previously noted. Rodriguez was convicted of attempted first-degree murder.

His sentence was enhanced on the grounds that he "used" the firearm in the commission of this offense. The issue in this proceeding is the enhancement of the sentence under section 775.087(1), which reads as follows:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 775.087(1), Fla.Stat. (1983) (emphasis added). In this instance, both parties agree that the reclassified sentence would be a life sentence.

Rodriguez filed a motion for postconviction relief, asserting that he was improperly sentenced because of application of the enhancement provision. The trial court granted relief, finding that "the firearm described in the information as that used

during the commission of the attempted murder was at no time carried, displayed, used, or attempted to be used by this Defendant." The trial court concluded that Rodriguez was improperly sentenced under a life-felony standard and directed that he be resentenced for attempted first-degree murder under sections 782.04(1) and 777.04.

On appeal, the Third District Court of Appeal affirmed, noting that it had "previously ruled that 'the enhancement provisions of section 775.087(1) ... require that the defendant personally possess the weapon during the commission of the crime involved.'" Rodriguez, 582 So.2d at 1190 (quoting Postell v. State, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)). See also Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA), review denied, 548 So.2d 663 (Fla.1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989).

[1] [2] The State argues that this case should be controlled by Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988). In Menendez, the defendant was convicted of trafficking in cocaine and was found to have personally possessed the weapon during the commission of the felony. Both the trial court and the district court in this proceeding held that Menendez was distinguishable. We agree that Menendez should not apply because the factual circumstances are distinguishable. We hold that, when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. In this case, the evidence plainly establishes that Rodriguez did not have personal possession of the rifle during the commission of the felony. We reject the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant.

We hold that the statute in this instance does not allow that construction or interpretation. See Postell; Willingham; Ngai. Interestingly, Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.

For the reasons expressed, we answer the question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

(FN1.) Art. V, § 3(b)(4), Fla. Const.

3.800 Brief  
EXHIBIT G

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78 So.3d 11  
36 Fla. L. Weekly D2241  
District Court of Appeal of Florida,  
Third District.  
Kevin D. HARVEY, Appellant,  
v.  
The STATE of Florida, Appellee.  
No. 3D11-2066.  
Oct. 12, 2011.

Background: Defendant whose convictions and sentences for attempted murder, robbery with a firearm, and aggravated assault were affirmed on direct appeal, and who filed and appealed numerous postconviction motions, filed motion to correct illegal sentence arguing that his consecutive three-year mandatory terms on each of his four life sentences for robbery were an illegal sentence. The Circuit Court, Miami-Dade County, Rosa Rodriguez, J., summarily denied motion. Defendant appealed.

Holding: The District Court of Appeal held that defendant was not collaterally estopped from raising the argument.

Reversed and remanded.

West Headnotes

- [1] Sentencing and Punishment K 2317  
350H ----  
350HXII Reconsideration and Modification of Sentence  
350HXII(C) Proceedings  
350HXII(C)3 Hearing and Determination  
350Hk2317 Successive proceedings.

Defendant was not collaterally estopped from arguing, in motion to correct illegal sentence, that his consecutive three-year mandatory terms on each of his four life sentences for robbery were an illegal sentence, even though issue was raised in defendant's first motion for postconviction relief; claim was not decided on the merits the first time it was raised, as defendant's appeal from the summary denial of the motion was dismissed by the District Court of Appeal for unknown reasons. West's F.S.A. RCrP Rules 3.800, 3.850.

- [2] Sentencing and Punishment K 2279  
350H ----  
350HXII Reconsideration and Modification of Sentence  
350HXII(C) Proceedings  
350HXII(C)1 In General  
350Hk2278 Time  
350Hk2279 In general.  
[See headnote text below]

- [2] Sentencing and Punishment K 2317  
350H ----  
350HXII Reconsideration and Modification of Sentence  
350HXII(C) Proceedings  
350HXII(C)3 Hearing and Determination  
350Hk2317 Successive proceedings.

A postconviction claim of an illegal sentence may be raised at any time, although collateral estoppel may bar successive motions for postconviction relief raising the same issue. West's F.S.A. RCrP Rule 3.800(a).

- [3] Sentencing and Punishment K 2317  
350H ----  
350HXII Reconsideration and Modification of Sentence  
350HXII(C) Proceedings  
350HXII(C)3 Hearing and Determination  
350Hk2317 Successive proceedings.

The collateral estoppel bar against successive postconviction motions raising the same issue applies only when the identical issue is raised in a prior motion and the issue is decided on the merits.

Kevin D. Harvey, in proper person.  
Pamela Jo Bondi, Attorney General, for appellee.

Before RAMIREZ, LAGOA, and EMAS, JJ.  
PER CURIAM.

Kevin D. Harvey appeals from the summary denial of his Florida Rule of Criminal Procedure 3.800 motion to correct an illegal sentence. We reverse.

After a jury trial, defendant was convicted of one count of attempted first degree murder, four counts of robbery with a firearm, and one count of aggravated assault. On October 25, 1989, the trial court sentenced defendant to fifteen years in prison, with three years mandatory, for the attempted murder, and life terms for each robbery count, with consecutive three years mandatory on each life term. This Court affirmed the judgment on direct appeal. Harvey v. State, 575 So.2d 663 (Fla. 3d DCA 1991).

Thereafter, defendant moved for post-conviction relief under Florida Rule of Criminal Procedure 3.850, alleging, among others contentions, that the consecutive mandatory terms on the four robbery counts were an illegal sentence. The trial court summarily denied defendant's motion and defendant appealed to this Court. For unknown reasons, this Court dismissed the appeal. Since then, defendant has filed and appealed numerous post-conviction motions, none of which raised the sentencing error. Recently, defendant filed a Rule 3.800 motion to correct the illegal sentence, and the trial court denied the motion on the ground that the error should have been raised on direct appeal. This recent filing is the subject of the current appeal.

[1] [2] [3] It is well settled that a postconviction claim of an illegal sentence may be raised at any time, see Fla. R. Crim. P. 3.800(a), although collateral estoppel may bar successive motions for post-conviction relief raising the same issue. See State v. McBride, 848 So.2d 287, 291 (Fla.2003). The collateral estoppel bar, however, only applies when the identical issue is raised in a prior motion and the issue is decided on the merits. Pleasure v. State, 931 So.2d 1000, 1002 (Fla. 3d DCA 2006). Because defendant's prior post-conviction claim of an illegal sentence was not decided on the merits, defendant's claim is not collaterally estopped. Additionally, defendant was not required to raise the illegal sentencing claim in his direct appeal first. See Bedford v. State, 633 So.2d 13, 14 (Fla.1994) (holding that illegal sentence may be corrected even after it is erroneously affirmed on appeal).

Accordingly, we reverse the trial court's summary denial of defendant's Rule 3.800 motion, and remand for the trial court to decide the motion on the merits.

Reversed and remanded.

Exhibit Pg  
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3.800 Brief  
EXHIBIT H

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348 So.2d 287  
28 Fla. L. Weekly S401  
Supreme Court of Florida.  
STATE of Florida, Petitioner,

v.

Antoine L. McBRIDE, Respondent.  
No. SC02-627.  
May 15, 2003.

Defendant was convicted, on negotiated plea of nolo contendere, of attempted first-degree murder with a firearm, possession of a firearm by a convicted felon, and robbery with a firearm, and was sentenced, as habitual felony offender, to concurrent thirty-year terms of imprisonment on each count. Defendant filed motion to correct illegal sentence, which motion was denied. Defendant filed second motion to correct illegal sentence, which motion was also denied by the Circuit Court, Marion County, William T. Swigert, J., denied. Defendant appealed from denial of second motion. The District Court of Appeal, Sawaya, J., 810 So.2d 1019, reversed in part and affirmed in part, certifying question. On certification, the Supreme Court, Cantero, J., held that: (1) principles of collateral estoppel barred defendant from raising in a successive motion to correct illegal sentence the same issue raised by him in his first motion; (2) as matter of first impression, collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice; and (3) application of collateral estoppel to bar defendant's claims would not result in manifest injustice.

Decision of the District Court quashed; certified question answered.

Pariante, J., concurred in result only with opinion, in which Anstead, C.J., joined.

Lewis, J., concurred in part and dissented in part with opinion.

#### West Headnotes

[1] Criminal Law K 1139

110 ----

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 In General.

Supreme Court's standard of review on the issue of whether a defendant is procedurally barred from obtaining relief is de novo.

[2] Courts K 99(6)

106 ----

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(6) Other Particular Matters, Rulings Relating To.

[See headnote text below]

[2] Sentencing and Punishment K 2317

350H ----

350HXII Reconsideration and Modification of Sentence

350HXII(C) Proceedings

350HXII(C)3 Hearing and Determination

350Hk2317 Successive Proceedings.

Trial court's denial of defendant's first motion to correct illegal sentence was not the law of the case with respect to issue of legality of defendant's sentence, where defendant did not appeal from such denial. West's F.S.A. RCrP Rule 3.800(a).

[3] Courts K 99(1)

106 ----

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(1) In General.

Law-of-the-case principles do not apply unless the issues are decided on appeal.

[4] Judgment K 584

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k584 Nature and Elements of Bar or Estoppel by Former Adjudication.

Res judicata prohibits not only relitigation of claims raised but also the litigation of claims that could have been raised in the prior action.

[5] Sentencing and Punishment K 2317

350H ----

350HXII Reconsideration and Modification of Sentence

350HXII(C) Proceedings

350HXII(C)3 Hearing and Determination

350Hk2317 Successive Proceedings.

Inclusion in the rule permitting a court to correct an illegal sentence of the phrase "at any time" allows defendants to file successive motions under the rule, expressly rejecting application of res judicata principles to such motions. West's F.S.A. RCrP Rule 3.800(a).

[6] Sentencing and Punishment K 2317

350H ----

350HXII Reconsideration and Modification of Sentence

350HXII(C) Proceedings

350HXII(C)3 Hearings and Determination

350Hk2317 Successive Proceedings.

Principles of collateral estoppel barred defendant from raising in a successive motion to correct illegal sentence the same issue raised by him in his first motion, from trial court's denial of which he never appealed. West's F.S.A. RCrP Rule 3.800(a).

[7] Judgment K 559

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k549 Nature of Action or Other Proceeding

228k559 Criminal Prosecutions.

[See headnote text below]

[7] Judgment K 648

228 ----

228XIV Conclusiveness of Adjudication

228XIV(A) Judgments Conclusive in General

228k643 Nature of Action or Other Proceeding

228k648 Civil or Criminal Proceedings.

Both res judicata and collateral estoppel apply in criminal and civil contexts.

[8] Criminal Law K 1668(1)

110 ----

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1666 Effect of Determination

110k1668 Successive Post-Conviction Proceedings

110k1668(1) In General.

[See headnote text below]

[8] Sentencing and Punishment K 2217

350H ----

350HXI Restitution

350HXI(G) Payment

350Hk2212 Enforcement

350Hk2217 Mode of Enforcement.

Although collateral estoppel generally precludes relitigation of an issue in a subsequent but separate cause of action, its intent, which is to prevent parties from rearguing the same issues that have been decided between them, applies in the postconviction context.

[9] Sentencing and Punishment K 2317

350H ----

350HXII Reconsideration and Modification of Sentence

350HXII(C) Proceedings

350HXII(C)3 Hearing and Determination

Exhibit PS  
B3



**\*350Hk2317 Successive Proceedings.**

Collateral estoppel precludes a defendant from rearguing in a successive rule motion to correct an illegal sentence the same issue argued in a prior motion. West's F.S.A. RCrP Rule 3.800(a).

[10] Judgment K 540

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k540 Nature and Requisites of Former Recovery as Bar in

General.

Res judicata will not be invoked where it would defeat the ends of

justice.

[11] Courts K 99(1)

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106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(1) In General.

Law of the case doctrine will not be invoked where it would defeat

the ends of justice.

[12] Judgment K 634

228 ----

228XIV Conclusiveness of Adjudication

228XIV(A) Judgments Conclusive in General

228k634 Nature and Requisites of Former Adjudication as Ground

of Estoppel in General.

Collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice.

[13] Sentencing and Punishment K 2317

350H ----

350HXII Reconsideration and Modification of Sentence

350HXII(C) Proceedings

350HXII(C)3 Hearing and Determination

350Hk2317 Successive Proceedings.

Application of collateral estoppel to bar defendant's successive motion to correct illegal sentence did not result in manifest injustice, where defendant was sentenced as habitual offender to concurrent 30-year terms of imprisonment on each of three felonies, only one of which sentences, that for life felony of attempted first-degree murder, was illegal, and where resentencing defendant for life felony had potential to increase his prison term. West's F.S.A. § 775.082; West's F.S.A. RCrP Rule 3.800(a).

Charles J. Crist, Jr., Attorney General, and Robin A. Compton and Kellie A. Nielan, Assistant Attorneys General, Daytona Beach, for Petitioner.

Beverly A. Pohl and Bruce Rogow of Bruce S. Rogow, P.A., Fort Lauderdale, for Respondent.

CANTERO, J.

We review *McBride v. State*, 810 So.2d 1019, 1023 (Fla. 5th DCA 2002), in which the district court of appeal certified the following question of great public importance:

IS A DEFENDANT ENTITLED TO RELIEF PURSUANT TO A SUCCESSIVE RULE 3.800(a) MOTION TO CORRECT AN ILLEGAL SENTENCE WHEN THE DEFENDANT RAISED THE IDENTICAL ISSUE IN A PRIOR RULE 3.800(a) MOTION THAT WAS DENIED BY THE TRIAL COURT BUT NEVER APPEALED TO THE DISTRICT COURT OF APPEAL?

We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the question in the negative and quash the decision of the Fifth District Court of Appeal.

I. Facts

Pursuant to a plea agreement, McBride entered a plea of nolo contendere to charges of attempted first-degree murder with a firearm, possession of a firearm by a convicted felon, and robbery with a firearm. See *McBride*, 810 So.2d at 1020. The court sentenced him as a habitual felony offender to concurrent thirty-year terms of imprisonment on each of the

three counts. *Id.* In May 1990, however, when he committed the attempted first-degree murder, which is a life felony, life felonies were not subject to sentence enhancement under the habitual offender statute. See *Lamont v. State*, 610 So.2d 435 (Fla.1992).

In 2000, respondent filed a motion under Florida Rule of Criminal Procedure 3.800(a), asserting that the habitual offender sentence imposed for the attempted first-degree murder was illegal and requesting that he be resentenced. The court denied the motion, and McBride did not appeal. The following year, McBride filed another motion under the same rule asserting the same argument. Noting the successive nature of the claim, the trial court denied the motion, and this time McBride appealed. The Fifth District reversed, holding that the law of the case doctrine did not bar review by an appellate court and that the illegal sentence should be corrected. The appellate court thus reversed and remanded for further proceedings and certified the question quoted above. *McBride*, 810 So.2d at 1023.

II. McBride's Habitual Offender Sentence

[1] This Court previously has held that habitual offender sentences imposed for life felonies when life felonies were not subject to the habitual offender statute are illegal. See *Carter v. State*, 786 So.2d 1173, 1180 (Fla.2001); *Lamont v. State*, 610 So.2d 435, 438 (Fla.1992). It is therefore undisputed that McBride's habitual offender sentence for attempted first-degree murder is illegal. Such a sentence ordinarily may be corrected under rule 3.800(a). See *Carter*, 786 So.2d at 1180. Because McBride already had filed the identical motion and the court had denied it, however, we must determine whether McBride is procedurally barred from obtaining relief. Our standard of review on such an issue is *de novo*. See *West v. State*, 790 So.2d 513, 514 (Fla. 5th DCA 2001); see also *State v. Nuckolls*, 677 So.2d 12, 13 (Fla. 5th DCA 1996) (noting that "[t]he issues in this case revolve around the legal sufficiency of the pleadings and therefore we review *de novo* the trial court's ruling").

Florida Rule of Criminal Procedure 3.800(a) provides as follows, in relevant part:

A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief ....

As we have previously stated, rule 3.800(a) "is intended to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law." *Carter*, 786 So.2d at 1176. A sentence is illegal if it imposes "a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." *Id.* at 1178 (quoting and approving definition in *Blakely v. State*, 746 So.2d 1182, 1186-87 (Fla. 4th DCA 1999)).

III. The Law of the Case Doctrine

[2] [3] The district court correctly held that the law of the case doctrine does not prevent McBride from relitigating the legality of his habitual offender sentence. That doctrine requires that "questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." Florida Dep't of Transp. v. Juliano, 801 So.2d 101, 105

(Fla.2001) To view preceding link please click here (emphasis added). Law-of-the-case principles do not apply unless the issues are decided on appeal. *Id.*; see also *Kelly v. State*, 739 So.2d 1164, 1164 (Fla. 5th DCA 1999) (holding that "[s]uccessive 3.800(a) motions re-addressing issues previously considered and rejected on the merits and reviewed on appeal are barred by the doctrine of law of the case"). Because McBride did not appeal the previous order denying his rule 3.800 motion, the district court correctly held that the law of the case doctrine does not apply.

IV. Res Judicata and Collateral Estoppel Principles

[4] [5] Our conclusion that the law of the case doctrine does not bar McBride's claim does not, however, end our analysis. The State urges us to apply the common law doctrine of res judicata. This Court has explained that doctrine as follows:

A judgment on the merits rendered in a former suit between the same parties

Exhibit 1 pg 9

or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

Juliano, 801 So.2d at 105 (quoting *Kimbrell v. Paige*, 448 So.2d 1009, 1012 (Fla.1984)). Thus, under *res judicata*, a judgment on the merits bars a subsequent action between the same parties on the same cause of action. See *Denson v. State*, 775 So.2d 288, 290 (Fla.2000) (applying *res judicata* to deny a habeas petition where the defendant had raised the same claim in a 3.800 motion decided against him on the merits and the defendant had exhausted all appropriate appellate review). *Res judicata*, however, prohibits not only relitigation of claims raised but also the litigation of claims that could have been raised in the prior action. Juliano, 801 So.2d at 105. The doctrine would require a motion to correct an illegal sentence to raise all arguments that the sentence is illegal. Subsequent motions would be barred if they contained arguments that were or could have been raised in the prior motion. Rule 3.800, however, allows a court to correct an illegal sentence "at any time." Florida courts have held, and we agree, that the phrase "at any time" allows defendants to file successive motions under rule 3.800. See *Raley v. State*, 675 So.2d 170, 173 (Fla. 5th DCA 1996); *Barnes v. State*, 661 So.2d 71, 71 (Fla. 2d DCA 1995). Thus, rule 3.800 expressly rejects application of *res judicata* principles to such motions.

[6] [7] [8] [9] Again, however, this conclusion does not end the analysis. Although *res judicata* may not apply to motions filed under rule 3.800, the similar, but more narrow, doctrine of collateral estoppel, or issue preclusion, does apply. (FN1) We have explained that doctrine as follows: "Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health & Rehabilitative Services v. B.J.M.*, 656 So.2d 906, 910 (Fla.1995). Under Florida law, collateral estoppel, or issue preclusion, applies when "the identical issue has been litigated between the same parties or their privies." *Gentile v. Bauder*, 718 So.2d 781, 783 (Fla.1998). In addition, the particular matter must be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction. See *B.J.M.*, 656 So.2d at 910.

*City of Oldsmar v. State*, 790 So.2d 1042, 1046 n. 4 (Fla.2001). Although collateral estoppel generally precludes relitigation of an issue in a subsequent but separate cause of action, its intent, which is to prevent parties from rearguing the same issues that have been decided between them, applies in the postconviction context. As explained above, under the principles of *res judicata* a defendant would be prohibited from filing any successive 3.800 motion on any issue that was or could have been raised. Collateral estoppel, on the other hand, only precludes a defendant from rearguing in a successive rule 3.800 motion the same issue argued in a prior motion.

This analysis is consistent with the application of rule 3.800 in the district courts of appeal. For example, in *Smith v. State*, 685 So.2d 912, 912 (Fla. 5th DCA 1996), the Fifth District considered "whether the defendant may obtain relief, based on a claim that he was not given proper gain time credit, by a successive rule 3.800 motion." The court concluded that "[w]hile it may be correct that rule 3.800 does not prohibit successive motions, we hold that where, as here, a defendant raises an issue under rule 3.800, the lower court denies relief and the defendant fails to appeal, he may not later raise the same issue in another rule 3.800 motion." *Id.* Accord *Tisdol v. State*, 823 So.2d 300, 301 (Fla. 3d DCA 2002); see also *Jenkins v. State*, 749 So.2d 527, 528 (Fla. 1st DCA 1999) (noting that a defendant may not raise the same illegal sentencing issue in successive postconviction motions); *Price v. State*, 692 So.2d 971, 971 (Fla. 2d DCA 1997) (noting that rule 3.800 "contains no proscription against the filing of successive motions" but that "a defendant is not entitled to successive review of a specific issue which has already been decided against him"). In barring the filing of successive repetitive 3.800 motions, these courts essentially have applied collateral estoppel principles.

#### V. Manifest Injustice

Our application of collateral estoppel principles does not end the analysis, either. We must still decide whether a manifest injustice exception

exists in the context of collateral estoppel, and if it does, whether manifest injustice would prohibit application of that doctrine.

[10] [11] [12] This Court has long recognized that *res judicata* will not be invoked where it would defeat the ends of justice. See *deCancino v. E. Airlines, Inc.*, 283 So.2d 97, 98 (Fla.1973); *Universal Constr. Co. v. City of Fort Lauderdale*, 68 So.2d 366, 369 (Fla.1953). The law of the case doctrine also contains such an exception. See *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla.1965). We have found no Florida case holding that such an exception applies to collateral estoppel. Federal courts and other state courts, however, have held that the collateral estoppel doctrine does contain such a manifest injustice exception. See, e.g., *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Thompson v. Schweiker*, 665 F.2d 936, 940 (9th Cir.1982); *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir.1971); *Dowling v. Finley Assocs., Inc.*, 248 Conn. 364, 727 A.2d 1245, 1249 n. 5 (1999); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321, 1333 (1997); *State v. Harrison*, 148 Wash.2d 550, 61 P.3d 1104, 1109 (2003) To view preceding link please click here . We agree. We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice.

[13] In light of this holding, we must now determine whether the application of collateral estoppel in this case creates a manifest injustice that can be determined from the face of the record. See Fla. R.Crim. P. 3.800(a) (stating that the motion must "affirmatively allege[ ] that the court records demonstrate on their face an entitlement to ... relief"). As noted above, McBride was sentenced as a habitual offender to concurrent thirty-year terms of imprisonment on each of three felonies. Only the habitual offender sentence for the life felony of attempted first-degree murder, however, is illegal. In light of the concurrent sentences of the same length McBride is serving as a habitual offender, applying collateral estoppel to his successive motion will not result in a manifest injustice. In fact, as the State notes, resentencing McBride for the life felony could very well result in an increase in his prison term. See § 775.082, Fla. Stat. (1989). Therefore, McBride's claim is barred.

Based on the foregoing, the trial court correctly denied McBride's successive rule 3.800 motion, which raised the identical claim raised in his earlier motion, the denial of which he did not appeal. The prior judgment on the merits is thus final with regard to all matters addressed by the trial court in that order. Accordingly, we quash the decision of the Fifth District Court of Appeal, and answer the certified question in the negative.

It is so ordered.

WELLS and QUINCE, JJ., and SHAW, Senior Justice, concur.

PARIENTE, J., concurs in result only with an opinion, in which ANSTEAD, C.J., concurs.

LEWIS, J., concurs in part and dissents in part with an opinion.

PARIENTE, J., concurring in result only.

Although the members of this Court agree that McBride is not entitled to sentence correction via his rule 3.800(a) motion, we diverge in our views of the law dictating this result. The majority rejects the doctrines of law of the case and *res judicata*, and instead applies collateral estoppel, recognizing a manifest injustice exception. Justice Lewis considers collateral estoppel inapplicable and asserts that *res judicata* is the proper legal principle, while also embracing a manifest injustice exception.

In my view, the reason for the struggle to make well-established legal principles fit into the rule 3.800(a) framework is because neither doctrine is suited to the unique jurisprudential concerns regarding illegal sentences and the specification in rule 3.800(a) that an illegal sentence may be challenged at any time. Instead, I conclude that we should quash the Fifth District decision reversing the trial court's denial of the rule 3.800(a) motion because McBride has not received an illegal sentence remediable under the rule.

Moreover, even assuming the doctrine of collateral estoppel bars a successive rule 3.800(a) claim based on the identical claim previously raised, it is essential that we clarify the precise definition of the manifest injustice exception to provide guidance to trial courts and appellate courts. In my view,

Exhibit 13  
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unless the trial court could have imposed the same sentence or a more severe sentence absent the illegality, correction of an illegal sentence under rule 3.800(a) is necessary to prevent a manifest injustice.

McBride's sentence is in accord with a plea agreement and is within the statutory maximum for a life felony. In *Maddox v. State*, 760 So.2d 89, 103 (Fla.2000), we reaffirmed our precedent "allowing defendants to agree through a plea bargain to a sentence not specifically authorized by statute or rule as long as the sentence does not exceed the statutory maximum." Cases in which we held that an unauthorized habitual offender sentence for a life felony could be rectified via rule 3.800(a) involved sentences imposed after trial and not as the result of a guilty or no contest plea. See *Carter v. State*, 786 So.2d 1173 (Fla.2001), quashing 704 So.2d 1068, 1069 (Fla. 5th DCA 1997) (defendant "tried and convicted"); *Lamont v. State*, 610 So.2d 435, 436, 439 (Fla.1992) (defendant "found guilty"; discussion of verdict form).

I do not endorse the propositions that either *res judicata*, which protects the finality of judgments, or collateral estoppel, which precludes relitigation of issues previously resolved, bars the correction of truly illegal sentences under rule 3.800(a). In fact, the very notion of rule 3.800(a) is that it allows the illegality of a sentence to be raised at any time after the judgment and sentence are final—even though the challenge to the sentence could have been raised on direct appeal. The fact that a trial court may have in a given case erroneously rejected a postconviction claim of an illegal sentence brought by a defendant (who most likely is unrepresented) should not bar a valid challenge to a truly illegal sentence in a rule 3.800 proceeding. Indeed, past experience shows that even valid challenges to sentences may be rejected and the denial of the motion affirmed *per curiam* without opinion, especially in areas where the law is in transition. See, e.g., *Dixon v. State*, 730 So.2d 265, 268 n. 4 (Fla.1999) (noting disparate treatment of appeals from summary denials of postconviction motions seeking retroactive application of *Hale v. State*, 630 So.2d 521 (Fla.1993)).

Application of either *res judicata* or collateral estoppel to rule 3.800 proceedings can also frustrate pro se litigants whose meritorious claims have been previously derailed on procedural grounds. For example, in *Ford v. State*, 667 So.2d 455 (Fla. 4th DCA 1996), the trial court denied, on *res judicata* grounds, a successive rule 3.800(a) motion seeking presentence jail credit after the appeal of the denial of the previous motion was dismissed as untimely. To its credit, the State acknowledged on appeal that the second motion was not barred. *Id.* at 455. Pro se defendants who are ignorant of the fact that rule 3.800 does not authorize a motion for rehearing often file for rehearing and then find that their appeals have been dismissed as untimely. See, e.g., *Mincey v. State*, 789 So.2d 492 (Fla. 1st DCA 2001).

While I would never condone the successive filing of nonmeritorious motions, we should not bar reconsideration of a meritorious claim under rule 3.800 that the sentence is illegal. I thus do not agree with the majority that consideration of a successive motion that a sentence is illegal should turn on the existence of a "manifest injustice" exception. See majority op. at 291-92. Rather, in my view the mechanism for correcting illegal sentences provided by rule 3.800(a) should be limited only by the provisos that the error appear on the face of the record and that the sentence itself be illegal as measured by statute, rule, or case law.

As we noted in *Maddox*, "[t]he extraordinary provision made for remedying illegal sentences evidences the utmost importance of correcting such errors, even at the expense of legal principles that might preclude relief from trial court errors of less consequence." 760 So.2d at 101. We recognized

that "clearly the class of errors that constitute an 'illegal' sentence that can be raised for the first time in a postconviction motion decades after a sentence becomes final is a narrower class of errors than those termed 'fundamental' errors that can be raised on direct appeal even though unpreserved." *Id.* at 100 n. 8. We observed in *Maddox* that the State recognizes that it "has no interest in any defendant serving a sentence that is longer than the sentence authorized by law." *Id.* at 99. Indeed, the entire justice system certainly has an interest in ensuring that the defendant is not incarcerated longer than is

authorized by law, or under illegal terms. The courts have an obligation to correct any such error whenever it is brought to their attention.

In accord with the principles espoused in *Maddox*, we held in *Bover v. State*, 797 So.2d 1246 (Fla.2001), that a defendant who pled no contest to fifteen third-degree felonies for a ten-year habitual offender sentence could challenge the sentence via rule 3.800(a) on grounds that his prior offenses did not qualify him for habitualization. Absent qualification as a habitual offender, the maximum sentence Bover could have received for each third-degree felony was five years in prison. We noted that pursuant to the recommended guidelines sentence of life, Bover could have received fifteen consecutive five-year sentences, but we declined to address the effect of the plea agreement on the claim that he lacked the prior felonies necessary for habitualization because neither party raised the issue. *Id.* at 1251 n. 7.

In this case, however, the existence of the plea agreement should not be ignored, because it resulted in three concurrent thirty-year habitual offender sentences, one of which was on the attempted murder count at issue here. Although a habitual offender sentence was not authorized for a life felony, the thirty-year sentence on this count is within the applicable statutory maximum of a "term of years not exceeding 40 years" for a life felony. § 775.082(3)(a), Fla. Stat. (1989). The plea agreement and resulting sentence within the statutory maximum bring this case within the class of cases contemplated by our approval in *Maddox* of agreements to sentences that are not specifically authorized by statute but do not exceed the statutory maximum. See 760 So.2d at 103. Therefore, consistent with *Maddox*, I would hold that the imposition of an unauthorized habitual offender sentence can be corrected via rule 3.800(a), except in those situations in which the defendant has agreed through a knowing and voluntary plea to a sentence that does not exceed the maximum penalty authorized for the offense.

Because McBride agreed to his unauthorized sentence as part of a plea and the thirty-year sentence does not exceed the maximum penalty authorized for a life felony under section 775.082(3)(a), he is not entitled to relief via rule 3.800(a). However, because the certified question does not draw a distinction for unauthorized habitual offender sentences imposed pursuant to plea, I do not concur in the majority's answer to the certified question.

ANSTEAD, C.J., concurs.

LEWIS, J., concurring in part and dissenting in part.

I concur in the result only with regard to the issues addressed by the majority today, but I cannot accept the creative reasoning adopted by the Court without authority in its opinion. I must dissent from the majority's unprecedented decision to ignore age-old precedent and rewrite Florida law to apply the doctrine of collateral estoppel to the facts of the present case. In my view, the majority ignores

extraordinarily well-settled facets of Florida's common law, and simply creates new law, without any deference to, or consideration of, the prior opinions of this Court. Because I can find no existing authority which supports the inordinate and rash action taken today by the Court to totally eliminate the clear legal distinction between collateral estoppel and *res judicata*, while years of precedent counsel against application of the doctrine of collateral estoppel to the instant case, I dissent.

The doctrines of *res judicata* and collateral estoppel, and their very separate and distinct nature, are age old. Indeed, each doctrine "was recognized by the Roman law, and later by the English courts, and it is said that [each] pervades, not only our own, but all other, systems of jurisprudence to this day, and has become a rule of universal law." *Cragin v. Ocean & Lake Realty Co.*, 101 Fla. 1324, 133 So. 569, 571 (1931); see also *Coral Realty Co. v. Peacock Holding Co.*, 103 Fla. 916, 138 So. 622, 624 (1931). Central to the law regarding the preclusive effects of prior judgments, and critical in the present action, are the discrete and important differences between the doctrines of *res judicata* and collateral estoppel.

As long as the doctrines have been part of Florida law, a matter has qualified for the application of *res judicata*, thereby barring further litigation on a relevant claim, only where there is "a concurrence of identity in the thing sued for, identity of cause of action, identity of persons and parties to the action, and identity of quality in persons for or against whom claim is made."

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McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323, 328 (1935); see also Palm AFC Holdings, Inc. v. Palm Beach County, 807 So.2d 703, 704 (Fla. 4th DCA 2002); State Dep't of Revenue v. Ferguson, 673 So.2d 920, 922 (Fla. 2d DCA 1996). I suggest that there is no question that the doctrine of res judicata applies in the present case. Here, McBride's initial and subsequent rule 3.800 motions contained recitations of identical facts, raised identical claims, involved identical parties, and were, in both substance and form, identical actions.

McBride

The pertinent, well-recognized difference between the doctrines of res judicata and collateral estoppel is that while res judicata requires identity of the cause of action, see McGregor, this Court has always reserved collateral estoppel only for the situation in which a party attempts to rely upon the judgment entered or determination made in a prior and unrelated action. Indeed, the decisions in which this Court has limited application of collateral estoppel to "those cases wherein the parties are the same in the second suit as in the former action but the causes of action are different," Yovan v. Burdine's, 81 So.2d 555, 557 (Fla.1955), are myriad. Probably the most succinct and direct expression of this principle is found in this Court's statement in Universal Construction Co. v. City of Fort Lauderdale, 68 So.2d 366 (Fla.1953): "Estoppel by judgment is applicable only in those cases wherein the parties are the same in the second suit as in the former but the cause of action is different." Id. at 369 (emphasis supplied). There are multiple Florida decisions which echo this conclusion. (FN2)

Because the majority chooses to simply ignore overwhelming authority which precludes the application of collateral estoppel to the facts of the instant case due to the simple, obvious fact that the cause of action before this Court is absolutely identical to that filed originally by McBride in 2000, and refuses to apply the correct doctrine of res judicata, I dissent. I can find absolutely no authority which supports the course of action taken by the majority today, and the majority provides no authority for applying collateral estoppel and obliterating the well-defined legal distinction between this doctrine and res judicata. With this decision the Court rewrites the law of collateral estoppel, applying the doctrine to a subsequent, identical action in contravention of decades of Florida precedent. I refuse to be part of a unilateral and baseless revision of the law which changes the very core of the doctrine of collateral estoppel; therefore, I dissent from that portion of the majority opinion applying collateral estoppel to the present case, and concur only in the result. Collateral estoppel now has the identical components which have historically existed only for application of res judicata.

State of Florida, Petitioner, v. Antoine L. McBRIDE, Respondent., 2002 WL 32131708 (Appellate Brief) (Fla. May 2002), Petitioner's Initial Brief on the Merits

State of Florida, Petitioner, v. Antoine L. McBRIDE, Respondent., 2002 WL 32131830 (Appellate Brief) (Fla. May 2002), Petitioner's Initial Brief on the Merits

#### Briefs and Other Related Documents

(FN1.) Both res judicata and collateral estoppel apply in criminal and civil contexts. See, e.g., Thompson v. Crawford, 479 So.2d 169 (Fla. 3d DCA 1985) (noting that the doctrine of res judicata is as applicable to judgments in criminal prosecutions as to civil cases); Brown v. State, 397 So.2d 320, 322 (Fla. 2d DCA 1981) (holding that denial of motions to suppress in a bookstore robbery case was proper under a theory of collateral estoppel where the same witness identification was the subject of prior suppression motions denied in a market robbery case).

(FN2.) See Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591, 594 (Fla.1956); Gordon v. Gordon, 59 So.2d 40, 44 (Fla.1952); Green v. State Dep't of Health & Rehabilitative Servs., 412 So.2d 413, 414 (Fla. 3d DCA 1982) ("Where the causes of action are different, the doctrine of estoppel by judgment comes into play ....") (quoting 32 Fla. Jur.2d, Judgments and Decrees, § 116); Clean Water, Inc. v. State Dep't of Env'tl. Reg., 402 So.2d 456, 458 (Fla. 1st DCA 1981) ("The doctrine of res judicata bars relitigation of the same cause of action between the same parties and collateral estoppel bars relitigation of the same issues between the same parties in a different cause of action.").

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3.800 Brief  
EXHIBIT I

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA  
FELONY DIVISION F5

STATE OF FLORIDA,

Plaintiff,

-vs-

CASE NO. CF04-004392

SAMUEL GREEN,

Defendant.

**ORDER DENYING REHEARING**

This cause came on for consideration of the Motion for Rehearing filed by Defendant **SAMUEL GREEN** in the above-styled case. Upon a review of the motion, the files and records in this case, and the applicable law, the Court finds that the motion fails to state adequate cause for revisiting, modifying, or withdrawing its order of December 19, 2012. Accordingly, it is **ORDERED** and **ADJUDGED** that the Motion for Rehearing is hereby **DENIED**.

**DONE and ORDERED** on this the 15<sup>th</sup> day of January 2013 in chambers at Bartow, Polk County, Florida.

/s/MICHAEL E. RAIDEN  
**MICHAEL E. RAIDEN,**  
Circuit Court Judge

**Copies furnished to:**

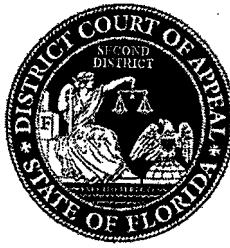
Samuel Green, DOC No. B-370562, Hamilton Correctional Institute Annex, 11419 S.W. County Road 259, Jasper, FL 32052

Victoria Avalon, Esq., ASA

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3.800 Brief  
EXHIBIT J

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**DISTRICT COURT OF APPEAL**  
**SECOND DISTRICT**  
1005 E. MEMORIAL BOULEVARD  
LAKELAND, FLORIDA 33801-0327  
(863)-499-2290

**ACKNOWLEDGMENT OF NEW CASE**

DATE: January 29, 2013

STYLE: SAMUEL LEE GREEN v. STATE OF FLORIDA

2DCA#: 2D13-377

The Second District Court of Appeal has received the Notice of Appeal reflecting a filing date of 1/18/13

The county of origin is Polk.

The lower tribunal case number provided is 2004CF-004392-01XX-X

The filing fee is No Fee-3.800.

Case Type: Criminal 3.800 Summary

The Second District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

cc: Samuel Lee Green

Attorney General

Stacy Butterfield, Clerk

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3.800 Brief  
EXHIBIT K

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RULE 3.992(a) CRIMINAL PUNISHMENT CODE RESHEET

1. SENT. DATE 7/14/05	2. PREP'S NAME K. WILLIAMS	3. COUNTY POLK	4. SENTENCING JUDGE D2 Maloney
5. NAME (LAST, FIRST, MID, SUFF) GREEN, SAMUEL, JR.	6. DOB 04/09/1973	8. RACE BLACK	10. PRI. OFF. DATE 06/22/2004
9. UNIFORM DOCKET # 532004CF00439201XXXX	7. DC # 370562	9. GENDER MALE	11. PRIMARY DOCKET # 0404392
			12. PLEA

PRIMARY OFFENSE: If Qual., check \_\_\_A\_\_\_S\_\_\_C\_\_\_R (A=Att, S=Solict, C=Consp, R=Rec)

LONG F.S.#	DESCRIPTION	OFFENSE LEVEL	POINTS
812.13(2)(A)	ROBB. GUN/DEADLY WPN	09	
Level - Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116			
For capital felony triples Primary Offense points - NO			
			I. 92.0

ADDITIONAL OFFENSE(S): Supplemental page attached - NO

CKET# FEL/MM F.S.#	DEGREE	OFFENSE LEVEL	QUALIFY A S C R	COUNTS	POINTS	TOTAL
00855 MISDEME 812.014(3)(A)		M		001 X	0.2	0.2
DESCRIPTION: PETTY-THEFT-MISD						
UC#: 532004CF00085501XXXX						
Level-Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58						
For capital felony triples Add. Off. points - NO						
						Suppl. page points
						0.0
I. VICTIM INJURY						II. 0.2

nd Deg.	Number	Total		Number	Total
nd Deg. Murder	240 X	0.0 =	0.0	Slight	4 X
Death	120 X	0.0 =	0.0	Sex Penet.	80 X
Severe	40 X	0.0 =	0.0	Sex Cont.	40 X
Moderate	18 X	0.0 =	0.0		

PRIOR RECORD: Supplemental page attached - NO III. 0.0

L/MM F.S.#	OFFENSE LEVEL	QUAL ASCR	DESCRIPTION	NBR	PTS	TOTAL
812.13(2)(A)	09		ROBB. GUN/DEADLY WP	001 X	23.0	23.0
810.02(2)(B)	08		BURGLARY, ARMED W/EX	001 X	19.0	19.0
ev-Pnts: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29						
Supplemental page points:						
IV. 42.0						
Page 1 Subtotal: 134.2						

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998.

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Page 1

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RICHARD M. WEISS, CLERK

Exhibit

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180

Legal Status violation = 4 Points

Page 1 Subtotal: 134.2  
V. 4.0

Community Sanction violation before the court for sentencing VI. 12.0  
6 points X each successive violation OR  
New felony conviction = 12 points X each successive violation

I. Firearm/Semi-Automatic or Machine Gun = 18 or 25 points VII. 0.0

II. Prior Serious Felony = 30 Points VIII. 0.0

Enhancements (only if the primary offense qualifies for enhancement) Subtotal Sentence Points 150.2

Law Enforc. Prot.	Drug Traffic	Grand Theft Motor Veh.	Street Gang	Domestic Violence

Enhanced Subtotal Sentence Points IX. 0.0  
TOTAL SENTENCE POINTS 150.2  
SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is a non-state prison sanction

If total sentence points are greater than 44:

150.2 total sentence points minus 28 = 122.2 X .75 = 91.6  
lowest permissible prison sentence in months

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s.775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

LIFE  
maximum sentence  
in years

	TOTAL SENTENCE IMPOSED			
	Years	Months	Days	
<input checked="" type="checkbox"/> State Prison	<input checked="" type="checkbox"/> Life			
<input type="checkbox"/> County Jail	<input type="checkbox"/> Time Served			
<input type="checkbox"/> Community Control				
<input type="checkbox"/> Probation				

ease check if sentenced as ☐ habitual offender, ☐ habitual violent offender,  
☐ violent career criminal, ☒ prison releasee reoffender, or  
☐ mandatory minimum applies.

☐ Mitigated Departure ☐ Plea Bargain ☐ DOP  
her Reason

JUDGE'S SIGNATURE

EXHIBIT  
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RULE 3.992(b) CRIMINAL PUNISHMENT CODE SUPPLEMENTAL SCORESHEET

NAME (LAST, FIRST, MIDDLE, SUFFIX) GREEN, SAMUEL, LEE,	DOCKET 0404392	UNIFORM CASE NUMBER 532004CF00439201XXXX	DATE OF SENT 01/01/9999 7/14/05
--	-------------------	---	---------------------------------------

ADDITIONAL OFFENSE(S):

cket#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	COUNTS	POINTS	TOTAL
-------	------------------	-------	------------------	--------------------	--------	--------	-------

Level-Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)  
II. 0.0

PRIOR RECORD:

L/MM GREE	F.S.#	OFFENSE LEVEL	QUAL ASCR	DESCRIPTION	NBR	PTS	TOTAL
--------------	-------	------------------	--------------	-------------	-----	-----	-------

Level-Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)  
IV. 0.0

Reasons for Departure - Mitigating Circumstances  
(reasons may be checked here or written on the scoresheet)

- \_\_\_ Legitimate, uncoerced plea bargain
- \_\_\_ The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- \_\_\_ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- \_\_\_ The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.
- \_\_\_ The need for payment of restitution to the victim outweighs the need for a prison sentence.
- \_\_\_ The victim was an initiator, willing participant, aggressor, or provoker of the incident.
- \_\_\_ The defendant acted under extreme duress or under the domination of another person.
- \_\_\_ Before the identity of the defendant was determined, the victim was substantially compensated.
- \_\_\_ The defendant cooperated with the State to resolve the current offense or any other offense.
- \_\_\_ The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
- \_\_\_ At the time of the offense the defendant was too young to appreciate the consequences of the offense.
- \_\_\_ The defendant is to be sentenced as a youthful offender.

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence.

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JUL 14 2005

RICHARD M. WEISS, CLERK

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MEMO OF SENTENCE / ORDER OF THE COURT  
IN THE CIRCUIT / COUNTY COURT POLK COUNTY, FLORIDA / CRIMINAL DIVISION BI #:04014447  
IV: E2 ATE: 07/14/05 BONDSMAN: DEF. LOC: JAIL  
CASE NO.: CF04-004392-XX STATE VS: GREEN SAMUEL LEE  
EQ# CT# FINE / CST BD SRTY / CASH  
001 1 WEAP-F/AR ARMED ROBBERY (FIREARM)

NO MORE CHARGES FOR THIS CASE ONLY

A. Steinlicht JUDGE DENNIS P. MALONEY COURT REPORTER ELR

DEFENDANT PLEA ADJUDICATION

☐ Pres w/o Atty ☒ Guilty ☐ Nolo Cont ☒ Guilty ☐ Withheld  
☒ Pres w/Atty PD Bipland ☐ Not Guilty ☐ Not Guilty ☐ Withheld Pending Disp  
☐ Atty / PD

☐ FTA ☐ SRTY/CSH BD \$ 6000 ☐ WAIV JT& COUNS ☐ WAIV PSI  
☐ Capi Ord. ☐ Bond Set \$ 6000 C/S EA CT. / TOTAL OR BLANKET W/  
☐ Capi/Warr. W/D ☐ PSCO Notified ☐ Bond Forfeiture Ordered Set Aside

P.D. Appt. for Appeal  
☐ PD APPT YOUR NEXT COURT DATE IS:

☐ Arraignment @ ☐ Jury Trial / Non-Jury Trial @  
☐ Status Conf. @ ☐ Plea @  
☐ Pretrial Conf. @ ☐ Disposition @  
☐ Viol. Prob. @ ☐ Other @  
☐ INFO FILED IN OPEN COURT ☐ NOTIFY DEFT / ALL ☐ DEFT REF. P.S.I. / PDR ☐ WAIV SP TRIAL  
☐ JURY TRIAL STARTS ☐ JURY VERDICT

Deft placed on ☐ PROBATION / COMM CONTROL FOR A PERIOD OF

☐ To run concurrent / consecutive with Warr. Costs / Fine Due within Warr. Filed  
☐ PROB / CCPR: ☐ RESTORED ☐ MODIFIED ☐ REVOKED ☐ CRT ORD D/L SUSP Don't Cont  
☐ JAIL ☐ REST ☐ ALCOHOL / DRUG EVAL ☐ DW/DDS SCHOOL ☐ Probation Terminated Satisfactorily/Unsatisfactorily  
☐ DOM VIOL PROG ☐ STANDARD DRUG COND ☐ COMMITMENT CC: Def PA/PA SAO JAIL Prob  
☐ ACS HOURS within

It is the judgment of the court, and the sentence of the law that you, the above named defendant be confined in the  
Life ☐ Polk County Jail ☒ State Prison ☐ Youthful Offender for a term of:  
DYS/MOS/YRS CT# 1 TO RUN CONCUR/CONSEC WITH Deft. Sent  
DYS/MOS/YRS CT# TO RUN CONCUR/CONSEC WITH PRR  
DYS/MOS/YRS CT# TO RUN CONCUR/CONSEC WITH  
DYS/MOS/YRS CT# TO RUN CONCUR/CONSEC WITH  
DYS/MOS/YRS CT# TO RUN CONCUR/CONSEC WITH

☒ TO BE GIVEN CREDIT FOR all TIME SERVED. ☐ DEFT TO BE RELEASED THIS CASE ONLY  
☐ WEEKEND WORK RELEASE TO BEGIN AT 7:45 AM ☐ WEWR MEMO SIGNED

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF THE CIRCUIT / COUNTY COURT THIS DATE 7-14-05

DATE 7-14-05 BY [Signature] D.C. RICHARD M. WEISS PDO  
ORIGINAL (COURT FILE) CIRCUIT JUDGE 790-0574

IN THE CIRCUIT COURT, 10TH JUDICIAL  
CIRCUIT, IN AND FOR POLK COUNTY,  
FLORIDA

DIVISION: 2

CASE NUMBER: CF04-004392-XX

(UCN NO:53-2004-CF-004392-01XX-XX)

D.C. NUMBER: 370562

OBTS NUMBER: 5301057790

STATE OF FLORIDA

VS.

SAMUEL LEE GREEN 3

J U D G M E N T

THE DEFENDANT SAMUEL LEE GREEN 3  
BEING PERSONALLY BEFORE THIS COURT REPRESENTED BY JOHN KIRKLAND  
HIS ATTORNEY OF RECORD, AND THE STATE REPRESENTED BY PETER STEINLICH  
ASSISTANT STATE'S ATTORNEY, AND HAVING

BEEN TRIED AND FOUND GUILTY OF THE FOLLOWING CRIME(S);

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	PAGE
001	WEAP-F/ARM ARMED ROBBERY (FIREARM)	812.13	FL, PBL-L9	BOOK

X AND NO CAUSE BEING SHOWN WHY THE DEFENDANT SHOULD NOT BE ADJUDICATED  
GUILTY, IT IS ORDERED THAT THE DEFENDANT IS HEREBY ADJUDICATED GUILTY OF THE  
ABOVE CRIME(S).

X AND PURSUANT TO SECTION 943.325, FLORIDA STATUTES, HAVING BEEN CONVICTED  
OF ATTEMPTS OR OFFENSES RELATING TO SEXUAL BATTERY (CH. 794) OR LEWD AND  
LASCIVIOUS CONDUCT (CH. 800); INDECENT EXPOSURE, 782.04-MURDER,  
784.045-AGGRAVATED BATTERY, 812.133-CARJACKING, 812.135-HOME INVASION  
ROBBERY, (CH. 787) - KIDNAPPING, 782.04 - HOMICIDE, 782.07 - MANSLAUGHTER,  
812.13 - ROBBERY, 812.131 - ROBBERY/SUDDEN SNATCHING, 810.02 - BURGLARY; THE  
DEFENDANT SHALL BE REQUIRED TO SUBMIT BLOOD SPECIMENS.

DOC - COMMUNITY CONTROL (FOR ADULT OFFENDERS ONLY)- SECTION 827.071,  
FLORIDA STATUTES-SEX PERFORMANCE BY A CHILD, 847.0145-SELL OR BUY OF MINORS

AND GOOD CAUSE BEING SHOWN; IT IS ORDERED THAT ADJUDICATION OF GUILT BE  
WITHHELD. (TO BE CHECKED ONLY IF DEFENDANT IS FINGERPRINTED)

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NAME: Green SAMUEL LEE GREEN  
CASE NUMBER: CF04-004392-XX  
S. S. #: 589-05-7538

**FINGERPRINTS OF DEFENDANT**

FINGERPRINTS TAKEN BY: Cathy Newby Pcs0 2300 (NAME & TITLE)

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

DONE AND ORDERED IN OPEN COURT AT BARTOW, POLK COUNTY, FLORIDA THIS  
14TH DAY OF JULY A.D., 20 05

I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING FINGERPRINTS ARE OF THE DEFENDANT  
SAMUEL LEE GREEN, AND THEY WERE PLACED THEREON BY SAID DEFENDANT IN  
MY PRESENCE, IN OPEN COURT THIS DATE.

FILED AND RECORDED

BOOK \_\_\_\_\_ PAGE \_\_\_\_\_

JUL 25 2005

RICHARD M. WEISS, CLERK

BY \_\_\_\_\_ Page 2 of 6 Pages

DENNIS P. MALONEY

JUDGE

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X THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY HIS ATTORNEY, JOHN KIRKLAND AND HAVING BEEN ADJUDICATED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY HE SHOULD NOT BE SENTENCED AS PROVIDED BY LAW, AND NO CAUSE BEING SHOWN,

(CHECK ONE IF APPLICABLE)

SENTENCE (AS TO COUNT 001)

\_\_\_\_\_ AND THE COURT HAVING ON \_\_\_\_\_ DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE.

\_\_\_\_\_ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGEMENT IN THIS CASE ON \_\_\_\_\_ NOW RESENTENCES THE DEFENDANT.

\_\_\_\_\_ AND THE COURT HAVING PLACED THE DEFENDANT ON PROBATION/COMMUNITY CONTROL AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S PROBATION/COMMUNITY CONTROL.

IT IS THE SENTENCE OF THE COURT THAT:

\_\_\_\_\_ THE DEFENDANT PAY A FINE OF \$ \_\_\_\_\_ PURSUANT TO F.S. 775.083, FLORIDA STATUTES, PLUS \$ \_\_\_\_\_ AS THE 5% SURCHARGE REQUIRED BY F.S. 960.25, FLORIDA STATUTES.

X THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

\_\_\_\_\_ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF POLK COUNTY, FLORIDA.

\_\_\_\_\_ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

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BOOK \_\_\_\_\_ PAGE \_\_\_\_\_

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE): JUL 25 2005

X FOR A TERM OF LIFE

RICHARD M. WEISS, CLERK  
BY \_\_\_\_\_

\_\_\_\_\_ FOR A TERM OF \_\_\_\_\_

\_\_\_\_\_ SAID SENTENCE SUSPENDED FOR A PERIOD OF \_\_\_\_\_ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE COMPLETE THE APPROPRIATE PARAGRAPH

\_\_\_\_\_ FOLLOWED BY A PERIOD OF \_\_\_\_\_ ON PROBATION/COMMUNITY CONTROL UNDER THE SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.



HOWEVER, AFTER SERVING A PERIOD OF \_\_\_\_\_ IMPRISONMENT IN \_\_\_\_\_  
THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON  
PROBATION/COMMUNITY CONTROL FOR A PERIOD OF \_\_\_\_\_ UNDER SUPERVISION OF THE  
DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF  
PROBATION/COMMUNITY CONTROL SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL  
INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE  
OF THE SUPERVISION TERMS.

## SPECIAL PROVISIONS

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY TO THE SENTENCE IMPOSED:

MANDATORY/MINIMUM PROVISIONS:

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BOOK \_\_\_\_\_ PAGE \_\_\_\_\_

JUL 25 2005

## FIREARM

IT IS FURTHER ORDERED THAT THE THREE YEAR MINIMUM IMPRISONMENT PROVISIONS  
OF SECTION 775.087(2), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE  
SENTENCE SPECIFIED IN THIS COUNT.

RICHARD M. WEISS, CLERK

## DRUG TRAFFICKING

IT IS FURTHER ORDERED THAT THE \_\_\_\_\_ MANDATORY MINIMUM  
IMPRISONMENT PROVISION OF SECTION 893.13(1), FLORIDA STATUTES, IS HEREBY  
IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

## CONTROLLED SUBSTANCE

WITHIN 1000 FEET OF SCHOOL

IT IS FURTHER ORDERED THAT THE THREE YEAR MINIMUM IMPRISONMENT  
PROVISIONS OF SECTION 893.13(1)(E)(1), FLORIDA STATUTES, IS HEREBY  
IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

## HABITUAL FELONY OFFENDER

THE DEFENDANT IS ADJUDICATED A HABITUAL FELONY OFFENDER AND HAS BEEN  
SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF  
SECTION 775.084(4)(A), FLORIDA STATUTES. THE REQUISITE FINDINGS BY THE  
COURT ARE SET FORTH IN A SEPARATE ORDER OR AS STATED ON THE RECORD IN  
OPEN COURT.

## HABITUAL VIOLENT FELONY OFFENDER

THE DEFENDANT IS ADJUDICATED A HABITUAL VIOLENT FELONY OFFENDER AND  
HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS  
OF SECTION 775.084(4)(B), FLORIDA STATUTES. A MINIMUM TERM OF \_\_\_\_\_  
YEAR(S) MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE  
COURT ARE SET FORTH IN A SEPARATE ORDER OR AS STATED ON THE RECORD IN  
OPEN COURT.

## PRISON RELEASEE REOFFENDER

X THE DEFENDANT IS ADJUDICATED AS A PRISON RELEASEE REOFFENDER AND HAS  
BEEN SENTENCED IN ACCORDANCE WITH THE PROVISION OF SECTION 755.082,  
FLORIDA STATUTES. THE REQUISITE FINDINGS BY THE COURT ARE SET FORTH IN A  
SEPARATE ORDER OR AS STATED ON THE RECORD IN OPEN COURT.

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## FIREARM (10/20/LIFE)

IT IS FURTHER ORDERED THAT THE \_\_\_\_\_ MANDATORY MINIMUM IMPRISONMENT PROVISION OF SECTION 775.087(2), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

## LAW ENFORCEMENT PROTECTION ACT

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE A MINIMUM OF \_\_\_\_\_ YEARS BEFORE RELEASE IN ACCORDANCE WITH SECTION 775.0823, FLORIDA STATUTES.

## CAPITAL OFFENSE

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE NO LESS THAN 25 YEARS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.082(1), FLORIDA STATUTES.

## SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN

IT IS FURTHER ORDERED THAT THE FIVE YEAR MINIMUM PROVISIONS OF SECTION 790.221(2), FLORIDA STATUTES, ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

## CONTINUING CRIMINAL ENTERPRISE

IT IS FURTHER ORDERED THAT THE 25 YEAR MINIMUM SENTENCE PROVISIONS OF SECTION 893.20, FLORIDA STATUTES, ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

## TAKING A LAW ENFORCEMENT OFFICER'S FIREARM

IT IS FURTHER ORDERED THAT THE THREE YEAR MANDATORY MINIMUM IMPRISONMENT PROVISION OF SECTION 775.0857(1), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

## OTHER PROVISIONS:

## RETENTION OF JURISDICTION

THE COURT RETAINS JURISDICTION OVER THE DEFENDANT PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1983).

## JAIL CREDIT

X IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL BE ALLOWED A TOTAL OF 21 DAYS AS CREDIT FOR TIME INCARCERATED BEFORE IMPOSITION OF THIS SENTENCE.

## CREDIT FOR TIME SERVED IN RESENTENCING AFTER VIOLATION OF PROBATION OR COMMUNITY CONTROL

IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED \_\_\_\_\_ DAYS TIME SERVED BETWEEN DATE OF ARREST AS A VIOLATOR FOLLOWING RELEASE FROM PRISON TO THE DATE OF RESENTENCING. THE DEPARTMENT OF CORRECTIONS SHALL APPLY ORIGINAL JAIL TIME CREDIT AND SHALL COMPUTE AND APPLY CREDIT FOR TIME SERVED AND UNFORFEITED GAIN TIME PREVIOUSLY AWARDED ON CASE/COUNT \_\_\_\_\_. (OFFENSES COMMITTED BEFORE OCTOBER 1, 1989)

FILED AND RECORDED

BOOK \_\_\_\_\_ PAGE \_\_\_\_\_

JUL 25 2005

RICHARD M. WEISS, CLERK

BY \_\_\_\_\_

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Defendant's Name SAMUEL LEE GREEN

Case Number CF 04-004392-XX

☐ POLK COUNTY JAIL (NO PROBATION)

☒ FLORIDA STATE PRISON

In the event the above sentence is to the Department of Corrections, the Sheriff of Polk County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections, at the facility designated by the Department, together with a copy of this judgment and sentence and any other documents specified by Florida Statutes.

The defendant in open Court was advised of his/her right to appeal this sentence by filing a notice of appeal within thirty (30) days from this date, with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal, at the expense of the State, upon showing of indigence.

In imposing the above sentence, the Court further recommends:

DONE AND ORDERED, IN OPEN COURT, AT BARTOW, POLK COUNTY, FLORIDA.

7/14/05  
DATE

I certify that a copy of this order has been furnished to the State Attorney and the Defense Attorney.

this 25th day of July, 05  
RICHARD M. WEISS, Clerk of Courts

By [Signature]  
Deputy Clerk

FILED AND RECORDED

BOOK \_\_\_\_\_ PAGE \_\_\_\_\_

JUL 25 2005

DENNIS P. MALONEY

JUDGE

RICHARD M. WEISS, CLERK

BY \_\_\_\_\_

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Revised 2/19/04

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# **EXHIBIT B**

## **Jurisdictional Brief**

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA

SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

# **EXHIBIT C**

## Jurisdictional Brief

DUPLICATE PROVIDED TO HAMILTON C.I. ON  
FOR MAILING

6-06-13

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

DCA CASE NO: 2D13-377

STATE OF FLORIDA,  
Appellee.

CERTIFICATION OF A WRITTEN OPINION

COMES NOW, Appellant Samuel Lee Green, pro se; pursuant to Fla. R. App. P. 9.330 and 9.331, submits this Motion for Certification of a Written Opinion in the above styled case and in support states the following:

1. This Appellant believes that a certified written opinion will provide a legitimate basis for a Supreme Court review due to a conflict of the Florida Supreme Court's opinion in the cited case of Roby v. State, 246 So. 2d 566 (Fla. 1971), where the Supreme Court held that a person is guilty as a principle of a crime if evidence establishes such guilt, contradicting and conflicting with the Florida Supreme Court's later opinion in the case of Rodriguez v. State, 602 So. 2d 1270 (Fla. 1997), where the Court held that if a person is charged under Fla. Statute 775.087, despite being adjudicated guilty as a principle to a crime involving the use of a firearm does not constitute a sentence reclassification or enhancement where a Defendant was determined not to personally possess a

firearm.

The Court's written opinion on how the Court is apprehending and interpreting Florida Supreme Court law in the case of Roby v. State in RE, 246 So. 2d 566 (Fla. 1971) to the facts of Appellant's claim is needed in the interest of justice due to Appellant's whole claim is based on the case law of Rodriguez v. State, 602 So. 2d 1270, 1272 (Fla. 1997). As it is a more recent opinion Appellant expresses a belief his claim is of great public interest which will affect a great many people and based on a reasoned and studied judgment due to where the Florida Supreme Court held that a person is guilty as a principle and must be punished as to what his co-perpretator did who possessed the firearm and the Florida Supreme Court's prior opinion 20 years later that established that the principle participation of guilt does not allow a Court to sentence a person to a higher reclassification or enhancement when that individual does not possess the firearm and is charged with Fla. Statute 775.087, is a prima facie conflict of law.

Appellant respectfully requests this Court to provide certification of its written opinion in the case. The Courts decision is of exceptional importance.

Date: 6-6-13

Respectfully Submitted,



Samuel Lee Green, # 370562



**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Certification of a Written Opinion in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 6<sup>th</sup> day of June, 2013.



---

Samuel Lee Green, # 370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

# **EXHIBIT D**

## **Jurisdictional Brief**

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

CASE NO: 2D 13-377

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_/

CLARIFICATION

COMES NOW, Samuel Lee Green (Appellant) moves this Honorable Court for Clarification of its decision dated May 22, 2013, in Appeal Case No. 2d 13-377. Pursuant to Rule 9.330; 9.030; Fla. Const. Art. 1, 2; and U.S. Const. Amend 1.

As seen in the Denial Order as seen in Exhibit A, on May 22, 2013, seemingly is rested on three (3) cited cases.

The one cited case of Roby v. State, 246 So.2d 566 (Fla. 1971), (*See* Exhibit B), is of interest of Appellant's right to seek this court to clarify this case standing denial as compared to the Appellant's case standing of Rodriguez v. State, 602 So.2d 1270, 1272 (Fla. 1992) (*See* Exhibit C), as (*Rodriguez, supra*) is what Appellant's entire 3.800(A) Illegal Sentence Claim revolves around.

Appellant believes that there is a conflict of the two Florida Supreme Court cases where (Roby, supra) does not override (Rodriguez, supra) because of the "principle" theory.

The District Court is being put on notice that there is a conflict in these two cites and the Appellant claim facts are based on the law established in the latter dated 1992 case ruling of [Rodriguez, supra].


In the interest of justice Appellant seeks a Clarification and opinion of its denial where the cases cited by this Court does not show a specific opinion on how this Court is interpreting the denial case cite standing of (Roby, supra) to Appellant's claim.

Thus, if this Court does not clarify this cite, the (Roby, supra) case cite is contradicting (Rodriguez, supra) because in 1992 the Florida Supreme Court rejected the State trying to use the "principle" theory of guilt to "enhance or reclassify" a Defendant's sentence as long as the firearm was not in the Appellant's actual possession regardless if a Co-Defendant was the actual holder.

Appellant asks this Court for clarification please. To distinguish the two rulings as applied to Appellant's claim.

Respectfully Submitted,

/s/



Samuel Lee Green #370562

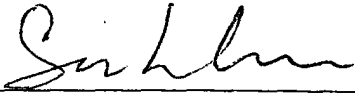
**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Motion for Clarification in the hands of Hamilton Correctional Institution-Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 6<sup>th</sup> day of JUNE, 2013

/s/   
Samuel Lee Green #370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

# EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

# EXHIBIT B



Supreme Court of Florida.  
STATE of Florida, Petitioner,

v.

Arthur Lee ROBY, Respondent.

No. 39434.

March 10, 1971.

Rehearing Denied April 26, 1971.

Defendant was convicted in the Circuit Court, Hillsborough County, Roger D. Flynn, J., of murder in the second degree, and he appealed. The District Court of Appeal, 229 So.2d 604, reversed and remanded for new trial, and certiorari was granted. The Supreme Court, Hodges, Circuit Judge, held that refusal to give aiding and abetting instruction was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of homicide victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Decision of District Court of Appeal quashed and judgment of trial court reinstated.

Carlton, J., dissented.

#### West Headnotes

- [1] Homicide K 1179  
203 ----  
203IX Evidence  
203IX(G) Weight and Sufficiency  
203k1176 Commission of or Participation in Act by Accused;

#### Identity

203k1179 Altercation or Attack by Several.

(Formerly 203k234(4))

Evidence, including evidence that although a total of between two and seven shots were fired by three defendants at homicide victim only one .22 caliber slug from pistol of codefendant was taken from victim's body and that no one saw projectile from defendant's gun hit victim, was insufficient to sustain conviction of defendant on substantive charge of murder in the second degree.

- [2] Criminal Law K 59(5)  
110 ----  
110VII Parties to Offenses  
110k59 Principals, Aiders, Abettors, and Accomplices in General  
110k59(5) Aiding, Abetting, or Other Participation in Offense.

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime. F.S.A. § 776.011.

- [3] Indictment and Information K 171  
210 ----  
210XII Issues, Proof, and Variance  
210k170 Variance Between Allegations and Proof  
210k171 In General.

Generally, a defendant is entitled to have charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

- [4] Criminal Law K 61.1  
110 ----  
110VII Parties to Offenses  
110k61 Principals in First Degree  
110k61.1 In General.  
(Formerly 110k61)

A person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by statute. F.S.A. § 776.011.

- [5] Homicide K 1466  
203 ----  
203XII Instructions

203XII(D) Parties

203k1466 Aiding, Abetting, or Other Participation in Offense.

(Formerly 203k305)

[See headnote text below]

Criminal Law K 1173.5

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.5 Errors Favorable to Accused.

(Formerly 203k341)

Refusal to give aiding and abetting instruction, in homicide prosecution, was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Robert L. Shevin, Atty. Gen., and Michael n. Kavouklis, Asst. Atty. Gen., for petitioner.

John W. Boulton, of Fowler, White, Gillen, Hunkey & Kinney, Tampa, for respondent.

HODGES, Circuit Judge.

The decision in the case of Roby v. State of Florida, 229 So.2d, 604, is reviewed here on certiorari to the Second District Court of Appeal, pursuant to Article V, Section 4, of the Florida Constitution, F.S.A., and Rule 4.5(c) of the Florida Appellate Rules, 32 F.S.A.

The respondent, Arthur Lee Roby, and two other defendants, William Henry Johnson, Jr., and Ernest Williams, were jointly charged with the substantive crime of 1st degree murder of one Frank Cutler, deceased, the indictment alleging in the usual language that the three defendants unlawfully effected the death of the victim by shooting him with a pistol.

At the conclusion of a trial lasting five days, the jury acquitted the defendant Johnson, but returned verdicts of guilty of murder in the 2nd degree against the defendant, Ernest Williams, and the respondent, Arthur Lee Roby. After entry of judgment of conviction, both defendants were sentenced by the trial court to be confined at hard labor for twenty years.

The trial court's judgment of conviction of the respondent Roby was reversed on appeal by the District Court's cited opinion, which certiorari lays open to legal scrutiny to determine whether or not it conflicts with decisive law as enunciated in reported opinions of the Supreme Court or other District Courts of Appeal.

From the Court's review of the entire record in the case, permitted in such proceedings, James v. Keene, Fla., 133 So.2d 297, we believe that the facts, as stated in the decision which is the subject of our judicial inquiry, perhaps sufficiently present the legal issues upon which our conclusions hinge. However, for reference accommodation and immediate perspective relief of the legal questions presented, we shall briefly restate the pertinent facts as we

have gleaned them from the extremely lengthy transcript of evidence, much of which was understandably befuddled and confused because of the nature of the melee out of which the killing took place and which was made more nebulous because the actions of those involved in the tumult were so rash, precipitative and intermingled and their sequence of such rapidity that it is impossible to completely separate and narrate them as to exact time or location in the barroom.

The evidence does reveal that in Tampa, Florida, at 1024 Central Avenue, there was located a drinking establishment known as the Pyramid Lounge, comprised of a rectangular room running east and west of about 20 75 and divided into an east side area, containing about nine tables with chairs, known as the 'Ace Lounge', and a west side portion, where a semi-circular bar and stools were situate, called the 'Pyramid Bar'. Back to back open booths ran the entire length of the room on the north side.

On the evening of February 4, 1968, somewhere near 11:30 P.M., the three named defendants and one Robbie Marva Robinson, who had entered the spot with them at about 9:30 P.M., were in the 'Pyramid Bar' area

of the establishment seated at a booth.

The place was crowded with patrons and noisy.

One James L. Hogan, 19, came into the room with one Margaret Hunt and a person named Romae Lee Rucker, and this trio had gone to the 'Ace Lounge' portion of the premises near the bar. An argument ensued between Hogan and the said Robbie Robinson, who had come over to the vicinity of Hogan and his companions and accused Hogan of referring to her as a member of the demimonde, but not in those exact words. The defendant, William Henry Johnson, Jr., following Robinson, loudly reaffirmed the accusation against Hogan and attempted to hit Hogan but the blow was deflected by Rucker. At this point the decedent, Frank Cutler, interjected himself into the argument and for a fleeting moment, at least, restrained Johnson and Hogan from becoming unalterably involved in that altercation by taking Hogan with him toward the eastern portion of the 'Pyramid Bar'.

The smoldering residuals of this noisy wrangle swiftly drifted to that part of the establishment now occupied by Hogan and Cutler and broke out into a new fiery fracas between Johnson and Hogan, as the former angrily and persistently voiced his resentment to the alleged slur on Robbie Robinson, whom he claimed to be his sister. This confrontation became the incipient cause of the tragedy in this case as the respondent Roby and the doomed Cutler, again interceding for his close friend Hogan, almost immediately became antagonistic participants in a violent dispute which deteriorated at once into physical combat, it not being clear who struck the first blow.

The final struggle carried the combatants a short distance toward the rear of the barroom to a point a few feet farther east of the bar. The defendant Williams followed in close pursuit and William Henry Johnson, Jr., also maneuvered in toward the center of the fury.

After stating at one point to Cutler that he would kill him, the respondent Roby began firing his .25 caliber pistol at Cutler at the same time that codefendant Williams was shooting at the victim with his .22 caliber pistol. There was testimony that the defendant Johnson also discharged his .22 caliber pistol in the direction at Cutler.

Cutler slumped and fell mortally wounded with two slugs in his abdomen, after stating, according to witnesses, 'It doesn't make sense', his terminal utterance on earth. Some witnesses, including Roby, stated that Cutler held a chair raised over his head in a threatening manner when, or shortly before, the pistols began to bark, and testimony was also admitted that he was a mean and dangerous man, having once broken a man's back by kicking him in a fight in front of the Pyramid Lounge.

A rather enthusiastic general exodus from the building followed the shooting. Near the lead of the evacuation was a group composed of the three armed defendants and the one whose remonstrance at indignity had lighted the explosion fuse to begin with, Robbie Robinson. She had been in the rest room at the time of the actual shooting, but said at the trial in describing her withdrawal with the defendants: 'We all run automatically together.' She further testified at the trial as follows:

'Well, Roby wanted to keep saying that he had shot the boy, and they wanted to keep telling him not to say that until he found out what was going on, and they say with all that shooting in there any one of them could have done it.'

And she reiterated later, upon questioning, that both Johnson and Williams had said that any one of the three defendants could have shot Cutler.

When cross-examined at the trial, respondent Roby said:

'I told Robbie Robinson I thought I had shot at him. I shot a boy in the bar.'

Immediately thereafter and at all times since, he has been emphatic in stating that he shot 'at' the deceased rather than that he shot him in fact. No witness testified that a projectile from Roby's weapon hit Cutler.

The autopsy report revealed that two slugs were found in the victim's body and a pathologist testified that the cause of death was the combined effect of two gunshot wounds in the abdomen.

Only one .22 caliber slug was placed in evidence. Another slug of disputed caliber was allegedly taken from Cutler's body but this slug and testimony relating to it were not admitted.

At the conclusion of the testimony, the trial court refused to submit to the jury, orally or in written form, the following instruction requested by the

State and to which the respondent objected:

'When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in furtherance or prosecution of the common design; and if two or more persons combine to do an unlawful act, and in the prosecution of the common object; an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish; the immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.'

The trial court, counsel for the State and defense counsel had engaged in some discussion relative to a 'conspiracy charge', but obviously the Court was referring to the quoted aiding and abetting charge which was declined.

The District Court of Appeal concluded, in a divisive opinion of two to one, that the evidence was inadequate to support a valid finding on the substantive charge that the respondent Roby caused the death of the deceased. It also held that the failure of the trial court to instruct the jury as to provisions of Section 776.011, Florida Statutes, F.S.A., which makes a person a principal in the first degree whether he actually commits the crime or is present aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed, rendered the verdict invalid on this theory.

The Court also further decided that the refusal to grant the quoted instruction, as requested by the State and objected to by the respondent, was plainly within the discretion of the trial judge, since it was not clear whether the case dealt with 'conspiracy' or 'aiding and abetting'.

The contention here of the petitioner, State of Florida, based upon conflict of decision, has a dual aspect.

First, it is urged that the evidence at the trial was, indeed, sufficient to support the verdict of the jury on the substantive charge against Roby, under the decision of this Court, and Second, that in any event, respondent's conviction should be sustained, under Section 776.011, Florida Statutes (F.S.A.), because the evidence plainly shows that he was present, aiding and abetting the commission of the offense and that a jury instruction on aiding and abetting was not necessary to sustain the conviction under the controlling reported case law of this court as well as that of other district courts of appeal.

While the question involved in the first point may appear to be a close one, in view of the respondent's own quoted statements immediately after the shooting and at the trial, we are convinced that the District Court of Appeal was correct in that portion of its decision which held that the facts proved at the trial were legally insufficient to support conviction on the substantive charge. In our opinion, no conflict exists between their decision on this point and the decisions of this Court of any other District Appellate Court on this question.

[1] The proof, under the evidence admitted, was that two gunshot wounds caused the death of Cutler; that a total of between two and seven shots were fired by the three defendants at Cutler; that only one .22 caliber slug from the pistol of defendant Williams was taken from Cutler's body; and that no one saw a projectile from Roby's gun hit Cutler. It is obvious that one reasonable hypothesis, based upon these facts, is that no projectile from respondent Roby's pistol found its mark. This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to nullify a reasonable doubt and support a criminal conviction. The burden of proof of connecting the death to Roby's pistol was not met. *Driggers v. State, Fla., 164 So.2d 200; Davis v. State, Fla., 90 So.2d 629.*

The authorities cited by respondent, including *Land v. State, Fla., 156 So.2d 8; Coachman v. State, Fla.App., 114 So.2d 189; Hopper v. State, Fla., 54 So.2d 165; Tongay v. State, Fla., 79 So.2d 673; and Bellamy v. State, 56 Fla. 43, 47 So. 868*, are distinguishable, as to factual complex, from the case under consideration, and because of the distinctions are not controlling.

We must depart from the ruling of the District Court, however, on the second contention of the petitioner because it is incompatible with the

decisions of this Court and other Appellate Courts of this State.

[2] Abundant proof that the respondent Roby was present aiding and abetting in the commission of the offense was adduced at the trial. The evidence was fully sufficient, as a matter of law, to sustain such a charge, and it is now well established in Florida that a person who is charged in an indictment or information with commission of a crime may be convicted upon proof that he aided or abetted in the commission of such crime, under Section 776.011, Florida Statutes, F.S.A., which enacted the recognized precept into statutory law.

The rule was first recognized, albeit, perhaps, in obiter dictum, by this Court in the year 1893 in *Albritton v. State*, 32 Fla. 358, 13 So. 955. It was followed in many other decisions, among them, *Green v. State*, 40 Fla. 191, 23 So. 851 (1898); *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865; *Brown v. State*, 82 Fla. 306, 89 So. 873; *Jimenez v. State*, 158 Fla. 719, 30 So.2d 292; *Chaudoin v. State*, Fla.App., 118 So.2d 569 and *Newman v. State* (Fla.) 196 So.2d 897 (See also *Sons v. State*, Fla.App., 99 So.2d 888, cert. den. 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160), to finally establish it as law in the criminal jurisprudence of Florida.

In *Jacobs v. State*, 184 So.2d 711, it was held by the First District Court of Appeal that one may be charged with aiding, abetting or procuring the commission of a criminal offense and may be convicted upon proof establishing the actual commission of the offense by him, and vice versa.

[3] In that case the defendant, who was charged with a substantive offense, conceded that the aiding and abetting statute (F.S. Sec. 776.011, F.S.A.) makes an aider and abetter a principal equally guilty as the person who actually perpetrates the crime but contended that the State had the duty of charging him as an aider and abetter in the information filed against him, concluding that he could not be found guilty of aiding and abetting on the substantive charge contained in the information. His contention, of course, was based upon the general rule that a defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

In clearly rejecting this contention and affirming the judgment of conviction, the Court, in *Jacobs*, quoting from the *Albritton* case, said:

" \* \* \* Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. \* \* \* Under this indictment, \* \* \* the named defendants are indicted as principals,--Andrew in the first degree, and Henry \* \* \* in the second degree. \* \* \* The punishment prescribed for principals in the first and second degrees is the same under our law."

The Court then stated:

"One may be charged in an information or indictment with aiding, abetting, or procuring the commission of a criminal offense, but if the proof establishes that he actually committed the offense, a verdict finding him guilty as charged will be sustained. Conversely, It would follow that if an information, such as the one filed in the case sub judice, charges a defendant with the commission of a criminal offense, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty as charged should be sustained." (Italicizing ours)

[4] Under our statute, therefore, a person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he was guilty of one of the acts denounced by the statute. See *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865.

The underlying reason, to which the rule, as enunciated in the cited cases from *Albritton* to the present time, is obviously pegged, is that the provisions of the statute, proscribing acts of aiding, abetting, counseling, hiring

and procuring of criminal offenses, must be read into the formal charges against persons accused of crime, and that they coalesce with and become a part of the indictment or information alleging substantive offenses.

The majority opinion of the District Court of Appeal demonstrates some confusion in its statement relative to 'conspiracy', probably induced by its mention by the trial court and counsel in connection with jury instructions.

It appears to be crystal clear that the substantive crime of conspiracy, an offense entirely separate and distinct, and governed by a different statute, from the substantive crime with which the respondent Roby was charged, has no relevancy in this case. *Blackburn v. State*, Fla., 83 So.2d 694, cert. denied, 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854.

We believe it is also free from doubt that the instruction requested by the State, although not as artfully or precisely drawn as it might have been, nevertheless embraced a proper statement of the law bearing upon the facts of the case.

[5] The learned trial judge's refusal to give the instruction, upon objection of the respondent, while erroneous insofar as the State was concerned, was not reversible error as to the respondent Roby, who could only benefit by its absence. The minority opinion of the District Court of Appeal, we think, was eminently correct on this phase of the case.

In view of the foregoing, the decision of the District Court of Appeal is quashed and the judgment and sentence of the trial court reinstated.

ROBERTS, C.J., and ERVIN and DREW (Retired), JJ., concur.  
CARLTON, J., dissents.

# EXHIBIT C

Following affirmance, 528 So.2d 1373, of conviction for attempted first-degree murder, defendant sought postconviction relief. The Circuit Court for Dade County, Fredricka G. Smith, J., found that sentencing enhancement was illegal. State appealed. The District Court of Appeal, 582 So.2d 1189, affirmed and certified question of great public importance. The Supreme Court, Overton, J., held that felony defendant's sentence could not be enhanced based on "use" of weapon, absent evidence of his personal possession of weapon during commission of felony.

Certified question answered; District Court decision approved.

## West Headnotes

- [1] Sentencing and Punishment K 79  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk79 Possession and Carrying.  
(Formerly 110k1208.6(2))

When defendant is charged with felony involving the "use" of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. West's F.S.A. § 775.087(1).

- [2] Sentencing and Punishment K 81  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk81 Accomplices and Co-Participants.  
(Formerly 110k1208.6(2))

Defendant's sentence for attempted first-degree murder could not be enhanced on basis of codefendant's possession of rifle during commission of the crime. West's F.S.A. § 775.087(1).

Robert A. Butterworth, Atty. Gen., and Jorge Espinosa and Michael J. Neimand, Asst. Attys. Gen., Miami, for petitioner.

Bennet H. Brummer, Public Defender and Michel Ociacovski Weisz, Sp. Asst. Public Defender, Eleventh Judicial Circuit, Miami, for respondent.

OVERTON, Justice.

We have for review State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified the following question as being of great public importance:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?

Id. at 1191.

We have jurisdiction (FN1) and answer the question in the negative, finding, in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant.

The relevant facts reflect that Rodriguez was charged with an attempt to commit murder in the first degree upon allegations that he and his codefendant fired a deadly weapon at Officer Kenneth Nelson, in violation of sections 782.04(1), 777.04(1), and 775.087, Florida Statutes (1983). The evidence established that, when the police attempted to pull over Rodriguez's vehicle, he fled at high speed. During the chase, a passenger in Rodriguez's car picked up a rifle and began shooting at the pursuing officers. Rodriguez and his codefendant were apprehended and charged by information as previously noted. Rodriguez was convicted of attempted first-degree murder.

His sentence was enhanced on the grounds that he "used" the firearm in the commission of this offense. The issue in this proceeding is the enhancement of the sentence under section 775.087(1), which reads as follows:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 775.087(1), Fla.Stat. (1983) (emphasis added). In this instance both parties agree that the reclassified sentence would be a life sentence.

Rodriguez filed a motion for postconviction relief, asserting that he was improperly sentenced because of application of the enhancement provision. The trial court granted relief, finding that "the firearm described in the information as that used

during the commission of the attempted murder was at no time carried, displayed, used, or attempted to be used by this Defendant." The trial court concluded that Rodriguez was improperly sentenced under a life-felony standard and directed that he be resentenced for attempted first-degree murder under sections 782.04(1) and 777.04.

On appeal, the Third District Court of Appeal affirmed, noting that it had "previously ruled that the enhancement provisions of section 775.087(1) ... require that the defendant personally possess the weapon during the commission of the crime involved." Rodriguez, 582 So.2d at 1190 (quoting Postell v. State, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)). See also Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA), review denied, 548 So.2d 663 (Fla.1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989).

[1] [2] The State argues that this case should be controlled by Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988). In Menendez, the defendant was convicted of trafficking in cocaine and was found to have personally possessed the weapon during the commission of the felony. Both the trial court and the district court in this proceeding held that Menendez was distinguishable. We agree that Menendez should not apply because the factual circumstances are distinguishable. We hold that, when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. In this case, the evidence plainly establishes that Rodriguez did not have personal possession of the rifle during the commission of the felony. We reject the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant.

We hold that the statute in this instance does not allow that construction or interpretation. See Postell; Willingham; Ngai. Interestingly, Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.

For the reasons expressed, we answer the question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

(FN1.) Art. V, § 3(b)(4), Fla. Const.

# **EXHIBIT E**

## **Jurisdictional Brief**

6-6-13

MAILED

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

CASE NO: 2D13-377  
C.C. JUDGE: KELLY/  
VILLANTI/  
LA ROSE/  
J.J.

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_/

REHEARING

COMES NOW Samuel Lee Green, (Appellant) moves this Honorable Court for Rehearing of its decision dated May 22, 2013, in Appeal Case No. 2D13-377, pursuant to Rule 9.330; 9.030; Fla. Const. Art. 1, 2; 1, 9; and U.S. Const. Amend 1.

On May 22, 2013, this Court entered a denial order of Appellant's 3.800(a) Illegal Sentence Appeal in favor of the 10<sup>th</sup> Judicial Courts Judges John Radabaugh and Michael E. Raiden.

As seen in the denial order as seen in Exhibit A on May 22, 2013, seemingly is rested on three (3) cited cases as to:

Roby v. State, 246 So. 2d 566 (Fla. 1971) (Exhibit B)

Lopez v. State, 833 So. 2d 283 (Fla. 5<sup>th</sup> DCA 2002) (Exhibit C)

Roberts v. State, 813 So. 2d 1016 (Fla. 1<sup>st</sup> DCA 2002) (Exhibit D)

Appellant respectfully asks this Court to reconsider its denial where this

Court has wholly overlooked and misapplied the Florida Supreme Courts case law to Appellant's argument.

This Court overlooked that Appellant based his entire argument on a sentencing error that was undistinguishable from the supporting case of Florida Supreme Court's [Rodriguez v. State, 602 So. 2d 1270, 1272 (Fla. 1992) (Exhibit E)].

This Court overlooked that Appellant did not argue his conviction was illegal he argued that his [Sentence] was illegal because as seen in (Rodriguez, supra) the law of Florida Statute 777.011 "Principle in the First Degree" does not allow a Defendant's sentence to be reclassified or enhanced from Second Degree to First Degree sentencing where the firearm was not determined to be in the actual possession of the Appellant, because the Florida Supreme Court rejected the State's contention that Rodriguez's sentence [not conviction] could be enhanced on a theory of constructive or vicarious possession based on the conduct of the or [a] Co-Defendant. [Law]

Appellant clearly showed that his facts are undistinguishable from established Florida Supreme Court case of (Rodriguez, supra) and that established Florida Supreme Court law shows that a Defendant's [Green's] sentence can not be enhanced to a life sentence, where only a 15 year sentence could have been given, with the P.R.R. its still a 15 year mandatory sentence. (See Exhibit E)



The denial case of (Roby, Supra) is not supportive of the Appellant argument to warrant denial because the [1971] opinion in (Roby, supra) compared to the [1992] opinion in (Rodriguez, supra), are two contrary holdings by the Florida Supreme Court and thus a conclusion of denial can not be given because this Court obviously did not interpret the argument of Appellant's sentence. (Roby, supra) does not speak of any sentence, or Florida Statute 775.087. This case is and has been obviously misapplied because (Roby, supra) speaks of a defendant being charged and found guilty as a principle and does not speak of Appellant's claim of illegal sentencing. (*See Exhibit B*)


Therefore, Appellant seeks a reversal on this denial because the denial case cites do not established any law that denies Appellant relief sought on his sentencing. The facts of Appellant are overlooked because the District Court should have clearly seen that:

1. Appellant (Green was clearly charged with 775.087, in a crime involving the use of a weapon [Robbery with a Firearm]) (*See Exhibit F*).
2. Appellant (Green was clearly determined not to carry a firearm in the robbery by the jury) (*See Exhibit G*).
3. Appellant (Green was clearly given a 1<sup>st</sup> Degree Life Sentence adjudicated [guilty of Robbery with a Firearm as a principle]) (*See Exhibit H*).

These (3) three facts are undistinguishable from (Rodriguez, supra, See Exhibit E) that this Court overlooked and as a result Rodriguez was sentenced to a Second Degree Felony despite being a [Principle] because the firearm was not in his actual possession.

Appellant, asks this Court to review the law and facts and to reverse this decision because if not a substantial injustice has occurred and it is the responsibility of this Court to correct a manifest injustice. (State v. McBride, 848 So. 2d 287, 291-92 (Fla. 2003).

Respectfully Submitted,

  
\_\_\_\_\_  
Samuel Lee Green, DC #370562


**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Rehearing in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 6<sup>th</sup> day of June, 2013.

  
\_\_\_\_\_  
Samuel Lee Green, DC #370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

# EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA

SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

# EXHIBIT B

Supreme Court of Florida.  
STATE of Florida, Petitioner,  
v.

Arthur Lee ROBY, Respondent.

No. 39434.

March 10, 1971.

Rehearing Denied April 26, 1971.

Defendant was convicted in the Circuit Court, Hillsborough County, Roger D. Flynn, J., of murder in the second degree, and he appealed. The District Court of Appeal, 229 So.2d 604, reversed and remanded for new trial, and certiorari was granted. The Supreme Court, Hodges, Circuit Judge, held that refusal to give aiding and abetting instruction was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of homicide victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Decision of District Court of Appeal quashed and judgment of trial court reinstated.

Carlton, J., dissented.

#### West Headnotes

[1] Homicide K 1179

203 ----

203IX Evidence

203IX(G) Weight and Sufficiency

203k1176 Commission of or Participation in Act by Accused;

#### Identity

203k1179 Altercation or Attack by Several.

(Formerly 203k234(4))

Evidence, including evidence that although a total of between two and seven shots were fired by three defendants at homicide victim only one .22 caliber slug from pistol of codefendant was taken from victim's body and that no one saw projectile from defendant's gun hit victim, was insufficient to sustain conviction of defendant on substantive charge of murder in the second degree.

[2] Criminal Law K 59(5)

110 ----

110VII Parties to Offenses

110k59 Principals, Aiders, Abettors, and Accomplices in General

110k59(5) Aiding, Abetting, or Other Participation in Offense.

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime. F.S.A. § 776.011.

[3] Indictment and Information K 171

210 ----

210XII Issues, Proof, and Variance

210k170 Variance Between Allegations and Proof

210k171 In General.

Generally, a defendant is entitled to have charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

[4] Criminal Law K 61.1

110 ----

110VII Parties to Offenses

110k61 Principals in First Degree

110k61.1 In General.

(Formerly 110k61)

A person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by statute. F.S.A. § 776.011.

[5] Homicide K 1466

203 ----

203XII Instructions

203XII(D) Parties

203k1466 Aiding, Abetting, or Other Participation in Offense.

(Formerly 203k305)

[See headnote text below]

[5] Criminal Law K 1173.5

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.5 Errors Favorable to Accused.

(Formerly 203k341)

Refusal to give aiding and abetting instruction, in homicide prosecution, was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Robert L. Shevin, Atty. Gen., and Michael n. Kavouklis, Asst. Atty Gen., for petitioner.

John W. Boulton, of Fowler, White, Gillen, Hunkey & Kinney, Tampa for respondent.

HODGES, Circuit Judge.

The decision in the case of Roby v. State of Florida, 229 So.2d 604, is reviewed here on certiorari to the Second District Court of Appeal, pursuant to Article V, Section 4, of the Florida Constitution, F.S.A., and Rule 4.5(c) of the Florida Appellate Rules, 32 F.S.A.

The respondent, Arthur Lee Roby, and two other defendants, William Henry Johnson, Jr., and Ernest Williams, were jointly charged with the substantive crime of 1st degree murder of one Frank Cutler, deceased, the indictment alleging in the usual language that the three defendants unlawfully effected the death of the victim by shooting him with a pistol.

At the conclusion of a trial lasting five days, the jury acquitted the defendant Johnson, but returned verdicts of guilty of murder in the 2nd degree against the defendant, Ernest Williams, and the respondent, Arthur Lee Roby. After entry of judgment of conviction, both defendants were sentenced by the trial court to be confined at hard labor for twenty years.

The trial court's judgment of conviction of the respondent Roby was reversed on appeal by the District Court's cited opinion, which certiorari lays open to legal scrutiny to determine whether or not it conflicts with decisive law as enunciated in reported opinions of the Supreme Court or other District Courts of Appeal.

From the Court's review of the entire record in the case, permitted in such proceedings, James v. Keene, Fla., 133 So.2d 297, we believe that the facts, as stated in the decision which is the subject of our judicial inquiry, perhaps sufficiently present the legal issues upon which our conclusions hinge. However, for reference accommodation and immediate perspective relief of the legal questions presented, we shall briefly restate the pertinent facts as we

have gleaned them from the extremely lengthy transcript of evidence, much of which was understandably befuddled and confused because of the nature of the melee out of which the killing took place and which was made more nebulous because the actions of those involved in the tumult were so rash, precipitative and intermingled and their sequence of such rapidity that it is impossible to completely separate and narrate them as to exact time or location in the barroom.

The evidence does reveal that in Tampa, Florida, at 1024 Central Avenue, there was located a drinking establishment known as the Pyramid Lounge, comprised of a rectangular room running east and west of about 20 75' and divided into an east side area, containing about nine tables with chairs, known as the 'Ace Lounge', and a west side portion, where a semi-circular bar and stools were situated, called the 'Pyramid Bar'. Back to back open booths ran the entire length of the room on the north side.

On the evening of February 4, 1968, somewhere near 11:30 P.M., the three named defendants and one Robbie Marva Robinson, who had entered the spot with them at about 9:30 P.M., were in the 'Pyramid Bar' area

of the establishment seated at a booth.

The place was crowded with patrons and noisy.

One James L. Hogan, 19, came into the room with one Margaret Hunt and a person named Romae Lee Rucker, and this trio had gone to the 'Ace Lounge' portion of the premises near the bar. An argument ensued between Hogan and the said Robbie Robinson, who had come over to the vicinity of Hogan and his companions and accused Hogan of referring to her as a member of the demimonde, but not in those exact words. The defendant, William Henry Johnson, Jr., following Robinson, loudly reaffirmed the accusation against Hogan and attempted to hit Hogan but the blow was deflected by Rucker. At this point the decedent, Frank Cutler, interjected himself into the argument and for a fleeting moment, at least, restrained Johnson and Hogan from becoming unalterably involved in that altercation by taking Hogan with him toward the eastern portion of the 'Pyramid Bar'.

The smoldering residuals of this noisy wrangle swiftly drifted to that part of the establishment now occupied by Hogan and Cutler and broke out into a new fiery fracas between Johnson and Hogan, as the former angrily and persistently voiced his resentment to the alleged slur on Robbie Robinson, whom he claimed to be his sister. This confrontation became the incipient cause of the tragedy in this case as the respondent Roby and the doomed Cutler, again interceding for his close friend Hogan, almost immediately became antagonistic participants in a violent dispute which deteriorated at once into physical combat, it not being clear who struck the first blow.

The final struggle carried the combatants a short distance toward the rear of the barroom to a point a few feet farther east of the bar. The defendant Williams followed in close pursuit and William Henry Johnson, Jr., also maneuvered in toward the center of the fury.

After stating at one point to Cutler that he would kill him, the respondent Roby began firing his .25 caliber pistol at Cutler at the same time that codefendant Williams was shooting at the victim with his .22 caliber pistol. There was testimony that the defendant Johnson also discharged his .22 caliber pistol in the direction at Cutler.

Cutler slumped and fell mortally wounded with two slugs in his abdomen, after stating, according to witnesses, 'It doesn't make sense', his terminal utterance on earth. Some witnesses, including Roby, stated that Cutler held a chair raised over his head in a threatening manner when, or shortly before, the pistols began to bark, and testimony was also admitted that he was a mean and dangerous man, having once broken a man's back by kicking him in a fight in front of the Pyramid Lounge.

A rather enthusiastic general exodus from the building followed the shooting. Near the lead of the evacuation was a group composed of the three armed defendants and the one whose remonstrance at indignity had lighted the explosion fuse to begin with, Robbie Robinson. She had been in the rest room at the time of the actual shooting, but said at the trial in describing her withdrawal with the defendants: 'We all run automatically together.' She further testified at the trial as follows:

'Well, Roby wanted to keep saying that he had shot the boy, and they wanted to keep telling him not to say that until he found out what was going on, and they say with all that shooting in there any one of them could have done it.'

And she reiterated later, upon questioning, that both Johnson and Williams had said that any one of the three defendants could have shot Cutler.

When cross-examined at the trial, respondent Roby said:

'I told Robbie Robinson I thought I had shot at him. I shot a boy in the bar.'

Immediately thereafter and at all times since, he has been emphatic in stating that he shot 'at' the deceased rather than that he shot him in fact. No witness testified that a projectile from Roby's weapon hit Cutler.

The autopsy report revealed that two slugs were found in the victim's body and a pathologist testified that the cause of death was the combined effect of two gunshot wounds in the abdomen.

Only one .22 caliber slug was placed in evidence. Another slug of disputed caliber was allegedly taken from Cutler's body but this slug and testimony relating to it were not admitted.

At the conclusion of the testimony, the trial court refused to submit to the jury, orally or in written form, the following instruction requested by the

State and to which the respondent objected:

'When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in furtherance or prosecution of the common design; and if two or more persons combine to do an unlawful act, and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish; the immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.'

The trial court, counsel for the State and defense counsel had engaged in some discussion relative to a 'conspiracy charge', but obviously the Court was referring to the quoted aiding and abetting charge which was declined.

The District Court of Appeal concluded, in a divisive opinion of two to one, that the evidence was inadequate to support a valid finding on the substantive charge that the respondent Roby caused the death of the deceased. It also held that the failure of the trial court to instruct the jury as to provisions of Section 776.011, Florida Statutes, F.S.A., which makes a person a principal in the first degree whether he actually commits the crime or is present aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed, rendered the verdict invalid on this theory.

The Court also further decided that the refusal to grant the quoted instruction, as requested by the State and objected to by the respondent, was plainly within the discretion of the trial judge, since it was not clear whether the case dealt with 'conspiracy' or 'aiding and abetting'.

The contention here of the petitioner, State of Florida, based upon conflict of decision, has a dual aspect.

First, it is urged that the evidence at the trial was, indeed, sufficient to support the verdict of the jury on the substantive charge against Roby, under the decision of this Court, and Second, that in any event, respondent's conviction should be sustained, under Section 776.011, Florida Statutes (F.S.A.), because the evidence plainly shows that he was present, aiding and abetting the commission of the offense and that a jury instruction on aiding and abetting was not necessary to sustain the conviction under the controlling reported case law of this court as well as that of other district courts of appeal.

While the question involved in the first point may appear to be a close one, in view of the respondent's own quoted statements immediately after the shooting and at the trial, we are convinced that the District Court of Appeal was correct in that portion of its decision which held that the facts proved at the trial were legally insufficient to support conviction on the substantive charge. In our opinion, no conflict exists between their decision on this point and the decisions of this Court of any other District Appellate Court on this question.

[1] The proof, under the evidence admitted, was that two gunshot wounds caused the death of Cutler; that a total of between two and seven shots were fired by the three defendants at Cutler; that only one .22 caliber slug from the pistol of defendant Williams was taken from Cutler's body; and that no one saw a projectile from Roby's gun hit Cutler. It is obvious that one reasonable hypothesis, based upon these facts, is that no projectile from respondent Roby's pistol found its mark. This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to nullify a reasonable doubt and support a criminal conviction. The burden of proof of connecting the death to Roby's pistol was not met. *Driggers v. State, Fla.*, 164 So.2d 200; *Davis v. State, Fla.*, 90 So.2d 629.

The authorities cited by respondent, including *Land v. State, Fla.*, 156 So.2d 8; *Coachman v. State, Fla.App.*, 114 So.2d 189; *Hopper v. State, Fla.*, 54 So.2d 165; *Tongay v. State, Fla.*, 79 So.2d 673; and *Bellamy v. State, Fla.*, 43, 47 So. 868, are distinguishable, as to factual complex, from the case under consideration, and because of the distinctions are not controlling.

We must depart from the ruling of the District Court, however, on the second contention of the petitioner because it is incompatible with the

decisions of this Court and other Appellate Courts of this State.

[2] Abundant proof that the respondent Roby was present aiding and abetting in the commission of the offense was adduced at the trial. The evidence was fully sufficient, as a matter of law, to sustain such a charge, and it is now well established in Florida that a person who is charged in an indictment or information with commission of a crime may be convicted upon proof that he aided or abetted in the commission of such crime, under Section 776.011, Florida Statutes, F.S.A., which enacted the recognized precept into statutory law.

The rule was first recognized, albeit, perhaps, in obiter dictum, by this Court in the year 1893 in *Albritton v. State*, 32 Fla. 358, 13 So. 955. It was followed in many other decisions, among them, *Green v. State*, 40 Fla. 191, 23 So. 851 (1898); *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865; *Brown v. State*, 82 Fla. 306, 89 So. 873; *Jimenez v. State*, 158 Fla. 719, 30 So.2d 292; *Chaudoin v. State*, Fla.App., 118 So.2d 569 and *Newman v. State* (Fla.) 196 So.2d 897 (See also *Sons v. State*, Fla.App., 99 So.2d 888, cert. den. 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160), to finally establish it as law in the criminal jurisprudence of Florida.

In *Jacobs v. State*, 184 So.2d 711, it was held by the First District Court of Appeal that one may be charged with aiding, abetting or procuring the commission of a criminal offense and may be convicted upon proof establishing the actual commission of the offense by him, and vice versa.

[3] In that case the defendant, who was charged with a substantive offense, conceded that the aiding and abetting statute (F.S. Sec. 776.011, F.S.A.) makes an aider and abetter a principal equally guilty as the person who actually perpetrates the crime but contended that the State had the duty of charging him as an aider and abetter in the information filed against him, concluding that he could not be found guilty of aiding and abetting on the substantive charge contained in the information. His contention, of course, was based upon the general rule that a defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

In clearly rejecting this contention and affirming the judgment of conviction, the Court, in *Jacobs*, quoting from the *Albritton* case, said:

\* \* \* Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. \* \*

\* Under this indictment, \* \* \* the named defendants are indicted as principals,--Andrew in the first degree, and Henry \* \* \* in the second degree. \* \* \* The punishment prescribed for principals in the first and second degrees is the same under our law.'

The Court then stated:

'One may be charged in an information or indictment with aiding, abetting, or procuring the commission of a criminal offense, but if the proof establishes that he actually committed the offense, a verdict finding him guilty as charged will be sustained. Conversely, It would follow that if an information, such as the one filed in the case sub judice, charges a defendant with the commission of a criminal offense, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty as charged should be sustained.' (Italicizing ours)

[4] Under our statute, therefore, a person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he was guilty of one of the acts denounced by the statute. See *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865.

The underlying reason, to which the rule, as enunciated in the cited cases from *Albritton* to the present time, is obviously pegged, is that the provisions of the statute, proscribing acts of aiding, abetting, counseling, hiring

and procuring of criminal offenses, must be read into the formal charge against persons accused of crime, and that they coalesce with and become a part of the indictment or information alleging substantive offenses.

The majority opinion of the District Court of Appeal demonstrates some confusion in its statement relative to 'conspiracy', probably induced by its mention by the trial court and counsel in connection with jury instructions.

It appears to be crystal clear that the substantive crime of conspiracy, an offense entirely separate and distinct, and governed by a different statute, from the substantive crime with which the respondent Roby was charged, has no relevancy in this case. *Blackburn v. State*, Fla., 82 So.2d 694, cert. denied, 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854.

We believe it is also free from doubt that the instruction requested by the State, although not as artfully or precisely drawn as it might have been nevertheless embraced a proper statement of the law bearing upon the facts of the case.

[5] The learned trial judge's refusal to give the instruction, upon objection of the respondent, while erroneous insofar as the State was concerned, was not reversible error as to the respondent Roby, who could only benefit by its absence. The minority opinion of the District Court of Appeal, we think, was eminently correct on this phase of the case.

In view of the foregoing, the decision of the District Court of Appeal is quashed and the judgment and sentence of the trial court reinstated.

ROBERTS, C.J., and ERVIN and DREW (Retired), JJ., concur.  
CARLTON, J., dissents.



# EXHIBIT C

Defendant appealed an order of the Circuit Court, Orange County, Frederick J. Lauten, J., summarily denying his motion to for postconviction relief challenging his convictions and sentence for carjacking with a firearm and robbery with a firearm. The District Court of Appeal, Griffin, J., held that: (1) special finding that defendant did not carry, display, use or possess a firearm did not preclude convictions, and (2) statute assessing points for possession of a semi-automatic firearm did not apply.

Sentence vacated and remanded.

West Headnotes

- [1] Sentencing and Punishment K 81  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk81 Accomplices and Co-Participants.

Special finding that defendant did not carry, display, use or possess a firearm did not preclude convictions for carjacking with a firearm and robbery with a firearm; the law of principals allowed defendant to be convicted of the main offenses regardless of whether he personally possessed a firearm, and evidence indicated that a second, unknown suspect participated in the offenses and used a gun.

- [2] Sentencing and Punishment K 79  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk79 Possession and Carrying.

Sentencing statute assessing points for possession of a semi-automatic firearm did not apply to defendant, who was convicted of carjacking with a firearm and robbery with a firearm; statute required that firearm must be in a defendant's possession, and jury expressly found that defendant did not personally possess the firearm. West's F.S.A. § 775.087(3); West's F.S.A. RCrP Rule 3.703(d)(19).

- [3] Sentencing and Punishment K 139  
350H ----  
350HI Punishment in General  
350HI(G) Dual Use  
350Hk137 Elements of Offense  
350Hk139 Weapons and Dangerous Instruments.

Application of both a minimum mandatory penalty and the assessment of extra points for use of the same firearm is not permitted.

- [4] Criminal Law K 1177.3(1)  
110 ----  
110XXIV Review  
110XXIV(Q) Harmless and Reversible Error  
110k1177.3 Sentencing and Punishment  
110k1177.3(1) In General.  
(Formerly 110k1177)

Erroneous assessment of 25 points for possession of a semi-automatic firearm was not harmless, because it resulted in defendant receiving a sentence of 144 months instead of 137.5. West's F.S.A. § 775.087(3); West's F.S.A. RCrP Rule 3.703(d)(19).

Edgardo Lopez, Bowling Green, pro se.

Richard E. Doran, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

GRIFFIN, J.

Edgardo Lopez ["Lopez"], appeals the summary denial of his Rule 3.800(a) motion. He alleges that he was charged with carjacking with a firearm and robbery with a firearm, but the jury only found him guilty of carjacking and robbery and specifically found that he did not carry, display or use a firearm. (FN1) He contends that he should not have been sentenced for committing the substantive offenses "with a firearm." He also complains that twenty-five points were erroneously added for possession of a semi-automatic weapon.

The trial court denied Lopez's motion without a hearing. The verdict reflects that the jury actually found Lopez guilty of carjacking with a firearm and robbery with a firearm, while also entering a special finding that he did not carry, display, use or possess a firearm. The court pointed out that the record indicates that a second, unknown suspect, participated in the offenses with Lopez and concluded the jury could have found that the unknown perpetrator used a gun, which was apparently a semi-automatic weapon. The trial court ruled that the special finding did not preclude sentencing as a principal for carjacking with a firearm and robbery with a firearm, but did preclude imposition of a minimum mandatory term pursuant to section 775.087(3), Florida Statutes, because that statute required Lopez to personally possess a firearm. (FN2) The court also ruled that twenty-five points for possession of a semi-automatic weapon were properly scored.

[1] We affirm Lopez's convictions for carjacking with a firearm and robbery with a firearm, despite the special finding made by the jury. The State is correct that it is immaterial whether Lopez was expressly charged as a principal, so long as there was proof he was guilty of one of the acts denounced in the statute. See *State v. Roby*, 246 So.2d 566, 571 (Fla.1971). The law of principals allows Lopez to be convicted of the main offenses regardless of whether he personally possessed a firearm, even if he could not be given a minimum mandatory sentence.

[2] [3] The State concedes that it was unable to find any authority on the issue of whether personal possession of a firearm is required to assess twenty-five points under Florida Rule of Criminal Procedure 3.703(d)(19). The rule states that:

Possession of a firearm, semiautomatic firearm or machine gun during the commission or attempt to commit a crime will result in additional sentence points ... Twenty-five sentence points are assessed if the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(3) while having in his or her possession a semiautomatic firearm ...

*Id.* (Emphasis added). The State acknowledges that the rule appears to be offender specific because it refers to a weapon in "his or her possession." In addition, the State agrees that normally no extra points would be assessed for possession of a firearm

because carjacking and robbery are two of the enumerated felonies in section 775.087(3), to which a mandatory minimum sentence is applied. Application of both a minimum mandatory penalty and the assessment of extra points for use of the same firearm is not permitted. *White v. State*, 714 So.2d 440 (Fla.1998). This is why the rule precludes the assessment of points in those cases in which a minimum mandatory sentence has been imposed. See also § 921.0014(1)(a), Fla. Stat. (1997) (providing for assessment of extra points for use of a firearm if minimum mandatory not imposed due to use of firearm). Because no minimum mandatory sentence was imposed in this case, nor were Lopez's crimes enhanced pursuant to section 775.087(1), the State argues the imposition of additional points for the firearm would not constitute a double enhancement or violate double jeopardy. Therefore, the State argues that the trial court's order should be affirmed.

We conclude that the assessment of points for possession of a semi-automatic should not have been applied, as carjacking and robbery are enumerated offenses in section 775.087(3) and therefore are excluded from application of the points. In addition, by specifying the firearm must be "in his or her possession," the rule requires personal possession, and the jury in this case expressly found that Lopez did not personally possess the firearm.

"One of the most fundamental principles of Florida law is that penal

§ es must be strictly construed according to their letter." State v. Byars, 823 So.2d 740, 742 (Fla.2002), quoting Perkins v. State, 576 So.2d 1310, 1312 (Fla.1991). See also State v. Rife, 789 So.2d 288 (Fla.2001) (rule of lenity, which also applies to guidelines, requires that when language is susceptible to differing constructions, it shall be construed most favorably to the accused).

[4] By subtracting the twenty-five points for possession of a semi-automatic weapon from Lopez's score, his maximum sentence is reduced to 137.5 months. As Lopez was sentenced to 144 months, this error was not harmless. Accordingly, we vacate the sentence and remand for resentencing.

SENTENCE VACATED and REMANDED.

PLEUS and ORFINGER, JJ., concur.

(FN1.) Defendant's conviction and sentence of twelve years in prison, followed by ten years probation, concurrent on both counts, was affirmed without opinion in Lopez v. State, 743 So.2d 1102 (Fla. 5th DCA 1999).

(FN2.) It applies where, "during the commission of the offense, such person possessed a 'firearm' or 'destructive device' as those terms are defined in s. 790.001...." § 775.087(3), Fla. Stat. (1997).

# EXHIBIT D

813 So.2d 1010  
27 Fla. L. Weekly D753  
District Court of Appeal of Florida,  
First District.  
Jermaine ROBERTS, Appellant,  
v.  
STATE of Florida, Appellee.  
No. 1D01-0769.  
April 4, 2002.

Defendant was convicted in the Circuit Court, Nassau County, Robert M. Foster, J., of sale or delivery of cocaine. Defendant appealed. The District Court of Appeal held that: (1) "principals" instruction was not erroneous, although defendant was not specifically charged with aiding or abetting; (2) court could not impose public defender's lien on defendant, as he was not given notice or an opportunity to be heard on the issue; and (3) defendant could not be ordered to pay discretionary costs.

Affirmed in part, reversed in part, and remanded for entry of corrected sentence.

West Headnotes

- [1] Controlled Substances K 98  
96H ----  
96HIII Prosecutions  
96Hk95 Instructions  
96Hk98 Sale, Distribution, Delivery, Transfer or Trafficking.  
(Formerly 138k131 Drugs and Narcotics)

Evidence was sufficient at trial for sale or delivery of cocaine to grant prosecution's request to give a "principals" instruction to the jury, and thus the instruction was not in error, even though defendant was not specifically charged with aiding and abetting the sale or delivery of cocaine.

- [2] Costs K 325  
102 ----  
102XIV In Criminal Prosecutions  
102k325 Lien and Enforcement Thereof.

Court could not impose a public defender's lien on defendant, as he was not given notice or an opportunity to be heard on the issue.

- [3] Costs K 314  
102 ----  
102XIV In Criminal Prosecutions  
102k313 Taxation or Allowance of Bill  
102k314 In General.

Defendant could not be ordered to pay discretionary costs, where defendant was not given notice and the trial court failed to make an oral pronouncement as to such a cost.

Nancy A. Daniels, Public Defender and Fred Parker Bingham, II, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Alan R. Dakan, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Jermaine Roberts challenges his judgment of conviction and sentence for sale or delivery of cocaine. We affirm the convictions, but find that certain costs were erroneously imposed and therefore reverse in part.

[1] With regard to his conviction, appellant argues that the trial court erred in granting the prosecution's request, made during trial, to give a "principals" instruction to the jury. There was sufficient evidence adduced in the state's case-in-chief to support such an instruction; accordingly, the trial court did not err in granting the request for such an instruction, despite the fact that Roberts was not specifically charged with aiding and abetting the sale or delivery of cocaine. See *Jacobs v. State*, 184 So.2d 711 (Fla. 1st DCA 1966), and *State v. Roby*, 246 So.2d 566 (Fla.1971).

[2] [3] When sentenced, the trial court imposed a public defender's lien in the amount of \$500; however, Roberts was not given notice or an opportunity to be heard on the issue. This was error. See *S.I. v. State*, 784 So.2d 1208 (Fla. 2d DCA 2001). The trial court further erred in ordering, in the written sentence, payment of \$123 in discretionary costs when appellant

was not given notice and when the trial court failed to make an oral pronouncement as to such a cost. See *Bryant v. State*, 661 So.2d 1315 (Fla. 1st DCA 1995).

These costs are therefore stricken. Because these costs were ordered as conditions of probation, they may not be reimposed. See *Car v. State*, 787 So.2d 193 (Fla. 1st DCA 2001); see also *Justice v. State*, 6 So.2d 123, 126 (Fla.1996). In all other respects, the sentence, like the judgment of conviction, is AFFIRMED, and the cause is REMANDED for entry of a corrected sentence.

ERVIN, VAN NORTWICK and BROWNING, JJ., concur.

# EXHIBIT E

Following affirmance, 528 So.2d 1373, of conviction for attempted first-degree murder, defendant sought postconviction relief. The Circuit Court for Dade County, Fredricka G. Smith, J., found that sentencing enhancement was illegal. State appealed. The District Court of Appeal, 582 So.2d 1189, affirmed and certified question of great public importance. The Supreme Court, Overton, J., held that felony defendant's sentence could not be enhanced based on "use" of weapon, absent evidence of his personal possession of weapon during commission of felony.

Certified question answered; District Court decision approved.

#### West Headnotes

[1] Sentencing and Punishment K 79

350H ----

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk76 Weapons

350Hk79 Possession and Carrying.

(Formerly 110k1208.6(2))

When defendant is charged with felony involving the "use" of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. West's F.S.A. § 775.087(1).

[2] Sentencing and Punishment K 81

350H ----

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk76 Weapons

350Hk81 Accomplices and Co-Participants.

(Formerly 110k1208.6(2))

Defendant's sentence for attempted first-degree murder could not be enhanced on basis of codefendant's possession of rifle during commission of the crime. West's F.S.A. § 775.087(1).

Robert A. Butterworth, Atty. Gen., and Jorge Espinosa and Michael J. Neimand, Asst. Attys. Gen., Miami, for petitioner.

Bennet H. Brummer, Public Defender and Michel Ociacovski Weisz, Sp. Asst. Public Defender, Eleventh Judicial Circuit, Miami, for respondent.

OVERTON, Justice.

We have for review State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified the following question as being of great public importance:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?

Id. at 1191.

We have jurisdiction (FN1) and answer the question in the negative, finding, in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant.

The relevant facts reflect that Rodriguez was charged with an attempt to commit murder in the first degree upon allegations that he and his codefendant fired a deadly weapon at Officer Kenneth Nelson, in violation of sections 782.04(1), 777.04(1), and 775.087, Florida Statutes (1983). The evidence established that, when the police attempted to pull over Rodriguez's vehicle, he fled at high speed. During the chase, a passenger in Rodriguez's car picked up a rifle and began shooting at the pursuing officers. Rodriguez and his codefendant were apprehended and charged by information as previously noted. Rodriguez was convicted of attempted first-degree murder.

His sentence was enhanced on the grounds that he "used" the firearm in the commission of this offense. The issue in this proceeding is the enhancement of the sentence under section 775.087(1), which reads as follows:

(1) Unless otherwise provided by law, whenever a person charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 775.087(1), Fla.Stat. (1983) (emphasis added). In this instance both parties agree that the reclassified sentence would be a life sentence.

Rodriguez filed a motion for postconviction relief, asserting that he was improperly sentenced because of application of the enhancement provision. The trial court granted relief, finding that "the firearm described in the information as that used

during the commission of the attempted murder was at no time carried, displayed, used, or attempted to be used by this Defendant." The trial court concluded that Rodriguez was improperly sentenced under a life-felon standard and directed that he be resentenced for attempted first-degree murder under sections 782.04(1) and 777.04.

On appeal, the Third District Court of Appeal affirmed, noting that it had "previously ruled that 'the enhancement provisions of section 775.087(1) ... require that the defendant personally possess the weapon during the commission of the crime involved.'" Rodriguez, 582 So.2d at 1190 (quoting Postell v. State, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)). See also Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA), review denied, 541 So.2d 663 (Fla.1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989).

[1] [2] The State argues that this case should be controlled by Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988). In Menendez, the defendant was convicted of trafficking in cocaine and was found to have personally possessed the weapon during the commission of the felony. Both the trial court and the district court in this proceeding held that Menendez was distinguishable. We agree that Menendez should not apply because the factual circumstances are distinguishable. We hold that, when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. In this case, the evidence plainly establishes that Rodriguez did not have personal possession of the rifle during the commission of the felony. We reject the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant.

We hold that the statute in this instance does not allow that construction or interpretation. See Postell; Willingham; Ngai. Interestingly, Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.

For the reasons expressed, we answer the question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

(FN1.) Art. V, § 3(b)(4), Fla. Const.

# EXHIBIT F



IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

CASE #: 53-2004-CF-004392-01XX-XX

vs.

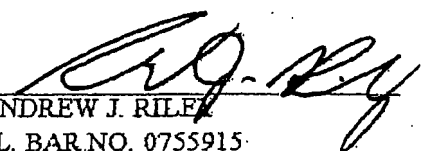
SAMUEL LEE GREEN, B/M, 04/09/1973, 589-05-7538

INFORMATION FOR:

1) ROBBERY WITH A FIREARM

In the Name and by Authority of the State of Florida:

JERRY HILL, State Attorney for the Tenth Judicial Circuit, by and through his undersigned Assistant State Attorney, charges that SAMUEL LEE GREEN on or about June 22, 2004, in the County of Polk and State of Florida, by force, violence, assault, or putting in fear, did knowingly take away money, of some value, from the person or custody of AJAY J PATEL, with the intent to permanently or temporarily deprive AJAY J PATEL of the property, and in the course of committing the robbery there was carried a firearm, contrary to Florida Statutes 812.13 and 775.087 (1 DEG FEL, PBL) (LEVEL 9)

  
ANDREW J. RILEY  
FL. BAR NO. 0755915  
Assistant State Attorney  
Polk County, Florida

②

# EXHIBIT G

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL  
CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO: CF04-04392-XX

SAMUEL L. GREEN,

Defendant.

**VERDICT**

We, the Jury, find the Defendant, **SAMUEL L. GREEN:**

          X          

**GUILTY of Robbery With a Firearm**

and we further find in the course of committing the robbery  
there

                                 was carried a firearm

          X          

                                 was not carried a firearm

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                                 was carried a deadly weapon

                                 was not carried a deadly weapon

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                                 was carried a weapon

                                 was not carried a weapon

**GUILTY of Robbery Without a Weapon,**  
a lesser included offense

**GUILTY of Theft, A lesser included offense**

**NOT GUILTY**

RECEIVED AND FILED

JUN 30 2005

RICHARD M. WEISS, CLERK

142  
Exhibit  
10/1/05

# EXHIBIT H

1 question what went on in that jury room. You've  
2 got a right to talk to them if you want to. You  
3 have an absolute right to refuse to discuss went on  
4 in that jury room, and traditionally, in the  
5 American system of justice, the workings of a jury  
6 are secret. If you are approached and asked about  
7 it, I recommend that you decline to talk about it,  
8 but it's up to you.

9 Okay, again, thank you very much.

10 (The jury left the courtroom.)

11 (JURY OUT)

12 THE COURT: Well, what is the impact of that?  
13 I mean, how do you find him guilty of robbery with  
14 a firearm and then find that the firearm was not  
15 carried?

16 MR. STERNLICHT: I think that applies to  
17 10-20-life.

18 THE COURT: And by that, you mean?

19 MR. STERNLICHT: Well, he doesn't get a  
20 minimum mandatory because it wasn't in his hand.  
21 But still, as a principal, I think they found him  
22 guilty.

23 MR. KIRKLAND: That's exactly what --

24 THE COURT: That's the way you see it.

25 MR. KIRKLAND: That's the way I see it.

1 THE COURT: So guilty of robbery with a  
2 firearm as a principal, but he doesn't get the  
3 minimum mandatory because he didn't have the gun?

4 MR. KIRKLAND: No, he didn't have the gun.

5 MR. STERNLICHT: And we didn't allege it that  
6 way either, Your Honor. If you notice the way the  
7 information was charged, we never thought from the  
8 beginning Mr. Green had the gun, so we never  
9 charged him under 10-20-life. Because we didn't  
10 ask for a finding of actual possession.

11 THE COURT: Okay.

12 MR. STERNLICHT: Which I think you have to  
13 have for 10-20-life.

14 THE COURT: All right. You were telling me  
15 you're going out of town. When will you be ready  
16 for sentencing?

17 MR. KIRKLAND: Maybe next week, Your Honor.

18 MR. STERNLICHT: Judge, I won't be here at all  
19 next week. Can we postpone that?

20 THE COURT: How about if we set this matter  
21 down for sentencing on July the 12th, will that be  
22 possible? It's a Tuesday.

23 MR. KIRKLAND: It's a pretrial day, that's  
24 fine, Your Honor.

25 THE COURT: Oh, is that pretrial? I don't

# **EXHIBIT F**

## **Jurisdictional Brief**

PROVIDED TO HAMILTON C.I. ON

FOR MAILING

6-7-13

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

DCA CASE NO: 2D13-377

STATE OF FLORIDA,  
Appellee.

MOTION TO STAY MANDATE

Comes Now Appellant, Samuel Lee Green, Pro Se, pursuant to Fla. R. App. P. 3.10, submits this Motion to Stay to this Honorable Court in reference to the above styled case number and in support states the following:

1. Appellant's 3.800 Illegal Sentence appeal was denied by this Court on May 22, 2013, by way of cited case authority.
2. Appellant recently filed for timely rehearing, clarification, and certification on June 6, 2013.
3. Appellant believes that he is in need of this Court to issue a stay of the mandate, in order for Appellant to seek discretionary review in the Florida Supreme Court where a conflict between two contrary holdings of Florida Supreme Court established law that his Court based its denial upon is at controversy.
4. Appellant believes that the stay order will only sufficiency provide Appellant his due process procedural rights to access of the Courts to petition the


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higher court by allowing him to prepare the proper pleading timely to clarify the conflicting Florida Supreme Court case law, affording effective administration and interpretation of the law.

As such Appellant respectfully request a 30 day stay of the mandate, until Appellant files his proper paperwork to this Court on a Notice of Discretionary Review.

Respectfully Submitted,

  
Samuel Lee Green, # 370562


**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Motion to Stay Mandate in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 2<sup>TH</sup> day of June, 2013.

  
Samuel Lee Green, # 370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

## EXHIBIT D

# **EXHIBIT G**

## Jurisdictional Brief

# M A N D A T E

from

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA**

## **SECOND DISTRICT**

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL,  
AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS  
BE HAD IN SAID CAUSE , IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF  
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS  
ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF  
FLORIDA.

WITNESS THE HONORABLE MORRIS SILBERMAN CHIEF JUDGE OF THE  
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT,  
AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

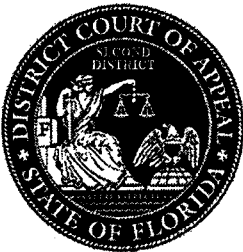
DATE: June 7, 2013

SECOND DCA CASE NO. 2D13-377

COUNTY OF ORIGIN: Polk

LOWER TRIBUNAL CASE NO. 2004CF-004392-01XX-X

CASE STYLE: SAMUEL LEE GREEN v. STATE OF FLORIDA



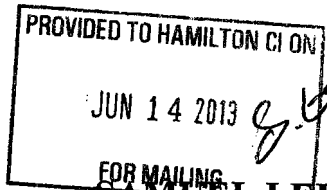
*James Birkhold*  
James Birkhold  
Clerk

cc: (Without Attached Opinion)  
Samuel Lee Green Attorney General

me

# **EXHIBIT H**

## **Jurisdictional Brief**



IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

~~SAMUEL LEE GREEN,~~  
Appellant,

v.

DCA CASE NO: 2D13-377

STATE OF FLORIDA,  
10<sup>th</sup> JUDICIAL COURT,  
Appellee.

MOTION TO RECALL OR WITHDRAW MANDATE

COMES NOW, Appellant, Samuel Lee Green, moves this Honorable Court in good faith, to recall, or withdraw its mandate that was filed on June 7, 2013 in the above-styled D.C.A. case number. Reasons stated below are that:

1. Appellant's 3.800(A) illegal sentence appeal was denied on May 22<sup>nd</sup>, 2013 by this Court. *(SEE EXHIBIT A)*
2. Appellant filed 3 motions, timely within the 15 day time requirement for filing for rehearing. The motion were date stamped and mailed by corrections officers on 6-06-13, which is on the (15<sup>th</sup> day) of the time required for rehearing. *(See motions filed on 6-06-13 Exhibit B)*
3. These three motion should have stopped the time for rehearing and as such Appellant filed a subsequent motion to stay the mandate for further review on 6-07-13, which would have been timely because the motions filed for rehearing on

6-06-13, by law, stops the time for final order continuing jurisdiction of the Second District Court because the motions filed on 6-06-13 have to be docketed and taken into review consideration which would have resulted in Appellant's motions for rehearing, clarification written opinion and motion to stay to be deemed timely filed. (See Exhibit C)

4. On 6-07-13, this court issued a mandate on this case without any consideration to the timely filed documents/motions filed on 6-06-13 or 6-07-13. (See Exhibit D).

5. As such that Appellant filed his rehearing motions timely by law of the mailbox rule of (Hagg v. State, 591 So.2d 614 (Fla. 1992)). And that Appellant filed his motion to stay subsequently in time that the court would have been under review of its rehearing motions, Appellant respectfully moves this court to recall or withdraw its mandate filed on 6-07-13, where Appellant filed his motions for rehearing timely, yet this District Court may not have received the motions before the clerk issued its mandate.

6. Appellant asserts to this court that this should be taken as excusable neglect because Appellant received the denial order a couple of days later than dated May 22<sup>nd</sup>, 2013. Then Appellant had to be placed on a callout to get to his law library. Then Appellant had to research the law on rehearing methods, clarifications, written opinions, etc. And Appellant had to figure out the conflict

between the cited case denial authority of D.C.A. from Appellant's Florida Supreme Court Standing Authority. Then Appellant had to get his motions typed, stamped and mailed. Which Appellant did all of this timely within the 15<sup>th</sup> day (6-06-13) from the denial on May 22<sup>nd</sup> 2013.

7. For said reasons above, Appellant prayerfully in goodfaith moves this court to recall or withdraw its mandate until this court has reviewed, considered and answered Appellant's timely filed motions within the (15) required rehearing time. PURSUANT TO (PLUCICK V. STATE 885 SO.2d 478 (FLA. APP. 5 DIST. 2004))

Respectfully Submitted,



Samuel Lee Green #370562

Hamilton Correctional Inst. - Annex

11419 SW County Road # 249

Jasper, Florida 32052-3735



**CERTIFICATE OF SERVICE**


I certify that I placed a copy of this motion in the hands of Hamilton

Correctional Institution-Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 14<sup>th</sup> day of JUNE, 2013



---

Samuel Lee Green #370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

# EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

## EXHIBIT B

PROVIDED TO HAMILTON C.I. ON  
Sub FOR MAILING  
6-6-13

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

CASE NO: 2D 13-377

STATE OF FLORIDA,  
Appellee.

CLARIFICATION

COMES NOW, Samuel Lee Green (Appellant) moves this Honorable Court for Clarification of its decision dated May 22, 2013, in Appeal Case No. 2d 13-377. Pursuant to Rule 9.330; 9.030; Fla. Const. Art. 1, 2; and U.S. Const. Amend 1.

As seen in the Denial Order as seen in Exhibit A, on May 22, 2013, seemingly is rested on three (3) cited cases.

The one cited case of Roby v. State, 246 So.2d 566 (Fla. 1971), (See Exhibit B), is of interest of Appellant's right to seek this court to clarify this case standing denial as compared to the Appellant's case standing of Rodriguez v. State, 602 So.2d 1270, 1272 (Fla. 1992) (See Exhibit C), as (Rodriguez, supra) is what Appellant's entire 3.800(A) Illegal Sentence Claim revolves around.

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Appellant believes that there is a conflict of the two Florida Supreme Court cases where (Roby, supra) does not override (Rodriguez, supra) because of the "principle" theory.


The District Court is being put on notice that there is a conflict in these two cites and the Appellant claim facts are based on the law established in the latter dated 1992 case ruling of [Rodriguez, supra].

In the interest of justice Appellant seeks a Clarification and opinion of its denial where the cases cited by this Court does not show a specific opinion on how this Court is interpreting the denial case cite standing of (Roby, supra) to Appellant's claim.

Thus, if this Court does not clarify this cite, the (Roby, supra) case cite is contradicting (Rodriguez, supra) because in 1992 the Florida Supreme Court rejected the State trying to use the "principle" theory of guilt to "enhance or reclassify" a Defendant's sentence as long as the firearm was not in the Appellant's actual possession regardless if a Co-Defendant was the actual holder.

Appellant asks this Court for clarification please. To distinguish the two rulings as applied to Appellant's claim.

Respectfully Submitted,

/s/ 

Samuel Lee Green #370562


**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Motion for Clarification in the hands of Hamilton Correctional Institution-Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 6<sup>th</sup> day of June, 2013

/s/   
Samuel Lee Green #370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

# EXHIBIT A



NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

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# EXHIBIT B

Supreme Court of Florida.  
STATE of Florida, Petitioner,

v.

Arthur Lee ROBY, Respondent.

No. 39434.

March 10, 1971.

Rehearing Denied April 26, 1971.

Defendant was convicted in the Circuit Court, Hillsborough County, Roger D. Flynn, J., of murder in the second degree, and he appealed. The District Court of Appeal, 229 So.2d 604, reversed and remanded for new trial, and certiorari was granted. The Supreme Court, Hodges, Circuit Judge, held that refusal to give aiding and abetting instruction was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of homicide victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Decision of District Court of Appeal quashed and judgment of trial court reinstated.

Carlton, J., dissented.

#### West Headnotes

- [1] Homicide K 1179  
203 ----  
203IX Evidence  
203IX(G) Weight and Sufficiency  
203k1176 Commission of or Participation in Act by Accused;

#### Identity

203k1179 Altercation or Attack by Several.

(Formerly 203k234(4))

Evidence, including evidence that although a total of between two and seven shots were fired by three defendants at homicide victim only one .22 caliber slug from pistol of codefendant was taken from victim's body and that no one saw projectile from defendant's gun hit victim, was insufficient to sustain conviction of defendant on substantive charge of murder in the second degree.

- [2] Criminal Law K 59(5)  
110 ----  
110VII Parties to Offenses  
110k59 Principals, Aiders, Abettors, and Accomplices in General  
110k59(5) Aiding, Abetting, or Other Participation in Offense.

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime. F.S.A. § 776.011.

- [3] Indictment and Information K 171  
210 ----  
210XII Issues, Proof, and Variance  
210k170 Variance Between Allegations and Proof  
210k171 In General.

Generally, a defendant is entitled to have charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

- [4] Criminal Law K 61.1  
110 ----  
110VII Parties to Offenses  
110k61 Principals in First Degree  
110k61.1 In General.  
(Formerly 110k61)

A person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by statute. F.S.A. § 776.011.

- [5] Homicide K 1466  
203 ----  
203XII Instructions

#### 203XII(D) Parties

203k1466 Aiding, Abetting, or Other Participation in Offense.

(Formerly 203k305)

[See headnote text below]

Criminal Law K 1173.5

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.5 Errors Favorable to Accused.

(Formerly 203k341)

Refusal to give aiding and abetting instruction, in homicide prosecution, was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Robert L. Shevin, Atty. Gen., and Michael n. Kavouklis, Asst. Atty. Gen., for petitioner.

John W. Boulton, of Fowler, White, Gillen, Hunkey & Kinney, Tampa, for respondent.

HODGES, Circuit Judge.

The decision in the case of Roby v. State of Florida, 229 So.2d, 604, is reviewed here on certiorari to the Second District Court of Appeal, pursuant to Article V, Section 4, of the Florida Constitution, F.S.A., and Rule 4.5(c) of the Florida Appellate Rules, 32 F.S.A.

The respondent, Arthur Lee Roby, and two other defendants, William Henry Johnson, Jr., and Ernest Williams, were jointly charged with the substantive crime of 1st degree murder of one Frank Cutler, deceased, the indictment alleging in the usual language that the three defendants unlawfully effected the death of the victim by shooting him with a pistol.

At the conclusion of a trial lasting five days, the jury acquitted the defendant Johnson, but returned verdicts of guilty of murder in the 2nd degree against the defendant, Ernest Williams, and the respondent, Arthur Lee Roby. After entry of judgment of conviction, both defendants were sentenced by the trial court to be confined at hard labor for twenty years.

The trial court's judgment of conviction of the respondent Roby was reversed on appeal by the District Court's cited opinion, which certiorari lays open to legal scrutiny to determine whether or not it conflicts with decisive law as enunciated in reported opinions of the Supreme Court or other District Courts of Appeal.

From the Court's review of the entire record in the case, permitted in such proceedings, James v. Keene, Fla., 133 So.2d 297, we believe that the facts, as stated in the decision which is the subject of our judicial inquiry, perhaps sufficiently present the legal issues upon which our conclusions hinge. However, for reference accommodation and immediate perspective relief of the legal questions presented, we shall briefly restate the pertinent facts as we

have gleaned them from the extremely lengthy transcript of evidence, much of which was understandably befuddled and confused because of the nature of the melee out of which the killing took place and which was made more nebulous because the actions of those involved in the tumult were so rash, precipitative and intermingled and their sequence of such rapidity that it is impossible to completely separate and narrate them as to exact time or location in the barroom.

The evidence does reveal that in Tampa, Florida, at 1024 Central Avenue, there was located a drinking establishment known as the Pyramid Lounge, comprised of a rectangular room running east and west of about 20 75 and divided into an east side area, containing about nine tables with chairs, known as the 'Ace Lounge', and a west side portion, where a semi-circular bar and stools were situated, called the 'Pyramid Bar'. Back to back open booths ran the entire length of the room on the north side.

On the evening of February 4, 1968, somewhere near 11:30 P.M., the three named defendants and one Robbie Marva Robinson, who had entered the spot with them at about 9:30 P.M., were in the 'Pyramid Bar' area

D.C.A.  
DENIED CASE  
ON THIS  
THIS CASE LAW  
ONLY CONTAINS  
RODRIGUEZ AND  
IS NOT  
SUFFICIENT.

of the establishment seated at a booth.

The place was crowded with patrons and noisy.

One James L. Hogan, 19, came into the room with one Margaret Hunt and a person named Romae Lee Rucker, and this trio had gone to the 'Ace Lounge' portion of the premises near the bar. An argument ensued between Hogan and the said Robbie Robinson, who had come over to the vicinity of Hogan and his companions and accused Hogan of referring to her as a member of the demimonde, but not in those exact words. The defendant, William Henry Johnson, Jr., following Robinson, loudly reaffirmed the accusation against Hogan and attempted to hit Hogan but the blow was deflected by Rucker. At this point the decedent, Frank Cutler, interjected himself into the argument and for a fleeting moment, at least, restrained Johnson and Hogan from becoming unalterably involved in that altercation by taking Hogan with him toward the eastern portion of the 'Pyramid Bar'.

The smoldering residuals of this noisy wrangle swiftly drifted to that part of the establishment now occupied by Hogan and Cutler and broke out into a new fiery fracas between Johnson and Hogan, as the former angrily and persistently voiced his resentment to the alleged slur on Robbie Robinson, whom he claimed to be his sister. This confrontation became the incipient cause of the tragedy in this case as the respondent Roby and the doomed Cutler, again interceding for his close friend Hogan, almost immediately became antagonistic participants in a violent dispute which deteriorated at once into physical combat, it not being clear who struck the first blow.

The final struggle carried the combatants a short distance toward the rear of the barroom to a point a few feet farther east of the bar. The defendant Williams followed in close pursuit and William Henry Johnson, Jr., also maneuvered in toward the center of the fury.

After stating at one point to Cutler that he would kill him, the respondent Roby began firing his .25 caliber pistol at Cutler at the same time that codefendant Williams was shooting at the victim with his .22 caliber pistol. There was testimony that the defendant Johnson also discharged his .22 caliber pistol in the direction at Cutler.

Cutler slumped and fell mortally wounded with two slugs in his abdomen, after stating, according to witnesses, 'It doesn't make sense', his criminal utterance on earth. Some witnesses, including Roby, stated that Cutler held a chair raised over his head in a threatening manner when, or shortly before, the pistols began to bark, and testimony was also admitted that he was a mean and dangerous man, having once broken a man's back by kicking him in a fight in front of the Pyramid lounge.

A rather enthusiastic general exodus from the building followed the shooting. Near the lead of the evacuation was a group composed of the three armed defendants and the one whose remonstrance at indignity had lighted the explosion fuse to begin with, Robbie Robinson. She had been in the rest room at the time of the actual shooting, but said at the trial in describing her withdrawal with the defendants: 'We all run automatically together.' She further testified at the trial as follows:

'Well, Roby wanted to keep saying that he had shot the boy, and they wanted keep telling him not to say that until he found out what was going on, and they say with all that shooting in there any one of them could have done it.'

And she reiterated later, upon questioning, that both Johnson and Williams had said that any one of the three defendants could have shot Cutler.

When cross-examined at the trial, respondent Roby said: 'I told Robbie Robinson I thought I had shot at him. I shot a boy in the bar.'

Immediately thereafter and at all times since, he has been emphatic stating that he shot 'at' the deceased rather than that he shot him in fact. The witness testified that a projectile from Roby's weapon hit Cutler.

The autopsy report revealed that two slugs were found in the victim's body and a pathologist testified that the cause of death was the combined effect of two gunshot wounds in the abdomen.

Only one .22 caliber slug was placed in evidence. Another slug of disputed caliber was allegedly taken from Cutler's body but this slug and testimony relating to it were not admitted.

At the conclusion of the testimony, the trial court refused to submit the jury, orally or in written form, the following instruction requested by the

State and to which the respondent objected:

'When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in furtherance or prosecution of the common design; and if two or more persons combine to do an unlawful act, and in the prosecution of the common object, an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish; the immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.'

The trial court, counsel for the State and defense counsel had engaged in some discussion relative to a 'conspiracy charge', but obviously the Court was referring to the quoted aiding and abetting charge which was declined.

The District Court of Appeal concluded, in a divisive opinion of two to one, that the evidence was inadequate to support a valid finding on the substantive charge that the respondent Roby caused the death of the deceased. It also held that the failure of the trial court to instruct the jury as to provisions of Section 776.011, Florida Statutes, F.S.A., which makes a person a principal in the first degree whether he actually commits the crime or is present aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed, rendered the verdict invalid on this theory.

The Court also further decided that the refusal to grant the quoted instruction, as requested by the State and objected to by the respondent, was plainly within the discretion of the trial judge, since it was not clear whether the case dealt with 'conspiracy' or 'aiding and abetting'.

The contention here of the petitioner, State of Florida, based upon conflict of decision, has a dual aspect.

First, it is urged that the evidence at the trial was, indeed, sufficient to support the verdict of the jury on the substantive charge against Roby, under the decision of this Court, and Second, that in any event, respondent's conviction should be sustained, under Section 776.011, Florida Statutes (F.S.A.), because the evidence plainly shows that he was present, aiding and abetting the commission of the offense and that a jury instruction on aiding and abetting was not necessary to sustain the conviction under the controlling reported case law of this court as well as that of other district courts of appeal.

While the question involved in the first point may appear to be a close one, in view of the respondent's own quoted statements immediately after the shooting and at the trial, we are convinced that the District Court of Appeal was correct in that portion of its decision which held that the facts proved at the trial were legally insufficient to support conviction on the substantive charge. In our opinion, no conflict exists between their decision on this point and the decisions of this Court of any other District Appellate Court on this question.

[1] The proof, under the evidence admitted, was that two gunshot wounds caused the death of Cutler; that a total of between two and seven shots were fired by the three defendants at Cutler; that only one .22 caliber slug from the pistol of defendant Williams was taken from Cutler's body; and that no one saw a projectile from Roby's gun hit Cutler. It is obvious that one reasonable hypothesis, based upon these facts, is that no projectile from respondent Roby's pistol found its mark. This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to nullify a reasonable doubt and support a criminal conviction. The burden of proof of connecting the death to Roby's pistol was not met. *Driggers v. State, Fla., 164 So.2d 200; Davis v. State, Fla., 90 So.2d 629.*

The authorities cited by respondent, including *Land v. State, Fla., 156 So.2d 8; Coachman v. State, Fla.App., 114 So.2d 189; Hopper v. State, Fla., 54 So.2d 165; Tongay v. State, Fla., 79 So.2d 673; and Bellamy v. State, 56 Fla. 43, 47 So. 868*, are distinguishable, as to factual complex, from the case under consideration, and because of the distinctions are not controlling.

We must depart from the ruling of the District Court, however, on the second contention of the petitioner because it is incompatible with the

decisions of this Court and other Appellate Courts of this State.

[2] Abundant proof that the respondent Roby was present aiding and abetting in the commission of the offense was adduced at the trial. The evidence was fully sufficient, as a matter of law, to sustain such a charge, and it is now well established in Florida that a person who is charged in an indictment or information with commission of a crime may be convicted upon proof that he aided or abetted in the commission of such crime, under Section 776.011, Florida Statutes, F.S.A., which enacted the recognized precept into statutory law.

The rule was first recognized, albeit, perhaps, in obiter dictum, by this Court in the year 1893 in *Albritton v. State*, 32 Fla. 358, 13 So. 955. It was followed in many other decisions, among them, *Green v. State*, 40 Fla. 191, 23 So. 851 (1898); *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865; *Brown v. State*, 82 Fla. 306, 89 So. 873; *Jimenez v. State*, 158 Fla. 719, 30 So.2d 292; *Chaudoin v. State*, Fla.App., 118 So.2d 569 and *Newman v. State* (Fla.) 196 So.2d 897 (See also *Sons v. State*, Fla.App., 99 So.2d 888, cert. den. 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160), to finally establish it as law in the criminal jurisprudence of Florida.

In *Jacobs v. State*, 184 So.2d 711, it was held by the First District Court of Appeal that one may be charged with aiding, abetting or procuring the commission of a criminal offense and may be convicted upon proof establishing the actual commission of the offense by him, and vice versa.

[3] In that case the defendant, who was charged with a substantive offense, conceded that the aiding and abetting statute (F.S. Sec. 776.011, F.S.A.) makes an aider and abetter a principal equally guilty as the person who actually perpetrates the crime but contended that the State had the duty of charging him as an aider and abetter in the information filed against him, concluding that he could not be found guilty of aiding and abetting on the substantive charge contained in the information. His contention, of course, was based upon the general rule that a defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

In clearly rejecting this contention and affirming the judgment of conviction, the Court, in *Jacobs*, quoting from the *Albritton* case, said:

\* \* Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. \* \*

Under this indictment, \* \* \* the named defendants are indicted as principals,--Andrew in the first degree, and Henry \* \* \* in the second degree. \*

\* The punishment prescribed for principals in the first and second degrees is the same under our law.'

The Court then stated:

One may be charged in an information or indictment with aiding, abetting, or procuring the commission of a criminal offense, but if the proof establishes that he actually committed the offense, a verdict finding him guilty as charged will be sustained. Conversely, it would follow that if an information, such as the one filed in the case sub judice, charges a defendant with the commission of a criminal offense, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty as charged should be sustained.' (Italicizing ours)

[4] Under our statute, therefore, a person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by the statute. See *Myers v. State*, Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865.

The underlying reason, to which the rule, as enunciated in the cited cases from *Albritton* to the present time, is obviously pegged, is that the provisions of the statute, proscribing acts of aiding, abetting, counseling, hiring

and procuring of criminal offenses, must be read into the formal charges against persons accused of crime, and that they coalesce with and become a part of the indictment or information alleging substantive offenses.

The majority opinion of the District Court of Appeal demonstrates some confusion in its statement relative to 'conspiracy', probably induced by its mention by the trial court and counsel in connection with jury instructions.

It appears to be crystal clear that the substantive crime of conspiracy, an offense entirely separate and distinct, and governed by a different statute, from the substantive crime with which the respondent Roby was charged, has no relevancy in this case. *Blackburn v. State*, Fla., 83 So.2d 694, cert. denied, 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854.

We believe it is also free from doubt that the instruction requested by the State, although not as artfully or precisely drawn as it might have been, nevertheless embraced a proper statement of the law bearing upon the facts of the case.

[5] The learned trial judge's refusal to give the instruction, upon objection of the respondent, while erroneous insofar as the State was concerned, was not reversible error as to the respondent Roby, who could only benefit by its absence. The minority opinion of the District Court of Appeal, we think, was eminently correct on this phase of the case.

In view of the foregoing, the decision of the District Court of Appeal is quashed and the judgment and sentence of the trial court reinstated.

ROBERTS, C.J., and ERVIN and DREW (Retired), JJ., concur.

CARLTON, J., dissents.

# EXHIBIT C

July 2, 1992.

Following affirmance, 528 So.2d 1373, of conviction for attempted first-degree murder, defendant sought postconviction relief. The Circuit Court for Dade County, Fredricka G. Smith, J., found that sentencing enhancement was illegal. State appealed. The District Court of Appeal, 582 So.2d 1189, affirmed and certified question of great public importance. The Supreme Court, Overton, J., held that felony defendant's sentence could not be enhanced based on "use" of weapon, absent evidence of his personal possession of weapon during commission of felony.

Certified question answered; District Court decision approved.

## West Headnotes

## [1] Sentencing and Punishment K 79

350H ----

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk76 Weapons

350Hk79 Possession and Carrying.

(Formerly 110k1208.6(2))

When defendant is charged with felony involving the "use" of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. West's F.S.A. § 775.087(1).

## [2] Sentencing and Punishment K 81

350H ----

350HI Punishment in General

350HI(D) Factors Related to Offense

350Hk76 Weapons

350Hk81 Accomplices and Co-Participants.

(Formerly 110k1208.6(2))

Defendant's sentence for attempted first-degree murder could not be enhanced on basis of codefendant's possession of rifle during commission of the crime. West's F.S.A. § 775.087(1).

Robert A. Butterworth, Atty. Gen., and Jorge Espinosa and Michael J. Neimand, Asst. Attys. Gen., Miami, for petitioner.

Bennet H. Brummer, Public Defender and Michel Ociacovski Weisz, Sp. Asst. Public Defender, Eleventh Judicial Circuit, Miami, for respondent.

OVERTON, Justice.

We have for review State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified the following question as being of great public importance:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?

Id. at 1191.

We have jurisdiction (FN1) and answer the question in the negative, finding, in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant.

The relevant facts reflect that Rodriguez was charged with an attempt to commit murder in the first degree upon allegations that he and his codefendant fired a deadly weapon at Officer Kenneth Nelson, in violation of sections 782.04(1), 777.04(1), and 775.087, Florida Statutes (1983). The evidence established that, when the police attempted to pull over Rodriguez's vehicle, he fled at high speed. During the chase, a passenger in Rodriguez's car picked up a rifle and began shooting at the pursuing officers. Rodriguez and his codefendant were apprehended and charged by information as previously noted. Rodriguez was convicted of attempted first-degree murder.

His sentence was enhanced on the grounds that he "used" the firearm in the commission of this offense. The issue in this proceeding is the enhancement of the sentence under section 775.087(1), which reads as follows:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 775.087(1), Fla.Stat. (1983) (emphasis added). In this instance both parties agree that the reclassified sentence would be a life sentence.

Rodriguez filed a motion for postconviction relief, asserting that he was improperly sentenced because of application of the enhancement provision. The trial court granted relief, finding that "the firearm described in the information as that used

during the commission of the attempted murder was at no time carried, displayed, used, or attempted to be used by this Defendant." The trial court concluded that Rodriguez was improperly sentenced under a life-felony standard and directed that he be resentenced for attempted first-degree murder under sections 782.04(1) and 777.04.

On appeal, the Third District Court of Appeal affirmed, noting that it had "previously ruled that 'the enhancement provisions of section 775.087(1) ... require that the defendant personally possess the weapon during the commission of the crime involved.'" Rodriguez, 582 So.2d at 1190 (quoting Postell v. State, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)). See also Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA), review denied, 548 So.2d 663 (Fla. 1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989).

[1] [2] The State argues that this case should be controlled by Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988). In Menendez, the defendant was convicted of trafficking in cocaine and was found to have personally possessed the weapon during the commission of the felony. Both the trial court and the district court in this proceeding held that Menendez was distinguishable. We agree that Menendez should not apply because the factual circumstances are distinguishable. We hold that, when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. In this case, the evidence plainly establishes that Rodriguez did not have personal possession of the rifle during the commission of the felony. We reject the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant.

We hold that the statute in this instance does not allow that construction or interpretation. See Postell; Willingham; Ngai. Interestingly, Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.

For the reasons expressed, we answer the question in the negative and approve the decision of the district court.

It is so ordered.

BARRETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

(FN1.) Art. V, § 3(b)(4), Fla. Const.

PROVIDED TO HAMILTON C.I. ON  
FOR MAILING  
6-06-13

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

DCA CASE NO: 2D13-377

STATE OF FLORIDA,  
Appellee.

CERTIFICATION OF A WRITTEN OPINION

COMES NOW, Appellant Samuel Lee Green, pro se; pursuant to Fla. R. App. P. 9.330 and 9.331, submits this Motion for Certification of a Written Opinion in the above styled case and in support states the following:

1. This Appellant believes that a certified written opinion will provide a legitimate basis for a Supreme Court review due to a conflict of the Florida Supreme Court's opinion in the cited case of Roby v. State, 246 So. 2d 566 (Fla. 1971), where the Supreme Court held that a person is guilty as a principle of a crime if evidence establishes such guilt, contradicting and conflicting with the Florida Supreme Court's later opinion in the case of Rodriguez v. State, 602 So. 2d 1270 (Fla. 1997), where the Court held that if a person is charged under Fla. Statute 775.087, despite being adjudicated guilty as a principle to a crime involving the use of a firearm does not constitute a sentence reclassification or enhancement where a Defendant was determined not to personally possess a




firearm.

The Court's written opinion on how the Court is apprehending and interpreting Florida Supreme Court law in the case of Roby v. State in RE, 246 So. 2d 566 (Fla. 1971) to the facts of Appellant's claim is needed in the interest of justice due to Appellant's whole claim is based on the case law of Rodriguez v. State, 602 So. 2d 1270, 1272 (Fla. 1997). As it is a more recent opinion Appellant expresses a belief his claim is of great public interest which will affect a great many people and based on a reasoned and studied judgment due to where the Florida Supreme Court held that a person is guilty as a principle and must be punished as to what his co-perpretator did who possessed the firearm and the Florida Supreme Court's prior opinion 20 years later that established that the principle participation of guilt does not allow a Court to sentence a person to a higher reclassification or enhancement when that individual does not possess the firearm and is charged with Fla. Statute 775.087, is a prima facie conflict of law.

Appellant respectfully requests this Court to provide certification of its written opinion in the case. The Courts decision is of exceptional importance.

Date: 6-6-13

Respectfully Submitted,

  
\_\_\_\_\_  
Samuel Lee Green, # 370562

**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Certification of a Written Opinion in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 6<sup>th</sup> day of June, 2013.



---

Samuel Lee Green, # 370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

PROVIDED TO HAMILTON C.I. ON  
FOR MAILING

6-6-13

May 22, 2013

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

CASE NO: 2D13-377  
C.C. JUDGE: KELLY/  
VILLANTI/  
LA ROSE/  
J.J.

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_ /

REHEARING

COMES NOW Samuel Lee Green, (Appellant) moves this Honorable Court for Rehearing of its decision dated May 22, 2013, in Appeal Case No. 2D13-377, pursuant to Rule 9.330; 9.030; Fla. Const. Art. 1, 2; 1, 9; and U.S. Const. Amend 1.

On May 22, 2013, this Court entered a denial order of Appellant's 3.800(a) Illegal Sentence Appeal in favor of the 10<sup>th</sup> Judicial Courts Judges John Radabaugh and Michael E. Raiden.

As seen in the denial order as seen in Exhibit A on May 22, 2013, seemingly is rested on three (3) cited cases as to:

Roby v. State, 246 So. 2d 566 (Fla. 1971) (Exhibit B)

Lopez v. State, 833 So. 2d 283 (Fla. 5<sup>th</sup> DCA 2002) (Exhibit C)

Roberts v. State, 813 So. 2d 1016 (Fla. 1<sup>st</sup> DCA 2002) (Exhibit D)

Appellant respectfully asks this Court to reconsider its denial where this

Court has wholly overlooked and misapplied the Florida Supreme Courts case law to Appellant's argument.

This Court overlooked that Appellant based his entire argument on a sentencing error that was undistinguishable from the supporting case of Florida Supreme Court's [Rodriguez v. State, 602 So. 2d 1270, 1272 (Fla. 1992) (Exhibit E)].

This Court overlooked that Appellant did not argue his conviction was illegal he argued that his [Sentence] was illegal because as seen in (Rodriguez, supra) the law of Florida Statute 777.011 "Principle in the First Degree" does not allow a Defendant's sentence to be reclassified or enhanced from Second Degree to First Degree sentencing where the firearm was not determined to be in the actual possession of the Appellant, because the Florida Supreme Court rejected the State's contention that Rodriguez's sentence [not conviction] could be enhanced on a theory of constructive or vicarious possession based on the conduct of the or [a] Co-Defendant. [Law]

Appellant clearly showed that his facts are undistinguishable from established Florida Supreme Court case of (Rodriguez, supra) and that established Florida Supreme Court law shows that a Defendant's [Green's] sentence can not be enhanced to a life sentence, where only a 15 year sentence could have been given, with the P.R.R. its still a 15 year mandatory sentence. (See Exhibit E)

The denial case of (Roby, Supra) is not supportive of the Appellant argument to warrant denial because the [1971] opinion in (Roby, supra) compared to the [1992] opinion in (Rodriguez, supra), are two contrary holdings by the Florida Supreme Court and thus a conclusion of denial can not be given because this Court obviously did not interpret the argument of Appellant's sentence. (Roby, supra) does not speak of any sentence, or Florida Statute 775.087. This case is and has been obviously misapplied because (Roby, supra) speaks of a defendant being charged and found guilty as a principle and does not speak of Appellant's claim of illegal sentencing. (See Exhibit B)

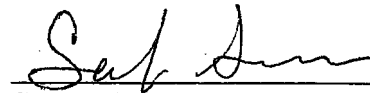
Therefore, Appellant seeks a reversal on this denial because the denial case cites do not established any law that denies Appellant relief sought on his sentencing. The facts of Appellant are overlooked because the District Court should have clearly seen that:

1. Appellant (Green was clearly charged with 775.087, in a crime involving the use of a weapon [Robbery with a Firearm]) (See Exhibit F).
2. Appellant (Green was clearly determined not to carry a firearm in the robbery by the jury) (See Exhibit G).
3. Appellant (Green was clearly given a 1<sup>st</sup> Degree Life Sentence adjudicated [guilty of Robbery with a Firearm as a principle]) (See Exhibit H).

These (3) three facts are undistinguishable from (Rodriguez, supra, See Exhibit E) that this Court overlooked and as a result Rodriguez was sentenced to a Second Degree Felony despite being a [Principle] because the firearm was not in his actual possession.

Appellant, asks this Court to review the law and facts and to reverse this decision because if not a substantial injustice has occurred and it is the responsibility of this Court to correct a manifest injustice. (State v. McBride, 848 So. 2d 287, 291-92 (Fla. 2003).

Respectfully Submitted,



Samuel Lee Green, DC #370562

**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Rehearing in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 6<sup>th</sup> day of June, 2013.



Samuel Lee Green, DC #370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

ⓔ

# EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

180



# EXHIBIT B

Supreme Court of Florida.

STATE of Florida, Petitioner,

v.

Arthur Lee ROBY, Respondent.

No. 39434.

March 10, 1971.

Rehearing Denied April 26, 1971.

Defendant was convicted in the Circuit Court, Hillsborough County, Roger D. Flynn, J., of murder in the second degree, and he appealed. The District Court of Appeal, 229 So.2d 604, reversed and remanded for new trial, and certiorari was granted. The Supreme Court, Hodges, Circuit Judge, held that refusal to give aiding and abetting instruction was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of homicide victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Decision of District Court of Appeal quashed and judgment of trial court reinstated.

Carlton, J., dissented.

## West Headnotes

- [1] Homicide K 1179  
203 ----  
203IX Evidence  
203IX(G) Weight and Sufficiency  
203k1176 Commission of or Participation in Act by Accused;

Identity

203k1179 Altercation or Attack by Several.

(Formerly 203k234(4))

Evidence, including evidence that although a total of between two and seven shots were fired by three defendants at homicide victim only one .22 caliber slug from pistol of codefendant was taken from victim's body and that no one saw projectile from defendant's gun hit victim, was insufficient to sustain conviction of defendant on substantive charge of murder in the second degree.

- [2] Criminal Law K 59(5)  
110 ----  
110VII Parties to Offenses  
110k59 Principals, Aiders, Abettors, and Accomplices in General  
110k59(5) Aiding, Abetting, or Other Participation in Offense.

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime. F.S.A. § 776.011.

- [3] Indictment and Information K 171  
210 ----  
210XII Issues, Proof, and Variance  
210k170 Variance Between Allegations and Proof  
210k171 In General.

Generally, a defendant is entitled to have charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

- [4] Criminal Law K 61.1  
110 ----  
110VII Parties to Offenses  
110k61 Principals in First Degree  
110k61.1 In General.  
(Formerly 110k61)

A person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by statute. F.S.A. § 776.011.

- [5] Homicide K 1466  
203 ----  
203XII Instructions

203XII(D) Parties

203k1466 Aiding, Abetting, or Other Participation in Offense.

(Formerly 203k305)

[See headnote text below]

[5] Criminal Law K 1173.5

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.5 Errors Favorable to Accused.

(Formerly 203k341)

Refusal to give aiding and abetting instruction, in homicide prosecution, was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Robert L. Shevin, Atty. Gen., and Michael n. Kavouklis, Asst. Atty Gen., for petitioner.

John W. Boulton, of Fowler, White, Gillen, Hunkey & Kinney, Tampa for respondent.

HODGES, Circuit Judge.

The decision in the case of Roby v. State of Florida, 229 So.2d 604, is reviewed here on certiorari to the Second District Court of Appeal, pursuant to Article V, Section 4, of the Florida Constitution, F.S.A., and Rule 4.5(c) of the Florida Appellate Rules, 32 F.S.A.

The respondent, Arthur Lee Roby, and two other defendants, William Henry Johnson, Jr., and Ernest Williams, were jointly charged with the substantive crime of 1st degree murder of one Frank Cutler, deceased, the indictment alleging in the usual language that the three defendants unlawfully effected the death of the victim by shooting him with a pistol.

At the conclusion of a trial lasting five days, the jury acquitted the defendant Johnson, but returned verdicts of guilty of murder in the 2nd degree against the defendant, Ernest Williams, and the respondent, Arthur Lee Roby. After entry of judgment of conviction, both defendants were sentenced by the trial court to be confined at hard labor for twenty years.

The trial court's judgment of conviction of the respondent Roby was reversed on appeal by the District Court's cited opinion, which certiorari lays open to legal scrutiny to determine whether or not it conflicts with decisive law as enunciated in reported opinions of the Supreme Court or other District Courts of Appeal.

From the Court's review of the entire record in the case, permitted in such proceedings, James v. Keene, Fla., 133 So.2d 297, we believe that the facts, as stated in the decision which is the subject of our judicial inquiry, perhaps sufficiently present the legal issues upon which our conclusions hinge. However, for reference accommodation and immediate perspective relief of the legal questions presented, we shall briefly restate the pertinent facts as we

have gleaned them from the extremely lengthy transcript of evidence, much of which was understandably befuddled and confused because of the nature of the melee out of which the killing took place and which was made more nebulous because the actions of those involved in the tumult were so rash, precipitative and intermingled and their sequence of such rapidity that it is impossible to completely separate and narrate them as to exact time or location in the barroom.

The evidence does reveal that in Tampa, Florida, at 1024 Central Avenue, there was located a drinking establishment known as the Pyramid Lounge, comprised of a rectangular room running east and west of about 20 75 and divided into an east side area, containing about nine tables with chairs, known as the 'Ace Lounge', and a west side portion, where a semi-circular bar and stools were situate, called the 'Pyramid Bar'. Back to back open booths ran the entire length of the room on the north side.

On the evening of February 4, 1968, somewhere near 11:30 P.M., the three named defendants and one Robbie Marva Robinson, who had entered the spot with them at about 9:30 P.M., were in the 'Pyramid Bar' area

of the establishment seated at a booth.

The place was crowded with patrons and noisy.

One James L. Hogan, 19, came into the room with one Margaret Hunt and a person named Romae Lee Rucker, and this trio had gone to the 'Ace Lounge' portion of the premises near the bar. An argument ensued between Hogan and the said Robbie Robinson, who had come over to the vicinity of Hogan and his companions and accused Hogan of referring to her as a member of the demimonde, but not in those exact words. The defendant, William Henry Johnson, Jr., following Robinson, loudly reaffirmed the accusation against Hogan and attempted to hit Hogan but the blow was deflected by Rucker. At this point the decedent, Frank Cutler, interjected himself into the argument and for a fleeting moment, at least, restrained Johnson and Hogan from becoming unalterably involved in that altercation by taking Hogan with him toward the eastern portion of the 'Pyramid Bar'.

The smoldering residuals of this noisy wrangle swiftly drifted to that part of the establishment now occupied by Hogan and Cutler and broke out into a new fiery fracas between Johnson and Hogan, as the former angrily and persistently voiced his resentment to the alleged slur on Robbie Robinson, whom he claimed to be his sister. This confrontation became the incipient cause of the tragedy in this case as the respondent Roby and the doomed Cutler, again interceding for his close friend Hogan, almost immediately became antagonistic participants in a violent dispute which deteriorated at once into physical combat, it not being clear who struck the first blow.

The final struggle carried the combatants a short distance toward the rear of the barroom to a point a few feet farther east of the bar. The defendant Williams followed in close pursuit and William Henry Johnson, Jr., also maneuvered in toward the center of the fury.

After stating at one point to Cutler that he would kill him, the respondent Roby began firing his .25 caliber pistol at Cutler at the same time that codefendant Williams was shooting at the victim with his .22 caliber pistol. There was testimony that the defendant Johnson also discharged his .22 caliber pistol in the direction at Cutler.

Cutler slumped and fell mortally wounded with two slugs in his abdomen, after stating, according to witnesses, 'It doesn't make sense', his terminal utterance on earth. Some witnesses, including Roby, stated that Cutler held a chair raised over his head in a threatening manner when, or shortly before, the pistols began to bark, and testimony was also admitted that he was a mean and dangerous man, having once broken a man's back by kicking him in a fight in front of the Pyramid Lounge.

A rather enthusiastic general exodus from the building followed the shooting. Near the lead of the evacuation was a group composed of the three armed defendants and the one whose remonstrance at indignity had lighted the explosion fuse to begin with, Robbie Robinson. She had been in the rest room at the time of the actual shooting, but said at the trial in describing her withdrawal with the defendants: 'We all run automatically together.' She further testified at the trial as follows:

'Well, Roby wanted to keep saying that he had shot the boy, and they wanted to keep telling him not to say that until he found out what was going on, and they say with all that shooting in there any one of them could have done it.'

And she reiterated later, upon questioning, that both Johnson and Williams had said that any one of the three defendants could have shot Cutler.

When cross-examined at the trial, respondent Roby said: 'I told Robbie Robinson I thought I had shot at him. I shot a boy in the bar.'

Immediately thereafter and at all times since, he has been emphatic in stating that he shot 'at' the deceased rather than that he shot him in fact. No witness testified that a projectile from Roby's weapon hit Cutler.

The autopsy report revealed that two slugs were found in the victim's body and a pathologist testified that the cause of death was the combined effect of two gunshot wounds in the abdomen.

Only one .22 caliber slug was placed in evidence. Another slug of disputed caliber was allegedly taken from Cutler's body but this slug and testimony relating to it were not admitted.

At the conclusion of the testimony, the trial court refused to submit to the jury, orally or in written form, the following instruction requested by the

State and to which the respondent objected:

'When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in furtherance or prosecution of the common design; and if two or more persons combine to do an unlawful act, and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish; the immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.'

The trial court, counsel for the State and defense counsel had engaged in some discussion relative to a 'conspiracy charge', but obviously the Court was referring to the quoted aiding and abetting charge which was declined.

The District Court of Appeal concluded, in a divisive opinion of two to one, that the evidence was inadequate to support a valid finding on the substantive charge that the respondent Roby caused the death of the deceased. It also held that the failure of the trial court to instruct the jury as to provisions of Section 776.011, Florida Statutes, F.S.A., which makes a person a principal in the first degree whether he actually commits the crime or is present aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed, rendered the verdict invalid on this theory.

The Court also further decided that the refusal to grant the quoted instruction, as requested by the State and objected to by the respondent, was plainly within the discretion of the trial judge, since it was not clear whether the case dealt with 'conspiracy' or 'aiding and abetting'.

The contention here of the petitioner, State of Florida, based upon conflict of decision, has a dual aspect.

First, it is urged that the evidence at the trial was, indeed, sufficient to support the verdict of the jury on the substantive charge against Roby, under the decision of this Court, and Second, that in any event, respondent's conviction should be sustained, under Section 776.011, Florida Statutes (F.S.A.), because the evidence plainly shows that he was present, aiding and abetting the commission of the offense and that a jury instruction on aiding and abetting was not necessary to sustain the conviction under the controlling reported case law of this court as well as that of other district courts of appeal.

While the question involved in the first point may appear to be a close one, in view of the respondent's own quoted statements immediately after the shooting and at the trial, we are convinced that the District Court of Appeal was correct in that portion of its decision which held that the facts proved at the trial were legally insufficient to support conviction on the substantive charge. In our opinion, no conflict exists between their decision on this point and the decisions of this Court of any other District Appellate Court on this question.

[1] The proof, under the evidence admitted, was that two gunshot wounds caused the death of Cutler; that a total of between two and seven shots were fired by the three defendants at Cutler; that only one .22 caliber slug from the pistol of defendant Williams was taken from Cutler's body; and that no one saw a projectile from Roby's gun hit Cutler. It is obvious that one reasonable hypothesis, based upon these facts, is that no projectile from respondent Roby's pistol found its mark. This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to nullify a reasonable doubt and support a criminal conviction. The burden of proof of connecting the death to Roby's pistol was not met. *Driggers v. State, Fla.*, 164 So.2d 200; *Davis v. State, Fla.*, 90 So.2d 629.

The authorities cited by respondent, including *Land v. State, Fla.*, 156 So.2d 8; *Coachman v. State, Fla.App.*, 114 So.2d 189; *Hopper v. State, Fla.*, 54 So.2d 165; *Tongay v. State, Fla.*, 79 So.2d 673; and *Bellamy v. State, Fla.*, 43, 47 So. 868, are distinguishable, as to factual complex, from the case under consideration, and because of the distinctions are not controlling.

We must depart from the ruling of the District Court, however, on the second contention of the petitioner because it is incompatible with the

decisions of this Court and other Appellate Courts of this State.

[2] Abundant proof that the respondent Roby was present aiding and abetting in the commission of the offense was adduced at the trial. The evidence was fully sufficient, as a matter of law, to sustain such a charge, and it is now well established in Florida that a person who is charged in an indictment or information with commission of a crime may be convicted upon proof that he aided or abetted in the commission of such crime, under Section 776.011, Florida Statutes, F.S.A., which enacted the recognized precept into statutory law.

The rule was first recognized, albeit, perhaps, in obiter dictum, by this Court in the year 1893 in *Albritton v. State*, 32 Fla. 358, 13 So. 955. It was followed in many other decisions, among them, *Green v. State*, 40 Fla. 191, 23 So. 851 (1898); *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865; *Brown v. State*, 82 Fla. 306, 89 So. 873; *Jimenez v. State*, 158 Fla. 719, 30 So.2d 292; *Chaudoin v. State*, Fla.App., 118 So.2d 569 and *Newman v. State* (Fla.) 196 So.2d 897 (See also *Sons v. State*, Fla.App., 99 So.2d 888, cert. den. 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160), to finally establish it as law in the criminal jurisprudence of Florida.

In *Jacobs v. State*, 184 So.2d 711, it was held by the First District Court of Appeal that one may be charged with aiding, abetting or procuring the commission of a criminal offense and may be convicted upon proof establishing the actual commission of the offense by him, and vice versa.

[3] In that case the defendant, who was charged with a substantive offense, conceded that the aiding and abetting statute (F.S. Sec. 776.011, F.S.A.) makes an aider and abetter a principal equally guilty as the person who actually perpetrates the crime but contended that the State had the duty of charging him as an aider and abetter in the information filed against him, concluding that he could not be found guilty of aiding and abetting on the substantive charge contained in the information. His contention, of course, was based upon the general rule that a defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

In clearly rejecting this contention and affirming the judgment of conviction, the Court, in *Jacobs*, quoting from the *Albritton* case, said:

\* \* \* Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. \* \*  
\* Under this indictment, \* \* \* the named defendants are indicted as principals,--Andrew in the first degree, and Henry \* \* \* in the second degree. \*  
\* \* The punishment prescribed for principals in the first and second degrees is the same under our law.'

The Court then stated:

One may be charged in an information or indictment with aiding, abetting, or procuring the commission of a criminal offense, but if the proof establishes that he actually committed the offense, a verdict finding him guilty as charged will be sustained. Conversely, it would follow that if an information, such as the one filed in the case sub judice, charges a defendant with the commission of a criminal offense, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty is charged should be sustained.' (Italicizing ours)

[4] Under our statute, therefore, a person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by the statute. See *Myers v. State*, 3 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865.

The underlying reason, to which the rule, as enunciated in the cited cases from *Albritton* to the present time, is obviously pegged, is that the provisions of the statute, proscribing acts of aiding, abetting, counseling, hiring

and procuring of criminal offenses, must be read into the formal charge against persons accused of crime, and that they coalesce with and become a part of the indictment or information alleging substantive offenses.

The majority opinion of the District Court of Appeal demonstrates some confusion in its statement relative to 'conspiracy', probably induced by its mention by the trial court and counsel in connection with jury instructions.

It appears to be crystal clear that the substantive crime of conspiracy, an offense entirely separate and distinct, and governed by a different statute, from the substantive crime with which the respondent Roby was charged, has no relevancy in this case. *Blackburn v. State*, Fla., 81 So.2d 694, cert. denied, 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854.

We believe it is also free from doubt that the instruction requested by the State, although not as artfully or precisely drawn as it might have been nevertheless embraced a proper statement of the law bearing upon the facts of the case.

[5] The learned trial judge's refusal to give the instruction, upon objection of the respondent, while erroneous insofar as the State was concerned, was not reversible error as to the respondent Roby, who could only benefit by its absence. The minority opinion of the District Court of Appeal, we think, was eminently correct on this phase of the case.

In view of the foregoing, the decision of the District Court of Appeal is quashed and the judgment and sentence of the trial court reinstated.

ROBERTS, C.J., and ERVIN and DREW (Retired), JJ., concur.  
CARLTON, J., dissents.

# EXHIBIT C

28 Fla. L. Weekly D130  
District Court of Appeal of Florida,  
Fifth District.

Edgardo LOPEZ, Appellant,  
v.

STATE of Florida, Appellee.

No. 5D02-2483.

Dec. 27, 2002.

Defendant appealed an order of the Circuit Court, Orange County, Frederick J. Lauten, J., summarily denying his motion to for postconviction relief challenging his convictions and sentence for carjacking with a firearm and robbery with a firearm. The District Court of Appeal, Griffin, J., held that: (1) special finding that defendant did not carry, display, use or possess a firearm did not preclude convictions, and (2) statute assessing points for possession of a semi-automatic firearm did not apply.

Sentence vacated and remanded.

West Headnotes

- [1] Sentencing and Punishment K 81  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk81 Accomplices and Co-Participants.

Special finding that defendant did not carry, display, use or possess a firearm did not preclude convictions for carjacking with a firearm and robbery with a firearm; the law of principals allowed defendant to be convicted of the main offenses regardless of whether he personally possessed a firearm, and evidence indicated that a second, unknown suspect participated in the offenses and used a gun.

- [2] Sentencing and Punishment K 79  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk79 Possession and Carrying.

Sentencing statute assessing points for possession of a semi-automatic firearm did not apply to defendant, who was convicted of carjacking with a firearm and robbery with a firearm; statute required that firearm must be in a defendant's possession, and jury expressly found that defendant did not personally possess the firearm. West's F.S.A. § 775.087(3); West's F.S.A. RCrP Rule 3.703(d)(19).

- [3] Sentencing and Punishment K 139  
350H ----  
350HI Punishment in General  
350HI(G) Dual Use  
350Hk137 Elements of Offense  
350Hk139 Weapons and Dangerous Instruments.

Application of both a minimum mandatory penalty and the assessment of extra points for use of the same firearm is not permitted.

- [4] Criminal Law K 1177.3(1)  
110 ----  
110XXIV Review  
110XXIV(Q) Harmless and Reversible Error  
110k1177.3 Sentencing and Punishment  
110k1177.3(1) In General.  
(Formerly 110k1177)

Erroneous assessment of 25 points for possession of a semi-automatic firearm was not harmless, because it resulted in defendant receiving a sentence of 144 months instead of 137.5. West's F.S.A. § 75.087(3); West's F.S.A. RCrP Rule 3.703(d)(19).

Edgardo Lopez, Bowling Green, pro se.

Richard E. Doran, Attorney General, Tallahassee, and Pamela J. Miller, Assistant Attorney General, Daytona Beach, for Appellee.

GRIFFIN, J.

Edgardo Lopez ["Lopez"], appeals the summary denial of his Rule 3.800(a) motion. He alleges that he was charged with carjacking with a firearm and robbery with a firearm, but the jury only found him guilty of carjacking and robbery and specifically found that he did not carry, display or use a firearm. (FN1) He contends that he should not have been sentenced for committing the substantive offenses "with a firearm." He also complains that twenty-five points were erroneously added for possession of a semi-automatic weapon.

The trial court denied Lopez's motion without a hearing. The verdict reflects that the jury actually found Lopez guilty of carjacking with a firearm and robbery with a firearm, while also entering a special finding that he did not carry, display, use or possess a firearm. The court pointed out that the record indicates that a second, unknown suspect, participated in the offenses with Lopez and concluded the jury could have found that the unknown perpetrator used a gun, which was apparently a semi-automatic weapon. The trial court ruled that the special finding did not preclude sentencing as a principal to carjacking with a firearm and robbery with a firearm, but did preclude imposition of a minimum mandatory term pursuant to section 775.087(3) Florida Statutes, because that statute required Lopez to personally possess a firearm. (FN2) The court also ruled that twenty-five points for possession of a semi-automatic weapon were properly scored.

[1] We affirm Lopez's convictions for carjacking with a firearm and robbery with a firearm, despite the special finding made by the jury. The State is correct that it is immaterial whether Lopez was expressly charged as a principal, so long as there was proof he was guilty of one of the acts denounced in the statute. See State v. Roby, 246 So.2d 566, 571 (Fla.1971). The law of principals allows Lopez to be convicted of the main offenses regardless of whether he personally possessed a firearm, even if he could not be given a minimum mandatory sentence.

[2] [3] The State concedes that it was unable to find any authority on the issue of whether personal possession of a firearm is required to assess twenty-five points under Florida Rule of Criminal Procedure 3.703(d)(19). The rule states that:

Possession of a firearm, semiautomatic firearm or machine gun during the commission or attempt to commit a crime will result in additional sentence points ... Twenty-five sentence points are assessed if the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(3) while having in his or her possession a semiautomatic firearm ...

Id. (Emphasis added). The State acknowledges that the rule appears to be offender specific because it refers to a weapon in "his or her possession." In addition, the State agrees that normally no extra points would be assessed for possession of a firearm because carjacking and robbery are two of the enumerated felonies in section 775.087(3), to which a mandatory minimum sentence is applied. Application of both a minimum mandatory penalty and the assessment of extra points for use of the same firearm is not permitted. White v. State, 714 So.2d 440 (Fla.1998). This is why the rule precludes the assessment of points in those cases in which a minimum mandatory sentence has been imposed. See also § 921.0014(1)(a), Fla. Stat. (1997) (providing for assessment of extra points for use of a firearm if minimum mandatory not imposed due to use of firearm). Because no minimum mandatory sentence was imposed in this case, nor were Lopez's crimes enhanced pursuant to section 775.087(1), the State argues the imposition of additional points for the firearm would not constitute a double enhancement or violate double jeopardy. Therefore, the State argues that the trial court's order should be affirmed.

We conclude that the assessment of points for possession of a semi-automatic should not have been applied, as carjacking and robbery are enumerated offenses in section 775.087(3) and therefore are excluded from application of the points. In addition, by specifying the firearm must be "in his or her possession," the rule requires personal possession, and the jury in this case expressly found that Lopez did not personally possess the firearm.

"One of the most fundamental principles of Florida law is that penal

ses must be strictly construed according to their letter." State v. Byars, 823 So.2d 740, 742 (Fla.2002), quoting Perkins v. State, 576 So.2d 1310, 1312 (Fla.1991). See also State v. Rife, 789 So.2d 288 (Fla.2001) (rule of lenity, which also applies to guidelines, requires that when language is susceptible to differing constructions, it shall be construed most favorably to the accused).

[4] By subtracting the twenty-five points for possession of a semi-automatic weapon from Lopez's score, his maximum sentence is reduced to 137.5 months. As Lopez was sentenced to 144 months, this error was not harmless. Accordingly, we vacate the sentence and remand for resentencing.

SENTENCE VACATED and REMANDED.

PLEUS and ORFINGER, JJ., concur.

(FN1.) Defendant's conviction and sentence of twelve years in prison, followed by ten years probation, concurrent on both counts, was affirmed without opinion in Lopez v. State, 743 So.2d 1102 (Fla. 5th DCA 1999).

(FN2.) It applies where, "during the commission of the offense, such person possessed a 'firearm' or 'destructive device' as those terms are defined in s. 790.001...." § 775.087(3), Fla. Stat. (1997).

# EXHIBIT D



District Court of Appeal of Florida,  
First District.

Jermaine ROBERTS, Appellant,  
v.

STATE of Florida, Appellee.

No. 1D01-0769.

April 4, 2002.

Defendant was convicted in the Circuit Court, Nassau County, Robert M. Foster, J., of sale or delivery of cocaine. Defendant appealed. The District Court of Appeal held that: (1) "principals" instruction was not erroneous, although defendant was not specifically charged with aiding or abetting; (2) court could not impose public defender's lien on defendant, as he was not given notice or an opportunity to be heard on the issue; and (3) defendant could not be ordered to pay discretionary costs.

Affirmed in part, reversed in part, and remanded for entry of corrected sentence.

West Headnotes

[1] Controlled Substances K 98

96H ----

96HIII Prosecutions

96Hk95 Instructions

96Hk98 Sale, Distribution, Delivery, Transfer or Trafficking.

(Formerly 138k131 Drugs and Narcotics)

Evidence was sufficient at trial for sale or delivery of cocaine to grant prosecution's request to give a "principals" instruction to the jury, and thus the instruction was not in error, even though defendant was not specifically charged with aiding and abetting the sale or delivery of cocaine.

[2] Costs K 325

102 ----

102XIV In Criminal Prosecutions

102k325 Lien and Enforcement Thereof.

Court could not impose a public defender's lien on defendant, as he was not given notice or an opportunity to be heard on the issue.

[3] Costs K 314

102 ----

102XIV In Criminal Prosecutions

102k313 Taxation or Allowance of Bill

102k314 In General.

Defendant could not be ordered to pay discretionary costs, where defendant was not given notice and the trial court failed to make an oral pronouncement as to such a cost.

Nancy A. Daniels, Public Defender and Fred Parker Bingham, II, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Alan R. Dakan, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Jermaine Roberts challenges his judgment of conviction and sentence for sale or delivery of cocaine. We affirm the convictions, but find that certain costs were erroneously imposed and therefore reverse in part.

[1] With regard to his conviction, appellant argues that the trial court erred in granting the prosecution's request, made during trial, to give a "principals" instruction to the jury. There was sufficient evidence adduced in the state's case-in-chief to support such an instruction; accordingly, the trial court did not err in granting the request for such an instruction, despite the fact that Roberts was not specifically charged with aiding and abetting the sale or delivery of cocaine. See *Jacobs v. State*, 184 So.2d 711 (Fla. 1st DCA 1966), and *State v. Roby*, 246 So.2d 566 (Fla.1971).

[2] [3] When sentenced, the trial court imposed a public defender's lien in the amount of \$500; however, Roberts was not given notice or an opportunity to be heard on the issue. This was error. See *S.I. v. State*, 784 So.2d 1208 (Fla. 2d DCA 2001). The trial court further erred in ordering, in the written sentence, payment of \$123 in discretionary costs when appellant

was not given notice and when the trial court failed to make an oral pronouncement as to such a cost. See *Bryant v. State*, 661 So.2d 1315 (Fla. 1st DCA 1995).

These costs are therefore stricken. Because these costs were ordered as conditions of probation, they may not be reimposed. See *Car v. State*, 787 So.2d 193 (Fla. 1st DCA 2001); see also *Justice v. State*, 6 So.2d 123, 126 (Fla.1996). In all other respects, the sentence, like the judgment of conviction, is AFFIRMED, and the cause is REMANDED for entry of a corrected sentence.

ERVIN, VAN NORTWICK and BROWNING, JJ., concur.

# EXHIBIT E

*This is a 1st degree murder case.*

Following affirmance, 528 So.2d 1373, of conviction for attempted first-degree murder, defendant sought postconviction relief. The Circuit Court for Dade County, Fredricka G. Smith, J., found that sentencing enhancement was illegal. State appealed. The District Court of Appeal, 582 So.2d 1189, affirmed and certified question of great public importance. The Supreme Court, Overton, J., held that felony defendant's sentence could not be enhanced based on "use" of weapon, absent evidence of his personal possession of weapon during commission of felony.

Certified question answered; District Court decision approved.

West Headnotes

- [1] Sentencing and Punishment K 79  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk79 Possession and Carrying.  
(Formerly 110k1208.6(2))

When defendant is charged with felony involving the "use" of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. West's F.S.A. § 775.087(1).

- [2] Sentencing and Punishment K 81  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk81 Accomplices and Co-Participants.  
(Formerly 110k1208.6(2))

Defendant's sentence for attempted first-degree murder could not be enhanced on basis of codefendant's possession of rifle during commission of the crime. West's F.S.A. § 775.087(1).

Robert A. Butterworth, Atty. Gen., and Jorge Espinosa and Michael J. Neimand, Asst. Attys. Gen., Miami, for petitioner.

Bennet H. Brummer, Public Defender and Michel Ociacovski Weisz, Sp. Asst. Public Defender, Eleventh Judicial Circuit, Miami, for respondent.  
OVERTON, Justice.

We have for review State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified the following question as being of great public importance:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?

Id. at 1191.

We have jurisdiction (FN1) and answer the question in the negative, finding, in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant.

The relevant facts reflect that Rodriguez was charged with an attempt to commit murder in the first degree upon allegations that he and his codefendant fired a deadly weapon at Officer Kenneth Nelson, in violation of sections 782.04(1), 777.04(1), and 775.087, Florida Statutes (1983). The evidence established that, when the police attempted to pull over Rodriguez's vehicle, he fled at high speed. During the chase, a passenger in Rodriguez's car picked up a rifle and began shooting at the pursuing officers. Rodriguez and his codefendant were apprehended and charged by information as previously noted. Rodriguez was convicted of attempted first-degree murder.

His sentence was enhanced on the grounds that he "used" the firearm in the commission of this offense. The issue in this proceeding is the enhancement of the sentence under section 775.087(1), which reads as follows:

(1) Unless otherwise provided by law, whenever a person charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony he personally carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits aggravated battery, the felony for which the person is charged shall be reclassified as follows:

- (a) In the case of a felony of the first degree, to a life felony.  
(b) In the case of a felony of the second degree, to a felony of the first degree.  
(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 775.087(1), Fla.Stat. (1983) (emphasis added). In this instance both parties agree that the reclassified sentence would be a life sentence.

Rodriguez filed a motion for postconviction relief, asserting that he was improperly sentenced because of application of the enhancement provision. The trial court granted relief, finding that "the firearm described in the information as that used

during the commission of the attempted murder was at no time carried, displayed, used, or attempted to be used by this Defendant." The trial court concluded that Rodriguez was improperly sentenced under a life-felon standard and directed that he be resentenced for attempted first-degree murder under sections 782.04(1) and 777.04.

On appeal, the Third District Court of Appeal affirmed, noting that had "previously ruled that 'the enhancement provisions of section 775.087(1) ... require that the defendant personally possess the weapon during the commission of the crime involved.'" Rodriguez, 582 So.2d at 1190 (quoting Postell v. State, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)). See also Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA), review denied, 541 So.2d 663 (Fla.1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989).

[1] [2] The State argues that this case should be controlled by Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988). In Menendez, the defendant was convicted of trafficking in cocaine and was found to have personally possessed the weapon during the commission of the felony. Both the trial court and the district court in this proceeding held that Menendez was distinguishable. We agree that Menendez should not apply because the factual circumstances are distinguishable. We hold that, when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. In this case, the evidence plainly establishes that Rodriguez did not have personal possession of the rifle during the commission of the felony. We reject the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant.

We hold that the statute in this instance does not allow that construction or interpretation. See Postell; Willingham; Ngai. Interestingly, Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.

For the reasons expressed, we answer the question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

(FN1.) Art. V, § 3(b)(4), Fla. Const.

# EXHIBIT F

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

CASE #: 53-2004-CF-004392-01XX-XX

vs.

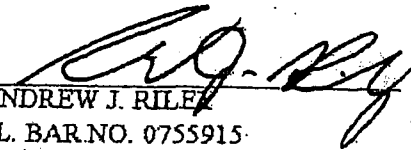
SAMUEL LEE GREEN, B/M, 04/09/1973, 589-05-7538

INFORMATION FOR:

1) ROBBERY WITH A FIREARM

In the Name and by Authority of the State of Florida:

JERRY HILL, State Attorney for the Tenth Judicial Circuit, by and through his undersigned Assistant State Attorney, charges that SAMUEL LEE GREEN on or about June 22, 2004, in the County of Polk and State of Florida, by force, violence, assault, or putting in fear, did knowingly take away money, of some value, from the person or custody of AJAY J PATEL, with the intent to permanently or temporarily deprive AJAY J PATEL of the property, and in the course of committing the robbery there was carried a firearm, contrary to Florida Statutes 812.13 and 775.087 (1 DEG FEL, PBL) (LEVEL 9)

  
ANDREW J. RILEY  
FL. BAR NO. 0755915  
Assistant State Attorney  
Polk County, Florida

# EXHIBIT G

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL  
CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY

STATE OF FLORIDA,  
Plaintiff,

vs.

CASE NO: CF04-04392-XX

SAMUEL L. GREEN,  
Defendant.

**VERDICT**

We, the Jury, find the Defendant, **SAMUEL L. GREEN:**

          X          

**GUILTY of Robbery With a Firearm**

and we further find in the course of committing the robbery  
there

                                 was carried a firearm

          X          

                                 was not carried a firearm

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                                 was carried a deadly weapon

                                 was not carried a deadly weapon

**GUILTY of Robbery, a lesser included offense,**

And we further find in the course of committing the robbery  
there

                                 was carried a weapon

                                 was not carried a weapon

**GUILTY of Robbery Without a Weapon,**  
a lesser included offense

**GUILTY of Theft, A lesser included offense.**

**NOT GUILTY**

RECEIVED AND FILED

JUN 30 2005

RICHARD M. WEISS, CLERK

195-  
Exhibit  
5.0.1.0

# EXHIBIT H



1 Verdict, we the jury find the defendant,  
2 Samuel Green, guilty of robbery with a firearm, and  
3 we further find that in the course of committing  
4 the robbery, there was not carried a firearm. So  
5 say we all, Laney Spann, dated this 30th day of  
6 June, 2005.

7 Ms. Spann, is that your verdict?

8 MS. SPANN: Yes, sir.

9 THE COURT: Mr. Mobley, was that your verdict?

10 MR. MOBLEY: Yes, sir.

11 THE COURT: Ms. Smith, was that your verdict?

12 MS. SMITH: Yes, sir.

13 THE COURT: Mr. Lofquist, was that your  
14 verdict?

15 MR. LOFQUIST: Yes.

16 THE COURT: Ms. Montford, was that your  
17 verdict?

18 MS. MONTFORD: Yes.

19 THE COURT: Ms. O'Brien, was that your  
20 verdict?

21 MS. O'BRIEN: Yes, sir.

22 THE COURT: Okay, once again, I thank you very  
23 much. These people are not going to be, that is to  
24 say, the lawyers, are not going to have anything to  
25 say to you. They are not permitted to. Others may

1 question what went on in that jury room. You've  
2 got a right to talk to them if you want to. You  
3 have an absolute right to refuse to discuss went on  
4 in that jury room, and traditionally, in the  
5 American system of justice, the workings of a jury  
6 are secret. If you are approached and asked about  
7 it, I recommend that you decline to talk about it,  
8 but it's up to you.

9 Okay, again, thank you very much.

10 (The jury left the courtroom.)

11 (JURY OUT)

12 THE COURT: Well, what is the impact of that?  
13 I mean, how do you find him guilty of robbery with  
14 a firearm and then find that the firearm was not  
15 carried?

16 MR. STERNLICHT: I think that applies to  
17 10-20-life.

18 THE COURT: And by that, you mean?

19 MR. STERNLICHT: Well, he doesn't get a  
20 minimum mandatory because it wasn't in his hand.  
21 But still, as a principal, I think they found him  
22 guilty.

23 MR. KIRKLAND: That's exactly what --

24 THE COURT: That's the way you see it.

25 MR. KIRKLAND: That's the way I see it.

1 THE COURT: So guilty of robbery with a  
2 firearm as a principal, but he doesn't get the  
3 minimum mandatory because he didn't have the gun?

4 MR. KIRKLAND: No, he didn't have the gun.

5 MR. STERNLICHT: And we didn't allege it that  
6 way either, Your Honor. If you notice the way the  
7 information was charged, we never thought from the  
8 beginning Mr. Green had the gun, so we never  
9 charged him under 10-20-life. Because we didn't  
10 ask for a finding of actual possession.

11 THE COURT: Okay.

12 MR. STERNLICHT: Which I think you have to  
13 have for 10-20-life.

14 THE COURT: All right. You were telling me  
15 you're going out of town. When will you be ready  
16 for sentencing?

17 MR. KIRKLAND: Maybe next week, Your Honor.

18 MR. STERNLICHT: Judge, I won't be here at all  
19 next week. Can we postpone that?

20 THE COURT: How about if we set this matter  
21 down for sentencing on July the 12th, will that be  
22 possible? It's a Tuesday.

23 MR. KIRKLAND: It's a pretrial day, that's  
24 fine, Your Honor.

25 THE COURT: Oh, is that pretrial? I don't

# EXHIBIT C

IN THE DISTRICT COURT OF APPEAL  
FOR THE SECOND DISTRICT  
STATE OF FLORIDA

SAMUEL LEE GREEN,  
Appellant,

v.

DCA CASE NO: 2D13-377

STATE OF FLORIDA,  
Appellee.

MOTION TO STAY MANDATE


Comes Now Appellant, Samuel Lee Green, Pro Se, pursuant to Fla. R. App. P. 3.10, submits this Motion to Stay to this Honorable Court in reference to the above styled case number and in support states the following:

1. Appellant's 3.800 Illegal Sentence appeal was denied by this Court on May 22, 2013, by way of cited case authority.
2. Appellant recently filed for timely rehearing, clarification, and certification on June 6, 2013.
3. Appellant believes that he is in need of this Court to issue a stay of the mandate, in order for Appellant to seek discretionary review in the Florida Supreme Court where a conflict between two contrary holdings of Florida Supreme Court established law that his Court based its denial upon is at controversy.
4. Appellant believes that the stay order will only sufficiency provide Appellant his due process procedural rights to access of the Courts to petition the

higher court by allowing him to prepare the proper pleading timely to clarify the conflicting Florida Supreme Court case law, affording effective administration and interpretation of the law.

As such Appellant respectfully request a 30 day stay of the mandate, until Appellant files his proper paperwork to this Court on a Notice of Discretionary Review.

Respectfully Submitted,

  
Samuel Lee Green, # 370562


**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Motion to Stay Mandate in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 2<sup>TH</sup> day of June, 2013.

  
Samuel Lee Green, # 370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

# EXHIBIT D

# M A N D A T E

from

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA**

## **SECOND DISTRICT**

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL,  
AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS  
BE HAD IN SAID CAUSE , IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF  
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS  
ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF  
FLORIDA.

WITNESS THE HONORABLE MORRIS SILBERMAN CHIEF JUDGE OF THE  
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT,  
AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

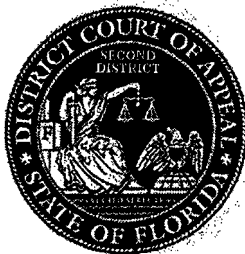
DATE: June 7, 2013

SECOND DCA CASE NO. 2D13-377

COUNTY OF ORIGIN: Polk

LOWER TRIBUNAL CASE NO. 2004CF-004392-01XX-X

CASE STYLE: SAMUEL LEE GREEN v. STATE OF FLORIDA



*James Birkhold*  
James Birkhold  
Clerk

cc: (Without Attached Opinion)  
Samuel Lee Green Attorney General

me

204



# **EXHIBIT I**

## **Jurisdictional Brief**

My Copy

6-21-13  
PROVIDED TO HAMILTON C.I. ON  
FOR MAILING

IN THE DISTRICT COURT OF APPEAL FLORIDA, SECOND DISTRICT

SAMUEL LEE GREEN,  
Appellant,

v.

L.T. CASE NO: 2004CF-004392-01XXX  
DCA CASE NO: 2D13-377  
SUPREME COURT CASE NO: \_\_\_\_\_

STATE OF FLORIDA,  
10<sup>th</sup> JUDICIAL CIRCUIT COURT,  
Appellee.

\_\_\_\_\_ /

NOTICE TO INVOKE DISCRETIONARY JURISDICTION<sup>1</sup>

Notice is hereby given that Samuel Lee Green (Appellant, pro se) timely, within 30 days of District Court's mandate, invokes the discretionary jurisdiction of the Florida Supreme Court (in good faith) to review the case cited decision of this Court (Second District Court) rendered on May 22<sup>nd</sup>, 2013. (See Exhibit A in attached appendix).

The specific cited Florida Supreme Court authority rested upon in the denial order by the Second District Court is in direct conflict with and contrary to the Florida Supreme Court case holding that Appellant based his 3.800(a) Illegal Sentence claim on. Thus invoking the jurisdiction of the Florida Supreme Court to review and remedy such contrary holding or conflict as the law prescribes that as long as the Florida Supreme Court authority cited citation used for denial by the

<sup>1</sup> Pursuant to State Appellant Rule 9.030(2); Rule 9.100; Rule 9.120; Fla. Constitution Articles 1, Section 2; Article 1, Section 9, Article V § 3(b)(3) and United States Constitution Amendment 1, 5 and 14.

District Court establishes a point of law that explicitly notes a contrary holding of another Florida Supreme Court authority citation used by Appellant, which creates a conflict, the Florida Supreme Court is the proper court to resolve this type issue. (See Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 2005) and Tippens v. State, 897 So. 2d 1278 (Fla. 2005). (See Exhibit B in attached appendix).

Furthermore, due process requires application for this discretionary review concerning Appellant's sentence despite its finality because the two conflicting opinions of the Florida Supreme Court precludes Appellant's inquiry of violations of rights to be foreclosed on a unsettled point of law.

Therefore the proper decision is within the discretion of the Florida Supreme Court because Appellant based his denied 3.800(a) Illegal Sentence claim on the later cited 1992 Florida Supreme Court case of Rodriguez v. State, 602 So. 2d 1270 (Fla. 1992). (See Exhibit C). Where the Florida Supreme Court reversed the prior established law pertaining to state courts reclassifying and enhancing sentences of persons who were found guilty of crimes involving the use of firearms where those persons who were found not to have actually possessed the firearm but a co-perpetrator did possess the firearm during the overt act where the Florida Supreme Court established that Florida Statute 775.087 does not apply in those type cases. (Rodriguez, supra), expressly shows the Florida Supreme Court answering a certified question in this case that established the controlling law to be

followed as such that:

**“Section 775.087(1) does not by its terms, allow for vicarious enhancement because of the action of a co-defendant.”**

Further the Florida Supreme Court established the law in this case that:

**“When a defendant is charged with a felony involving the “use” of a weapon, his or her sentence can not be enhanced under 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during commission of the felony. We reject the state’s contention that Rodriguez’s sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the co-defendant.”**

In 1971, in the Florida Supreme Court case of Roby v. State, 246 So. 2d 566, the high court established that **a person can be found guilty of a crime as a principle where the evidence or proof at trial establishes such.** (See Exhibit D).

This discretionary review by the Florida Supreme Court is requested because the (1971) (Roby, supra) case cite opinion holding is in Conflict of Law with the latest 1992 (Rodriguez, supra) case cite opinion because as the two opinions of law are compared, the (Roby, supra) case is saying that a person is Convicted and Sentenced as a principle if evidence or proof at trial establishes such.

However, the (Roby, supra) case cite holding is contrary to and conflicts the (Rodriguez, supra) case cite because in (Rodriguez, supra) the Florida Supreme Court has opined that they reject an idea that a persons sentence can be

enhanced or reclassified due to a co-perpetrators actual possession of a firearm during an overt act in a crime involving the use of a firearm, despite the person being adjudicated as a principle.

As these are the rulings of the Florida Supreme Court the two opinioned rulings on how the law is to be applied is in conflict with one another and due to Appellant's unique circumstances of his denied 3.800(a) claim Appellant (Green) has been prejudicially affected by the Second District Courts expressed case cite denial because where the state courts are relying on the Principle Theory of Guilt to [enhance or reclassify] sentences, the state courts are not taking into consideration that the person (A) determined not to have possessed the firearm (weapon) can not be [enhanced or reclassified] on his sentence portion of his sentencing as his co-defendant (B) who did actually possess the firearm.

Moreover, the state court is not taking into consideration that the (1971) (Roby, supra) holdings were seemingly superceded or modified 21 years later in the (1992) (Rodriguez, supra) case and by law a person (A) can not be sentenced to the same sentence as his co-defendant (B) who actually possessed and carried the firearm but the person (A) did not carry or posses the firearm in the same overt act. (See Rodriguez, supra) [Law]

Appellant recognizes that District Courts are established to proscribe the Florida Supreme Court's function 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 great public importance and the preservation of uniformity of principle and practice.

Due process would require application of a discretionary review for clarification to Green's sentence despite its finality because there is a public importance that urges uniformity of the law to construe the two conflicting opinions of the Florida Supreme Court which precludes the Second District Court to follow a Florida Supreme Court holding that is contrary to another, thereby resulting in foreclosure of Appellant's inquiry of violation of his due process equal protection rights on a seemingly unsettled point of law.


Appellant's case is undistinguishable as compared to the case of (Rodriguez, supra). The only slight difference is Rodriguez was charged with attempt to commit murder in the first degree and Appellant was charged with robbery with a firearm. However, both crimes involved the use of a weapon and both crimes involved co-defendants who actually possessed the firearm and both crimes charged in the informations charging Fla. Statute 775.087 which due process to equal protection of the law demands that Appellant be treated as Rodriguez did by only being sentenced to a second degree sentencing which in Appellant's case can only be 15 years mandatory as a P.R.R.

Respectfully Submitted,

  
Samuel Lee Green, DC #370562

**UNNOTARIZED OATH**

Under penalties of perjury I declare that I have read the foregoing Notice to Invoke Discretionary Jurisdiction and the facts stated in it are true.

  
Samuel Lee Green, DC #370562

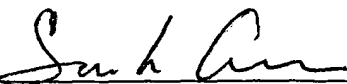
**CERTIFICATE OF SERVICE**

I certify that I placed a copy of this Notice to Invoke Discretionary Jurisdiction in the hands of Hamilton Correctional Institution Annex officials for mailing to:

District Court of Appeal  
Second District  
1005 East Memorial Boulevard  
Post Office Box 327  
Lakeland, Florida 33801

Office of the Attorney General  
Criminal Appeals Division  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013

On this 21<sup>st</sup> day of June, 2013.

  
Samuel Lee Green, DC #370562  
Hamilton Correctional Inst. - Annex  
11419 S.W. County Road #249  
Jasper, Florida 32052-3735

IN THE DISTRICT COURT OF APPEAL FLORIDA, SECOND DISTRICT

SAMUEL LEE GREEN,  
Appellant,

v.

L.T. CASE NO: 2004CF-004392-01XXX  
DCA CASE NO: 2D13-377  
SUPREME COURT CASE NO: \_\_\_\_\_

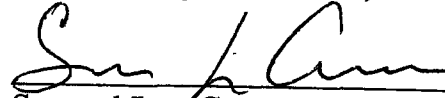
STATE OF FLORIDA,  
10<sup>th</sup> JUDICIAL CIRCUIT COURT,  
Appellee.

\_\_\_\_\_/

APPENDIX

- A. D.C.A. Denial.....
- B. Florida Star and Tippens case cite.....
- C. Rodriguez v. State, 602 So. 2d 1270 (Fla. 1992).....
- D. Roby v. State, 246 So. 2d 566 (Fla. 1971).....

Respectfully Submitted,



Samuel Lee Green  
Hamilton Correctional Inst. – Annex  
11419 SW County Road # 249  
Jasper, Florida 32052-3735



# EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SAMUEL LEE GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-377

Opinion filed May 22, 2013.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Polk County; John Radabaugh and  
Michael E. Raiden, Judges.

Samuel Lee Green, pro se.

PER CURIAM.

Affirmed. See State v. Roby, 246 So. 2d 566 (Fla. 1971); Lopez v. State,  
833 So. 2d 283 (Fla. 5th DCA 2002); Roberts v. State, 813 So. 2d 1016 (Fla. 1st DCA  
2002).

KELLY, VILLANTI, and LaROSE, JJ., Concur.

# EXHIBIT B

v.  
B.J.F., Appellee.  
No. 71615.  
Sept. 1, 1988.

Rape victim obtained judgment in the Circuit Court, Duval County, John S. Cox, J., awarding her compensatory and punitive damages against newspaper for publishing her name, and newspaper appealed. The District Court of Appeal, 499 So.2d 883, affirmed, and the Supreme Court summarily denied review, 509 So.2d 1117. Upon seeking further review, the United States Supreme Court, 108 S.Ct. 499, certified question as to state Supreme Court's jurisdiction. The Supreme Court, Barkett, J., held that it had subject matter jurisdiction to hear newspaper's appeal.

Certified question answered in affirmative.

West Headnotes

Courts K 216

106 ----

106VI Courts of Appellate Jurisdiction

106VI(B) Courts of Particular States

106k216 Florida.

State Supreme Court had subject matter jurisdiction over appeal of decision of intermediate appellate court expressly citing statute, even though statute was only quoted and was neither discussed nor expressly upheld against appellant's constitutional challenge; Supreme Court's constitutional authority to review any appellate decision establishing point of law only required that there be some statement or citation in opinion that hypothetically could create conflict if there were another opinion reaching contrary result. West's F.S.A. Const. Art. 5, § 3(b)(3).

George K. Rahdert and Bonita M. Riggins of Rahdert, Acosta & Dickson, P.A., St. Petersburg, for appellant.

Joel D. Eaton of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami, and Beckham, McAliley & Schulz, P.A., Jacksonville, for appellee.

Alan C. Sundberg of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, Tallahassee, Gerald B. Cope, Jr. and Laura Besvinick of Greer, Homer, Cope & Bonner, P.A., Miami, Richard J. Ovelmen, General Counsel, The Miami Herald Pub. Co., Miami, Paul J. Levine of Spence, Payne, Masington, Grossman & Needle, Miami, Florida; and Sanford L. Bohrer of Thomson, Zeder, Bohrer, Werth & Razook, Miami, Florida, amici curiae for The Miami Herald Pub. Co., The Florida First Amendment Foundation, The Florida Press Ass'n, and The Florida Soc. of Newspaper Editors.

BARCKETT, Justice.

This case is before us on the following question of Florida law certified by the United States Supreme Court:

Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, § 3(b)(3) (FN1) of the Florida Constitution or otherwise, to hear Appellant's appeal [petition for review] in this cause from the Florida First District Court of Appeal?

The Florida Star v. B.J.F., --- U.S. ---, 108 S.Ct. 499, 499, 98 L.Ed.2d 498 (1987). We have jurisdiction. Art. V, § 3(b)(6), Fla. Const. As delimited by this opinion, we answer in the affirmative.

The Florida Star, a Jacksonville newspaper, published the

name of a rape victim that police erroneously had included in material released to the press pretrial. There is no dispute that the name should not have been released and that the newspaper itself had policy against the publication of rape victims' names. Publication appeared to be a criminal violation under section 794.03, Florida Statutes (1985). (FN2)

B.J.F., the rape victim, brought a civil action premised on a statutory duty arising from section 794.03. The Florida Star moved for dismissal based on the ground that the theory of recovery violated the first and fourteenth amendments. In denying this motion, the trial court ruled that no such violation would occur, and it specifically upheld the constitutionality of section 794.03.

On appeal, the Florida Star again challenged the constitutionality of the statute. The district court affirmed but did not discuss section 794.03 except to quote it verbatim, nor did it expressly uphold the statute against appellant's constitutional challenge.

The Florida Star subsequently filed a jurisdictional brief with this Court, seeking discretionary review. Review summarily was denied. The Florida Star v. B.J.F., 509 So.2d 1117 (Fla.1987).

On August 26, 1987, the Florida Star sought review in the United States Supreme Court. Appellee filed a motion to dismiss on grounds the appeal was untimely. Appellee argued that the Florida Supreme Court lacked jurisdiction to review the case, and that the opinion of the First District thus was the final decision of the highest state court empowered to hear the cause. Under this argument, the Florida

Star should have appealed to the United States Supreme Court within ninety days of the First District's opinion. The United States Supreme Court then certified the instant question to this Court.

We do not read the question presented by the Supreme Court as a request to explain the internal mechanism of the court or to attempt the impossible task of second-guessing the original panel's decision on jurisdiction. Nor do we believe, as appellee suggests, that the present court should reexamine the question and decide anew whether conflict existed.

Instead, we limit our answer to the context in which the question was posed. For that sole purpose, we answer the question in the affirmative. This Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. (FN3) That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests. The opinion in B.J.F. unquestionably met this requirement.

We premise our holding on our conclusion that article V, section 3(b)(3) creates and defines two separate concepts. The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised. In effect, the second is a limiting principle dictated to this Court by the people of Florida. While our subject-matter jurisdiction in conflict cases necessarily is very broad, our discretion to exercise it is more narrowly circumscribed by what the people have commanded:

(b) JURISDICTION.--The supreme court:

....

(3) May 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.

Art. V, § 3(b)(3), Fla. Const.

Thus, it is not necessary that conflict actually exist for this

Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. This is the only reasonable interpretation of this constitutional provision. As the final authority on the meaning of the Florida Constitution, see Art. IV, § 1(c), and Art. V, § 3(b)(1), (3), Fla. Const., this Court has the final and inherent power to determine what constitutes express and direct conflict. No other authority exists, except the people pursuant to their power to amend the constitution, that may nullify this Court's pronouncements on that question.

This, by definition, is discretion, not jurisdiction. As noted in Black's Law Dictionary 419 (5th ed. 1979), discretion is the exercise of judicial judgment, based on facts and guided by law.... It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law.

Subject-matter jurisdiction, on the other hand, is defined as: Power of a particular court to hear the type of case that is then before it.... jurisdiction over the nature of the cause of action and relief sought....

Id. at 767. While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.

We thus conclude that we had complete subject-matter jurisdiction to hear B.J.F. and decide the case on its merits with finality. This jurisdiction must be regarded as complete until the time the petition for review was denied. Moreover, the denial of review in B.J.F. did not operate to deprive this Court of its subject-matter jurisdiction retroactively, but merely constituted the point in time at which jurisdiction, for whatever reason, had ended.

We confess that we are much influenced in this holding by the procedural quagmire that would result from a negative answer. To seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review available in the courts of the state. The fact that review in the highest court is discretionary is irrelevant; the litigant still must seek such review in order to proceed to the United States Supreme Court. *American Ry. Express v. Levee*, 263 U.S. 19, 20-21, 44 S.Ct. 11, 12-13, 68 L.Ed. 140 (1923); *Stratton v. Stratton*, 239 U.S. 55, 56-57, 36 S.Ct. 26, 27, 60 L.Ed. 142 (1915).

It is therefore essential to the preservation of a litigant's right to United States Supreme Court review that he or she know with certainty the avenues of appellate review required by the courts of the state. If, after the fact, we held in a case such as this that there was no jurisdiction, litigants would be placed in a needlessly burdensome position. A party would have to try to predict which court ultimately would recognize jurisdiction in the case and file a petition for review accordingly. A party who files only in the United States Supreme Court, however, would risk the objection that he or she has not exhausted state court remedies. On the other hand, a party who files only in the Florida Supreme Court and is denied review, would risk the objection made by B.J.F. here that the later appeal to the United States Supreme Court is untimely.

Alternatively, a party could file a petition for review in both the Florida Supreme Court and the United States Supreme Court

simultaneously, simply to protect his or her rights. This solution would entail double work, separate briefs, and much more expense for the clients. Moreover, a stay would likely need to be sought in the United States Supreme Court because the appeal in that Court would not be ripe for review unless and until this Court denied review or otherwise disposed of the case. The situation is further aggravated by the fact that, on some occasions, this Court agrees to review a case on the merits, but after briefing or argument determines that review was improvidently granted.

No purpose is served by this duplication of effort, added expense and uncertainty. We do not believe the people intended such a result when they amended the constitution in 1980.

For the foregoing reasons, we answer the certified question in the affirmative. This opinion shall be transmitted forthwith to the United States Supreme Court.

It is so ordered.

EHRlich, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

FN1. This section vests the Florida Supreme Court with subject-matter jurisdiction over cases that manifest express and direct conflict with opinions of another district court or of this Court. For convenience, this type of jurisdiction usually is called "conflict jurisdiction."

(FN2.) The statute states:

No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(FN3.) This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court. Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the case cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court. See *Jollie v. State*, 405 So.2d 418, 420 (Fla.1981).

897 So.2d 1278  
30 Fla. L. Weekly S163  
Supreme Court of Florida.  
Robert Earl TIPPENS, Petitioner,

v.

STATE of Florida, Respondent.  
Thomas Edward Jurkowich, Petitioner,

v.

State of Florida, Respondent.  
Richard Walker, Petitioner,

v.

State of Florida, Respondent.  
Nos. SC02-2514, SC03-266, SC04-308.  
March 17, 2005.

Background: Petitions were filed for review of decisions of the District Court of Appeal based on direct conflict of decisions.

Holding: The Supreme Court held that it lacked subject-matter jurisdiction based on conflict of decisions.

Dismissed.

Anstead and Lewis, JJ., concurred in result only.

West Headnotes

- [1] Courts K 216  
106 ----  
106VI Courts of Appellate Jurisdiction  
106VI(B) Courts of Particular States  
106k216 Florida.

To be within Supreme Court's jurisdiction to review District Court of Appeal's decision in express and direct conflict with another decision, the District Court decision under review must contain a statement or citation effectively establishing a point of law upon which the decision rests. West's F.S.A. Const. Art. 5, § 3(b)(3).

- [2] Courts K 216  
106 ----  
106VI Courts of Appellate Jurisdiction  
106VI(B) Courts of Particular States  
106k216 Florida.

Supreme Court lacked subject-matter jurisdiction based on conflict of decisions arising from District Court of Appeal's orders denying a motion to supplement the record, a motion for relief from filing deadlines, a request for access to legal materials; the orders did not contain a statement or citation effectively establishing a point of law upon which the decisions rested with regard to the contested rulings. West's F.S.A. Const. Art. 5, § 3(b)(3).

Robert Earl Tippens, pro se, for Petitioner.

Charles J. Crist, Jr., Attorney General, Tallahassee, FL, Kellie A. Nielan and Judy Taylor Rush, Assistant Attorneys General, Daytona Beach, FL, for Respondent.

Thomas Edward Jurkowich, pro se, for Petitioner.

Charles J. Crist, Jr., Attorney General and James W. Rogers, Senior Assistant Attorney General, Tallahassee, FL, for Respondent.

Richard Walker, pro se, for Petitioner.

Charles J. Crist, Jr., Attorney General, Tallahassee, FL, Angela D. McCravy and Kellie A. Nielan, Assistant Attorneys General, Daytona Beach, FL, for Respondent.

PER CURIAM.

Petitioners Robert Earl Tippens, Thomas Edward Jurkowich, and Richard Walker allege that the district courts below

issued orders that expressly and directly conflict with decisions of other district courts or of this Court. See art. V, § 3(b)(3), Fla. Const. We consolidated these cases for purposes of this opinion, and we dismiss all three cases for lack of subject-matter jurisdiction.

1. Facts

Tippens was charged with several crimes and the trial court denied his motion to suppress his confession. He entered pleas and was sentenced to a term of imprisonment. He later filed in the district court a document entitled "Appellant's Initial Brief to Denial of Motion to Suppress Confession." He then filed a letter in this Court, asking the Court to order that the record on appeal be supplemented with a transcript of the hearing on his motion to suppress. This Court treated the letter as a petition for writ of mandamus and transferred it to the district court. The district court then issued an order that provided as follows in full:

Upon consideration that Appellant entered pleas in his criminal case(s) below, it is

Ordered that the Motion to Supplement Record with Transcript of Hearing on Motion to Suppress that was transferred from the Supreme Court of Florida is denied. Such denial is without prejudice to allege or demonstrate that in entering his pleas Appellant reserved his right to appeal the suppression order as dispositive of the cases.

Based on the above order, Tippens now has filed in this Court a petition for review, alleging direct conflict. Specifically, he challenges that portion of the order that denies his motion to supplement the record.

Jurkowich was convicted of a criminal offense and was sentenced to a term of imprisonment. He appealed and the district court, in the course of the appellate proceedings, issued an order that provided as follows in full:

The appellant's motion for relief of filing deadlines seeking a 25 day extension on all filings, filed on December 17, 2002, is denied.

Appellant's petition for enlargement of time, filed on December 23, 2002, is granted, and time for service of the initial brief is extended 60 days from the date of this order. The appellant's petition for enlargement of time for service of the reply brief is denied as premature.

Based on the above order, Jurkowich now has filed in this Court a petition for review, alleging direct conflict. Specifically, he challenges that portion of the order that denies his motion for relief from filing deadlines.

Walker was convicted of a criminal offense and was sentenced to a term of imprisonment. He later filed in circuit court a postconviction motion under Florida Rule of Criminal Procedure 3.850, which was summarily denied. He appealed and the district court, in the course of the appellate proceedings, issued an order that provided as follows in full:

Upon consideration of Appellant's Motion for Extension of time, filed November 25, 2003, it is

Ordered that Appellant is granted to and including January 5, 2004, to file and serve an initial brief in this cause. No further enlargement of time will be granted Appellant for this purpose. See also Davis v. State, 660 So.2d 1161 (Fla. 4th DCA 1995). Appellant's concurrent request to require the lower court to supply relevant legal materials is denied.

Based on the above order, Walker now has filed in this Court a petition for review, alleging direct conflict. Specifically, he challenges that portion of the order that denies his request for access to legal

...materials.

## 2. The Applicable Law

Article V, section 3(b)(3), Florida Constitution, provides the basis for the Court's direct conflict jurisdiction. Section 3(b)(3) states that, in order to meet jurisdictional requirements, the decisional conflict must be both express and direct:

(b) JURISDICTION.--The supreme court:

....

(3) May 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.

Art. V, § 3(b)(3), Fla. Const.

This Court in *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla.1988) (hereinafter "Florida Star II"), addressed the Court's subject-matter jurisdiction under section 3(b)(3). There, a newspaper published the name of a rape victim, and the victim sued the newspaper. The newspaper moved to dismiss the suit; the motion was denied; and the district court affirmed. The newspaper sought discretionary review in this Court, which was denied, and the newspaper appealed to the United States Supreme Court. See *Florida Star v. B.J.F.*, 484 U.S. 984, 108 S.Ct. 499, 98 L.Ed.2d 498 (1987) (hereinafter "Florida Star I"). The victim moved to dismiss the appeal as untimely, arguing that because the Florida Supreme Court lacked discretionary jurisdiction to review the case, as evidenced by its denial of review, the newspaper should have appealed to the United States Supreme Court within ninety days after issuance of the Florida district court decision. The United States Supreme Court certified the following question to this Court:

Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear appellant's [petition for review] in this cause from the Florida First District Court of Appeal?

*Florida Star I*, 484 U.S. at 984, 108 S.Ct. 499.

[1] In response, this Court explained that its direct conflict jurisdiction is a two-tiered concept: "The first [tier] is a general grant of discretionary subject-matter jurisdiction, and the second [tier] is a constitutional command as to how the discretion itself may be exercised." *Florida Star II*, 530 So.2d at 288. The Court described the first-tier limitations thusly:

This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as [a decision] issued without opinion or citation.... Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court.

*Florida Star II*, 530 So.2d at 288 n. 3. Specifically, the district court decision under review "must contain a statement or citation effectively establishing a point of law upon which the decision rests." *Id.* at 288. The Court answered the certified question in the affirmative.

## 3. The Present Cases

[2] Applying *Florida Star II* to the present cases, we conclude that the district court orders fail to meet the above standard. First, the challenged ruling in *Tippens's* case is a simple denial of a motion to supplement the record, with no statement of the factual or legal basis for the ruling. Although the order contains additional language addressing the issue of prejudice, that matter is not

contested and is not before the Court. Second, the challenged ruling in *Jurkovich's* case is a denial of a motion for relief from filing deadlines, with no statement of the factual or legal basis for the ruling. Although the order contains additional language addressing other matters, those matters are not contested and are not before the Court. And third, the challenged ruling in *Walker's* case is a denial of a request for access to legal materials, with no statement of the factual or legal basis for the ruling. Although the order contains additional language addressing an enlargement of time, that matter is not contested and is not before the Court. In all three cases, the orders do not "contain a statement or citation effectively establishing a point of law upon which the decision rests" with regard to the contested rulings. See *Florida Star II*, 530 So.2d at 288.

## 4. Conclusion

Based on the foregoing, we conclude that the district court orders in the present cases fail to meet the *Florida Star II* standard set forth above, and we lack subject-matter jurisdiction over these cases. Accordingly, we dismiss the petitions for review. No motion for rehearing or clarification will be entertained in these cases or in any other case that we may dismiss in the future based on the reasonin set forth herein. See Fla. R.App. P. 9.330(d).

It is so ordered.

PARIENTE, C.J., and WELLS, QUINCE, CANTERO, and BELL, JJ., concur.

ANSTEAD and LEWIS, JJ., concur in result only.

# EXHIBIT C



17 Fla. L. Weekly S379

Supreme Court of Florida.

STATE of Florida, Petitioner,

v.

Anibal RODRIGUEZ, Respondent.

No. 77859.

July 2, 1992.

Following affirmance, 528 So.2d 1373, of conviction for attempted first-degree murder, defendant sought postconviction relief. The Circuit Court for Dade County, Fredricka G. Smith, J., found that sentencing enhancement was illegal. State appealed. The District Court of Appeal, 582 So.2d 1189, affirmed and certified question of great public importance. The Supreme Court, Overton, J., held that felony defendant's sentence could not be enhanced based on "use" of weapon, absent evidence of his personal possession of weapon during commission of felony.

Certified question answered; District Court decision approved.

## West Headnotes

- [1] Sentencing and Punishment K 79  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk79 Possession and Carrying.  
(Formerly 110k1208.6(2))

When defendant is charged with felony involving the "use" of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. West's F.S.A. § 775.087(1).

- [2] Sentencing and Punishment K 81  
350H ----  
350HI Punishment in General  
350HI(D) Factors Related to Offense  
350Hk76 Weapons  
350Hk81 Accomplices and Co-Participants.  
(Formerly 110k1208.6(2))

Defendant's sentence for attempted first-degree murder could not be enhanced on basis of codefendant's possession of rifle during commission of the crime. West's F.S.A. § 775.087(1).

Robert A. Butterworth, Atty. Gen., and Jorge Espinosa and Michael J. Neimand, Asst. Attys. Gen., Miami, for petitioner.

Bennet H. Brummer, Public Defender and Michel Ociacovski Weisz, Sp. Asst. Public Defender, Eleventh Judicial Circuit, Miami, for respondent.  
OVERTON, Justice.

We have for review State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified the following question as being of great public importance:

Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a cop perpetrator?

Id. at 1191.

We have jurisdiction (FN1) and answer the question in the negative, finding, in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant.

The relevant facts reflect that Rodriguez was charged with an attempt to commit murder in the first degree upon allegations that he and his codefendant fired a deadly weapon at Officer Kenneth Nelson, in violation of sections 782.04(1), 777.04(1), and 775.087, Florida Statutes (1983). The evidence established that, when the police attempted to pull over Rodriguez's vehicle, he fled at high speed. During the chase, a passenger in Rodriguez's car picked up a rifle and began shooting at the pursuing officers. Rodriguez and his codefendant were apprehended and charged by information as previously noted. Rodriguez was convicted of attempted first-degree murder.

His sentence was enhanced on the grounds that he "used" the firearm in the commission of this offense. The issue in this proceeding is the enhancement of the sentence under section 775.087(1), which reads as follows:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

- (a) In the case of a felony of the first degree, to a life felony.  
(b) In the case of a felony of the second degree, to a felony of the first degree.  
(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 775.087(1), Fla.Stat. (1983) (emphasis added). In this instance both parties agree that the reclassified sentence would be a life sentence.

Rodriguez filed a motion for postconviction relief, asserting that he was improperly sentenced because of application of the enhancement provision. The trial court granted relief, finding that "the firearm described in the information as that used

during the commission of the attempted murder was at no time carried, displayed, used, or attempted to be used by this Defendant." The trial court concluded that Rodriguez was improperly sentenced under a life-felony standard and directed that he be resentenced for attempted first-degree murder under sections 782.04(1) and 777.04.

On appeal, the Third District Court of Appeal affirmed, noting that it had "previously ruled that 'the enhancement provisions of section 775.087(1) ... require that the defendant personally possess the weapon during the commission of the crime involved.'" Rodriguez, 582 So.2d at 1190 (quoting Postell v. State, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)). See also Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA), review denied, 548 So.2d 663 (Fla.1989); Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1989).

[1] [2] The State argues that this case should be controlled by Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988). In Menendez, the defendant was convicted of trafficking in cocaine and was found to have personally possessed the weapon during the commission of the felony. Both the trial court and the district court in this proceeding held that Menendez was distinguishable. We agree that Menendez should not apply because the factual circumstances are distinguishable. We hold that when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. In this case, the evidence plainly establishes that Rodriguez did not have personal possession of the rifle during the commission of the felony. [We reject the State's contention that Rodriguez's sentence should be enhanced on the theory of constructive or vicarious possession based on the conduct of the codefendant.]

We hold that the statute in this instance does not allow that construction or interpretation. See Postell; Willingham; Ngai. Interestingly, Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.

For the reasons expressed, we answer the question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

(FN1.) Art. V, § 3(b)(4), Fla. Const.

# EXHIBIT D

Supreme Court of Florida.  
STATE of Florida, Petitioner,

v.

Arthur Lee ROBY, Respondent.

No. 39434.

March 10, 1971.

Rehearing Denied April 26, 1971.

Defendant was convicted in the Circuit Court, Hillsborough County, Roger D. Flynn, J., of murder in the second degree, and he appealed. The District Court of Appeal, 229 So.2d 604, reversed and remanded for new trial, and certiorari was granted. The Supreme Court, Hodges, Circuit Judge, held that refusal to give aiding and abetting instruction was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of homicide victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Decision of District Court of Appeal quashed and judgment of trial court reinstated.

Carlton, J., dissented.

#### West Headnotes

- [1] Homicide K 1179  
203 ----  
203IX Evidence  
203IX(G) Weight and Sufficiency  
203k1176 Commission of or Participation in Act by Accused;

#### Identity

203k1179 Altercation or Attack by Several.  
(Formerly 203k234(4))

Evidence, including evidence that although a total of between two and seven shots were fired by three defendants at homicide victim only one .22 caliber slug from pistol of codefendant was taken from victim's body and that no one saw projectile from defendant's gun hit victim, was insufficient to sustain conviction of defendant on substantive charge of murder in the second degree.

- [2] Criminal Law K 59(5)  
110 ----  
110VII Parties to Offenses  
110k59 Principals, Aiders, Abettors, and Accomplices in General  
110k59(5) Aiding, Abetting, or Other Participation in Offense.

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime. F.S.A. § 776.011.

- [3] Indictment and Information K 171  
210 ----  
210XII Issues, Proof, and Variance  
210k170 Variance Between Allegations and Proof  
210k171 In General.

Generally, a defendant is entitled to have charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

- [4] Criminal Law K 61.1  
110 ----  
110VII Parties to Offenses  
110k61 Principals in First Degree  
110k61.1 In General.  
(Formerly 110k61)

A person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by statute. F.S.A. § 776.011.

- [5] Homicide K 1466  
203 ----  
203XII Instructions

#### 203XII(D) Parties

203k1466 Aiding, Abetting, or Other Participation in Offense.

(Formerly 203k305)

[See headnote text below]

- [5] Criminal Law K 1173.5

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.5 Errors Favorable to Accused.

(Formerly 203k341)

Refusal to give aiding and abetting instruction, in homicide prosecution, was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Robert L. Shevin, Atty. Gen., and Michael n. Kavouklis, Asst. Atty Gen., for petitioner.

John W. Boulton, of Fowler, White, Gillen, Hunkey & Kinney, Tampa for respondent.

HODGES, Circuit Judge.

The decision in the case of Roby v. State of Florida, 229 So.2d 604, is reviewed here on certiorari to the Second District Court of Appeal pursuant to Article V, Section 4, of the Florida Constitution, F.S.A., and Rule 4.5(c) of the Florida Appellate Rules, 32 F.S.A.

The respondent, Arthur Lee Roby, and two other defendants, William Henry Johnson, Jr., and Ernest Williams, were jointly charged with the substantive crime of 1st degree murder of one Frank Cutler, deceased, the indictment alleging in the usual language that the three defendants unlawfully effected the death of the victim by shooting him with a pistol.

At the conclusion of a trial lasting five days, the jury acquitted the defendant Johnson, but returned verdicts of guilty of murder in the 2nd degree against the defendant, Ernest Williams, and the respondent, Arthur Lee Roby. After entry of judgment of conviction, both defendants were sentenced by the trial court to be confined at hard labor for twenty years.

The trial court's judgment of conviction of the respondent Roby was reversed on appeal by the District Court's cited opinion, which certiorari lays open to legal scrutiny to determine whether or not it conflicts with decisive law as enunciated in reported opinions of the Supreme Court or other District Courts of Appeal.

From the Court's review of the entire record in the case, permitted in such proceedings, James v. Keene, Fla., 133 So.2d 297, we believe that the facts, as stated in the decision which is the subject of our judicial inquiry, perhaps sufficiently present the legal issues upon which our conclusions hinge. However, for reference accommodation and immediate perspective relief of the legal questions presented, we shall briefly restate the pertinent facts as we

have gleaned them from the extremely lengthy transcript of evidence, much of which was understandably befuddled and confused because of the nature of the melee out of which the killing took place and which was made more nebulous because the actions of those involved in the tumult were so rash, precipitative and intermingled and their sequence of such rapidity that it is impossible to completely separate and narrate them as to exact time or location in the barroom.

The evidence does reveal that in Tampa, Florida, at 1024 Central Avenue, there was located a drinking establishment known as the Pyramid Lounge, comprised of a rectangular room running east and west of about 20 75 and divided into an east side area, containing about nine tables with chairs, known as the 'Ace Lounge', and a west side portion, where a semi-circular bar and stools were situate, called the 'Pyramid Bar'. Back to back open booths ran the entire length of the room on the north side.

On the evening of February 4, 1968, somewhere near 11:30 P.M., the three named defendants and one Robbie Marva Robinson, who had entered the spot with them at about 9:30 P.M., were in the 'Pyramid Bar' area

of the establishment seated at a booth.

The place was crowded with patrons and noisy.

One James L. Hogan, 19, came into the room with one Margaret Hunt and a person named Romae Lee Rucker, and this trio had gone to the 'Ace Lounge' portion of the premises near the bar. An argument ensued between Hogan and the said Robbie Robinson, who had come over to the vicinity of Hogan and his companions and accused Hogan of referring to her as a member of the demimonde, but not in those exact words. The defendant, William Henry Johnson, Jr., following Robinson, loudly reaffirmed the accusation against Hogan and attempted to hit Hogan but the blow was deflected by Rucker. At this point the decedent, Frank Cutler, interjected himself into the argument and for a fleeting moment, at least, restrained Johnson and Hogan from becoming unalterably involved in that altercation by taking Hogan with him toward the eastern portion of the 'Pyramid Bar'.

The smoldering residuals of this noisy wrangle swiftly drifted to that part of the establishment now occupied by Hogan and Cutler and broke out into a new fiery fracas between Johnson and Hogan, as the former angrily and persistently voiced his resentment to the alleged slur on Robbie Robinson, whom he claimed to be his sister. This confrontation became the incipient cause of the tragedy in this case as the respondent Roby and the doomed Cutler, again interceding for his close friend Hogan, almost immediately became antagonistic participants in a violent dispute which deteriorated at once into physical combat, it not being clear who struck the first blow.

The final struggle carried the combatants a short distance toward the rear of the barroom to a point a few feet farther east of the bar. The defendant Williams followed in close pursuit and William Henry Johnson, Jr., also maneuvered in toward the center of the fury.

After stating at one point to Cutler that he would kill him, the respondent Roby began firing his .25 caliber pistol at Cutler at the same time that codefendant Williams was shooting at the victim with his .22 caliber pistol. There was testimony that the defendant Johnson also discharged his .22 caliber pistol in the direction at Cutler.

Cutler slumped and fell mortally wounded with two slugs in his abdomen, after stating, according to witnesses, 'It doesn't make sense', his terminal utterance on earth. Some witnesses, including Roby, stated that Cutler held a chair raised over his head in a threatening manner when, or shortly before, the pistols began to bark, and testimony was also admitted that he was a mean and dangerous man, having once broken a man's back by kicking him in a fight in front of the Pyramid Lounge.

A rather enthusiastic general exodus from the building followed the shooting. Near the lead of the evacuation was a group composed of the three armed defendants and the one whose remonstrance at indignity had lighted the explosion fuse to begin with, Robbie Robinson. She had been in the rest room at the time of the actual shooting, but said at the trial in describing her withdrawal with the defendants: 'We all run automatically together.' She further testified at the trial as follows:

'Well, Roby wanted to keep saying that he had shot the boy, and they wanted to keep telling him not to say that until he found out what was going on, and they say with all that shooting in there any one of them could have done it.'

And she reiterated later, upon questioning, that both Johnson and Williams had said that any one of the three defendants could have shot Cutler.

When cross-examined at the trial, respondent Roby said:

'I told Robbie Robinson I thought I had shot at him. I shot a boy in the bar.'

Immediately thereafter and at all times since, he has been emphatic in stating that he shot 'at' the deceased rather than that he shot him in fact. No witness testified that a projectile from Roby's weapon hit Cutler.

The autopsy report revealed that two slugs were found in the victim's body and a pathologist testified that the cause of death was the combined effect of two gunshot wounds in the abdomen.

Only one .22 caliber slug was placed in evidence. Another slug of disputed caliber was allegedly taken from Cutler's body but this slug and testimony relating to it were not admitted.

At the conclusion of the testimony, the trial court refused to submit to the jury, orally or in written form, the following instruction requested by the

State and to which the respondent objected:

'When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in furtherance or prosecution of the common design; and if two or more persons combine to do an unlawful act, and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish; the immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.'

The trial court, counsel for the State and defense counsel had engaged in some discussion relative to a 'conspiracy charge', but obviously the Court was referring to the quoted aiding and abetting charge which was declined.

The District Court of Appeal concluded, in a divisive opinion of two to one, that the evidence was inadequate to support a valid finding on the substantive charge that the respondent Roby caused the death of the deceased. It also held that the failure of the trial court to instruct the jury as to provisions of Section 776.011, Florida Statutes, F.S.A., which makes a person a principal in the first degree whether he actually commits the crime or is present aiding, abetting, counseling, hiring or otherwise procuring such offense to be committed, rendered the verdict invalid on this theory.

The Court also further decided that the refusal to grant the quoted instruction, as requested by the State and objected to by the respondent, was plainly within the discretion of the trial judge, since it was not clear whether the case dealt with 'conspiracy' or 'aiding and abetting'.

The contention here of the petitioner, State of Florida, based upon conflict of decision, has a dual aspect.

First, it is urged that the evidence at the trial was, indeed, sufficient to support the verdict of the jury on the substantive charge against Roby, under the decision of this Court, and Second, that in any event, respondent's conviction should be sustained, under Section 776.011, Florida Statutes (F.S.A.), because the evidence plainly shows that he was present, aiding and abetting the commission of the offense and that a jury instruction on aiding and abetting was not necessary to sustain the conviction under the controlling reported case law of this court as well as that of other district courts of appeal.

While the question involved in the first point may appear to be a close one, in view of the respondent's own quoted statements immediately after the shooting and at the trial, we are convinced that the District Court of Appeal was correct in that portion of its decision which held that the facts proved at the trial were legally insufficient to support conviction on the substantive charge. In our opinion, no conflict exists between their decision on this point and the decisions of this Court of any other District Appellate Court on this question.

[1] The proof, under the evidence admitted, was that two gunshot wounds caused the death of Cutler; that a total of between two and seven shots were fired by the three defendants at Cutler; that only one .22 caliber slug from the pistol of defendant Williams was taken from Cutler's body; and that no one saw a projectile from Roby's gun hit Cutler. It is obvious that one reasonable hypothesis, based upon these facts, is that no projectile from respondent Roby's pistol found its mark. This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to nullify a reasonable doubt and support a criminal conviction. The burden of proof of connecting the death to Roby's pistol was not met. *Driggers v. State, Fla.*, 164 So.2d 200; *Davis v. State, Fla.*, 90 So.2d 629.

The authorities cited by respondent, including *Land v. State, Fla.*, 156 So.2d 8; *Coachman v. State, Fla.App.*, 114 So.2d 189; *Hopper v. State, Fla.*, 54 So.2d 165; *Tongay v. State, Fla.*, 79 So.2d 673; and *Bellamy v. State, Fla.*, 43, 47 So. 868, are distinguishable, as to factual complex, from the case under consideration, and because of the distinctions are not controlling.

We must depart from the ruling of the District Court, however, on the second contention of the petitioner because it is incompatible with the

decisions of this Court and other Appellate Courts of this State.

[2] Abundant proof that the respondent Roby was present aiding and abetting in the commission of the offense was adduced at the trial. The evidence was fully sufficient, as a matter of law, to sustain such a charge, and it is now well established in Florida that a person who is charged in an indictment or information with commission of a crime may be convicted upon proof that he aided or abetted in the commission of such crime, under Section 776.011, Florida Statutes, F.S.A., which enacted the recognized precept into statutory law.

The rule was first recognized, albeit, perhaps, in obiter dictum, by this Court in the year 1893 in *Albritton v. State*, 32 Fla. 358, 13 So. 955. It was followed in many other decisions, among them, *Green v. State*, 40 Fla. 191, 23 So. 851 (1898); *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865; *Brown v. State*, 82 Fla. 306, 89 So. 873; *Jimenez v. State*, 158 Fla. 719, 30 So.2d 292; *Chaudoin v. State*, Fla.App., 118 So.2d 569 and *Newman v. State* (Fla.) 196 So.2d 897 (See also *Sons v. State*, Fla.App., 99 So.2d 888, cert. den. 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160), to finally establish it as law in the criminal jurisprudence of Florida.

In *Jacobs v. State*, 184 So.2d 711, it was held by the First District Court of Appeal that one may be charged with aiding, abetting or procuring the commission of a criminal offense and may be convicted upon proof establishing the actual commission of the offense by him, and vice versa.

[3] In that case the defendant, who was charged with a substantive offense, conceded that the aiding and abetting statute (F.S. Sec. 776.011, F.S.A.) makes an aider and abetter a principal equally guilty as the person who actually perpetrates the crime but contended that the State had the duty of charging him as an aider and abetter in the information filed against him, concluding that he could not be found guilty of aiding and abetting on the substantive charge contained in the information. His contention, of course, was based upon the general rule that a defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

In clearly rejecting this contention and affirming the judgment of conviction, the Court, in *Jacobs*, quoting from the *Albritton* case, said:

\* \* \* Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. \* \*

\* Under this indictment, \* \* \* the named defendants are indicted as principals,--Andrew in the first degree, and Henry \* \* \* in the second degree. \*

\* \* The punishment prescribed for principals in the first and second degrees is the same under our law.'

The Court then stated:

'One may be charged in an information or indictment with aiding, abetting, or procuring the commission of a criminal offense, but if the proof establishes that he actually committed the offense, a verdict finding him guilty as charged will be sustained. Conversely, it would follow that if an information, such as the one filed in the case sub judice, charges a defendant with the commission of a criminal offense, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty as charged should be sustained.' (Italicizing ours)

[4] Under our statute, therefore, a person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he was guilty of one of the acts denounced by the statute. See *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865.

The underlying reason, to which the rule, as enunciated in the cited cases from *Albritton* to the present time, is obviously pegged, is that the provisions of the statute, proscribing acts of aiding, abetting, counseling, hiring

and procuring of criminal offenses, must be read into the formal charge against persons accused of crime, and that they coalesce with and become a part of the indictment or information alleging substantive offenses.

The majority opinion of the District Court of Appeal demonstrates some confusion in its statement relative to 'conspiracy', probably induced by its mention by the trial court and counsel in connection with jury instructions.

It appears to be crystal clear that the substantive crime of conspiracy, an offense entirely separate and distinct, and governed by a different statute, from the substantive crime with which the respondent Roby was charged, has no relevancy in this case. *Blackburn v. State*, Fla., 82 So.2d 694, cert. denied, 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854.

We believe it is also free from doubt that the instruction requested by the State, although not as artfully or precisely drawn as it might have been nevertheless embraced a proper statement of the law bearing upon the facts of the case.

[5] The learned trial judge's refusal to give the instruction, upon objection of the respondent, while erroneous insofar as the State was concerned, was not reversible error as to the respondent Roby, who could only benefit by its absence. The minority opinion of the District Court of Appeal, we think, was eminently correct on this phase of the case.

In view of the foregoing, the decision of the District Court of Appeal is quashed and the judgment and sentence of the trial court reinstated.

ROBERTS, C.J., and ERVIN and DREW (Retired), JJ., concur.  
CARLTON, J., dissents.

# **EXHIBIT J**

## **Jurisdictional Brief**

Supreme Court of Florida.  
STATE of Florida, Petitioner,  
v.

Arthur Lee ROBY, Respondent.

No. 39434.

March 10, 1971.

Rehearing Denied April 26, 1971.

Defendant was convicted in the Circuit Court, Hillsborough County, Roger D. Flynn, J., of murder in the second degree, and he appealed. The District Court of Appeal, 229 So.2d 604, reversed and remanded for new trial, and certiorari was granted. The Supreme Court, Hodges, Circuit Judge, held that refusal to give aiding and abetting instruction was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of homicide victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

Decision of District Court of Appeal quashed and judgment of trial court reinstated.

Carlton, J., dissented.

#### West Headnotes

[1] Homicide K 1179

203 ----

203IX Evidence

203IX(G) Weight and Sufficiency

203k1176 Commission of or Participation in Act by Accused;

#### Identity

203k1179 Altercation or Attack by Several.

(Formerly 203k234(4))

Evidence, including evidence that although a total of between two and seven shots were fired by three defendants at homicide victim only one .22 caliber slug from pistol of codefendant was taken from victim's body and that no one saw projectile from defendant's gun hit victim, was insufficient to sustain conviction of defendant on substantive charge of murder in the second degree.

[2] Criminal Law K 59(5)

110 ----

110VII Parties to Offenses

110k59 Principals, Aiders, Abettors, and Accomplices in General

110k59(5) Aiding, Abetting, or Other Participation in Offense.

A person who is charged in an indictment or information with commission of a crime may be convicted on proof that he aided or abetted in the commission of such crime. F.S.A. § 776.011.

[3] Indictment and Information K 171

210 ----

210XII Issues, Proof, and Variance

210k170 Variance Between Allegations and Proof

210k171 In General.

Generally, a defendant is entitled to have charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

[4] Criminal Law K 61.1

110 ----

110VII Parties to Offenses

110k61 Principals in First Degree

110k61.1 In General.

(Formerly 110k61)

A person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he is guilty of one of the acts denounced by statute. F.S.A. § 776.011.

[5] Homicide K 1466

203 ----

203XII Instructions

203XII(D) Parties

203k1466 Aiding, Abetting, or Other Participation in Offense.

(Formerly 203k305)

[See headnote text below]

[5] Criminal Law K 1173.5

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.5 Errors Favorable to Accused.

(Formerly 203k341)

Refusal to give aiding and abetting instruction, in homicide prosecution, was erroneous insofar as the State was concerned where evidence would support finding that defendant was principal in shooting of victim but such refusal was not reversible error as to defendant, who could only benefit by its absence.

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have gleaned them from the extremely lengthy transcript of evidence, much of which was understandably befuddled and confused because of the nature of the melee out of which the killing took place and which was made more nebulous because the actions of those involved in the tumult were so rash, precipitative and intermingled and their sequence of such rapidity that it is impossible to completely separate and narrate them as to exact time or location in the barroom.

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of the establishment seated at a booth.

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The final struggle carried the combatants a short distance toward the rear of the barroom to a point a few feet farther east of the bar. The defendant Williams followed in close pursuit and William Henry Johnson, Jr., also maneuvered in toward the center of the fury.

After stating at one point to Cutler that he would kill him, the respondent Roby began firing his .25 caliber pistol at Cutler at the same time that codefendant Williams was shooting at the victim with his .22 caliber pistol. There was testimony that the defendant Johnson also discharged his .22 caliber pistol in the direction at Cutler.

Cutler slumped and fell mortally wounded with two slugs in his abdomen, after stating, according to witnesses, 'It doesn't make sense', his terminal utterance on earth. Some witnesses, including Roby, stated that Cutler held a chair raised over his head in a threatening manner when, or shortly before, the pistols began to bark, and testimony was also admitted that he was a mean and dangerous man, having once broken a man's back by kicking him in a fight in front of the Pyramid Lounge.

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'Well, Roby wanted to keep saying that he had shot the boy, and they wanted to keep telling him not to say that until he found out what was going on, and they say with all that shooting in there any one of them could have done it.'

And she reiterated later, upon questioning, that both Johnson and Williams had said that any one of the three defendants could have shot Cutler.

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'I told Robbie Robinson I thought I had shot at him. I shot a boy in the bar.'

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At the conclusion of the testimony, the trial court refused to submit to the jury, orally or in written form, the following instruction requested by the

State and to which the respondent objected:

'When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed furtherance or prosecution of the common design; and if two or more persons combine to do an unlawful act, and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish; the immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.'

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The contention here of the petitioner, State of Florida, based upon conflict of decision, has a dual aspect.

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While the question involved in the first point may appear to be a close one, in view of the respondent's own quoted statements immediately after the shooting and at the trial, we are convinced that the District Court of Appeal was correct in that portion of its decision which held that the facts proved at the trial were legally insufficient to support conviction on the substantive charge. In our opinion, no conflict exists between their decision on this point and the decisions of this Court of any other District Appellate Court on this question.

[1] The proof, under the evidence admitted, was that two gunshot wounds caused the death of Cutler; that a total of between two and seven shots were fired by the three defendants at Cutler; that only one .22 caliber slug from the pistol of defendant Williams was taken from Cutler's body; and that no one saw a projectile from Roby's gun hit Cutler. It is obvious that one reasonable hypothesis, based upon these facts, is that no projectile from respondent Roby's pistol found its mark. This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to nullify a reasonable doubt and support a criminal conviction. The burden of proof of connecting the death to Roby's pistol was not met. *Driggers v. State, Fla.*, 164 So.2d 200; *Davis v. State, Fla.*, 90 So.2d 629.

The authorities cited by respondent, including *Land v. State, Fla.*, 156 So.2d 8; *Coachman v. State, Fla.App.*, 114 So.2d 189; *Hopper v. State, Fla.*, 54 So.2d 165; *Tongay v. State, Fla.*, 79 So.2d 673; and *Bellamy v. State, Fla.*, 43, 47 So. 868, are distinguishable, as to factual complex, from the case under consideration, and because of the distinctions are not controlling.

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decisions of this Court and other Appellate Courts of this State.

[2] Abundant proof that the respondent Roby was present aiding and abetting in the commission of the offense was adduced at the trial. The evidence was fully sufficient, as a matter of law, to sustain such a charge, and it is now well established in Florida that a person who is charged in an indictment or information with commission of a crime may be convicted upon proof that he aided or abetted in the commission of such crime, under Section 776.011, Florida Statutes, F.S.A., which enacted the recognized precept into statutory law.

The rule was first recognized, albeit, perhaps, in obiter dictum, by this Court in the year 1893 in *Albritton v. State*, 32 Fla. 358, 13 So. 955. It was followed in many other decisions, among them, *Green v. State*, 40 Fla. 191, 23 So. 851 (1898); *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865; *Brown v. State*, 82 Fla. 306, 89 So. 873; *Jimenez v. State*, 158 Fla. 719, 30 So.2d 292; *Chaudoin v. State*, Fla.App., 118 So.2d 569 and *Newman v. State* (Fla.) 196 So.2d 897 (See also *Sons v. State*, Fla.App., 99 So.2d 888, cert. den. 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160), to finally establish it as law in the criminal jurisprudence of Florida.

In *Jacobs v. State*, 184 So.2d 711, it was held by the First District Court of Appeal that one may be charged with aiding, abetting or procuring the commission of a criminal offense and may be convicted upon proof establishing the actual commission of the offense by him, and vice versa.

[3] In that case the defendant, who was charged with a substantive offense, conceded that the aiding and abetting statute (F.S. Sec. 776.011, F.S.A.) makes an aider and abetter a principal equally guilty as the person who actually perpetrates the crime but contended that the State had the duty of charging him as an aider and abetter in the information filed against him, concluding that he could not be found guilty of aiding and abetting on the substantive charge contained in the information. His contention, of course, was based upon the general rule that a defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information and cannot be prosecuted for one offense and convicted and sentenced for another.

In clearly rejecting this contention and affirming the judgment of conviction, the Court, in *Jacobs*, quoting from the *Albritton* case, said:

\* \* \* Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. \* \*

\* Under this indictment, \* \* \* the named defendants are indicted as principals,--Andrew in the first degree, and Henry \* \* \* in the second degree. \*

\* \* The punishment prescribed for principals in the first and second degrees is the same under our law.'

The Court then stated:

'One may be charged in an information or indictment with aiding, abetting, or procuring the commission of a criminal offense, but if the proof establishes that he actually committed the offense, a verdict finding him guilty as charged will be sustained. Conversely, It would follow that if an information, such as the one filed in the case sub judice, charges a defendant with the commission of a criminal offense, and the proof establishes only that he was feloniously present, aiding, and abetting in the commission of the crime, a verdict of guilty as charged should be sustained.' (Italicizing ours)

[4] Under our statute, therefore, a person is a principal in the first degree whether he actually commits the crime or merely aids, abets or procures its commission, and it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he was guilty of one of the acts denounced by the statute. See *Myers v. State*, 43 Fla. 500, 31 So. 275; *Pope v. State*, 84 Fla. 428, 94 So. 865.

The underlying reason, to which the rule, as enunciated in the cited cases from *Albritton* to the present time, is obviously pegged, is that the provisions of the statute, proscribing acts of aiding, abetting, counseling, hiring

and procuring of criminal offenses, must be read into the formal charge against persons accused of crime, and that they coalesce with and become a part of the indictment or information alleging substantive offenses.

The majority opinion of the District Court of Appeal demonstrate some confusion in its statement relative to 'conspiracy', probably induced by its mention by the trial court and counsel in connection with jury instructions.

It appears to be crystal clear that the substantive crime of conspiracy, an offense entirely separate and distinct, and governed by a different statute, from the substantive crime with which the respondent Roby was charged, has no relevancy in this case. *Blackburn v. State*, Fla., 8 So.2d 694, cert. denied, 350 U.S. 987, 76 S.Ct. 473, 100 L.Ed. 854.

We believe it is also free from doubt that the instruction requested by the State, although not as artfully or precisely drawn as it might have been nevertheless embraced a proper statement of the law bearing upon the facts of the case.

[5] The learned trial judge's refusal to give the instruction, upon objection of the respondent, while erroneous insofar as the State was concerned, was not reversible error as to the respondent Roby, who could only benefit by its absence. The minority opinion of the District Court of Appeal, we think, was eminently correct on this phase of the case.

In view of the foregoing, the decision of the District Court of Appeal is quashed and the judgment and sentence of the trial court reinstated.

ROBERTS, C.J., and ERVIN and DREW (Retired), JJ., concur.  
CARLTON, J., dissents.

DEAR CLERK OF THE FLORIDA SUPREME COURT,  
HONORABLE MR. THOMAS D. HALL :

FILED NUMBER SC13-1375  
THOMAS D. HALL

2013 AUG 12 PM 2:37

AUG 6 2013 GREETINGS! MY NAME IS SAMUEL LEE GREEN II. I AM WRITING TO  
CLERK SUPREME COURT BY

INFORM YOU THAT I RECEIVED A ACKNOWLEDGEMENT OF NEW CASE NUMBER SC13-1375  
CONCERNING THE FILING OF MY "NOTICE TO INVOK DISCRETIONARY JURISDICTION".

ENCLOSED I AM SENDING A COPY OF MY "JURISDICTIONAL BRIEF" THAT  
I HAD SENT TO THIS HONORABLE COURT AS DATED AND SEEN ON [6-25-13]. THIS  
"JURISDICTIONAL BRIEF" WAS PLACED IN THE INSTITUTIONAL LAW LIBRARY STAFFS HANDS  
AS DATED STAMPED AND MAILED BY SEAL.

MY FAMILY MEMBER [DENISE L. BURNEY] WENT ON LINE ON 7-05-13  
AT THE HTTP://WWW.FLORIDASUPREME COURT.ORG/CLERK/INDEX.SHTML LOCATION  
TO SEE IF YOU REVIEWED AND DOCKETED THIS ENCLOSED TIMELY FILED "JURISDICTIONAL BRIEF".  
MY MOTHER ONLY SEEN DOCKET ENTRY FOR THE LETTER I SENT TO YOU / THE NOTICE TO INVOK  
DISCRETIONARY JURISDICTION / MY MOTION TO STAY OF MANDATE. THESE DOCUMENTS "MY MOTION  
TO STAY OF MANDATE AND LETTER OF EXPLANATION OF EVENTS FILED SEEDING WAS MY JURISDICTIONAL BRIEF  
RECEIVED BY YOUR OFFICE WAS BOTH FILED AND MAILED AFTER MY JURISDICTIONAL  
BRIEF.

YET, THE CASE DOCKET INQUIRY ONLY SHOWS THESE ITEMS AND NO NOTATION  
OF JURISDICTIONAL BRIEF ENTERED. WELL, I AM PRO SE AND OF LEARNING THAT THE DOCKET  
DOES NOT REFLECT A FILING OF MY TIMELY FILED JURISDICTIONAL BRIEF WHICH I  
HAD TO FILE 10 DAYS AFTER MY "NOTICE TO INVOK DISCRETIONARY JURISDICTION"  
I AM SENDING A COPY OF THE FIRST "JURISDICTIONAL BRIEF" THAT I SENT EARLIER,  
HOWEVER, I AM PLACING THE NEW CASE ACKNOWLEDGEMENT NUMBER SC13-1375  
ON IT AS I AM ASKING THIS HONORABLE COURT TO PLEASE DON'T FROWN UPON ME ON MY

Filing As I am Dilligently trying to meet the required rules to ensure proper review of this manifest injustice that has occured to me involving the conflict of Second District Courts Standing on the Florida Supreme Courts case law opinion that is in conflict with a more recent Florida Supreme Court opinion as all clearly explained in my "Jurisdictional Brief"

Enclosed please find my "Jurisdictional Brief" with the new Acknowledgment of Case Number. I'm only filing this to you again because this Jurisdictional Brief is the very base of the 3.800(a) claim and is showing this court the filings of the lower tribunal, the denial answers and the law as established by this Honorable Supreme Court opinion which has created a conflict as applied to my unique circumstances in my case sentencing.

MR. HALL, I HOPE THAT I AM RIGHT IN GETTING THIS BRIEF TO YOU AS I CAN ONLY TRY. THANKYOU AND CAN YOU PLEASE SEND ME A NOTICE OF RECEIPT OF THIS JURISDICTIONAL BRIEF.

NOTE: THE FIRST TIME THAT I FILED THIS BRIEF TO YOUR COURT MY DECISION ON MY RETERRING HAD NOT BEEN FINALIZED. SINCE THEN I HAVE GOTTEN A RULING FROM THE SECOND DISTRICT COURT THAT IS A DENIAL. THE JURISDICTIONAL BRIEF ENCLOSED DID NOT SPEAK ON THAT AT THAT TIME SO I AM MAKING THIS COURT EXTREMELY AWARE.

CC: HONORABLE THOMAS HALL

FLORIDA SUPREME COURT  
CLERK OF COURT

500 SOUTH DUVAL STREET  
TALLAHASSEE, FLORIDA 32399-1925

Respectfully Submitted,



SAMUEL LEE GREEN II  
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