

IN THE SUPREME COURT OF FLORIDA

JOHNNIE F. HOWARD,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

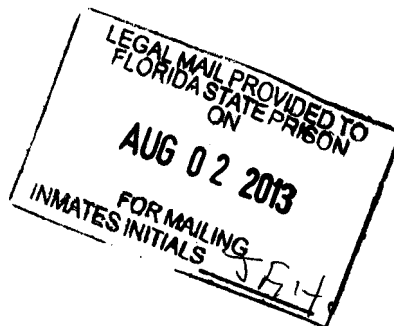
CASE NO. :

DCA CASE NO. : 2D13-501

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PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Second District
State of Florida



Johnnie F. Howard #502819
Florida State Prison
7819 N.W. 228th Street
Raiford, Florida 32026

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STATEMENT OF THE CASE AND FACTS

The Petitioner filed a motion to correct an illegal thirty (30) years prison sentence imposed by the lower circuit court. In the motion, Petitioner specifically challenged the improper reclassification of offense and enhancement of sentence. The circuit court Judge (Honorable Gregory P. Holden) denied the motion based upon a previous order which denied a similar prior challenge by another circuit court Judge (Honorable William Fuente), who explicitly and expressly stated that the trial court **DID NOT** reclassify the offense and that Petitioner **WAS NOT** "sentenced under § 775.087 (1)(b), Fla. Stat. (1987), but under § 775.082 (8), Fla. Stat. (1997)." (emphasis added). (See, Trial Court's August 18, 2005, denial order.). The trial court also in its previous order emphasized that, "The court was required by statute to sentence [Petitioner] to Fifteen (15) years prison for the second-degree felony [Petitioner] committed." (See August 18, 2005, "Order Denying Motion To Correct Illegal Sentence," page 7-9) The trial courtⁱⁿ its denial order adamantly reaffirming that it (the court) **did not** reclassify the offense. Based upon the previous denial order, the recent circuit court Judge (Gregory P. Holden) decided to stand-by and abide by the previous denial order issued by circuit court Judge Fuente, and denied Petitioner's motion to correct illegal sentence.

Petitioner sought a timely appeal which initially resulted in the appellate court issuing an Per Curiam Affirmance, citing case law

authority that do not support the lower Circuit Court's proposition and denial order. Petitioner sought a timely motion for clarification En Banc

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal in Howard v. State, 2013-501 citing that the jury verdict made finding Petitioner committed aggravated battery great bodily harm and the use of a deadly weapon was proper for reclassification and enhancement of sentence, collides with this Supreme Court's decision in Gonzalez v. State, 585 So.2d 932 (Fla. 1991) (use of firearm was essential element before jury of crime for which defendant was convicted, so that conviction could not be enhanced for use of weapon); and State v. Tripp, 642 So. 2d 728, 730 n.2 (Fla. 1994) ("Reclassification was improper under section 775.087(1) because attempted armed robbery is a felony in which the use of a weapon is an essential element.") because the Court of Appeal's opinion results in the application of a rule of law that produce a different result in this case which involves substantially the same controlling facts as the prior decisions disposed of by this Court. Hence, the Court of Appeal opinion expressly and directly conflict with a decision of another district court of appeal or of this Supreme Court on the same question of law.

JURISDICTIONAL STATEMENT

Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or other District Court of Appeal on the same point of law. Article V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(iv).

ARGUMENT

DISTRICT COURT OF APPEAL'S APPLICATION OF RULE OF LAW PRODUCED DIFFERENT RESULT IN CASE WHICH INVOLVES SUBSTANTIALLY SAME CONTROLLING FACTS IN STATE V. TRIPP, 642 So. 2d 728 (Fla. 1994); AND GONZALEZ V. STATE, 505 So. 2d 932 (Fla. 1991).

Section 775.087 (1), Florida Statutes (1997), provides for reclassification of a crime from a second-degree felony to a first-degree felony if the defendant uses a weapon during its commission, unless "the use of a weapon or firearm is an essential element of the crime." See Dozier v. State, 677 So. 2d 1352 (Fla. 2d DCA 1996).

In the instant case, the trial court specifically told the jury, that the third element of the Aggravated Battery charge the state had to prove against Petitioner was: "Johnnie F. Howard used a deadly weapon." Both the Circuit Court and Appeal Court completely overlooks

this fundamental error and fact, when denying Petitioner's motion to correct Illegal Sentence.

The "use of the deadly weapon" was made an essential element of the charge, making it inseparable and impossible for the jury to find Petitioner guilty of Aggravated Battery with Great Bodily Harm independent of the use of a Deadly weapon, because of the very instruction the Circuit Court gave to the jury. State v. Tripp, 642 So.2d 728, 730 n. 2 (Fla. 1994) ("Reclassification was improper under section 775.087(1), because attempted armed robbery is a felony in which the use of a weapon is an essential element.").

In the instant case, the circuit court improperly reclassified the charged offense from a second-degree felony to a first-degree felony and sentenced Petitioner to a Thirty (30) - years prison term, based upon the findings of the jury, which found Petitioner guilty of Aggravated Battery Great Bodily Harm and use of a Deadly weapon, as charged.

The Court of Appeal has decided and applied the rule of law that has produced a different result in this case, that is substantially the exact, same controlling facts as this Supreme Court has decided in Gonzalez v. State, 505 So.2d 932 (Fla. 1991) (use of firearm was an essential element of the crime for which defendant was convicted, so that conviction could not be enhanced for use of a weapon); see also Traylor v. State, 710 So.2d 172 (Fla. 2000). Thus, this Court should exercise its discretionary jurisdiction to review the decision of the district court of appeal entered in this case, to resolve the legal conflict created.

CONCLUSION

Therefore, the Thirty (30) years imprisonment sentence imposed in this case is an illegal sentence, upheld by the decision of the District Court of Appeal which expressly and directly conflicts with the decision of this Supreme Court on the same question of law, previously disposed of in a prior case. Petitioner respectfully requests that this Honorable Court exercise its jurisdiction, resolve the conflict, and quash the decision of the District Court of Appeal based on the merits of Petitioner's arguments.

August 2, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished by U.S. Mail to Brandon Robert Christian, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607 on this 2nd day of August 2013.

Johnnie F. Howard
Johnnie F. Howard #502819
(PRO-SE)

APPENDIX TO BRIEF

APPENDIX -A Copy of The Second District Court of
Appeal's Decision Under Review issued

June 19, 2013 1

Rec
6-20-13

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOHNNIE F. HOWARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-501

Opinion filed June 19, 2013.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for
Hillsborough County; Gregory P. Holder,
Judge.

Johnnie F. Howard, pro se.

PER CURIAM.

Affirmed. See Howard v. State, 11 So. 3d 967 (Fla. 2d DCA 2008); State
v. Richards, 639 So. 2d 680 (Fla. 2d DCA 1994); Thompson v. State, 636 So. 2d 599
(Fla. 5th DCA 1994).

SILBERMAN, C.J., and CASANUEVA and WALLACE, JJ., Concur.