IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC12-1276

ALFIO GENTILE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

JACQUELINE N. BROWN
Assistant Attorney General
Florida Bar No. 059697
1515 North Flagler Drive
Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 837-5000
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Florida Statutes

Florida Constitution

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are those set forth in the order issued by the Fourth District Court of Appeal. A copy of the opinion is contained in the appendix to this brief.

SUMMARY OF THE ARGUMENT

In this case, the decision of the Fourth District Court of Appeals correctly states, and applies the current status of the law as outlined in the District's opinion. This Court must decline to exercise jurisdiction because the Petitioner has misapplied the law as it stands in regards to *State v. Tripp*, 642 So.2d 728 (Fla. 1994) The Petitioner's argument is contrary to this Courts subsequent rulings in *State v. Iseley*, 944 So.2d 227, 231 (Fla. 2006); *Tucker v. State*, 726 So.2d 768, 771 (Fla. 1999); *State v. Hargrove*, 694 So.2d 729, 731 (Fla. 1997), and therefore the Petitioner has failed to establish that this Court should exercise discretionary jurisdiction.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN *State v. Tripp*, 642 So. 2d 728 (Fla. 1994). (RESTATED)

Petitioner argues that the decision rendered by the Fourth District Court of Appeal is in direct conflict with this Court's decision in *State v. Tripp*, 642 So.2d 728 (Fla. 1994), because the lower court misapplied Fla. Stat. Section 775.087(1) when it held that his offense was properly reclassified pursuant to the statute. Petitioner argues that the reclassification under section 775.087(1) requires a "specific finding", on the jury verdict form, that he used a deadly weapon. He alleges that because a special verdict form was not used, reversible error occurred. To support his position Petitioner relies on this Court's ruling in *Tripp*. In *Tripp*, 642 So.2d at 730, this Court held as follows:

> "[w]ithout a special verdict form, reclassification of Tripp's attempted first-degree murder conviction to a life felony was inappropriate. As he held in *Overfelt*, "[t]he question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury." (citations omitted) The special verdict form not allegations in an information indicates when a jury finds a weapon has been used." *State v. Overfelt*, 457 So.2d 1385 (Fla. 1984).

However, in this matter the Fourth District Court of Appeals determined that

Tripp is not applicable because this Court has clarified its decision in *Tripp* and its progeny by finding that, although a specific finding in an interrogatory on the verdict form is preferable, what *Overfelt* ultimately requires is a "clear jury finding". *Gentile v. State*, 87 So.3d 55, 57 (Fla. 4th DCA 2012); *State v. Iseley*, 944 So.2d 227, 231 (Fla. 2006); *Tucker v. State*, 726 So.2d 768, 771 (Fla. 1999); *State v. Hargrove*, 694 So.2d 729, 731 (Fla. 1997). The Fourth District Court of Appeals properly relied upon this Court's decision in *Sanders v. State*, 944 So. 2d 203, 207 (Fla. 2006), wherein this Court stated as follows:

> [a]ll that is required for the application of a reclassification or enhancement statute to an offense is a clear jury finding of the facts necessary to the reclassification or enhancement "either by (1) a specific question or special verdict form, or (2) the inclusion of a reference to [the fact necessary for reclassification] in identifying the specific crime for which the defendant is found guilty.

The Fourth District Court of Appeals properly opined in light of the subsequent decisions by this Court, the jury, by convicting the Petitioner as charged in the information, which specifically charged use of a deadly weapon and a violation of section 775.087(1), was indicative that the jury specifically found that he used a deadly weapon keeping with the essence of *Overfelt*, thus rendering the offence properly reclassified. *See Tucker*, 726 So.2d at 771.

Therefore the Petitioner has failed to establish that there is any conflict,

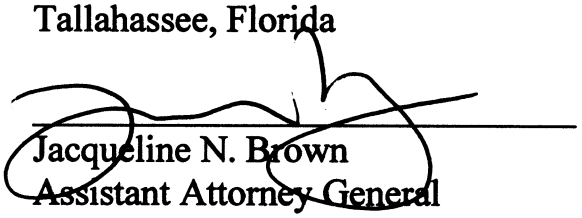
because the Fourth District Court of Appeals correctly states and applies the law as outlined in the District's order. Thus this Court must decline to exercise jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court DENY Petitioner's request for discretionary review over the instant cause.

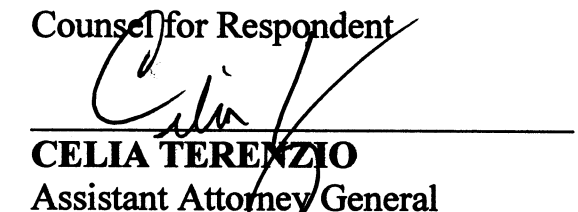
Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida



Jacqueline N. Brown
Assistant Attorney General
Florida Bar No. 059697
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
(561) 837-5000

Counsel for Respondent



CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished to: Alfio Gentile, DC # W10136, Taylor Correctional Institution, 8515 Hampton Springs Road, Perry, Fl 32348-8784 this 27th day of June, 2012.

JACQUELINE N. BROWN

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14 point Times New Roman Type.

JACQUELINE N. BROWN

APPENDIX

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

ALFIO GENTILE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D12-382

[April 18, 2012]

PER CURIAM.

Alfio Gentile filed a petition for writ of habeas corpus in this court raising a meritless claim which this court has repeatedly rejected. We dismiss the petition for writ of habeas corpus and impose the sanction of no longer accepting petitioner's pro se filings.

In 1999, petitioner bludgeoned his wife with a hammer while she lay in bed, inflicting severe injuries to her head and face. The victim was in a coma for several days and required various reconstructive surgeries. A jury convicted petitioner of attempted first-degree murder with a deadly weapon, and the court sentenced him to life in prison. This court affirmed on direct appeal. *Gentile v. State*, 808 So. 2d 225 (Fla. 4th DCA 2002) (table).

In numerous postconviction motions and petitions, petitioner has repeatedly raised the same meritless claim, that his offense should not have been reclassified from a first-degree felony to a life felony pursuant to section 775.087(1), Florida Statutes, because the jury allegedly did not specifically find that he used a deadly weapon. This meritless claim has been repeatedly rejected. *Gentile v. State*, 950 So. 2d 1251 (Fla. 4th DCA 2007) (table); *Gentile v. State*, 965 So. 2d 143 (Fla. 4th DCA 2007) (table); *Gentile v. State*, 7 So. 3d 1114 (Fla. 4th DCA 2009) (table); *Gentile v. State*, No. 4D09-934 (Fla. 4th DCA Apr. 9, 2009) (petition for writ of habeas corpus denied).

Most recently, petitioner again raised the same issue in another habeas corpus petition filed in this court in case number 4D09-5034.

This court issued an order to show cause why sanctions should not be imposed in that case. *See State v. Spencer*, 751 So. 2d 47 (Fla. 1999); Fla. R. Crim. P. 3.850(m). Following petitioner's response, this court declined to impose sanctions but explained to petitioner that his claim lacked merit. This court cautioned him that sanctions would be imposed if he continued to raise this claim. *Gentile v. State*, No. 4D09-5034 (Fla. 4th DCA Feb. 9, 2010) (February 9, 2010 order).

In the instant case, petitioner has yet again raised the same claim. This court issued an order to show cause pursuant to *Spencer* and Rule 3.850(m). In response, petitioner maintains that his claim has merit because the jury on the verdict form did not specifically find that a deadly weapon was used.

The jury convicted petitioner on a verdict form which reads: "Guilty of ATTEMPTED FIRST DEGREE MURDER, as charged in the information." The information charged: "ATTEMPTED FIRST DEGREE MURDER WITH A DEADLY WEAPON." The information alleged that petitioner attempted "to commit First Degree Murder with a Deadly Weapon" by striking the victim about the head with a hammer and/or blunt object. The information alleged that petitioner carried, displayed, used, threatened to use, or attempted to use "a hammer and/or blunt object" and cited the deadly weapon reclassification statute, section 775.087(1), Florida Statutes.

Petitioner maintains that the reclassification of section 775.087(1) should not have been applied because of the lack of a specific jury finding on the verdict form that he used a deadly weapon. He relies on *State v. Tripp*, 642 So. 2d 728, 730 (Fla. 1994), and *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984). However, the Florida Supreme Court has clarified that, although a specific finding in an interrogatory on the verdict form is preferable, what *Overfelt* ultimately requires is a "clear jury finding." *State v. Iseley*, 944 So. 2d 227, 231 (Fla. 2006); *Tucker v. State*, 726 So. 2d 768, 771 (Fla. 1999); *State v. Hargrove*, 694 So. 2d 729, 731 (Fla. 1997).

> [A]ll that is required for the application of a reclassification or enhancement statute to an offense is a clear jury finding of the facts necessary to the reclassification or enhancement "either by (1) a specific question or special verdict form (which is the better practice), or (2) the inclusion of a reference to [the fact necessary for reclassification] in identifying the specific crime for which the defendant is found guilty."

Sanders v. State, 944 So. 2d 203, 207 n.2 (Fla. 2006) (quoting *Iseley*, 944 So. 2d at 231).

In convicting petitioner as charged in the information, which specifically charged use of a deadly weapon and a violation of section 775.087(1), the jury clearly found that he used a deadly weapon. The offense was properly reclassified under the circumstances of this case. *See Johnson v. State*, 720 So. 2d 232, 237 (Fla. 1998). To be sure, petitioner acted alone and no possibility exists that the jury convicted him under an accomplice liability theory; the jury could not have found that someone other than petitioner himself personally carried or used the deadly weapon. Further, the only manner in which petitioner was alleged to have attempted to murder the victim was through the use of a deadly weapon. The "as charged" verdict unambiguously reflects the jury's finding that a deadly weapon was used and is sufficient to support the reclassification. *See, e.g., Amos v. State*, 833 So. 2d 841, 842-43 (Fla. 4th DCA 2002); *Hunter v. State*, 828 So. 2d 1038, 1039 (Fla. 1st DCA 2002); *Whitehead v. State*, 446 So. 2d 194, 197 (Fla. 4th DCA 1984). *See also Maglio v. State*, 918 So. 2d 369, 376 (Fla. 4th DCA 2005).

Petitioner also contends that the reclassification violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As previously explained to petitioner, any error in the jury's failure to make a more specific finding is clearly harmless because of the overwhelming evidence that he used a deadly weapon. *Galindez v. State*, 955 So. 2d 517 (Fla. 2007) (applying *Washington v. Recuenco*, 548 U.S. 212 (2006)). In *Galindez*, the Florida Supreme Court recognized that the suggestion in pre-*Apprendi* cases (like *Overfelt* and *Tripp*) that this type of error could not be harmless was superseded by *Recuenco*. *Galindez*, 955 So. 2d at 523.

Petitioner's unrelenting repetition of this meritless claim in successive postconviction motions, and in various appeals and petitions filed in this court, is an abuse of procedure. The petition for writ of habeas corpus is dismissed. *Baker v. State*, 878 So. 2d 1236, 1243-44 (Fla. 2004); Fla. R. Crim. P. 3.850(*l*).

The Florida Supreme Court has repeatedly emphasized the need "for court-imposed sanctions to preserve every citizen's right to access to courts." *Hastings v. State*, 79 So. 3d 739, 742 (Fla. 2011); *Johnson v. Rundle*, 59 So. 3d 1080, 1082 (Fla. 2011); *Steele v. State*, 14 So. 3d 221, 223 (Fla. 2009); *Peterson v. State*, 817 So. 2d 838, 840 (Fla. 2002). Similarly, this court has cautioned that abuse of writ of habeas corpus

and postconviction relief procedures damages the remedy. *McCutcheon v. State*, 44 So. 3d 157, 161 (Fla. 4th DCA 2010).

We conclude that appellant has not excused his abusive and repetitive filing. We direct the clerk of this court to no longer accept filings from petitioner relating to this criminal case unless they are signed by a member of The Florida Bar in good standing.

Petition dismissed and sanctions imposed.

MAY, C.J., TAYLOR and LEVINE, JJ., concur.

* * *

Petition for writ of habeas corpus to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Kenneth A. Marra, Judge; L.T. Case No. 1999CF005145AXX.

Alfio Gentile, Perry, pro se.

No appearance required for respondent.

Not final until disposition of timely filed motion for rehearing.