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No.:

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH EUGENE NIX  
Petitioner

V.

STATE OF FLORIDA  
Respondent

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE FLORIDA FOURTH DISTRICT  
COURT OF APPEAL

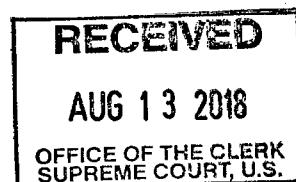
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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

**IS FLORIDA STATUTE 784.045 IMPERMISSIBLY  
VAGUE AND/OR DOES IT ENCOURAGE  
ARBITRARY AND DISCRIMINATORY  
ENFORCEMENT?**

**LIST OF PARTIES**

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE  
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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

## **OPINIONS BELOW**

The March 29, 2018 unpublished per curiam affirmation by the Florida Fourth District court of Appeal of Petitioner Kenneth Eugene Nix's appeal of the final judgment of the circuit court in and for Broward county, Florida, attached as Appendix1.

The April 18, 2018 unpublished order of the Florida Fourth District court of Appeal denying Petitioner's motion for Rehearing, attached as Appendix 2.

## **STATEMENT OF JURISDICTION**

Petitioner invokes the jurisdiction of this court pursuant to 28 U.S.C, § 1254(1) and 28 U.S.C, § 1257(a). because the Fourth District court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review the case and the Fourth District court of Appeal is the highest state court in which a decision could be had. Florida Constitution Art. V § 3(b); Florida Supreme court manual for internal operating procedures II B. 1. (a)(1); Jenkins v. State, 385 So.2d 1356 (Fla. 1980)

Jurisdiction is further consistent with Supreme court rules 10(c) and 13(1) for the reasons set forth herein.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that “No State shall deprive any person of life, liberty or property without due process of law”

Section 784.045, Florida Statutes states, in pertinent part:

### **784.045 Aggravated Battery (2004)**

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.

... whoever commits aggravated battery shall be guilty of a felony of the second degree.

Section 775.087, Florida Statutes (2004) states, in pertinent part:

### **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 ..., 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

### **STATEMENT OF THE CASE AND FACTS**

Petitioner was charged by information with aggravated battery, specifically and expressly pursuant to sec. 784.045(1)(a) 1 Fla. Statute, causing “Great Bodily Harm”, a 2<sup>nd</sup> degree felony. (Petition for Writ of Habeas Corpus, Appendix 3, Ex 1).

The State then sought, and obtained, a reclassification of Petitioner’s charge from a 2<sup>nd</sup> degree felony to a 1<sup>st</sup> degree felony by alleging a “use of a weapon” pursuant to sec. 775.087(1)(b), effectively increasing the statutory maximum from 15 years to 30 years. All of the State’s discovery and police reports contained the uncontested fact that the Petitioner used a “club like object” during the incident and the use of said weapon was referred to in the Information.

On May 19, 2004, after a trial by jury, the Petitioner was found guilty of “aggravated battery with a deadly weapon” pursuant to § 784.045(1)(a) 2 Fla. Statutes. (Appendix 3 Petition for Writ of Habeas Corpus, Ex 2)

The State then sought, and obtained, a further enhancement of Petitioner's sentence pursuant to Florida's "Habitual Offender" Statute (due to 2 prior felony convictions) pursuant to sec. 775.084(4)(a) 1, Fla. Statutes. This raised Petitioner's (now) 1<sup>st</sup> degree felony exposure from 30 years to a felony "Punishable by Life".

Petitioner was thereupon sentenced to 40 years, despite substantial mitigating factors introduced at sentencing.

Petitioner filed numerous appeals and post conviction motions attacking his conviction and sentence challenging the series of reclassifications and enhancement of his charges. On each occasion presented to it, the Florida Fourth District court of Appeal declined to issue an opinion or explanation for the denial of Petitioner's appeals. (Appendix 3, pp 6-7; Initial Brief of Appellant, Appendix 4, pp 2-6)

Although Petitioner still maintains that the trial court erred in simply adopting the state's "response" to Petitioner's post conviction motion, which was demonstrably inaccurate and contained obvious material misrepresentation refuted by the record (see Appendix 3, pp14-16; Appendix pp 17-19; Appendix 5 Motion for Rehearing), For purposes of this Petition the focus is upon Sec. 784.045 and it's inherent arbitrary and discriminatory enforcement by the State.

## **REASONS FOR GRANTING THE PETITION**

**THE SUBJECT FLORIDA STATUTES ALLOW THE STATE TO ABUSE IT'S DISCRETION IN CHARGING AGGRAVATED BATTERY BY ARBITRARY AND DISCRIMINATORY ENHANCEMENT OF THE CHARGE BEYOND THE LETTER AND INTENT OF THE STATUTE**

Petitioner's facts render the potential and actual abuse inherent in the current prosecution of such offense readily apparent.

The temptation for a zealous prosecutor to maximize punishment upon a selected defendant under an aggravated battery charge is, indeed, compelling - and ultimately justifiable – although it is clearly an advantage taken upon a grey area in Florida <sup>Law</sup> ~~can~~.

Specifically, under sec. 784.045, the State can charge aggravated battery by alleging that it caused “Great Bodily Harm” or that it involved the use of a “deadly weapon”. In either case, the penalty is a 2<sup>nd</sup> degree felony, punishable by up to 15 years in prison,

As stated, sec. 775.087 allows the State to “bump up” a felony to the next level where a defendant uses “any weapon” (or firearm) in the act of the felony unless the use of a weapon (or firearm) “is an essential element” of that felony.

Therefore, as Petitioner’s case demonstrates, a zealous prosecutor can simply choose to charge “Great Bodily Harm” as a basis for aggravated battery and

then justify a “bump up” where a weapon is used on the theory that, technically, the charge of “aggravated battery, great bodily harm” does not allege a weapon as an “essential element”.

Of course, should that same prosecutor, (who knows full well that a deadly “weapon” was used in the crime) have chosen to charge the same defendant under the proper section (aggravated battery with a deadly weapon – 784.045(1(b)) he would be “stuck” with a 2<sup>nd</sup> degree felony since, then the “weapon” would clearly be an “essential element” of the felony charged, and no “bump” would be justifiable under sec. 775.087.

It should be noted that, after it all, the jury convicted Petitioner of “aggravated battery with a deadly weapon as charged in the information”. (Appendix 3, Ex 2). The Information however charged “great bodily harm”, and in either case, there was no justification thereby for a reclassification beyond the 2<sup>nd</sup> degree felony proscribed by the statute.

This court has held that “a statute can be impermissibly vague if it fails to provide people of ordinary intelligence to understand what conduct it prohibits, or if it authorizes or even encourages arbitrary and discriminatory enforcement” Hill v. Colorado, 100 S.Ct. 2480, 2481 (2000); U.S.C.A. Amend 14.

Furthermore, and clearly, the State cannot be “trusted” with potentially unconstitutional enforcements of, or in the event of, statutes which may be

unconstitutional. In U.S. v. Stevens, 130 S.Ct. 1577, 1591, the Court stated “We would not uphold an unconstitutional statute merely because the government promised to use it responsibly”. In Stevens the Court found the State’s prosecution itself was “evidence of the danger in putting faith in government representations or prosecutorial restraint” (Id., at 1591).

Nor can the State foist a justification of discretion as a determining factor in every case: “Prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes”. Freeman, v. Quicken Loans, 132 S.Ct. 2034, 2041 (2012); Abulhana v. United States, 129 S.Ct. 2102, 556 U.S. 816, 823 (2009).

Returning to Petitioner’s case, Florida defines 2 types of aggravated battery with an equal punishment. It further provided for an enhancement of a felony for the usage of a weapon or firearm, except in cases where the use of such weapon was an essential element of that felony.

The State was allowed to pursue aggravated battery where it was proper in circumstances where it resulted in great bodily harm or where a weapon was used. It is a mistake to assume that the State can be trusted to charge the statute properly, as Petitioner’s case – and likely many others – demonstrate.

In so doing, the State has promulgated a “retroactive judicial expansion of narrow and precise statutory language in violation of due process” U.S. v. Lanier, 117 S.Ct. 1219 (1997); Bradshaw v. Richey, 126 S.Ct. 602, 604 (2005).

Finally, to the extent that the statutory applications herein raised are ambiguous, such ambiguity should be resolved in Petitioner's favor under the rule of lenity. Staples v. United States, 114 S.Ct. 1793 (1994); Chapman v. United States, 111 S.Ct. 1919 (1991).

### **CONCLUSION**

Whether impermissibly vague or arbitrarily or discriminatorily enforced, Petitioner's rights of due process were violated by the State's application of section 784.045 and/or 775.087, Florida Statutes. Petitioner's case must therefore, be remanded for re-sentencing accordingly.

Respectfully Submitted,  
  
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