IN THE SUPREME COURT OF FLORIDA



LINDA GAYLE ROYAL and
WILLIAM ELLISON,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,720

# RESPONDENT'S BRIEF ON JURISDICTION

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## AUTHORITIES CITED

## ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL, ROYAL et al v. STATE, CASE NOS. 82-1050 & 82-1055 (FLA. 5TH DCA JULY 19, 1984)[9 FLW 1561], DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OF COLBY V. STATE, 46 FLA. 112, 35 So. 189 (1903) OR MONTSDOCA V. STATE, 84 FLA. 82, 93 So. 157 (1922), IN THAT, DESPITE PETITIONERS' ALLEGATIONS TO THE CONTRARY, THE DISTRICT COURT RECOGNIZED THAT IN ROBBERY FORCE MUST PRECEDE OR BE CONCURRENT WITH THE TAKING.

This Court has repeatedly emphasized the narrowness of the class of cases which comprise its "conflict" jurisdiction, pursuant to Art. V, § 3(b)(3) Fla. Const.. See Mystan Marine Inc. v. Harrington, 339 So.2d 200 (Fla. 1976); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Certorari will not be granted merely because of a disagreement with the result reached by the district court or because this Court might have made a different factual determination, had it been the trier of fact. See Mancini v. State, 312 So.2d 732 (Fla. 1975). Petitioners have failed to demonstrate the Royal et al v. State, Case Nos. 82-1050 & 82-1055 (Fla. 5th DCA July 19, 1984)[9 FLW 1561] either announces a rule of law which conflicts with a rule previously announced by this Court or applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. Compare Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). The instant petition for writ of certiorari should be denied.

In this case, the district court was confronted with a situation in which two individuals entered a self-service department store, placed several items of clothing into plastic garbage bags and attempted to exit the store without paying for the merchandise. When the pair reached the exit doors, a security guard accosted Petitioner Ellison; when she tried to show him her badge and identification, he physically pushed her aside and proceeded out with the stolen merchandise (R 9,10). Petitioner Royal followed and the two of them then entered their vehicle, which was parked alongside the curb in the fire lane in front of the store (R 12). Several store employees tried to prevent the pair from starting their car; in retribution, Petitioner Ellison kicked one and Petitioner Royal drew a gun and pressed it to the forehead of another (R 35,45,49). The garbage bags containing the merchandise had been thrown into the car (R 12); one of the witnesses stated that Ellison and one employee were involved in a tug-of-war in reference to one such bag (R 45). In analyzing these facts, the Fifth District concluded that Ellison's pushing aside of the security guard constituted force involved in taking the property, in that such taking was not yet complete, and that Petitioner Royal's use of the gun occurred concurrently with the taking because possession of the property was still in continuing dispute.

In reaching these conclusions, the district court took note of two other district court decisions, State v. Douglas, 337 So.2d 407 (Fla. 1st DCA 1976), cert. denied 348 So.2d 946 (Fla. 1977) and Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA

1983); both involve comparable factual situations. In Douglas, two persons entered a food market and grabbed several pieces of meat and placed them into a shoulder bag. The manager intercepted them as they attempted to exit the store and they agreed to accompany him back to the rear of such establishment; on the way, one struck the manager, who resisted, while the other pulled a knife and began stabbing him, as well as another employee. The pair then ran from the store and outside threatened a policeman with the knife before being arrested. The reviewing court found that the taking of the goods was not complete when such were merely placed into the shoulder bag, in that in order for thieves to "enjoy" the fruit of their theft, they would have had to "get it out of the market." In order to do exactly that, they used force upon the interfering and intervening manager. The First District found such force to be sufficiently concurrent with the taking so as to support the charge of robbery.

In Stufflebean, the Third District reached a similar conclusion, where, in the open air, a pair of thieves grabbed the victim's cassette radio, while the latter was painting in a public park. The victim immediately gave pursuit, but when he confronted the two, was threatened with a knife; the two then walked away with the property. The court found that the assault with the knife was sufficiently contemporaneous because it was used to overcome the victim's instant protest and pursuit in order to complete the taking of the property. In their brief, Petitioners do not suggest that Royal misapplied either Douglas or Stufflebean, and no basis for conflict exists in

regard to these precedents. *

Petitioners do allege, however, that Royal, and by implication Douglas and Stufflebean, conflict with two early decisions of this Court, Colby v. State, 46 Fla. 112, 35 So. 189 (1903) and Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922). This is not the case. Colby recognized that whereas simply stealthy entry into a pocket cannot constitute robbery, any struggle between the pickpocket and victim, wherein the former seeks to overcome the latter's resistance so as to "secure" the money in the pocket, can convert a theft into a robbery. This latter situation, which was not before this Court in Colby, was that considered by the district courts in Royal and Douglas, and no reason exists to suppose that this Court would have decided either case differently. In Colby, there simply was no force utilized by the pickpocket in his attempt to remove the wallet from the victim; here, Petitioners used considerable force to push aside the security guard and beat back the resistance of other store employees in order to complete their taking of the stolen merchandise. This was force utilized to secure the stolen property, inasmuch as it was all directed towards increasing the ability of the defendants to leave the area with the bags of stolen merchandise.

No conflict exists with Colby, nor with Montsdoca,

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* In their brief, Petitioner also erroneously attribute the holding just cited to Douglas, rather than to Stufflebean (See Brief of Petitioners at 6).

which is in large part simply a restatement of the law and which does not involve any issue discussed in Royal. In McCloud v. State, 335 So.2d 257 (Fla. 1976), this Court held that the force in a robbery can be either precedent of contemporaneous with the taking, and in affirming the Petitioners' convictions of robbery the district court acted in harmony with Colby, Montsdoca and McCloud, as well as with Douglas and Stufflebean. Petitioners have entirely failed to demonstrate a basis for the invocation of this Court's discretionary jurisdiction and the instant petition should be denied.

## CONCLUSION

WHEREFORE, based upon the above and foregoing arguments, the instant petition for writ of certiorari, filed pursuant to Rule 9.030(a)(2)(iv) Fla. R. App. P., and intended to invoke this Court's jurisdiction, pursuant to Art. V, §3(b)(3) Fla. Const., should be denied. Petitioners have entirely failed to demonstrate that Royal et al v. State expressly and directly conflicts with any decision of this Court or that of any other district court of appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Larry B. Henderson, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 29 day of August, 1984.

Of Counsel
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