

**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

**FEB 18 1999**

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

Case No. 94,832

SHAWN SEAY,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT, STATE OF FLORIDA

**BRIEF OF PETITIONER ON JURISDICTION**

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**OTHER AUTHORITIES:**

1995 Fla. Laws Ch. 95-182 . . . . . 4, 5

Article V § 3 (b) (3) Florida Constitution . . . . . 4, 6

Florida Rule of Appellate Procedure 9.030 (2) (A) (iv) . . . . . 4, 6

Florida Statutes Chapter 775.084 (1995) . . . . . 4

Florida Statutes Chapter 790.235 (1995) . . . . . 4

**STATEMENT REGARDING TYPE**

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

**PRELIMINARY STATEMENT**

The record on appeal will be referred to by the symbol (R) followed by the volume number, a colon, and then the appropriate page number.

**STATEMENT OF THE CASE AND FACTS**

On January 14, 1996, Appellant and his codefendant Timothy Stevens burglarized the Kwik Way Mobile Mart. They were apprehended close to the scene still in possession of some of the stolen items.

On February 2, 1996, Respondent was charged with one count of burglary, a third-degree felony. (R1: 5) On June 19, 1996, Respondent was found guilty as charged after a jury trial. (R1: 23) He was sentenced as a violent career criminal to 12 years incarceration with a 10-year minimum mandatory term on September 5, 1996. (R1: 66-67, 82, 96, 104-05, 111-113)

On February 3, 1999, the Second District Court of Appeal affirmed Respondent's conviction, but reversed his sentence under the authority of Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998). The decision may be found at Seay v. State, Case No. 96-04336 (Fla. 2d DCA February 3, 1999), and is attached as an appendix hereto.

**SUMMARY OF THE ARGUMENT**

This court has discretionary jurisdiction to review the decision of the Second District Court of Appeal rendered in this cause, because the decision expressly and directly conflicts with decisions of the Third District Court of Appeal on the same issue of law.

**ARGUMENT**

**ISSUE**

**THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL ON THE SAME ISSUE OF LAW.**

Article V § 3 (b) (3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (2) (A) (iv) provide that this Court has jurisdiction to review a decision of a district court of appeal which announces a rule of law which expressly and directly conflicts with a decision of another district court of appeal on the same question of law. Petitioner asserts that the decision rendered by the second DCA in the instant case expressly and directly conflicts with decisions of the third DCA as described *infra*.

In 1995 Fla. Laws Ch. 95-182, the Florida legislature amended Florida Statutes Chapter 775.084 (1995) (to define and add enhanced penalties for violent career criminals), and also created Florida Statutes Chapter 790.235 (1995), (which prohibited violent career criminals from possessing firearms/weapons). Both of these amendments are collectively known as the "Officer Evelyn Gort and All Fallen Officers Career Criminal Act of 1995." 1995 Fla. Laws Ch. 95-182, Section 1. ("Sections 2 through 7 of this act may be cited as the "Officer Evelyn Gort and All Fallen Officers Career Criminal Act of

1995").<sup>1</sup>

As to the first half of the amendment, the Second DCA has held that **1995 Fla. Laws Ch. 95-182** was unconstitutional regarding sentencing for offenses which were committed between 10/1/95 and 5/24/97. **Thompson v. State**, 708 So. 2d 315 (Fla. 2d DCA 1998), **rev. granted**, Case No. 92,831 (May 26, 1998).<sup>2</sup> Appellant's offense was committed January 14, 1996. (R2: 149) He was sentenced as a violent career criminal pursuant to **775.084 (4) (c)** on September 5, 1996. (R1: 66-67, 82, 96, 104-05, 112) Both of these dates are within the window period.

However, the Third DCA has addressed the exact same constitutional attack on the statute and has found it to be without merit. **Higgs v. State**, 695 So. 2d 872 (Fla. 3d DCA 1997). Even after the Second DCA rendered its decision in **Thompson**, the Third DCA continues to adhere to its position in **Higgs** and has certified conflict with **Thompson**. See **Linder v. State**, 711 So. 2d 1340 (Fla. 3d DCA 1998); **Holloway v. State**, 712

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<sup>1</sup>Officer Evelyn Gort was an off-duty Metro-Dade police detective who was standing by the car of a friend when Leroy Mitchell approached and robbed them at gunpoint. Mitchell shot and killed Officer Gort during the robbery. Mitchell was charged with first-degree murder and possession of a firearm by a convicted felon. On the first count he was found guilty of the lesser-included offense of manslaughter, a second-degree felony, which was enhanced to a first-degree felony for use of a firearm. He was sentenced to life in prison as an habitual offender. See **Mitchell v. State**, 689 So. 2d 1118 (Fla. 3d DCA 1997), **app. disp.**, 697 So. 2d 511 (Fla. 1997).

<sup>2</sup>Briefing has been completed in the Florida Supreme Court in this state appeal. Oral argument was had November 4, 1998.



So. 2d 439 (Fla. 3d DCA 1998); DuFree v. State, 711 So. 2d 647 (Fla. 3d DCA 1998); Elliard v. State, 714 So. 2d 1218 (Fla. 3d DCA 1998); Almanza v. State, 716 So. 2d 351 (Fla. 3d DCA 1998). In return, the Second DCA has also certified conflict with the Third District. Heggs v. State, 718 So. 2d 263 (Fla. 2d DCA 1998).

In the instant case, the Second DCA reversed Respondent's sentence and remanded for resentencing based upon its decision in Thompson, which has been certified by both the Second and Third DCAs as being in conflict with decisions of the Third DCA on this issue. Therefore this Court has jurisdiction to review the decision of the Second DCA pursuant to **Article V § 3 (b) (3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (2) (A) (iv)**.

**CONCLUSION**

Based on the foregoing facts, argument, and citations to authority, Petitioner respectfully requests that this Court make and render an order finding it has jurisdiction to accept discretionary review of Petitioner's cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
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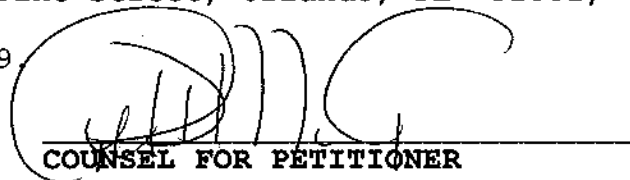


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Terrence E. Kehoe, Esq. Tinker Building, 18 West Pine Street, Orlando, FL 32801, this 16th day of February, 1999.



**COUNSEL FOR PETITIONER**

# Appendix

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

SHAWN SEAY, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
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Case No. 96-04336

Opinion filed February 3, 1999.

Appeal from the Circuit Court for Pinellas  
County; Burton C. Easton, (Senior) Acting  
Circuit Judge.

Terrence E. Kehoe, Orlando, for Appellant.

Robert A. Butterworth, Attorney General,  
Tallahassee, and Angela D. McCravy,  
Assistant Attorney General, Tampa, for  
Appellee.

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PER CURIAM.

Shawn Seay challenges his conviction and sentence as a career criminal for  
an offense occurring on January 6, 1996. We affirm the conviction and reverse for  
resentencing pursuant to Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998).

In Thompson, this court held that chapter 95-182, Laws of Florida, which created career criminal sentencing, is unconstitutional because it violates the single subject rule. Accordingly, based on Thompson, we reverse Seay's violent career criminal sentence and remand for resentencing. Our resolution of this matter makes it unnecessary to address the other sentencing issues.

Affirmed in part, reversed in part, and remanded.

ALTENBERND, A.C.J., and GREEN and SALCINES, JJ., Concur.