IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC05-2122**

LOWER COURT CASE NO. 3D05-1208

STATE OF FLORIDA,

Petitioner,

-vs-

BILL MONROE HEARNS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Florida Statutes

Constitutional Provisions

INTRODUCTION

The Petitioner, State of Florida, was the appellee in the court of appeal and the Respondent, Bill Monroe Hearns, was the appellant. In this brief, the designation "A." refers to the attached appendix, which contains a conformed copy of the decision of the lower court.

STATEMENT OF THE CASE AND FACTS

According to the decision of the Third District, Mr. Hearns was convicted of "unlawful possession of a firearm by a three-time convicted felon." (A. 2).[1] He received a mandatory sentence of life in prison as a violent career criminal (VCC). (A. 2-3). One of the convictions the trial court relied upon to apply VCC sentencing was a 1985 conviction for battery on a law enforcement officer. (A. 3).

Mr. Hearns filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which the trial court denied. (A. 1). On rehearing, the Third District acknowledged that to qualify as a "forcible felony" for VCC sentencing, the crime **must** involve the use or threat of physical force or violence against any individual. (A. 3). The court noted the decision in *Perkins v. State*, 576 So. 2d 1310, 1313 (Fla. 1991), which held that a crime is a "forcible felony"

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[1] Page 1 of the decision shows that the circuit court case number was 98-34265. There is no crime of "unlawful possession of a firearm by a three-time convicted felon" in the 1998 statutes. Section 790.23, Fla. Stat. (1998), prohibits possession of a firearm by a convicted felon, while Section 790.235, Fla. Stat. (1998), prohibits possession of a firearm by a violent career criminal. It is thus not clear from the four corners of the opinion even what crime Mr. Hearns was convicted of.

under section 776.08 only if the statutory elements of the crime necessarily include or encompass the use or threat of physical force or violence. The Third District determined that battery on a law enforcement officer is not invariably a qualified offense for VCC sentencing. (A. 3-4).

The Third District noted that simple battery is a misdemeanor, which becomes a felony because the victim is a law enforcement officer. (A. 4). The battery for which Mr. Hearns was convicted in 1985 could have been accomplished either by an unwanted touching, *see* section 784.03(1)(a), Fla. Stat. (1985), or by intentionally causing bodily harm, *see* section 784.03(1)(b), Fla. Stat. (1985). (A. 4). At the sentencing in 2000, however, the State presented "no record evidence" that the 1985 battery was accomplished by intentionally causing bodily harm as opposed to an unwanted touching. (A. 4). The Third District thus correctly held that Hearns did not qualify for sentencing as a VCC and remanded with directions that Hears be resentenced without VCC enhancement. (A. 4-5).

SUMMARY OF ARGUMENT

Jurisdiction should be declined for a number of reasons. First, there is no express and direct conflict as required by the constitution since this case involves sentencing as a VCC while the cases the State relies upon all involve sentencing as a prison releasee reoffender (PRR).

Second, the pronouncements in those cases that the State relies upon are

either dicta or are based on dicta. Moreover, none of the cases the State relies upon analyze, or even mention, *Perkins.*

Third, and perhaps most important, the decision below correctly applies this Court's holding in *Perkins* and, correctly read, does not conflict with the *dicta* the State relies upon. Contrary to the State's argument, the reference to "record evidence" does not evince a fact-based approach that requires reexamination of the old trial, but merely references a deficiency in the State's proof at the 2000 sentencing proceeding. Had the State produced record evidence that the 1985 conviction was obtained under section 784.03(1)(b), then the sentence could have been upheld. So read, the decision is nothing more than a correct application of this Court's decision in *Perkins.*

Finally, the State speculates that the decision below "will . . . create confusion and thereby foster conflict." That argument, though, is based upon the State's misreading of the decision below and, in any event, is not a proper basis for jurisdiction as the constitution requires there to be an actually existing express and direct conflict, not merely the possibility of some future conflict.

As there is no basis for assuming jurisdiction, the petition should be denied.

ARGUMENT

JURISDICTION SHOULD BE DECLINED AS THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

The State seeks review through conflict jurisdiction. Such jurisdiction may only be invoked when the decision below "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." *See* art. V, § 3(b)(3), Fla. Const. There is no such express and direct conflict here.

First, as the State acknowledges, all of the cases it relies upon involve sentencing as a prison releasee reoffender (PRR), while the instant case involves sentencing as a violent career criminal. (State Br. at 4-5). Whatever conflict there might be, then, it is not express and direct.

Second, the decision below was based on this Court's decision in *Perkins* while none of the five cases relied upon by the State involve any analysis or mention of *Perkins.* Thus, in *Spann v. State*, 772 So. 2d 38 (Fla. 4th DCA 2000), appellant challenged his sentence as a prison releasee reoffender, arguing that there was a double enhancement of his penalty. *Id*. at 39. The holding in *Spann* was as follows:

> In the present case, the legislature made battery, which is ordinarily a misdemeanor, a third degree felony when the victim is a law

> enforcement officer. § 784.07(2)(b). In section 775.082(8)(a)1.o, the legislature authorized increased sentences for defendants who qualify as prison releasee reoffenders and have committed certain felonies. Absent an ambiguity, and there is none here, the imposition of one sentence under the Prison Releasee Reoffender Act is not improper.

Id. Whether battery on a law enforcement officer was a qualifying offense for PRR sentencing was not an issue in that case, so the portion of the opinion finding battery on a law enforcement officer to be a qualifying offense for PRR sentencing is *dicta*. Further, the holding *Perkins* is never mentioned.

In *Brown v. State*, 789 So. 2d 366 (Fla. 2d DCA 2001), the appellant raised several challenges to the Prison Releasee Reoffender Punishment Act, including whether battery on a law enforcement officer was a qualifying offense for PRR sentencing. The holding of the court on this point was as follows:

> The Fourth District has held that battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing. *See Spann v. State*, 772 So. 2d 38 (Fla. 4th DCA 2000). We agree, and we reject Brown's argument on that issue.

The decision does not explain the specifics of appellant's challenge, and the court cited only to *Spann* for support of its holding. Thus, once again, *Perkins* was never mentioned and the holding relies upon *dicta* contained in the earlier decision.

In *Branch v. State*, 790 So. 2d 437 (Fla. 1st DCA 2000), the State cross-appealed a sentence, arguing that the trial could had the authority to impose consecutive PRR sentences. *Id*. at 439. The portion of the opinion the State now

relies upon to argue express and direct conflict is as follows:

> The appellant meets the criteria for classification as a prison releasee reoffender, for within three years of his 1996 release from a D.O.C. state correctional facility, he committed battery on a law enforcement officer, a qualifying offense that falls within the ambit of statutory subsection (8)(a)(1)(o), which includes "]a]ny felony that involves the use or threat of physical force or violence against an individual."

Id. While the decision indicates that the defendant made several challenges to the PRR statute, *id*. at 438-39 he did not challenge whether battery on a law enforcement officer was a qualifying offense. The portion of the opinion just quoted, then, is *dicta*. Also, as in the other cases, *Perkins* is never mentioned in the opinion by the First District in *Branch*.

In *State v. Crenshaw*, 792 So. 2d 582 (Fla. 2d DCA 2001), the State appealed a sentence imposed following a guilty plea, arguing that the trial court had no discretion on whether to impose a PRR sentence once it was shown that the defendant qualified for such sentencing. Crenshaw apparently made alternative arguments to try to uphold his plea, one of which was that the crime of battery on a law enforcement officer was not a qualifying offense for PRR sentencing. The decision on this point was as follows:

> Crenshaw also argues that neither battery on a law enforcement officer nor escape are enumerated offenses under the Act. We disagree. In *Brown v. State*, 789 So. 2d 366 (Fla. 2d DCA 2001), this court held that battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing.

Id. at 583. The decision, then, rested entirely on *Brown*, which, as noted earlier, rested entirely on the *dicta* contained in *Spann*. Again, *Perkins* is never mentioned, much less discussed or applied.

The last case relied upon by the State is *Jenkins v. State*, 884 So. 2d 1014 (Fla. 1st DCA 2004), *review denied*, 898 So. 2d 937 (Fla. 2005) (table) (Case No. SC04-2088). [2] There, the First District opined as follows:

> Finally, we reject appellant's contention that the Prison Releasee Reoffender Punishment Act does not apply to the battery of a law enforcement officer which was proven in this case. *See Branch v. State*, 790 So. 2d 437, 439 (Fla. 1st DCA 2000). . . . In the present case, whatever the rule when the jury fails to find even threatened violence, appellant's "battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing. *See Spann v. State*, 772 So. 2d 38 (Fla. 4th DCA 2000)." *Brown v. State*, 789 So. 2d 366, 367 (Fla. 2d DCA 2001).

Id. at 1016. The decision in *Jenkins*, then, relies exclusively upon the other decisions already discussed, with no independent analysis. As in those other decisions, there is no mention of *Perkins*.[3] In contrast, the decision below properly analyzed and applied the holding in *Perkins*. There is no express and direct

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[2] The State also cites to *Robinson v. State*, 751 So. 2d 737 (Fla. 1st DCA 2000), *approved in part*, 793 So. 2d 891 (Fla. 2001), but that case only involved a challenge to the constitutionality of the PRR Act, so clearly cannot provide the basis for express and direct conflict jurisdiction here. Presumably, the State cited to *Robinson* only because it appears in Judge Ervin's concurring and dissenting opinion in *Jenkins*.

[3] A review of the jurisdictional briefs submitted in *Jenkins* (Case No. SC04-2088) shows that *Perkins* was not argued there, either.

conflict when the case below is based upon a holding of this Court which is never discussed in the alleged conflict cases.

A third reason to decline jurisdiction is that the State simply misreads the decision below. According to the State,

> "it is quite evident that the Third District in the instant case used a fact-based approach in reaching its decision that Hearns' prior conviction for battery on a LEO was not a forcible felony for VCC sentencing purposes. Indeed, the district court came to this conclusion due to the fact that the State had not shown with 'record evidence that Hearns' conduct against a law enforcement officer was a forcible felony.'"

(State Br. at 7). In fact, the decision below correctly acknowledges that *Perkins* requires an offense to include or encompass the use or threat of physical force or violence as a necessary element before it can be considered a "forcible felony." The opinion also correctly acknowledges that battery on a law enforcement officer is not <u>invariably</u> a qualified offense for VCC sentencing as it can be accomplished by a mere unwanted touching, in violation of section 784.03(1)(a) [which would not be a qualifying offense], or by intentionally causing bodily harm, in violation of section 784.03(1)(b) [which would be a qualifying offense]. (A. 3-4).

The "record evidence" referred to in the decision below, then, is not a delving into the facts behind the 1985 conviction of battery on a law enforcement officer as the State seems to think; it is instead a reference to the record evidence **presented at the sentencing hearing in 2000.** If the State had shown through the

verdict form that the 1985 conviction was obtained under section 784.03(1)(b), then the enhanced VCC sentence would have been proper. However, absent such evidence, it wasn't shown that the statutory elements of the crime necessarily encompassed the use or threat of physical force or violence. Therefore, applying *Perkins*, the Third District correctly held that the sentence had to be reversed.[4] The Third District's proper application of this Court's holding in *Perkins* provides no basis for express and direct conflict jurisdiction.

Finally, the State argues that the decision's reference to "record evidence" of "Hearns' conduct" will "serve to create confusion and thereby foster conflict or, at least, inconsistency among the district courts of appeal." (State Br. at 7-8). This argument again manifests a misunderstanding of the actual holding below, which refers to the record evidence presented (or not presented) at the 2000 sentencing hearing and not to a review of the entire 1985 case. Further, the State appears to implicitly acknowledge by this argument that there is no **present** conflict to be cleared up, only possible future conflict. Absent an actual express and direct conflict, however, jurisdiction is not constitutionally appropriate. The State could have sought clarification or rehearing in the lower court. Seeking jurisdiction in this Court when there is no basis for doing so is not an appropriate substitute for a

[4] The analysis by the Third District is similar to the analysis by Judge Ervin, concurring in part and dissenting in part, in *Jenkins*, 884 So. 2d at 1017.

motion for rehearing or clarification in the lower court.

CONCLUSION

For the foregoing reasons, jurisdiction should be declined as the decision below does not expressly and directly conflict with any other decision of another court of appeal or of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on Jurisdiction was delivered by hand to Richard Polin and Douglas Glaid, Assistant Attorneys General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on January 13, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

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