IN THE SUPREME COURT OF THE STATE OF FLORIDA,

JERMAINE THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC06-1630

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the appellant and Respondent was the appellee in the Florida Fourth District Court of Appeal. The issue on appeal is whether the District Court erred when it affirmed Petitioner's sentence "because the PRR statute allows for the imposition of a PRR sentence for one of the enumerated felonies *or* under section 775.082(9)(a)1.o. for '[a]ny felony that involves the use or threat of force or violence against an individual' and the evidence adduced at trial was to the effect that the victim and the defendant struggled over the victim's purse and the defendant essentially dragged or pulled the victim toward the rear of the car."

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

JB = Petitioner's Initial Brief on Jurisdiction

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts insofar as it represents an accurate, objective and non-argumentative recitation of the facts and procedural history of this case. A copy of the Fourth District Court of Appeal's decision is attached hereto for the convenience of this Court.

SUMMARY OF THE ARGUMENT

In State v. Hearns, SC05-2122, the State argues that the statutory test rather than the underlying-fact test should be applied in determining whether a felony is one that "involves the use or threat of physical force or violence against an individual." This is, of course, the same argument that is presented by Petitioner in the case at bar. Oral argument in Hearns is scheduled for November 4, 2006.

In view of the State's position in State v. Hearns, SC05-2122, and the fact that the issue has been briefed and oral argument is scheduled, this Court should accept jurisdiction of this case and take no further action until Hearns is decided.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT; THE ISSUE INVOLVED IS IDENTICAL TO THE ISSUE IN STATE V. HEARNS, WHICH IS CURRENTLY UNDER REVIEW BY THIS COURT; THE COURT SHOULD ACCEPT JURISDICTION AND TAKE NO FURTHER ACTION UNTIL HEARNS IS DECIDED.

Petitioner was convicted of the crime of robbery by sudden snatching. Section 775.082 provides that a person who commits certain felonies within three years after being released for a state correctional facility may be sentenced as a prison releasee reoffender. Although robbery by sudden snatching is not one of the enumerated felonies under the statute, trial court found that Petitioner's actions brought him within the ambient of section 775.082(9)(a)1.o., a "catch-all" provision which provides that a PRR sentence may be imposed for "[a]ny felony that involves the use or threat of physical force or violence against an individual. The Florida Fourth District Court of Appeal affirmed Petitioner's conviction and sentence in the following language:

> "We did not affirm Thomas' PRR sentence for the crime of "robbery by sudden snatching" under the rationale that "robbery by sudden snatching" is the equivalent of the

> enumerated crime of "robbery" under section 775.082(9)(a)1.g. Rather, we affirmed the sentence because the PRR statute allows for the imposition of a PRR sentence for one of the enumerated felonies *or* under section 775.082(9)(a)1.o. for "[a]ny felony that involves the use or threat of force or violence against an individual" and the evidence adduced at trial was to the effect that the victim and the defendant struggled over the victim's purse and the defendant essentially dragged or pulled the victim toward the rear of the car.

Thomas v. State, 4D04-3143, at page 2.

Petitioner asks this Court to use its power of discretionary jurisdiction to review the decision of the Florida Fourth District Court of Appeal, and argues that "the definition of a forcible felony as one that 'involves the use or threat of physical force against any individual' can only be based upon the actual statutory elements of the crime itself rather than the facts of a particular case."

In State v. Hearns, SC05-2122, presently before this Court, the State raises the same argument as the Petitioner does in the case at bar. It appears that the holding of Perkins v. State, 576 So.2d 1310 (Fla. 1991) mandates an interpretation

of "involves" that is in conflict with the holding at bar. In its brief the State said:

> Until this case [Hearns], it appears that the courts have generally taken an element-based approach to this issue, apparently due to this Court's decision in Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991), where this Court interpreted the term "involves" in the "catch-all" provision of the forcible felony statute, s. 776.08, Fla. Stat., to mean that "the statutory elements of the crime itself must include or encompass conduct of the type described. The Court therefore concluded that a "forcible felony" is a felony "whose statutory elements include the use or threat of physical force or violence against any individual." Id. In accordance with this thinking, the Third District in Hudson v. State, 800 So. 2d 627 (Fla. 3d DCA 2001) (special concurring opinion of Chief Judge Schwartz adopted on rehearing as opinion of the court), clarified that to qualify as a forcible felony under s. 776.08, the crime, "**by statutory definition**, [must] necessarily involve physical force or violence against an individual." Id. at 629. The district court, speaking through then Chief Judge Schwartz, also suggested

that this rule would apply "no matter what the underlying facts or jury finding" are relating to the crime. Id. at 628.

In stark contrast to the statutory element test referred to above, 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 v. Hearns, Petitioner's Jurisdictional Brief, at pages 6-7

The State then argued that the statutory test rather than the underlying-fact test should be applied in determining whether a felony is one that "involves the use or threat of physical force or violence against an individual." This is, of course, the same argument that is presented by Petitioner in the case at bar.

In view of the State's position in State v. Hearns, SC05-2122, and the fact that the issue has been briefed and oral argument is scheduled, this Court should accept jurisdiction of this case and take no further action until Hearns is decided.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully submits this Court should accept jurisdiction of this case and take no further action until State v. Hearns, SC05-2122, is decided.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" was sent by courier to TOM WM. ODOM, Esq., Assistant Public Defender, 421 Third Street/6th Floor, West Palm Beach, FL 33401 and by e-mail to appeals@pd15.state.fl.us on September 12, 2006.

_____
JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent/Appellee hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

_____
JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Respondent

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APPENDIX

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