

**IN THE
SUPREME COURT OF FLORIDA**

JERMAINE THOMAS,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. SCO6-1630
)	(D.C.A. CASE NO. 4D04-3143)
STATE OF FLORIDA,)	
)	
Respondent.)	
_____)	

PETITIONER-S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	ii
AUTHORITIES CITED	iv
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT	4

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THOMAS V. STATE, 933 So.2d 45 (Fla. 4th DCA 2006), WHERE THE DECISION RENDERED IS IN EXPRESS AND DIRECT CONFLICT WITH THAT OF THIS COURT ON THE SAME POINT OF LAW.....	5
CONCLUSION.....	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF FONT COMPLIANCE	10

AUTHORITIES CITED

<u>CASES CITED</u>	<u>PAGE</u>
<i>Aguilera v. Inservices</i> , 905 So.2d 84 (Fla. 2005)	5
<i>Carpenter v. State</i> , 785 So.2d 1182 (Fla. 2001)	7
<i>Cohen v. State</i> , 920 So.2d 682 (Fla. 2d DCA 2006)	2, 3
<i>Dautel v. State</i> , 658 So.2d 88 (Fla. 1995)	7
<i>Kincaid v. World Insurance Co.</i> , 157 So.2d 517 (Fla. 1963)	6
<i>Nielson v. City of Sarasota</i> , 117 So.2d 731 (Fla. 1960)	5
<i>Perkins v. State</i> , 576 So.2d 1310 (Fla. 1991)	7
<i>Riggs v. State</i> , 918 So.2d 274 (Fla. 2005)	5
<i>Robinson v. State</i> , 692 So.2d 883 (Fla. 1997)	6
<i>Smith v. State</i> , 891 So.2d 1133 (Fla. 4 th DCA 2005)	2, 3
<i>Thomas v. State</i> , 933 So.2d 45 (Fla. 4 th DCA 2006)	2-4, 6, 8

FLORIDA CONSTITUTION

Article V, ' 3(b)(3) 5

FLORIDA STATUTES

Section 316.1935(2) 2
Section 775.082(9)(a)12, 6, 7
Section 776.08..... 7
Section 812.131(1) & (2)(b)..... 2

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 9.030(a)(2)(A)(iv)..... 5

PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and for Broward County, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before the Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of robbery by sudden snatching contrary to ' 812.131(1) & (2)(b), *Fla. Stat.* (2002) and aggravated fleeing and eluding contrary to ' 316.1935(2), *Fla. Stat.* (2002) and sentenced to mandatory minimum prison terms pursuant to the prison releasee reoffender (PRR) statute. *Thomas v. State*, 933 So.2d 45 (Fla. 4th DCA 2006); *see* ' 775.082(9)(a)1., *Fla. Stat.* (2002) (enumerating felonies qualifying defendants for PRR status). Petitioner sought review in the Fourth District Court of Appeal arguing, among other things, that the trial court erred in sentencing him under the PRR statute. *Thomas*, 933 So.2d at 46. The Fourth District Court affirmed petitioner's convictions and sentences in all respects, but for petitioner's PRR sentence for aggravated fleeing and eluding, which it reversed because aggravated fleeing and eluding is not one of the enumerated felonies in the PRR act or a felony that involves the use or threat of physical force or violence against an individual. *Id.*, citing ' 775.082(9)(a)1., *Fla. Stat.* (2002).

Petitioner sought rehearing before the Fourth District Court, contending that the Court had overlooked its prior decision in *Smith v. State*, 891 So.2d 1133 (Fla. 4th DCA 2005) as well as the Second District's decision in *Cohen v. State*, 920 So.2d 682 (Fla. 2d DCA 2006). *Id.*, at 47. (Both *Smith* and *Cohen* hold that robbery by sudden snatching, unlike robbery, is not an enumerated offense qualifying defendants for PRR sentencing. *Smith*, 891 So.2d at 1133; *Cohen*, 920 So.2d at 682). The Fourth District denied

petitioner's motion for rehearing, explaining that it affirmed petitioner's PRR sentence for robbery by sudden snatching

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) i.o. for **A**[a]ny felony that involves the use or threat of physical force or violence against an individual¹ 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 her car.

Thomas, 933 So.2d at 47. (Emphasis in original). On August 9, 2006, petitioner filed notice of intent to invoke the discretionary jurisdiction of this Court, asserting that the District Court's decision in this case was in express and direct conflict with the decisions of this Court. This jurisdictional brief now follows.

SUMMARY OF THE ARGUMENT

This Court may properly review the decision of a district court that is in direct and express conflict with a decision of this Court. The Fourth District's ruling in *Thomas* allows appellate courts, when deciding whether an offense qualifies a defendant for an enhanced sentence pursuant to the PRR statute, to consider the underlying facts of a particular case rather than its statutory elements to determine if it is a felony that involves the use or threat of physical force or violence. This ruling is inconsistent with prior decisions by this Court which require the courts to examine only the statutory elements of a crime to determine if it is a felony suitable to enhance a penalty. The *Thomas* opinion is in conflict with the specific ruling of this Court in *Perkins* that the courts may look only to the statutory elements of an offense to decide if it is a felony which involves the use or threat of physical force or violence against any individual.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THOMAS V. STATE, 933 So.2d 45 (Fla. 4th DCA 2006), WHERE THE DECISION RENDERED IS IN EXPRESS AND DIRECT CONFLICT WITH THAT OF THIS COURT ON THE SAME POINT OF LAW.

Article V, ' 3(b)(3) of the Florida Constitution vests this Court with jurisdiction to hear appeals in criminal cases as follows:

(3) May review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Accord Fla. R. App. P. 9.030(a)(2)(A)(iv). In Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960), this court discussed a conflict jurisdiction@ stating:

the principal situation justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflict are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a case disposed of by this Court.

Id., at 734; *accord Aguilera v. Inservices, 905 So.2d 84 (Fla. 2005); Riggs v. State, 918 So.2d 274 (Fla. 2005). A*The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents.@ *Kincaid v. World Insurance Co., 157 So.2d 517, 518 (Fla. 1963). The*

decision rendered by the Fourth District Court of Appeal gives rise to a form of conflict jurisdiction.

The rule of *Thomas* as enunciated by the Fourth District allows appellate courts to look beyond the statutory elements of an offense to the actual facts of the case to determine if the crime is a felony that involves the use or threat of physical force or violence against an individual. § 775.082(9)(a), *Fla. Stat.* (2002). This catch-all provision of the PRR statute allows a defendant to be sentenced under the enhanced penalties of PRR even though he has not been convicted of one of the enumerated felonies. Robbery by snatching is not an enumerated felony under the PRR statute and, prior to *Thomas*, no court has held that robbery by snatching could be a crime involving the use or threat of physical force or violence. But whether a felony involves the threat or use of violence must be determined by the elements of the felony and not the actual facts of an individual case. In analogous circumstances, this Court has ruled that whether a prior offense qualifies as a predicate for enhanced sentencing is a question of law to be determined by its statutory definition, not the actual facts. *See Robinson v. State*, 692 So.2d 883 (Fla. 1997) (Georgia conviction for robbery by sudden snatching was not a felony for purposes of establishing a prior felony for habitual offender sentencing; determination made by reference to statutory elements, not actual facts.) *See also Carpenter v. State*, 785 So.2d 1182 (Fla. 2001) (statutory elements of gross misdemeanor conviction in Nevada does not constitute felony in Florida for purposes of establishing

aggravating circumstance in penalty phase of murder trial); *Dautel v. State*, 658 So.2d 88 (Fla. 1995) (only the elements of out-of-state crime, not underlying facts, may be considered in determining whether prior conviction is analogous to Florida crime for purposes of calculating guidelines sentence).

Perhaps more germane to petitioner's argument is the case of *Perkins v. State*, 576 So.2d 1310 (Fla. 1991), where this Court held that cocaine trafficking is not a forcible felony, even though violence often accompanies drug trafficking and certainly violence occurred during the commission of Perkins's offense. Because criminal statutes must be strictly construed, the definition of a forcible felony as one that involves the use or threat of physical force or violence against any individual can only be based upon the actual statutory elements of the crime itself rather than the facts of a particular case. *Id.*, at 1313. Petitioner would note that the language of the catch-all provision of the PRR statute precisely mirrors that of the forcible felony statute, namely any other felony which involves the use or threat of physical force or violence against any individual. Compare § 776.08, *Fla. Stat.* (2002) with § 775.082(9)(a)1.o., *Fla. Stat.* (2002). A conviction for robbery by sudden snatching does not require proof of a statutory element involving the use or threat of physical force or violence against an individual and hence a conviction for this felony should not be used to enhance a criminal penalty. The decision of the Fourth District Court of Appeal in *Thomas* brings confusion to the law regarding whether a trial court judge must impose a minimum mandatory sentence pursuant to the

PRR statute upon a defendant's conviction for robbery by sudden snatching.

CONCLUSION

Petitioner has demonstrated the existence of express and direct conflict and, as a result, this Court should grant the petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joseph Tringali, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 this ____ day of August, 2006.

Attorney for appellant

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

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Attorney for Jermaine Thomas

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INDEX TO APPENDIX

1. Decision Denying Motion for Rehearing
 Filed July 12, 2006.....1-4
2. Decision Filed May 17, 2006.....5-6

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