

IN THE SUPREME COURT OF THE STATE OF FLORIDA

HORACE MCKINNEY,

Petitioner,

v.

S. Ct. Case No.

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted after jury trial on grand theft and robbery with a firearm which arose from the single taking of cash and a cell phone at gunpoint. Petitioner appealed to the Fifth District of Appeal and argued that the dual convictions violated his protection against double jeopardy. The Fifth District Court of Appeal disagreed and affirmed on the basis of this Court's decision in *Valdes v. State*, 3 So.3d 1067 (Fla. 2009). In doing so, the Fifth District expressly and directly certified conflict with *Shazer v. State*, 3 So.3d 453 (Fla. 4th DCA 2009), which held directly to the contrary. Petitioner timely filed his Notice to Invoke the Jurisdiction of this Court based on the certification of express and direct conflict.

SUMMARY OF THE ARGUMENT

The Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal. Jurisdiction of the Florida Supreme Court is invoked pursuant to *Fla. R. App. P. 9.030(a)(2)(A)(vi)*. The district court certified its decision to be in conflict with *Shazer v. State*, 3 So.3d 453, (Fla. 4th DCA 2009), which does directly conflict with the instant decision by holding that it is a violation of double jeopardy to convict for both robbery and grand theft of the same property.

ARGUMENT

THIS COURT HAS JURISDICTION TO RESOLVE
THE CONFLICT BETWEEN THE FIFTH DISTRICT
COURT OF APPEAL IN THE INSTANT CASE AND
THE FOURTH DISTRICT COURT OF APPEAL IN
SHAZER V. STATE.

Whether this Court has jurisdiction to accept the instant case for review is a question of law. Under *Florida Rules of Appellate Procedure 9.030(a)(2)(A)(vi)*, this Court is vested with jurisdiction to resolve a decision of a district court of appeal which certifies it to be in conflict with a decision of another district court of appeal. In the instant case, Appellant argued that dual convictions for grand theft and robbery which arose from a single taking of property violated the protection against double jeopardy. The Fifth District Court of Appeal acknowledged that prior precedent supported this conclusion but felt that this Court had abrogated that precedent in *Valdes v. State*, 3 So.3d 1067 (Fla. 2009). In that case, this Court held that Section 775.02(4)(b)(2) was intended to apply narrowly and prohibited separate punishments only when a criminal statute provides for variations in degree of the same offense such as the death statute or the homicide statute. Therefore, the Fifth District construed this holding to mean that since robbery is not a degree of theft nor was theft a degree of robbery, the dual convictions do not violate the description against double jeopardy. Following this Court's decision in *Valdes*, the Fourth District issued its opinion in *Shazer v. State*, 3 So.3d 453 (Fla. 4th DCA

2009), wherein it held that Shazer's dual conviction for robbery with a deadly weapon and grand theft violated his double jeopardy rights because same property formed the basis for both convictions. In so doing, the Fourth District relied on a prior case from their court, *Ingram v. State*, 928 So.2d 1262 (Fla 4th DCA 2006). The Fourth District does not discuss *Valdes* in its opinion. Petitioner believes that the analysis of the Fourth District is the correct analysis thus creating a clear conflict among the district courts of appeal. The two cases simply cannot be reconciled. This Court clearly has jurisdiction to accept the instant case for review.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, the petitioner respectfully requests that this Honorable Court to exercise its jurisdiction and accept the instant case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: Office of the Attorney General and mailed to Horace McKinney, DOC #X62050, Franklin Correctional Institute, 1760 Highway 67 North, Carrabelle, FL 32322, on this ____ day of January, 2010.

JAMES R. WULCHAK FOR:

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

JAMES R. WULCHAK FOR:

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER