IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-690

CHARLES PAUL,

Petitioner,

v. L.T. Nos. 4D09-2255
02-8513CF10A

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW OF THE FOURTH DISTRICT COURT OF APPEAL'S DECISION CERTIFYING CONFLICT

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STATEMENT OF THE CASE AND FACTS

Petitioner (Defendant below), Charles Paul ("Paul"), seeks review of a post-conviction motion regarding an enhanced sentence under the catch-all provision of the prisoner release reoffender 1("PRR") statute, Florida Statutes section 775.082(9)(a)1.o. (2001). The Petitioner was pro se during the appeals process and the post-conviction motion set forth his offense of shooting into an occupied vehicle in violation of Florida Statute section 790.19 (2001). The Fourth District Court of Appeal affirmed the lower court by holding the Petitioner's offense necessarily included the use of force or violence against an individual because in order to commit a violation of section 790.19 a vehicle must be occupied. However, the Fourth District also recognized and certified conflict with the First District Court of Appeals decision in *Crapps v. State, 968* So.2d 627 (Fla. 1st DCA 2007).

The First District's decision held that the offense of throwing a deadly missile into a vehicle did not qualify under the catch-all provision of the PRR statute because the use or threat of physical force or violence against an individual was not a necessary element of the offense as reiterated by this Court in *State v. Hearns,* 961 So.2d 211 (Fla. 2007). Petitioner finds the First District opinion to be well reasoned and correct and accordingly requests this Court to reverse the

decision of the Fourth District Court of Appeal and remand this action to the trial court for a new resentencing hearing.

I. Disposition Below

By order dated April 30, 2009, the trial court denied Paul's Motion for Post-Conviction Relief. (R. 2). Paul was convicted of violating section 790.19, Florida Statutes (2001). (R.6) According to Paul's own motion, he violated this statute by shooting into an occupied vehicle. (R.6) At his sentencing hearing, Paul's conviction was treated as a qualifying felony conviction under the PRR statute and he was sentenced to fifteen (15) years imprisonment. (R.6) Paul subsequently appealed the denial of his post-conviction motion to the Fourth District Court of Appeal.

On March 16, 2011, the Fourth District Court of Appeal issued its opinion by which it affirmed the lower court's denial of Paul's post-conviction motion. *Paul v. State,* 59 So.3d 193 (Fla. 4th DCA 2011). The Fourth District began by noting that Paul was convicted in the lower court under Florida Statutes section 790.19 (2001), "of shooting into an occupied vehicle and sentenced as a prison release reoffender (PRR)." *Id.* at 194. The issue the Court addressed was whether Paul's offense qualified within the forcible felony catch-all provision of the PRR statute. § 775.082(9)(a)1 .o., Fla. Stat. (2001). The Fourth District's analysis included the reasoning and interpretation that the Petitioner's offense "necessarily

includes the use of force or violence against an individual ... (t)o commit a violation of section 790.19, a vehicle *must be occupied." Id.* Consequently, the Fourth District affirmed the trial court's order denying Paul's post-conviction motion. *Id.*

Thereafter, the Court recognized and certified that its decision conflicted with the First District Court of Appeal's decision in *Capps v. State,* 968 So.2d 627 (Fla. 1st DCA 2007). *Id.* No brief was filed on behalf of the State of Florida in the Fourth District decision. *Id.* at 193.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred when it determined that the Petitioner's offense qualified for sentencing under the PRR statute and therefore should be reversed and remanded to the lower court for a new sentencing hearing. This Court has made clear in *Hearns,* and its predecessor *Perkins,* "in determining whether a crime constitutes a forcible felony, courts must consider only the statutory elements of the offense, regardless of the particular circumstances involved." *State v. Hearns,* 961 So.2d 211, 212 (Fla. 2007); *see also Perkins v. State,* 576 So.2d 1310, 1313 (Fla. 1991). The Fourth District incorrectly applied the statutory analysis test by not acknowledging the plain meaning Florida Statute section 790.19, which included necessary statutory elements that did not require the use of force or violence against an individual. § 790.19, Fla. Stat. (2001);

Hearns, 961 So.2d at 215-16. In addition, contrary to existing Florida case law, the Fourth District interpreted the catch-all provision of the PRR statute to include the offense of shooting into an occupied vehicle. *See Crapps v. State,* 968 So.2d 627 (Fla. 1st DCA 2007). For these reasons, more fully set forth below, Petitioner respectfully requests the Fourth District's decision be reversed and remanded to the trial court for a new sentencing hearing.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

The Fourth District Court of Appeal's decision denying Petitioner's motion for post-conviction relief involves an issue of law which is reviewed *de novo* by this Court. *See Willard v. State, 22* So.3d 864 (Fla. 4th DCA 2009) (noting motions to correct sentencing errors involve `purely legal issues' and are therefore reviewed *de novo); see also Daniels v. Dep 't of Health,* 898 So.2d 61, 64 (Fla. 2005) (indicating statutory interpretation is a matter of law and subject to *de novo* review).

II. THE FOURTH DISTRICT COURT OF APPEAL WAS IN ERROR WHEN IT DETERMINED THAT THE PETITIONER'S OFFENSE QUALIFIED FOR SENTENCING UNDER THE CATCH-ALL PROVISION OF FLORIDA STATUTE SECTION 775.082(9)(a)1.

The Petitioner's conviction of shooting into an occupied vehicle should not have been subject to the sentencing provisions of the PRR statute because the Fourth District incorrectly interpreted the statute. Under the statutory analysis put

forth by this Court in *Hearns,* and its predecessor *Perkins,* this Court has made clear in determining whether an offense is a forcible felony, only the statutory elements of the offense are to be considered. The Fourth District did not do this, therefore, its decision should be reversed and remanded to the trial court for a new sentencing hearing.

A. **<u>The Fourth District Court of Appeal erred when it misapplied the statutory elements analysis mandated by *Hearns* and did not follow the rule of strict construction.</u>**

The Fourth District incorrectly used the statutory analysis test in *Hearns,* to support its reasoning in affirming the denial of Petitioner's post-conviction motion. *Paul v. State,* 59 So.3d 193, 194 (Fla. 4th DCA 2011). In *Hearns,* this Court noted that the VCC statute and the PRR statute contained the exact same words, i.e. "any felony that involves the use or threat of physical force or violence against an individual." *State v. Hearns,* 961 So.2d 211, 217 (Fla. 2007). Therefore, the Court determined that when the Legislature uses the exact same words or phrases in different statutes, it is assumed it meant the same meaning applied. *Id.;* citing *Goldstein v. Acme Concrete Corp., 103* So.2d 202 (Fla. 1958). In addition, "in determining whether a crime constitutes a forcible felony, courts must consider only the statutory elements of the offense, regardless of the particular circumstances involved." *Hearns,* 961 So.2d at 212. "If the use or threat of physical force or violence against any individual is not a necessary element of the crime, then the crime is not a forcible felony..." *Id.*

at 216; quoting *Perkins, 576* So.2d at 1313. In contrast to the First District, the Fourth District erred because it failed to follow *Hearns'* strict statutory elements analysis when it interpreted Petitioner's offense as "necessarily includ[ing] the use of force or violence against an individual." *Paul, 59* So.3d at 194.

Florida Statutes section 790.19 (2001) states:

> Whoever, wantonly, or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or <u>unoccupied,</u> or public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being <u>used</u> or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree.
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> *§* 790.19, Fla. Stat. (2001)(emphasis added).

The plain meaning of the statute can allow an offense to occur in two ways without force or violence against an individual, i.e. a shooting into an unoccupied building and shooting into a vehicle that is being used, but not occupied. Courts that have analyzed the statute concerning the offense of shooting into a building, or car, pursuant to *Perkins* and *Hearns,* have not found forcible felonies or enhancement under the PRR statute because the elements of the statute do not necessitate the use or threat of physical force or violence against any individual. *Crapps v. State, 968* So.2d 627 (Fla. 2007); *Paul v. State,* 958 So.2d 1135 (Fla. 4th DCA 2007); *Hudson*

v. State, 800 So.2d 627 (Fla. 3d DCA 2001). Consequently, the Fourth District was in error when it read into the statute that in order for a violation under section 790.19 to occur, a vehicle must be occupied.

Notably, there are two ways under section 790.19 that a person may be convicted without the offense qualifying as a forcible felony. § 790.19, Fla. Stat. (2001). The legislature directs that shooting into a building is an offense, whether it is occupied or unoccupied. *Id.* Therefore, an individual shooting into an unoccupied building could be convicted of the offense without there being physical force or violence against an individual involved. Hence, the statutory elements analysis under *Hearns* mandates that a conviction under section 790.19 does not qualify under the catch-all provision of the PRR statute.

Second, the legislature states that shooting into a vehicle which is being used or occupied is a violation of the statute. *Id.* There are many ways in which a vehicle can be "in use" without it being occupied, i.e. a drive thru car wash; a trip to the grocery store (where the vehicle remains in the parking lot); using a vehicle as a boundary or to block traffic, etc. Merriam Webster's Dictionary defines "use" as "the privilege or benefit of using something" and the example given is: "<gave him the [use] of her car>". Webster's Ninth New Collegiate Dictionary (1988). Therefore, a person shooting into a vehicle which is "being used," would not qualify as a forcible felony as there would be no use of physical force or violence against an individual. As the legislature gave the alternative of buildings being occupied or unoccupied, it

follows that it also gave the same meaning to the alternative of a vehicle being used or occupied as well. Consequently, a conviction under section 790.19 of shooting into a vehicle would not qualify as a forcible felony for purposes of sentencing enhancement under the PRR statute.

It is precisely this language "or vehicle of any kind which is being used or occupied by any person" that the Fourth District selectively misinterpreted to carve out the exception it relied on in making its decision. *Id.; see Paul v. State, 59* So.3d 193, 194 (Fla. 4th DCA 2011). The Fourth District argues incorrectly that for a violation to occur under section 790.19, the vehicle must be occupied. *Paul, 59* So.3d at 194. As stated above, a vehicle does not have to be occupied to be "in use" or "being used." Therefore, the Fourth District's interpretation of section 790.19, in which it stated in order for a violation under the statute to occur a vehicle must be occupied, was in error. *Paul,* 59 So.3d at 194. Furthermore, the statutory analysis mandated by *Hearns* determines that a violation of section 790.19 can occur without using force or violence against an individual and does not qualify for sentencing enhancement under the catch-all provision of the PRR statute, as recognized in the First District's decision in *Crapps v. State,* 968 So.2d 627 (Fla. 1" DCA 2007).

In addition, the Petitioner finds *Perkins* relevant as well. While the Fourth District cited to *Hearns* in its opinion, it did not discuss *Perkins,* its predecessor. *Perkins v. State,* 576 So.2d 1310 (1991). In *Perkins,* the Florida Supreme Court

examined whether cocaine trafficking was a `forcible felony' for purposes of deciding whether self-defense was available to the defendant. *Perkins v. State, 576* So.2d 1310, 1311 (Fla. 1991). The lower court ruled that the defense was available, however, the Third District held that cocaine trafficking "inherently involves a propensity to violence" and therefore qualified as a forcible felony which would not allow the claim of self-defense. *Id.* at 1312. This Court noted that a fundamental principal of Florida criminal statutes is that they must be strictly construed and must state precisely what is prohibited. *Id.* "Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute." *Id.* Hence, "to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused." *Id.;* citing *Palmer v. State,* 438 So.2d 1, 3 (Fla. 1983); *Ferguson v. State,* 377 So.2d 709 (Fla. 1979). This Court also recognized that the rule of strict construction was codified within the Florida Criminal Code.' *Perkins* at 1312-1313. In quashing the Third District's decision this Court reasoned that "vagueness must be construed strictly, in the manner most

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"The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1987).

most favorable to the accused," therefore, cocaine trafficking was not a `forcible felony' whose statutory elements included the use or threat of physical force or violence against an individual. *Id.* at 1313-14.

As the afore-mentioned cases and discussion have shown, the Fourth District incorrectly interpreted Petitioner's offense as a forcible felony that qualified under the sentencing enhancement of the PRR statute, and should therefore be reversed and remanded.

B. The Fourth District Court of Appeal Certified Conflict with *Crapps v. State*, 968 So.2d 627 (Fla. 1st DCA 2007).

The Fourth District Court of Appeal also recognized and certified conflict with the decision of the First District Court of Appeal in *Crapps v. State,* 968 So.2d 627 (Fla. 1" DCA 2007). In *Crapps,* the First District Court of Appeal held that the offense of throwing a deadly missile into an occupied vehicle was not a qualifying offense for sentencing under the PRR statute "catch-all" provision. *Crapps v. State,* 968 So.2d 627-28 (Fla. 1" DCA 2007); § 775.082 (9)(a)l.o., Fla. Stat. (2005). In the lower court, the defendant had been convicted and sentenced under the PRR statute for throwing a deadly missile into an occupied vehicle. *Id.* at 627. In supporting the reasoning for its decision, the First District relied on *Paul v. State,* 958 So.2d 1135 (Fla. 4th DCA 2007) (holding the offense of shooting into a dwelling did not qualify under the catch-all provision of the PRR statute); *Hudson v. State,* 800 So.2d 627

(Fla. 3d DCA 2001) (holding that the offense of shooting into a hotel lobby was not a forcible felony for enhanced sentencing under the VCC statute which contains the same language as the PRR statute); and *State v. Hearns,* 961 So.2d 211 (Fla. 2007). Petitioner urges this Court to adopt the reasoning and holding in *Capps,* which is advocated to be the more well reasoned and accurate decision. In addition, Petitioner requests this Court to reverse and remand the Fourth District's decision to the trial court for a new resentencing hearing.

CONCLUSION

Therefore, for the foregoing reasons, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal with instructions to remand the proceedings to the trial court for a new sentencing hearing.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail, to **Joseph Albert Tringali, Esquire** and **Consiglia Terenzio, Esquire,** Office of the Attorney General's Office, 1515 N. Flagler Drive., Suite 900, West Palm Beach, FL 33401., Attorneys for Respondent, this _______________ day of September, 2011.

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I certify that the lettering in this brief is Times New Roman 14 point Font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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ATTORNEY

PAUL v. STATE OF FLORIDA

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CASE NO.: SCI 1-690

NO.	INDEX TO APPENDIX
1	The decision of the Fourth District Court of Appeal of Paul v. State of Florida, No. 4D09-2255 on March 16, 2011

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT .
January Term 2011

CHARLES PAUL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D09-2255

[March 16, 2011]

PER CURIAM..

We afflini. the trial court's denial of appellant's untimely and successive postconviction motion. Although appellant raised a claim of an illegal sentence in his motion, which could have been considered under Rule 3.800(a), that claim was rejected on direct appeal and lacks merit.

Appellant was convicted under . section 790.19, " Florida Statutes (2001),. of shooting into an occupied vehicle and sentenced as a prison releasee reoffender (PRR). He again argues that his offense does not qualify under the forcible felony catch-all provision of the PRR statute. § 775.082(9)(a)1.o.., Fla. Stat. (2001) (providing that the provisions of the PRR statute may apply to those convicted of "[a]ny felony that involves" the use or threat of physical force or violence against an individual").

Applying the strict statutory elements analysis required by *State v. Hearns,* 961 *So.* 2d 211 (Fla. 2007), this offense *necessarily* includes the use of force or violence against an individual. To commit a violation of section 790.19, a vehicle *must be occupied. This* case is distinguishable from *Paul v. State,* 958 So. 2d 1135, 1136-38 (Fla. 4th DCA .2007), and *Hudson v. State, 800* So. 2d 627 (Fla. 3d DCA. 2001), which involved shooting into a building. Under section 790.19, a building may be occupied or unoccupied. A conviction under that aspect of the statute does not necessarily require the use of force against an individual.

When conducting the statutory elements analysis required by *Hearns,* although a court may not look to the facts of the case in deciding

whether the use of force is involved, a court is not required to ignore the elements of the particular provision of the statute under which appellant is charged. Appellant's PRR sentence is not illegal on this ground because his offense necessarily required the use of force or violence against an individual. We recognize and certify that this decision directly conflicts with the decision in *Crapps v. State,* 968 So. 2d 627 (Fla. 1st DCA 2007).

The trial court's order denying appellant's postconviction motion is affirmed.

WARNER, MAY and CIKLIN, JJ., concur..

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michele TowbinSinger, Judge; L.T. Case No. 02-8513 CF10A.

Charles Paul, Raiford, pro se.

No brief filed for appellee.

Not final until disposition of timely filed motion for rehearing.