IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEAN KENNETH ROCKMORE,

Petitioner,

v.

Case No. SC12-577
5th DCA No. 5D10-1898

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the district court.[1] The Fifth District Court of Appeal's (Fifth District Court) opinion in Rockmore v. State, 37 Fla. L. Weekly D533 (Fla. 5th DCA March 2, 2011), set forth the following facts:

> The robbery conviction arose from Appellant's theft of clothing from a Wal–Mart store. A store employee confronted Appellant as he attempted to exit the store. Appellant fled with the merchandise, and the store employee pursued him. During the pursuit, the store employee grabbed Appellant's jacket, causing him to drop some or all of the merchandise. The employee continued to pursue Appellant until Appellant reached his get-away car. Before entering the car, Appellant displayed a firearm that had been concealed in his waistband and warned the employee to stop the pursuit. At that point, the employee retreated, and Appellant escaped.
>
> Appellant was apprehended by police and charged with robbery. He admitted stealing the merchandise, but denied that he had committed robbery because he claimed that he had not possessed a firearm. He asserted as an alternative defense to the robbery charge that even if he had displayed a firearm, he had abandoned the merchandise before the display. He argued that this defense entitled him to a judgment of acquittal or, at the very least, a jury instruction that he should be found not guilty if he

[1] Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

> "abandoned" the stolen property before he threatened force.
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> *******
>
> The State objected to Appellant's proffered special instruction, arguing that it was already covered in the standard instruction. The trial judge gave the instruction with some modification.

Id. at D534. After distinguishing State v. Baker, 540 So. 2d 847 (Fla. 3d DCA 1989), and Simmons v. State, 551 So. 2d 607 (Fla. 5th DCA 1989), the Fifth District Court concluded:

> We acknowledge conflict with Peterson v. State, 24 So. 3d 686, 690 (Fla. 2d DCA 2009). Although Peterson is in the Baker/Simmons category of cases and can be distinguished for the same reasons, we disagree with its conclusion regarding the necessity and propriety of the special instruction regarding "abandonment."

Id. at D535. Petitioner filed notice to invoke the discretionary jurisdiction of this Court. The State's brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. While the Fifth District Court of Appeal certified conflict with Peterson v. State, 624 So. 3d 686 (Fla. 2d DCA 2009), this language was pure *dicta* and there is no express and direct conflict with this case on the face of the decision under review.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), this Court explained:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves, 485 So. 2d at 830, n.3. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Respondent contends no such conflict exists between the cited authority and the instant opinion.

In Rockmore v. State, 37 Fla. L. Weekly D533 (Fla. 5th DCA March 2, 2012), the Fifth District Court held:

> Appellant argues in the alternative that he was entitled to a special

instruction consistent with his version of the facts and urges that his proffered instruction was a correct statement of the law under Baker[2] and Simmons[3] and should not have been modified by the trial court. Appellant's argument and proposed jury charge presents the question of whether the "abandonment" of stolen goods by a thief who is being pursued is a sufficient break in the "continuous series of events" such that a robbery conviction cannot be sustained. Consistent with the *dicta* in Baker, Appellant contends that Baker and Simmons apply anytime an escaping thief discards or drops the ill-gotten-gains before employing force or threatened force to evade capture by someone in pursuit. We think Baker and Simmons can be distinguished.

Simmons can be distinguished because the defendant there had been apprehended and escorted by employees back inside the store. 551 So. 2d at 608. This was an intervening event that interrupted the defendant's volitional course, thereby negating the continuity requirement of the statute. Baker is also distinguishable. There, the property was discarded in the shopping mall before the ensuing flight began. 540 So. 2d at 848. Arguably, the "taking" ended **before** the next act of flight began. Thus, the series of acts was not continuous because the defendant ceased the crime of theft before he began the flight. The *dicta* in Baker – that a fleeing thief must be in continuous possession of the stolen item(s) until the point of violence to constitute robbery – was unnecessary to the holding and in contravention of the plain language of the statute. Under this construction, if a fleeing thief drops the merchandise to retrieve a gun and shoot the pursuer, it is not robbery. We specifically reject the Baker *dicta* because it is repugnant with the

[2] State v. Baker, 540 So. 2d 847 (Fla. 3d DCA 1989).
[3] Simmons v. State, 551 So. 2d 607 (Fla. 5th DCA 1989).

> plain and unambiguous language of the statute and legislative history outlining the reason for the statutory amendment.

Id. at D534-535. (emphasis in original). In closing, the Fifth District Court stated:

> We acknowledge conflict with Peterson v. State, 24 So. 3d 686, 690 (Fla. 2d DCA 2009). Although Peterson is in the Baker/Simmons category of cases and can be distinguished for the same reasons, we disagree with its conclusion regarding the necessity and propriety of the special instruction regarding "abandonment."

Id. at D535.

In Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009), the Second District Court reversed a robbery conviction because the defendant was denied a special jury instruction on abandonment. Id. at 690. However, the jury in Petitioner's case received a special jury instruction on abandonment. Rockmore, 37 Fla. L. Weekly at D534. Thus, the language in Rockmore finding conflict with Peterson regarding the necessity of the abandonment instruction is pure *dicta* and is thus "without force as precedent." State ex rel. Biscayne Kennel Club v. Board of Bus. Regulation of Dept. of Bus. Regulation of State, 276 So. 2d 823, 826 (Fla. 1973). Accordingly, even assuming this Court agreed with the Peterson opinion that similarly situated defendants are entitled to an abandonment instruction, such a ruling by this Court would not change the result in this case and Petitioner

would be entitled to no relief. Jurisdiction should be denied. Ciongoli v. State, 337 So. 2d 780 (Fla. 1976) (declining to exercise conflict jurisdiction because conflicting language was *obiter dicta*).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been delivered via interoffice delivery to: Assistant Public Defender Kathryn Rollison Radtke, counsel for Petitioner, at the Office of the Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, this 13th day of April, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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