IN THE SUPREME COURT OF FLORIDA

OMAR CLIETT,

Petitioner,

Case No. SC07-582

v.

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Omar Cliett, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, found at 32 Fla. L. Weekly D 306.

The Florida First District stated in its opinion

> The supreme court adopted the standard jury instruction in 1981 and, although the instruction has been amended three times, the "putting in fear" element has gone unchanged. *See* Fla. Std. Jury Instr. (Crim.) 15.1 cmt; see also Freeman v. State, 761 So. 2d 1055, 1071 (Fla. 2000) (stating that "standard jury instructions are presumed to be correct"). The instruction does not use the term "subjective," nor does it ask the jury to view the circumstances from the victim's point of view. The instruction simply asks whether, from a jury's external viewpoint, the victim was put in fear -- an objective analysis. Although Cliett

> points to one reported case in which the state sought a special reasonable person jury instruction, the instruction simply clarified the standard instruction and did not substantively alter it. *See Smithson v. State*, 689 So. 2d 1226 (Fla. 5th DCA 1997). The challenged instruction, read as a whole, fairly presents the law and does not mislead the jury. *See Waters v. State*, 298 So. 2d 208 (Fla. 2d DCA 1974).

Cliett, 32 Fla. Law Weekly at 306.

SUMMARY OF ARGUMENT

Petitioner has improperly relied upon the record in the trial court and the reasoning and dissent in the DCA case. The appropriate focus upon the operative facts, as contained within the "four corners" of the DCA's decision, reveals no express and direct conflict with this Court or another DCA. Therefore, there is no expressed and direct conflict, and this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

ISSUE I

WHETHER THE FIRST DISTRICT'S OPINION IN CLIETT V. STATE, 32 FLA. LAW WEEKLY D 306, IS IN EXPRESS AND DIRECT CONFLICT WITH THE THIS COURT'S DECISION IN MONTSDOCA V. STATE, 93 SO. 157 (FLA. 1922) AND SMITHSON V. STATE, 689 SO. 2D 1226 (FLA. 5TH DCA 1997)? (Restated)

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay 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.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict and dismissing petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra.

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by

certiorari." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether this Court's decision in Montsdoca or the District Court's decision in Smithson reached a result opposite.

The Decision Below is Not in "Express and Direct" Conflict with Montsdoca or Smithson.

In the case at bar, the opinion of the Florida First District Court of Appeal contains no substantial statement regarding the facts of the case. The majority stated

> The supreme court adopted the standard jury instruction in 1981 and, although the instruction has been amended three times, the "putting in fear" element has gone unchanged. *See* Fla. Std. Jury Instr. (Crim.) 15.1 cmt; see also Freeman v.

> State, 761 So. 2d 1055, 1071 (Fla. 2000) (stating that "standard jury instructions are presumed to be correct"). The instruction does not use the term "subjective," nor does it ask the jury to view the circumstances from the victim's point of view. The instruction simply asks whether, from a jury's external viewpoint, the victim was put in fear -- an objective analysis. Although Cliett points to one reported case in which the state sought a special reasonable person jury instruction, the instruction simply clarified the standard instruction and did not substantively alter it. *See Smithson v. State*, 689 So. 2d 1226 (Fla. 5th DCA 1997).

The court held simply

> The challenged instruction, read as a whole, fairly presents the law and does not mislead the jury. *See Waters v. State*, 298 So. 2d 208 (Fla. 2d DCA 1974).

In Smithson, 689 So. 2d at 1228, the Florida Fifth District Court of Appeal rejected the appellant's contention that he was entitled to a reversal of his conviction for robbery where the trial court gave a special instruction requested by the State regarding the "putting in fear element" of robbery. In Smithson, the victim testified that he did not feel that the defendant would harm him despite the defendant having displayed a firearm. See id. at 1227. As a result, the State requested a special jury instruction, which read

> If the circumstances were such as to ordinarily induce fear in the mind of a reasonable person, then the victim may be found to have been in fear, and actual fear need not be precisely shown.

Id. at 1228. The Fifth District stated that it had "previously applied an 'objective' approach to determining whether a victim was put in fear." Id. The court continued that "'[t]o sustain a conviction for robbery, it is not necessary to show that actual violence was used, nor is it required to that the victim be placed in actual fear.'" Id. (quoting Brown v. State, 397 So. 2d 1153, 1155 (Fla. 5th DCA 1981)(citing Montsdoca, 93 So.). The court continued that "'[i]f the circumstances attendant to the robbery were such as to ordinarily induce fear in the mind of a reasonable person, then the victim may be found to be in fear for the purpose of the robbery statute, and actual fear need not be strictly and precisely shown.'" Id. (quoting Brown, 397 So. 2d at 1155)(citing Flagler v. State, 189 So. 2d 212 (Fla. 4th DCA 1966) and Thomas v. State, 183 So. 2d 297 (Fla. 3d DCA 1966)). The Smithson court held that the instruction was not error based upon its previous holding in Brown.

In the case at bar, no special instruction regarding the putting in fear element was requested. The State's argument in its Answer Brief below is of no consequence with respect to whether this Court has jurisdiction over this matter based upon express and direct conflict. As such, the First District's decision is not in express or direct conflict with the decision

in Smithson. Additionally, the First District found that the standard jury instruction read in the case at bar did not request that the jury view the circumstances of the robbery from the victim's or subjective point of view, but rather asked the jury to make an objective analysis of the facts of the case, just as the special instruction in Smithson did. Therefore, there is no express and direct conflict.

In Montsdoca, 93 So. at 160, this Court reviewed the charges given by the court and, while not quoted in the opinion, found them "to be full, clear and correct, exposition of the law as applicable to the evidence in the case." This Court's ruling in Montsdoca predates the adoption of the standard jury instruction on robbery, which was adopted in 1981. Nothing in Montsdoca is contrary to the standard jury instruction or the court's holding in the case at bar indicating that the instruction calls for an objective view by the jury of the circumstances of the case. This Court stated that

> Violence need not be actual to constitute the offense of robbery. It is robbery to create in the person to be despoiled a reasonable apprehension of violence to avoid which he parts with the thing. An assault which has not traveled to a battery, or probably any such array of force as is calculated to create the reasonable apprehension though short of a technical assault suffices. The menace must be of a sort to excite reasonable apprehension of danger. Threat of prosecution for a crime is generally regarded as insufficient to create fear upon the theory that a

> man in the hands of the law is not legally presumed to be in danger of bodily harm. The one exception grafted upon the doctrine by the English cases is a threat to bring against the victim the charge of sodomy. But says Mr. Bishop there is clearly no foundation of principle for the exception. It is an excrescence on the law. 2 Bishop's New Criminal Law 674-675.

Id. at 87. Therefore, there is no expressed and direct conflict, and this Court must dismiss this case for lack of jurisdiction.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Richard M. Summa, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on April 23, 2007.

Respectfully submitted and served,

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[AGO# L07-1-9829]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Christine Ann Guard
Attorney for State of Florida