IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,621

ANTHONY DUMAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Anthony Dumas, was the defendant in the trial court, and the appellant in the district court of appeal. The respondent, the State of Florida, was the prosecution in the trial court, and the appellee in the district court of appeal. In this brief, the parties will be referred to as they stood in the trial court. All references are to the defendant's appendix, paginated separately and identified as "A", followed by the page numbers.

STATEMENT OF THE CASE AND FACTS

The pertinent facts are set forth in the decision of the district court of appeal as follows:

> The following exchange appears in the record on the date the case was called for trial:
>
> > PROSECUTOR: This [case of Anthony Dumas] was set for a bench trial at eight o'clock. We did not try the case.
> > I believe we are in the process of plea negotiations at this time, and we may pass it.
> > Marilynn [defense counsel], is that correct?
> >
> > DEFENSE COUNSEL: That is correct.
> >
> > THE COURT: All right.
> > (Thereupon, other matters were heard, after which the following proceedings were had:)
> >
> > THE COURT: Anthony Dumas
> >
> > DEFENSE COUNSEL: We are ready for trial.
>
> The entire record on the waiver question consists of that colloquy and the signed written waiver on the information [which consists of a stamp on the face of the information which reads"waived trial by jury with consent of state", above which appears the defendant's signature].

(A. 1-2).

On appeal to the District Court of Appeal, Third District, rehearing en banc was ordered on the court's own motion pursuant to Florida Rule of Appellate Procedure 9.331(c). (A. 2). With two judges dissenting, the court affirmed the defendant's conviction, holding that:

> . . .record evidence showing an information stamped "waived trial by jury with consent of state", above which is the signature of the defendant, is sufficient, on a direct appeal

> from a judgment of conviction, to support a finding of an effective waiver of that constitutional right.

(A. 1). Rehearing was denied November 7, 1983 (A. 13).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed December 7, 1983.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN CIRIO v. STATE, ____So.2d___(Fla. 2d DCA 1983) (Case No. 83-400; opinion filed November 18, 1983) AND JOHNSON v. STATE, 411 So.2d 1023 (Fla. 2d DCA 1982).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In the instant case, the District Court of Appeal announced a rule of law which directly conflicts with the rule of law anounced by the Second District Court of Appeal in Cirio v. State, __So.2d__(Fla. 2d DCA 1983) (Case No. 83-400; opinion filed November 18, 1983) (8 FLW 2748) and Johnson v. State, 411 So.2d 1023 (Fla. 2d DCA 1982). Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

In the case at bar, the District Court of Appeal announced the following rule of law:

> . . .record evidence showing an information stamped "waived trial by jury with consent of state", above which is the signature of the defendant, is sufficient, on a direct appeal from a judgment of conviction, to support a finding of an effective waiver of that constitutional right.

(A. 1). In so holding, the District Court receded from its prior decision in Viggiani v. State, 390 So.2d 147 (Fla. 3d DCA 1980), rev. denied 402 So.2d 613 (Fla. 1981), which held that a record such as the one in this case is insufficient to establish a valid and effective waiver of the right to trial by jury.

The holding of the District Court in the instant case is in direct conflict with the following rule of law announced by the Second District Court of Appeal in Cirio v. State, supra, and Johnson v. State, supra:

> A defendant's knowing, voluntary, and intelligent waiver of a jury trial must be shown affirmatively from the record below.

As authority for this rule of law, the Second District Court of Appeal cited Viggiani v. State, supra, the decision from which the Third District Court of Appeal receded in the instant case.

The rule of law announced by the Third District in this case is irreconcilable with the rule announced in Cirio and Johnson. While the record in this case does show a written waiver by the defendant of his right to a jury trial, there is absolutely nothing in the record which affirmatively shows that this waiver was knowing, voluntary, and intelligent. The decision of the district court of appeal in this case acknowledges the lack of such an affirmative showing, but dispenses with such a requirement by indulging in the following presumption:

> Where a record shows a waiver, although there is no further evidence that the waiver was executed in open court, there is a presumption that in the regular course of the proceedings the defendant, through his attorney, learned of, and waived his constitutional right to jury trial. The presumption which springs from defendant's

> signature on the formal charging document denoting waiver of jury trial, is, more precisely, that the defendant was advised by his attorney of his right to trial by jury, the consequences of relinquishing that right, and any advantages to be expected therefrom, all of which makes for the knowing and intelligent waiver required by Patton v. United States, 281 U.S. 276 (1930).

(A. 2-3) (footnotes omitted).

As pointed out in the dissenting opinion in this case, the presumption used by the majority of the district court to find a valid and effective waiver contravenes long-established constitutional principles:

> . . .[I]t is a fundamental, undoubted proposition of law that every presumption is indulged against the existence of a waiver of a significant constitutional right. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.1461 (1938). Since that is true, such a waiver, it is invariably said, cannot be presumed "from a silent record." E.g., Boykin v. Alabama, 395 U.S. 242, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The court, however, has put these rules on their heads so that, on the one hand, an effective jury waiver is presumed on a tomblike transcript and record which contain only a signature written under circumstances which are entirely unknown and, on the other, the defendant is required to bear the burden to show otherwise in a Rule 3.850 or federal habeas corpus proceeding.

(A. 9-10) (emphasis in original). In addition to putting the well-established applicable constitutional principles "on their heads", the majority's sanction for the use of a presumption to establish that a waiver of the right to jury trial was knowing, voluntary, and intelligent expressly conflicts with the requirement set forth by the Second District in Cirio and Johnson that the record must affirmatively show that the waiver was

knowing, voluntary, and intelligent.* This Court's exercise of its discretionary jurisdiction is necessary to remedy this conflict of decisions.

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*

The decision in the instant case also cannot be reconciled with this Court's recent decision in Harris v. State, 438 So.2d 787 (Fla. 1983). In deciding whether a defendant could waive his procedural right to have the jury instructed on necessarily included lesser offenses, this Court in Harris compared such a waiver to a waiver of the right to a jury trial. This Court then announced the following rule of law governing waiver of the right to instructions on lesser offenses:

> We conclude that there must be an express waiver of the right to these instructions by the defendant, [emphasis in original], and the record must reflect that it was knowingly and intelligently made.

(438 So.2d at 797). Certainly, if a waiver of a procedural right such as the right to have the jury instructed on lesser included offenses requires an affirmative showing on the record that the waiver was knowingly and intelligently made, then a waiver of a fundamental constitutional right such as the right to a jury trial also must require such an affirmative showing on the record that the waiver was knowingly and intelligently made.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 13th day of December, 1983.

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender