IN THE SUPREME COURT OF FLORIDA

HERMAN JOHNSON, JR.,

Petitioner,

v. CASE NO. 66,551

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Herman Johnson was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," or by his proper name. Filed simultaneously with this brief is an appendix containing a copy of the decision of the District Court of Appeal, First District, as well as other matters pertinent to this Court's jurisdiction. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Petitioner, charged with the offense of robbery with a firearm occurring on September 5, 1982, entered a guilty plea to that offense on September 26, 1983. Although on October 21, 1983, appellant elected to be sentenced pursuant to Florida Rule of Criminal Procedure 3.701, the "sentencing guidelines," at no point was petitioner ever informed by the trial court that by electing the guidelines petitioner would waive his eligibility for parole, which he would otherwise receive if he did not elect to be sentenced under the guidelines. The trial court imposed a sentence of life imprisonment, which exceeded the seven to nine years range of sentence called for by the guidelines.

Petitioner timely took an appeal to the District Court of Appeal, First District. The first of three issues raised in the district court was framed as follows:

> APPELLANT MUST BE GIVEN AN OPPORTUNITY TO WITHDRAW HIS ELECTION TO BE SENTENCED UNDER THE GUIDELINES IN ORDER TO PRECLUDE A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS SECURED BY ARTICLE I, SECTIONS 9 AND 14, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10, FLORIDA CONSTITUTION.

The essence of petitioner's argument was that to apply the non-eligibility of parole aspect of the guidelines to petitioner's crimes, which occurred before the effective date of the guidelines, amounted to an ex post facto violation, and because the standard for waiver of a constitutional

right is that the waiver must be both knowing and intelligent, and since the record failed to show petitioner was ever informed he was waiving ex post protections by electing guidelines sentencing, petitioner should be given the opportunity to withdraw his plea.

By opinion dated December 21, 1984, the District Court of Appeal, First District, entered a per curiam affirmance citing to Johnson v. State, __So.2d__ (Fla. 1st DCA, opinion filed December 21, 1984) Case No. AW-172 (A-1). Johnson is a case decided also on December 21, 1984, involving the same petitioner, the same facts, and the same issues. For this Court's convenience, a copy of Johnson is included in the appendix (A-2-4).

On rehearing, petitioner pointed out that since petitioner's sentence was vacated in Johnson, but not in the instant case, the two decisions were inconsistent. Petitioner also pointed out that the district court in Cochran v. State, __So.2d__ (Fla. 1st DCA 1984) (9 FLW 2602) had certified the identical issue to this Court as involving a question of great public importance, and accordingly requested the court to afford the same treatment to Mr. Johnson as it did to Mr. Cochran, namely, by certifying the instant case to this Court as involving a question of great public importance (A-5-7). The state jointed the request to certify the Cochran issue to this Court (A-8-9). Nevertheless, on January 29, 1985, the parties' requests for certification were denied (A-10).

Also on January 29, 1985, the court withdrew its opinion of December 21, 1984, and issued an opinion vacating petitioner's sentence, but again rejecting petitioner's ex post facto claim on authority of Johnson (A-11).

Notice of intent to seek this Court's discretionary review was timely filed on February 13, 1985 (A-12).

III SUMMARY OF ARGUMENT

In Issue I petitioner asserts that the district court's treatment of his ex post facto claim conflicts with decisions of this Court which in effect recognize that waivers of important rights, such as constitutional rights, are not valid unless the record indicates affirmatively that the waiver was both knowing and intelligent. As a separate basis for this Court's jurisdiction, petitioner asserts that the fact that other litigants before the district court having the very same issue as petitioner had their case certified by the district court as involving a question of great public importance, but inexplicably the court failed to so certify the question in the instant case. This situation, petitioner contends, conflicts with well established case law from this Court dealing with how such circumstances should be handled by the district courts.

IV ARGUMENT

ISSUE I

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH TUCKER V. STATE, 459 So.2d 306 (Fla. 1984) AND HARRIS V. STATE, 438 So.2d 787 (Fla. 1983).

This Court should accept jurisdiction because the district court's decision on waiver of ex post facto rights is irreconcilable with Tucker v. State, 459 So.2d 306 (Fla. 1984) and Harris v. State, 438 So.2d 787 (Fla. 1983). In the instant case petitioner's ex post facto claim was rejected on authority of Johnson, supra, a companion case involving the same petitioner, the same record, and the same issues that were present in the instant case:

> Appellant pled guilty to a charge of robbery with a firearm for a 1982 offense and expressly elected to be sentenced pursuant to the provisions of Fla.R.Crim.P. 3.701. The application of Rule 3.701 in these circumstances requires only that appellant "affirmatively selects" to be sentenced pursuant to the rule, see §921.001(4)(a), Florida Statutes, and such affirmative selection does not require any advisement by the court as to parole ineligibility. See Jones v. State, Case No. AW-148 (Fla. 1st DCA November 28, 1984); Coates v. State, 9 FLW 2421 (Fla. 1st DCA November 16, 1984); Moore v. State, 9 FLW 1822 (Fla. 1st DCA August 22, 1984).

(A-3). Moore, cited by the district court, held that selection of a guidelines sentence did not have to be knowing and

intelligent. The court did not mention ex post facto rights but discussed only the statutory right to parole.

By holding that both the statutory right to parole and the constitutional protection from ex post facto laws could be waived "affirmatively" without an inquiry conducted by the trial judge and a knowing, intelligent and voluntary relinquishment made personally by a defendant on the record, the district court ruled directly contrary to Tucker, and Harris.

In Tucker this Court held that the statute of limitations defense had to be waived personally by the defendant, and the record had to show the knowing and voluntary nature of the waiver. In Harris this Court had earlier applied those same waiver requirements to the defendant's non-constitutional procedural right to have the jury instructed on lesser included offenses. In conflict with those decisions, the district court held in petitioner's case that there need be no showing on the record that a defendant made a knowing, intelligent and voluntary waiver of the statutory and constitutional rights which are forfeited by selection of a guidelines sentence. That ruling cannot be reconciled with Tucker or Harris.

There can be no doubt that when a person who committed a crime before October 1, 1983, selected guidelines the ensuing loss of parole eligibility became a retroactively applied disadvantageous consequence of that selection. See Weaver v. Graham, 450 U.S. 24 (1981). The district court

overlooked completely this constitutional deprivation, just as it had earlier in Moore, supra, and mentioned loss of parole as if it were merely statutory. Under Tucker and Harris, even loss of important statutory rights triggers a requirement of knowing and intelligent waivers; parole rights are arguably that important. But here the infringement on parole rights was applied retroactively in violation of ex post facto guarantees as well as statutory rights. State v. Williams, 397 So.2d 663 (Fla. 1981). Thus, petitioner's loss in this case was more grievous than the rights subject to waiver in Tucker and Harris.

This Court requires that even for important statutory rights, as in Tucker and Harris, waiver must be of record, personal, knowing, intelligent and voluntary. It necessarily logically follows that waiver of a constitutional right must appear with equal clarity on the record. The district court applied a lesser waiver standard to a constitutional right than this Court has decreed for statutory and procedural rights. This Court should therefore accept jurisdiction to resolve the patent conflict created by the district court's decision in this case.

ISSUE II

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DIRECTLY AND EXPRESSLY CONFLICTS WITH JOLLIE V. STATE, 405 So.2d 418 (Fla. 1981).

Petitioner contends the decision of the District Court of Appeal, First District, directly conflicts with Jollie v. State, 405 So.2d 418 (Fla. 1981), in two respects.

First, in Jollie this Court held that a district court opinion which cites as controlling authority a decision pending review in this Court constitutes prima facie express conflict and allows this Court to exercise its jurisdiction. Johnson, petitioner's companion case, is currently pending review in this Court, and bears this Court's docket number 66,552.

Second, the identical issue presented here was certified by the District Court of Appeal, First District, to this Court as involving a question of great public importance in Cochran v. State, supra. In Jollie, this Court recognized the "...injustice inherent in foreclosing review to some of several equally situated litigants." 405 So.2d at 421. Here, although Cochran was cited to the district court on rehearing, that court failed to either certify the instant case also, note that the issue here is the same as that in Cochran, or stay the mandate. Unless jurisdiction is accepted, the district court's treatment of the instant case will, indeed, foreclose review for petitioner yet the district court afforded such review for Mr. Cochran, although both litigants occupy the same legal posture in that both have the same issue before the district court. Thus, the very evil sought to be remedied by Jollie is present here.

V CONCLUSION

Based upon the preceding analysis and authorities appellant requests this Court to enter an order ruling it has jurisdiction and require that briefs on the merits be filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Mr. Thomas Bateman, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Herman Johnson, #847194, Union Correctional Institution, Post Office Box 221, Raiford, Florida, 32083, this 21 day of February, 1985.

CARL S. McGINNES