IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER/CROSS-RESPONDENT,

V.

HERMAN JOHNSON, JR.,

RESPONDENT/CROSS-PETITIONER.

CASE NO. 66,552

CROSS-RESPONDENT'S BRIEF ON JURISDICTION

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_____/

CROSS-RESPONDENT'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

The State of Florida was the prosecution in the trial court and appellee in the district court and will be referred to as the "State." Herman Johnson was the defendant and appellant in the lower courts and will be referred to as "Cross-Petitioner." Reference to Cross-Petitioner's brief on jurisdiction and filed as "Petitioner's Brief on Jurisdiction" will be referred to by the symbol "CPB" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts Cross-Petitioner's rendition of the statement of the case and facts as reasonably accurate for purpose of this proceeding.

SUMMARY OF ARGUMENT

The State argues that Cross-Petitioner has failed to demonstrate an express or direct conflict with other district courts or with the Supreme Court pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Rule 9.030(a)(2)(A)(iv), F.R.App.P. and this Honorable Court should deny jurisdiction on the basis claimed by Cross-Petitioner.

Moreover, Cross-Petitioner's second basis for this Court's jurisdiction is equally insufficient to invoke the Court's jurisdiction to review the district court's ruling. The cases cited by Cross-Petitioner are actually consistent with the district court's ruling contrary to Cross-Petitioner's claim of conflict. The State submits the Court should decline to accept jurisdiction on the basis of the claims made by Cross-Petitioner.

ARGUMENT

THE DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH TUCKER V. STATE[1] AND HARRIS V. STATE[2].

Cross-Petitioner claims this Honorable Court should accept jurisdiction to review the decision of the District Court of Appeal based on an express and direct conflict with Tucker v. State and Harris v. State. The State contends the decision below does not conflict with either Tucker or Harris and this Honorable Court should decline to accept jurisdiction on this basis.

As Cross-Petitioner correctly points out, the District Court held that the selection of a sentencing guidelines sentence need only be "affirmative" and does not require any advisement by the trial court as to parole ineligibility. (CPB, 6). However, Cross-Petitioner's claim that the "statutory right to parole and the constitutional protection from ex post facto laws" cannot be "affirmatively" waived without a "knowing, intelligent and voluntary relinquishment made personally" by the defendant contrary to this Court's opinion in Tucker and Harris, is without merit. The State submits the decision of the district court below does not conflict with either of these cases.

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1. 459 So.2d 306 (Fla. 1984)
2. 438 So.2d 787 (Fla. 1983)

Both Tucker and Harris involve the waiver of the giving of lesser-included instructions during the guilt phase of their respective trials. In Tucker, this Honorable Court held it was insufficient to waive the statute of limitations defense by trial counsel's act of requesting lesser-included jury instructions where the statute of limitations had run as to the lesser-included crimes absent a personal waiver by the defendant. In Harris, the Court found the trial judge sufficiently inquired of Harris personally as to his choice to waive the giving of the lesser-included instructions. In Harris, this Court noted that a state cannot prohibit the giving of lesser-included-offense instructions without violating the United States Constitution. The Court specifically noted the right may be expressly waived. Davis v. State, 159 Fla. 838, 32 So.2d 827 (1947). The differences between these cases and the case sub judice are several.

First, both Tucker and Harris involve matters pertaining to the guilt phase of the trial. Inasmuch as a defendant is constitutionally entitled to any lesser-included-offense instruction available to him he must personally waive the giving of the instructions in a knowing, intelligent and voluntary fashion. The case at bar involves a choice of sentencing alternatives. The case does not involve constitutional rights available to a defendant at trial. Cross-Petitioner pleaded guilty personally in the trial court thus waiving those traditional constitutional rights normally

associated with a defendant's right to trial. e.g., confrontation, calling witnesses, cross-examination.

Second, Tucker and Harris involved the substantive right to have the jury instructed as to lesser-included-offenses. This case involves Cross-Petitioner's choice ("affirmative selection") of sentencing - under the sentencing guidelines or pursuant to a standard sentence. If Cross-Petitioner's "affirmative selection" became a "disadvantageous consequence" of his election to be sentenced pursuant to the guidelines as he claims (CPB, 7), the State submits that such a consequence came about from the trial court's decision to depart from the sentencing guidelines and not from the failure of Cross-Petitioner to knowingly, intelligently and voluntarily waive some right to be eligible for parole. Cross-Petitioner is merely attempting to change his decision in the guise of an ex post facto application argument.

Moreover, Cross-Petitioner's reliance on Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) is equally without merit. Weaver involved a statute which altered the method of computing gain time of which the prisoner had no choice but to accept or challenge. In this case, Cross-Petitioner affirmatively selected to be sentenced under the guidelines. He should not now be allowed to challenge his selection because he did not like the sentence imposed upon him.

II

THE DECISION OF THE DISTRICT COURT DOES NOT CONFLICT WITH JOLLIE V. STATE[3]

Cross-Petitioner claims the decision below directly conflicts with Jollie in two respects. First, a district court opinion which cites as authority a case pending review in this Court constitutes a prima facie express conflict and allows this Court to exercise its jurisdiction. Second, the identical issue was certifed in another First District case and that court's treatment of the case sub judice may foreclose review for Cross-Petitioner.

The State submits Cross-Petitioner's claims must fail for two reasons. First, Jollie concerned the citation as authority of a case pending review in a per curiam affirmance.(PCA) The case sub judice does not involve a per curiam affirmance, but rather an opinion adverse to Cross-Petitioner.

Second, the fact the First District certified the identical issue in Cochran v. State, 9 F.L.W. 2602 (Fla. 1st DCA 1984) is of no moment in this case. Inherent in the District Court's refusal to certify the question as one of great public importance is the fact that the court impliedly found Cross-Petitioner not to be in the same legal posture as Cochran. This even though both parites joined in the request to certify the question.

The State sympathizes with Cross-Petitioner's treatment by

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3. 405 So.2d 418 (Fla. 1981).

the District Court in this regard but notes Jollie merely suggests a manner in which the district courts may treat similarly situated cases. Perhaps it is time for this Honorable Court to require the district courts to stay similarly situated cases where the district court has previously certified questions based on conflict or as being of great public importance.

CONCLUSION

Based on the foregoing argument and authority the State submits the Court should decline to accept jurisdiction as requested by Cross-Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been forwarded by hand delivery to Mr. Carl McGinnis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 13th day of March, 1985.

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