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IN THE SUPREME COURT OF FLORIDA

EARL JOHNSON CREWS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No.

80,458

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CYNTHIA J. DODGE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 345172

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On March 7, 1991, the State Attorney for the Tenth Judicial Circuit in and for **Polk** County, Florida, filed an information charging the Petitioner, EARL JOHNSON CREWS, with the following: discharge of a firearm in public in violation of section 790.15, Florida Statutes (1989); two counts of aggravated assault in violation of section **784.021**; possession of a firearm by a convicted felon in violation of section **790.23**; and resisting an officer without violence in violation of section 843.02. On April **22, 1991, the** state filed an amended information adding the charge of carrying a concealed firearm in violation of section **790.01**, Florida Statutes (1989).

On April 5, 1991, the state filed a habitual offender notice. The state severed Count IV of the information and the Petitioner was tried by a **jury** on the charge of possession of a firearm by a convicted felon before the Honorable Helió Gomez on July 31, 1991. The jury found the Petitioner guilty of as charged. On August **28, 1991,** the court found the Petitioner to be a habitual violent felony offender and sentenced the Petitioner to **20** years imprisonment with **a** ten year minimum mandatory. The sentence was to be consecutive to the sentence the Petitioner was purportedly serving in Pennsylvania. The guidelines recommended community control to 12 to **30** months. The Petitioner timely filed his notice of **appeal** on September **26, 1991.**

On appeal, Mr. Crews argued that because his crime occurred between October 1, **1989,** and May **2, 1991,** the trial court could not

use a prior aggravated battery to support a sentence **as** a habitual violent felony offender: based on the holding in Johnson v. State, 589 So.2d 1370, 1371, (Fla. 1st DCA 1991). Johnson held that Chapter **89-280, Laws of Florida**, which amends the habitual offender provisions, violates the single-subject **rule**. The Second District Court of Appeal affirmed the sentence on August 19, 1992, on the basis of McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), jurisdiction accepted, 593 So.2d 1052 (Fla. 1992) (Supreme Court Case No. **79,5361**, which holds that Chapter 89-280 **does** not violate the single-subject **rule**. The Second District **also** recognized that **the** Johnson decision **was** contrary to its holding.

STATEMENT OF THE FACTS

Mr. Crews stipulated that he **is** a convicted felon.

Johnny Dozier testified he has known Mr. Crews for most of his **life** and usually sees him every **day**. On January 1, 1991, at around **6:00 p.m.** he was sitting under a tree with **some** people and heard some shooting and then saw Mr. Crews shooting a shotgun **into** the air. He saw the shotgun in Mr. Crews' hand and saw the fire going into the air. Later he talked to Officer Jagniszak and told him what he **saw**. Mr. Crews had left by then.

About 7:00 p.m. that evening, Mr. Dozier was in Walter and Cora's Restaurant and Tavern when Mr. Crews **and** his nephew came in **and** spoke to Mr. Dozier and his friend. Mr. Crews talked to Mr. Dozier's cousin who operated the restaurant. Mr. Crews then pulled a sawed-off shotgun out of his pants. **He** was wearing **loose** jeans. Mr. Crews pointed the shotgun at his cousin and threatened to shoot.

Calvin Robertson heard an argument and Mr. Dozier told him to check on his father. **He** walked around and saw Mr. Crews with a shotgun at his father. Earlier that evening he saw Mr. Crews shooting a gun outside. **He also** saw the gun in Mr. Crews' hand.

Officer Lyle Jagniszak of the Lake Hamilton Police Department got a call to **go** to the northeast section of town about a **black man** firing a shotgun in the area. When he arrived the man **was** gone. Later, he got another **call** with reference to the same man inside the business with a sawed-off shot gun threatening to shoot people. when he pulled up, Mr. Crews came out of the restaurant side of the

business. People were running out the bar door. The officer knew Mr. Crews. He told Mr. Crews to stop and drop the gun several times. Mr. Crews turned and ran away with the gun in his hand. The officer fired a warning shot into the ground, but Mr. Crews did not stop. The officer found five spent .12 gauge shotgun shells near the area where the witnesses told him Mr. Crews was standing shooting a shotgun. The gun was never found.

A witness told Officer Jagniszak that a man called "Rat Man," wearing a dark blue jogging suit with a green duffle bag was firing a shotgun in the intersection of Rose and Pearl. No one told him Mr. Crews was wearing jeans. When the officer saw the man run out of the restaurant, the man was wearing jogging pants and a sweatshirt. The officer described the man as being six feet tall and weighing 180 pounds.

Mr. Crews testified that on the day of the incident he was wearing a grey pair of pants, a black shirt with Mickey Mouse on it, and black patten leather shoes. About 6:00 he and some friends went to Hardee's to get something to eat and went to ABC to get a six pack of beer and then went to Haines City. Prior to that he was on the corner of Pearl and Rose with five other men and a woman. They were sitting on the woman's car. Two of his nephews were with him that afternoon. Mr. Crews testified that they look like him. He was there when the gun was being shot, but he did not shoot it. Mr. Crews testified he never held the gun and he did not know who owned it.

About 11:30 p.m. he went home to his girlfriend's house in Haines City. He did not go to Walt and Cora's place that night and he did not see Officer Jagniszak. He stayed at his girlfriend's house until 3:00 to 3:30 and then went to his mother's house where he was living. Mr. Crews testified he is five-nine and weighs 165 pounds and has never weighed 180 pounds. He was arrested on February 25th.

SUMMARY OF THE ARGUMENT

Jurisdiction of this case should be accepted on the basis that the instant decision presents an issue already pending before this Court regarding a decision which expressly declares a state statute valid.

ARGUMENT

ISSUE

WHETHER THE ISSUE IN EARL JOHNSON
CREWS V. STATE, Case No. 91-3212
(Fla. 2d DCA August 19, 1992), AS-
SERTING A SINGLE-SUBJECT RULE VIOLA-
TION, IS PRESENTLY PENDING BEFORE
THIS COURT IN ANOTHER CASE?

Petitioner contested the trial court's use of a prior aggravated battery conviction **for** imposing a sentence **as** a violent habitual offender, arguing that Chapter 89-280, Laws of Florida, violated the single-subject requirement of Article 111, Section 6 of the Florida Constitution. The Second District Court of Appeal upheld **the** sentence on the basis of McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), jurisdiction accepted, 593 So.2d 1052 (Fla. 1992) (Supreme Court Case No. **78,536**). Jurisdiction in McCall was accepted on the basis that the Fourth District's decision expressly declared a state statute valid. Article V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(1). Inasmuch as this Court has the sentencing issue already before it, jurisdiction over Mr. **Crews case should** be accepted. See, Jollie v. State, 405 So.2d 418 (Fla. 1981). Also, the Second District pointed out that the decision of the First District in Johnson v. State, 589 So.2d 1370, 1371, (Fla. 1st DCA 1991), is contrary to **its** holding,

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner has demonstrated that the instant issue is presently pending before this Court so as to invoke discretionary jurisdiction.

APPENDIX

PAGE NO.

1. Decision of The District Court of Appeal of Florida,
Second District, Opinion filed August 19, 1991, Case.
No. 91-03212.

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Constitution. McCall v. State, 583 So. 2d 411 (Fla. 4th DCA 1991). Contra, Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991). That disposes of appellant's first point.

Appellant's only other point is that his classification as a habitual violent felony offender was a violation of due process and double jeopardy principles because the instant crime of which he was convicted (possession of a firearm by a convicted felon) was not a violent felony although several of his past felony convictions were for violent felonies. This issue has been decided contrary to appellant's position in Ross v. State, 17 F.L.W. S367 (Fla. June 18, 1992).

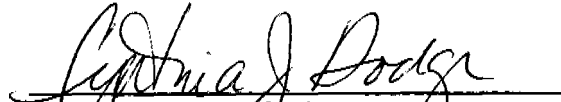
Affirmed.

PARKER, A.C.J., and ALTENBERND and BLUE, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of September, 1992.

Respectfully submitted,



JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

CYNTHIA J. DODGE
Assistant Public Defender
Florida Bar Number 345172
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

CJD/mlm