

**FILED**

SID J. WHITE

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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS,

Petitioner,

v.

CASE NO. 80,545

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

There is no conflict between this case and Johnson v. State, 597 So.2d 798 (Fla. 1992) or any other authority cited by the petitioner. Johnson did not address the specific legal question raised and addressed in the instant case. Sirmons does not expressly and directly conflict with a decision of this court or another district court of appeal as required by Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). This court should decline to accept jurisdiction.

## ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEALS IN SIRMONS V. STATE, 603 SO.2D 82 (FLA. 5TH DCA 1992), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA.

The petitioner, Jessie Sirmons ("Sirmons") claims the line of cases followed by the Fifth District in his case conflicts with another line of cases. Presumably, this latter line of cases includes Johnson v. State, 597 So.2d 798 (Fla. 1992), Foster v. State, 596 So.2d 1099 (Fla. 5th DCA 1992), Cleveland v. State, 587 So.2d 1145 (Fla. 1991); Houser v. State, 474 So.2d 1193 (Fla. 1985), and Gaskin v. State, 591 So.2d 917 (Fla. 1991).

In Sirmons v. State, 603 So.2d 82 (Fla. 5th DCA 1992) the Fifth District analyzed the present state of the law regarding double jeopardy. The court observed that Rodriguez v. State, 500 So.2d 120 (Fla. 1986) established that the determination of whether there may be cumulative convictions depends on whether each statute contains at least one element that the other does not. Sirmons, supra at 83. The Fifth District also recognized that this court receded from Rodriguez in Carawan v. State, 515 So.2d 161 (Fla. 1987) but Carawan was overridden by the legislative amendment of section 776.021(4), Florida Statutes, citing State v. Smith, 547 So.2d 613 (Fla. 1989). Sirmons, supra at 83. Therefore, Rodriguez was once again the rule in Florida.

Rodriguez, specifically held that grand theft is not a lesser included offense of robbery and a defendant can be convicted of both offenses. This is precisely what Sirmons holds, and these

cases are consistent. Sirmons is also consistent with cases in the Fourth District. Huston v. State, 557 So.2d 887 (Fla. 4th DCA 1990); Collins v. State, 577 So.2d 986 (Fla. 4th DCA 1991).

Sirmons does not conflict with Johnson. The question in Johnson was whether the defendant could be convicted of two counts of grand theft for taking one purse which contained two items. This court distinguished taking one purse with two items from taking two items (a calculator and gun during a house burglary). Id. at 799. The issue in Johnson was completely different from that in Sirmons.

Sirmons does not conflict with Foster. Foster involved the question whether a defendant can be convicted of both robbery and aggravated battery. The offenses occurred during the time Carawan was the law. Even using a Carawan analysis, both convictions were affirmed. Foster is completely distinguishable on the facts and on the law.

Sirmons does not conflict with Cleveland. That case involved whether a defendant could be convicted of armed robbery and possession of a firearm while committing the robbery. Cleveland's robbery conviction was enhanced because of the use of the firearm, and the firearm could not be used a second time to form the basis of a separate conviction. Cleveland does not present the same legal question as Sirmons.

Sirmons does not conflict with Houser or Gaskin. Those cases hold that only one homicide conviction may be imposed for a single death. These cases do not present the same legal question as Sirmons.

None of the cases cited by the petitioner address the same legal question decided in Sirmons. Even if they touch on the same subject, there is no direct and express conflict. Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) provides that discretionary jurisdiction may be sought to review decisions of District Courts that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. The cases cited by the petitioner simply do not provide the basis for this court to accept jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court refuse to accept jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction has been furnished by delivery to the Public Defender's basket at the Fifth District Court of Appeal to Jim Wulchak, this 22<sup>nd</sup> day of October, 1991.

*Barbara Davis*

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Of Counsel