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DEC 21 1992

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FRED JAMES, :

Petitioner, :

vs. :

STATE OF FLORIDA, :

Respondent. :

_____ :

Case No. 80957

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

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STATEMENT OF THE CASE AND FACTS

On March 29, 1990, the State Attorney for the Twentieth Judicial Circuit in and for Collier County, Florida, filed an information charging the Appellant, FRED JAMES, with delivery of a controlled substance in violation of section 893.13, Florida Statutes (1987), allegedly occurring on March 9, 1990. On June 12, 1990, Mr. James entered a plea of no contest with the understanding that the State was seeking to have him habitualized. Mr. James pled to a cap of 10 years as a habitual offender. On July 16, 1990, Mr. James was sentenced as a habitual offender to 10 years of imprisonment with credit for 129 days served. The guidelines in this case would have called for 2 1/2 to 3 1/2 years of prison. Mr. James timely filed his Notice of Appeal on August 8, 1990.

On appeal Mr. James attacked his habitual offender sentence. On October 11, 1991, the Second District Court of Appeal issued an opinion finding the habitual offender sentence illegal because there was no evidence of two predicate felonies necessary for the habitual offender status. The Court sent the case back to the trial court, giving the State the opportunity to present evidence of the requisite two predicate felonies should they exist.

Mr. James was resentenced on December 23, 1991. At that hearing the State presented evidence of two predicate felonies, and the trial court resentenced Mr. James to 10 years prison as an habitual with credit for 129 days served.

Again, Mr. James timely appealed his habitual offender sentence; but this time it was on the basis that one of the two

priors was an out-of-state conviction that could not be used in his case. Because the amendment to the statute allowing the use of out-of-state convictions was unconstitutional at the time Mr. James committed the crime sub judice, it could not be used to habitualize him. The Second District Court of Appeal rejected this argument and cited to its recent opinion in State v. Sheppard, 17 F.L.W. D1960 (Fla. 2d DCA Aug. 21, 1992).

SUMMARY OF THE ARGUMENT

Because the Second District Court of Appeal's opinion in this case conflicts with the opinion set forth by the First District Court of Appeal on the same exact issue, the opinion declares valid a state statute, and this issue is presently pending in this Court, this Court should accept jurisdiction over this case.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN STATE V. JAMES, CASE NO. 92-0043 (FLA. 2D DCA DEC. 9, 1992), IS IN CONFLICT WITH ANOTHER DISTRICT COURT OF APPEAL AS TO THE CONSTITUTIONALITY OF THE AMENDMENTS TO THE HABITUAL OFFENDER STATUTE?

The issue of conflict is present in this case. The First District Court of Appeal in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), has declared the amendments to the habitual offender statute unconstitutional and the Second District Court of Appeal in the Sheppard v. State, 17 F.L.W. D1960 (Fla. 2d DCA Aug. 21, 1992), opinion has declared the same amendments constitutional. Although the Second District Court of Appeal did not use the magic word of "certifying" direct conflict (which would have done away with the necessity of a jurisdictional brief), it did "recognize" their conflict with Johnson. In deciding Mr. James' case, the Second District Court of Appeal merely referred to Sheppard as its reason for affirming the case. Thus, conflict does exist since it exist with Sheppard; and this Court has jurisdiction to take this case under Florida Rule of Appellate Procedure 9.030(2)(A)(iv).

Because the Second District Court of Appeal's opinion also declares valid a state statute, this Court also can accept jurisdiction of this case based on Florida Rule of Appellate Procedure 9.030(2)(A)(i).

Last but not least, because Johnson is presently pending before this Court on the issue of the constitutionality of the amendments to the habitual offender statute and because Sheppard is presently pending in this Court on the issue of jurisdiction (Case No. 80,418), this Court should accept Mr. James' case. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

CONCLUSION

In light of the foregoing reasons, argument, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the First District Court of Appeal so as to invoke discretionary review. Petitioner has also demonstrated that this Court can accept jurisdiction due to the fact that the instant opinion declares valid a state statute and that the issue raised by the instant opinion is already pending before this Court.

APPENDIX

PAGE NO.

1. Second District Court of Appeal Opinion
filed December 9, 1992.

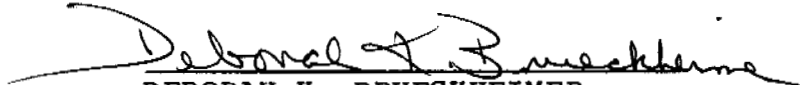
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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Anne Y. Swing,
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on
this 18th day of December, 1992.

Respectfully submitted,

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