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IN THE SUPREME COURT OF APPEAL OF FLORIDA

WILLIE B. HARRIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 85,297

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with the attempted second degree murder of his wife. He was convicted following a jury trial. At his sentencing hearing, Petitioner unsuccessfully challenged the guidelines scoring of a 1966 second degree murder conviction as a life felony. At the time of that offense felonies in Florida were not divided into degrees. Petitioner therefore argued his 1966 offense must be scored as a third degree felony pursuant to Fla. R. Crim. P. 3.701(d)(5)(C) because the degree of the offense was ambiguous or impossible to determine.

In an opinion issued October 5, 1994, (appendix 1) the fourth district agreed, relying on Johnson v. State, 525 So. 2d 964 (Fla. 1st DCA 1988), but acknowledged conflict with Jenkins v. State, 556 So. 2d 1239 (Fla. 5th DCA 1990). Following a motion for clarification of the remedy ordered, (appendix 2) the court *sua sponte* withdrew the October 5, opinion, and reversed its position. (appendix 3). This time the court held the degree of felony could be determined based on penalty, the very theory specifically rejected by the Johnson court. In its new opinion the court deleted any reference to either Johnson v. State, the case it previously found controlling, or Jenkins v. State, the case with which it had previously certified conflict. Harris v. State, slip op. February 1, 1995, at 4-5.

Petitioner filed his notice of intent to invoke this court's jurisdiction February 28, 1995. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the district court sub judice directly conflicts with the first district's decision in Johnson v. State, on the question of whether in guidelines scoring a trial court can look to penalty to determine the degree of offense for felonies committed in Florida before 1972, the first year felonies were divided into degrees. The court in Johnson expressly rejected penalties as determinative, interpreting those offenses as "ambiguous and impossible to determine" under Fla. R. Crim. P. 3.701(d)(5)(C). The Johnson court found all such offenses must be scored as third degree felonies. While in its initial decision here the fourth district court agreed and certified conflict with a fifth district case, Jenkins v. State, the court subsequently (sua sponte) withdrew its decision and assigned a degree to Petitioner's 1966 conviction based on penalty. Because the first and fourth districts expressly disagree on how to score pre-1972 offenses, this Court has conflict jurisdiction to decide the issue.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THIS COURT'S JURISDICTION SINCE THE OPINION IN HARRIS V. STATE, CONFLICTS WITH THE OPINION OF THE FIRST DISTRICT IN JOHNSON V. STATE, 525 SO.2D 964 (FLA. 1ST DCA 1988).

To properly invoke the conflict jurisdiction of this Court, Petitioner must demonstrate a direct conflict between the express holding of the decision challenged and that of another district court on the same rule of law. Art. V, s. 3(b)(3), Fla. Const., Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

The opinion of the fourth district sub judice decided the question of how to score on the guidelines a 1966 Florida felony conviction which has no degree because it was committed before felonies had been divided into degrees. In answering the question the court interpreted Fla. R. Crim. P. 3.701(d)(5)(C). That rule provides:

> When unable to determine whether an offense at conviction is a felony or a misdemeanor, the offense should be scored as a misdemeanor. *When the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.*

(emphasis added). The first district had previously decided the same question, again interpreting Fla. R. Crim. P. 3.701(d)(5)(C)[1], in Johnson v. State, 525 So. 2d 964 (Fla. 1st DCA 1988). The court held:

> We reject the assertion that the degree of a prior Florida felony should be determined by reference to the maximum allowable punishment for the offense. *** Moreover, assigning a degree to a Florida felony which had no degree at the time of a defendant's conviction for that felony would violate the rule established in Johnson v. State, 476 So. 2d 786 (Fla. 1st DCA 1985), that prior offenses should be scored according to their degree at the time of the prior conviction. *Where, as here, the felony has no degree at the time of the defendant's conviction, we conclude the degree is "impossible to determine"* in the language of Rule 3.701 d.5.(a)3, it *should have been scored as a third-degree felony*, ...

[1] At the time of the Johnson decision the rule was numbered 3.701 d.5.(a)(3). The language of the rule was identical to the current rule.

525 So. 2d at 966 (emphasis added). (appendix 4).

In the instant case the court issued an opinion October 5, 1994, finding that petitioner's 1966 conviction had been improperly scored as a life felony. Harris v. State, October 5, 1995 slip opinion at 4. Expressly relying on Johnson v. State, the court reversed with directions to recalculate the guidelines, scoring the prior conviction as a third degree felony. Id. In that opinion the court acknowledged its opinion was in conflict with Jenkins v. State, 556 So. 2d 1239 (Fla. 5th DCA 1990)[2]. Id. Petitioner requested a clarification regarding the remedy ordered. On February 1, 1995, the court *sua sponte* withdrew its previous opinion, ignored the previously acknowledged holdings in both Johnson and Jenkins, and ordered Petitioner's 1966 conviction to be scored as a first degree felony. Harris v. State, February 1, 1995 slip opinion at 5. The courts in Johnson and Harris have thus expressly reached opposite conclusions of law on the question of the guidelines scoring of pre-1972 Florida felony convictions.

This Court should exercise its discretion by accepting jurisdiction in this case. The district court's are clearly split on the scoring of pre-1972 offenses. Such a split defeats the express purpose of the guidelines which was to establish a uniform set of sentencing standards thereby minimizing or eliminating disparity in sentencing based on the court in which one appeared. 3.701(b), Fla. R. Crim. P.

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[2] Jenkins v. State, provided as appendix 5.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court accept jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan L. Greenberg, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 10 day of March, 1995.

CHERRY GRANT
Counsel for Respondent