

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,994

JAMES TARPLEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

This is a petition for discretionary review on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as "A", followed by the page numbers.

STATEMENT OF THE CASE AND FACTS

James Tarpley was convicted of burglary of an unoccupied structure and criminal mischief of \$200 or less, arising out of an incident that occurred on September 25, 1996. The 1995 sentencing guidelines took effect on October 1, 1995, so the offenses for which Mr. Tarpley was convicted took place within the temporal scope of the 1995 guidelines. The trial court sentenced Mr. Tarpley in accordance with the 1995 sentencing guidelines to a fifteen year term of incarceration, with a ten year mandatory minimum.

On appeal before the Third District Court of Appeal, Mr. Tarpley challenged the constitutionality of the "Gort Act" [Chapter 95-182 of the Laws of Florida], under which he received an enhanced sentence as a violent career criminal. Mr. Tarpley argued that the Gort Act violated the single subject requirement of Article III, section 6, of the Florida Constitution. In making this argument, Mr. Tarpley relied upon *Thompson v. State*, 708 So. 2d 315 (Fla. 2d

DCA), *review granted*, 717 So. 2d 538 (Fla. 1998). Alternatively, Mr. Tarpley requested that the Third District certify conflict with *Thompson*. In its answer brief, the state argued that the Gort Act was constitutional, but agreed that the Third District should certify conflict.

The Third District, adhering to its prior precedent, rejected Mr. Tarpley's challenge to the Gort Act and affirmed his sentence. A. 1. The Third District noted that "The latter holding is in conflict with *Thompson*," but inexplicably did not "certify" the conflict. A. 1. Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed on November 2, 1999.

SUMMARY OF ARGUMENT

Mr. Tarpley was sentenced for an offense committed after the effective date of the 1995 sentencing guidelines and within the window period to challenge Chapter 95-182 Laws of Florida. In *Thompson*, the Second District Court of Appeal held that the criminal sentencing provisions of Chapter 95-182 violated the single subject rule of Article III, section 6, of the Florida Constitution. Therefore, the express and direct conflict between the decisions of the two district courts of appeal is apparent.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *THOMPSON v. STATE*, 708 So. 2d 315 (Fla. 2d DCA 1998).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. *Neilsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960). In the present case, the Third District Court of Appeal applied a rule of law to produce a different result in a case which involves substantially the same facts as the decision of the Second District in *Thompson, supra*.

In *Thompson*, the Second District relied on this Court's decision in *Johnson v. State*, 616 So. 2d 1 (Fla 1993), invalidating the 1989 habitual felony offender amendments because they were incorporated in a legislative act containing conceptually unconnected legislation. *Thompson* similarly concluded that chapter 95-182 was comprised of statutory subject matters that were logically unrelated.

As a result, the Second District held that the criminal sentencing portions of chapter 95-182 were unconstitutional.

On appeal here, Mr. Tarpley asserted that his sentence was unlawful because the Gort Act violates the single subject requirement of Article III, section 6 of the Florida Constitution. The Third District's decision, in full (A. 1), was as follows:

We hold that there was no trial error below and, once again, that the Gort Act is constitutional. *Higgs v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997). The latter holding is in conflict with *Thompson v. State*, 708 So. 2d 315 (Fla. 2d DCA 1998), *review granted*, 717 So. 2d 538 (Fla. 1998).

Affirmed.

This holding of the Third District Court of Appeal stands in express and direct conflict with the Second District's holding in *Thompson* and with the rule of law asserted by this Court in *Johnson, supra*. This Court has already granted review in a case from the Third District involving the **same** issue and containing an **identically** worded holding. *Valdes v. State*, 728 So. 2d 1225 (Fla. 3d DCA 1999) ("The latter holding is in conflict with *Thompson*"), *review granted*, 740 So. 2d 529 (Fla. 1999). Numerous other cases where direct conflict was certified by the Third District on this same issue are also presently before this Court for review. *See, e.g., Waldo v. State*, 728 So. 2d 280 (Fla. 3d DCA), *review granted*,

741 So. 2d 1138 (Fla. 1999); *McGowan v. State*, 725 So. 2d 470 (Fla. 3d DCA), review granted, 741 So. 2d 1136 (Fla. 1999); *Gonzalez v. State*, 724 So. 2d 1271 (Fla. 3d DCA), review granted, 741 So. 2d 1135 (Fla. 1999); *English v. State*, 721 So. 2d 1250 (Fla. 3d DCA 1998), review granted, 732 So. 2d 326 (Fla. 1999); *Spann v. State*, 719 So. 2d 1031 (Fla. 3d DCA 1998), review granted, 729 So. 2d 918 (Fla. 1999); *Tillman v. State*, 718 So. 2d 944 (Fla. 3d DCA 1998), review granted, 727 So. 2d 914 (Fla. 1999); *Cyrus v. State*, 717 So. 2d 619 (Fla. 3d DCA 1998), review granted, 740 So. 2d 527 (Fla. 1999); *Almanza v. State*, 716 So. 2d 351 (Fla. 3d DCA 1998), review granted, 727 So. 2d 902 (Fla. 1999); *Elliard v. State*, 714 So. 2d 1218 (Fla. 3d DCA), review granted, 728 So. 2d 201 (Fla. 1998); *Holloway v. State*, 712 So. 2d 439 (Fla. 3d DCA), review granted, 727 So. 2d 906 (Fla. 1998). This Court should therefore exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in the instant case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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of Florida
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 3rd day of December, 1999.

Robert Godfrey
Robert Godfrey
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

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APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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Third District Court of Appeal Opinion

State vs. Tarpley (A-1)

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1999

JAMES TARPLEY,

**

Appellant,

**

vs.

**

CASE NO. 98-2140

THE STATE OF FLORIDA,

**

LOWER

Appellee.

**

TRIBUNAL NO. 96-30851

Opinion filed October 13, 1999.

An Appeal from the Circuit Court for Dade County, Peter Lopez, Judge.

Bennett H. Brummer, Public Defender and Robert Godfrey, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and M. Rebecca Springer, Assistant Attorney General (Fort Lauderdale), for appellee.

Before SCHWARTZ, C.J., and NESBITT and SORONDO, JJ.

PER CURIAM.

We hold that there was no trial error below and, once again, that the Gort Act is constitutional. *Higgs v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997). The latter holding is in conflict with *Thompson v. State*, 708 So. 2d 315 (Fla. 2nd DCA 1998), review granted, 717 So. 2d 538 (Fla. 1998).

Affirmed.