

**IN THE  
SUPREME COURT OF FLORIDA**

DALE JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC
	)	(4DCA 05-1585)
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

**PETITIONER'S BRIEF ON JURISDICTION**

On Review from the District Court of Appeal,  
Fourth District, State of Florida

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**ARGUMENT**

**POINT ON APPEAL**

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## **PRELIMINARY STATEMENT**

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before the Court.

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged with felony driving under the influence, the information alleging that he had three prior DUI convictions. *Johnson v. State*, 944 So. 2d 474, 476 (Fla. 4<sup>th</sup> DCA 2006).

The trial court conducted a jury trial on the single, present incident of DUI at issue without allowing the jury to learn of the alleged prior misdemeanor DUI offenses. After the jury returned a guilty verdict as to the present incident, it was excused and, based on the parties' previous stipulation; the trial court proceeded without a jury to determine whether Johnson had been convicted of DUI on three or more prior occasions.

*Id.* at 476.

The trial court, based upon its review of his driving record, found that petitioner had the required prior convictions and, as a result, adjudicated him guilty of felony DUI. *Id.*

On appeal to the Fourth District, petitioner argued that his right to a jury trial was violated when the trial court determined, without a jury, that he had three prior DUI convictions. *Id.* at 475.<sup>1</sup> The district court rejected petitioner's argument, concluding that he waived his right to a second phase jury determination. *Id.* at 476. Although recognizing that in order to be valid, an oral

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<sup>1</sup> It was undisputed that a written waiver of the right to a trial by jury was not executed by the petitioner.

waiver of the right to a jury trial must be preceded by a colloquy during which the trial court provides the defendant with a full explanation of the consequences of the waiver, and that the trial court did not conduct a colloquy with petitioner concerning the waiver in this case, the district court found a valid jury trial waiver stating:

Johnson's counsel had previously stipulated to a second phase bench trial and affirmed this stipulation at trial, in Johnson's presence, per the court's request. We therefore hold that the stipulation of Johnson's counsel affected a valid waiver of Johnson's right to a second phase jury determination of his prior DUI convictions, and affirm on this issue.

*Id.* at 476-477.<sup>2</sup>

Petitioner's timely filed motion for rehearing and rehearing en banc was denied. Notice to invoke the discretionary jurisdiction of this Court, based upon express and direct conflict, was subsequently filed. This jurisdictional brief now follows.

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<sup>2</sup> Citing to *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000), the district court recognized that whether petitioner had the required three prior DUI conviction was a matter he had a right to have a jury decide. 944 So. 2d at 476.

## **SUMMARY OF THE ARGUMENT**

### **POINT ON APPEAL**

Petitioner was charged with felony driving under the influence based upon his having three prior DUI convictions. A jury trial was held to determine whether petitioner was guilty of the instant DUI offense, but, after he was found guilty, the trial court made the determination that he had the requisite prior convictions. Petitioner did not sign a written waiver of his right to have a jury determine whether he had three prior DUI convictions and the trial court did not conduct an oral colloquy with him to determine whether petitioner was knowingly and voluntarily waiving his jury trial right. The Fourth District Court of Appeal found that petitioner's silence coupled with his attorney's stipulation to the trial court sitting as the phase-two trier-of-fact constituted a valid waiver of his right to a jury trial. The district court's decision is in express and direct conflict with decisions from this court and another district court of appeal which hold that in order to be valid, the waiver of the right to a jury trial must be made by the defendant, rather than his or her attorney, and must be preceded by a proper colloquy between the trial court and the defendant when executed orally, rather than in writing. The district court's decision has brought confusion to the issue of what constitutes a valid oral waiver of the right to a jury trial. This Court should resolve that conflict.

## ARGUMENT

### POINT ON APPEAL

**THIS COURT HAS JURISDICTION TO REVIEW *JOHNSON v. STATE*, 944 So. 2d 474 (Fla. 4<sup>th</sup> DCA 2006), WHERE THE DECISION RENDERED IS IN EXPRESS AND DIRECT CONFLICT WITH THAT OF THIS COURT AND ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.**

Article V, ' 3(b)(3) of the *Florida Constitution* vests this Court with jurisdiction to hear appeals in criminal cases as follows:

(3) May review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law.

*accord Fla. R. App. P. 9.030(a)(2)(A)(iv).*

In *Nielson v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960), this Court discussed

"conflict jurisdiction" stating:

the principal situation justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflict are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a case disposed of by this Court.

*Id.* at 734; accord *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). "The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents." *Kincaid v. World Insurance Co.*, 157 So. 2d 517, 518 (Fla. 1963).

In *Tucker v. State*, 559 So. 2d 218 (Fla. 1990) this Court recognized that while the rules of criminal procedure require a waiver of the right to trial by jury to be in writing, an oral waiver would suffice if the trial court advised the defendant of the value of a jury trial and made him aware of the likely consequences of the waiver. The holding in *Tucker* was reaffirmed by the Court in *State v. Upton*, 658 So. 2d 86 (Fla. 1995), which asked whether counsel's signature on a written waiver of jury trial waived his client's right to a jury trial absent an indication on the record that his client agreed to the waiver. Answering the question in the negative, the Court said:

In the instant case, there was no affirmative showing on the record establishing that Upton agreed with the waiver his attorney had signed. The trial judge did not conduct a colloquy with Upton concerning the waiver nor did Upton make any statements regarding the written waiver. The mere fact that Upton remained silent during the trial and did not object to the judge sitting as the fact-finder was insufficient to demonstrate that he agreed with the waiver. Thus, we cannot conclude that Upton knowingly,

voluntarily and intelligently waived his right to a trial by jury.

*Id.* at 88.

This Court's holdings in *Tucker* and *Upton* establish the principles that in order to be valid, the defendant, not his or her attorney, must execute a waiver of the right to a jury trial; where the waiver is executed orally, rather than in writing, the trial court must advise the defendant of the value of a jury trial and make him or her aware of the likely consequences of waiving it; and silence by the defendant whose waiver of the right to trial by jury was executed by counsel does not demonstrate an agreement with the waiver. The Fourth District Court of Appeals' decision in *Johnson* holds that counsel can waive the defendant's right to a jury trial, that a colloquy between the judge and the defendant addressing the consequences of waiving the right to a jury trial need not precede an oral waiver of the right, and that silence by the defendant in the face of counsel's waiver of his or her right to a jury trial demonstrates agreement with the waiver. Accordingly, *Johnson* is in express and direct conflict with *Tucker* and *Upton*. See also *Shuler v. State*, 463 So. 2d 464 (Fla. 2d DCA 1985)(waiver of jury trial invalid where not executed in writing or after a proper oral colloquy). With its decision, the district court has brought confusion to the issue of what constitutes a valid oral waiver of

the right to a jury trial. Trial by jury is too important a right to allow confusion concerning what constitutes a valid waiver of it to exist.

**CONCLUSION**

Petitioner has demonstrated the existence of express and direct conflict and, as a result, this Court should grant the petition for discretionary review.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the Petitioner's Brief on Jurisdiction has been furnished by courier to Ms. Sue-Ellen Kenny, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 and by U.S. Mail to Mr. Dale Johnson, DC # 670324, Columbia Correctional Institution Annex, 216 Southeast Corrections Way, Lake City, FL 32025-2013 this 23rd day of February, 2007.

\_\_\_\_\_  
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**CERTIFICATE OF FONT SIZE**

In accordance with *Florida Rule of Appellate Procedure* 9.210, petitioner hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

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David John McPherrin

Attorney for Dale Johnson