IN THE SUPREME COURT OF FLORIDA

CLAYTON HARRIS,

Petitioner,

Case No. SC08-1871

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

AMENDED JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the respondent in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Clayton Harris, the petitioner in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner’s statement of the case and facts. (PJB at 1).

The State adds the following procedural history: in Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), which followed Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), the Second District certified conflict with State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005), and State v. Coleman, 911 So. 3d 259 (Fla. 5th DCA 2005). This Court granted review in Gibson at Gibson v. State, 973 So. 2d 1123 (Fla. Jan 04, 2008), but discharged Gibson on July 3, 2008, stating that it had chosen

not to exercise its jurisdiction. State v. Gibson, 985 So. 2d 1088 (Fla. 2008).

On September 4, 2008, the First District released its opinion in Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008), which follows Laveroni and Coleman but indicates that Gibson's holding is contrary to Laveroni and Coleman, noting that Gibson had followed Matheson.

On September 29, 2008, Petitioner filed his notice invoking discretionary review and on October 2, 2008, his initial jurisdictional brief. On October 3, 2008, this Court dismissed the petition for discretionary review, noting that this Court did not have jurisdiction.

Petitioner filed a motion for reinstatement on October 10, 2008, arguing that because Harris contains a contra citation, this provides a basis for jurisdiction under Florida Star v. B.F.J., 530 So. 2d 286, 288 n.3 (Fla. 1988). This Court reinstated the petition for review on October 17, 2008.

SUMMARY OF ARGUMENT

The State disagrees with Petitioner's argument that this Court has jurisdiction under Florida Star, 530 So. 2d at 288, because the contra citation in Harris to Gibson does not "**explicitly note[] a contrary holding** of another district court." Rather, Harris merely cites to Gibson with a parenthetical that Gibson followed Matheson and does not explicitly establish the point of law or holding in Gibson with which it disagree.

But even if this Court had jurisdiction, because Harris cites to precisely the same conflict cases as Gibson but does so without an opinion, the State can offer no more compelling reason why this Court ought to exercise its discretion and take jurisdiction to resolve the conflict in Harris than was already presented to this Court in Gibson.

ARGUMENT

ISSUE I

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE FIRST DISTRICT COURT OF APPEAL'S PER CURIAM DENIAL WITHOUT OPINION IN HARRIS V. STATE, 989 So. 2d 1214 (Fla. 1ST DCA 2008)? (Restated)

The First District Court of Appeal issued a per curiam affirmance in this case, Harris v. State, 989 So. 2d 1214, 1215 (Fla. 1ST DCA 2008), citing State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005), and State v. Coleman, 911 So. 3d 259 (Fla. 5th DCA 2005). The First District also cited as contrary authority Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), noting in a parenthetical that Gibson followed Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003).

Article V, section 3(b)(3), Florida Constitution, states that, in order to meet jurisdictional requirements, the decisional conflict must be both **express** and direct:

> (b) JURISDICTION. - The supreme court:
>
> ....
>
> (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 of the supreme court on the same question of law.

(Emphasis added).

Generally, this Court does not review per curiam opinions from the district courts. In Tippens v. State, 897 So. 2d 1278, 1280 (Fla. 2005), a case relying on and explaining the case upon which Petitioner relies, Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988), this Court explained this and outlined the several exceptions:

> [T]his Court explained that its direct conflict jurisdiction is a two-tiered concept: "The first [tier] is a general grant of discretionary subject-matter jurisdiction, and the second [tier] is a constitutional command as to how the discretion itself may be exercised." Florida Star II, 530 So.2d at 288. The Court described the first-tier limitations thusly:
>
> > **This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as [a decision] issued without opinion or citation....** Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation **explicitly notes a contrary holding** of another district court or of this Court.
>
> Florida Star II, 530 So. 2d at 288 n. 3. Specifically, the district court decision under review "must contain a statement or citation effectively establishing a point of law upon which the decision rests." Id. at 288.

Tippens, 897 So. 2d at 1280 (emphasis added).

The State disagrees with Petitioner that Florida Star II provides this Court with a basis for jurisdiction based on the

contra citation in the First District's per curiam affirmance in Harris, as the citation in Harris **does not "explicitly note[] a contrary holding** of another district court." Florida Star II, 530 So. 2d at 288 n. 3; Tippens, 897 So. 2d at 1280. In other words, the First District's citation to Gibson does not expressly note the holding or legal point from Gibson with which the First District disagreed. Rather, the First District only noted that Gibson followed Matheson. Thus, Harris does not "contain a statement or citation effectively establishing a point of law upon which the decision rests." Florida Star II, 530 So. 2d at 288. While it could be inferred from the First District's citation to Coleman and Laveroni and contra citation to Gibson that the same conflicting legal issue is present in Harris as was present in those cases, **inferences are not sufficient**. The Florida Constitution requires that the conflicting point of law must be **explicit** or **express.** Art. V, § 3(b)(3), Fla. Const. Florida Star II merely recognizes that a per curiam with a contra citation may satisfy this requirement when the contra citation's holding is **explicitly** noted. Florida Star II, 530 So. 2d at 288 n. 3; Tippens, 897 So. 2d at 1280.

Moreover, because this Court discharged jurisdiction in Gibson on July 3, 2008, see State v. Gibson, 985 So. 2d 1088, 1089 (Fla. 2008), and Harris was not issued until September 4,

2008, this Court does not have jurisdiction under Jollie v. State, 405 So. 2d 418 (Fla. 1981)("We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.").

But even if this Court had jurisdiction, this Court should not exercise it given this Court's discharge of Gibson. In this Court's order discharging jurisdiction in Gibson, in which case the Second District relied on Matheson and certified conflict with Coleman and Laveroni,[1] this Court stated as follows:

> We initially accepted jurisdiction of this case, Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), on the basis of certified direct conflict with State v. Coleman, 911 So. 2d 259 (Fla. 5th DCA 2005), and State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005). Upon further consideration, we have determined that we should exercise our discretion and discharge jurisdiction. Accordingly, we hereby discharge jurisdiction and dismiss review.

985 So. 2d at 1089. While this Court did not indicate that review was improvidently granted in Gibson, given that the First District has cited to precisely the same conflict, i.e. the conflict between Gibson, Coleman, and Laveroni, it appears that even if this Court accepted jurisdiction, it is inclined not to

[1] See Gibson, 968 So. 2d at 632.

exercise jurisdiction. Further, because there is no opinion in this case, this Court cannot look to the four corners of Harris to determine whether the case is more important of more compelling for purposes of exercising its jurisdiction than the legal issue which was presented in Gibson.

CONCLUSION

Based on the foregoing, this Court does not have express and direct conflict jurisdiction over this case. Alternatively, even if this Court has jurisdiction to hear this case, in light of Gibson, the State can offer no compelling reason why the State should exercise that jurisdiction than what was presented to this Court in Gibson.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Glenn P. Gifford, Esq., Appellate Division Chief, Assistant Public Defender, 301 S. Monroe St., Suite 401, Tallahassee, FL 32301, by MAIL on October 29, 2008.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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