IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC09-
Lower Tribunal No. 1D08-4976

SIRRON JOHNSON,

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Roy L. Bush, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

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

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached hereto. It also can be found at 32 Fla. L. Weekly D 2515 (Fla. 1st DCA 2007).

SUMMARY OF ARGUMENT

This Court has jurisdiction in this case based upon direct conflict of decisions. This Court also has jurisdiction under the decision in Jollie v. State, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

ISSUE I

> WHETHER THE FIRST DISTRICT'S OPINION IN JOHNSON V. STATE IS IN EXPRESS AND DIRECT CONFLICT WITH THE SECOND DISTRICT'S DECISIONS IN BARRON V. STATE, 931 SO. 2D 929 (FLA. 2D DCA 2006) AND CUTTS V. STATE, 940 SO. 2D 1246 (FLA. 2D DCA 2006), THE THIRD DISTRICT'S DECISIONS IN CARTER V. STATE, 920 SO. 2D 774 (FLA. 3D DCA) AND CORNET V. STATE, 915 SO. 2D 239 (FLA. 3D DCA 2006), THE FOURTH DISTRICT'S DECISIONS IN HAMILTON V. STATE, 914 SO. 2D 993 (FLA. 4TH DCA 2005) AND THOMAS V. STATE, 914 SO. 2D 27 (FLA. 4TH DCA 2005), AND THE FIFTH DISTRICT'S DECISIONS LANGFORD V. STATE, 929 SO. 2D 528 (FLA. 5TH DCA 2006) AND LESTER V. STATE, 923 SO. 2D 596 (FLA. 5TH DCA 2006)?

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay 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.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict, and dismissing petition). In addition, it is the "conflict of decisions, not

conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the District Court's decision reached a result opposite to Barron v. State, 931 So. 2d 929 (Fla. 2d DCA 2006), Cutts v. State, 940 So. 2d 1246 (Fla. 2d DCA 2006)(holding that Blakely should not be applied retroactively), Carter v. State, 920 So. 2d 774 (Fla. 3d DCA), Cornet v. State, 915 So. 2d 239 (Fla. 3d DCA 2006), Hamilton v. State, 914 So. 2d 993 (Fla. 4th DCA 2005), Thomas v. State, 914 So. 2d 27 (Fla. 4th DCA 2005), Langford v. State, 929 So. 2d 528 (Fla. 5th DCA 2006)(finding that Apprendi and Blakely are not retroactively applicable), Lester v. State, 923 So. 2d 596 (Fla. 5th DCA 2006)(same), thereby bestowing conflict jurisdiction upon this Honorable Court. The State elaborates as follows.

The decision below is in "express and direct" conflict with Barron v. State, 931 So. 2d 929 (Fla. 2d DCA 2006), Cutts v. State, 940 So. 2d 1246 (Fla. 2d DCA 2006), Carter v. State, 920 So. 2d 774 (Fla. 3d DCA), Cornet v. State, 915 So. 2d 239 (Fla. 3d DCA 2006), Hamilton v. State, 914 So. 2d 993 (Fla. 4th DCA 2005), Thomas v. State, 914 So. 2d 27 (Fla. 4th DCA 2005), Langford v. State, 929 So. 2d 528 (Fla. 5th DCA 2006), Lester v. State, 923 So. 2d 596 (Fla. 5th DCA 2006).

In the case at bar, the First District's opinion reverses and remands the case for attachment of portions of the record refuting the claims or for harmless error analysis pursuant to Galindez v. State, 955 So. 2d 517 (Fla. 2007). The First District determined in its opinion that its decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), dictated that the decision in Blakely v. Washington, 542 U.S. 296 (2004), be applied and determining that the statutory maximum meant the maximum guidelines sentence that could be imposed without an upward departure.

Review of the decision of the First District in Isaac is currently pending before this Court on the basis that the decisions conflict with those of the courts in Barron v. State, 931 So. 2d 929 (Fla. 2d DCA 2006), Cutts v. State, 940 So. 2d 1246 (Fla. 2d DCA 2006)(holding that Blakely should not be applied retroactively), Carter v. State, 920 So. 2d 774 (Fla. 3d DCA), Cornet v. State, 915 So. 2d 239 (Fla. 3d DCA 2006),

Hamilton v. State, 914 So. 2d 993 (Fla. 4th DCA 2005), Thomas v. State, 914 So. 2d 27 (Fla. 4th DCA 2005), Langford v. State, 929 So. 2d 528 (Fla. 5th DCA 2006)(finding that Apprendi and Blakely are not retroactively applicable), and Lester v. State, 923 So. 2d 596 (Fla. 5th DCA 2006)(same). Therefore, there is expressed and direct conflict conferring jurisdiction to this Court for review.

ISSUE II

WHETHER THIS COURT HAS JURISDICTION TO HEAR THIS CASE PURSUANT TO JOLLIE V. STATE, 405 SO. 2D 418 (FLA. 1981)?

This Court has jurisdiction to review this matter under the decision in Jollie v. State, 405 So. 2d 418 (Fla. 1981). This Court, in Jollie stated that:

> 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.

The First District issued its opinion citing its decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005)." The First District's decision in Isaac is currently pending review in this Court. See State v. Isaac, SC05-2047. As a result, this Court has jurisdiction under Jollie.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court exercise its jurisdiction in this cause.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Sirron Johnson, DC# 471562, Jackson Correctional Institution, 5563 10th Street, Malone, Florida 32445-3144, by MAIL on August 21, 2009.

Respectfully submitted and served,

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[AGO# L08-1-32143]

CERTIFICATE OF COMPLIANCE

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

_____
Christine Ann Guard
Attorney for State of Florida

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APPENDIX

Johnson v. State, 1D08-4976, Slip op. (Fla. 1st DCA August 12, 2009)