Electronically Filed 05/15/2013 12:22:28 PM ET

RECEIVED, 5/15/2013 12:23:32, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

TORRENCE LAWTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-685

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

RICHARD L. POLIN
CHIEF ASSISTANT ATTORNEY GENERAL

NIKOLE HICIANO
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 844411

Office of the Attorney General
444 Brickell Ave, Suite 650
Miami, FL 33131
Primary E-Mail:
CrimAppMIA@MyFloridaLegal.com
Secondary E-Mail:
Nikole.Hiciano@myfloridalegal.com
(305) 377-5441
(305) 377-5655 Fax

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE#

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 4

WHETHER THE THIRD DISTRICT'S OPINION IN LAWTON IS IN EXPRESS AND DIRECT CONFLICT WITH THE FIRST DISTRICT COURT OF APPEAL'S OPINION IN AKINS, JOHNSON AND THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN WASHINGTON? 4

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE 11

TABLE OF CITATIONS

State Cases

Akins v. State, 104 So. 3d 1173 (Fla. 1st DCA 2012).....1, 5

Bunn v. Bunn, 311 So.2d 387 (Fla. 4th DCA 1975). 8

Frost v. State, 53 So. 3d 1119 (Fla. 4th DCA 2011).....8

Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) 5

Johnson v. State, 2013 WL 1809685 (Fla. 1st DCA April 30, 2013)..... 1, 5, 8

Lawton v. State, 3109 So. 3d 825 (Fla. 3d DCA 2013)..... *passim*

Reaves v. State, 485 So. 2d 829 (Fla. 1986).....5

Washington v. State, 37 Fla. L. Weekly D154 (Fla. 2d DCA January 18, 2012) .1, 6

Federal Cases

Graham v. Florida, —— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....1

Peterson v. BMI Refractories, 124 F.3d 1386 (11th Cir.1997) 8

STATEMENT OF THE CASE AND FACTS

Petitioner, Torrence Lawton, seeks discretionary review of the Third District Court of Appeal opinion in Lawton v. State, 3109 So. 3d 825 (Fla. 3d DCA 2013), based on the allegation that the opinion is in express and direct conflict with the First District Court of Appeal in Akins v. State, 104 So. 3d 1173 (Fla. 1st DCA 2012),and Johnson v. State, 1D12-3854, 2013 WL 1809685 (Fla. 1st DCA April 30, 2013) and the Second District Court of Appeal in Washington v. State, 37 Fla. L. Weekly D154 (Fla. 2d DCA January 18, 2012), as to whether a life sentence was illegal under Graham v. Florida, —– U.S. ——–, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Respondent, the State of Florida, adopts the Petitioner's statement of the case and facts only to the extent that they are non-argumentative and subject to the clarifications below:

Lawton was before the Third District appealing the denial of his motion to correct illegal sentences pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure, in two separate cases that were sentenced at the same time. On appeal, the Third District upheld that the life-without-parole sentences imposed for Case Number 87–9838 (homicide/nonhomicide case) finding that because Lawton was convicted of both homicide and nonhomicide offenses which arose out of a **single** criminal episode, it fell within the exception created in Graham, permitting the imposition of such a sentence for a juvenile who "committed both homicide and nonhomicide crimes...." Graham, 130 S.Ct. at 2023. The district court also noted

that the record revealed that the trial court, in sentencing Lawton to life without parole for the attempted murder and the armed robbery on his companion case, departed upward from the sentencing guidelines, and properly considered the unscored homicide as an aggravating factor justifying the departure sentence on the two nonhomicide offenses. The court also rejected Petitioner's argument that that the life-without-parole sentences on the two nonhomicides are nevertheless unconstitutional because those sentences (life without parole) "exceeded" the sentence imposed for the homicide (life with parole eligibility after twenty-five years). The Third District Court wrote that:

> nothing in Graham requires that the sentence on the homicide equal or exceed the sentence on the nonhomicide offense in order for the sentences to be lawful. More importantly, however, under the statutory scheme that existed at the time of the instant case, the trial judge imposed the maximum sentence authorized for first-degree murder. In fact, the trial court had no discretion whatsoever; given that the death penalty had been waived by the State, the trial court was required by law to impose a sentence of life without parole eligibility for twenty-five years. See § 775.082(1), Fla. Stat. (1987). In 1987, a sentence of life without parole for the homicide would have been illegal. The trial court did not and could not exercise any discretion in imposing this sentence. It seems plain, given the upward departure sentences of life-without-parole on the two nonhomicide offenses, that the trial court would have imposed life without parole on the homicide count, had such a sentence been authorized under the law.

Lawton v. State, 109 So. 3d 825 (Fla. 3d DCA 2013). Petitioner now seeks the discretionary review of this Court by arguing that it is in express and direct conflict with the First District Court of Appeal's opinion in Akins and Johnson and the

Second District Court of Appeal's decision in Washington. The State's response follows.

SUMMARY OF ARGUMENT

This Court should decline to exercise its discretionary jurisdiction in this matter as a careful comparison of the Third District's opinion in Lawton compels the conclusion that there is either no express or direct conflict with the other district courts and to the extent that conflict jurisdiction may exist, convincing reasons exist for the Court to decline to exercise its discretionary jurisdiction. The critical distinguishing factor in Akins and Johnson is that the majority opinions in those cases do not discuss whether or not the homicide offenses were interrelated with the non-homicide offenses because they were part of the same criminal episode. Decisions are only considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions, and not when any potential conflict appears in a concurring or dissenting opinion. Moreover, Petitioner relies on language of the Second District in Washington, which appears to be dicta and not a part of the Court's holding. Lastly, Petitioner relies on language from Akins and Johnson asserting that the "exception" in Graham is merely dicta. Although that might provide the basis for finding conflict with the Third District, which treats the Graham language as binding, the First District's language regarding dicta is based on an unreasonably constrained view

of what constitutes dicta. The language in Graham is not dicta and the Third District was clearly correct in treating that limitation as part of the Supreme Court's holding. Accordingly, this Court should not exercise its discretionary jurisdiction.

ARGUMENT

WHETHER THE THIRD DISTRICT'S OPINION IN LAWTON IS IN EXPRESS AND DIRECT CONFLICT WITH THE FIRST DISTRICT COURT OF APPEAL'S OPINION IN AKINS, JOHNSON AND THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN WASHINGTON?

Petitioner argues that the Third District's decision expressly and directly conflicts with the decisions of other districts courts of appeal in Akins, Washington, and Johnson. This Court should decline to exercise its discretionary jurisdiction in this matter as a careful comparison of the Third District's opinion in Lawton compels the conclusion that there is either no express or direct conflict and to the extent that conflict jurisdiction may exist, convincing reasons exist for the Court to decline to exercise its discretionary jurisdiction.

The holding of the Third District in Lawton was that when a defendant is convicted and sentenced for a non-homicide and a homicide, and both were part of the same criminal episode, the non-homicide can receive a life sentence without parole, under Graham, because in that situation, the sentence for the non-homicide is based, in part, on the fact the defendant was convicted for the homicide as well; the two are interrelated and inextricably intertwined. The Third District

distinguished this from cases in which the non-homicide and homicide offenses were not part of the same criminal episode and were therefore not interrelated.

However, the critical distinguishing factor in Akins and Johnson is that the majority opinions in those cases do not discuss whether or not the homicide offenses were interrelated with the non-homicide offenses because they were part of the same criminal episode. Decisions are considered to be in express and direct conflict only when the conflict appears within the four corners of the ***majority*** decisions, and not a concurring or dissenting opinion. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). If the offenses in Akins and Johnson were not part of the same criminal episode, those other courts were not faced with the same fact pattern and were not confronted with the same legal issue-whether offenses, when part of the same criminal episode, could result in true life sentences for the non-homicide offenses.

Thus, in Akins, the First District references the fact that the defendant was sentenced for one count of second degree murder and one count of attempted first-degree murder, but does not provide any facts from which it can be ascertained whether the offenses were part of the same criminal episode or not. Nor did it find that the attempted first-degree murder, with the life sentence, was interrelated with the prior conviction and sentence for second-degree murder, a true homicide offense. In Johnson, the same court notes that the defendant

was convicted of first degree murder and burglary with an assault, but the majority opinion is devoid of any facts from which it can be ascertained whether the offenses were part of the same criminal episode.

The language of the Second District in Washington, upon which Petitioner relies, appears to be dicta and not a part of the Court's holding. The district court there overturned sentences for felony murder and a related kidnapping, prohibiting the imposition of life without parole for the felony murders. The Second District, quoting the relevant language from Graham, concluded that the United States Supreme Court did, indeed, authorize life sentences for non-homicides when a defendant is also being sentenced for a homicide. That court, however, stated that the exception applied when the life sentence for the non-homicide was "accompanied by an authorized sentence of life without possibility of parole for a homicide offense." As the Second District was precluding a life sentence for the homicide on remand, it was therefore precluding a life sentence for the non- homicide, since the non-homicide would not be accompanied by a contemporaneous life sentence for a homicide.

The State recognizes that this holding expressly and directly conflicts with that of the Third District. While both Courts recognize an applicable exception under Graham, the Second District limits it to cases where the homicide receives a true life sentence; the Third District permits the life for the non-homicide even when the homicide receives a sentence of "less than" life.

Although this does constitute a conflict between the two districts, it is clear from the passage of Graham, that is fully quoted in Johnson, that the Graham exception is not limited to cases where the homicide receives a sentence of life without parole. The passage from Graham states:

> The State contends that [the Annino] study's tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in Sullivan v. Florida, O.T.2009, No. 08–7621, pp. 28–31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Graham v. Florida, 130 S.Ct. 2011, 2023 (2010).

As can be seen from the full quotation, there is not a single reference limiting that exception to cases where the sentence for the homicide is life without parole. The Second District's opinion in Washington clearly read into Graham something which was not there and it is therefore clearly a misreading of Graham. As the Third District's reading of Graham is fully consistent with the language in Graham and the result reached in the instant case is therefore clearly correct, there is no reason for this Court to grant review, even though it would

be within its discretion.

Lastly, the Petitioner in this case relies on language from Akins and Johnson asserting that the "exception" in Graham is merely dicta. Once again, although that might provide the basis for finding conflict with the Third District, which treats the Graham language as binding, a point with which the Second District, in Washington, clearly concurs, the First District's language regarding dicta is based on an unreasonably constrained view of what constitutes dicta. Obiter dictum, is "a purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination." Bunn v. Bunn, 311 So.2d 387, 389 (Fla. 4th DCA 1975). In particular, "[a]n expression which might otherwise be regarded as dictum becomes an authoritative statement when the court expressly declares it to be a guide for future conduct." Frost v. State, 53 So. 3d 1119, 1124 (Fla. 4th DCA 2011) review granted, decision quashed on other grounds, 94 So. 3d 481 (Fla. 2012)(citing to State v. Fahringer, 136 Ariz. 414, 666 P.2d 514, 515 (1983)). Further, "dicta from the Supreme Court is not something to be lightly cast aside." Peterson v. BMI Refractories, 124 F.3d 1386, 1392 n. 4 (11th Cir.1997).

When the Johnson court went through its analysis of what constitutes dicta, that court addressed the one paragraph of Graham in isolation from the rest of the

Graham opinion, when concluding that the one paragraph of Graham was merely a response to the State's statistical analysis. Johnson ignores the ultimate holding of the Supreme Court in Graham, which ultimately held: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile who did not commit homicide." 130 S.Ct. at 2034. The Court's express holding clearly applied only to non-homicide offenses of those juveniles who did not commit homicides. The prior paragraph of Graham, addressed at length by Johnson, therefore hardly qualifies as dicta. This point is further substantiated by yet another statement in Graham: "There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over." 130 S.Ct. at 2033. It is therefore eminently clear, based on a reading of Graham, in its entirety, that the language in Graham is not dicta and that the Third District was clearly correct in treating that limitation as part of the Supreme Court's holding.

As the Third District has reached the correct result on this question, this Court can exercise its discretion to decline review of the instant case. The State notes that numerous Graham issues are being addressed by the district courts of appeal and many of them are reaching this Court for possible discretionary review. This Court is going to have ample opportunity to address the numerous issues being generated by Graham. As such, this Court can exercise its discretion in

determining which ones to utilize as the basis for review and pronouncements on the relevant legal issues. Accordingly, the State would submit that the Court should decline to exercise its discretionary jurisdiction to review the instant case.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

Respectfully submitted,

PAMELA JO BONDI.
Attorney General
Tallahassee, Florida

s/ Richard L. Polin
RICHARD L. POLIN
Bureau Chief
Florida Bar No. 0230987

s/ Nikole Hiciano
NIKOLE HICIANO
Assistant Attorney General
Florida Bar Number 0844411
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441 (W)
(305) 377-5655 (F)
Primary E-Mail:
CrimAppMIA@MyFloridaLegal.com
Secondary E-Mail:
Nikole.Hiciano@myfloridalegal.com

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by electronic service to Andrew Stanton, Assistant Public Defender, Andrew Stanton, at appellatedefender@pdmiami.com on May 15, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Richard L. Polin
CHIEF ASSISTANT ATTORNEY GENERAL

/s/ Nikole Hiciano
By: NIKOLE HICIANO
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 844411
Attorney for Respondent, State of Fla.
Office of the Attorney General
444 Brickell Ave, Suite 650
Miami, FL 33131
Primary E-Mail:
CrimAppMIA@MyFloridaLegal.com
Secondary E-Mail:
Nikole.Hiciano@myfloridalegal.com
(305) 377-5441
(305) 377-5655 Fax