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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-685

TORRENCE LAWTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

SECOND AMENDED BRIEF OF PETITIONER ON JURISDICTION

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

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FLORIDA CONSTITUTION

Art. V, § 3(b)(3), Fla. Const 6

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SECOND AMENDED BRIEF OF PETITIONER ON JURISDICTION

INTRODUCTION

This is a petition for discretionary review on the grounds that the district court opinion expressly and directly conflicts with a decision of First and Second District Courts of Appeal. In this brief of petitioner on jurisdiction, all references are to the slip opinion in the appendix attached to this brief, identified as "A."

followed by page numbers.

STATEMENT OF THE CASE AND FACTS

In its opinion, the district court described the facts of this case as follows:

> … In 1987, at the age of sixteen, Lawton was charged in case number 87–9838 with first degree murder, attempted first degree murder and armed robbery ("the homicide/nonhomicide case"). That same year, Lawton was also charged in an unrelated case (case number 87–8000) with two counts of attempted murder ("the nonhomicide case").
>
> A jury found Lawton guilty of all three charges in the homicide/nonhomicide case. Prior to sentencing in that case, Lawton pled guilty to the charges in the nonhomicide case. On February 9, 1988, the trial court entered sentences on both cases as follows:
>
> ***The homicide/nonhomicide case (case number 87–9838)***
>
> First–Degree Murder (Count One): Life in prison without parole eligibility for twenty-five years;
>
> Attempted First–Degree Murder with a Firearm (Count Two): Life in prison with a three-year mandatory minimum (for use of a firearm in the commission of the offense) to run consecutively with the sentence in Count One;
>
> Armed Robbery (Count Three): Life in prison, to run concurrently with the sentence in Count Two but consecutively with the sentence in Count One.
>
> ***The nonhomicide case (case number 87–8000)***

> Attempted First–Degree Murder with a Firearm (Count One): Life in prison with a three-year mandatory minimum;
>
> Attempted First–Degree Murder with a Firearm (Count Two): Life in prison with a three-year mandatory minimum, to run concurrent with the sentence in Count One.
>
> The two sentences in the nonhomicide case were to run concurrent with each other and concurrent with the sentences imposed in the homicide/nonhomicide case. The judgments and sentences were all affirmed on direct appeal. *See Lawton v. State*, 538 So. 2d 1369 (Fla. 3d DCA 1989). Lawton thereafter filed several postconviction motions; each was denied and affirmed on appeal. The instant appeal arises out of a motion for postconviction relief filed by Lawton following the United States Supreme Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010). Lawton contended that, pursuant to *Graham*, the life-without-parole sentences imposed on his nonhomicide offenses (i.e., attempted first-degree murder and armed robbery in case number 87–9838; two counts of attempted first-degree murder in case number 87–8000) were unconstitutional. The trial court denied Lawton's motion for post-conviction relief, finding the sentences were permitted under *Graham* because those sentences were imposed at the same time as the sentence for his homicide conviction. This appeal followed.

Lawton v. State, 38 Fla. L. Weekly 522 (Fla. 3d DCA Mar. 6, 2013) (footnote omitted); (A. 2-4).

Mr. Lawton filed a motion to correct illegal sentence arguing that his[1] life-without-parole sentences violate *Graham v. Florida*, 130 S.Ct. 2011 (2010). The District Court affirmed as to the LWOP sentences for armed robbery and attempted murder in case number 87-9838, the "homicide/nonhomicide" [2]case. (A. 9-13). Even though the homicide sentence would have permitted Mr. Lawton the opportunity for parole, it concluded, "[N]othing in *Graham* requires that the sentence on the homicide offense in order for the sentences to be lawful." (A. 11).

On April 30, 2013, the First District Court of Appeal issued its opinion in *Johnson v. State*, 38 Fla. L. Weekly D953 (Fla. 1st DCA April 30, 2013), in which it certified conflict with the Third District's decision in Mr. Lawton's case.

Mr. Lawton now invokes this Court's discretion based on express and direct conflict with the First District's decision in *Johnson*, as well as with *Akins v. State*, 104 So. 3d 1173 (Fla. 1st DCA 2012), and *Washington v. State*, 37 Fla. L. Weekly D154 (January 18, 2012).

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1 Hereafter referred to as "LWOP."

2 The court reversed the LWOP sentences for the attempted murders in case number 87-8000, the "nonhomicide case."

SUMMARY OF ARGUMENT

The Third District's decision in this case expressly and directly conflicts with the First District's decision in *Johnson v. State*, 38 Fla. L. Weekly D953 (Fla. 1st DCA April 30, 2013). **The First District has certified the conflict.**

The Third District's decision also conflicts with *Akins v. State*, 104 So. 3d 1173 (Fla. 1st DCA 2012). In both this case and *Akins*, the defendant received non-LWOP sentences for homicide. In both cases, the trial court nevertheless imposed a sentence of LWOP solely on nonhomicide convictions. The First District held that this was unconstitutional under *Graham v. Florida*, 130 S.Ct. 2011 (2010). The Third District held that it was not. The two decisions simply cannot be reconciled.

The Third District's decision likewise conflicts with the Second District's decision in *Washington v. State*, 37 Fla. L. Weekly D154 (January 18, 2012). The Second District stated

> [T]he Supreme Court [in *Graham*] indicated that a life sentence without possibility of parole for a nonhomicide offense could be constitutional **if it accompanied an authorized sentence of life without possibility of parole for a homicide offense**.

(emphasis supplied). The Third District held precisely the opposite: the nonhomicide LWOP sentence *need not* accompany an authorized LWOP sentence

for homicide.

ARGUMENT

THE DISTRICT COURT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT'S DECISIONS IN *JOHNSON*[3] AND *AKINS*,[4] AND THE SECOND DISTRICT'S DECISION IN *WASHINGTON*.[5]

There can be no doubt that the decision in this case conflicts with the First District's decision in *Johnson v. State*.[6] The First District certified that it does:

> We do, however, certify conflict with the Third District, which recently held that *Graham* does not apply to a juvenile offender who was "convicted of both homicide and nonhomicide offenses which arose out of a single criminal episode." *Lawton v. State*, No. 3D11-2505, 2013 WL 811661 (Fla. 3d DCA, Mar. 6, 2013) (reading *Graham* to create an "exception" that allows for imposition of life without parole for a nonhomicide offense committed with a homicide in a single criminal episode).

Slip. Op. 4-5.

Johnson and this case are indistinguishable. Both *Johnson* and Mr. Lawtonwere sentenced to life imprisonment for first-degree murder, and LWOP for an

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3 *Johnson v. State*, 38 Fla. L. Weekly D953 (Fla. 1st DCA April 30, 2013)
4 *Akins v. State*, 104 So. 3d 1173 (Fla. 1st DCA 2012).
5 *Washington v. State*, 37 Fla. L. Weekly D154 (January 18, 2012).
6 This Court has jurisdiction to review a 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." Art. V, § 3(b)(3), Fla. Const.

accompanying nonhomicide offense. Both filed motions to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a), and both argued that *Graham v. Florida*, 130 S.Ct. 2011 (2010) forbids their LWOP sentences for nonhomicide [7]offenses.

The Third District's decision also squarely conflicts with the First District's decision in *Akins v. State*. Both Mr. Lawton and Akins received non-LWOP sentences for homicide, but were nevertheless sentenced to LWOP solely on their nonhomicide offenses. Interpreting *Graham*, the first district stated in *Akins*:

> Although appellant also committed a homicide, he was sentenced for the homicide, not to life without parole, but to twenty-seven years in prison.
>
> The life sentence appellant received was solely for the attempt, a nonhomicide offense.

104 So. 3d at 1174. In Mr. Lawton's case, the Third District stated:

> However, 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.

(A. 11). These two statements are irreconcilable. Either *Graham* permits a

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7 The only difference is one that makes Mr. Lawton's claim more compelling: He actually received a more lenient, parole-eligible sentence for homicide than he did for the nonhomicide.
8 In light of *Johnson*, the Third District's attempt to distinguish this case from *Akins* based on the fact that *Akins* received a term of years for homicide and the mandatory nature of Mr. Lawton's parole-eligible sentence, must fail.

minor[8] sentenced to less than LWOP for homicide to be sentenced to LWOP

“solely for a

nonhomicide offense" or it does not.

The Third District's decision also conflicts with the Second District's interpretation of *Graham* in *Washington v. State*. In *Washington*, the Second District reversed Washington's homicide sentences. It also reversed Washington's LWOP sentences for kidnapping, explaining:

> Because the homicide offense can be an aggravating factor in the sentencing of the nonhomicide offense, the Supreme Court [in *Graham*] indicated that a life sentence without possibility of parole for a nonhomicide offense could be constitutional **if it accompanied an authorized sentence of life without possibility of parole for a homicide offense**. *See [Graham]*.
>
> Thus, the constitutionality of Mr. Washington's two life sentences without parole for the kidnappings probably hinges on whether the trial court, on remand, imposes life without parole for felony murders.

Id. (emphasis supplied). In Mr. Lawton's case, the Third District stated precisely the opposite conclusion: "[N]othing 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.

The Court should exercise its discretionary jurisdiction to review Mr. Lawton's case. The Third District has taken a position that simply cannot be reconciled with that taken by the First and Second Districts. In the absence of

review by this Court, a juvenile's LWOP sentence will stand or fall solely on the happenstance of the district in which he was convicted. The Court should intervene to ensure that the Florida and Federal Constitutions are enforced consistently across the state.

CONCLUSION

For the foregoing reasons, the Court should grant discretionary jurisdiction based upon express and direct conflict of decisions, where the district Court's opinion expressly and directly conflicts with *Johnson v. State*, 38 Fla. L. Weekly D953 (Fla. 1st DCA April 30, 2013), *Akins v. State*, 104 So. 3d 1173 (Fla. 1st DCA 2012) and *Washington v. State*, 37 Fla. L. Weekly D154 (January 18, 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered electronically to CrimAppMia@MyFloridaLegal.com to counsel for the Respondent, Nicole Hiciano, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 1st day of May, 2013.

/s/Andrew Stanton
ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

/s/Andrew Stanton
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