

IN THE SUPREME COURT OF FLORIDA

RICO JOHNSON,

Petitioner,

v.

CASE NO. SC17-845

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The facts of this case were set forth in the opinion below as follows:

Appellant, Rico Johnson, challenges his conviction for conspiracy to traffic in cocaine. Among other claims, he argues that the trial court erred by permitting police officers to give opinion testimony identifying his and a co-conspirator's voices on intercepted telephone calls. He argues that because the police officers lacked any "prior special familiarity" with his voice, as witnesses to the crime or otherwise, admitting their testimony invaded the province of the jury...

In September 2014, the City/County Investigative Bureau in Seminole County (the "CCIB") began investigating the sale and distribution of cocaine that allegedly involved Appellant, co-conspirator Edward Howard, Jr., and more than one hundred other suspects. A wiretap on Howard's telephone allowed the CCIB to record calls and receive data about intercepted phone calls, including the date and time of the call, whether it was an incoming or outgoing call from the wiretapped phone, and the numbers dialed by the wiretapped phone. The investigating agents correlated the suspects' names with phone numbers and video surveillance of them and relayed that information to Agents Matt Scovel, the lead investigative agent, and Kevin Pederson, the administrator of the software system that intercepted the phone calls. During the investigation, Agents Scovel and Pederson listened to thousands of intercepted phone calls involving the suspects.

Based on the intercepted phone calls, the CCIB executed a search warrant at Howard's home on a day it suspected that Appellant would be delivering a supply of cocaine. Although cannabis and cash were found in the home, they found no cocaine. During the search, Agent Scovel spoke with Appellant for approximately five minutes but Agent Scovel "did most of the talking" because Appellant "felt uncomfortable talking to [him]." At the same time, Agent Pederson had a five-minute conversation with Howard, who spoke for approximately half of the time. This was the only time that either agent personally spoke with Appellant or Howard. Based

on the intercepted phone calls, sixteen suspects, including Appellant and Howard, were eventually arrested and charged with conspiracy to traffic in cocaine.

At trial, the State called Agents Scovel and Pederson to identify Appellant's and Howard's voices, respectively, on the recorded phone calls. Agent Scovel testified that he recognized Appellant's voice from the intercepted phone calls, their conversation at the time of the search, and a DVD recording of a hearing where Appellant testified for approximately twenty minutes. That recording was not entered into evidence at Appellant's trial or played for the jury. Agent Pederson testified that he recognized Howard's voice from the intercepted phone calls and their conversation at the time of the search. The State later played several phone calls for the jury in which Appellant, Howard, and other suspects allegedly discussed drug transactions in coded terms. According to Agent Scovel's testimony, the coded calls involved discussions between Howard and Appellant, and between Howard and other co-conspirators, about buying and selling cocaine, the amounts of and prices for the cocaine, the availability of buyers, and plans to meet to exchange the cocaine for money.

*Johnson v. State*, 42 Fla. L. Weekly D797, 2017 WL 13049544 \*1 (Fla. 5th DCA Apr. 7, 2017).

After an extension discussion of the relevant case law and the facts here, the court concluded that the trial court acted within its discretion in admitting the voice identification testimony. *Id.* at \*2-6.

SUMMARY OF ARGUMENT

This Court should not exercise jurisdiction over this case, where the lower court's opinion does not expressly and directly conflict with any other case.

ARGUMENT

THE DISTRICT COURT'S OPINION DOES NOT  
EXPRESSLY AND DIRECTLY CONFLICT WITH ANY  
OTHER DECISION.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

Here, the Petitioner asserts that the lower court's opinion conflicts with this Court's decision in *Evans v. State*, 177 So. 3d 1219 (Fla. 2015). There, this Court has held that a witness may testify that he recognizes a voice as belonging to the accused where the testifying witness (1) was an eyewitness to the crime, (2) has some prior special familiarity with the voice of the defendant, or (3) is qualified as an expert in identification. *Id.* at 1229.

This Court concluded that this test was not met where the investigator merely listened to a 911 call and a jail phone call after the fact and then identified the defendant's voice as that on the 911 call. *Id.* at 1229-30. As the lower court noted in its opinion here, the State could have just played those recordings and let the jury make the comparison, as it was just

as qualified to do so as the police officer was. *Johnson*, 2017 WL 1304954 at \*4. In choosing not to play the tapes and instead admitting the lay opinion testimony of an officer who had listened to them, the State's evidence invaded the province of the jury.

Here, in contrast, the investigators did much more than listen to recordings after the fact. As the court summarized below:

During the course of the conspiracy, the agents listened to thousands of conversations, culminating in the discovery of a probable place and time for the exchange of drugs and money. . . . After studying the voices of the conspirators over an extensive period of time, the agents had the opportunity to confront the conspirators and hear their voices in person.

*Id.* at \*5

Accordingly, the lower court properly concluded that the investigators were in fact "eyewitnesses" under any common understanding of that word, which requires personal contact during the event, rather than a focus on whether that contact involved the sense of sight rather than the sense of hearing.

*Id.*

The court also properly concluded that the scope of the investigation gave the investigators a special familiarity with the Defendant's voice, in that they had gained an intimacy with the Defendant that assisted them in identifying him as the person



on the calls in a manner that the jury could not possibly duplicate. *Id.* at \*6.

In short, then, the lower court's decision does not conflict with *Evans*, but instead properly and thoughtfully applies this precedent to the unique facts before it. *Id.* at \*3-6. The lower court's opinion does not expressly and directly conflict with any other decisions, and this Court has no jurisdiction to review it.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished to Matthew Funderburk, counsel for Petitioner, 444 Seabreeze Blvd., Ste. 210, Daytona Beach, Florida 32118, by e-service to appellate.efile@pd7.org and funderburk.matthew@pd7.org, this 9<sup>th</sup> day of June, 2017.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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