IN THE SUPREME COURT OF FLORIDA

OCTAVIUS ARNAZ JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC10-260

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, 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 Respondent, the prosecution, or the State. Petitioner, Octavius Arnaz Johnson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or 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 pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form (hereinafter referenced as "slip op." at [page number]). It also can be found at Johnson v. State, 25 So.3d 662 (Fla. 1st DCA 2010).

SUMMARY OF ARGUMENT

There is no direct and express conflict between the decision of the First District Court in Johnson v. State, 25 So.3d 662 (Fla. 1st DCA 2010), and the decision of this Court in Richardson v. State, 246 So.2d 771 (Fla. 1971); McDuffie v. State, 970 So.2d 312 (Fla. 2007), and State v. Schopp, 653 So.2d 1106 (Fla. 1995).

ARGUMENT

ISSUE I: IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND RICHARDSON V. STATE, 246 SO.2D 771 (FLA. 1971); MCDUFFIE V. STATE, 970 SO.2D 312 (FLA. 2007); AND STATE V. SCHOPP, 653 SO.2D 1016 (FLA. 1995)? (RESTATED)

A. The District Court of Appeal Did Not Certify Conflict With Any Of These Cases.

1. Jurisdictional Criteria

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) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, 485 So.2d at 830; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). 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 determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite from that reached in Richardson, McDuffie and Schopp.

2. The decision below is not in "express and direct" conflict with Richardson v. State, McDuffie v. State or State v. Schopp.

Petitioner contends that the present case expressly and directly conflicts on the same questions of law with Richardson, McDuffie and Schopp. (PJB.5). The State respectfully disagrees. First, the District Court below simply and accurately distinguished McDuffie, and thus is not in conflict with it. Second, as to Richardson, Appellant clearly took the loose language used by the trial court out of its context. Third, as to Richardson, the conclusion made by the District Court did not have any control over the outcome this case. Finally, as to Schopp, this case does not appear at all in the decision of the District Court, and thus is not in conflict with the District Court's decision upon which review was sought.

In decision below, the District Court distinguished McDuffie from the present case, as follows:

> We cannot, however elide the two critical facts that distinguish McDuffie from the case at bar: (1) the witness in the former prosecution was physically present in the courthouse when the ruling to exclude him was rendered; and (2) his testimony was proffered in considerable detail.

Id. at 666.

Petitioner argues, "[a]fter setting forth its reasoning, the district court in the defendant's case concluded that the trial "court did not **abuse its discretion** in failing to hold a **Richardson** hearing" (A-5)(emphasis supplied)." (PBJ.6). Petitioner has taken this statement out of context. The full statement by the District Court is as follows:

> Given the context here of a defense violation, failure to proffer, and unavailability of the witness, the court did not abuse its discretion in failing to hold a *Richardson* hearing.

Id. at 666;(emphasis added). The language concerning an "abuse of discretion in failing to hold a Richardson hearing is dicta in this case. The requested witness was not available to testify when the request was made. As such, the key inquiry was whether the court abused its discretion in denying the continuance to obtain the witness. Even if the District Court had found that the trial court had erred in failing to conduct a Richardson inquiry, it would have no effect on the propriety of the trial court's decision to deny the continuance, and no effect on the outcome of its appeal. This Court should not accept jurisdiction to resolve a theoretical dispute involving a matter that would not alter the outcome of the District Court's decision.

Finally, Schopp is not cited or referenced in the present opinion. This Court in Schopp held:

> that per se reversible rule was based on a mistaken assumption that reviewing court could never determine whether procedural prejudice resulted from unsanctioned discovery violation, and harmless error analysis would apply.

Id. at 1017-1018. In the present case, there is no mentioning of issues concerning harmless error or per se reversible error. Petitioner is reaching beyond the four corners of the District Court decision below to this non-relied upon, non-mentioned case in order to bring additional issues to this Court. Clearly, there is no conflict with Schopp.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on April 21, 2010: Carl McGinnes, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 301, Tallahassee, Florida, 32301.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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