

IN THE SUPREME COURT OF FLORIDA

LEON SHIPMAN, :  
Petitioner, :  
VS. : CASE NO. SC01-2072  
(1D00-558)  
STATE OF FLORIDA, :  
Respondent. :

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**AMENDED JURISDICTIONAL BRIEF OF PETITIONER**

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**AMENDED**

**JURISDICTIONAL BRIEF OF PETITIONER**

I STATEMENT OF THE

CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal in Shipman v. State, 791 So.2d 592 (Fla. 1st DCA 2001)(*order on motion for rehearing or cert.*). The district court opinion was a per curiam affirmance citing two cases. The decision cited Hall v. State, 773 So.2d 99 (Fla. 1st DCA 2000), in which the issue was whether the Criminal Punishment Code was constitutional. This court affirmed Hall. Hall v. State, 823 So.2d 757 (Fla. 2002). The district court also cited Harvey v. State, 786 So.2d 28 (Fla. 1<sup>st</sup> DCA 2001), in which the issue was whether a facial constitutionality claim can be raised for

the first time on appeal after this court's decision in Maddox v. State, 760 So.2d 89 (Fla. 2000). This court quashed Harvey. Harvey v. State, 848 So.2d 1060 (Fla. 2003).

In the instant case, petitioner Shipman timely filed notice to invoke and his jurisdictional brief. March 26, 2002, this court granted the state's motion to stay the proceedings pending the decisions in Hall and Harvey. November 13, 2003, this court ordered petitioner to file a jurisdictional brief.

## II SUMMARY OF THE ARGUMENT

In his original jurisdictional brief, Shipman argued for jurisdiction under Jollie v State, infra. Under Jollie, the citation by the district court to a case pending a decision in this court creates conflict jurisdiction under article V, § 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. At that time, this court had accepted Hall for review, and Harvey was pending a decision on jurisdiction, thus Shipman fell within the requirements of Jollie for this court's jurisdiction.

Now that this court has decided Hall and Harvey, it appears that this court has jurisdiction under Jollie only if the district court's affirmance conflicts with this

court's decisions in Hall or Harvey.

In the opinion of undersigned counsel, this court would have jurisdiction under Hall only if the court were willing to reconsider its ruling that the Criminal Punishment Code is constitutional. Assuming the court were willing to reconsider constitutionality, then the error would be fundamental. As expressed in Brannon, infra, the court recognized an exception to the preservation requirement for "fundamental error arising from the facial unconstitutionality of a sentencing statute."

### III ARGUMENT

#### ISSUE PRESENTED

THE COURT SHOULD ACCEPT THIS CASE TO RECONSIDER THE CONSTITUTIONALITY OF THE CRIMINAL PUNISHMENT CODE.

At the time the original jurisdictional brief was filed, the First District Court had upheld the constitutionality of the Criminal Punishment Code (CPC) in Hall v. State, supra, and this court had granted review in Hall and some other cases on the same issue. Also at the time of the original jurisdiction-al brief, the First District had certified questions in Harvey, supra, on the issue of whether a claim that a sentencing statute was facially unconstitutional could be raised for the first time on appeal, where it had not been raised first on a motion to correct sentencing errors under Rule 3.800(b)(2), Florida

Rules of Criminal Procedure, after this court's decision in Maddox, supra. The district court had already rejected in another case the issue raised in Harvey, which means the trial court would have no choice but to deny a 3.800(b)(2) motion had Harvey presented the motion to the trial court.

In the instant case, the First District court affirmed per curiam, citing Hall and Harvey. This type of opinion, called a "PCA cite" creates a type of discretionary conflict jurisdiction recognized by this court in Jollie v. State, 405 So.2d 418 (Fla. 1981). Jollie recognized that a conflict existed, even where the district court did nothing more than per curiam affirm with a citation, as long as the cited case was pending in this court.

Because the instant case involves the same issues as Hall and Harvey, and Hall and Harvey were then pending review in this court, this court had jurisdiction under Jollie.

Now that this court has decided Hall and Harvey, it appears that this court has jurisdiction under Jollie only if the district court's affirmance in this case conflicts with this court's decisions in Hall or Harvey.

In the opinion of undersigned counsel, this court would have jurisdiction under Hall only if the court were willing to reconsider its ruling that the Criminal Punishment Code is constitutional.

As to Harvey, it is a procedural case, which addresses

whether a sentencing issue which formerly would be classified as fundamental error must be raised on 3.800(b)(2) motion to be preserved for appeal. Or, as the certified question put it:

Whether the concept of fundamental sentencing error, as discussed in Maddox. . ., applies to defendants who could have availed themselves of the procedural mechanism of the most recent amendments to Florida Rule of Criminal Procedure [3.800(b)(2)]?

Harvey, 848 So.2d at 1060.

Harvey involved a Heggs claim. Heggs v. State, 759 So.2d 620 (Fla. 2000), held that the 1995 sentencing guidelines amendments violated the single-subject rule. Thus, the guidelines amendments were invalid during a 2-1/2-year window period, and depending on the revised scoresheet, some sentences imposed thereunder, including Harvey's, were illegal.

This court quashed the First District Court's decision in Harvey, and held the error was fundamental. On the other hand, as to most issues, the error would not be fundamental. In an opinion issued the same day as Harvey, this court affirmed Brannon v. State, 850 So.2d 452 (Fla. 2003), finding the issue was not preserved. Brannon involved the question of whether an habitual offender sentence could be imposed for the first time on violation of probation. Had the court reached the merits, the answer would depend on whether the defendant's original sentence validly imposed habitual offender status.

In Brannon, the district court had certified the identical question as in Harvey, quoted above, and a second question:

Where the district court previously ruled that a sentencing issue is fundamental error, the initial brief was filed after the effective date of rule 3.800(b)(2). . .but before the Florida Supreme Court decided Maddox v. State, does Maddox preclude the district court from ruling on the issue as a matter of fundamental error?

850 So.2d at 453. This court said:

. . .we answer the first certified question in the negative, **with the exception of fundamental error arising from the facial unconstitutionality of a sentencing statute**, as further explained herein; answer the second certified question in the affirmative; and approve the decision below. (emphasis added)

Id.

Were this court to hold the Criminal Punishment Code to be unconstitutional, then this case would fall into the Harvey exception, as explained in Brannon.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order brief-ing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert Wheeler, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, this \_\_\_\_\_ day of December, 2003.

CERTIFICATION OF

FONT AND TYPE SIZE

This brief is typed in Courier New 12.

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KATHLEEN STOVER

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**APPENDIX**

Opinion

**PAGE**

Appendix