

IN THE SUPREME COURT OF FLORIDA

MICHAEL CLEMENT JOHNSON,

Petitioner,

v.

CASE NO. SC10-1286

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_/

ON PETITION FOR DISCRETIONARY REVIEW  
OF A DECISION OF THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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STATE OF FLORIDA,

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\_\_\_\_\_/

**JURISDICTIONAL BRIEF OF PETITIONER**

**PRELIMINARY STATEMENT**

This case is presented on discretionary review from the decision of the Florida First District Court of Appeal in Michael Clemente Johnson v. State, No. 1D09-1711 (Fla. 1<sup>st</sup> DCA, June 22, 2010). The trial proceedings were held in the Circuit Court for Duval County, Judge Mark H. Mahon, circuit judge, presiding. The record on appeal consists of three volumes and one supplemental volume

## STATEMENT OF THE CASE AND FACTS

Petitioner, Michael Clemente Johnson, was convicted of one count of sale or delivery of cocaine, in contravention of section 893.13(1)(a)1., Florida Statutes. Relying on Chicone v. State, 684 So. 2d 736 (Fla. 1996), Petitioner argued that section 893.13(1)(a)1., Florida Statutes, was facially unconstitutional (violated substantive due process) because it authorized felony punishment for a strict liability offense. Petitioner argued that section 893.13(1)(a)1., was a strict liability offense because, as explained in section 893.101, Florida Statutes, the offense does not include the mens rea element of "knowledge of the illicit nature of the substance."

The district court rejected this argument, stating that this Court, in Chicone, implied the existence of the mens rea element only as a matter of statutory construction in an instance where "there has not been a clear expression of legislative intent as to whether guilty knowledge is an element of a crime." According to the district court, because the legislature subsequently enacted section 893.101, Florida Statutes, expressly stating that "knowledge of the illicit nature of the substance" is not an element of any offense under chapter 893, Petitioner's reliance on Chicone was misplaced.

### SUMMARY OF ARGUMENT

This Court possesses the discretion to exercise jurisdiction of the case because the opinion of the First District Court of Appeal expressly and directly conflicts with the decisions of this Court in Chicone v. State, 684 So. 2d 736 (Fla. 1996), Sult v. State, 906 So. 2d 1013 (Fla. 2005), and Wyche v. State, 619 So. 2d 231 (Fla. 1993). In Chicone v. State, this Court held that the felony offense of possession of cocaine would encompass innocent conduct if it did not include the mens rea element of “knowledge of the illicit nature of the substance” and would therefore be unconstitutional (violate due process). The Court, therefore, implied the existence of the mens rea element as a matter of judicial construction.

The same rule applies to the second degree felony of sale or delivery of cocaine. By enactment of section 893.101, Florida Statutes, the Legislature expressly stated that “knowledge of the illicit nature of the substance” is not an element of any offense under chapter 893, including sale or delivery of cocaine. Since sale or delivery of cocaine does not include this mens rea element (as expressly stated in section 893.101), the offense of sale or delivery of cocaine broadly encompasses innocent conduct and must be unconstitutional in accordance with Chicone. See also, Sult v. State, 906 So. 2d 1013 (Fla. 2005)(statute criminalizing innocent conduct violates substantive due process); Wyche v. State, 619 So.

2d 231 (Fla. 1993)(same). In other words, Chicone “saved” the constitutionality of the possession statute by inferring a mens rea element. Here, the constitutionality of the statute may not be “saved” because the Court, in accordance with clear legislative expression, may not infer a mens rea element. The sale or delivery statute is, therefore, unconstitutional. The district court nonetheless held that the offense of sale or delivery of cocaine is not unconstitutional. The decision of the district court, therefore, expressly and directly conflicts with Chicone, Sult and Wyche.

## ARGUMENT

### ISSUE

WHETHER THIS COURT HAS JURISDICTION OF THE CASE AND, IF SO, WHETHER THIS COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT BELOW?

### STANDARD OF REVIEW

The determination of jurisdiction is a legal question. Jacobsen v. Ross Stores, 882 So. 2d 431 (Fla. 1<sup>st</sup> DCA 2004). Legal questions are determined *de novo*. Engle v. Liggett Group Inc., 945 So. 2d 1246, 1259 (Fla. 2006).

### MERITS

#### A. Jurisdiction

This Court possesses the discretion to review any decision of a district court which expressly and directly conflicts with a decision of the supreme court on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(iv). The decision of the district court below expressly and directly conflicts with the decision of this Court in Chicone v. State, 684 So. 2d 736 (Fla. 1996). This Court therefore possesses the discretion to review the decision below.

The district court's opinion satisfies the "express and direct conflict" requirement. The district court expressed in words the rule of law upon which it relied to render its decision. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980)(defining "express" as "to represent in words" or "to give expression to"). As for the "conflict" requirement, this Court has held that a



discussion of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review.

Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). The decision below satisfies the conflict requirement.

In Chicone v. State, this Court held that the felony offense of possession of cocaine would be unconstitutional (violate due process) if it did not include the mens rea element of "knowledge of the illicit nature of the substance." Specifically, the Court noted that mens rea, or scienter, is ordinarily required even where a statute does not expressly include scienter. Id. at 741. The possession of cocaine statute was deemed akin to offenses that presume a scienter requirement in the absence of express contrary intent. Id. at 742.

Silence does not suggest that the legislature dispensed with scienter here.

Chicone, 684 So. 2d at 744.

Interpreting the statute as dispensing with scienter would "criminalize a broad range of apparently innocent conduct."

Id. at 743, citing Liparota v. United States, 471 U.S. 419 (1985).

By its reliance on Liparota, this Court adhered to a rule of federal constitutional law: The imposition of felony punishment for an offense lacking mens rea, and therefore criminalizing a broad range of innocent conduct, violates due process. See also, Sult v. State, 906 So. 2d 1013, 1020-22 (Fla. 2005)(statute

criminalizing innocent conduct violates substantive due process); Wyche v. State, 619 So. 2d 231, 237 (Fla. 1993)(same).

The same rule applies to the second degree felony of sale or delivery of cocaine. By enactment of section 893.101, Florida Statutes, the Legislature expressly stated that “knowledge of the illicit nature of the substance” is not an element of any offense under chapter 893, including sale or delivery of cocaine. Since sale or delivery of cocaine does not include this mens rea element (as expressly stated in section 893.101), the offense of sale or delivery broadly encompasses innocent conduct and must be unconstitutional, in accordance with Chicone, Sult and Wyche. In other words, Chicone “saved” the constitutionality of the possession statute by inferring a mens rea element. Here, the constitutionality of the statute may not be “saved” because the Court may not infer a mens rea element. The district court nonetheless held that the offense of sale or delivery of cocaine is not unconstitutional. The decision of the district court, therefore, expressly and directly conflicts with Chicone, Sult and Wyche. These contrary holdings cannot be reconciled and thus form a basis for the Court’s jurisdiction. See Aravena v. Miami-Dade County, 928 So. 2d 1163 (Fla. 2006); Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958).

To the extent that the district court professed Chicone to be distinguishable from Petitioner's case, that suggestion does not control the determination of conflict. It is well established that the district court need not identify a conflicting decision to establish conflict jurisdiction. Ford Motor Co. v. Kikis, 401 So. 2d at 1342.

B. Exercise of jurisdiction

This Court should exercise jurisdiction. The question presented in this case strikes at the heart of the most basic principles of government and of the separation of powers essential to our constitutional democracy. In Chicone, this Court stated that the element of "knowledge of the illicit nature of the substance" was necessary to ensure the constitutionality of the controlled substance offense. By enactment of section 893.101, Florida Statutes, the Florida Legislature expressly stated that "knowledge of the illicit nature of the substance" was not an element of any controlled substance offense. This legislative enactment merely begs the question whether the controlled substance offense, as defined by the legislature, passes constitutional muster. While it is the sole province of the legislature to define the law, i.e., prescribe the elements of a criminal offense, it is the sole province of the judiciary to declare whether the law (as defined by the legislature) is constitutional. This principle was

firmly established in the landmark case of Marbury v. Madison, 5 U.S. 137 (1803). Thus, the enactment of section 893.101, Florida Statutes, could not have *overruled* any expression in Chicone based upon constitutional considerations. If a drug offense is unconstitutional absent mens rea (Chicone), it is still unconstitutional even though the legislature subsequently clarifies that it did not intend to include a mens rea element. In other words, the legislature cannot make cure a constitutional defect by simply stating that it intended the condition which makes the statute unconstitutional, i.e., lack of mens rea.

This constitutional crisis is heating to a boil. The longer the crisis lingers, the greater the number of pipeline cases. The number of drug cases affected could easily rise into the thousands.

If not resolved swiftly by this Court, the issue will eventually erupt in federal court. The issue will be resolved sooner or later. If resolved favorably to the defense, there is no telling how many thousands of cases will spill from the pipeline. The havoc to the efficiency of the administration of justice will be immeasurable. The effect on the public confidence in the administration of justice will be devastating.

This Court should accept jurisdiction of the case in order to stem the looming constitutional crisis.

### **CONCLUSION**

For the reasons expressed above, Petitioner respectfully requests that the Court exercise its jurisdiction to review this case.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charlie McCoy, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to appellant, Michael Johnson, #097798, Gulf C.I., 500 Ike Steele Rd., Wewahitchka, FL 32465, on this \_\_\_\_ day of July, 2010.

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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