IN THE SUPREME COURT OF FLORIDA

CASE NO.

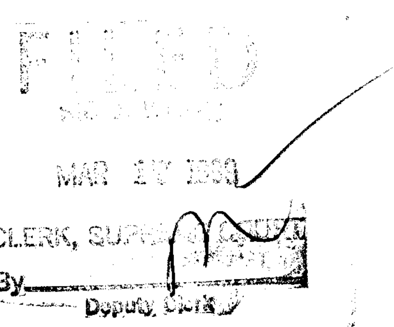
THE STATE OF FLORIDA,

Petitioner,

vs.

ABRAHAM JOHNSON

Respondent.



ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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WHERE THE DECISION BELOW WAS A SUMMARY ONE CITING AS CONTROLLING AUTHORITY A DECISION THAT IS NOT PRESENTLY PENDING REVIEW BEFORE THIS COURT WITHIN THE MEANING OF HARRISON v. HYSTER CO.. 515 So.2d 1279 (Fla. 19871, THIS COURT DOES.NOT PRESENTLY HAVE JURISDICTION TO GRANT REVIEW; IF THE JURISDICTIONAL PETITION TO REVIEW MILES v. STATE, 536 So.2d 262 (Fla. 3d DCA 1988) IS GRANTED, THEN JURISDICTION ACKNOWLEDGEDLY WOULD FOLLOW UNDER THE RULE OF JOLLIE v. STATE, 405 So.2d 418 (Fla. 1981)

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SUMMARY OF ARGUMENT

The decision below affords no jurisdiction for review unless and until the petition for review in Miles v. State, 536 So.2d 262 (Fla. 3d DCA 1988), presently pending on jurisdictional briefing, is granted. In that event, both decisions should be affirmed on the merits as entirely correct.

ARGUMENT

WHERE THE DECISION BELOW WAS A SUMMARY ONE CITING AS CONTROLLING AUTHORITY A DECISION THAT IS NOT PRESENTLY PENDING REVIEW BEFORE THIS COURT WITHIN THE MEANING OF HARRISON v. HYSTER CO., 515 So.2d 1279 (Fla. 1987), THIS COURT DOES NOT PRESENTLY HAVE JURISDICTION TO GRANT REVIEW: IF THE JURISDICTIONAL PETITION TO REVIEW MILES v. STATE, 536 So.2d 262 (Fla. 3d DCA 1988) IS GRANTED, THEN JURISDICTION ACKNOWLEDGEDLY WOULD FOLLOW UNDER THE RULE OF JOLLIE v. STATE, 405 So.2d 418 (Fla. 1981).

The decision below merely states, in its entirety, "Reversed on the authority of Miles v. State, No. 87-461 (Fla. 3d DCA Nov. 8, 1988) [since published at 536 So.2d 262]. This court does not in the ordinary instance have jurisdiction to review such a decision. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). An exception to the absence of jurisdiction is a decision, albeit summary, which cites as controlling authority a decision "that is ... pending review in ... this Court(.)" Jollie v. State, 405 So.2d 418, 420 (Fla. 1981).

Although Miles is the subject of a pending petition for review in this Court, jurisdiction has not as yet been granted and Miles is not at this point before the court for review on the merits. It therefore falls outside the definition of a case "pending review ... in this Court(.)" As stated in Harrison v. Hyster Co., 515 So.2d 1279, 1280 (Fla. 1987): "Jollie's reference to the controlling authority ... that is ... pending review refers to a case in which the petition for jurisdictional review has been granted and the case is pending for disposition on the merits." (emphasis added).

Accordingly, this Court does not, at this point, have jurisdiction over the instant case. The Respondent readily acknowledges that if jurisdictional review in Miles is granted and Miles is considered on the merits, jurisdiction over the instant case would thereby be established under the rule of Jollie.

On the merits, the holding of the court below and that in Miles that the maximum sentence on revocation of a youthful offender's probation or community control is six years, is eminently correct under a plethora of authority, not the least of which is this Court's decision in Allen v. State, 526 So.2d 69 (Fla. 1988), which held the statutory maximum on initial sentencing to be six years, as well as the federal decisions interpreting the federal statutory counterpart to Florida's Youthful Offender Act, upon which, as stated in Allen, 526 So.2d at 70, the Florida Act is patterned. See United States v. Won Cho, 730 F.2d 1260, 1266-1267 (9th Cir. 1984) (en banc) and United States v. Robinson, 770 F.2d 413, 415 (4th Cir. 1985), cert. denied, 474 U.S. 1103 (1986) (holding or presuming that upon revocation of probation of a federal youthful offender, the length of sentence is limited to that established by the initial decision to sentence under former provision 18 U.S.C. § 5010(b) and its reference provision, § 5017(c), which are the counterparts of the Florida youthful offender provisions).

CONCLUSION

Based on the foregoing argument and authorities cited, the petition for revi w should be denied for lack of jurisdiction, unless jurisdiction is granted in Miles v. State, 536 So.2d 262 (Fla. 3d DCA 1988), in which case both decisions should be affirmed on the merits as entirely correct.

Respectfully submitted,

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By:

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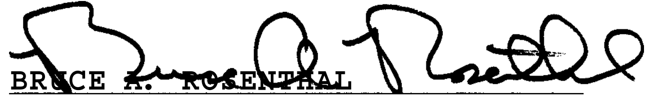
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 14th day of March, 1989.



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