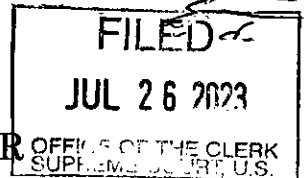


No. **23-5349** **ORIGINAL**
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JUL 26 2023

IN THE
SUPREME COURT OF THE UNITED STATES FOR MAILING **CD**

ELBERT JOHNSON(S) - PETITIONER



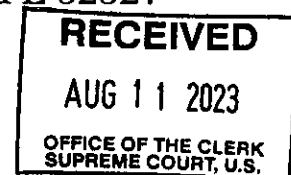
v.

STATE OF FLORIDA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

Elbert Johnson
013118 / G2-121-S
Wakulla Correctional Institution
110 Melaleuca Drive
Crawfordville, FL 32327



QUESTION(S) PRESENTED

When a circuit court judge is called upon, to be a witness against a defendant in a case, and then later on, sentence the defendant in the same case right afterwards. Does this create a conflict with the defendant and the judgment entered?

After sentencing, does trial court commit reversible error when it sentences a defendant to an illegal sentence and is clearly shown. Does the court create a manifest injustice and a violation of due process when it refuses to correct an illegal sentence?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page.
A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

There are no other cases in reference to this case pending.

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OPINIONS BELOW

1. First DCA Case No. 1D20-1440:
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3. First DCA Case No. 1D11-3574:
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4. First DCA Case No. 1D10-1829:
Johnson v. State, 41 So.3d 895 (Fla. 1st DCA 2010)
5. First DCA Case No. 1D04-5461:
Johnson v. State, 896 So.2d 750 (Fla. 1st DCA 2005)
6. First DCA Case No. 1D04-0351:
Johnson v. State, 871 So.2d 210 (Fla. 1st DCA 2004)
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Johnson v. State, 743 So.2d 512 (Fla. 1st DCA 1999)
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9. First DCA Case No. 1D95-3943:
Johnson v. State, 670 So.2d 944 (Fla. 1st DCA 1996)
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JURISDICTION

This court has jurisdiction pursuant to Article V, § 3(b)(4)

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

STATEMENT OF THE CASE

Procedural Background

The Petitioner was charged by information as to case no: 79-636-CF on February 06, 1980, the information alleged that the Petitioner committed the offense of Armed Robbery, on September 25, 1980, the honorable Robert L. McCrary adjudged that the Petitioner was guilty of said offense and sentenced him to one-hundred (100) years. (Appendix)

On August 20, 1980, the Jackson County Clerk of Court riled a subpoena commanding Judge Robert L. McCrary, to be and appear as a witness in case no.: 80-365. Wherein, the State of Florida was Plaintiff and Elbert Johnson was defendant. (Appendix). See Subpoena filed on August 20, 1980.

Petitioner says that five days later the State filed an information charging him with battery. A trial was conducted and Judge Robert L. McCrary, presided over the August 25, 1980, sentencing hearing, without objections from defense counsel or the prosecution.

REASONS FOR GRANTING THE WRIT

When a Circuit Judge is called upon to be a witness against a defendant in the same case. And then later sentence Defendant in the same case right afterwards. Does this create a conflict with the Defendant and the judgment entered?

The code of judicial conduct sets forth basic principles of law judges should conduct themselves in carrying out their judicial duties, Canon 3-C(1), states that “[a] Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned...” This is totally consistent with the case law of this court, which holds that a party seeking to disqualify a need on show” well grounded fear that he will not have a fair and impartial trial, in this case its obvious the Petitioner didn’t. Petitioner says that when Petitioner was charged with battery against Judge McCrary court bailiff, it was essential that once Judge Robert L. McCrary became a valued witness there would have been not doubt that any judgment entered by Judge McCrary would be bias and would create a conflict.

Petitioner says that a motion to disqualify is governed by § 38.10 Fla. Stat. (2023), and Fla. R. Jud. Admin. 2.330. The standard for

viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she would not received a fair trial at the hands of that Judge. Fla. R. Jud. Admin., 2.330(d)(1). When a trial judge fails to act in accord with Fla. R. Jud. Admin., 2.160 and § 38.10 Fla. Stat., he violates the code of ethic. Wickham v. State, 2008 Fla. LEXIS 1617.

Petitioner unsuccessfully moved to disqualify the trial judge Robert L. McCrary. Petitioner petitioned the District Court to issue writs of prohibition directing that the trial judge take no further action; the petition was denied. Petitioner appealed. The First District Court of Appeal (Florida) ruled that the denial of a petition for writ of prohibition was not an appealable order, but was reviewable by certiorari.

Petitioner sought further review. trial judge Robert L. McCrary, denied Petitioner's petition for writ of prohibition. Florida District Court of Appeal could not hear latter order, but had certiorari jurisdiction to review it under Fla. R. App. P. 9.030(b)(2)(b) Siegel v. State, 861 So.2d 90.

The law imposes on a circuit judge the duty to hear and determine all cases properly brought before him for judicial consideration. This duty he must perform whether he wishes to do so or not unless he be either disqualified as a matter of law, or be challenged and required to recuse himself under circumstances existing that require him as a matter of law to retire from the case, or he himself, shall make it a matter of record and certify that he is personally conscious of and feels toward one of the parties such disqualifying bias or prejudice as will in good conscience preclude his impartial consideration of the controversy.

Palatka v. Frederick, 128 Fla. 366, 174 So. 826.

Petitioner also asserts that when a defendant in a criminal case asserts in an appeal from a judgment and sentence that the trial court erroneously denied a legally sufficient motion to disqualify the trial court for alleged bias or prejudice. Under § 38.10 Fla. Stat. (2023), and Fla. R. Jud. Admin., 2.330(d)(1). Davis v. She, 311 So.3d 927, 2020 Fla. App. LEXIS 7663-347 So.3d 315.

After sentencing does trial court commit reversible error when it sentences a Petitioner to an illegal sentence and is clearly shown. Does

the court create a manifest of injustice and a violation of due process when it refuses to correct sentence.

As this issue relates to Petitioner's illegal sentence, Petitioner argues that pursuant to section § 775.082, a life felony committed before October 1, 1983 was punishable "by a term of imprisonment for life or by a term of imprisonment not exceeding 30 years § 775.082(3)(A). Ryan v. State, 2022 Fla. App. LEXIS 2667.

When a court opted for a term of years instead of a life sentence for a life felony, it may not impose a sentence longer than 30 years. Keller v. State, 712 So.2d 1133 and see also, Summer v. State, 658 So.2d 11 (Fla. 2nd DCA 1995)

CONCLUSION

Based upon this petitioner's cited cases and authorities he says that the petition for writ of certiorari should be granted. And any other relief deemed just and proper.

Respectfully submitted,



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