

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

By _____

Deputy Clerk

JOHNNIE LEE JONES,)
)
Petitioner,)

vs.)

STATE OF FLORIDA,)
)
_____)

CASE NO. 74,004

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4-6
 THE DECISION OF THE COURT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL SO THIS COURT'S JURISDICTION HAS NOT BEEN ESTABLISHED, AND CITATION OF A CASE PENDING SUPREME COURT REVIEW AS CONTROLLING DOES NOT MANDATE ACCEPTANCE OF JURISDICTION. 	
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Brumbley v. State</u> , 520 So.2d 275 (Fla. 1988)	5
<u>Dean v. State</u> , 523 So.2d 165 (Fla. 1st DCA 1988)	5
<u>Ford Motor Co. v. Kikis</u> , 401 So.2d 1341 (Fla. 1981)	6
<u>Harris v. State</u> , 520 So.2d 688 (Fla. 3d DCA 1988)	5
<u>Jones v. State</u> , 14 F.L.W. 798 (Fla. 4th DCA March 29, 1989)	2
<u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980)	4,6
<u>Jollie v. State</u> , 405 So.2d 418 (Fla. 1981)	5
<u>Morganti v. State</u> , 524 So.2d 641 (Fla. 1988)	5
<u>Mystan Marine Inc. v. Harrington</u> , 399 So.2d 200 (Fla. 1976)	6
<u>Roberts v. State</u> , 534 So.2d 1225 (Fla. 1st DCA 1988)	3,5
<u>Sanchez v. Wimpey</u> , 409 So.2d 20 (Fla. 1982)	6
<u>Shull v. Dugger</u> , 515 So.2d 748 (Fla. 1987)	4,5

PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"PB" Petitioner's Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, as found on page one (1) of his brief, to the extent that it is applicable to the issue of this Court's jurisdiction to hear this case on the basis of conflict, and with the following clarification.

As found by the Fourth District Court of Appeal in Jones III [Jones v. State, 14 F.L.W. 798 (Fla. 4th DCA March 29, 1989)], the original sentence imposed upon Petitioner was not a guidelines sentence, but was an habitual offender sentence outside the guidelines. Therefore, Petitioner's statement that "[o]n resentencing the trial court stated new reasons for departure" (PB 1) is erroneous.

SUMMARY OF THE ARGUMENT

Petitioner has failed to show the requisite express conflict between the opinion in the instant case, and opinions of this Court or other district courts of appeal.

Further, although the Fourth District Court of Appeal cited as authority a case currently pending review in this Court, accepting jurisdiction is still discretionary. Respondent asserts that judicial economy would be better served by waiting until Roberts v. State,¹ is decided as the opinion may moot out any basis for jurisdiction.

¹ Roberts v. State, 534 So.2d 1225 (Fla. 1st DCA 1988).

ARGUMENT

THE DECISION OF THE COURT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL SO THIS COURT'S JURISDICTION HAS NOT BEEN ESTABLISHED, AND CITATION OF A CASE PENDING SUPREME COURT REVIEW AS CONTROLLING DOES NOT MANDATE ACCEPTANCE OF JURISDICTION.

Petitioner seeks to establish this Court's "conflict" jurisdiction by arguing that the decision below conflicts with Shull v. Dugger, 515 So.2d 748 (Fla. 1987) and its progeny (PB 3). Respondent maintains that Petitioner has not demonstrated conflict with other state appellate decisions from the face of the decision sub judice, that the decision does not conflict with other decisions, and that this Honorable Court therefore lacks jurisdiction to grant Petitioner's application for discretionary review.

It is well-settled that in order to establish conflict jurisdiction, the decision sought to be reviewed (and not opinions or reasons contained therein or in a dissent) must expressly and directly create conflict. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Petitioner has not and cannot demonstrate that the decision of the Fourth District Court of Appeal in the instant case expressly and directly conflicts with another state appellate decision.

Petitioner in alleging conflict jurisdiction totally ignores a critical fact which distinguishes the decision in the instant case from the cases with which Petitioner says the instant decision conflicts; in the case at bar, the Fourth District Court of Appeal expressly found in Jones III that the original sentence was never intended to be a guidelines sentence. 14 F.L.W. at 798. Accordingly, there can be no conflict with opinions which state that upon resentencing under the guidelines no new departure reasons can be given. There can not be "new" reasons for a departure sentence, when the original sentence was not a sentencing guidelines sentence, departure or otherwise.

Petitioner further alleges jurisdiction based upon Roberts v. State, currently pending review in this Court in case number 73,439. Although Respondent acknowledges that Jollie v. State, 405 So.2d 418 (Fla. 1981) allows for jurisdiction when a pending Supreme Court case is cited as controlling authority by a district court of appeal, Respondent asserts that Jollie does not mandate that this Court accept jurisdiction. The interests of judicial economy would better be served by waiting to determine jurisdiction until Roberts v. State is decided, as that decision may moot out any basis for further review of the instant case.

² Shull v. Dugger; Brumbley v. State, 520 So.2d 275 (Fla. 1988); Morganti v. State, 524 So.2d 641 (Fla. 1988); Harris v. State, 520 So.2d 688 (Fla. 3d DCA 1988); Dean v. State, 523 So.2d 165 (Fla. 1st DCA 1988).

Since it is evident that the court's holding below is not in express and direct conflict with other appellate decisions, it is apparent that Petitioner is seeking to invoke this Court's jurisdiction in a thinly veiled attempt to pursue another appeal. Such a use of this Court's jurisdiction is not permitted. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). The court has repeatedly condemned such misguided efforts to invoke its discretionary jurisdiction and has repeatedly emphasized the need for finality in district court of appeal decisions. Jenkins, supra. The legal principles discussed by the fourth district in its decision below do not conflict with the cases cited by Petitioner. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981). Petitioner's reliance on extraneous material in his brief speaks for itself; conflict ~~in the~~ decision is not present. This Court's discretionary jurisdiction is directed to a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants. Mystan Marine, Inc. v. Harrington, 399 So.2d 200 (Fla. 1976). Therefore, as Petitioner has failed to show any express and direct conflict between this case and other state appellate cases, discretionary jurisdiction has not been established in the case sub judice and this Honorable Court lacks jurisdiction to grant Petitioner's application for discretionary review.

CONCLUSION

Since no conflict between the decision in the instant case and other appellate decisions has been established, Respondent would ask that this Court decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished, by courier, to MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401 this 20th day of April, 1989.

Joan Fowler

Of Counsel