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CLERK SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

GREGORY MCKNIGHT,
Petitioner,

v.

Case No. 79,689

STATE OF FLORIDA,
Respondent.

By _____
Chief Deputy Clerk

DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

PAGE NO.

SUMMARY OF THE ARGUMENT	1
ARGUMENT	
ISSUE	
WHETHER THE DECISION BELOW IS IN JURISDICTIONAL CONFLICT WITH STATE V. KENDRICK, 17 F.L.W. D812 (FLA. 5TH DCA MAR. 27, 1992)?	
(As restated by respondent).....	2
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

PAGE NO.

Jenkins v. State,
385 So.2d 1356 (Fla. 1980).....2

Nielsen v. City of Sarasota,
117 So.2d 731 (Fla. 1960).....2

Reaves v. State,
485 So.2d 829 (Fla. 1986).....4

State v. Kendrick,
17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992).....1, 4

OTHER AUTHORITIES:

Art. v, §3(b)(3), Fla. Const.....2

SUMMARY OF THE ARGUMENT

The portion of the decision to which appellant points to establish jurisdictional conflict with State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992) is only dicta. Conflict between dicta in the case under review and the decision in the case or cases cited for conflict will not support a finding of jurisdiction.

ARGUMENT

ISSUE

**WHETHER THE DECISION BELOW IS IN JURISDICTIONAL
CONFLICT WITH STATE V. KENDRICK, 17 F.L.W. D812
(FLA. 5TH DCA MAR. 27, 1992)?**

(As restated by respondent)

To establish jurisdictional conflict under Art. V, §3(b)(3 , Fla. Const. a petitioner must show that there is an express and direct conflict of decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Neither conflict of opinions nor **the** reasoning on which they rest will support a finding of jurisdiction. There must be an express and direct conflict of decisions. Reference to Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960), the decision to which Jenkins **cites** as authority for the proposition stated above, illustrates **this** principle in action. And, it shows why there is no jurisdictional conflict of decisions that would support this court's discretionary jurisdiction.

The question before **the** court in Nielsen was whether **the** district court's decision on a circuit court's ruling on proximate **cause** in a negligence case was in jurisdictional conflict with Supreme Court decisions permitting proof of proximate cause by circumstantial evidence. The language in the district court decision that was alleged to create the conflict was, "'There is a total lack of certain evidence to provide proximate cause even if it might be said that there was some evidence of negligence * * *' 110 So.2d at page 420" 117 So.2d at 733. Nielsen had contended that this language "required direct, testimonial evidence of proximate cause" and

was thus in conflict with a Supreme Court case permitting proof of proximate cause by circumstantial evidence.

In its review of what creates jurisdictional conflict, the court first stated that on the surface it might appear that there was some conflict. But, its decision then went on to find that the district court decision should be read to hold "that on the basis of the record before it there was a total absence of evidence, either direct or circumstantial, to support a conclusion that the alleged negligence of the respondents was the proximate cause of the injury to Kenneth Nielsen. Given such a reading the court found no jurisdictional conflict. The decision then goes on to explain that the court's jurisdiction is not dependent on whether it would rule differently, but whether the district court's ruling as it stands can only create conflict.

The decision then goes on to state the two principle examples of conflict:

[T]he principal situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a **case** which involves substantially the same controlling facts as a prior case disposed of by this court.

117 So.2d at 743 (emphasis in original)

The decision below neither announced a rule of law in conflict with a previously announced rule or law. Nor, can it be said that the decision falls in to the second general **class** of cases generating jurisdictional conflict.


Looking to the facts as they appear in the four corners of the opinion as this court must under Reaves v. State, 485 So.2d 829 (Fla. 1986), it is clear that the decision in this case is not in conflict with any of the **cases** cited in petitioners brief for conflict. The decision below is that the case must be remanded for the court to either make the requisite finding for a habitual offender adjudication or to resentence him. Slip opinion at 2. That decision differs materially from the decision in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992). The Fifth District unambiguously decided in that case that probation was not a dispositional alternative following a finding that a defendant was a habitual felony offender. That the court stated that probation is a viable alternative following a finding that a defendant is a habitual offender is of no moment. That statement is only dicta. And, it had no effect on the decision of the court. Accordingly, it is clear that the petitioner has failed to demonstrate jurisdictional conflict.

CONCLUSION

WHEREFORE Respondent asks the court to decline to accept jurisdiction on the basis of the above and foregoing reasons, arguments and authorities.

Respectfully Submitted,

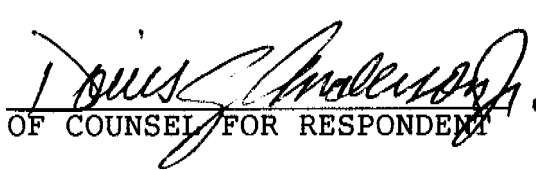
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondent on Jurisdiction has been furnished to, John S. Lynch, Assistant Public Defender, Public Defenders Office, Polk County Courthouse, P.O. Drawer 9000--Drawer PD, Bartow, Florida 33830, Attorney for Petitioner, by United States Mail, postage prepaid, this 15th day of May, 1992.


OF COUNSEL FOR RESPONDENT