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SID J. WHITE

JUN 18 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,973

CHARLES MILLS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, State of Florida, was the Appellee and the prosecution, respectively in the lower courts. In this Brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "PA" will be used to refer to Exhibit A of Petitioner's Appendix, which is a conformed copy of the District Court's opinion.

STATEMENT OF THE CASE AND FACTS

Respondent does not accept Petitioner's statement of the case and facts. Respondent would instead rely on the opinion of the District Court of Appeal for its statement of the case and facts (PA). Further, Respondent would point out that the District Court did not "acknowledge[] that it's (sic) holding expressly and directly conflicted with the First District Court of Appeal upon the same issue" as stated in Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court decline to take jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Fourth District Court of Appeal expressly and directly conflicts with any decision of this Court, other District Courts, or that it falls under any of the subdivisions as provided by Fla.R.App.P. 9.030(a)(2), or Art. V, Section 3(b) Fla.Const. (1980). Conflict has not been established with Cherry v. State, 572 So.2d 521 (Fla. 1st DCA 1990).

ARGUMENT

PETITIONER IMPROPERLY INVOKES
THE DISCRETIONARY JURISDICTION
OF THIS COURT WHERE THE DECISION
OF THE FOURTH DISTRICT COURT OF
APPEAL DOES NOT EXPRESSLY AND
DIRECTLY CONFLICT WITH DECISIONS
OF THIS COURT OR OF OTHER
DISTRICT COURTS OF APPEAL

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b) Fla.Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(IV), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Respondent respectfully requests this Honorable Court decline to take jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner's allegation that the opinion of the Fourth District Court in the instant case conflicts on the same question of law with Cherry v. State, 572 So.2d 521 (Fla. 1st DCA 1990) is without merit. A reading of the decision of the Fourth District Court of Appeal makes it abundantly clear that there is no express and direct conflict. The court, after applying State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) to the situation, found that a harmless error rule applied. The court stated: "Therefore, in direct conflict with Cherry, we hold that the harmless error rule applies where defense counsel and

the defendant have notice of a jury question but the trial judge fails to give defense counsel the opportunity to be heard as to the appropriate response." (PA 4). The District Court's statement regarding direct conflict is misplaced. Cherry involved a situation where defense counsel did not have notice and an opportunity to be heard regarding the appropriate response to a jury question. Cherry is distinguishable from the case at bar since here counsel was given notice.

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of its brother or father court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975). In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms 'express' include: 'to represent in words; to give expression to.' 'Expressly' is defined: 'in an express manner.' Websters Third New International Dictionary (1961 ed. unabr.)

See also Reaves v. State, 485 So.2d 829 (Fla. 1986); see generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958);

Withlacoochee River Electric Co-op v. Tampa Electric Co., 158 So.2d 136 (Fla. 1963). It is not appropriate to allege conflict based on the contents of a dissenting opinion. Jenkins.

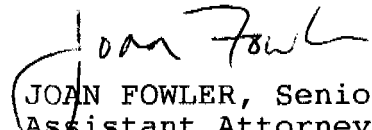
Petitioner has not established the direct and express conflict from the face of the opinions necessary for this court to exercise its discretionary jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing argument and the authorities cited therein, Respondent respectfully requests this Honorable Court decline to accept discretionary jurisdiction in the instant case.

Respectfully submitted,

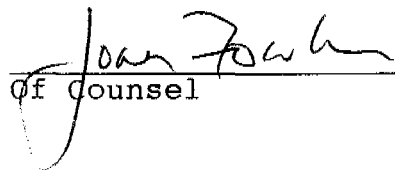
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to KAYO E. MORGAN, Esquire, 432 N.E. 3rd Avenue, Fort Lauderdale, Florida 33301 this 16 day of June, 1992.



of Counsel