IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,704

JOHN W. KEMP,

Petitioner,

vs.

MURPHY MANUFACTURING COMPANY,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

In this answer brief on jurisdiction, the parties will be referred to as they stand before this Court. References to the Appendix to Petitioner's initial brief on jurisdiction will be by the letter "A" and a page number. Documents in Respondent's Appendix will be referenced specifically in text.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts except insofar as Petitioner states or implies that the decisions below and in Cates v. Graham, 427 So.2d 290 (Fla. 3d DCA 1983) expressly declare valid a state statute within the meaning of Rule 9.030(a)(2)(A)(i) Fla. R. App. P. Respondent further takes exception to the statement by Petitioner that Cates and the case at bar are legally indistinguishable.

JURISDICTIONAL ISSUE

WHETHER THIS COURT MAY CONSTITUTIONALLY TAKE JURISDICTION OF AND REVIEW AN ORDER OF A DISTRICT COURT ISSUED WITHOUT A WRITTEN OPINION WHERE NO CONFLICT IS URGED WITH THE ONE DECISION CITED IN THE ORDER PRESENTED FOR REVIEW.

ARGUMENT

Jollie v. State, 405 So.2d 418 (Fla. 1981) does not stand as authority for the proposition that this Court may constitutionally review the decision below. The holding in

Jollie was:

> We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction. (at 420)(emphasis added)

Petitioner, in his notice invoking the jurisdiction of this Court stated that the decision below conflicts with "decisions rendered by other District Courts of Appeal and the Supreme Court of Florida." In his jurisdictional brief Petitioner cites no decision with which the decision below purports to conflict.

Petitioner has presented no documentation from the record below by which this Court could conclude that if Cates v. Graham, 427 So.2d 290 (Fla. 3d DCA 1983) were accepted for review by this Court (which has not been done as yet), and ultimately were reversed, that an "express and direct" conflict would exist between such decision of this Court in Cates v. Graham and the decision presented here for review. Petitioner does nothing more than baldly state that the cases are in "all significant legal respects. . . indistinguishable."

The court in Cates v. Graham did not, in its opinion "expressly declare valid a state statute" within the meaning of Rule 9.030(a)(2)(A)(i). The court there affirmed a summary judgment in which the trial court held Fla. Stat. § 95.11(4)(b) constitutional as applied to the facts of that case. The decision of the District Court was, in essence,

a refusal to overrule the trial court's determination that five months was a reasonable time for the plaintiff to act before being barred under the applicable statute of repose under the facts of that case. (The opinion in Cates v. Graham does not conflict with any prior decision of a district court or of this Court, nor does Petitioner contend that it does.)

If the opinion in Cates v. Graham is held to "expressly declare valid a state statute," then any decision by a district court which affirms a trial court order in which the judge ruled that a statute could constitutionally be applied to given facts loses the finality which the people sought to impose on district court opinions by constitutional amendment in 1980. Such was clearly not the intent of the voters, or of this Court in Jollie.

Procedurally, the instant situation is clearly distinguishable from Jollie. There, Jollie v. State, 381 So.2d 351 (Fla. 5th DCA March 26, 1980) was decided at a time when the decisions in Tascano v. State, 363 So.2d 405 (Fla. 1st DCA 1978) and Murray v. State, 378 So.2d 111 (Fla. 5th DCA January 10, 1980) were still "on the books." Jollie I could, therefore, ride the coattails of Murray I for conflict purposes since the conflict between Murray I and Tascano I was still in existence, and there was clear conflict (Tascano I went up on a certified question).

This Court resolved the issue in those cases by resolving the certified question presented in Tascano I. By that time, the Court had apparently already granted review in Murray I. Tascano v. State, 393 So.2d 540 (Fla. 1980) presented conflict with Murray I because although the rule of law was the same, the result reached in Murray I (no new trial, harmless error doctrine) conflicted with the result in Tascano II (new trial mandatory).

Clearly, the existence of Tascano I, and then Tascano II, was necessary for this Court to constitutionally exercise its jurisdiction and review Murray I. Jollie I could only tag along because the case cited as controlling, Murray I, was itself in conflict with Tascano I, then Tascano II. In short, Murray I was not, standing alone, sufficient as a predicate for this Court to constitutionally review Jollie I. This Court did not hold that the potential of reversal of a referenced decision was enough to support prima facie conflict.

In order to grant review here, this Court will have to take Jollie II at least two steps further. First, the necessity of a decision which conflicts with the referenced decision (here, Cates v. Graham) must be dispensed with. Second, the Court must take the word of Petitioner that the case presented for review is so closely identical to the referenced decision that a reversal of one mandates reversal of the other.

Having thus abused Rule 9.030(a)(2)(A)(iv), this Court would have to interpret Rule 9.030(a)(2)(A)(i) to the point of meaninglessness. The jurisdictional holding would have to be that a per curiam affirmance, with a referenced decision but no opinion, of a summary judgment which does not, on its fact, make any ruling whatsoever as to the validity vel non of a state statute (see copy of summary judgment in Respondent's Appendix) is a sufficient constitutional predicate for review under Rule 9.030(a)(2)(A)(i). That such a decision of a district court does not expressly hold a state statute valid is clear.

At the most, assuming this Court is now reviving the "record proper" doctrine, Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), repudiated by the people in 1980, such a case history amounts to a refusal by the circuit and district court to hold a state statute invalid on the facts of a given case — certainly far different from an express holding of validity.

The "record proper" doctrine should not be thus exhumed. Jollie should not be thus expanded. This Court is without jurisidction. Alternatively, this Court should decline to exercise its jurisdiction because Petitioner has utterly failed to present this Court with sufficient documents from the record below by which this Court could determine whether a reversal of Cates v. Graham would mandate a reversal in the instant case.

CONCLUSION

For the reasons stated above, this Court should decline review of this case.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this answer brief on jurisdiction of Respondent MURPHY MANUFACTURING COMPANY was mailed this 10th day of June, 1983, to: EDWARD A. PERSE, ESQ., HORTON, PERSE & GINSBERG, Attorneys for Petitioner, 410 Concord Building, 66 West Flagler Street, Miami, FL 33130; and TEW, SPITTLER, BERGER & BLUESTEIN, 304 Palermo Avenue, Coral Gables, FL 33134.

By: _____
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