IN THE SUPREME COURT OF FLORIDA

HUGH MILLER CURTIS,	)	
Petitioner,	)	
v.	)	Case No. 65,891
STATE OF FLORIDA	)	
Respondent.	)	

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent shall rely upon the facts as set forth in the opinion of the Fifth District Court of Appeal. The Respondent would especially note that there is no record of any ex parte communication between the judge and jury at trial.

No objection was raised in the trial court nor was the alleged "error" raised in Mr. Curtis' motion for new trial or his petition for post conviction (3.850) relief.

IT IS SUGGESTED THAT THIS HONOR-
ABLE COURT IS WITHOUT JURISDICTION.

ARGUMENT

The Petitioner bases his request for discretionary review, as he did his appeal, upon a factual assertion that is devoid of record support; to wit: that some ex parte communication transpired between the trial judge and jury.

Curiously, the jury's question and the judge's answer were both filed in open court, yet defense counsel never objected and never raised the issue in his motion for new trial, and Mr. Curtis himself never raised the issue in the petition for post conviction relief filed pursuant to Fla. R. Crim. P. 3.850.

The Fifth District "assumed" the existence of an ex parte communication despite the lack of record support, and addressed this issue despite the state's insistence upon resolution in accordance with Clark v. State, 363 So.2d 331 (Fla. 1978); Sullivan v. State, 303 So.2d 632 (Fla. 1974) and Wainwright v. Sykes, 433 U.S. 72 (1977). The only error committed by the district court was its decision to address the merits of the case.

It is submitted that no "express" and "direct" conflict exists.

The decision in Ivory v. State, 351 So.2d 26 (Fla. 1977), was predicated upon the circumstances of that case. This Honorable Court, in Hitchcock v. State, 413 So.2d 741 (Fla. 1982) and Rose v. State, 425 So.2d 521 (Fla. 1982), modified Ivory along the lines indicated by the United States Supreme Court in

Rushen v. Spain, ___U.S.___, 104 S.Ct. 453 (1983).

The only "arguable conflict" between Curtis and Ivory, therefore, is the conflict which exists only after total avoidance of other, intervening, decisions of this Court. Obviously, Supreme Court decisions do not exist in a vacuum, and the requested ignoral of Hitchcock and Rose is simply not possible.

"Conflict," of course, refers to actual decisional conflict which either announces a new rule of law, conflicting with an existing rule, or announces a conflicting decision after applying an existing rule of law to identical facts or "substantially the same facts," see Nielsen v. Sarasota, 117 So.2d 731 (Fla. 1960).

In Kyle v. Kyle, 139 So.2d 885,87 (Fla. 1962), this Court said:

> "... That conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the later. Ansin v. Thurston, Fla, 101 So.2d 808. If the two cases are distinguishable in controlling factual elements of if the points of law settled by the two cases are not the same, then no conflict can arise."

Applying this to our case, we find (first of all) that any "conflict" which might have existed between this case and Ivory was diluted, if not eliminated, by the "harmless error" and "no per se rule" holdings of Hitchcock and Rose. Second, given the fact that Ivory involved the delivery of documents while this case involved a purely procedural admonition to arrive

at a verdict based upon the "evidence and testimony adduced at trial," without more, it is clear that (factually) this case is distinguishable from Ivory and is in line with Hitchcock.

Thus, our case concerns itself with the rights of particular litigants, not "decisional precedents." Mystan Marine Inc. v. Harrington, 339 So.2d 200 (Fla. 1976).

Jurisdiction will not lie here even if this Honorable Court might disagree with the decision of the district court. See Mancini v. State, 312 So.2d 733 (Fla. 1975).

This, of course, returns us to the underlying problem in this case: the facts are not known. There is no record of any ex parte contact. There was no objection or other act of preservation (or protest) prior to appeal. The entire appeal is predicated upon a factual suspicion by appellate counsel.' Nothing more.

Discretionary review cannot and should not be predicated upon unsupported factual claims raised de novo on appeal by a lawyer[1] who can only guess at what happened at trial.

Certainly this "guess" cannot be coupled with selective disregard for intervening decisions of this Court in order to arrive at "conflict jurisdiction."

Discretionary review should be denied.

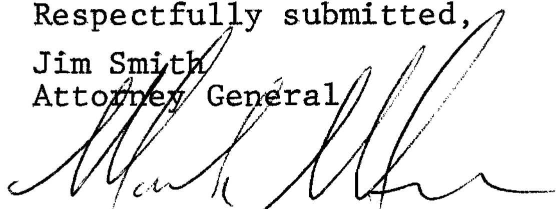
[1] It is also true that appellate counsel may simply more adroit than his successor, given the state's prior exposure to appellate counsel at bar this is highly probable.

CONCLUSION

The Petitioner is not entitled to discretionary review of a district court ruling which does not expressly or directly conflict with a decision of this Court. This is especially true when the "error" which prompted the appeal to the district court is not contained in the record and is only "suspected" to have ever happened.

Respectfully submitted,

Jim Smith
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished to Larry B. Henderson, Assistant Public Defender, 1012 South Ridgewood Avenue, Daytona Beach, Florida, by delivery, this 9th day of October, 1984.

Of Counsel