

IN THE SUPREME COURT OF FLORIDA

FILED  
S. J. WHITE

JUN 20 1987

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

KENNETH SCURRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 70,525  
Appeal No. 85-1934

APPEAL FROM THE CIRCUIT COURT  
IN THE TWENTIETH JUDICIAL CIRCUIT  
FOR LEE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2,3
WHETHER THE COURT HAS JURISDICTION BECAUSE THE DECISION ON PETITIONER'S APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN <u>BRYAN V. STATE</u> , 287 So.2d 73, 76 (Fla. 1973)	
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980)	1,2
<u>Scurry v. State</u> , ___ So.2d ___, (Fla. 2d DCA, Feb. 27, 1987)[12 F.L.W. 644]	1,2,3
<u>State v. Bryan</u> , 287 So.2d 73, 76 (Fla. 1973)	1,2,3

OTHER AUTHORITIES

Art. 5, Section 3(b)(3), Fla. Constitution	2
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SUMMARY OF THE ARGUMENT

Since the Scurry, infra, opinion does not mention the Bryan, infra, case, there cannot be express and direct conflict. See Jenkins, infra. Accordingly, review should not be granted in this case. Neither should review be granted on direct, though not express, conflict since the rulings of law are consistent and the facts are dissimilar enough so as not to require the same results in Scurry as in Bryan.

## ARGUMENT

WHETHER THE COURT HAS JURISDICTION BECAUSE THE  
DECISION ON PETITIONER'S APPEAL EXPRESSLY AND  
DIRECTLY CONFLICTS WITH THIS COURT'S DECISION  
IN BRYAN V. STATE, 287 So.2d. 73,76 (Fla. 1973)

Petitioner seeks to invoke review of this case based on alleged conflict with this court's decision in State v. Bryan, 287 So.2d 73, 76 (Fla. 1973). However, there is no direct and express conflict between the opinions since the Scurry opinion does not even mention the Bryan case. No jurisdictional grounds exist on which to grant review of this case and petitioner is not entitled to review merely to again argue the merits of his case.

The Constitution grants this court jurisdiction to review decision of district courts of appeal that expressly and directly conflict with decisions of other district courts or the supreme court on the same question of law. Art. V, Section 3(b)(3), Fla. Const. To have an express and direct conflict, the opinion must refer to the decision alleged to be in conflict. Jenkins v.State, 385 So.2d 1356 (Fla. 1980). Bryan is not even mentioned in the Scurry opinion. Therefore, the court's decision in Scurry cannot expressly and directly conflict with Bryan, so there is no jurisdictional conflict of decisions to support this court's discretionary review.

While it is possible for this Court to find direct (though not express) conflict where a district court of appeal has overlooked a case directly on point which would require an opposite holding,

this is not the situation here. The Scurry court did not make a pronouncement of law which conflicts with Bryan, rather, both decisions are in accord in regard to second degree murder. The court merely found that the evidence in Scurry fell short of second degree murder. The facts in Scurry and Bryan are not so similar as to require the same holding.

Because there is no express and/or direct conflict between the decision of Bryan and Scurry, there is no basis for this court to review the Second DCA's opinion in Scurry v. State, \_\_\_ So.2d\_\_\_, (Fla. 2d DCA, Feb. 27, 1987)[12 F.L.W. 644].

CONCLUSION

The opinion in Scurry v. State, does not meet the standards necessary to invoke discretionary jurisdiction, so the Respondent respectfully urges this Court to deny review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to A. N. Radabaugh, Assistant Public Defender, P.O. Box 1640, Bartow, Florida 33830-3798 on this 26<sup>th</sup> day of June, 1987.

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