IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,615

THE FLORIDA STAR,

Appellant,

vs.

B.J.F.,

Appellee.

_____/

ON CERTIFIED QUESTION FROM
THE UNITED STATES SUPREME COURT

BRIEF OF APPELLEE

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AUTHORITIES

I.
STATEMENT OF THE CASE AND FACTS

A single, narrow question has been certified to this Court:

> Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal [i. e., petition for discretionary review] in this cause from the Florida First District Court of Appeal?

Order of December 14, 1987; Case No. 87-329.[1/] The identical question was before this Court on a prior occasion, of course, when it voted (in case no. 70,089) five to zero to deny review of the *Florida Star v. B. J. F.*, 499 So.2d 883 (Fla. 1st DCA 1986), *review denied*, 509 So.2d 1117 (Fla. 1987). Therefore, all that the United States Supreme Court really wants to know is whether the Court denied review of that decision (1) because it was without jurisdiction, or (2) because, notwithstanding that it had jurisdiction, it declined to exercise its discretion to hear the case. In our judgment, that question could and should have been answered upon a simple review of the jurisdictional briefs filed here in case no. 70,089, rather than a full-blown reargument.

Nevertheless, and notwithstanding that the briefing of jurisdictional issues in this Court is ordinarily limited to 10 pages, the defendant has filed a 42-page brief. Approximately 10 pages of that brief actually address the narrow question before the Court. The remainder of the brief explores the "record proper" at length; argues the merits of the case; asks the Court to *change* its jurisdiction retroactively to moot our pending motion to dismiss its appeal; and argues a number of things concerning the jurisdiction of the United States Supreme Court--things which are more appropriately addressed to that

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[1/] The reason for this question will be evident from the Motion to Dismiss or Affirm which we filed in the United State Supreme Court, and which has been forwarded to this Court, so we see no need to elaborate upon that reason here. We simply refer the Court to our motion to dismiss for that background, although we are constrained to observe that we believe that background to be irrelevant to the question which the United States Supreme Court has asked this Court to answer.

Court in connection with our pending motion to dismiss. The defendant's brief also asks this Court to ignore the United States Supreme Court's question by declining to answer it accurately, and by providing a dishonest answer instead.[2/] Frankly, we think these additional arguments were both unnecessary and inappropriate. We therefore intend to focus on the narrow question before the Court, and we will do that first. We will then respond as briefly as possible to the defendant's miscellaneous arguments.

Before we can argue the narrow issue before the Court, however, it is necessary to restate the case and facts briefly, because the defendant's statements of the case and the facts are as inappropriate as the bulk of its argument. They are inappropriate because they are constructed almost entirely upon the "record proper", rather than upon the face of the decision which the defendant initially sought to have reviewed here. It is settled, however, that the jurisdictional issue presently before the Court must be determined upon the words contained within the four corners of that decision, and not upon any other matters extrinsic to those words. *See, e. g., Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986); *Reaves v. State*, 485 So.2d 829 (Fla. 1986); *School Board of Pinellas County v. District Court of Appeal*, 467 So.2d 985 (Fla. 1985); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).[3/]

[2/] The defendant's amici have also filed a 20-page brief. With one minor exception which we will address in our argument, this brief is merely a condensed version of the defendant's brief, and therefore adds nothing of substance to the debate. As a result, we need not respond separately to it.

[3/] The question in three of these cases was whether "express and direct conflict" existed, and the question in one was whether a district court decision "expressly affect[ed] a class of constitutional officers". As the Court noted in *School Board of Pinellas County, supra* at 986, however, "[t]he term expressly . . . means within the written district court opinion". We therefore take it to be beyond debate that the word "expressly" means the same thing in every context in which it is used in Art. V, §3(b)(3), Fla. Constn.--including the two additional contexts involved here ("expressly declares valid a state statute" and "expressly construes a provision of the state or federal constitution"), areas in which this Court has apparently not written a specific opinion on the point.

We therefore believe that the defendant's statement of the case and facts should be disregarded in its entirety here, and that the following statement of the case and facts should be substituted in its stead:

> PER CURIAM.
>
> This cause is before us on appeal from a final judgment awarding compensatory and punitive damages pursuant to a jury verdict. We affirm.
>
> . . . .
>
> Reaching the merits, we find that the information published, the rape victim's name, was of a private nature and not to be published as a matter of law.[2] *See Doe v. Sarasota-Bradenton Florida Television Company, Inc.*, 436 So.2d 328, 330 (Fla. 2nd DCA 1983), particularly the reference to Opinion 075-203 of the Attorney General of Florida (July 14, 1975), which suggests that Section 794.03, Florida Statutes, be applied to the prosecution of parties publishing nonpublic informaton. Accordingly, we affirm.
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> . . . .
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> 2. Section 794.03, Florida Statutes, is pertinent and states:
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> > No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The Florida Star v. B. J. F., supra at 884. (We have omitted the second paragraph of the opinion and its footnote, because the defendant does not rest any claim of "jurisdiction" upon them.)

Since that is the extent of the relevant background here, we do not feel that we should compound the impropriety of the defendant's initial statements by quarreling with each and every inaccuracy in them. We alert the Court that they are not entirely accurate, however. If the Court is at all interested in what the "record proper" actually

reflects, we refer it to two places in which the inaccuracies are corrected--the Statement of the Case and Facts in the jurisdictional brief which we previously filed here in case no. 70,089, and the Statement of the Case contained in the Motion to Dismiss or Affirm which we filed in the United States Supreme Court in this case. Both of these briefs are of record and presently available to the Court, and we simply refer the Court to them in lieu of debating what amounts to irrelevant matters here.

II.
ISSUE PRESENTED BY CERTIFIED QUESTION

> WHETHER THIS COURT HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION IN *THE FLORIDA STAR V. B. J. F.*, 499 SO.2D 883 (FLA. 1ST DCA 1986), *REVIEW DENIED*, 409 SO.2D 1117 (FLA. 1987).

III.
SUMMARY OF THE ARGUMENT

Because our argument is longer than it should have been, our summary of it will be quite brief. We intend to demonstrate, as we believe we did when this Court initially denied review of the district court's decision by a vote of five to zero, that the Court did not have jurisdiction to review the decision. The decision was not in "express and direct conflict" with any other decision; it did not "expressly declare valid a state statute"; and it did not "expressly construe a provision of the state or federal constitution". We will leave the specifics of that demonstration to the argument which follows.

After we have responded to that issue, which is the only issue really presented here, we will respond to the several miscellaneous arguments which the defendant has made in an effort to avoid an accurate answer to the certified question. We will agree with the defendant that this Court had "jurisdiction to determine its own jurisdiction", but we will explain that this truism is irrelevant to the question before the Court. The United States Supreme Court does not want to know whether this Court had "jurisdiction to determine its own jurisdiction"; it wants to know if this Court had *plenary* jurisdiction, because *its* jurisdiction depends upon whether a timely appeal was taken from a "[f]inal

judgment . . . rendered by the highest court of a State *in which a decision could be had*" on the merits, not upon whether the defendant perfected a timely appeal from just any court which had "jurisdiction to determine its own jurisdiction". The very existence of the certified question itself therefore renders the defendant's truism irrelevant to the issue before the Court.

The defendant's next miscellaneous contention--that the word "expressly" in Art. V, § 3(b)(3), Fla. Constn., was inserted *solely* for the purpose of precluding review of so-called PCA's (decisions without opinions)--is completely untenable. This Court has written enough on that subject in recent years to recognize immediately that the defendant's argument is not a request to apply the existing law, but a request to *change* the existing law. To do so, however, this Court would be required to overrule every decision it has ever written on the subject (with one or two exceptions), and render the 1980 amendments to the Constitution meaningless--so we are confident that this second miscellaneous argument is completely without merit.

In its third miscellaneous contention, the defendant asks this Court to answer the certified question in the affirmative even if a negative answer would have been the correct answer. This request is so outrageously improper that we will not dignify it with a response. Instead, we will simply examine the reasoning upon which the request is constructed, to demonstrate that there is no precedent whatsoever for the request. And, of course, we will suggest that the Court provide an honest answer to the certified question.

We will devote the remainder of our argument to demonstrating that the so-called "Hobson's choice" of which the defendant complains is something that this Court can do nothing about. The predicament exists because of a combination of the constitutionally-limited nature of this Court's jurisdiction, and the specificity of language in the federal statute defining the jurisdiction of the United States Supreme Court. This Court cannot

change the language of the Florida Constitution, and it cannot change the language of the federal statute. There is therefore nothing which this Court can do (short of construing the Florida Constitution in such a way that the 1980 amendments are rendered meaningless) to eliminate the problem of which the defendant complains. In any event, as we shall demonstrate, the so-called "Hobson's choice" arises only infrequently, and it is capable of solution with a little foresight by competent practitioners, so the problem itself does not provide a substantial enough reason for this Court to acquiesce in any of the defendant's proposed avoidances of the narrow issue presented here. The Court therefore should not overrule nearly every one of its jurisdictional decisions; it should not hold that its "jurisdiction to determine its own jurisdiction" is jurisdiction to render a decision on the merits; and it should not respond dishonestly to the certified question. The certified question should be answered accurately, in the negative.

IV.
ARGUMENT

THIS COURT DID NOT HAVE JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION IN *THE FLORIDA STAR V. B. J. F.*, 499 SO.2D 883 (FLA. 1ST DCA 1986), *REVIEW DENIED*, 509 SO.2D 1117 (FLA. 1987).

As we noted at the outset, our response to the defendant's arguments will be in two parts, in the inverse order in which the arguments are made in the defendant's brief. First, we will address the narrow issue before the Court--whether this Court had jurisdiction to review the district court's decision. We will then respond as briefly as possible to the additional, miscellaneous arguments by which the defendant has attempted to avoid a straightforward answer to that question.

A. THE COURT'S JURISDICTION.

The defendant contends that this Court had jurisdiction to review the district court's decision under one or more of the following provisions of the Florida Constitution:

(b) JURISDICTION.--The supreme court:

. . .

> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, . . . or that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.

Art. V, §3(b)(3), Fla. Constn. In our judgment, the district court's decision did not qualify for review here on any of these grounds.

1. No express and direct conflict.

The defendant first raises its previously-rejected contention that the district court's decision is in "express and direct conflict" with other decisions.[4/] To place this initial subissue in its proper historical context, we begin with the leading decision concerning the publication of rape victims' names, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975). In *Cox*, the Supreme Court held that, "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served", and that the First Amendment therefore prevents a state from imposing sanctions for publication of the name of a rape victim obtained from "public court documents open to public inspection". 420 U.S. at 495. The Court noted, however, that "if there are privacy interests to be protected . . . , the States must respond by means which avoid public documentation or other exposure of private information"--and it expressly left open "any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records . . .". 420 U.S. at 496, 496 n. 26. In

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[4/] For purposes of responding to this contention and the remaining claims of jurisdiction under Art. V, § 3(b)(3), we will assume that the word "expressly" means "expressed within the four corners" of the district court's opinion, as this Court has repeatedly held. *See* the decisions cited at page 2, *supra*. We will address the defendant's quite different contention--that the word "expressly" should be construed to eliminate jurisdiction only when no opinion has been written--at a subsequent place in our argument.

the instant case, the State of Florida "responded" with §119.07(3)(h), Fla. Stat., an exception to Florida's "Public Records Act", which represents the State's conclusion that the public interest is *not* served by public disclosure of rape victims' names, and which expressly provides that rape victims' names are exempt from public disclosure--i. e., that they are "nonpublic information".[5/] The issue presented here is therefore not controlled by *Cox*; instead, it is the issue left open by *Cox*. With that background behind us, we turn to the defendant's multiple claims of "conflict".[6/]

The defendant first claims "conflict" with the very decision upon which the district court squarely relied below: *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328 (Fla. 2nd DCA 1983). There is clearly no "conflict", however. *Doe* holds simply, as *Cox* requires, that the First Amendment protects the publication of the name of a rape victim, where the name is learned *in an open court proceeding*. *Doe* goes on to address the question left open in *Cox*, however, and observes (by quoting an Attorney General's Opinion also relied upon by the district court below), that the First Amendment would *not* protect the publication of the name of a rape victim obtained from "nonpublic information". 436 So.2d at 330. In the instant case, of course, as the face of the district court's decision expressly reflects, the defendant obtained the plaintiff's name from "nonpublic information" protected by statute, not from a public record open to public

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5/ It is no answer to this statutory provision protecting the confidentiality of the plaintiff's name that the sheriff's office may have inadvertently failed to sanitize the police report from which it was obtained. It would appear to be settled in this State that a newspaper's retrieval of information made confidential by statute is not rendered lawful merely because it was inadvertently unprotected by a state employee--since it is protected by a higher authority in the form of a state statute. *See Cape Publications, Inc. v. Hitchner*, 514 So.2d 1136 (Fla. 5th DCA 1987); *Patterson v. Tribune Co.*, 146 So.2d 623 (Fla. 2nd DCA 1962), *cert. denied*, 153 So.2d 306 (Fla. 1963).

6/ The defendant's contention that §794.03, Fla. Stat., represents an impermissible "prior restraint" is simply wrong, and should therefore be entirely disregarded. It is thoroughly settled that statutes which provide *post-publication* remedies do not represent "prior restraints" against publishing. *See, e. g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed.2d 1 (1978).

inspection. The district court's decision is therefore perfectly consistent with *Doe* in every respect, and not even arguably in "express and direct conflict" with it.[7/]

There is also clearly no "conflict" with *The Sarasota Herald-Tribune v. J. T. J.*, 502 So.2d 930 (Fla. 2nd DCA 1987). In the first place, *J. T. J.* did not determine whether the First Amendment would protect publication of the names of the minor criminal and minor victim in that case; the *only* issue that it decided was that the press had a right to be heard at the hearing on the motion for closure of the criminal proceedings. That marked dissimilarity of the issues decided in the two cases, by itself, is enough to preclude an "express and direct conflict" here. *See Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986). In any event, even if the issue presented here had been presented in *J. T. J.*, the fact remains that in *J.T.J.* the press learned the names from a "press release" issued by the sheriff's department, so the information was clearly "public". In the instant case, as the face of the district court's decision expressly reflects, the information published was "nonpublic", and it was protected twice over by statute. *J. T. J.* is therefore, at most, like *Doe*, and does not even arguably "conflict" with the decision at issue here.

There is also no "conflict" with *Gardner v. Bradenton Herald, Inc.*, 413 So.2d 10 (Fla.), *cert. denied*, 459 U.S. 865, 103 S. Ct. 143, 74 L. Ed.2d 121 (1982), which holds that the State's interest in confidentiality of the subjects of its wiretaps does not outweigh First Amendment interests in publishing information about those wiretaps. In the first place, *Gardner* expressly left open the issues presented here:

[7/] The same thing is true of *Williams v. New York Times, Inc.*, 462 So.2d 38 (Fla. 1st DCA 1984), in which the name of the rape victim was learned in open court proceedings (not, as in this case, purloined from "nonpublic information"), and in which the Court also observed that a different result would be required in the type of circumstance presented in the instant case. In any event, even if the district court's decision were in conflict with *Williams*, the conflict would be an *intra*district conflict, not an *inter*district conflict of the type necessary to create jurisdiction here.

> . . . Finally, we emphasize that this case does not involve any question of access of the press to the identities of persons whose communications have been intercepted under chapter 934.
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> We also do not have before us, nor do we reach, any question concerning the possible private cause of action that John Doe or similarly situated persons might have for libel or invasion of privacy against any news medium. . . The state in the person of the state attorney has no standing in this proceeding to assert the privacy rights of those persons it has wiretapped.

413 So.2d at 12. In the instant case, of course, the "question of access of the press to the identities of persons" who are rape victims has already been answered adversely to the press by §119.07(3)(h), Fla. Stat. And, of course, this case involves a "private cause of action . . . for . . . invasion of privacy". Since the Court made it clear that neither of these issues was presented or decided in *Gardner*, it is simply impossible that *Gardner* *expressly* conflicts with the district court's decision.

Just as importantly, *Gardner* does not stand for the proposition for which it has been asserted here--that any statute which purports to restrict the press is facially unconstitutional if it does not contain express provisions allowing "balancing" of the various interests involved. What the Court held in *Gardner* was that the statute prohibiting the publication of the names of unindicted parties to an intercepted communication was simply too broad to allow a meaningful balancing of the respective interests involved. That is clear from its follow-up observation that the result might be different in a case involving "a narrowly drawn statute closely tailored to interests such as protecting the national security, protecting the safety of undercover officers, preserving an ongoing investigation, protecting the life of a kidnap victim, or ensuring a fair trial." *Id.* In the instant case, of course, §794.03, Fla. Stat., is *very* narrowly drawn to protect an interest which all right-thinking persons would recognize as compelling indeed--the constitutional, statutory, and common law privacy interests which a rape victim has in avoiding public exposure of and traffic in her identity.

Moreover, the decisional law is replete with cases which make it clear that, in determining the constitutionality of a statute restricting the press, it is the judiciary's function to "balance" the respective interests involved--and none of these cases even arguably intimate that this function cannot be carried out unless the challenged statute itself contains a provision authorizing "balancing", as the defendant contends. The defendant is correct, of course, that there are many decisions in which, because the interests to be protected by the statute in issue were found less weighty than the interest protected by the First Amendment, the "balance" has been struck in favor of the First Amendment.[8/] These decisions clearly do not control the result in this case, however, because there are just as many decisions in which interests designed to be protected by constitutional or statutory provisions were found to be far weightier than the interest protected by the First Amendment, and in which the "balance" has therefore been struck in favor of the protected interest at the expense of the press.[9/]

8/ *See, e. g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed.2d 1 (1978) (First Amendment interest in qualifications of judiciary outweighed judges' interest in confidentiality); *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97, 99 S. Ct. 2667, 61 L. Ed.2d 399 (1979) (First Amendment interest in publishing name of juvenile criminal defendant "lawfully" obtained by merely asking various witnesses outweighed defendant's interest in confidentiality; question of "unlawful press access to confidential" information expressly left open); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S. Ct. 1045, 51 L. Ed.2d 355 (1977) (First Amendment interest in publishing name of juvenile learned at court proceedings open to the public outweighed juvenile's interest in confidentiality).

9/ *See, e. g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 1055 S. Ct. 2939, 86 L. Ed.2d 593 (1985) (state's interest in protecting reputations of citizens outweighs First Amendment interests where speech does not involve matter of public concern); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed.2d 17 (1984) (plaintiffs' privacy rights and state's interest in the judicial discovery process outweighed First Amendment rights in publishing private information obtained through discovery process); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed.2d 608 (1979) (criminal defendant's Sixth Amendment rights outweigh press's First Amendment rights, justifying closure of pre-trial suppression hearing); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982) (same); *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987) (similar); *Sentinel Communications Co. v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), *review denied*, 503 So.2d 328 (Fla. 1987) (privacy interests outweigh First Amendment interests justifying sealing of court records in

In the final analysis, of course, that is what the merits of the instant case were clearly all about. And, we respectfully submit, the district court's perfectly proper "balancing" of the respective interests involved here reaches the only permissible conclusion on the facts involved in this case: the plaintiff's constitutional, statutory, and common law interests in avoiding disclosure and publication of her name far outweigh any chimerical interest (an interest which, if the "record proper" were relevant here, the defendant has itself disavowed by its own policy) which the defendant might have in violating the statutes involved here and egregiously invading the plaintiff's privacy in the process. There is nothing in *Gardner* which even arguably suggests a different conclusion on the quite different facts in this case, and the defendant's claim of "conflict" with *Gardner* is therefore without merit.

The defendant also claims "conflict" with *Jacova v. Southern Radio & Television Co.*, 83 So.2d 34 (Fla. 1955), and *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA), *review denied*, 431 So.2d 988 (Fla.), *cert. denied*, 464 U.S. 893, 104 S. Ct. 239, 78 L. Ed.2d 229 (1983). Both of these cases stand for the undeniably correct proposition that publication of an embarrassing matter about a person caught up in a "newsworthy" event which is a matter of "legitimate public interest" (including, in dictum, the identity of a victim of a crime), is not ordinarily an actionable invasion of privacy. That proposition is inapplicable to this case, however, for three simple reasons. First, the defendant did not learn the plaintiff's name by observing the crime, or in any other "lawful" manner; it purloined her name from "nonpublic information" protected by statute. Second, both §119.07(3)(h) and §794.03 announce the public policy of this State to be that the identity of a rape victim is *not* a matter of "legitimate public interest". Third, and surely not least (and once again, if the "record proper" were relevant here), the defen-

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domestic relations case). *Cf. Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533, 56 A.L.R.4th 739 (Fla. 1987) (blood donors' privacy interests outweigh litigant's interest in discovery of their names).

dant itself conceded below that the name of a rape victim was neither "newsworthy" nor a matter of "legitimate public interest", since its policy (as well as the code of ethics governing journalists) prohibited its publication. The result in this case was therefore perfectly consistent with both *Jacova* and *Bridges*, and the defendant's claim of "conflict" is just as clearly without merit.

Finally, amici (but not the defendant) contend that the district court's decision is in "conflict" with "Florida decisional law holding that no cause of action should be implied under a criminal statute where it will conflict with or undermine an existing civil remedy" (amici's brief, p. 18).[10/] As we noted in the Statement of the Case and Facts in our initial jurisdictional brief (and as we explain in the Motion to Dismiss or Affirm which generated this second round of jurisdictional briefs), however, this was a common law action for invasion of privacy, not a civil remedy implied solely from a criminal statute--and the statute was utilized simply to elevate the defendant's negligence to negligence *per se*. *See DeJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198 (Fla. 1973). Moreover, even if the plaintiff's cause of action had been implied solely from §794.03, nothing in that implication resulted in any type of "conflict" with the ordinary elements of a common law action for invasion of privacy.

And finally, on the merits of amici's contention, we think that even if no common law action for invasion of privacy existed, §794.03 would be a perfect candidate for implication of a civil remedy. *See Shaw v. Fletcher*, 137 Fla. 519, 188 So. 135 (1939) (violation of criminal rape statute supports tort action against rapist); *Rosenberg v.*

10/ The reason the defendant did not raise this issue is that it consistently maintained the position below that §794.03 *did* create a civil cause of action (subject to the "impact rule"), and thereby rendered the common law action for invasion of privacy (which does not incorporate the "impact rule") irrelevant (T. 67-71, 131-35). Not only do amici have no business arguing a position eschewed by the defendant here, they also clearly have no business arguing a position directly contrary to the position taken by the defendant below.

Ryder Leasing, Inc., 168 So.2d 678 (Fla. 3rd DCA 1964) (penal statute which imposes a duty for the benefit of a class of individuals impliedly creates a civil action for its breach); *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So.2d 1367 (Fla. 4th DCA 1981) (same). This case is complicated enough without full-blown argument on that point, however, so we will return to the point in issue here--this Court's "conflict" jurisdiction. Whatever the merits of amici's argument, the fact remains that the district court's decision does not address it in any manner, shape, or form--and it is therefore impossible that there is any *express* and direct conflict between it and the decisions upon which amici rely. In short, all of the defendant's claims of "express and direct conflict" are clearly without merit--a conclusion which we believe is already plainly reflected by this Court's initial five to zero vote on the question.

2. No express declaration of validity of state statute or express construction of a constitution.

The defendant next argues that this Court has jurisdiction to review the district court's decision because it "expressly declare[s] valid a state statute" and "expressly construe[s] a provision of the state or federal constitution". It is perfectly clear from a simple reading of the district court's opinion that it does no such thing, however. The defendant's constitutional challenge to the validity of §794.03 on the facts in this case is not mentioned in the opinion. Neither does the opinion discuss the constitutional validity or non-validity of that or any other statute. (With respect to §794.03, the most that the decision states is that it is "pertinent".) Neither does the opinion mention any constitutional provision of either the state or federal constitutions. Neither can this Court refer to *Doe* to determine its jurisdiction. *Harrison v. Hyster Co.*, 12 FLW 595 (Fla. Dec. 3, 1987).

We do not deny that the defendant staked its defense on the First Amendment below, and we do not deny that the district court rejected that defense to the plaintiff's

action for invasion of privacy on the unique and compelling facts in this case. Neither do we deny that, given the entire background of the case (which is, of course, not disclosed in the district court's opinion), a rejection of the defendant's First Amendment challenge to the constitutionality of §794.03 is *implicit* in the *result* which the district court reached (which, incidentally, is all that the defendant has really argued here). That is not enough to create jurisdiction in this Court, however, because the Constitution was amended in 1980 to *limit* this Court's jurisdiction to review only those decisions which "*expressly* declare valid a state statute" and which "*expressly* construe a provision of the state or federal constitution". And, as we noted at the outset, this Court has repeatedly held that the word "expressly" means precisely what it says, and that the Court lacks jurisdiction to review any decision which does not meet this rigorous requirement of the Constitution.

The defendant's apparent reliance upon *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981), for a contrary proposition is badly misplaced. All that this Court held in that case was that it is not necessary that a district court opinion explicitly identify conflicting decisions in order for "express and direct conflict" to appear; it is enough, the Court held, that the discussion of the legal principles expressed within the four corners of the decision conflicts with another decision's discussion of the same legal principles. In other words, the conflict need not be acknowledged or identified, but it must still be "express". There is nothing in *Ford Motor Co.* from which it can fairly be inferred that a conflict which is not express, but which is implicit or inherent in the result of the case, creates jurisdiction in this Court.

If there were ever any doubt about that, that doubt was clearly removed by this Court's more recent decision in *Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986), in which the Court squarely rejected a petitioner's attempt to revive the pre-1980 line of cases upon which

the defendant's argument for "jurisdiction by implication" depends here:[11/]

> . . . While HRS concedes that standing was not an issue before the Third District Court in the *Adoption Hot Line* cases, it argues that the "inferential" or "implied" conflict inherent in the decisions supports this Court's jurisdiction.
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> All the cases relied on by HRS for this "implied" conflict argument were decided prior to the 1980 amendment to article V, section 3(b)(3) of the Florida Constitution. As we recently noted in *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986), "[c]onflict between decisions must be express and direct, i. e., it must appear within the four corners of the majority decision." In other words, inherent or so called "implied" conflict may no longer serve as a basis for this Court's jurisdiction.

498 So.2d at 889.

The only difference between that case and this one is that "inherent conflict" was rejected there, and "inherent declaration" and "inherent construction" are in issue here. That is clearly a distinction without a difference, however, because the holding in *Department of Health* is bottomed upon a single word--the word "expressly"--and that word modifies each and every one of the three jurisdictional provisions upon which the defendant stakes its claim to jurisdiction here. We are therefore confident that the defendant's contention that the Court had "jurisdiction by implication" is without merit here.

Although reasonable persons can certainly differ about the wisdom of these rigorous constitutional provisions, and even about the propriety of the manner in which the district court chose to write its opinion in this case, the fact remains that the Constitu-

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11/ *See, e. g., Aguilar v. Community General Hospital*, 396 So.2d 149, 150 (Fla. 1981) ("This Court has jurisdiction since the trial court inherently ruled on the constitutional validity of section 768.44(1)(c) when it denied Aguilar's motion for rehearing."). This jurisdiction, broad as it was, apparently applied only to "inherent" declarations of the validity of a state statute, however; even it was not broad enough to support the defendant's additional claim to jurisdiction based upon an "inherent" construction of a constitution. *See Dykman v. State*, 294 So.2d 633 (Fla. 1973), *cert. denied*, 419 U.S. 1105, 95 S. Ct. 774, 42 L. Ed.2d 800 (1975); *Rojas v. State*, 288 So.2d 234 (Fla. 1973), *cert. denied*, 419 U.S. 851, 95 S. Ct. 93, 42 L. Ed.2d 82 (1974).

tion is the supreme law of the State, and must be followed by this Court. If the Court limits its review of the jurisdictional question presented here to the face of the district court's decision, as it is constitutionally bound to do, it clearly will find neither an *express* declaration of the validity of a state statute nor an *express* construction of a provision of the state or federal constitution. Neither, as we initially demonstrated, will it find any "express and direct conflict." It must therefore conclude again, as we believe it concluded previously in its initial five to zero vote on the question, that the Constitution foreclosed review of the district court's decision. It is respectfully submitted that a negative answer is the only proper answer to the question which the Court has been asked to answer here.

B. THE DEFENDANT'S MISCELLANEOUS ARGUMENTS.

In our judgment, the foregoing ought to be sufficient argument to allow considered disposition of the narrow issue presented here. The defendant has not been content simply to argue that issue, however. It has asserted a grab bag full of additional miscellaneous arguments--arguments which, although they appear to us to be either irrelevant or insubstantial on their face, deserve at least a brief response. The miscellaneous arguments are sufficiently discrete that they can be addressed separately, so we will respond to them in that fashion.

1. The Court's "jurisdiction to determine its own jurisdiction".

The defendant first contends that this Court has "jurisdiction to determine its own jurisdiction". *Of course* this Court has limited, preliminary jurisdiction to determine if it has plenary jurisdiction. That is a truism with which no reasonable justice, judge, or attorney would disagree--but we fail to see its relevance to the question which the United States Supreme Court has asked this Court to answer. That Court knows that this Court possesses the first "jurisdiction" referred to in the phrase "jurisdiction to

determine its own jurisdiction". All courts undeniably possess that jurisdiction. What the Supreme Court does not know, and what it wants to know, is whether this Court possessed the *second* "jurisdiction" referred to in the phrase "jurisdiction to determine its own jurisdiction"--*i.e.*, plenary jurisdiction "to hear Appellant's appeal in this cause from the Florida First District Court of Appeal" (or in words more appropriate to Florida's particular jurisprudence, jurisdiction to review the district court's decision on the merits).

The reason that the United States Supreme Court needs an answer to that question is that *its* jurisdiction depends upon whether a timely appeal was taken from a "[f]inal judgment. . . rendered by the highest court of a State *in which a decision could be had*" on the merits (28 U.S.C. §1257; emphasis supplied)--not upon whether a timely appeal was taken from just any court which had "jurisdiction to determine its own jurisdiction", but which was incapable of rendering a decision on the merits for lack of plenary jurisdiction.[12/] If that were not so, of course, then the Supreme Court would have had no reason whatsoever to certify the pending question to this Court. In other words, the very existence of the certified question itself renders the defendant's truism absolutely irrelevant to the issue before the Court.

The *only* relevant question here is whether this Court had jurisdiction to entertain the defendant's petition for discretionary review on the merits and render a decision on

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12/ The United States Supreme Court has consistently construed its jurisdiction in this fashion. *See Dresner v. Tallahassee*, 375 U.S. 136, 84 S. Ct. 235, 11 L. Ed.2d 208 (1963); *Dresner v. Tallahassee*, 378 U.S. 539, 84 S. Ct. 1895, 12 L. Ed.2d 1018 (1964); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed.2d 438 (1967); *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed.2d 446 (1970); *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed.2d 421 (1984); *Florida v. Rodriguez*, 469 U.S. 1, 105 S. Ct. 308, 83 L. Ed.2d 165 (1984).

See, in addition, *Stratton v. Stratton*, 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142 (1915); *American Railway Express Co. v. Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954); *Gotthilf v. Sills*, 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed.2d 159 (1963).

the merits--and the fact that it may have had preliminary jurisdiction to announce that it had no plenary jurisdiction is clearly beside the point.[13/] In due course, the defendant may quarrel with the United States Supreme Court over whether a court's mere "jurisdiction to determine its own jurisdiction" should be equated with jurisdiction to render a decision on the merits for purposes of *that* Court's jurisdiction, but the argument clearly has no place in this Court.[14/] This miscellaneous argument is therefore both irrelevant and without merit.

13/ Because the defendant's argument is in the final analysis irrelevant, we should not need to respond to the defendant's related, but equally irrelevant contention--that this Court's "jurisdiction to determine its own jurisdiction" is somehow different in cases where a district court has written an opinion than it is in cases where a district court has not written an opinion. We will respond briefly, however, to leave no stone unturned. We note simply that the fact that this Court has delegated its authority to deny review to the Clerk in "no opinion" cases does not somehow elevate this Court's "jurisdiction to determine its own jurisdiction" to some higher level (such as that of jurisdiction to afford plenary review) in "opinion" cases, as the defendant appears to suggest.

This Court's delegation of authority to its Clerk is simply an internal, administrative procedure designed for economy, to relieve this Court from the need to read jurisdictional briefs in cases in which a petitioner's claim of jurisdiction is frivolous on its face. When the Clerk enters an order denying review in such a case, however, he acts on behalf of the Court, not himself, and review is denied by the Court, not by the Clerk. And when the Court enters an order denying review after reading jurisdictional briefs in cases which do not qualify for automatic denial at the threshold, the order it enters is simply not distinguishable in any legal sense from the similar order entered by the Clerk on behalf of the Court. Both types of orders are simply exercises of this Court's preliminary jurisdiction to determine if it has plenary jurisdiction, and the fact the Court determines its jurisdiction with two different administrative procedures simply has no legal significance to the issue before the Court.

14/ We also think it highly doubtful that the United State Supreme Court would accept the defendant's argument and overrule the numerous decisions cited in footnote 12, *supra*, since there is no logic in the argument whatsoever. If the defendant is correct that it may delay the period in which it must appeal from a final judgment rendered by the highest court of the state in which a decision could be had, simply by initiating a proceeding in any court which had "jurisdiction to determine its own jurisdiction", then the defendant could have petitioned the District Court of Appeal, Second District, to review the decision of the First District, then initiated successive petitions in the Third, Fourth, and Fifth Districts (and perhaps even a petition to, for example, the Supreme Court of Nebraska)--and, after having been rejected by all of those courts for lack of jurisdiction to afford plenary review, it could then file a timely notice of appeal in the United States Supreme Court. We seriously doubt that the United States Supreme Court is prepared to open the Pandora's Box suggested by the defendant's "jurisdiction to determine its own jurisdiction" argument.

Although the foregoing should be a sufficient response to this first miscellaneous argument, the defendant has made a sub-argument which requires a separate, brief rebuttal. According to the defendant:

> The filing of a notice of appeal or a notice of intent to seek discretionary review over a case vests jurisdiction in the reviewing court. *See* Florida Rule of Appellate Procedure 9.120(b); *Lelekis v. Liler*, 240 So.2d 478 (Fla. 1970); *Payne v. State*, 493 So.2d 1104 (Fla. 1st DCA 1986), *approved and remanded on other grounds*, 498 So.2d 413 (Fla. 1986). In *Payne*, the First District explicitly rejected appellant's [sic] argument that the Florida Supreme Court does not acquire jurisdiction over a case until it determines to review the case on the merits. . . .

(Defendant's brief, p. 10).[15/]

We have no quarrel with the opening assertion--that the filing of a notice vests jurisdiction in the reviewing court. That is simply another truism. The jurisdiction which is initially vested, however, is clearly only the reviewing court's "jurisdiction to determine its own jurisdiction", since a mere notice invoking jurisdiction cannot create plenary jurisdiction where the Constitution does not grant it. This sub-argument is therefore irrelevant for the same reason that the main argument is irrelevant.

Of course, a notice of *appeal* to a court which *has* plenary jurisdiction to review a case on the merits *does* vest plenary jurisdiction in the reviewing court (since its "jurisdiction to determine its own jurisdiction" must ultimately result in a conclusion of plenary jurisdiction), and the *lower* court is thereby deprived of jurisdiction absent a relinquishment of jurisdiction. That is all that *Lelekis v. Liler*, 240 So.2d 478 (Fla. 1970)--and the similar additional decisions relied upon by amici--holds. But the fact that

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[15/] *Payne* has been inadvertently miscited in this passage. The "subsequent history" attributed to it belongs to an earlier district court decision in the case: *Payne v. State*, 480 So.2d 202 (Fla. 1st DCA 1985), *remanded*, 498 So.2d 413 (Fla. 1986). The correct citation of the decision relied upon by the defendant is *Payne v. State*, 493 So.2d 1104 (Fla. 1st DCA 1986). We do not quibble with this citation merely to be picky; we intend to demonstrate in a moment that *Payne* was wrongly decided, and it is therefore important that the Court understand that it did not "approve" that decision.

a lower court is deprived of jurisdiction when an *appeal* has been taken to a higher court which does possess plenary jurisdiction is simply irrelevant to the question presented here--whether this Court did or did not have plenary review jurisdiction.

Although *Payne v. State*, 493 So.2d 1104 (Fla. 1st DCA 1986), deals with notices invoking the discretionary review jurisdiction of this Court, rather than an appeal as of right, it is also irrelevant for essentially the same reason. All that it holds is that, when a notice invoking the discretionary review jurisdiction of this Court to review a district court decision is filed, a *trial court* has no jurisdiction to proceed in the case, notwithstanding that the district court has issued its mandate. There is no issue presented here concerning the *trial court's* jurisdiction to proceed once the defendant filed its notice invoking this Court's discretionary jurisdiction (so *Payne* clearly did not "reject" *any* position we have taken here--including the position attributed to us by the defendant, which we have never taken). The only question presented here is whether, when that notice was filed, this Court had plenary jurisdiction, or merely "jurisdiction to determine its own jurisdiction"--and the answer to that question cannot depend in any way upon *Payne's* conclusion that a trial court cannot act in the face of a notice invoking this Court's jurisdiction.

Although *Payne* is therefore irrelevant to the issue presented here, we would be remiss if we did not also explain that *Payne* was wrongly decided. Under the 1962 Rules of Appellate Procedure, the mere filing of a notice seeking discretionary review in this Court operated as an automatic stay of further proceedings in the trial court. That rule was purposefully changed in 1977, however, and a party who wishes a stay of proceedings below pending discretionary review must now file a motion seeking a stay of the district court's mandate--and it is only when the mandate is stayed that a trial court is deprived of jurisdiction to proceed. This Court made that clear (or at least we thought it had made that clear) in *State ex rel. Price v. McCord*, 380 So.2d 1037 (Fla. 1980).

In any event, *Payne* is clearly an anomaly.[16/] All of the other courts which have confronted the question, including the First District itself, have ruled the other way--as *State ex rel. Price v. McCord, supra*, would clearly seem to require. *E.g., Vicknair v. State*, 501 So.2d 755 (Fla. 5th DCA), *review dismissed*, 511 So.2d 299 (Fla. 1987); *Thibodeau v. Sarasota Memorial Hospital*, 449 So.2d 297 (Fla. 1st DCA 1984); *Robbins v. Pfeiffer*, 407 So.2d 1016 (Fla. 5th DCA 1981); *Zettler v. Ehrlich*, 384 So.2d 928 (Fla. 3rd DCA), *review denied*, 392 So.2d 1381 (Fla. 1980); *Murphy v. Murphy*, 378 So.2d 27 (Fla. 3rd DCA 1979); *Aetna Insurance Co. v. Buchanan*, 372 So.2d 172 (Fla. 2nd DCA), *cert. denied*, 378 So.2d 342 (Fla. 1979).

The error of *Payne* has already been expressly recognized by the Fifth District, in *Vicknair v. State, supra*, as follows:

> The state urges that Vicknair's sentence is a nullity because the resentencing took place during the time the state was seeking discretionary review in the supreme court. *Payne v. State*, 492 So.2d 1104 (Fla. 1st DCA ... 1986), holds that after discretionary review in the supreme court is sought, the trial court (as well as the district court of appeal) loses jurisdiction and cannot resentence pending final disposition by the reviewing court where it is proceeding in a matter which affects the subject matter on appeal. We respectfully disagree with *Payne* that the filing for discretionary review in the supreme court pursuant to rule 9.120 automatically deprives the trial court of jurisdiction to carry out the mandate of the district court of appeal. That view would make the rules dealing with applications for stay of mandate pending review superfluous.

501 So.2d at 756. In short, *Payne* is both irrelevant and wrong. The defendant's contention that this Court's "jurisdiction to determine its own jurisdiction" amounts to plenary

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16/ The anomaly may be explainable by the fact that, in *Payne*, four days after the trial court had complied with the district court's mandate, this Court granted plenary review of the decision with which the trial court had complied. In that circumstance, it may have been appropriate for the district court to have stayed the appeal from the order entered on the mandate (as the appellant had requested)--but there was simply no justification for the district court's conclusions that the trial court had no jurisdiction to comply with its mandate merely because a notice seeking discretionary review had been filed, or that the order entered in compliance with the mandate was illegal as a result.

jurisdiction is also both irrelevant and without merit--which brings us to the defendant's second miscellaneous argument.

2. The meaning of the word "expressly".

The next argument which the defendant has pulled out of its grab bag goes like this: the *sole* purpose of the word "expressly" (which qualifies each of the three jurisdictional bases upon which the defendant claims entitlement to plenary review in this Court) was to preclude this Court from reviewing so-called PCA's--i. e., decisions without opinions;[17/] therefore, this Court has jurisdiction to review *all* decisions in which a district court has written an opinion containing one or more sentences, whether that opinion expressly conflicts with, expressly validates, or expressly construes anything. Put another way, the defendant contends that as long as a district court's decision has "four corners" by virtue of having one or more sentences to support the frame, this Court has jurisdiction to review it whether the matter framed by the four corners qualifies for review under the restrictive language of Article V, §3(b)(3) or not. This Court has written enough on this subject in recent years to recognize immediately that this contention is completely untenable.

For example, this Court recently declared that it had no jurisdiction to review a district court's decision, notwithstanding that the majority had written a lengthy opinion, where nothing in the opinion was in "express and direct conflict" with any other decision--noting as follows: "Conflict between decisions must be express and direct, i. e., it must appear within the four corners of the majority decision." *Reaves* v. *State*, 485 So.2d 829, 830 (Fla. 1986). For this Court to accept the defendant's contention that only

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17/ It is true, of course, that this was *one* of the purposes of the 1980 amendments to Article V, §3(b)(3), as *Jenkins* v. *State*, 385 So.2d 1356 (Fla. 1980), plainly holds. However, nothing in *Jenkins* even remotely supports the defendant's contention that this was the *sole* purpose of the amendments.

one or more sentences must appear within the four corners of an opinion, rather than a conflict between decisions, it must necessarily overrule *Reaves*. It must also overrule all of the following recent pronouncements it has made on the subject: *Harrison v. Hyster Co.*, 12 FLW 595 (Fla. Dec. 3, 1987); *Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986); *School Board of Pinellas County v. District Court of Appeal*, 467 So.2d 985 (Fla. 1985); *Bailey v. Hough*, 441 So.2d 614 (Fla. 1983); *Davis v. Mandau*, 410 So.2d 915 (Fla. 1981); *Petrik v. New Hampshire Insurance Co.*, 400 So.2d 8 (Fla. 1981); *Pena v. Tampa Federal Savings & Loan Ass'n*, 385 So.2d 1370 (Fla. 1980).

In fact, with the possible exception of *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980) (no jurisdiction to review PCA citing cases only), acceptance of the defendant's contention would require the overruling of probably every decision which this Court has ever written on the subject, except the single decision upon which the defendant has constructed its untenable argument: *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).[18/] Acceptance of the defendant's contention would also reqire the implicit overruling of all of the numerous cases in which this Court has initially accepted review, determined after hearing the merits that it had no jurisdiction and that review had been improvidently granted, and then denied review--cases which are simply too numerous to list.

In short, the defendant's contention is not an argument upon what the law is; it is an entreaty to this Court to reverse itself and *change* the settled law--and thereby render the substantial changes effected by the plain language of the 1980 amendments to

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18/ Even then, however, this Court would have to disavow its undeniably correct observation in *Jenkins* that abolition of jurisdiction to review PCA's was only "*one* of the intents and effects of the revision of section 3(b)(3) . . ." (*Jenkins, supra* at 1359; emphasis supplied)--and hold instead that this was the *sole* intent of the 1980 amendments.

§3(b)(3) essentially meaningless. In view of this Court's consistent and oft-expressed views on the subject (not to mention the fact that such a change would reopen the flood gates here, and thereby revive the very problem which provoked the 1980 amendments in the first place), there should be no need for us to present any argument as to why that request should be rejected--so we will turn to the next of the defendant's miscellaneous contentions.

3. The propriety of an accurate answer to the certified question.

The defendant also asks this Court to answer the certified question in the affirmative even if a negative answer would have been the correct answer.[19/] In effect, of course, this request asks the Court to lie to the United States Supreme Court--and it is therefore such an outrageously improper request that we should not dignify it with a response. It is worth examining at least the reason given in support of the request, however, so that the Court is not misled into believing that there might be some precedent supporting it, as the defendant attempts to suggest. According to the defendant, this Court once declined to answer a question certified to it by the United States Court of Appeals for the Fifth Circuit, because to do so would have invaded the sanctity of its private deliberations; and the Court should not break with this precedent by accurately answering the certified question because that would set a new precedent which would encourage the federal courts to inundate it with future incursions into its deliberative processes. There are so many things wrong with this reasoning that we can only hope to list a few.

In the first place, *Greene v. Massey*, 384 So.2d 24 (Fla. 1980), has been badly misrepresented to the Court. In *Greene*, this Court answered four of the five questions

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19/ The defendant's amici make essentially the same request, although in a somewhat less blatant way.

certified to it, and it did not decline to answer the fifth question out of fear that the sanctity of its private deliberations would be invaded. The fifth question did not ask for a statement of Florida law; it asked the Court instead to explain an ambiguity in an earlier opinion--an explanation which would have required knowledge of the subjective intent of seven former justices, none of whom were presently on the Court. In short, the question was incapable of an accurate answer because it depended upon the subjective intent of persons unavailable, and simply could not be answered in any objective way--and this Court therefore had little choice but to decline to answer it.

In contrast, the answer to the straightforward legal question presently before the Court is capable of an objectively determined answer, just as it was the first time it was presented to this Court--and it is simply unnecessary for the Court to examine the subjective intent of the five justices who previously voted to deny review in this case in order to answer the question. Furthermore, even if the subjective intent of those five justices were somehow relevant here, all five of them are presently on the Court, so it should be a simple matter for them to explain their votes in two words or less--"jurisdiction" or "no jurisdiction"--if that is what is necessary. For both of these reasons, *Greene* is simply beside the point here.

We also do not believe that this Court has any business participating in a scheme designed to discourage federal courts from certifying questions to it. If certified questions are overloading the Court, the remedy is a repeal of Art. V, §3(b)(6), Fla. Constn., and Rule 9.150, Fla. R. App. P.--both of which authorize certified questions--not a closed-door or wrong-answer policy designed to subvert that jurisdiction. Neither do we believe that answering the certified question accurately will create any untoward precedent which will inundate this Court with future inquiries on the point. A question nearly identical to the one presently before the Court was certified to the Court by the United States Supreme Court in 1963, and this Court honorably answered it in *Dresner v. City of*

Tallahassee, 164 So.2d 208 (Fla. 1964). No flood gates opened. As far as we have been able to ascertain, the instant case is the only case in which such a question has been certified in the 23 years since.

In addition, as the decisions cited in foonote 12 *supra*, reflect, the question is not always in need of certification to this Court. Moreover, of course, if this Court wishes to discourage future questions of this type, it has a much more honorable way of doing it than that suggested by the defendant. All that it has to do is ensure in the future that its orders denying review state the answer to the question presented here--i. e., that review is denied for lack of jurisdiction, or that review is denied in the Court's discretion notwithstanding that jurisdiction existed. If that practice were adopted here, it would be highly unlikely that the Court would ever be presented with a certified question concerning the existence of its jurisdiction again. And finally, we think it goes without saying that fundamental principles of comity, not to mention the respect which the United States Supreme Court simply must be accorded by this Court, absolutely requires that the certified question be answered--and that it be answered honestly.

4. The problems facing practitioners.

Finally, the defendant contends that it was presented with a "Hobson's choice" in deciding whether to seek review of the district court's decision in this Court or in appealing directly to the United States Supreme Court; and that the practical problems facing practitioners which are implicated by the circumstances in which it finds itself are so serious that this Court should do something for it, anything for it, which would salvage its appeal--like overruling every one of its jurisdictional decisions except *Jenkins*, or holding that its "jurisdiction to determine its own jurisdiction" is jurisdiction to render a decision on the merits, or even responding in the affirmative notwithstanding that a negative answer might be the correct answer. As the Court might expect, we also have a number of problems with this more generalized contention.

Before we respond, however, a brief defensive observation is in order. To the extent that the defendant has attempted to blame us for the predicament which it perceives it is in, we plead not guilty. If it is a predicament, it was created by a combination of (1) the constitutionally-limited nature of this Court's jurisdiction; (2) the specificity of language in the federal statute defining the jurisdiction of the United States Supreme Court; and (3) the defendant's own failure to think the problem through before electing to apply to this Court, rather than the United States Supreme Court, for review. As we hope to demonstrate, there were ways to avoid the problem--and, in any event, the problem is not one which this Court can solve, since it arises from the wording of the Florida Constitution and the federal statute governing the United States Supreme Court's jurisdiction, not any deficiency in Florida law which is correctible by this Court. We take no pleasure in the defendant's perceived predicament. We have an obligation to represent our client zealously within the bounds of the law, however, and "jurisdiction is jurisdiction" (which is incapable of either stipulation or waiver)--so it would appear to be incumbent upon us to demonstate the error of this final miscellaneous contention, whether we enjoy it or not.

We readily concede that Florida practitioners face quite a different (and sometimes more difficult) problem than most practitioners do in negotiating the terrain between state courts and the United States Supreme Court. Like the United States Supreme Court, most state courts have broad supervisory power over their lower courts, and unlimited discretion to review almost every decision rendered by a lower court. A practitioner in such a state never sees a decision like *Jenkins v. State*, *supra*, or *Reaves v. State*, *supra*, in a lifetime of practice, and he has no choices to make. He *must* petition his state's highest court for discretionary review before appealing to (or petitioning for review by certiorari in) the United States Supreme Court, because his state's highest court is *always*, in the language of the federal statute which controls the United States

Supreme Court's jurisdiction, the "highest court of [the] State in which a decision could be had". 28 U.S.C. §1257.

In Florida, however, "the highest court . . . in which a decision could be had" is not always this Court. Sometimes--as the cases cited in footnote 12 *supra* (as well as the very fact that the pending question has been certified to this Court) clearly reflect--it is a district court of appeal. A Florida practitioner therefore cannot automatically file a petition for discretionary review in this Court, and ignore the period of time which federal law gives him in which to invoke the jurisdiction of the United States Supreme Court. He must make a decision, guided by the Florida Constitution and this Court's decisions construing it, as to whether this Court possesses jurisdiction or not--and proceed accordingly.

Perhaps 90% of the time, the direction in which to proceed will be relatively easy to ascertain--since the signpost can be found, as this Court has consistently observed, within the four corners of the district court's decision, and only an *express* signpost pointing at this Court will ever justify that route. (Incidentally, as the Court no doubt expects, we think the jurisdictional issue presented in the instant case falls squarely in this category, not in the category represented by the remaining 10% which we have conceded might be problematical.) Reasonable people can disagree concerning our estimate of 90%, of course, but we doubt that the Court will disagree with the thrust of that observation, since it has itself determined that the issue is ordinarily so simple that it justifies no more than two rounds of 10-page briefs. *See* Rule 9.210(a)(5), Fla. R. App. P. In short, the "Hobson's choice" which the defendant has postulated for all cases except the so-called PCA's actually presents itself only infrequently.[20/]

[20/] By conceding that the issue might be problematical perhaps 10% of the time, we do not mean that the problem will arise in 10% of the cases decided by the district courts. The problem *never* arises unless a reviewable *federal* question has been presented and decided, and the number of those cases is perhaps only 10% of the decided cases. The

When that infrequent, problematical case arises, however, the so-called "Hobson's choice" is not created solely by the nature of this Court's jurisdiction. It is indisputably created by the combination of this Court's limited jurisdiction and the specificity of the federal statute governing the United States Supreme Court's jurisdiction. This Court can do nothing about the language of the federal statute, however, which is why the defendant's argument about this Court's "jurisdiction to determine its own jurisdiction" is inappropriate here. That argument belongs in the United States Supreme Court, and it is that Court which must decide whether a state court's "jurisdiction to determine its own jurisdiction" qualifies as jurisdiction of "the highest court of a State in which a decision could be had"--not this Court.

On the other hand, this Court arguably can do something about its own jurisdiction (at least to the extent that the Florida Constitution lends itself to flexible construction), which is why the defendant has asked it to expand its limited plenary jurisdiction to include *all* decisions except PCA's. That would certainly eliminate the "Hobson's choice" which the defendant perceives. However, it would also return this Court to one step short of the broad discretionary review which exists in most other states in which no "Hobson's choice" is ever confronted--and all but that last step can be taken only if Art. V, §3(b)(3), of the Florida Constitution allows it, since this Court's jurisdiction depends entirely upon that grant of jurisdiction. Unfortunately, as we have previously demonstrated, and as this Court has consistently held since 1980, the 1980 amendments to Art. V, §3(b)(3), do not permit that expanded jurisdiction simply to eliminate the "Hobson's choice" of which the defendant complains. The problem will always exist until the Florida Constitution is changed, or the federal statute governing the United States Supreme Court's jurisdiction is changed--and since this Court is powerless to change either one of

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"Hobson's choice" of which the defendant complains therefore appears in perhaps only 1% of the cases decided by the district courts--and the defendant has therefore blown the magnitude of the problem out of all reasonable proportion.

them in this case, it should simply provide an accurate answer to the certified question, and leave the problem to the practitioners.

In any event, as we have already opined, the problem will arise only infrequently, and there *are* solutions to it--solutions which do not require this Court to render the 1980 amendments to the Constitution all but meaningless; or to decide for the United States Supreme Court that its "jurisdiction to determine its own jurisdiction" is the equivalent of jurisdiction of "the highest court of a State in which a decision could be had"; or to provide the wrong answer to the certified question to that Court. For example, faced with (1) a case presenting a federal question which might justify review in the United States Supreme Court, and (2) a district court opinion which could honestly be deemed problematical with respect to this Court's jurisdiction, a litigant could file his notice and jurisdictional brief a day or two after rendition of the district court's decision--and file a motion explaining the need for expeditious resolution of the jurisdictional question, and requesting that the Court determine its jurisdiction within 90 days after rendition of the district court's decision.[21/]

Such a request would require a slight acceleration of this Court's ordinary disposition time, but not a significant acceleration, and we think it probable that the Court would accommodate such a request. If this Court's determination of jurisdiction were announced within the 90-day period, of course, then the litigant will have time remaining in which to perfect his federal remedy (if the Court has determined that it is without jurisdiction), and he faces no "Hobson's choice" at all.

Similarly, even if this Court were unwilling to expedite a determination of jurisdiction for such a litigant, postponement is available on the other end. Where review is to

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21/ The only circumstance in which a shorter period would be required is in a criminal case, when the federal remedy is by certiorari. In that circumstance, the petition for writ of certiorari must be filed within 60 days. Supreme Court Rule 20.1.

be by certiorari in a civil case, a 60-day extension is available for filing the petition for writ of certiorari, "for good cause shown". 28 U.S.C. §2101(c). An identical 60-day extension is available in which to docket both civil and criminal appeals in the United States Supreme Court, "for good cause shown". Supreme Court Rule 12.2.[22/] Surely, an honest belief that the jurisdiction of this Court is problematical and needs to be resolved before proceeding further is "good cause shown" for an extension in which to perfect a federal remedy, and we think it probable that the United States Supreme Court would accommodate such a request.

All else failing, of course, there is nothing to prevent a litigant from perfecting both remedies in a timely fashion, and then asking the United States Supreme Court simply to stay the determination of its jurisdiction temporarily until the jurisdiction of this Court can be determined. That, of course, is essentially the procedural posture of the present case (except that the defendant did not protect itself before-the-fact in this fashion, and the United States Supreme Court therefore created it after-the-fact with its certified question). In other words, the fact that this case is now proceeding on jurisdictional questions in both courts plainly indicates that it is possible to overcome the predicament which the defendant claims to perceive, with a little foresight.

Of course, we do not deny that the solutions which we have proposed require a little extra work on the part of practitioners. Neither do we deny that, in the best of all possible worlds, Florida's constitution-drafters and Congress's jurisdictional lawmakers might have put together a simpler system. But the point is that they did not, and given the fact that "jurisdiction is jurisdiction" and therefore inflexible, a litigant must turn to

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22/ The only circumstance in which the time periods might be too stringent to enable this Court to determine its jurisdiction before extensions run out in the United States Supreme Court is in a criminal case, when the federal remedy is by certiorari. In that circumstance, the petition is required within 60 days, and only a 30-day extension is available in the United States Supreme Court. Supreme Court Rule 20.1.

something which *is* flexible in order to protect himself from the arguable mismatch of the lawmakers--and that flexibility is clearly available in both courts by mere procedural requests. Therefore, with a little foresight, the "Hobson's choice" of which the defendant complains need never arise, and can be mooted entirely with one or more simple procedural adjustments in the particular timetables involved. And because of the availability of these various procedural remedies, there is no good reason for this Court to revive its pre-1980 jurisdiction, or to tinker with the United States Supreme Court's jurisdiction by indirection, or to lie to that Court--simply to relieve the defendant of its lack of foresight, in order to salvage its untimely appeal.

A final word is in order concerning two of the more specific arguments which the defendant has made in support of its general "Hobson's choice" argument. First, the defendant argues that the United States Supreme Court has reviewed four cases in which this Court had denied review, and in which the jurisdiction of the United States Supreme Court was invoked outside the time period allowed, if counted from the rendition date of the district court's decision. That much of the defendant's argument is correct. The defendant then goes on to suggest, however, that those four cases are exactly like this one. We will demonstrate in a moment that this suggestion is dead wrong. For the moment, however, we observe that even if the defendant were correct, the observation is irrelevant to the narrow question which the Court has been asked to answer.

What the defendant is suggesting is that the United States Supreme Court has acted inconsistently in accepting those four cases, and in then certifying this one to this Court (with a view to possibly dismissing the defendant's appeal if it receives a negative answer to the question). If that complaint were justified (and it is not, as we will demonstrate in a moment), it has to be made to the United States Supreme Court--because there is simply nothing which this Court can do about it. This Court has been asked to answer a legal question, and nothing else. It is up to the United States Supreme Court whether to

entertain the defendant's appeal after it has this Court's answer, and the defendant should lodge its complaint of inconsistency there, not here.

In any event, as we noted, the defendant is dead wrong in suggesting that the four United States Supreme Court cases upon which it has constructed its complaint of inconsistency are like this one. It is dead wrong because, in each of those cases, the district court's decision, on its face, indisputably created jurisdiction in this Court. The losing party in each of them was therefore *required* to exhaust his potential remedy in this Court before proceeding further, and since this Court's jurisdiction to review each of them was facially obvious, each subsequent proceeding in the United States Supreme Court was facially timely. We will review the four cases briefly, and when we are done, we think the Court will be astounded at the defendant's temerity in suggesting that they are exactly like this one.

In *Chandler v. State*, 366 So.2d 64 (Fla. 3rd DCA 1978), *cert. denied*, 376 So.2d 1157 (Fla. 1979), *aff'd*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed.2d 740 (1981), the district court *certified a question of great public interest* to this Court. No "Hobson's choice" in that; this Court indisputably had "certified question" jurisdiction. Review was denied, according to this Court, not because it had no jurisdiction (as the defendant has represented to this Court), but because the certified question "has been rendered moot by the decision in *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979)". 376 So.2d at 1157. That case is therefore not even remotely like this one, and a motion to dismiss Mr. Chandler's appeal to the United States Supreme Court would have been entirely frivolous (and most certainly would not have provoked a certified question to this Court).

The three remaining cases have, as their sources, lengthy district court opinions *expressly construing the Fourth Amendment of the United States Constitution*, on three sets of facts involving three different searches and seizures: *Hayes v. State*, 439 So.2d 896 (Fla. 2nd DCA), *cert. denied*, 447 So.2d 886 (Fla. 1983), *rev'd*, 470 U.S. 811, 105 S.

Ct. 1643, 84 L. Ed.2d 705 (1985); *Myers v. State*, 432 So.2d 97 (Fla. 4th DCA), *review denied*, 441 So.2d 633 (Fla. 1983), *rev'd*, 466 U.S. 380, 104 S. Ct. 1852, 80 L. Ed.2d 381 (1984); *Royer v. State*, 389 So.2d 1007 (Fla. 3rd DCA 1980) (en banc), *review denied*, 397 So.2d 779 (Fla. 1981), *aff'd*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed.2d 229 (1983). No "Hobson's choice" in any of those cases; this Court indisputably had jurisdiction to review each one of them under Art. V, §3(b)(3), Fla. Constn. ("The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly construes a provision of the . . . federal constitution . . ."). In each of the three cases, this Court simply exercised its discretion not to extend the jurisdiction it plainly possessed. These three cases are therefore not even remotely like this one, and a motion to dismiss any one of the subsequent proceedings in the United States Supreme Court would have been entirely frivolous. In short, the inconsistency of which the defendant complains simply does not exist--because, in the instant case, it is not "jurisdiction" which plainly appears on the face of the district court's decision; it is "no jurisidiction" which plainly appears there.[23/]

Second, and finally, the defendant notes that this Court sometimes grants review, and then after considering the case on the merits, decides that it lacks jurisdiction--and then denies review for lack of jurisdiction. The defendant then suggests that such a disposition should not operate to bar further review in the United States Supreme Court. Of course, that is not what happened in this case, since this Court voted five to zero to deny review at the outset--so the defendant's observation is clearly an academic

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23/ For purposes of comparison with the defendant's four cases, the Court is reminded of the several decisions in which the United States Supreme Court has accepted review directly from a Florida district court of appeal, where "no jurisdiction" plainly appeared on the face of the district court's decision: *Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed.2d 438 (1967); *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed.2d 446 (1970); *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed.2d 421 (1984); *Florida v. Rodriguez*, 469 U.S. 1, 105 S. Ct. 308, 83 L. Ed.2d 165 (1984).

one, irrelevant to the question at hand. In any event, the problem which the defendant perceives in this type of delayed denial is a problem which the United States Supreme Court must resolve by construction of *its* jurisdictional statute; it is not a problem which this Court can resolve. And, when faced with the problem, we think it likely that the United States Supreme Court would construe its jurisdictional statute to allow for a delayed review in that unique circumstance. The problem clearly requires resolution there, however, not here--so the Court need not concern itself with it in answering the single legal question presently before it.

In short and in sum, we concede that the transition between a district court of appeal and the United States Supreme Court may occasionally be less than perfectly straightforward and simple. That is not a problem which this Court can resolve here, however, because it can only be resolved by changing the Florida Constitution or the United States Supreme Court's jurisdictional statute--and this Court is powerless to change either. And because the problem is soluble with a little care and foresight by competent practitioners, it is simply not such an overwhelming problem that it justifies any of the defendant's proposed solutions. The Court therefore should not overrule every one of its jurisdictional decisions except *Jenkins*; it should not hold that its "jurisdiction to determine its own jurisdiction" is jurisdiction to render a decision on the merits; and it should not respond dishonestly to the certified question.

V.
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court did not have jurisdiction to review the decision of the district court, and that the certified question should be answered honestly, in the negative.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 9th day of

February, 1988, to: George K. Rahdert, Esq. and Bonita M. Riggens, Esquire, Rahdert, Acosta & Dickson, P.A., 233 Third Street North, St. Petersburg, Fla. 33701; Alan C. Sundberg, Esq., Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, 215 South Monroe Street, Suite 410, Tallahassee, Fla. 32301; Gerald B. Cope, Jr., Esq. and Laura Besvinick, Esq., Greer, Homer, Cope & Bonner, P.A., 4870 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Fla. 33131; Richard J. Ovelmen, Esq., General Counsel, The Miami Herald Publishing Co., One Herald Plaza, Miami, Fla. 33101; Paul J. Levine, Esq., Spence, Payne, Masington, Grossman & Needle, P.A., 2950 S.W. 27th Avenue, Suite 300, Miami, Fla.; Sanford L. Bohrer, Esq., Thomson Zeder Bohrer Werth & Razook, 4900 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Fla. 33131; and to Louis Hubener, Assistant Attorney General, The Capitol, Tallahassee, Fla. 32301.

Respectfully submitted,

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