

IN THE FLORIDA SUPREME COURT

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CLERK, SUPREME COURT

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ROBERT RAY FERGUSON,
Petitioner,

v.

CASE NO. 74,908

STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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TOPICAL INDEX

PAGES :

AUTHORITIES CITED ii

SUMMARY OF ARGUMENT 1

ARGUMENT

 THERE IS NO EXPRESS AND DIRECT
 CONFLICT BETWEEN THE INSTANT
 DECISION OF THE FIFTH DISTRICT COURT
 OF APPEAL, AND A PRIOR DECISION OF
 THIS COURT OR A DECISION OF ANOTHER
 DISTRICT COURT OF APPEAL. 2

CONCLUSION 4

CERTIFICATE OF SERVICE 4

AUTHORITIES CITED

CASES:

PAGES:

<u>Barbera v. State,</u> 505 So.2d 413 (Fla. 1987).....	3
<u>Criqler v. State,</u> 526 So.2d 176 (Fla. 2d DCA 1988).....	2
<u>Florence v. State,</u> 532 So.2d 1345 (Fla. 4th DCA 1988).....	2
<u>Jenkins v. State,</u> 528 So.2d 527 (Fla. 2d DCA 1988).....	3
<u>Jollie v. State,</u> 405 So.2d 418 (Fla. 1981).....	1,2
<u>Martinez v. State,</u> 526 So.2d 1080 (Fla. 2d DCA 1988).....	2
<u>Nichols v. State,</u> 521 So.2d 372 (Fla. 2d DCA 1988).....	2
<u>Oden v. State,</u> 463 So.2d 313 (Fla. 1st DCA 1984).....	3
<u>Rangel v. State,</u> 532 So.2d 84 (Fla. 3d DCA 1988).....	2
<u>Shull v. Dugger,</u> 515 So.2d 748 (Fla. 1987).....	2
<u>State v. Oden,</u> 478 So.2d 51 (Fla. 1985).....	3

OTHER AUTHORITIES

Rule 9.030(a)(2)(A), Fla.R.App.P	2
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SUMMARY OF ARGUMENT

Although the district court cited as controlling a decision which is pending in this court, Jollie v. State, infra, is not controlling. The opinion which cites the pending decision is not a *per curiam* opinion as required by Jollie. Furthermore, on the face of the opinion, there is not express and direct conflict with decisions of this court or of other district courts. This court should decline jurisdiction.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT
CONFLICT BETWEEN THE INSTANT
DECISION OF THE FIFTH DISTRICT COURT
OF APPEAL AND A PRIOR DECISION OF
THIS COURT OR A DECISION OF ANOTHER
DISTRICT COURT OF APPEAL.

"A district court of appeal *per curiam* opinion which cites as controlling authority a decision" that is pending review in this court constitutes express conflict and allows this court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418, 420 (Fla. 1981). Petitioner contends that Jollie, supra, should control in the instant cause. Respondent submits that Jollie, supra, is not controlling. In Jollie, supra, this court specifically referred to *per curiam* opinions. The opinion in the instant cause was not a *per curiam* opinion, as petitioner acknowledges. Thus, Jollie, supra, is not controlling. There is no express conflict and this court should decline jurisdiction.

Furthermore, the discretionary jurisdiction of this court may be sought to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this court on the same question of law. Fla.R.App.P. 9.030(a)(2)(A). Petitioner contends that the instant decision conflicts with this court's prior decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987), as well as the decision of the district courts of appeal in Rangel v. State, 532 So.2d 84 (Fla. 3d DCA 1988), Florence v. State, 532 So.2d 1345 (Fla. 4th DCA 1988), Nichols v. State, 521 So.2d 372 (Fla. 2d DCA 1988), Crigler v. State, 526 So.2d 176 (Fla. 2d DCA 1988), Martinez v. State, 526 So.2d 1080 (Fla. 2d DCA 1988), and Jenkins v. State, 528 So.2d 527 (Fla. 2d DCA

1988). There is nothing in the instant opinion which states there is express and direct conflict with a decision of this court or a decision of other district courts.


Respondent further submits that the district court's opinion is in conformance with prior opinions of this court. In Barbera v. State, 505 So.2d 413, 414 (Fla. 1987), this court agreed that the cause "must be remanded for resentencing so that the trial judge can write out his specific reasons for departure," where written reasons were not entered. Also, this court has previously approved a decision of the First District, where it directed the trial court to enter a written order should it decide to depart from the guidelines upon resentencing, where it had failed to do so the first time. State v. Oden, 478 So.2d 51 (Fla. 1985); Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984). Since there is not express and direct conflict on the same question of law, this court should decline to accept jurisdiction in the instant case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished by delivery to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 20th day of November, 1989.


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