IN THE SUPREME COURT OF FLORIDA

GARY GOULD,

Petitioner,

v.

2DCA CASE NO. 87-2068

F.S.CT. CASE NO. 75,833

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE JURISDICTION

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SUMMARY OF THE ARGUMENT

The schedule of lesser included offenses is not a "decision" upon which conflict jurisdiction can be based. The district court expressed no conflict with the Wilcott, *infra*, decision. The Wilcott decision did not address the same question of law as Gould.

The district court expressed no conflict with Bean v. State, *infra*. The Gould court based its decision upon the meaning of Section 924.34, whereas the Bean court focused upon the state's conduct at trial. Therefore, the Gould decision does not deal with the same question of law as Bean.

The district court never mentioned, let alone declared valid, a state statue or expressly construed any provision of the state or federal constitutions.

The district court never even mentioned Penny v. State, *infra*, let alone expressed conflict with it. That 924.34 may be in conflict with Penny does not confer conflict jurisdiction upon this court.

ARGUMENT

ISSUE I

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SCHEDULE OF LESSER INCLUDED OFFENSES AND WILCOTT V. STATE.

In Jenkins v. State 385 So.2d 1356 (1980), this Court laid down the standard for "conflict review" of decisions by the district courts:

> The pertinent language of section 3(b)(3), as amended April 10, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal of the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined; "in an express manner." (Citations omitted, emphasis added).

In the instant case, the schedule of lesser included offenses cannot, by any stretch of the legal imagination, be considered a "decision" in any way similar to a traditional and common opinion of an appellate court entered after adversary parties have filed briefs setting out their respective arguments and authorities. Merely because the schedule has been given a formal citation in the Southern Reporter simply does not mean that it rises to the level of a "decision". Petitioner can cite no authority or appellate rule of procedure indicating that the schedule is indeed a "decision" upon which conflict jurisdiction can be

based. Accordingly, because the schedule of lesser included offenses is not a "decision", it cannot form the basis for conflict jurisdiction in this case.

Petitioner's reliance on Wilcott v. State, 509 So.2d 261 (Fla. 1987) is equally as misplaced. Nowhere in the Gould decision does the district court even mention Wilcott, let alone "express in words" that its decision conflicts with Wilcott (or any other decision, for that matter). Moreover, Wilcott simply does not touch upon the same point of law as discussed in Gould. The Wilcott decision does not address the applicability and operation of Section 924.34, Florida Statutes. It merely states that it was error for the trial court to not have given a particular Category 2 lesser included offense instruction when the evidence adduced at trial supported the same. The Gould decision discusses no such issue. The issue of whether a jury should be given the opportunity to hear a lesser offense instruction was of no concern to the Gould court. Accordingly, because Gould does not express conflict with Wilcott on the same question of law, conflict jurisdiction cannot be found.

ISSUE II

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH BEAN V. STATE, 469 SO.2D 768 (FLA. 5TH DCA 1984).

The district court expressed no conflict with the 5th District's decision in Bean v. State, 469 So.2d 768 (Fla. 5th DCA 1984). Rather, it found some merit to its logic. However, the Gould court took one step further than did the Bean court when it addressed the very meaning of the language found in 924.34. The Bean court limited its inquiry to the states conduct at trial. The Second District grounded its decision on the dictates of 924.34 itself, whereas the Bean court never touched upon the meaning and application of 924.34. Accordingly, Bean and Gould are not in conflict because they do not address the same question of law.

ISSUE III

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY DECLARES VALID A STATE STATUTE OR EXPRESSLY CONSTRUES A PROVISION OF THE STATE AND FEDERAL CONSTITUTIONS.

Once again, Petitioner needs an education concerning the meaning of "express" and is invited to review that portion of this Court's decision in Jenkins, supra, that is laid out in Issue I.

Petitioner's Supplemental Brief to the Second District mentioned only the 5th Amendment to the United States Constitution and mentioned no particular article or section of the Florida Constitution. Petitioner raises the spectre of the 14th Amendment, as making due process applicable to the states, for the very first time in his jurisdictional brief. Thus, because Petitioner did not raise the 14th Amendment or Article I, Section 9 of the Florida Constitution, he cannot now claim that the district court specifically addressed and declared valid, under those constitutional provisions, Section 924.34.

Moreover, the Gould court never mentioned, let alone "construed", any provision of the state of federal constitutions. Nowhere in Gould could even the most fastidious legal scholar wring some obscure constitutional construction of the 14 Amendment. Therefore, it is impossible to conclude that this Court has jurisdiction because the Gould court expressly construed a provision of the state or federal constitutions.

Finally, even if some vague argument could be made that the second district grappled with any concepts of constitutional due process, it is impossible to find any line in Gould where the court expressly rejected Petitioner's "due process argument". Obviously, if, as Petitioner argues, the court "ignored" the due process argument, it can only logically be concluded that the court expressed no opinion concerning due process. Absent such expression, this Court is without jurisdiction.

ISSUE IV

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH PENNY V. STATE.

To the very last, Petitioner refuses to acknowledge the meaning of "express and direct conflict". Once again, absolutely nowhere in Gould does the court mention Penny v. State, 191 So. 190 (1939), let alone express conflict with it.

Petitioner simply wants this Court to declare Section 924.34 invalid because it allows, at worst, an appellate court to charge, try, and convict him for a crime which, arguendo, was not particularly mentioned at trial. However, Petitioner fails to realize that sexual battery with force and violence not likely to cause serious personal injury was declared to be a necessarily lesser included offense of sexual battery upon a victim physically helpless to resist. Accordingly, all the elements of sexual battery under section 794.011(5) were included, and proven, at trail all while he had the full and fair opportunity to defend against the same. To say that Petitioner was not afforded ample notice and opportunity to defend against sexual battery with slight force is ludicrous in light of the fact that he had to defend against two counts of sexual battery while threatening to use force or violence likely to cause serious personal injury. No convoluted leap of legal logic could ever conclude that a defense to sexual battery with force or violence likely to cause serious personal injury did not, in this case, encompass the same quantum of defense evidence necessary to

defend against sexual battery with force or violence not likely to cause serious personal injury.

Section 924.34 simply allows an appellate court to do exactly that which the jury could have done at trial. By virtue of limiting itself to necessarily lesser included offenses, 924.34 protects against a defendant being convicted of a crime for which he has had no opportunity to defend. Nonetheless, all of the above argument is but an esoteric exercise in legal analysis given that the true issue herein is whether the district court "expressed" conflict with Penny. Whether 924.34 is in conflict with any language in Penny does not confer conflict jurisdiction upon this court. Therefore, conflict jurisdiction does not exist based upon the Penny decision.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, this Court should decline to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

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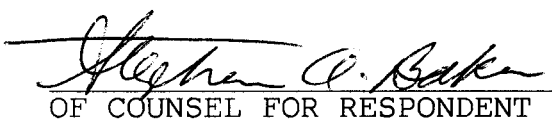
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to J. ANDREA NORGARD, Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this 20th day of April, 1990.



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