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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77, 702

**HORACE WILLIAMS,**

Petitioner,

v.

**STATE OF FLORIDA,**

Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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## PRELIMINARY STATEMENT

Petitioner was the appellant-cross appellee in the Fourth District Court of Appeal and the defendant in the trial court. Respondent was the appellee-cross appellant and the prosecution, respectively, in those courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

## STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts with the following additions and clarifications.

Respondent does not agree with the "facts" in petitioner's brief which do not appear in the Fourth District's opinion.

## SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in this case does not directly and expressly conflict with a decision of this Court. All the cases cited by petitioner are factually, and thus legally distinguishable.

## ARGUMENT

THE DECISION OF THE COURT OF APPEAL IN THIS CASE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A DECISION OF THIS COURT.

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975). In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> 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 or the Supreme Court on the same question of law. The dictionary definition of the terms 'express' include: 'to represent in words'; to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary (1961 ed. unabr.)

See generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963), cert. denied, 377 U.S. 952, 84 S.Ct. 1628, 12 L.Ed.2d 497 (1964); and England and Williams, Florida Appellate Reform One Year Later, 9 F.S.U. L. Rev. 221 (1981). See also Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 210 (Fla. 1976) (This Court's discretionary

jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

Petitioner claims that the decision conflicts with decisions of Troupe v. Rowe, 283 So.2d 857 (Fla. 1973); Fasenmeyer v. State, 457 So.2d 1361 (Fla. 1984), cert. denied, 470 U.S. 1035, 105 S.Ct. 1407, 84 L.Ed.2d 796 (1985) and Brown v. State, 521 So.2d 110 (Fla.), cert. denied, 488 U.S. 912, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988). He does not explain how the decision conflicts with Troupe or Fasenmeyer. There is language in Troupe that suggests that once a defendant begins serving his sentence, it cannot be increased. Id. at 859. Troupe was cited in Fasenmeyer for that proposition. Id. at 1365. However, this Court has since noted in other decisions that such language is too broad.

In Goene v. State, 16 F.L.W. S216, S219 (Fla. Mar. 21, 1991), n. 2, this Court noted that the holding in Troupe was based on a quotation from United States v. Benz, 282 U.S. 304 (1931), which cited Ex. Parte Lange, 85 U.S. 163 (1874) as authority. This Court disapproved a decision of a district court based on the quote used in Troupe. This Court then quoted United States v. DiFrancesco 449 U.S. 117 (1980), with approval:

> The real and only issue in Benz, however, was whether the trial judge had the power to reduce a defendant's sentence after service had begun. The Court held that the trial court had such power. It went on to say gratuitously, however, and with quotations from a textbook and from Ex. Parte Lange, that the trial court

> may not increase a sentence, even though the increase is effectuated during the same court session, if the defendant has begun service of his sentence. But the dictums' source, Ex. Parte Lange, states no such principle. . . . The holding in Lange, and thus the dictum in Benz, are not susceptible of general application. We confine the dictum in Benz to Lange's specific context.

Thus, there is no conflict with those opinions as clarified by subsequent opinions.

Petitioner also claims that the opinion conflicts with this Court's decision in Brown v. State, 521 So.2d 110 (Fla. 1988). Respondent disagrees. Brown relied on Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) and Bullington v. Missouri, 451 U.S. 439, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). Brown and those cases hold that when a penalty phase resembles a trial, double jeopardy prohibits resentencing. In Brown, the trial judge opened the penalty phase by hearing arguments and then making a ruling on a matter of law that did not require the presence of the jury. Under those circumstances, this Court held that double jeopardy precluded resentencing the defendant to death.

Here, unlike Brown (and Rumsey and Bullington) there is no indication on what the trial judge based his decision to forego the penalty phase of the proceeding. There is no indication that the trial judge held any sort of proceeding, took any testimony, or made any sort of legal finding that death was an inappropriate penalty. The opinion does not reveal whether the trial judge made any sort of analysis or simply decided he was against the death penalty. There is no indication that the trial judge conducted any sort of

hearing resembling a trial.

Accordingly, there is no direct and express conflict between Brown and the present case. In State v. Daniels, 207 Conn. 374, 542 A.2d 306 (1988), the trial judge imposed a life sentence in a capital case. The Connecticut Supreme Court was unable to determine why the trial judge did this. It stated:

> Under one construction the trial court, in imposing a life sentence, resolved some of the factual elements underlying the imposition of a life sentence thereby "acquitting" the defendant of the death penalty. Under the other construction, the trial court imposed a life sentence because it erroneously believed that it had no authority to do otherwise. In the former case, principles of double jeopardy would bar review of the state's claim. United States v. Martin Linen Supply Co., supra, 430 U.S. at 571, 97 S.Ct. at 1354.

Id. at 321.

In People ex rel. Daley v. Strayhorn, 121 Ill.2d 470, 118 Ill.Dec. 387, 521 N.E.2d 864 (1988), the trial judge failed to hold a capital sentencing hearing in accord with the Illinois statute. Instead, the trial judge denied the state's request for a sentencing hearing and sentenced the defendant to 40 years. The state appealed. In analyzing Rumsey and Bullington the Illinois Supreme Court found no double jeopardy violation:

> The interests which the double jeopardy clause seeks to protect are not implicated unless a defendant is put in jeopardy. In nonjury trials, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. The defendant must be "'put to trial before the trier of facts, whether the trier be a jury or judge.'" Serfass (1975), 420 U.S. at 388, 95 S.Ct. at 1062. 43 L.Ed.2d at 274. . . . (some citations omitted).

> Bullington and Rumsey are inapplicable to the present cause because the defendant was never placed in jeopardy. In the present action, the trial judge did not hold a capital sentencing proceeding in accord with the requirements of section 9-1(d). Our State's death penalty statute provides for a bifurcated sentencing hearing.
>
> * * *
>
> Our review of the record reveals that in the present cause, the trial judge failed to hold the requested first phase of the statutory bifurcated capital sentencing hearing. Instead, the proceedings more closely resemble preliminary proceedings often heard on motions before trials, which do not constitute jeopardy. (citation omitted). The trial judge was acting in response to the defendant's motion to preclude the imposition of the death penalty and the prosecutor was responding to that motion. Although the State had the burden of establishing, beyond a reasonable doubt, the existence of an aggravating factor, the State was precluded from introducing [evidence and witnesses] due to the trial judge's abrupt ruling. . . .. It is clear that the State in this situation was not provided "one fair opportunity to offer whatever proof it could assemble" at a full-scale sentencing hearing. (Bullington, 451 U.S. at 446, 101 S.Ct. at 1862, 68 L.Ed.2d 283.) Because we believe that the first phase of a death penalty sentencing proceeding was never conducted, we find that a capital sentencing hearing is not barred by double jeopardy.

Id. at 867-868. Unlike, Brown, there is no indication that the trial judge here held any sort of a sentencing proceeding. Accordingly, there is no express and direct conflict.

Respondent also notes that petitioner is not without a remedy on direct appeal. Should the State decide to hold a sentencing hearing and should petitioner be sentenced to death, he could appeal that sentence to this Court on double jeopardy grounds.

## CONCLUSION

Based on the preceding argument and authorities, this Court should decline jurisdiction as there is no direct and express conflict.

Respectfully submitted,

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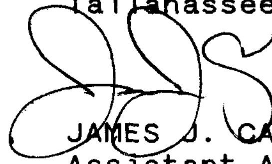

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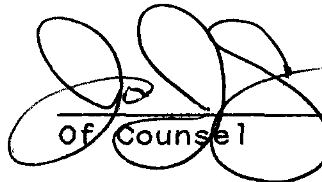
## CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by mail to Michael Dubiner, Counsel for Appellant, 1101 North Congress Avenue, Boynton Beach, Florida, 33426, this 6 day of May, 1991.



Of Counsel