IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,765

MAX FENELON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Max Fenelon was the defendant below and shall be referred to as "petitioner," in this brief. The State of Florida shall be referred to as "respondent."

STATEMENT OF THE CASE AND FACTS

Respondent does not agree with petitioner's statement of the case and facts as they contain purported facts which are not found in the opinion. The argument portion of his brief also improperly contains alleged facts not found in the opinion.

Fenelon v. State, 575 So.2d 264 (Fla. 4th DCA 1991), indicates that petitioner was sentenced after being found guilty of first degree murder and attempted robbery with a firearm. Appellant argued that the trial judge erred in instructing the jury, over his objection, on flight from the crime scene. He argued that evidence of flight, standing alone was insufficient to support such an instruction. The Fourth District found ample evidence of flight to support the instruction. One witness testified that on the morning of the shooting, appellant, whom he had known for a year, told him that he was going to "jack" someone. The witness interpreted this statement as meaning that appellant intended to commit a robbery. A second witness who knew appellant testified that she saw him running past a restaurant at about 4:30 p.m. on the date of the shooting. She also testified that she saw what appeared to be the handle of a gun protruding from appellant's pocket. Another friend of appellant's testified that she saw appellant that evening and he told her that he had been holding a gun that discharged and a lady was shot. The court held that this evidence was sufficient to support an instruction on flight. 575 So.2d at

265.

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 any district court or this Court. All the cases cited by petitioner are consistent with this case.

ARGUMENT

THE DECISION OF THE COURT OF APPEAL IN THIS CASE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW.

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 recites what he purports to be an instruction read to the jury in this case. This instruction was not part of the opinion below and therefore cannot form the basis for any claimed conflict jurisdiction. The error claimed at the District Court level and discussed in the opinion was sufficiency of the evidence to support a jury instruction.

Proffitt v. State, 315 So.2d 467 (Fla. 1975), affd., 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), is consistent with the decision here. Proffitt held that a defendant's leaving the scene at the time of the crime is insufficient, standing alone, to support a flight instruction. This Court concluded in Proffit, as did the court in Fenelon that there was more evidence than mere flight. Id. at 464. Accordingly, the instruction in both cases was proper.

Similarly, there is absolutely nothing in Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985) or Merritt v. State, 523 So.2d 573 (Fla. 1988), that conflict with the opinion here. Shively held that ". . . a jury can be instructed on flight when the evidence clearly establishes that an accused fled the vicinity of a crime or did anything indicating an intent to avoid detection or capture." Id. at 353. Merritt held that "Flight evidence is admissible as relevant to the defendant's consciousness of guilt where

there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense." Id. at 574. Both are consistent with the outcome in this case.

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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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by mail to Max Fenelon DC#185136, pro se, Charlotte C.I., 33123 Oil Well Road, MN-976, Punta Gorda, Florida 1, 33955, this 29 day of April, 1991.

Of Counsel