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**FILED**  
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JUL 22 1991  
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By [Signature]  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78185

JERRY D. NEWTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

\*\*\*\*\*

RESPONDENT'S BRIEF ON JURISDICTION

\*\*\*\*\*

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

JAMES J. CARNEY  
Assistant Attorney General  
111 Georgia Avenue  
Suite 204  
(407) 837-5062  
Florida Bar #475246

Counsel for Respondent

[Signature]

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PRELIMINARY STATEMENT

Jerry Newton was the defendant below and shall be referred to as "petitioner," in this brief. The State of Florida shall be referred to as "respondent." The State of Florida has filed a juris brief as a cross-petitioner under separate cover.

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts, except that respondent does not agree with the portions of the statement of the case and facts that contain "facts" not in the opinion. For example, the first two sentences of paragraph three of petitioner's statement of the case and facts contain "facts" not in the opinion.

### SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in this case does not directly and expressly conflict with the dicta in the decision of the First District in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), rev. denied, 576 So.2d 264 (Fla. 1990). Assuming that this Court finds that the decision here conflicts with the decision in Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990), respondent notes that Gholston has been on rehearing for over six months. If this Court is inclined to accept jurisdiction, respondent asks that this Court await the outcome of the rehearing before making its decision. The decision on rehearing may resolve any conflict with other districts.

## ARGUMENT

THE DECISION OF THE COURT OF APPEAL IN THIS CASE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A FINAL DECISION OF ANOTHER DISTRICT 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. unab.)

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).

Clearly, the dicta in Barber v. State, 564 So.2d 1169

(Fla. 1st DCA), rev. denied, 576 So.2d 264 (Fla. 1990) does not establish conflict jurisdiction. See Westbrook v. State, 574 So.2d 1187, 1188 (Fla. 3d DCA 1991). Should this Court find conflict with Barber, respondent asks that this Court delay any decision to accept jurisdiction (see argument below).

Respondent acknowledges the language in Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990). However, Gholston has been on rehearing for over six months. (see petitioner's brief p. 4). If this Court is inclined to accept jurisdiction, respondent asks that this Court await the outcome of the rehearing before making its decision. The decision on rehearing may resolve any conflict with prevailing view in the other districts. See Myster 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).

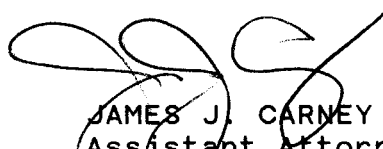


CONCLUSION

Based on the preceding argument and authorities, this Court should decline to accept jurisdiction on this issue.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

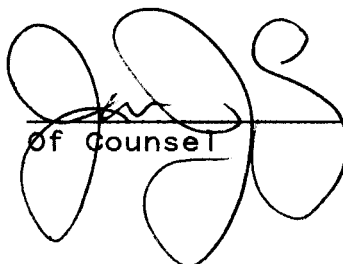


JAMES J. CARNEY  
Assistant Attorney General  
Florida Bar #475246  
111 Georgia Avenue, Suite 204  
W. Palm Beach, Florida 33401

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Anthony Calvello, Assistant Public Defender, Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 18 day of July, 1991.



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of Counsel