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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,

Petitioner

v.

CASE NO.: 79,278

STATE OF FLORIDA,

Respondent.

_____ /

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FEB 19 1992
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Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,

Petitioner

v.

CASE NO.: 79,278

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, WILLIAM THOMAS CONLEY, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred herein as either "Respondent" or "the State."

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner's argument's fail to identify any express and direct conflict so as to give this court jurisdiction to hear this case. Petitioner's first allegation of conflict misses the mark because the cases apply different points of law. Petitioner's second point fails to identify any express and direct conflict. Finally, petitioner's third claim has already been decided. Therefore, this court should decline jurisdiction.

ARGUMENT

ISSUE

THE DECISION OF THE DISTRICT COURT OF APPEAL IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

The fundamental prerequisite for discretionary review, pursuant to Rule 9.030(a)(2), Florida Rules of Appellate Procedure and Article V §3 of the Florida Constitution, is the existence of direct and express conflict between the decisions of district courts of appeals, or, between the decisions of the district court and the decisions of this Court on the same question of law. Reaves v. State, 485 So.2d 829 (Fla. 1986). Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Petitioner points to no conflict of decisions sufficient to give rise to the discretionary jurisdiction of this Court. In fact, he points to no conflict between this decision and the decision of any other court in the state of Florida on this point of law. Therefore, this Court should decline review.

Petitioner first attempts to develop conflict between the decision in this case and the decisions in State v. Baird, 572 So.2d 904 (Fla. 1991) and Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989). In this attempt, he reads these decisions much too broadly. The cases petitioner relies on are cases in which the explanation given by the officer for his presence on the

scene "consisted of an out of court statement that the defendant engaged in the criminal activity for which he was being tried". Baird at 908. The situation in petitioner's case is not similar thus no conflict exists.

In Baird, the defendant was charged with gambling. The statement introduced at trial identified Baird by name and indicated he was a gambler. In Harris, the defendant was charged with drug dealing. The statement introduced indicated that he was selling drugs and identified Harris by the clothing he was wearing. In petitioner's case the statement indicated only that someone who had a gun was chasing a person down the street. The statement contained no details which indicated that the petitioner was the culprit. Thus, the rule of Baird is not implicated.

Moreover, the petitioner was not charged with any crime related to chasing the victim down the street with a gun. In fact, the crimes charged were already complete at the time the chase down the street occurred. Thus, the alleged statement did not refer to the criminal activity for which petitioner was charged. Since the predicate conditions which are necessary for Baird error to exist are absent from this case, the decisions involve different points of law and no conflict exists.

In this claim, petitioner has identified no conflict on the same point of law which is evident from the four corners of the

opinion, thus, he has failed to show the conflict necessary to confer jurisdiction upon this court. Therefore, this court should deny review.

Claim Two

Petitioner's next claimed area of conflict relates to the introduction of a statement made to the doctor who treated the victim.

Petitioner assertions, contained in his second claim, fail to establish conflict. In Reaves, this court defined the type of conflict which must exist to accept a petition for discretionary review. It said:

Conflict between decisions must be express and direct, i.d., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

In his second basis for jurisdiction, petitioner ignores these standards for conflict jurisdiction and attempts to obtain review through reference to the dissenting opinion. Petitioner also attempts to bootstrap review through Jollie v. State, 405 So.2d 418 (Fla. 1981). He asserts that because this Court accepted jurisdiction in the case of Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), rev. granted 78,923, and because Flanagan is cited in his case jurisdiction exists.

Petitioner's claim is bereft of argument on how the review granted in Flanagan can be bootstrapped under Jollie. The Jollie decision dealt with a particular problem, how to apply the new constitutional amendment on jurisdiction to per curiam affirmed opinions that contained a citation to a case pending review. Unlike a decision containing the lower court's reasoning, the PCA presented a problem because it did not provide a basis to determine how the cited case controlled the decision. This Court resolved the problem by allowing the PCA to ride the coattails of the case being reviewed.

In the instant case, the court wrote an opinion setting forth the basis for its decision. Petitioner fails to show how the holding of Jollie authorizing review of PCA opinions containing a citation to a case being reviewed applies to a case in which he received a written opinion. Therefore, discretionary review should not be granted under Jollie.

Respondent acknowledges that Jollie is often referred to as authorizing review under other factual situations. One of these may arise when this Court accepts a case based on the existence of express and direct conflict. Often the lower courts continue to decide other cases based on these decisions which have been accepted due to conflict. Review is often granted in these subsequent cases. While Jollie is often claimed as the basis for the granting of review, jurisdiction exists in these cases because of the continuing direct and express conflict.

Therefore, in order to obtain review under this theory petitioner whose case was not a PCA must show express and direct conflict.

The other scenario where Jollie is mentioned as a basis for review is when a District Court decides an issue but certifies a question to this Court. If this Court accepts jurisdiction to answer the certified question then it often will accept jurisdiction in other cases in which the question is presented.

Since true Jollie jurisdiction doesn't exist, an examination should be conducted to see whether jurisdiction exists because of the court's citation to a case accepted for review. In the case petitioner relies on, Flanagan, the District Court wrote a long opinion and certified two questions to this Court. Jurisdiction was invoked to answer those questions, however, petitioner's issue is not related to either of the certified questions. Thus, Flanagan which was not accepted due to the existence of conflict and whose certified questions do not pertain to the issue petitioner desires review on cannot be a basis to bootstrap review in this case.

Moreover, an examination of the District Court's citation to Flanagan establishes the frivolous nature of petitioner's claims. Flanagan is first cited in petitioner's case for the uncontrovertible principle that the standard of review of a trial court's ruling on the admission of evidence is abuse of

discretion. See Blanco v. State, 452 So.2d 520 (Fla. 1984). Flanagan is also mentioned in the opinion as authority for the proposition that the introduction of such testimony can be harmless error. This too is hardly a novel proposition. In fact this Court made that exact same finding in Torres-Arboledo. Because, the decision in petitioner's case does not conflict with established law, the citation to a case pending review is irrelevant. No matter how this court answers the certified questions in Flanagan the ruling in petitioner's case won't change.

Finally, an examination of the opinion in this case establishes that petitioner's claim of direct and express conflict is meritless. Petitioner's argument relies on the dissenting opinion to establish conflict. As stated in Reaves conflict cannot be based on a dissenting opinion. Furthermore, the District Court's citation to the case of Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), for the proposition that the statements are admissible if they are reasonably pertinent to the diagnosis or treatment is a quote from Torres-Arboledo and does not create express and direct conflict.

Since petitioner has identified no conflict emanating from within the four corners of the opinion he cites, the petition for discretionary review should be denied.

Claim Three

As a third basis for the invocation of jurisdiction, petitioner again attempts to bootstrap review pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981), based upon this Court's acceptance of Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991) for review. However, this Court recently decided Burdick v. State, 17 FLW S88 (Fla. Feb 6, 1992), contrary to petitioner's position, and affirmed the First District's holding that a first degree felony punishable by life imprisonment is subject to the habitual offender statute. Therefore, petitioner has not identified a basis for this Court to accept jurisdiction.

Latent conflicts

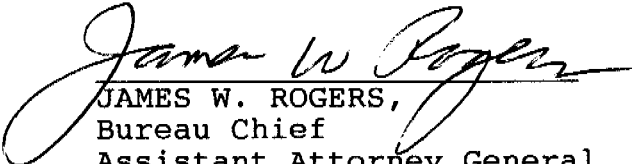
Respondent notes that petitioner argues as reasons for accepting jurisdiction claims he describes as "latent conflicts". Respondent has researched the applicable law and cannot locate any constitutional provision which authorizes this court to take jurisdiction based on "latent" conflicts. Apparently unable to find cases which conflict on any of these points of law, he has decided that because he disagrees with the decision there exists conflict which is "latent". Apparently believing the slogan that "the rules are different here", petitioner ignores the constitutional limitations on this court's jurisdiction.

CONCLUSION

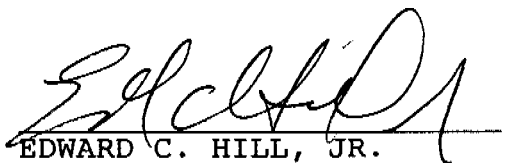
Based on the above cited authorities, Respondent prays this Honorable Court decline to accept jurisdiction in this case.

Respectfully submitted,

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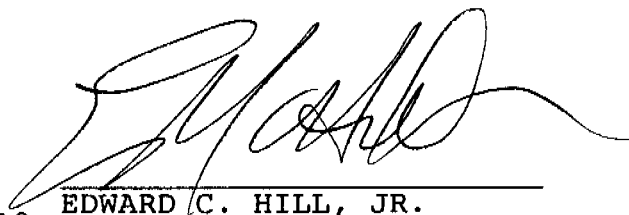
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of February, 1992.



EDWARD C. HILL, JR.
Assistant Attorney General