

047

FILED

SD J. WHITE

JUL 15 1992

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHARLES EUGENE COLEMAN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

80109

Case No.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Appellant drafted a presentencing memorandum where he contrasted the 1987 and 1989 statutes raising that aspect of the change that no longer required the court to make a finding that the protection of the public warranted habitualizing the defendant. (R. 13-19) Appellant drafted a motion to preclude an application of violent felony offender claiming that 8775.084 Fla. Stat. (1989) violated due process and equal protection rights because it gave the prosecutor unbridled discretion to determine who the State would seek to habitualize, and because this particular trial judge indicated he would habitualize all those who met the criteria. (R. 10, 11).

At the plea hearing, Appellant acknowledged

"let me preface by saying this case was set for trial this week but we notified the court last week of the change of plea. This was after the court entered the order denying the motion to exclude identification evidence. Entering this plea today would not be anyway to preserve that issue for appeal, and this plea would be waiving issues for appeal and we recognize that up front."

(R. 91-92).

Counsel was then assured by the court that a life sentence was not mandatory upon habitualization. Only then did Appellant plead guilty, knowing he was to be sentenced as a habitual violent felony offender. (R. 92-95).

SUMMARY OF THE ARGUMENT

There *is* no express conflict herein as the case cited by the Court in the instant *per curiam* decision was not relied upon as controlling.

ARGUMENT

ISSUE

WHETHER THE INSTANT DECISION PRESENTS CONFLICT WITH THE OPINION IN JOHNSON V. STATE, 589 So.2d 1370 (1st DCA 1991) REVIEW PENDING.

In 1965, this Court extended its discretionary review of discernible conflict of district court decisions without opinion. Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965). However, this Court's jurisdiction in this regard **was** thereafter modified. See, Article V, Section 3(b) Florida Constitution 1980. "Amended Article V abolishes the Foley doctrine by requiring an "express" **as** well as a "direct" conflict of district court decisions as a pre-requisite to Supreme Court review". See, Committee Note to Florida Rule of Appellate Procedure **9.030(a)(2)(A)(iv)** (1980 Amendment). And, see Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Company v. Editorial America, S.A., 385 So.2d **1369** (Fla. 1980); Robles DelMar, Inc. v. Town of Indian River Shores, 385 So.2d 1371 (Fla. 1980).

In Jenkins v. State, supra, the court said

The pertinent language of section **3(b)(3)**, as amended April 1, 1990, 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 or 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." Webster's Third New International Dictionary, (1961 ed. unabr.). The single word "affirmed" comports with none of these definitions.

Respondent recognizes that in State v. Lofton, 534 So.2d 1149 (Fla. 1988) this Court held that a district court of appeal's **per** curiam decision without opinion which cites as controlling authority a decision that is pending review in this court constitutes prima facie express conflict for purposes of jurisdiction. However the instant opinion does not cite Johnson v. State **supra** as controlling, and because one of the arguments raised and stressed **as** controlling by Respondent below was the Respondent's failure to preserve the issue for review by the Second District Court of **Appeal**, it is entirely unclear upon what basis the per curiam opinion was based.

CONCLUSION

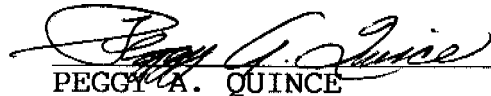
WHEREFORE, based on the foregoing this Court should decline to exercise its discretionary power to review the instant case.

Respectfully submitted,

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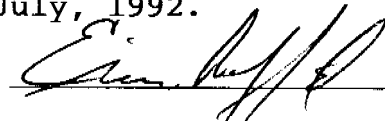


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to TIMOTHY J. FERRERI, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33830, this 13th day of July, 1992.



OF COUNSEL FOR RESPONDENT