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CLERK, SUPREME COURT.

By _____
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IN THE FLORIDA SUPREME COURT

MARVIN TUCKER,
Petitioner,

v.

Case No. 80,870

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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/srr

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STATEMENT OF THE FACTS

Respondent objects to the statement of facts in the petitioner's brief on jurisdiction as it goes outside of the four corners of the opinion. With respect to the issue raised to demonstrate the only thing that the opinion states is, "We affirm the remaining convictions as well as the habitual offender sentence imposed. See Baxter v. State, 599 So. 2d 721 (Fla. 1992)[sic]."

SUMMARY OF THE ARGUMENT

Because Baxter was preceded by the introductory signal "see" it is clear that the proposition for which it was cited was not stated in it but only followed from it. Accordingly, it is clear that the decision below differed from the decision in Baxter. Just because Baxter is in conflict with decisions of other districts does not mean that the decision below is in conflict with the same decisions. The decision below is, at best, cryptic.

ARGUMENT

ISSUE

WHETHER THERE IS JURISDICTIONAL
CONFLICT BETWEEN THE CASE BELOW
AND THE CASES CITED FOR CONFLICT?

(As restated by respondent)

It is axiomatic in the law of jurisdictional conflict that there must be direct conflict between the decisions in the case for which review is sought and the cases on which conflict is predicated. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Neither conflict of opinions nor the reasoning on which they rest will support a finding of jurisdiction.

Petitioner asserts that there is jurisdictional conflict between the decision below and cases that have been found to be in conflict with Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992). Petitioner asks this court to look to Jollie v. State, 405 So. 2d 418 (Fla. 1981) and find conflict since conflict was certified in Baxter.

If Baxter had been cited as direct authority for the decision below then respondent would concede that there is conflict. But, Baxter was not cited as direct authority. It was preceded by the signal "See." Use of the signal "see" indicates that Baxter was not direct authority for decision below. When "see" is used as an introductory signal it means that the proposition for which it is cited is not stated in the decision but follows from it. A Uniform System of Citation, 2.2 at 8 (14th ed.).

If the proposition for which Baxter was cited is not stated in Baxter then the decision in the case below can hardly be the same decision as Baxter. The nature of the decision below on the habitual offender question is at best cryptic. What is clear is that however much Baxter may be in conflict with decisions of other districts on the question of whether absence of pardon or set aside on post-conviction relief is part of the state's case or an affirmative defense to a finding that an offender is a habitual offender.

Even if the court were to consider Baxter direct authority for the decision below and the court could look to State v. Lofton, 534 So. 2d 1148 (Fla. 1988), Jollie v. State, 405 So. 2d 418 (Fla. 1981) to determine jurisdiction, there is still no need for this court to exercise it jurisdiction. Multiplying the number of cases presenting the same question would be a misuse of scarce resources. It would occupy the court's already overburdened time with duplicative briefs. And, it would burden the already overburdened respondent's attorney's time as well. In these times of scarce governmental resources, this court should take every action that it can to minimize the strain on those resources.


Declining jurisdiction would cause no prejudice to the petitioner. Should this court affirm Baxter, then there would be no relief due to the petitioner. Should this court reverse Baxter then petitioner could take this court's decision to the circuit court and get relief under Rule 3.800 as an illegal sentence can be corrected at any time.

CONCLUSION

WHEREFORE Respondent asks the court to exercise its discretion and decline jurisdiction over this case for the above and foregoing reasons, arguments, and authorities.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondent on Jurisdiction has been furnished to, Deborah K. Brueckheimer, Assistant Public Defender, Public Defenders Office, Polk County Courthouse, P.O. Drawer 9000--Drawer PD, Bartow, Florida 33830, Attorney for Petitioner, by United States Mail, postage prepaid, this 24th day of December, 1992.


OF COUNSEL FOR RESPONDENT