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MAY 8 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Case No. 81,613

TIMOTHY BOUTWELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

EDWARD L. GILES

Assistant Attorney General
Florida Bar No. 901954
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida
33401-2299
(407) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT.....	3
<u>ARGUMENT</u>	4
PETITIONER IMPROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS COURT WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER DISTRICT COURTS OF APPEAL	
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	7

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Ansin v. Thurston,</u> 101 So. 2d 808 (Fla. 1958).....	6
<u>Hallman v. State,</u> 492 So. 2d 1136 (Fla. 2d DCA 1986).....	6
<u>Halland v. Webster,</u> 43 Fla. 85, 29 So. 625 (1901).....	6
<u>Jenkins v. State,</u> 385 So. 2d 1356 (Fla. 1980).....	7
<u>Mancini v. State,</u> 312 So. 2d 732 (Fla. 1975).....	7
<u>Reaves v. State,</u> 485 So. 2d 829 (Fla. 1986).....	6
<u>Withlacoochee River Electric Co-op v. Tampa Electric Co.,</u> 158 So. 2d 136 (Fla. 1963).....	6
<u>Wright v. State,</u> 592 So. 2d 1123 (Fla. 3d DCA 1992, quashed, <u>State v. Wright</u> , 600 So. 2d 457 (Fla. 1992)	3,4,5
 <u>OTHER AUTHORITIES</u>	
Art. V, § 3(b), Fla. Const. (1980).....	3,4
Fla. R. App. P. 9.030(a)(2)(A)(IV)	3,4
§ 322.34(1) Fla. Stat. (1989).....	5
§ 322.34(3) Fla. Stat. (1989).....	5

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in a criminal prosecution from the Nineteenth Judicial Circuit, in and for Indian River County. The Respondent, State of Florida, was the Appellee and the prosecution, respectively in the lower courts. In this Brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "PA" will be used to refer to Exhibit A of Petitioner's Appendix, which is a conformed copy of the District Court's opinion.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as a reasonably accurate representation of the facts below. Respondent would also rely on the opinion of the District Court of Appeal for its statement of the case and facts (PA).

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court decline to take jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Fourth District Court of Appeal expressly and directly conflicts with any decision of this Court, other District Courts, or that it falls under any of the subdivisions as provided by Fla.R.App.P. 9.030(a)(2), or Art. V, Section 3(b) Fla.Const. (1980). Conflict has not been established with Wright v. State, 592 So. 2d 1123 (FLa. 3d DCA 1991), where the Fourth District Court of Appeal did not recognize a conflict by certifying such, and the Wright decision has been quashed. See State v. Wright, 600 So. 2d 457 (Fla. 1992). This Court should decline to accept discretionary jurisdiction.

ARGUMENT

PETITIONER IMPROPERLY INVOKES
THE DISCRETIONARY JURISDICTION
OF THIS COURT WHERE THE DECISION
OF THE FOURTH DISTRICT COURT OF
APPEAL DOES NOT EXPRESSLY AND
DIRECTLY CONFLICT WITH DECISIONS
OF THIS COURT OR OF OTHER
DISTRICT COURTS OF APPEAL

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b) Fla.Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(IV), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Respondent respectfully requests this Honorable Court decline to take jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner's allegation that the opinion of the Fourth District Court in the instant case conflicts on the same question of law with Wright v. State, 592 So. 2d 457 (Fla. 3d DCA 1991). This Court quashed and and remanded Wright to the Third District Court of Appeal, stating in its opinion as follows:

The decision under review, Wright v. State, 592 So. 2d 1123 (Fla. 3d DCA 1991), is quashed and remanded to the Third District Court of Appeal for further consideration in accordance with our decision in Jefferson v. State, 595 So. 2d 38 (Fla. 1992), and Brooks v. Mazaheritehrani, 595 So. 2d 37 (Fla. 1992).

See State v. Wright, 600 So. 2d 457 (Fla. 1992). Despite references to Jefferson and Brooks, there is no indication that any part of Wright was affirmed. The word "quash" has been defined as "to abate, annul, overthrow, or make void" Holland v. Webster, 43 Fla. 85, 29 So. 625 (1901). Respondent would therefore contend that any conflict initially existing between the trial court decision and Wright, would not exist at this point in time.

It is important also to note that the original Wright decision, while addressing a charge against the defendant of driving with a suspended license and causing serious injury to another, § 322.34(3) Fla. Stat. (1989), the actual discussion of that court would appear to have dealt with another portion of that statute. The court stated as follows:

However, defendant is correct in arguing that the above facts justify only a single conviction and sentence for driving with a suspended license. Defendant's action was a single continuing offense and thus a single violation of section 322.34. See Hallman v. State, 492 So. 2d 1136 (Fla. 2d DCA 1986).

Id. at 1126. This is in line with the Hallman decision, where there is no mention of injured persons, thus a violation of § 322.34(1) as opposed to a violation of § 322.34(3). The Hallman case was likewise reviewed and distinguished by the Fourth District in the instant case for much the same reason. (AP 4). While rejecting the Wright decision, the District Court of Appeal did not certify a conflict to this Court.

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's

discretionary jurisdiction under Fla.R.App.P. 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 its brother or father 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 definitions of the terms 'express' include: 'to represent in words; to give expression to.' 'Expressly' is defined: 'in an express manner.' Websters Third New International Dictionary (1961 ed. unabr.)

See also Reaves v. State, 485 So. 2d 829 (Fla. 1986); see generally Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Co., 158 So. 2d 136 (Fla. 1963). It is not appropriate to allege conflict based on the contents of a dissenting opinion. Jenkins.

Petitioner has not established the direct and express conflict from the face of the opinions necessary for this court to exercise its discretionary jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing argument and the authorities cited therein, Respondent respectfully requests this Honorable Court decline to accept discretionary jurisdiction in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida




EDWARD L. GILES
Assistant Attorney General
Florida Bar No. 901954
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
Telephone (407) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: CHERRY GRANT, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, Florida 33401, this 30th day of April, 1993.


Edward L. Giles
Of Counsel