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CLERK, SUPREME COURT

By _____
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IN THE SUPREME COURT OF FLORIDA

CASE NO.

81,614

CHARLES BAKER

Petitioner

vs.

STATE OF FLORIDA

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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THE DECISION BELOW DOES NOT EXPRESSLY CONSTRUE
THE STATE OR FEDERAL CONSTITUTIONS AND THIS
COURT SHOULD DENY PETITIONER'S REQUEST FOR
REVIEW.

TABLE OF AUTHORITIES

CASES

<u>Jollie v. State</u> , 405 So. 2d 418 (Fla. 1981)	3, 5
<u>Ogle v. Pepin</u> , 273 So. 2d 391 (Fla. 1973)	4
<u>School Board of Pinellas County v. District Court of Appeal</u> , 467 So. 2d 985 (Fla. 1985)	4
<u>Metcalf v. State</u> , 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993)	3, 5

PRELIMINARY STATEMENT

The Petitioner was the Appellee in the Fourth District Court of Appeal and the defendant in a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward 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 Petitioner's Appendix, which is a conformed copy of the District Court's opinion.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The only facts relevant to a determination of this Court's jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(ii) are those set out in the opinion sought to be reviewed. That opinion simply states:

This cause is affirmed on the authority of Metcalf v. State, No. 92-0885 (Fla. 4th DCA Jan. 27, 1993).

(PA 1). Respondent takes exception to the extent that Petitioner's Statement of the Case and Facts refers to record materials outside the four corners of the district court opinion, particularly as Metcalf is not currently pending before this Court for resolution.

SUMMARY OF THE ARGUMENT

The State asserts that the District Court of Appeal did not expressly construe the State or Federal Constitutions, and thus no basis lies for this Court to exercise its discretionary jurisdiction. Due to the fact that Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993), is not currently pending before this Court for review, Petitioner is not entitled to review pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY CONSTRUE THE STATE OR FEDERAL CONSTITUTIONS AND THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR REVIEW.

Petitioner maintains that the Fourth District's decision below involves an interpretation of the Due Process clauses of the Florida and United States Constitutions. Respondent acknowledges that the Metcalf decision cited in the Fourth District's opinion makes reference to due process. However, the Fourth District did not in any manner construe the Constitution in the instant case. Thus, this Court should decline to exercise its discretionary jurisdiction.

It is axiomatic that in order to establish this Court's conflict jurisdiction, or to establish jurisdiction on the basis that a district court opinion affects a class of constitutional officers, the basis for the discretionary review must appear on the face of the district court opinion. See School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985). This requirement of expression on the face of the opinion extends to constitutional construction as well.

In order to expressly construe a provision of the federal or state constitutions for the purpose of invoking this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii), a district court's decision must explicitly "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." Ogle

v. Pepin, 273 So. 2d 391, 393 (Fla. 1973) (quoting Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958). In the case at bar, neither the Florida Constitution nor the United States Constitution was construed within the meaning of the above language. This is particularly true since the District Court's decision below merely relied upon another case in which due process was mentioned but not construed. Thus, this Court's jurisdiction does not lie.

Petitioner's reliance upon Jollie v. State, 408 So. 2d 418 (Fla. 1981), to establish jurisdiction is misplaced. Pursuant to Jollie, a district court's decision which cites as controlling authority a decision which is **either pending review in or has been reversed by this Court** will constitute prima facie express conflict over which this Court may exercise its discretionary jurisdiction. Jollie, 405 So. 2d at 420. However, Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993), is not currently pending review in this Court. Nor has Metcalf been reversed by this Court. Petitioner acknowledges this fact, but asserts on page 4 that "A petition for review is being filed in Metcalf itself." However, to date no notice to invoke this Court's discretionary jurisdiction has even been filed in the district court. Until Metcalf is actually pending before this Court, Jollie certainly does not extend discretionary jurisdiction to the instant case. Accordingly, this Court should decline to exercise its discretionary jurisdiction.

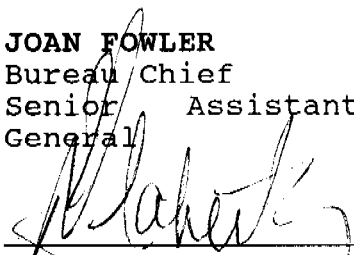
CONCLUSION

WHEREFORE, based upon 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by Courier to: ALLEN DeWEESE, Counsel for Petitioner, Fifteenth Judicial Circuit of Florida, 421 3rd Street, West Palm Beach, Florida, this 13th day of April, 1993.



Of Counsel