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APR 26 1993

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92-0953

OWEN LACY,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

\*\*\*\*\*

ON PETITION FOR DISCRETIONARY REVIEW

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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TABLE OF CONTENTS

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....2

SUMMARY OF THE ARGUMENT.....3

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT  
EXPRESSLY CONSTRUE THE STATE OR  
FEDERAL CONSTITUTIONS AND THIS  
COURT SHOULD DENY PETITIONER'S  
REQUEST .....4

CONCLUSION.....6

CERTIFICATE OF SERVICE.....6

TABLE OF CITATIONS

<u>CASE</u> .....	<u>PAGE</u>
<u>Armstrong v. City of Tampa,</u> 106 So. 2d 407, 409 (Fla. 1958) .....	5
<u>Jollie v. State,</u> 405 So. 2d 418 (Fla. 1981) .....	3
<u>Jollie v. State,</u> 408 So. 2d 418 (Fla. 1981) .....	5
<u>Metcalf v. State,</u> 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 2, 1993) .....	3
<u>School Board of Pinellas County v. District Court of Appeal,</u> 467 So. 2d 985 (Fla. 1985) .....	4
 <u>OTHER AUTHORITIES:</u>	
Fla. R. App. P. 9.030(a)(2)(A)(ii) .....	4

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 Appellant and the prosecution, respectively in the lower courts. In this Brief, the parties will be referred to as they appear before this Honorable Court.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth in Petitioner's brief.

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. 2, 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).

REASONS FOR DENYING THE WRIT

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 asserts on page 4 that "A petition for review is being filed in Metcalf itself." However, 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.




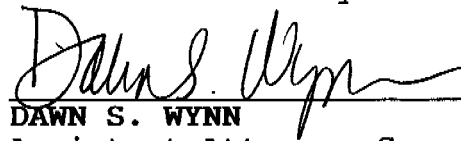
CONCLUSION

WHEREFORE, based 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

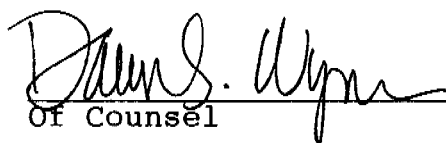
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to ANTHONY CALVELLO, Esq., 421 3rd Street/6th Floor, West Palm Beach, Florida 33401 this 22<sup>nd</sup> day of April 1993.

  
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Of Counsel