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FILED

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SEP 7 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

CASE NO. 82,217

By _____
Chief Deputy Clerk

MARVIN REED,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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WHICH IS A PER CURIAM AFFIRMANCE WHICH
RELIES, IN PART, ON STATE V. DORIAN, 18
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30, 1993) (EN BANC) DOES NOT EXPRESSLY
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INTRODUCTION

The Petitioner, MARVIN REED, was the appellant in the court below and the defendant in the Circuit Court. The Respondent, THE STATE OF FLORIDA, was the appellee in the District Court and the prosecution in the trial court. The parties will be referred to, in this brief, as they stand before this court. The symbol "A" will identify the Appendix to the Brief of Petitioner (on Jurisdiction). All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts refers almost exclusively to documents not before this court (Brief of Petitioner on Jurisdiction, 1-3) and is, therefore, improper. Additionally, it contains numerous fact allegations not relevant to the jurisdictional issue, the only issue properly before the court at this time and, therefore, is rejected by the Respondent to the extent it contains irrelevant matter. However, it does contain a generally true and correct account of the relevant proceedings (from the last paragraph of page 2 through page 3 of the Petitioner's Brief) which account is accepted by the Respondent, with such acceptance limited to the jurisdictional issue before the court at this time.

ISSUE PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE DISTRICT COURT, WHICH IS A PER CURIAM AFFIRMANCE WHICH RELIES, IN PART, ON STATE V. DORIAN, 18 FLA. L. WEEKLY D856 (FLA. 3D DCA MARCH 30, 1993) (EN BANC) DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN STATE V. AGEE, 18 FLA. L. WEEKLY S391 (FLA. JULY 1, 1993)? (Restated).

SUMMARY OF THE ARGUMENT

The decision in this case does not expressly or directly conflict with the decision of State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993) or any other case of this court or of any other district court of appeal. Although the PCA decision of the District Court does rely, in part, on State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993) (en banc), the fact is that Dorian has not been reversed, quashed or overruled (although it has been disapproved, at least in part). Thus, it does not appear that express and direct conflict presently exists.

ARGUMENT

THE DECISION OF THE DISTRICT COURT, WHICH IS A PER CURIAM AFFIRMANCE WHICH RELIES, IN PART, ON STATE V. DORIAN, 18 FLA. L. WEEKLY D856 (FLA. 3D DCA MARCH 30, 1993) (EN BANC) DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN STATE V. AGEE, 18 FLA. L. WEEKLY S391 (FLA. JULY 1, 1993)? (Restated).

The Petitioner contends that this Court's disapproval of State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993) (en banc) creates direct and express conflict with this case because the District Court cites to Dorian in a per curiam affirmance. The Petitioner has been unable to refer to any authority which supports that statement of law.

It is true, of course, that, if Dorian had been either reversed or quashed, this Court could assert jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981). Indeed, if Dorian is pending review in this court, as it may well be (although the Petitioner has not so alleged), then jurisdiction could be proper in this case on that ground, as well. Jollie at 421. However, the undersigned has not, thus far, discovered authority which creates conflict jurisdiction based on the disapproval by this Court of a case which is cited in a per curiam affirmance. Therefore, at least on those grounds (which are the ones urged by the Petitioner), conflict jurisdiction should not be granted.

It should be noted that the Respondent disagrees with and takes issue with many of the statements that the Petitioner

makes in the argument portion of his brief. Indeed, the Respondent contends that, once the underlying facts are examined, it will be clear that this case is distinguishable from both Dorian and State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993) on material grounds. However, since the record containing those facts is not before this court at this time those facts may not properly be argued at this time (despite the fact that the Petitioner attempts to do so). They are not relevant to the jurisdictional issue before this court, at any rate, so the Respondent will not distinguish Dorian and Agee at this time.

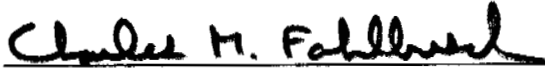
However, it is clear that the decision in this case does not directly and expressly conflict with Agee and that jurisdiction should not be granted on that ground.

CONCLUSION

Based upon the foregoing reasons and authorities, this court should decline to accept jurisdiction of this action based on the grounds alleged by the Petitioner.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by U.S. Mail to Geoffrey C. Fleck, Esquire, FRIEND & FLECK, Sunset Station Plaza, 5975 Sunset Drive, Penthouse 802, South Miami, Florida 33143 on this 3rd day of September, 1993.



CHARLES M. FAHLBUSCH
Assistant Attorney General