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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86544

FILED

SID J. WHITE

OCT 23 1995

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JAMES HEUSS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case as set forth in his brief on jurisdiction for purposes of this Court's decision on whether to accept or decline jurisdiction in this case.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal does not conflict with decisions of this and/or other courts of the State of Florida, rather the decision is in conformity with the decisions of the courts of this state and is merely an interpretation or refinement of this Court's holding in Ciccarelli v. State, 531 So. 2d 129 (Fla.1988), and the decisions of the First District in Johnson v. State, 595 So. 2d 132 (Fla. 1st DCA 1992); Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991); and Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS NOT IN CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL OR DECISIONS OF THIS COURT (Restated).

Petitioner contends the decision of the Fourth District in this case expressly and directly conflicts with the decisions of the First District in Johnson v. State, 595 So. 2d 132 (Fla. 1st DCA 1992); Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991); and Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990) (which are based on this Court's decision in Ciccarelli v. State, 531 So. 2d 129 (Fla.1988)), by misapplying the holdings in those cases. Respondent submits that the decision in this case **does not** conflict with the decisions cited by Petitioner, rather it conforms with the decision upon which the First District opinions are based, as well as with Florida Statutes. Moreover, the Fourth District distinguished the decisions of the First District, thus this Court should decline to accept jurisdiction in this cause.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of

law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Thus, conflict jurisdiction is properly invoked when the district court announces a rule of law which conflicts with another district's, or when the district court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). Petitioner appears to seek conflict jurisdiction based on the former situation. "Obviously two cases can not be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring; affirmed, 428 So.2d 220 (Fla. 1982). Respondent submits that the decision in this case in no way conflicts with the cases cited by Petitioner, nor does the Fourth District's decision conflict with any other case law.

Petitioner asserts the Fourth District's decision in this cause creates conflict by holding that appellate courts may apply a harmless error analysis notwithstanding the State's failure to argue harmless error which is contrary to holdings of the First District in Johnson, Perkins and Taylor. Respondent submits that Petitioner has interpreted the First District's opinions in those cases too literally, as if those decisions create some sort of

jurisdictional barrier to an appellate court's application of harmless error review. However, as noted by the Fourth District in its opinion on rehearing in this cause, this Court in Ciccarelli did not hold that an appellate court could go not *sua sponte* apply harmless error review, this Court held that where "the state has not presented a prima facie case of harmlessness in its argument, the court **need** go no further." Id. at 131. The Fourth District noted that the language of Ciccarelli was permissive and not mandatory, particularly in light of Florida Statute 59.041 (1967).

Additionally, the decision in Johnson relies on Perkins and Taylor, Perkins relies on Taylor, and Taylor relies on Ciccarelli. As the First District's decisions all stem from this Court's decision Ciccarelli, which holds that an appellate court **may**, but is **not required** to decline to apply harmless error where it is not argued by the state, they cannot be interpreted as Petitioner suggests, i.e. to preclude a harmless error analysis where the state has not argued it.

It is well established that two cases can not be in conflict if they can be validly distinguished. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983). In this case, the Fourth District distinguished and clarified its decision from those in

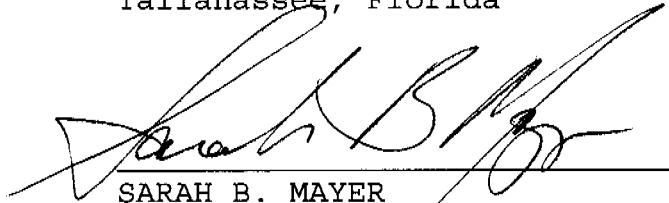
Ciccarelli, Johnson, Perkins, and Taylor. As there is no express or direct conflict between the Fourth District's decision in this case and the decisions cited by Petitioner, this Court should decline to exercise its jurisdiction to review this case.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to DECLINE to review the instant decision.

Respectfully submitted,

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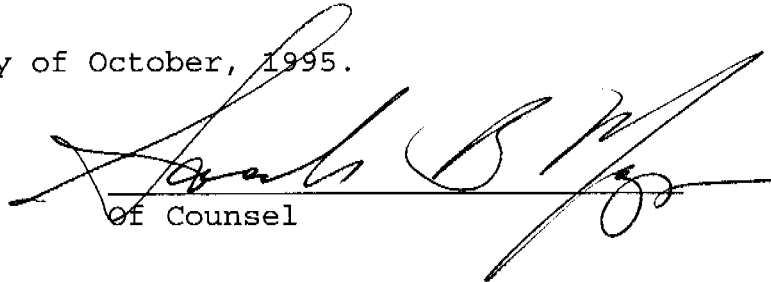


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by Courier to: IAN SELDIN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 18th day of October, 1995.



of Counsel