

ORIGINAL

IN THE SUPREME COURT
OF FLORIDA

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No.:

90,439

DAVID L. TAYLOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Notice to Invoke Discretionary Reivew of a Decision
of the Fifth District Court of Appeal

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
TABLE OF ISSUES PRESENTED	iii
SUMMARY OF THE ARGUMENT.	iv
ARGUMENT	1

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION AS THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN JACKSON V. STATE, 654 SO.2D 234 (FLA. 4TH DCA 1995) AND THE FIRST DISTRICT COURT OF APPEAL IN CECIL V. STATE, 614 SO.2D 603 (FLA. 1ST DCA 1993) , 1

CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

<u>Case(s)</u>	<u>Page</u>
<u>Cecil v. State,</u> 614 So.2d 603 (Fla. 1st DCA 1993)	1,2
<u>Jackson v. State,</u> 654 So.2d 234 (Fla. 4th DCA 1995) . . . , ,	1,2
<u>Kincaid v. World Ins. Co.,</u> 157 So.2d 517 (Fla. 1963)	, 2
<u>Mancini v. State,</u> 312 So.2d 7342 (Fla. 1975) , ,	2
<u>Nielsen v. City of Sarasota,</u> 117 so. 731 (Fla. 1960)	2
 <u>Statutes and Rules</u>	
§316.193, Fla. Stat. (1993)	1
§775.082(3) (d), Fla. Stat. (1993)	1
Fla.R.App.P. 9.030(a) (2) (A) (iv)	1,3,4

TABLE OF ISSUE PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION AS THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN JACKSON V. STATE, 654 SO.2D 234 (FLA. 4TH DCA 1995) AND THE FIRST DISTRICT COURT OF APPEAL IN CECIL V. STATE, 614 SO.2D 603 (FLA. 1ST DCA 1993).

SUMMARY OF THE ARGUMENT

This Court should invoke its discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) to review the decision below of the Fifth District Court of Appeal because said opinion is in direct and express conflict with two other district courts of appeal on the same question of law.

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION AS THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN JACKSON V. STATE, 654 **SO.2D** 234 (FLA. 4TH DCA 1995) AND THE FIRST DISTRICT COURT OF APPEAL IN CECIL V. STATE, 614 **SO.2D** 603 (FLA. 1ST DCA 1993).

pursuant to Fla.R.App.P. 9.030 (a) (2) (A) (iv), this Court should invoke its discretionary jurisdiction to review the decision below of the Fifth District Court of Appeal. On June 30, 1995, the petitioner, David Taylor, was sentenced to 10 years probation as a downward departure on the charge of Driving Under the Influence Resulting in Serious Bodily Injury, a third degree felony. § 316.193, Fla. Stat. (1993). Mr. Taylor thereafter violated his probation as indicated in the Violation of Probation of December 22, 1995. On May 31, 1996, Mr. Taylor's probation was revoked and he was subsequently sentenced to incarceration for 38 months at a state facility. The petitioner argued on appeal that his probation could not be revoked as the 10 year sentence was illegal for exceeding the statutory maximum of 5 years for a third degree felony. § 775.082(3) (d), Fla. Stat. (1993).

In support of his argument, the petitioner relied on Jackson v. State, 654 **So.2d** 234 (Fla. 4th DCA 1995). In Jackson, the district court held that:

Since appellant was serving an illegal sentence, the trial court could not charge appellant with a violation of the terms of his probation nor revoke his probation.

* * *

We . . . hold that a defendant may not be violated on a condition of probation or

community control while serving an illegal sentence.

Id. at 236. Further, relying on Jackson and Cecil v. State, 614 So.2d 603 (Fla. 1st DCA 1993), the petitioner argued that it was irrelevant whether the revocation of probation occurred within the so-called "legal" portion of the sentence; that is, during the initial five years.

The district court below rejected petitioner's arguments and affirmed petitioner's sentence. The district court held that although it recognized that petitioner's original sentence was illegal in that it exceeded the maximum statutory authority, the sentence was legal as the violation occurred during the first five years. This conclusion by the Fifth District expressly and directly conflicts with the holdings of the Fourth District Court's decision in Jackson v. State, 654 So.3d 234 (Fla. 4th DCA 1995) and the First District Court's decision in Cecil v. State, 614 So.2d 603 (Fla. 1st DCA 1993). Indeed, the district court below specifically "acknowledge[d] conflict with Jackson v. State, 654 So.2d 234 (Fla. 4th DCA 1995)."

A decision which applies a rule of law to procure a different result in a case involving controlling facts substantially similar to those in a prior decision of this Court, demonstrates an express and direct conflict. See Mancini v. State, 312 So.2d 732, 733 (Fla. 1975); Kincaid v. World Ins., Co., 157 So.2d 517 (Fla. 1963); Nielsen v. City of Sarasota, 117 So. 731 (Fla. 1960). The facts of the instant case are substantially similar to the facts in Jackson and Cecil. However, the results and decisions are directly

contrary to each other. Accordingly, petitioner seeks to invoke this Court's discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

CONCLUSION

Based on the foregoing reasons, this Court should invoke its discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David A. Foxman, Esquire, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by United States Mail, this 30th day of April, 1997.



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APPENDIX TO
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Tab

Opinion of the District Court of Appeal,
Fifth District, dated March 27, 1997

1