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SID J. WHITE

JAN 5 1998

CLERK, SUPREME COURT

By

Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HECTOR Z. LUCIO,
Petitioner,

v.

CASE NO. 92,066

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

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OTHER:

Art. V, § (3) (b) (3), Fla. Const. 3

STATEMENT OF FACTS

Lucio's conviction and sentence were affirmed without opinion by the Fifth District Court of Appeal. Lucio v. State, 22 Fla. L. Wkly. D2591 (Fla. 5th DCA Nov. 14, 1997). In so holding, the district court found this case to be controlled by its recent decision in Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997).

SUMMARY OF ARGUMENT

In deciding this case, the district court relied on its recent opinion in Raulerson v. State. A petition for review of Raulerson is presently pending before this Court (case # 91,611). Should this Court grant review in Raulerson, the Court would also have jurisdiction to review the instant case. However, in the absence of review of Raulerson, no review of this case is warranted, as the district court's limited per curiam affirmed opinion does not facially conflict with any other case.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT
JURISDICTION OF THIS CASE UNLESS IT
ACCEPTS JURISDICTION IN RAULERSON.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. Where the district court's decision is a per curiam opinion which cites as controlling law a decision that is either pending review in or has been reversed by this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981).

Here, the district court found this case to be controlled by its recent decision in Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997). A petition for review of Raulerson is presently pending before this Court (case # 91,611). Should this Court grant review in Raulerson, jurisdiction would be appropriate in this case as well.


However, if this Court declines to accept jurisdiction in Raulerson, then it must decline jurisdiction here also, as the district court's limited per curiam affirmed opinion does not facially conflict with any other case.. See Harrison v. Hyster Co., 515 So. 2d 1279 (Fla. 1987).

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case unless it accepts jurisdiction in Raulerson.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished to James R. Wulchak, Assistant Public Defender, by delivery to the Public Defender's basket at the Fifth District Court of Appeal, this 31ST day of December, 1997.



Kristen L. Davenport
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

HECTOR Z. LUCIO,
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v.

CASE NO. 92,066

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

Davenport
L97-1-1894

A/B 4-16-97

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 1997

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NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

HECTOR Z. LUCIO,

Appellant,

v.

CASE NO. 97-168

L.C. 96-2781

STATE OF FLORIDA,

Appellee.

Opinion Filed November 14, 1997.

Appeal from the Circuit Court
for Marion County,
Thomas Sawaya, Judge.

James B. Gibson, Public Defender, and
Dan D. Hallenberg, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona Beach,
for Appellee.

PER CURIAM.

AFFIRMED. See Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997)

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GRIFFIN, C.J., THOMPSON and ANTOON, JJ., concur.