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SID J. WHITE  
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By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LEOTIS SMITH,

Petitioner,

v.

CASE NO. 94,703

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

BRIEF OF RESPONDENT ON JURISDICTION

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ATTORNEY GENERAL

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ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR #397024

✓ WESLEY HEIDT  
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STATEMENT OF THE CASE AND FACTS

Petitioner's sentence was affirmed on appeal based on the precedent of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998).

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier.

SUMMARY OF ARGUMENT

Since the decision of the Fifth District Court of Appeal relies on a case currently pending in this court, this Court has jurisdiction to accept the appeal.

ARGUMENT

THIS COURT HAS THE DISCRETION  
TO ACCEPT JURISDICTION IN THE  
INSTANT CASE.


In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court held that when a district court issues a decision where the controlling precedent is presently pending in this Court, there is "prima facie express conflict (which) allows this court to exercise its jurisdiction." Id. at 420. The decision of the Fifth District Court of Appeal in the instant case relied on Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998), which is currently pending review before this Court. This Court therefore has discretion to entertain the review sought by Petitioner.

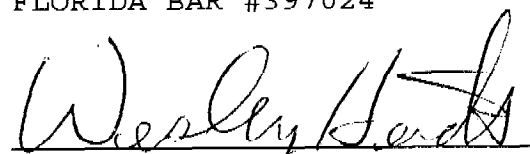
CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court accept jurisdiction in this case pursuant to the holding in Jollie.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

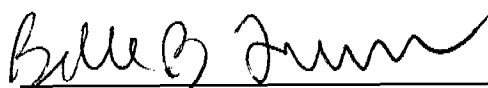
  
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FLORIDA BAR #397024

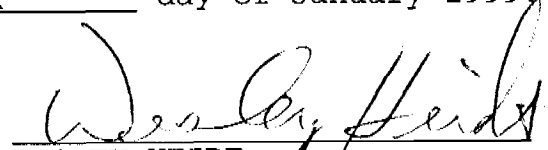
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Stephanie H. Park, counsel for the Petitioner, 112 Orange Ave. Ste A., Daytona Beach, FL 32114, this 29<sup>th</sup> day of January 1999.

  
\_\_\_\_\_  
BELLE B. TURNER  
ASSISTANT ATTORNEY GENERAL

  
\_\_\_\_\_  
WESLEY HEIDT  
ASSISTANT ATTORNEY GENERAL

General, Tallahassee, for Appellee.

(PER CURIAM.) We affirm that portion of the trial court's order dismissing, with prejudice, appellant's complaint brought against appellees in their individual capacities. Since appellant did not bring suit against appellees in their official capacities, we treat that portion of the trial court's order dismissing such complaint against appellees in their official capacities as a nullity. (MINER and LAWRENCE, JJ., and McDONALD, PARKER LEE, Senior Judge, CONCUR.)

\* \* \*

JAMES CODY and DEBBIE CODY, Appellants, v. COLONIAL IMAGING PRODUCTS & SERVICES, etc., et al., Appellees. 5th District. Case No. 98-1392. Opinion filed December 11, 1998. Appeal from the Circuit Court for Orange County, Walter Komanski, Judge. Counsel: Richard E. Dunegan and David B. Falstad, of Gurney & Handley, P.A., Orlando, for Appellants. No Appearance for Appellees.

(THOMPSON, J.) The final judgment awarding attorney's fees is reversed. *See Cody v. Colonial Imaging Products & Services, Inc.*, 23 Fla. Law Weekly D2236 (Fla. 5th DCA Oct. 2, 1998).

REVERSED. (GRIFFIN, C.J., and DAUKSCH, J., concur.)

\* \* \*

DONALD FRANK SWIHART, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-645. Opinion filed December 11, 1998. Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge. Counsel: James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

**ON MOTION FOR REHEARING AND REQUEST FOR CERTIFICATION OF CONFLICT**

[Original Opinion at 23 Fla. L. Weekly D2353q]

(COBB, J.) We grant appellants' motion for rehearing and certification, rescind our prior opinion, and issue the following opinion:

We affirm on the authority of *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996), *rev. denied*, 694 So. 2d 737 (Fla. 1997). *Accord State v. Hayes*, 23 Fla. L. Weekly D2184 (Fla. 4th DCA Sept. 23, 1998). *Contra State v. Holland*, 689 So. 2d 1268 (Fla. 1st DCA 1997), *State v. Perry*, 716 So. 2d 327 (Fla. 2d DCA 1998).

We certify conflict with *Holland* and *Perry*. (GOSHORN and THOMPSON, JJ., concur.)

\* \* \*

K.F., a child, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-1254. Opinion filed December 9, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Karen Martin, Judge; L.T. Case No. 98-0356. Counsel: Richard L. Jorandy, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Affirmed. The error in overruling Appellant's objection to the question posed here was not prejudicial. § 924.051(1),(3),(7), Fla. Stat. (1997). (STONE, C.J., POLEN and STEVENSON, JJ., concur.)

\* \* \*

WONDELL CARTER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-0077. Opinion filed December 9, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Howard Berman, Judge; L.T. Case No. 97-5601 CF A02. Counsel: David Nunes of Law Office of David Nunes & Associates P.A., Fort Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Barbra Amron Weisberg, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Affirmed without prejudice to seek relief pursuant to Florida Rule of Criminal Procedure 3.850. (STONE, C.J., POLEN and STEVENSON, JJ., concur.)

\* \* \*

MARION ASHLEY, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 98-2819. L.T. Case No. 92-12874-C. Opinion filed December 9, 1998. An appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, Ellen L. Leesfield, Judge. Counsel: Marion Ashley, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before SCHWARTZ, C.J., and NESBITT, and COPE, JJ.)

(PER CURIAM.) The order under review is affirmed without prejudice to refile the motion in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County.

Affirmed.

\* \* \*

MANSHUM vs. CARNIVAL CRUISE LINES, INC. 3rd District. #98-822. December 9, 1998. Appeal from the Circuit Court for Dade County. Affirmed. *Froug v. Carnival Leisure Indus., Ltd.*, 627 So. 2d 538 (Fla. 3d DCA 1993); *Barquin v. Flores*, 459 So. 2d 436 (Fla. 3d DCA 1984).

CADE vs. STATE. 3rd District. #98-3018. December 9, 1998. Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County. Affirmed. *See Fla. R. Crim. P. 3.850(f)*.

\* \* \*

NESSMITH v. ARNOLD. 1st District. #96-4110. December 11, 1998. Appeal from the Circuit Court for Columbia County. AFFIRMED. *See section 733.702(2), Florida Statutes (1995)*.

CRUMBIE v. LEON COUNTY SCHOOL BOARD. 1st District. #98-1056. December 11, 1998. Appeal from the Circuit Court for Leon County. Affirmed. *See Milano v. Moldmaster, Inc.*, 703 So. 2d 1093 (Fla. 4th DCA 1998).

RUDOLPH, JR. v. STATE. 1st District. #97-2732. December 11, 1998. Appeal from the Circuit Court for Escambia County. This appeal is dismissed. *See Robinson v. State*, 373 So. 2d 898 (Fla. 1979).

DARRELL v. STATE. 1st District. #97-3733. December 11, 1998. Appeal from the Circuit Court for Alachua County. This appeal is dismissed. *See Robinson v. State*, 373 So. 2d 898 (Fla. 1979).

CARLSON v. STATE. 1st District. #98-451. December 11, 1998. Appeal from the Circuit Court for Wakulla County. AFFIRMED. *See State v. Cunningham*, 712 So. 2d 1221 (Fla. 2d DCA 1998).

\* \* \*

MONCRIEF v. STATE. 4th District. #98-1301. December 9, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed on the authority of *Manka v. State*, No. 96-3318, 1998 WL 732949 (Fla. 4th DCA Oct. 21, 1998) [23 Fla. L. Weekly D2357].

\* \* \*

McKENZIE v. STATE. 5th District. #98-1114. December 11, 1998. Appeal from the Circuit Court for Marion County. AFFIRMED. *See State v. Price*, 564 So. 2d 1239 (Fla. 5th DCA 1990).

McBRIDE v. COUNTY OF VOLUSIA. 5th District. #98-783. December 11, 1998. Appeal from the Circuit Court for Volusia County. AFFIRMED. *See In re Forfeiture of \$7,750 in United States Currency*, 546 So. 2d 1128, 1131 (Fla. 2d DCA 1989).

SPENCER v. STATE. 5th District. #98-563. December 11, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Archer v. State*, 613 So. 2d 446 (Fla. 1993), *cert. denied*, 117 S. Ct. 197 (1996); *Pope v. State*, 646 So. 2d 827 (Fla. 5th DCA 1994).

B. K. v. STATE. 5th District. #98-558. December 11, 1998. Appeal from the Circuit Court for Sumter County. AFFIRMED. *State v. E.D.P.*, 23 Fla. Law Weekly S524 (Fla. Oct. 8, 1998).

KUBINSKI v. STATE. 5th District. #98-299. December 11, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Hardwick v. State*, 630 So. 2d 1212 (Fla. 5th DCA 1994).

RAIMONDO v. AMERICAN UNITED LIFE INSURANCE COMPANY. 5th District. #s 97-3582 & 98-1250. December 11, 1998. Appeal from the Circuit Court for Volusia County. AFFIRMED. *See McMullen Oil Co., Inc. v. ISS Int'l Service System, Inc.*, 698 So. 2d 372 (Fla. 2d DCA 1997); *Murphy v. Tucker*, 689 So. 2d 1164 (Fla. 2d DCA 1997).

PRUETT v. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION. 5th District. #97-3210. December 11, 1998. Administrative Appeal from the Department of Business and Professional Regulation. AFFIRMED. *See Walker v. Florida Department of Business and Professional Regulation*, 705 So. 2d 652 (Fla. 5th DCA 1998).

SMITH v. STATE. 5th District. #97-2647. December 11, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA), *rev. granted*, 718 So. 2d 169 (Fla. 1998).

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