

IN THE SUPREME COURT OF FLORIDA

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DAVID **HERNANDEZ** RODRIGUEZ,

Petitioner,

v.

CASE NO. 96,794

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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CERTIFICATE OF SIZE AND STYLE OF FONT

Your undersigned hereby certifies that the size and style of font used in this brief is 12-point Courier New, a font that is not proportionately spaced. And, if footnotes are published, the same size and style of font is used and the footnotes are single spaced.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as presented by
Petitioner is essentially correct for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Respondent urges this Court to decline jurisdiction. The opinion below is a *per curiam affirmance* citing a sister court decision where this Court has accepted jurisdiction. The decision on which Petitioner relies to establish conflict was determined on a motion for rehearing en *banc*. The decision on which Petitioner seeks to invoke this Court's jurisdiction is a consolidated case with five (5) different appeals involving three different categories of review: (1) appeals from the denial of *coram nobis* applications; (2) the state government seeking review of *coram nobis* relief granted; and, (3) collateral appeal from the denial of a timely motion for post-conviction relief. On the face of the opinion below, it cannot be determined which category is being invoked. Granted, the cited authority in the decision below is pending before this Court. That said, because the decision below does not address any of the "three" categories of review or the legal principles that were applied as a basis for this decision, the decision below is unreviewable.

ISSUE I

WHETHER A CITATION *PER CURIAM AFFIRMANCE* MAY
BE REVIEWED WHERE THE CONTROLLING PRECEDENT
INVOLVES FIVE (5) CONSOLIDATED CASES EMBRACING
THREE (3) DIFFERENT CATEGORIES OF REVIEW?

(As Stated by the State Government)

This Court has held that it does not have jurisdiction to review a *per curiam affirmance* [PCA] that does not expressly conflict with another decision even if "conflict" can be shown from the cited precedent. See, Dodi Publishing Co. v. Editorial America, 385 So.2d 1369 (Fla. 1980). Petitioner relies on Jollie v. State, 405 So.2d 418 (Fla. 1981) to invoke this Court's jurisdiction which holds that this Court may in its discretion review a citation PCA if the cited authority is itself pending before this Court,

The decision below reads: "Affirmed. See Peart v. State, 705 So.2d 1059 (Fla. 3d DCA), rev. granted, 722 So.2d 193 (Fla. 1998) (pending on certified conflict)." The Peart case is now submitted to this Court for decision. However, it cannot be determined which of the three (3) categories of review designated in Peart Petitioner is asserting for conflict.

For example, in Taylor v. State, 601 So.2d 540 (Fla. 1992), this Court accepted jurisdiction because the same issue was pending in Flowers v. State, 586 So.2d 1058 (Fla. 1991). The distinction is that the Taylor case involves a single principle

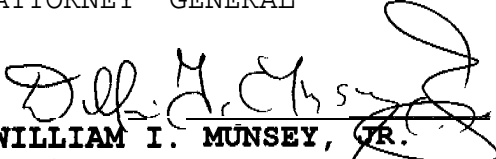
of law [reliance on a multiplier in calculating legal constraint points on a sentencing guidelines score sheet] where this citation PCA involves three (3) categories of review. This case does not present an appropriate basis for the exercise of discretionary jurisdiction.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the "State" would pray that this Court would make and render an Order declining to accept jurisdiction in this case.

Respectfully submitted,

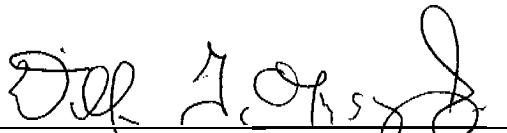
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Neil D. Kolner, Esq., Liberty Building, 124 South Miami Avenue, Miami, FL 33130-1605 on this 14th day of November, 1999.


OF COUNSEL FOR RESPONDENT