

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FRANCISCO VARELA,

Petitioner,

v.

Case No. SC03-
5DCA Case No. 5D03-892

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF THE FIFTH DISTRICT

ANSWER BRIEF ON JURISDICTION

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THERE IS NO CONFLICT OF DECISIONS
BETWEEN THE DECISION IN THIS CASE
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STATEMENT OF THE CASE AND FACTS

This case is before the Court from a per curiam: affirmed decision from the District Court of Appeal, Fifth District. Petitioner contends that this decision is in conflict with other decisions and that this Court should exercise jurisdiction.

Petitioner filed a motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). This motion was denied by the trial court by order entered November 20, 2002. Petitioner moved for rehearing of this order, which was denied on February 27, 2003. Notice of Appeal was filed on March 13, 2003.

On March 24, 2003, the fifth district issued an order to show cause why the appeal should not be dismissed for failure to timely file the notice of appeal. The order noted that there was no authorization for a motion for rehearing of the denial of a 3.800 motion, and so such a motion did not toll the time for filing a notice of appeal. Petitioner filed a response.

The district court did not dismiss the appeal for lack of jurisdiction, but rather, on May 20, 2003, entered a per curiam: affirmed decision citing to Mathis v. State, 720 So.2d 1116 (Fla. 5th DCA 1998). After unsuccessfully moving for rehearing en banc, Petitioner timely filed the notice to invoke this Court's jurisdiction on July 1, 2003.

SUMMARY OF ARGUMENT

There is no conflict between the decision below and any other decision and so this Court should not exercise jurisdiction to consider this case.

This Court lacks subject matter jurisdiction over a district court opinion that fails to expressly address a question of law. This Court does not have jurisdiction to review per curiam decisions where the only case cited is not pending before this Court.

Even assuming arguendo that the district court intended to dismiss the case for lack of jurisdiction, rather than affirm, no conflict is established. All district courts agree that a motion for rehearing is not expressly authorized in rule 3.800, and so the filing of a motion for rehearing from the denial of a motion to correct an illegal sentence does not toll the time for filing a notice of appeal. The cases Petitioner relies on for conflict all concern motions for rehearing under rule 3.850, which are expressly authorized under that rule and so toll the time for filing a notice of appeal.

There is no conflict between the decision below and any other decision and so this Court should not exercise jurisdiction to consider this case.

ARGUMENT

THERE IS NO CONFLICT OF DECISIONS
BETWEEN THE DECISION IN THIS CASE
AND ANY OTHER CASE.

Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In Reaves v. State, 485 So.2d 829 (Fla. 1986), this Court held that the only facts relevant to the decision to accept or reject petitions for review are those facts contained within the four corners of the majority decision; neither the dissenting opinion nor the record may be used to establish jurisdiction. Moreover, jurisdiction depends upon whether the conflict between decisions is express and direct and not whether the conflict is inherent or implied. Dept. Of HRS v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986). The district courts are ordinarily the court of final appellate jurisdiction, and this Court's review on the basis of conflict of decisions is limited. Viewed in this light, there is no basis to exercise jurisdiction in this case.

This case is before the Court from a per curiam: affirmed

decision from the District Court of Appeal, Fifth District, with a citation to Mathis v. State, 720 So.2d 1116 (Fla. 5th DCA 1998). Petitioner contends that this decision is in conflict with other decisions and that this Court should exercise jurisdiction. The first reason why this Court should not accept jurisdiction in this case is because the Mathis case is not pending before this Court. No express and direct conflict of a citation PCA is apparent unless the cited case is pending before this Court. Jollie v. State, 405 So.2d 418 (Fla. 1981); see also, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The second reason that this Court lacks jurisdiction is because Petitioner relies upon cases decided by the fifth district to establish conflict. This Court's jurisdiction lies only to correct inter-district conflict, not intra-district conflict. The rule requires express and direct conflict with a decision of *another* district court of appeal or the supreme court on the same question of law. Fla.R.App.P. 9.030(2).

Even if this Court considers the merits of this case, there is still no conflict. The underlying issue in this case is whether or not a motion for rehearing of an order denying a motion to correct sentence pursuant to rule 3.800 tolls the time for filing a notice of appeal. Even assuming arguendo that the district court intended to dismiss the case for lack of

jurisdiction, rather than affirm, no conflict is established. All district courts agree that a motion for rehearing is not expressly authorized in rule 3.800, and so the filing of a motion for rehearing from the denial of a motion to correct an illegal sentence does not toll the time for filing a notice of appeal. Mincey v. State, 789 So.2d 492 (Fla. 1st DCA 2001); Dawson-Knapp v. State, 679 So.2d 1 (Fla. 2d DCA 1995); Newman v. State, 610 So.2d 455 (Fla. 4th DCA 1992). This Court has cited these cases with approval in unpublished orders. See, Marion v. State, Case No. SC02-732 (Fla. October 9, 2002).

The cases Petitioner relies on for conflict all concern motions for rehearing under rule 3.850, which are expressly authorized under that rule and so toll the time for filing a notice of appeal. Not only are these decisions other fifth district cases, they are distinguishable as rule 3.850 and not rule 3.800 cases.

This Court lacks jurisdiction to consider the decision below because it is a per curiam: affirmed decision that does not cite to a case currently pending before this Court. Second, Petitioner relies upon other cases decided by the fifth district to establish conflict, and not decisions from other district courts of appeal. This Court has jurisdiction to resolve inter-district conflict, not multiple decisions from the same district

court. Finally, all districts courts agree that a motion for rehearing is not authorized for orders denying motions to correct illegal sentences under rule 3.800, and so the time for filing a notice of appeal is not tolled by the motion for rehearing. Petitioner has failed to demonstrate any basis for this Court to exercise jurisdiction in this case.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Court to decline to exercise its discretion to accept jurisdiction of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Brief has been furnished by U.S. Mail to Francisco Varela, DC# X33380, at Century Correctional Institution, 400 Tedder Road, Century, FL 32535, this ____ day of July, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FRANCISCO VARELA,

Petitioner,

v.

Case No. SC03-0318

STATE OF FLORIDA,

Respondent.

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APPENDIX

Varela v. State,

Case No. 5D03-892 (Fla. 5th DCA May 20, 2003).....1

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TABLE OF AUTHORITIES

<u>Dawson-Knapp v. State,</u> 679 So.2d 1 (Fla. 2d DCA 1995)	5
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