

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC03-821**

**JAVIER GONZALEZ,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

\*\*\*\*\*

ON PETITION FOR DISCRETIONARY REVIEW

FROM THE THIRD DISTRICT COURT OF APPEAL

\*\*\*\*\*

**RESPONDENT'S BRIEF ON JURISDICTION**

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## **INTRODUCTION**

The Petitioner, **JAVIER GONZALEZ**, was the Defendant below, and the State of Florida was the prosecution. In this brief, the parties will be referred to as they stood in the proceedings below, or as Petitioner and Respondent. All references to the attached appendix will be designated “App.” followed by the appropriate page number.

## **STATEMENT OF THE CASE AND FACTS**

The statement of the case and facts is succinctly recited in the Third District opinion (App. A) which is recited here for the Court’s convenience.

Javier Gonzalez was charged in count 1 with burglary of a dwelling with assault while armed with a dangerous weapon (a screwdriver), and in count 2 with possession of burglary tools (the screwdriver).

In the middle of the day, the victim, a 12 year old girl, was getting ready to leave with her mother and went out to her carport intending to wait in the family car. As she approached the car, she saw Gonzalez crouching over inside the open door of a utility room at the rear of the carport, shoving things around with his hands. The utility room door was normally kept closed with a concrete block against the bottom of it to hold it shut, and the yard of the house was fenced and gated, although the record does not establish whether the gate was locked. Gonzalez turned around, approached the victim, and raised a 12-inch long screwdriver from his side as he came around the car. The victim testified Gonzalez had a threatening expression.

Scared, and thinking Gonzalez had a machete, she retreated, saying she had to go talk to her mother, and Gonzalez said he was just trying to get out of the rain. As the victim ran inside screaming, "Mommy, he's going to kill me," Gonzalez picked up his own bike, which was on the ground next to the car, and rode away. Mother and daughter ran outside in time to see Gonzalez depart, and later identified him for police who found him on his bike near the house, with the screwdriver. Gonzalez confessed to trespassing.

The jury returned a verdict convicting Gonzalez on count 1 of burglary of a dwelling without an assault, while being armed, this being one of the lesser included offenses on which the jury was instructed. On count 2 Gonzalez was convicted of possession of burglary tools, as charged. Gonzalez challenges both convictions. We affirm the conviction on count 1, and reverse the conviction on count 2.

## **POINTS INVOLVED ON APPEAL**

**WHETHER THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF ANY DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW?  
(Restated)**

## **SUMMARY OF THE ARGUMENT**

Respondent respectfully requests this Court, in its discretion, to decline to accept jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Third District Court of Appeal expressly and directly conflicts with a decision of this Court or of another district court of appeal on the same question of law, or that it falls under any of the subdivisions provided in Fla. R. App. P. 9.030(a)(2), or Art. V, Section 3(b)(3), Fla. Const. (1980). Express and direct conflict simply does not appear within the four corners of the Third District's decision.

## ARGUMENT

### THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF ANY DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which **expressly and directly conflicts** with a decision of **another** district court of appeal **or of the Supreme Court** on the **same question of law**. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id. Intradistrict decisions that allegedly conflict are not the subject of this Court's discretionary jurisdiction. In re Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370, 1375 (Fla. 1980)("The new Article also terminates Supreme Court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in Rule 9.331"). Here,

Petitioner submits that the decision of the Third District Court below expressly and directly conflicts with decisions of this Court and the First, Fourth, and Fifth District Courts of Appeal. However, Petitioner's allegation that the District Court's decision below expressly and directly conflicts with decisions of other District Courts or of this Court fails. It is well established that inherent or "implied" conflict cannot serve as a basis for the discretionary jurisdiction of this Court. Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

The Petitioner claims that the decision of the Third District Court of Appeal is in direct conflict with the First District Court's decision in D.C.v. State, 567 So. 2d 998 (Fla. 1st DCA 1990); the Second District's decision in Williams v. State, 651 So.2d 1242 (Fla. 2d DCA 1995); the Fourth District in Arroyo v. State, 564 So.2d 1153 (Fla. 4th DCA 1990); and Nicarry v. State, 795 So.2d 1114 (Fla. 5th DCA 2001). Petitioner contends that these cases are in conflict because the Third District did not reverse the armed burglary charge. Petitioner argued that:

a screwdriver is a "dangerous weapon" only if used as such, Vincente v. State, 669 So. 2d 1119 (Fla. 3d DCA 1996), and that since the jury acquitted Gonzalez of assault, the jury necessarily determined thereby that the screwdriver was not used as a dangerous weapon. Thus, Gonzalez argues, he could not have been "armed," relying heavily upon Nicarry v. State, 795 So. 2d 1114 (Fla. 5th DCA

2001), rev. denied, 819 So. 2d 138 (Fla. 2002).

The Third District distinguished Nicarry from Petitioner's case because Nicarry involved interlocking charges where an acquittal on one charge was truly inconsistent with a finding in a separate charge. Here, as the Third District notes, there was a single count of armed burglary with an assault and the jury found an armed burglary without an assault as a lesser include offense. Respondent contends that there is no conflict with Nicarry.

Arroyo is likewise distinguishable. In that case, which relied heavily on the Third District decision in State v. Nixon, 295 So.2d 121 (Fla. 3d DCA 1974), the Court found that the pocketknife used in the burglary was not a dangerous weapon. There, the Court found, "Thus, the pocketknife in this case could also be a dangerous weapon if it was used in a manner likely to produce death or great bodily injury. A review of the record indicates that such was not the case here." Arroyo at 1155. The Court found that it was not the case because, "No such evidence was presented to the jury." *Id.* In Petitioner's case, however, there was evidence presented to the jury that Petitioner had a twelve inch long screwdriver which was mistakenly taken to be a machete, that the victim was scared, and Petitioner had a threatening expression as he came around the car toward the victim. (App. A).

Here, unlike Arroyo, the Third District found that there was competent and

substantial evidence to support the finding of the jury. The State submits that no conflict exists with Arroyo.

The State maintains that no conflict exists on this issue between either of the two remaining cases cited by Petitioner, D.C.v. State, 567 So. 2d 998 (Fla. 1st DCA 1990), and Williams v. State, 651 So.2d 1242 (Fla. 2d DCA 1995). In D.C. v. State, the Court found that a can of deodorant spray was not a deadly weapon to sustain an aggravated battery charge because the State failed to submit any evidence to show that spraying a person at close range with the aerosol spray is likely to cause death or great bodily harm. D.C. v. State at 1000. The Second District Court in Williams found that the use of hot coffee did not constitute the use of a weapon under the robbery statute. Once again, the State failed to present evidence to prove hot coffee was a weapon. The Court, citing to D.C. v. State, held that, “the evidence presented in this particular case was insufficient to establish that the coffee was a weapon under the robbery statute. . . .” Williams at 1243. Respondent claims that there is no “express conflict” in the decision below with the cases cited by Petitioner.

Petitioner also claims conflict with the decision below and this Court’s decision in State v. Weller, 590 So.2d (Fla. 1991). That case dealt with the refusal of the trial court to give an instruction on all three of the trafficking offenses involving 28 or more grams of cocaine which is irrelevant to the instant case as the instant case does not

include different penalties for trafficking based on weight and since this is not a trafficking case, no express and direct conflict exists. Also, in this case, the trial court gave the instruction as requested by Petitioner's counsel. (App. A). Petitioner appears to argue that since the jury was instructed on an offense which was not truly a lesser included offense, i.e., burglary of a dwelling without an assault while being armed, his counsel was ineffective and that ineffectiveness is apparent from the record. Accordingly, the argument continues, the Third District should have ruled on it.

The Third District held that the claim of ineffectiveness of trial counsel, raised for the first time on direct appeal, was not cognizable. Indeed, the very case relied upon by Petitioner states, "Generally, ineffective assistance of counsel is a collateral matter which should be addressed through a motion for post-conviction relief." Stewart v. State, 420 So. 2d 862 (Fla. 1982) at note 4. Here, the Third District has instructed Petitioner to proceed with his claim through a motion for post conviction relief. The Third District has not established a point of law which is contrary to decisions of this Court or any other District Court of Appeal.

"As we recently noted in Reaves v. State, 485 So.2d 829, 830, (Fla.1986), '[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." Department of

Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). The Third District's holding in this case does not conflict with any decision of this Court or any other District Court of Appeal.

Here, Petitioner would have this Court find that the Third District impliedly created a conflict by their decision. This course is forbidden by Reaves v. State, supra. "While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." The Florida Star v. B.J.F., 530 So.2d 286, 288-289 (Fla. 1988). The State submits that the decision below establishes no point of law contrary to the decisions of this Court or another District Court of Appeal.

Accordingly, since Petitioner has not shown any **express and direct conflict** within the four corners of the district court's opinion, this Court's jurisdiction has not been established and Respondent respectfully requests that jurisdiction be declined.

## CONCLUSION

Based upon the foregoing arguments and cited authorities, the Respondent respectfully requests that this Honorable Court REJECT discretionary jurisdiction in this cause.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to **JAVIER GONZALEZ**, DC#M17315, Century Correctional Institution, 400 Tedder Road, Century, FL 32535 this \_\_\_\_\_ day of September, 2003.

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**THOMAS C. MIELKE**  
Assistant Attorney General

**CERTIFICATION OF FONT AND TYPE SIZE**

**I HEREBY CERTIFY** that the font and type size in this response complies with Fla.R.App.P. requirements in that Times New Roman 14 point was utilized.

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**THOMAS C. MIELKE**  
Assistant Attorney General

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**APPENDIX**

Appendix "A"      Third District's Opinion in case number 3D03-415 of April 9, 2003.

# **APPENDIX A**

