

IN THE SUPREME COURT OF FLORIDA

STANLEY COBB,

Petitioner,

v.

Case No. SC05-1365

Lower Tribunal No. 2D04-5608

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On June 10, 2005, the Second District Court of Appeal affirmed the denial of Petitioner's motion filed pursuant to Fla. R. Crim. P. 3.800(a) without prejudice to any right Petitioner may have to file a timely and facially sufficient motion pursuant to Fla. R. Crim. P. 3.850, citing Cooper v. State, 817 So. 2d 934 (Fla. 3d DCA 2002). The Second District Court of Appeal subsequently denied Petitioner's motion for rehearing, on July 11, 2005.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to hear this case since Petitioner fails to raise an issue in which discretionary review by this Court may be sought. Moreover, the Second District Court of Appeal's opinion in the instant case is not in direct conflict with other district courts or this Court. Thus, discretionary jurisdiction for review is not warranted.

ARGUMENT

**THE FLORIDA SUPREME COURT LACKS DISCRETIONARY
JURISDICTION TO REVIEW THE SECOND DISTRICT COURT OF
APPEAL'S DECISION.**

Pursuant to Fla. R. App. P. 9.030(a), this Court lacks jurisdiction to hear this case. Petitioner fails to raise an issue in which discretionary review by this Court may be sought. Petitioner argues that this Court should invoke its discretionary jurisdiction because the Second District Court of Appeal's decision in his case denied him "relief on merits of fundamental error." There being no basis alleged by Petitioner for discretionary jurisdiction, this Court should decline to accept jurisdiction.

Petitioner does not legally base this petition on express or direct conflict of the district court decision with that of another district court or a decision of this Court. Petitioner cites two cases: Hooters of America, Inc. v. Carolina Wings, Inc., 655 So. 2d 1231 (Fla. 1st DCA 1995) and Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970), which he erroneously claims are in direct conflict with his case. Hooters of America and Sanford both addressed fundamental error. The First District in Hooters of America held that fundamental error can be considered on appeal without objection in the lower court, even if not properly presented below, if the error amounted to a denial of

due process. In Sanford, this Honorable Court further discussed the principles of fundamental error. These cases do not reflect a direct conflict with the Second District's decision in this case. Here, the court simply affirmed the denial of Petitioner's motion filed pursuant to Fla. R. Crim. P. 3.800(a) without prejudice to any right Petitioner may have to file a timely and facially sufficient motion pursuant to Fla. R. Crim. P. 3.850. None of the case law relied on by Petitioner compels a grant of jurisdiction in this case. The cases relied on by Petitioner fail to show any conflict with the Second District's holding. The opinion solely directed Petitioner in filing the proper pleading, which Petitioner ignored, as he is instead seeking discretionary jurisdiction in this Honorable Court.

Petitioner's argument fails to show any conflict between the Second District's opinion and the decision of another district court or a decision of this Court. Thus, these issues do not warrant discretionary review since it appears that this Court does not have jurisdiction pursuant to Art. V, Section 3(b)(3) & (b)(4), Fla. Const.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court deny jurisdiction for review of the decision of the Second District Court of Appeal.

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 E-Mail and U.S. Regular Mail to Stanley D. Cobb, Inmate No. 247904, Taylor Correctional Institution Annex K1109L, 8629 Hampton Springs Road, Perry, Florida 32348, this 14th day of September 2005.

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT 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).

COUNSEL FOR RESPONDENT