

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1369

Lower Tribunal Case No. 3D03-2697

STEPHEN EDWARD ROLLE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Florida Bar No. 0230987
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305)377-5441
(305)377-5655 Facsimile

JILL K. TRAINA

Assistant Attorney General
Florida Bar No. 0378992

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STATEMENT REGARDING APPENDIX

As the petitioner has not provided the respondent with an appendix containing a conformed copy of the decision of the district court of appeal, as required by Fla.R.App.P. 9.120(d) and as ordered by this Court on August 28, 2005, the respondent has attached an appendix with a conformed copy of the May 11, 2005 opinion of the Third District Court of Appeal to this brief and references to the opinion are abbreviated to as AA.@ followed by the page number. Conflict with these cases does not appear within the four corners of the lower court's opinion. Facts addressed by the petitioner in his jurisdictional brief do not appear in the lower court's opinion. Additionally, the cases relied upon by the petitioner to show conflict are distinguishable from the lower court's opinion.

STATEMENT OF THE CASE AND FACTS

The respondent prefaces this Statement of the Case and Facts with the observation that facts alleged in the arguments

contained in the petitioner's brief on jurisdiction differ from the facts in the record on appeal which were relied upon by the respondent in its brief of appellee and the lower court in its May 11, 2005 opinion in Case No. 3D03-2697. In this brief, the respondent has sought to respond to the petitioner's claims while referring only to the facts discussed in the lower court's May 11, 2005 opinion, which facts are reflected in the record on appeal. Pursuant to Article V, Sec. 3(b)(3) of the Florida Constitution, conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

The appellant was convicted in 1998 of burglary of an unoccupied dwelling and resisting an officer without violence. (A.1-2). The petitioner filed a sixth motion to either correct illegal sentence or for postconviction relief. (A.2) This sixth motion was a Florida Rule of Criminal Procedure 3.850 motion, which the trial court summarily denied as successive, finding that there had been at least one prior denial of a motion for postconviction relief, one denial of a request for a deferred ruling on a successive motion for postconviction relief, and a striking of the defendant's pleadings concerning a successive

motion for postconviction relief. (A.2).

Initially, the lower court held in its April 6, 2005 opinion that the appeal was both time barred and procedurally barred as successive. Rolle v. State, 30 Fla. L. Weekly D914 (Fla. 3d DCA April 6, 2005). Upon granting the petitioner's motion for rehearing on May 11, 2005, the April 6, 2005 opinion was withdrawn and the lower court found the appeal of the denial of the most recent motion for postconviction relief was barred as successive and affirmed the trial court's order. (A.1-2).

The petitioner filed in this Court a motion for extension of time on July 26, 2005, which was treated as a notice to invoke discretionary jurisdiction. An initial brief on jurisdiction was filed by the petitioner on August 26, 2005 and this respondent's brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

The lower court's May 11, 2005 opinion does not expressly and directly conflict with Reid v. State, 724 So.2d 127 (Fla. 1st DCA 1998) Orosco v. State, 730 So.2d 815 (Fla. 2d DCA 1999) or Miles v. State, 752 So.2d 1247 (Fla. 4th DCA 2000).

Conflict with Reid, Orosco and Miles does not appear within the four corners of the lower court's opinion. Facts argued by

the petitioner in his jurisdictional brief do not appear in the four corners of the lower court's opinion. Additionally, the above cases relied upon by the petitioner do not show express and direct conflict with the lower court's opinion as they are factually and legally distinguishable from the lower court's opinion.

ARGUMENT

- I. **THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE DISTRICT COURTS IN REID V. STATE, 724 So.2d 127(Fla. 1st DCA 1998) OR OROSCO V. STATE, 730 So.2d 815 (Fla. 2d DCA 1999).**

Pursuant to Article V, Sec. 3(b)(3) of the Florida Constitution, conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Reaves v. State, supra at 830. The petitioner has violated the rule that conflict between decisions must appear within the four corners of the majority decision by repeatedly referring to facts which were not in the May 11, 2005 opinion in this case.¹ Additionally, those facts, raised by the

¹For example, the petitioner claims in Ground I that a January 16, 2003 Rule 3.850 motion was the initial Rule 3.850 filed and on February 28, 2003 the petitioner filed a second

petitioner in the Argument section in the petitioner's brief on jurisdiction, differ from the facts in the record on appeal which were relied upon by the respondent in its brief of appellee as well as the lower court in its May 11, 2005 opinion in Case No. 3D03-2697. The petitioner does not show that the May 11, 2005 opinion expressly and directly conflicts with other district court opinions, but rather reaches outside of the four corners of the opinion and cites his own version of facts which are not a part of that opinion.

Additionally, the discretionary jurisdiction of this Court may not be sought to review decisions of the district courts of appeal that do not expressly and directly conflict with a decision of another district court of appeal or of this Court on the same question of law. Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

The lower court's April 13, 2005 opinion does not expressly and directly conflict with the this Court's decisions in Reid v. State, supra or Orosco v. State, supra and therefore this Court

Rule 3.850 motion. In Ground 2 he also claims that he had a public records request pending prior to filing his first Rule

does not have jurisdiction to review it.

Reid v. State, supra, held that the Rule 3.850 motion, which raised a claim of ineffective assistance of counsel in the guilt phase, should not be considered successive because the first two motions Reid filed were Rule 3.800(a) motions which raised only sentencing issues, and the trial court treated the Rule 3.800(a) motions as filed pursuant to Rule 3.850 because of the unique circumstances of the claims. The lower court's opinion in the instant case does not expressly and directly conflict with Reid because the motion reviewed was at least the petitioner's third consecutive motion filed pursuant to Rule 3.850. The trial court denied this motion stating that there is at least one prior denial of the motion for postconviction relief, one denial of a request for a deferred ruling on a successive motion for postconviction relief, and a striking of the defendant's pleadings concerning a successive motion for postconviction relief. (A.2). In the instant case, the prior motions which resulted in the most recent Rule 3.850 motion being ruled successive were Rule 3.850 motions, not Rule 3.800(a) motions that were treated as Rule 3.850 motions.

3.850 motion which was denied as legally insufficient.

In Orosco v. State, supra, a prior Rule 3.850 motion had been filed claiming that the trial court failed to inform him that by pleading guilty he could be subject to deportation. His next Rule 3.850 motion claimed that his sentence was illegal because he lacked the necessary predicate offense, a claim which is facially sufficient for a Rule 3.800(a) motion which allows for raising a claim at any time. Because the second Rule 3.850 stated a claim that was facially sufficient under Rule 3.800(a), it was not successive. However, Orosco is distinguishable from the instant case because the claims raised in the instant motion were not facially sufficient under Rule 3.800(a). Rather, the instant motion was at least the petitioner's third consecutive motion filed pursuant to Rule 3.850.

Therefore, the May 11, 2005 opinion in this case is not in express and direct conflict with Reid and Orosco.

II. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT IN MILES V. STATE, 752 So.2d 1247 (FLA. 4th DCA 2000).

In Miles v. State, supra, the Fourth District Court of Appeal affirmed the denial of the Rule 3.850 motion, but noted that if the public records request that was pending when the

motion was filed led to newly discovered facts, the affirmance was without prejudice to file a new motion based on that information. Miles is distinguishable from the instant case, because in Miles the Rule 3.850 motion was denied on the merits, and the district court affirmed without prejudice to file a new motion if the pending records request yielded new discovered facts. In the present case, what was at least the third Rule 3.850 motion was denied as successive, not on the merits, and there was no pending public records request. The petitioner's prior Rule 3.850 motion was also denied as successive, and any information that might have been recovered from a public records request that was the basis for the petitioner's motion for a deferred ruling which was denied, could not have changed the outcome because the motion was successive². Therefore, the holding in Miles did not apply and the May 11, 2005 opinion in the instant case did not expressly and directly conflict with Miles.

CONCLUSION

Based on the foregoing authorities and arguments, the

²In the denial of the instant motion on the grounds that it is successive, the trial court ruled that there had been a denial for a deferred ruling on a successive motion for

Respondent State of Florida respectfully requests that this Court decline to exercise its discretionary jurisdiction.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Miami, Florida 33131
(305)377-5441
(305)377-5655 Facsimile

Assistant Attorney General
Florida Bar No. 0378992

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 6th day of October, 2005 to Stephen Rolle, DC #449128, Gulf Correctional Institution Annex Q3214 U, 699 Ike Steele Road, Wewahitchka, Florida 32465.

JILL K. TRAINA

postconviction relief. (A.2).

Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with the font standards required by Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and is submitted in Courier New 12-point font.

JILL K. TRAINA
Assistant Attorney General