IN THE SUPREME COURT OF FLORIDA

ROBERT E. McDANNOLD,

Petitioner,

Case No. SC07-1507

v.

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Robert McDannold, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as "slip op."]. It also can be found as McDannold v. State, 959 So.2d 320 (Fla. 1st DCA 2007).

SUMMARY OF ARGUMENT

Petitioner has improperly relied upon the record in the trial court. The appropriate focus upon the operative facts, as contained within the "four corners" of the DCA's decision, reveals no express and direct conflict with this Court or another DCA. Therefore, there is no expressed and direct conflict, and this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

ISSUE I

WHETHER THE FIRST DISTRICT'S OPINION IN McDANNOLD V. STATE IS IN EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION IN QUARREL V. MINERVINI, THE FIFTH DISTRICT'S DECISION IN ERWIN V. TODD, OR THE FOURTH DISTRICT'S DECISION IN LIBERATE V. KAUFMAN? (Restated)

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides: The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a

dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So.2d 974 (Fla. 2002).

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained: It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite that of Quarrel v. Minervini, 510 So.2d 977

(Fla. 3rd DCA 1987), Erwin v. Todd, 699 So.2d 275 (Fla. 5th DCA 1997 or Liberate v. Kaufman, 835 So.2d 404 (Fla. 4th DCA 2003).

The decision below is not in "express and direct" conflict with Quarrel, Erwin or Liberate.

In its written opinion, the First District affirmed the denial of Appellant's claim that his attorney was ineffective for failing to object to the expert's improper bolstering. The First District held that while the expert's reference to a study was improper, the appellant had failed to establish that but for the "bolstered" testimony the outcome of the proceeding would have been different. The First District also did not remand for reconsideration of appellant's eleventh ground for relief which the Circuit Court had failed to address because the District Court found that the claim was facially insufficient.

Petitioner claims conflict on two points seen in the decision of the First District below: *One*, bolstering of an expert's opinion by reference to a "study[.]" *Two*, failure to order remand on a claim not addressed by the Circuit Court in the 3.850 action. Lastly, Petitioner also endeavors to raise an "intrinsic fraud" claim that is nowhere to be seen in the First District's decision.

Bolstering

An important prefatory note must be emphasized: all three of Petitioner's cited cases on the bolstering issue are civil medical malpractice cases. None of them deal with the issue addressed by the First District below: a harmless error analysis of a bolstering claim in the context of a claim of ineffective assistance of counsel in a criminal prosecution. Respondent submits that no conflict can be found on that basis alone. The issue upon which Petitioner claims conflict with the decision below is literally unmentioned in the three cases he cites.

And it is to be noted that all the First District did was to acknowledge the impropriety of bolstering, but hold the error harmless on this record under the standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Slip opn. at pp. 1-2. Such harmless error analysis is what a District Court is supposed to do. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) adopting harmless error test of claimed Constitutional violations set out in Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Nor is there anything noteworthy or improper as to the First District's conclusion below that the bolstering, although error, was harmless error given the "minimal bolstering" and the otherwise "substantial testimony from Dr. Aruzza, based on her

personal experience and expertise[.]" Slip opn., p. 2. Thus, no conflict, much less express and direct conflict has been established over the First District's harmless error finding below and any case cited by Petitioner.

No Remand Ordered

The second claim, that conflict is shown by the First District's holding that no reversal to the Circuit Court is required because the claim was facially invalid (slip opn., pp. 2-3), and that such expressly and directly conflicts with Freeman v. State, 671 So.2d 764 (Fla. 2nd DCA 1993) likewise demonstrates no conflict jurisdiction. In its decision below, the First District expressly recognized that remand to the Circuit Court to review unaddressed claims is the ordinary practice. Here, however, the newly discovered evidence claim was held to be facially invalid.

Freeman simply and properly, on the facts presented there, ordered remand for the Circuit Court to address a "facially sufficient allegation." 617 So.2d at 765. Here the claim is facially invalid. There is thus no conflict between Freeman's holding of remand to address a facially sufficient allegation and the First District's holding here of no need to do so because the claim is facially invalid.

The First District's conclusion that the claim was facially invalid is unremarkable and correct, because Petitioner did not show the information undiscoverable despite due diligence, or that it would probably produce an acquittal on retrial. This is a pedestrian legal conclusion, well in alignment with the law of this State.

Intrinsic Fraud Claim

Petitioner conclusorily asserts "intrinsic fraud" on the part of the expert. This claim is expressly based on his view of the record. (IB, p. 6). Such reliance on the record, rather than on the four corners of the District Court decision is improper and shows no basis for jurisdiction. Reaves, supra. No hint of an "intrinsic fraud" analysis is to be found in the First District decision.

Respondent does not quarrel with the unremarkable premise that fraud upon a court can be raised at any time, but observes that no colorable claim of such fraud can plausibly be maintained on the facts noted in the First District's decision.

There is no express and direct conflict on any claim Petitioner raises here, therefore this Court should dismiss this case for lack of jurisdiction.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert E. McDannold, *pro* se, DOC#J17688, Baker CI, PO Box 500, Sanderson, Fl. 32087, by MAIL on this 10th day of September, 2007.

Respectfully submitted and served,

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[AGO# L07-1-25039]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Daniel A. David
Attorney for State of Florida

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APPENDIX

McDannold v. State, slip opinion