

COPY

IN THE SUPREME COURT OF FLORIDA

**FILED
THOMAS D. HALL**

ROBERT E. McDANNOLD,
Petitioner,

2007 AUG 17 A 10: 59

CLERK, SUPREME COURT

—vs—

Case No.: 07-1507

(To be ^{BY} supplied by Clerk) —

STATE OF FLORIDA,
Respondent.

L.T. No.: **1D06-5481**

PETITIONER'S JURISDICTIONAL BRIEF

**ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA**

Robert E. McDannold, #J17688
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Petitioner, *pro se*

TABLE OF CONTENTS

	Page No(s).
TABLE OF CITATIONS	i
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	3
JURISDICTIONAL STATEMENT	4
ARGUMENT:	
The decision of the First District Court of Appeal in this case expressly and directly conflicts with other decisions of the District Courts <i>Liberate v. Kaufman</i> , 835 So.2d 404 (Fla. 4 th DCA 2003); <i>Quarrel v. Minervini</i> , 510 So.2d 977 (Fla. 3 rd DCA 1987), review denied 519 So.2d 987 (Fla. 1988); <i>Erwin v. Todd</i> , 699 So.2d 275 (Fla. 5 th DCA 1997) and <i>Freeman v. State</i> , 617 So.2d 764 (Fla. 2 nd DCA 1993).	5
CONCLUSION	7
CERTIFICATE OF SERVICE	7
CERTIFICATE OF COMPLIANCE	7

TABLE OF CITATIONS

<u>Cases</u>	<u>Page No(s).</u>
<i>Erwin v. Todd</i> , 699 So.2d 275 (Fla. 5 th DCA 1997)	5
<i>Freeman v. State</i> , 617 So.2d 764 (Fla. 2 nd DCA 1993)	5
<i>Liberate v. Kaufman</i> , 835 So.2d 404 (Fla. 4 th DCA 2003)	5
<i>Quarrel v. Minervini</i> , 510 So.2d 987 (Fla. 1988), review denied, 519 So.2d 987	5
<i>State v. Burton</i> , 314 So.2d 136 (Fla. 1975)	6
<u>Statutes</u>	
Fla. Statute 90.706	5

STATEMENT OF THE CASE AND FACTS

The Petitioner filed a motion for Post-conviction Relief under Fla. R. Crim. P. 3.850 in the Circuit Court of Clay County, Fourth Judicial Circuit on April 14, 2004, a first Supplement on July 7, 2005 to his post-conviction motion and a second Supplement on February 21, 2006.

On August 22, 2006, the Circuit Court entered an order summarily denying Petitioner's motion. However, the order of denial from the trial court addressed the 3.850 motion and the first Supplement, but failed to enter an order on the second Supplement; which raised intrinsic fraud practiced on the trial court by a state witness. Petitioner filed timely Notice of Appeal on September 20, 2006, and filed an Initial Brief on October 19, 2006.

The First District Court affirmed, *per curiam*, the trial court's order via written opinion on May 17, 2007, holding that while the issue of the state's expert bolstered her testimony was indeed improper, the Record attachments provided by the trial court conclusively refuted the claim and thus the issue amounted to harmless error.

The First District also held that generally remand would be required when a trial court failed to rule on an issue raised in a post-conviction proceeding. The District Court held the claim facially invalid as it misconstrued the claim as newly discovered evidence.

A timely Motion for Rehearing was filed on June 4, 2007, and was denied on July 13, 2007. Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on August 6, 2007.

SUMMARY OF THE ARGUMENT

In this case, the District Court's holding as to the bolstering of the State's expert witness on direct examination as a "treatise" and/or "study" agrees with their opinion, does not constitute reversible error, and the holding that a claim not addressed by the trial court in a post-conviction motion should not be remanded back for the trial court's consideration and an order entered thereon is in direct and express conflict with other decisions from various District Courts on the same points of law.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of other District Courts of Appeal on the same point of law. Article V, section 3(b)(3), Florida Constitution (1980); Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DECISIONS OF THE DISTRICT COURTS ON THE SAME POINTS OF LAW.

In this case, the District Court of Appeal held that even though the bolstering was based upon a study and indeed improper, the Record attachments conclusively refuted the claim. The decision of the District Court cannot be reconciled with previous decisions of other District Courts: *Liberate v. Kaufman*, 835 So.2d 404 (Fla. 4th DCA 2003); *Quarrel v. Minervini*, 510 So.2d 977 (Fla. 3rd DCA 1987), review denied 519 So.2d 987 (Fla. 1988); *Erwin v. Todd*, 699 So.2d 275 (Fla. 5th DCA 1997), wherein the Courts interpreted Section 90.706, Fla. Stat. Requires that experts cannot, bolster their testimony by testifying that a treatise agrees with their opinion.

Further, the District Court of Appeal held that although we would generally remand an issue not addressed by a trial court in a post-conviction motion, the court held that the claim was facially invalid, as the court misconstrued the claim as one asserting newly discovered evidence. However, the claim actually asserted by Petitioner in the trial court was one of intrinsic fraud practiced on the court by a state witness.

This decision of the District Court cannot be reconciled with a previous decision of the Second District Court in *Freeman v. State*, 617 So.2d 764 (Fla. 2nd

DCA 1993), wherein the District Court held that the trial court's order of denial that doesn't address an allegation must be remanded for the trial court to consider the claim.

The First District incorrectly interpreted section 90.706, Fla. Stat., as to the bolstering of expert witness testimony. The Third District in *Quarrel v. Minervini*, 510 So.2d 977 (Fla. 3rd DCA 1987), review denied 519 So.2d 987 (Fla. 1988); *Liberate v. Kaufman*, 835 So.2d 404 (Fla. 4th DCA 2003) and *Erwin v. Todd*, 699 So.2d 275 (Fla. 5th DCA 1997) entered correct interpretations as to the statutory law, and reversed.

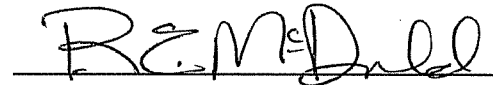
Thus, the conflict of decisions on this point of law. Also, the First District Court held that normally it would reverse an issue not addressed by a trial court in a post-conviction proceeding. Then the court went on to misconstrue the issue raised in the trial court as one of newly discovered evidence and held the claim as invalid. The Record reflects that the claim was one of intrinsic fraud. The Second District correctly held that when an issue in a post-conviction motion is not addressed by the trial court, the District Court must reverse and remand for the trial court to rule on the issue. *Freeman v. State*, 617 So.2d 764 (Fla. 2nd DCA 1993). Thus, the conflict between the District Courts.

It should also be noted that this Court in *State v. Burton*, 314 So.2d 136 (Fla. 1975), held that intrinsic fraud practiced upon the court may be raised at any time.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the Petitioner's jurisdictional argument.

Respectfully Submitted,

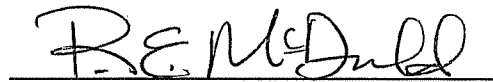


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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Jurisdictional Brief was placed in the hands of prison officials for mailing via regular U.S. Mail this 14 day of August 2007, to be forwarded to the following:

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050.



Robert E. McDannold, *pro se*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this brief was prepared using Times New Roman 14-point font.



Robert E. McDannold, *pro se*