IN THE SUPREME COURT OF FLORIDA

MELVIN B. THOMPSON,

Petitioner,

Case No. SC07-489

v.

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

BILL McCOLLUM
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR 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, Melvin B. Thompson, 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 published Thompson v. State, 949 So. 2d 1169 (Fla. 2007).

SUMMARY OF ARGUMENT

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 BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH THE SECOND AND FOURTH DISTRICTS' DECISIONS IN GOINES V. STATE, 708 SO. 2d 656 (FLA. 4th DCA 1998) AND KLEPPLINGER V. STATE, 884 SO. 2D 146 (FLA. 2D DCA 2004)? (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 decision below reached a result opposite to that in Goines and Klepplinger. The State submits that it does not.

Goines was convicted of selling cocaine and although not imposed, the assistant state attorney filed a notice of intent to seek habitual felony offender sentencing based, in part, on a prior narcotics conviction. Goines filed a motion for post-conviction relief, pursuant to Fla. R. Crim. P. 3.850, asserting that his trial counsel was ineffective for failing to file a motion to disqualify the trial judge who had prosecuted him six years earlier on the prior unrelated narcotics charge relied upon in the notice. The trial court, after various remands for evidentiary hearings which established that counsel's failure to file the motion was a matter of lack memory, not a tactical decision, denied relief on the ground that Goines failed to establish prejudice without making any finding with regard to deficient performance.

The Fourth District Court emphasized the gravity of imposition of a potential HO sentence and found that under the

circumstances, had a motion for disqualification been filed, disqualification would have been required because trial counsel conceded the failure to act on his part was not the result of a tactical decision. Significantly, the Court's decision relied upon Lockhart v. Fretwell, 506 U.S. 364, 373, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) which it asserted altered the prejudice prong of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1982) which requires a showing that the outcome of the proceedings would have been different but for counsel's error, to a standard which requires a determination of whether counsel's deficient performance rendered the proceeding fundamentally unfair.

In Kleppinger, the defendant filed a post-conviction motion pursuant to Fla. R. Crim. P. 3.850, asserting, in part, that counsel was ineffective for failing to file a motion to disqualify the trial judge. Kleppinger's trial involved charges arising from the brutal beating of a corrections officer in the course of an escape attempt. The judge's son was a corrections officer in the same county in which the offense occurred and was a close personal friend of both the victim and witnesses in the case. The trial court denied the motion, finding that Kleppinger's fear of bias was subjective.

On appeal, the Second District Court, applying Goines' interpretation of the prejudice prong of the ineffective assistance standard, reversed, holding that a motion to disqualify on this ground would have been legally sufficient, holding, "[t]his is a specific fact about the trial judge's personal bias or sympathy. It would have placed a reasonable person charged with the brutal assault of a friend of the judge's immediate family in fear of not receiving a fair trial, especially considering the constant taunting by the corrections officers." 884 So. 2d at 149. In so doing, however, the Kleppinger Court specifically noted that its holding was directly contrary to the Florida Supreme Court's holding in Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981).

Here, trial counsel filed a motion to disqualify the judge based upon comments made by him in the course of denying counsel's motion to withdraw which related to the court's belief that Petitioner's threats of violence to counsel and the court were specious because, if convicted on the first degree felony punishable by life, he would serve life in prison and be unable to carry out his threats. Although counsel filed a motion to disqualify the judge based upon the comments, the motion was denied as untimely. As a result, Petitioner filed a motion for post-conviction relief which encompassed both his claim that

counsel was ineffective with regard to the late filed motion and Fla. R. Crim. P. 3.800 claims. The motion was denied by the trial court.

Below, the First District Court found that Petitioner failed to establish the existence of a structural defect, because "appellant's argument is merely that he had a reason to believe that the trial judge appeared to be biased," and "[i]t goes without saying that the appearance of bias, is different from the existence of actual bias, which is checked by a judge's ethical obligation to recuse himself even if no motion to disqualify is ever filed." 949 So. 2d at 1174, fn. 3. The Thompson Court recognized that Petitioner did not allege that the trial judge was biased because of his relationship to the parties, nor did he identify any pecuniary interest in the outcome of the proceedings, or point to any action or inaction on the part of the judge that was not entirely permissible in light of applicable law and attendant circumstances present in the case.

The Court held:

> The Second and Fourth Districts have improperly relied upon the emphasized language (above) to conclude that a defendant's failure to demonstrate how the outcome of the trial, or the sentence imposed, would have been different, does not preclude that defendant from obtaining relief in an ineffective assistance claim. These courts have interpreted *Lockhart* as altering the standard

> handed down in *Strickland.* Essentially, these courts require all ineffective assistance of counsel claims to be reviewed to determine whether *"the result of the proceeding was fundamentally unfair or unreliable,"* even when a defendant cannot show that the result at trial or the sentence imposed would have been different.
>
> This interpretation of *Lockhart,* has led the Second and Fourth Districts to rule that, as a matter of law, when a judge-who would have been forced to recuse himself by a timely filed motion to disqualify-presides over a defendant's trial and sentencing, the defendant is entitled to relief under an ineffective assistance of counsel claim, because such proceedings are fundamentally unfair or unreliable. United States Supreme Court case law, post-dating *Lockhart,* makes it abundantly clear that the Second and Fourth Districts' interpretation of *Lockhart* is manifestly incorrect.
> Id. At 1177.

As shown above, the decision below is factually distinguishable from Goines and Kleppinger as: this case involved a mixed post-conviction motion of ineffectiveness and 3.800 issues; a motion to disqualify was in fact filed, albeit untimely; no allegation of personal bias or pecuniary interest on the part of the judge was established; and, no evidentiary hearing was held below to supply evidence then relied upon by the District Court.

The cases are also distinguishable as they fail to apply the same principle of law to achieve contrary results. The Goines and Kleppinger Courts applied what they perceived to be a new standard established by Lockhart, which they contend altered

that enunciated in Strickland. In direct contrast, the First District Court below applied the test set forth in Strickland.

Therefore, there is no expressed and direct conflict, and this Court must 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 Phil Patterson, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on ____ day of June, 2007.

Respectfully submitted and served,

BILL McCOLLUM
ATTORNEY GENERAL

_____
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

_____
GISELLE LYLEN RIVERA
Assistant Attorney General
Florida Bar No. 0508012

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L07-1-8363]

CERTIFICATE OF COMPLIANCE

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

_____
Giselle Lylen Rivera
Attorney for State of Florida

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APPENDIX

Thompson v. State, 949 So. 2d 1169 (Fla. 1sr DCA 2007)