

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-820
DCA CASE NO. 3D07-3153

JOSE CRUZ,

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

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INTRODUCTION

Petitioner, Jose Cruz, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted and sentenced for armed burglary, armed kidnapping, and two counts of armed robbery. The Third District Court of Appeal affirmed his conviction and sentence with a written opinion. *Cruz v. State*, 660 So. 2d 792 (Fla. 3d DCA 1995) [3D94-1029]. Petitioner thereafter apparently filed and appealed numerous post conviction motions and challenges to his conviction.

In December, 2007, Petitioner filed a notice of appeal in the Third District Court from the denial of a Fla. R. Crim. P. 3.850 motion. On March 31, 2008, the district court ordered Petitioner to show good cause why he should not be precluded from filing further successive pro se pleadings, attacking the convictions and sentences in lower court case number 92-20576. (See Petitioner's Appendix).

In April, 2008, Petitioner filed a pleading in this Court which the Court treated as a notice to invoke discretionary review. On May 12, 2008, Petitioner filed his brief on jurisdiction.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION TO REVIEW THE THIRD DISTRICT COURT OF APPEAL'S OPINION THAT DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. Petitioner does not seek review of any particular opinion of the Third District Court of Appeal. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

PETITIONER’S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner does not seek review of any particular district court decision. Petitioner contends that this Court should invoke its discretionary review power to determine “whether the circuit court of the Eleventh Judicial Circuit, supported by the Third District Court of Appeals affirmance has violated Defendant’s constitutional right to due process, where those decisions are in direct conflict with *Jacobs v. State*, 880 So. 2d 548, 551 (Fla. 2004).” (Petitioner’s Brief on Jurisdiction, p. 7). Petitioner does not indicate what “those decisions” are. Petitioner essentially disagrees with the outcomes of his various post conviction pleadings and seeks some general level of review from this Court. Trial court motions and orders are not subject to review by this Court. Petitioner claims there is direct conflict with *Jacobs*, but does not specify any particular district court decision which he claims is in conflict with *Jacobs*. The Third District Court had not even issued any decision in Petitioner’s case, 3D07-3153, at the time he sought discretionary review in this Court.

To the extent that Petitioner is seeking review of the Third District Court's order to show cause dated March 31, 2008, that order is not a decision of the district court subject to review by this Court pursuant to Fla. R. App. P. 9.030(a)(2). The order to show cause is not a final decision in the case and decides nothing regarding the case; it merely directs Petitioner to file a response in the district court.

The Third District Court issued a decision in Petitioner's case on May 21, 2008, **after** he sought discretionary review in this Court. *Cruz v. State*, __ So. 2d __, 2008 WL 2116916 (Fla. 3d DCA May 21, 2008). Even assuming Petitioner seeks discretionary review of that opinion, no conflict exists. That opinion merely explains that Petitioner failed to show good cause why he should not be barred from filing further pro se pleadings and prohibits him from such future filings. It does not address the merits of Petitioner's post conviction motion and does not address how the trial court should handle a facially sufficient post conviction motion, the subject of *Jacobs*. The Third District Court's opinion also does not certify conflict with any case or certify a question to this Court. There is no express and direct conflict with *Jacobs*, or any decision from this Court or any other district court on the same question of law. Therefore, the Third District Court's opinion does not give rise to any express conflict and this petition to invoke discretionary review must be denied.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to Jose Cruz, DC# 938059, Union Correctional Institution, 7819 NW 228 Street, Raiford, FL 32026 on this ____ day of June, 2008.

ANGEL L. FLEMING
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

ANGEL L. FLEMING
Assistant Attorney General

