

IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC09-635**

Lower Tribunal Case No. 3D02-1842

SHELBY JACKSON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

BILL McCOLLUM
Attorney General

RICHARD L. POLIN
Chief Assistant Attorney General
Florida Bar No. 230987

TIMOTHY R.M. THOMAS
Assistant Attorney General
Florida Bar No. 24959
Department of Legal Affairs
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441 (phone)
(305) 377-5655 (facsimile)

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of aggravated battery after a jury trial in which he represented himself, and that conviction was affirmed on direct appeal. *Jackson v. State*, 2 So. 3d 1036 (Fla. 3d DCA 2009). Petitioner correctly states that the appellate review process took many years, and that a “rapid” and expedited conclusion was forced by intervention of the United States District Court for the Southern District of Florida, at Petitioner’s instigation. (Initial Jurisdictional Brief at 2); *see also*, *Jackson v. McNeil*, 08-20265 (S.D. Fla. 2009). Every other statement made by Petitioner in his Statement of Case and Facts is surplusage not material to the issue at hand.

SUMMARY OF THE ARGUMENT

The Initial Brief on Jurisdiction fails to cite to any opinion of the district courts or of this Court that is in express or direct conflict with the opinion below. The only Florida case cited does not rule differently on the same issue of law, the effectiveness of any *Faretta* inquiry, and does not address the precise issue encompassed in the opinion below, forfeiture or waiver of the right to counsel by the actions of Defendant. This lone Florida case citation is therefore not in conflict with the opinion below.

ARGUMENT

I. PETITIONER HAS FAILED TO SET FORTH ANY COGNIZABLE BASIS FOR DISCRETIONARY REVIEW.

“The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.” Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also*, Art. V, § 3(b)(3) - (4), Fla. Const. This Court’s discretionary review is limited to the facts contained within the four-corners of the lower court decision. *See, Reaves v. State*, 485 So. 2d 829 (Fla. 1986). “[J]urisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case.” *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

Instead of setting forth an allegation of conflict, Petitioner’s Jurisdictional Statement merely re-litigates arguments made to, and properly rejected by, both the trial court and the district court. Petitioner cites three cases in his brief, none of which is in express and direct conflict with the opinion below. Although all three are discussed herein, it should be noted that the first two are not “a decision of

another district court or of the supreme court,” and as such cannot confer conflict jurisdiction on this court. Art. V, § 3(b)(3), Fla. Const.; *see also*, Harry Lee Anstead, *et al.*, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 514 (2005)(“A citation to a statute, administrative, or other rule, federal case, or case from another jurisdiction is insufficient to establish discretion for review”).

In *United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995), the defendant complained that he was denied his right to counsel during a critical stage of the prosecution. *Id.* at 1369. Veras’ first attorney filed a motion to suppress and prepared a reply to the government’s response before withdrawing to accept a position with the United States Attorney’s office. *Id.* A federal public defender was appointed who filed the previously prepared reply, but did not enter his appearance. *Id.* A third attorney then entered his appearance, and was given the opportunity to submit further pleadings or request a hearing, which he declined, before the court ruled on the original motion. *Id.* The circuit court held that although there may have been technical gaps in representation, there was no substantive denial of the right to counsel and “no harm resulted for which the defendant can now complain.” *Id.*

In the instant case, the court below held that “the trial court did not err in requiring Jackson to proceed without counsel.” *Jackson*, 2 So. 3d at 1037. The

opinion cited six federal and state precedents in support of the finding that Petitioner's "recalcitrance, antagonism and even personal attacks upon each of a lengthy series of court-appointed attorneys, all of whom were required to withdraw, rendered it obvious that he simply would not permit himself to be represented by anyone and amounted to a binding forfeiture or waiver of that right." *Id.* As such, *Veras* is not only not in conflict, it is inapposite, because it addressed a gap in representation rather than an outright forfeiture or waiver of the right to counsel.

In *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court established the rule that a post-indictment lineup was a critical stage of the prosecution at which a defendant was entitled to the assistance of counsel. *Id.* at 237. Once again, this case is not only not in conflict with the opinion below, it is hardly instructive. Petitioner complained that he was denied his right to counsel at trial, not at any critical stage prior to trial, and *Wade* does not address the forfeiture or waiver of the expanded right to counsel established.

In *Tyler v. State*, 710 So. 2d 645 (Fla. 4th DCA 1998), the district court held that it was "fundamental error to require Appellant to admit or deny the pending charges without first appointing counsel or securing an informed waiver of his right to counsel." *Id.* at 646. The trial court addressed a group of defendants simultaneously, appointing two public defenders to handle the entire group. *Id.*

Without establishing whether the defendant had taken the opportunity to consult with appointed counsel, or chose to waive counsel, the trial court then invited the defendant to respond to the charges. *Id.* at 646-47. The district court held that the failure to so inquire prevented the finding of an effective waiver in the defendant's responses, citing *Faretta v. California*, 422 U.S. 806 (1975). *Id.* at 647-48.

The holding in *Tyler* is not in conflict with the decision of the court below, either expressly or by inference. Here, the district court characterized the trial court's actions as "attempted *Faretta* inquiries [that] may not have passed legal muster," but also did not constitute error because Petitioner's actions "made it obvious that he simply would not permit himself to be represented" *Jackson*, 2 So. 3d at 1037. Both *Tyler* and *Jackson* applied the same rule, based on *Faretta*, to reach the same conclusion, that the respective inquiries did not establish a waiver of the right to counsel. However, the court below went further to find that Petitioner's actions, outside of the inquiry, "amounted to a binding forfeiture or waiver of that right." *Jackson*, 2 So. 2d at 1037. This holding was entirely outside of the scope of the ruling in *Tyler*, and therefore not in conflict with it.

Petitioner also cites *Brady v. Maryland*, 373 U.S. 83 (1963), in support of his argument, repeated *ad nauseum* at every level of this case, that a video which "captured crimes of public corruption" was material to this case. (Initial Brief at 5). Petitioner appears to add a new twist in his charge that "the video was being

withheld.” *Id.* at 7. This citation fails to invoke the discretionary jurisdiction of this Court, however, because no argument or finding regarding the videotape is mentioned within the four corners of the opinion below. *See, Reaves v. State*, 485 So. 2d 829 (Fla. 1986).

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should decline to accept the instant case for review.

Respectfully Submitted,

BILL McCOLLUM
Attorney General

RICHARD L. POLIN
Chief Assistant Attorney General
Florida Bar Number 230987

TIMOTHY R.M. THOMAS
Assistant Attorney General
Florida Bar Number 24959

Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 650
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 5th day of August, 2009 to Shelby Jackson, DC #195268, Everglades Correctional Institution, P.O. Box 949000, Miami, FL 33194.

I FURTHER CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

TIMOTHY R.M. THOMAS
Florida Bar Number 24959
Assistant Attorney General