

IN THE SUPREME COURT OF FLORIDA

MARK ELLIOTT,

Petitioner,

v.

CASE NO. SC09-1165

LOWER TRIBUNAL CASE NO. 5D08-3465

STATE OF FLORIDA,

Respondent.

_____/

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

BILL McCOLLUM,
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #773026
ANTHONY J. GOLDEN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0162172
444 Seabreeze Blvd.
5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax No. (386) 238-4997

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGES:</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	3

ARGUMENT -- RESTATED

THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUBJUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OF THE CASES CITED BY PETITIONER.	4
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	7
CERTIFICATE OF COMPLIANCE	7

TABLE OF AUTHORITIES

STATE CASES

<u>Calloway v. State,</u>	
658 So.2d 983 (Fla. 1993).....	1
<u>Elliott v. State,</u>	
9 So.3d 660 (Fla. 5 th DCA 2009)	2,5
<u>Hale v. State,</u>	
630 So.2d 521 (Fla. 1993).....	1,4
<u>Jackson v. State,</u>	
926 So.2d 1262 (Fla. 2006).....	4
<u>Reaves v. State,</u>	
485 So. 2d 829 (Fla. 1986)	4
<u>State v. Hill,</u>	
660 So.2d 1384 (Fla. 1995)	4

OTHER AUTHORITIES CITED

Article V, Section 3(b)(3), Florida Constitution	3,4
Fla. R. App. P. 9.210(a)(2)	7
Florida Rule of Appellate Procedure 9.030(a)(2)(A)	3,4

STATEMENT OF THE CASE

Petitioner entered nolo contendere pleas to robbery and possession of a hoax bomb in the commission of a felony in Hernando County Circuit Court Case No. 06-2064. On September 27, 2007, he was found to meet the criteria for sentencing as an habitual felony offender, but the trial court judge chose to impose only five year terms of imprisonment to be followed by ten years of probation on each count.

In his April 11, 2008 Motion to Correct Illegal Sentence, Petitioner argued that his crimes were committed during a single criminal episode and that his sentences for those offenses could not be imposed to run consecutively, citing Hale v. State, 630 So.2d 521 (Fla. 1993). He further argued that this matter was cognizable under Rule 3.800, because the fact that both offenses were committed during the same criminal episode was apparent from the face of the record, citing Calloway v. State, 658 So.2d 983 (Fla. 1993). In its order denying relief on that motion, the trial court judge found the motion to be facially deficient because Petitioner had failed to attach any non-hearsay record evidence that the two charges arose from the same criminal episode, but went on to hold that Hale did not apply because he was sentenced to the legal maximum length of supervision on each count without any enhancements beyond those legal maximums.

In its April 3, 2009 opinion affirming the trial court judge's summary denial of Petitioner's motion, the Fifth District Court agreed with the trial court postconviction judge that the motion was facially deficient, but decided to consider Petitioner's claim anyway. The District Court said that the whole point of this Court's Hale decision was to prevent the sentencing judge from using the habitual felony offender sentencing scheme to enhance sentences for crimes occurring during a single criminal episode beyond the statutory maximum by imposing them to be served consecutively. Since Petitioner's sentences did not exceed the maximum he could have received as an habitual felony offender, the District Court concluded that they were not illegal. Petitioner is now seeking discretionary review of that opinion. (See Appendix I - Elliott v. State, 9 So.3d 660 (Fla. 5th DCA 2009)).

SUMMARY OF ARGUMENT

Petitioner has not cited any Florida cases which are in express and direct conflict with the opinion of the Fifth District Court of Appeal in the instant case nor has he raised any other basis upon which this Court could exercise its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution or Florida Rule of Appellate Procedure 9.030(a)(2)(A).

ARGUMENT -- RESTATED

THE OPINION OF THE FIFTH DISTRICT COURT OF
APPEAL IN THE CASE SUBJUDICE IS NOT IN
EXPRESS AND DIRECT CONFLICT WITH ANY OF THE
CASES CITED BY PETITIONER.

Under Article V, Section 3 (b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may 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. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. In Jackson v. State, 926 So.2d 1262 (Fla. 2006), this Court reiterated its long held view that Article V, Section 3 (b), never intended that the district courts of appeal be intermediate courts and that Supreme Court discretionary review jurisdiction is properly limited to a very narrow class of cases enumerated under that constitutional provision.

In his jurisdictional brief, Petitioner argues that the District Court's opinion is in conflict with this Court's decisions in Hale v. State, 630 So.2d 521 (Fla. 1993) and State v. Hill, 660 So.2d 1384 (Fla. 1995). However, in that opinion

the District Court cited to and applied the sentencing law as set forth in those decisions in upholding the trial court judge's denial of relief on Petitioner's Motion to Correct Illegal Sentence. (See Appendix I - Elliott v. State, 9 So.3d 660 (Fla. 5th DCA 2009). Petitioner's sentences did not exceed the maximum he could receive as an habitual felony offender. Petitioner has not established "direct conflict" or any other basis upon which this Court should choose to exercise its discretionary jurisdiction.

CONCLUSION

Since Petitioner has failed to establish express and direct conflict or any other basis upon which this Court could exercise its discretionary jurisdiction in this case, Respondent respectfully prays this Honorable Court decline to do so.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar # 773026

ANTHONY J. GOLDEN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #162172
444 Seabreeze Blvd.
5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax No. (386) 238-4997

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been mailed to Mark Elliott, Petitioner, DC# 893474: Dorm C2-20-L, Quincy Annex, 2225 Pat Thomas Parkway, Quincy, Florida 32351, this ____ day of July, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Anthony J. Golden
Assistant Attorney General