IN THE SUPREME COURT OF FLORIDA

SANTERIS T. MCKINNEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC12-463

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitution & Statutes

Rules

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, SANTERIS MCKINNEY, 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.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as “slip op.”] as Appendix A. It also can be found at *McKinney v. State*, 51 So. 3d 645 (Fla. 1st DCA Jan. 24, 2011).

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that the decision of the First District expressly and directly conflicts with any decision of this Court or another district court of appeal. No decision referenced by Petitioner even involves the same offenses as that addressed by the First District. Further, the First District expressly addressed and distinguished the cases upon which Defendant relies for conflict. Moreover, Defendant's claim of "misapplication" jurisdiction is entirely devoid of merit and it expressly ignores unambiguous statutory law.

ARGUMENT

ISSUE: WHETHER THE DISTRICT COURT OF APPEAL DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL (RESTATED)

A. The District Court of Appeal's Decision Does Not Expressly and Directly Conflict With a Decision of This Court or Another District Court of Appeal.

1. Jurisdictional Criteria

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*, 485 So. 2d at 830; *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.

Thus, "this Court does not have jurisdiction to review per curiam decisions of the district courts of appeal that merely affirm with citations to cases not pending review in this Court," *Persaud v. State,* 838 So. 2d 527, 531-32 (Fla. Jan. 23, 2003) (citing *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jollie v. State*, 405 So. 2d 418 (Fla. 1981)).

A district court of appeal opinion that is devoid of facts contains no holding that could conflict with another district court of appeal opinion:

> [I]n those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court to have included some facts in its decision so that the question of law addressed by the district court in its decision can be discerned by this Court.

Persaud, 838 So. 2d at 533.

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 First District decision in *McKinney v. State*, 51 So. 3d 645 (Fla. 1st DCA Jan. 24, 2011), reached a result opposite that of this Court in *Houser v. State*, 474 So. 2d 1193 (Fla. 1985); *McKay v. State*, 925 So. 2d 1133 (Fla. 2d DCA 2006); or *Rodriguez v. State*, 875 So. 2d 642 (Fla. 2d DCA 2004).

2. The decision below is not in "express and direct" conflict with *Houser*, *Rodriguez* or *McKay*.

Petitioner contended that his offenses of third degree murder, in violation of Section 782.04(4), Florida Statutes, and fleeing or attempting to elude a law enforcement officer causing death, in violation of Section 316.1935(3)(b), Florida Statutes ("fleeing and eluding"), violate double jeopardy.[1] However, the cases upon which Petitioner alleges "direct and

[1] Although Petitioner's contention is "double jeopardy," as the First District recognized, the claim is not actually a violation of the Double Jeopardy Clauses of the United States or Florida Constitutions. *See McKinney*, 51 So. 3d at 647. Rather, Florida law includes a general principle---which, after the promulgation of 775.021(4), Florida Statutes, is not actually based on double jeopardy---that "fundamental fairness" requires that a person be convicted and sentenced for only one homicide conviction for the death of each victim. As this Court explained in *Gordon v. State*, 780 So. 2d 17 (Fla. 2001), *receded from on other grounds in Valdes v. State*, 3 So. 3d 1067 (Fla. 2009):

> Gordon highlights the principle that convictions for both premeditated murder and felony murder are impermissible when

express" conflict of decisions do not even involve the same offenses, as none of them involves this fleeing and eluding offense. *See Houser*, 474 So. 2d at 1196 (DWI manslaughter & vehicular homicide); *Rodriguez*, 875 So. 2d at 643-44 (third-degree murder & DUI manslaughter); *McKay*, 925 So. 2d at 1134 (third-degree murder & vehicular homicide). Indeed, none of these cases discusses, much less conflicts, with the lynchpin proposition of the First District's decision, that the fleeing and eluding offense set forth in Section 316.1935(3)(b), Florida Statutes, is "not a homicide offense."

> only one death occurred. *See Goss v. State*, 398 So. 2d 998, 999 (Fla. 5th DCA 1981). We have held repeatedly that section 775.021 did not abrogate our previous pronouncements concerning punishments for singular homicides. *See Goodwin v. State*, 634 So. 2d at 157-58 (Grimes, J. concurring) ("I believe that the Legislature could not have intended that a defendant could be convicted of two crimes of homicide for killing a single person."); *State v. Chapman*, 625 So. 2d 838, 839 (Fla. 1993); *Houser v. State*, 474 So. 2d 1193, 1196 (Fla. 1985) (noting that "only one homicide conviction and sentence may be imposed for a single death"); *Campbell-Eley*, 718 So. 2d at 329; *Laines v. State*, 662 So. 2d at 1250; *Goss v. State*, 398 So. 2d at 999. **Indeed, this principle is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing.**

Id. at 25 (bold and underline added). Certainly, there is case law that confuses the basis for this principle of Florida law as one arising as a matter of the Double Jeopardy Clause. *See, e.g., Tucker v. State*, 857 So. 2d 978 (Fla. 4th DCA 2003) (relying on *Gordon* and applying single homicide rule as issue of double jeopardy). These cases either incorrectly read *Gordon* or ultimately rely on pre-*Gordon* cases. However, *Gordon* makes clear that, after the promulgation of Section 775.021(4), Florida Statutes, the legal basis for this concept is "notions of fundamental fairness," not the Double Jeopardy Clause. 780 So. 2d at 25.

McKinney, 51 So. 3d at 648. Furthermore, even if a conflict could be based on reasoning rather than decisions, none of these cases discuss, much less conflict, with the First District's determination that:

> [u]nlike DUI manslaughter and vehicular homicide, fleeing and eluding can be committed without causing a death. Thus, fleeing and eluding is not a homicide offense. The alternative element of "serious bodily injury" contained in Section 316.1935(3)(b) distinguishes fleeing and eluding from the underlying felony offenses in *Rodriguez* and *McKay*, and it also distinguishes fleeing and eluding from DUI manslaughter, which the supreme court held in *Houser* to be a homicide offense rather than an enhancement to the penalty for DWI because death was an element of the offense.

McKinney, 51 So. 3d at 648. Quite simply, as *Houser*, *McKay* and *Rodriguez*, do not at all consider, much less address, Section 316.1935(3)(b), Florida Statutes, there is no express and direct conflict and no basis for this Court to take jurisdiction.

Unable to demonstrate a direct and express conflict, Defendant then claims that there is a "misapplication of *Houser*" because "Petitioner was charged and convicted of aggravated fleeing to elude causing death, not aggravated fleeing or eluding causing serious bodily injury." (PJB. 6 (underline added).) However, Petitioner utterly ignores the express language of Section 775.021(4)(a), Florida Statutes, which states, in relevant part: "For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, ***without regard to the accusatory pleading*** or the proof adduced at trial." § 775.021(4)(a), FLA. STAT. (bold, underline and italics added).

Accordingly, the language of Petitioner's charging document is irrelevant to Petitioner's claim of conflict. Defendant's attempt to create misapplication where none exists is unavailing.

Accordingly, Petitioner has utterly and completely failed to meet his burden to demonstrate express and direct conflict with any decision of this Court or of another district court of appeal.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail (pursuant to pre-existing agreement) on April 10, 2012: A. Victoria Wiggins, Esq., Assistant Public Defender, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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INDEX TO APPENDIX