

IN THE SUPREME COURT OF FLORIDA

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WALTER KYSER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. : _____

DCA No. : 1D09-3932

FILED
THOMAS D. HALL

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PETITIONER'S BRIEF ON JURISDICTION

(On Request For Discretionary Review From A)

(Decision Of The First District Court Of Appeal)

WALTER KYSER

DOC No.: 104847

JACKSON CORRECTIONAL INSTITUTION

5563 10TH STREET

MALONE, FLORIDA 32445-3144

PETITIONER — PRO SE

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PRELIMINARY STATEMENT

At issue is a conflict between the First District Court of Appeals' decision in Kyser v. State, case number 1D09-3932 and the Third District Court of Appeal in State v. Overton, 970 So.2d 359 (Fla. 3d DCA 2007).

Mr. Kyser, the Petitioner herein, will be referred to by name throughout this brief.

All other parties, persons, etc. will be referred to as seems appropriate.

RELEVANT FACTS

On February 14, 1986, Mr. Kyser was charged by indictment in the Fourteenth Judicial Circuit for Bay County with one count premeditated first-degree murder. Trial was held in Bay County, Mr. Kyser was found guilty as charged, and a sentence of death was imposed. On direct appeal, this Court reversed and remanded for a new trial. Kyser v. State, 533 So.2d 285 (Fla. 1988). On remand, an attempt to seat a jury in Bay County was unsuccessful, and Fourteenth Judicial Circuit Judge N. Russell Bower entered an order of change of venue removing the case to the First Judicial Circuit in Escambia County. Judge Bower obtained from the Chief Justice of this Court an order temporarily assigning him as a circuit judge in the First Judicial Circuit for the purpose of trying the case, and retrial of the case took place in the First Judicial Circuit in Escambia County. An Escambia County jury found Mr. Kyser guilty as charged, and a life sentence was imposed. The conviction and

sentence was affirmed on direct appeal. Kyser v. State, 576 So.2d 888 (Fla. 1st DCA 1991). Mr. Kyser filed a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief in the Fourteenth Judicial Circuit in Bay County, Fourteenth Judicial Circuit Judge Don T. Sirmons denied the motion without holding an evidentiary hearing, and the First District Court of Appeal per curiam affirmed denial of postconviction relief. Kyser v. State, 701 So.2d 870 (Fla. 1st DCA 1997). In 2009, Mr. Kyser, relying on State v. Overton, 970 So.2d 359 (Fla. 3d DCA 2007), filed in the Fourteenth Judicial Circuit a petition for writ of habeas corpus alleging that the order denying postconviction is a nullity because the court lacked jurisdiction to entertain and rule on the motion because he was tried and convicted in the First Judicial Circuit, and requested that the court withdraw its order denying postconviction relief and transfer his postconviction motion to the First Judicial Circuit for consideration and ruling by a judge sitting in that circuit. Judge Sirmons denied the petition and Mr. Kyser took an appeal. On appeal, the First District Court of Appeal per curiam affirmed denial of habeas corpus relief in a written opinion. Mr. Kyser moved for rehearing and requested certification of conflict with Overton, and same was denied.

Mr. Kyser now seeks discretionary review by this Court to settle the conflict between the First District's decision in case number 1D09-3932 and Overton, supra, where the decisions of both courts are based upon the same facts.

QUESTION PRESENTED

DID THE FIRST DISTRICT COURT OF APPEAL ERR IN AFFIRMING THE CIRCUIT COURT'S DENIAL OF HABEAS CORPUS RELIEF, WHERE ITS DECISION IS IN DIRECT CONFLICT WITH THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN STATE V. OVERTON, 970 So.2d 359 (Fla. 3d DCA 2007), AND MISAPPLIED THIS COURT'S DECISIONS IN BREEDLOVE V. SINGLETARY, 595 So.2d 8 (Fla. 1992); AND MILLS V. DUGGER, 574 So.2d 63 (Fla. 1990)?

JURISDICTION

The 1980 revision of Article V, Section 3(b)(3) of the Florida Constitution severely restricted this Court's jurisdictional powers by deleting the term "certiorari" and restricting the class of district court of appeal decisions it may review on the basis of conflict. Thus, this Court's concept of its discretionary jurisdiction power to review district court of appeal decisions has since focused primarily on its power to resolve decisional conflicts in the body of the law.

In The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), this Court concluded that Article V, Section 3(b)(3) creates and defines two concepts, explaining that the first concept is a general grant of discretionary subject matter jurisdiction, and that the second concept is a constitutional command as to how the discretion itself may be exercised. Continuing, this Court stated that "in the broadest sense [it] has subject matter jurisdiction ... over

any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." Id., 530 So.2d at 288.

In Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court defined the term "expressly" by its ordinary dictionary definition / meaning: "in an express manner." As used and explained in Jenkins, the term "express" means "to represent in words" or "to give expression to." See also Times Publishing Co. v. Russell, 615 So.2d 158 (Fla. 1993).

It is not necessary for the district court to expressly identify conflicting district court or Florida Supreme Court decisions in its opinion to create an express conflict under Article V, Section 3(b)(3). See Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). See also Hardee v. State, 534 So.2d 706 (Fla. 1988) (accepting review based on a finding that the "fair implication" that the previous district court of appeal cases were contrary to the holding of the district court case under review).

As this Court has explained, one of the tests of express and direct conflict is whether it has been shown that the two decisions are irreconcilable. See Aravena v. Miami-Dade County, 926 So.2d 1163 (Fla. 2006). See also Crossley v. State, 596 So.2d 447, 449 (Fla. 1992) (concluding that because the court below "reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated" the result reached by the alleged conflict case, a conflict of decisions existed that warranted accepting jurisdiction).

Finally, express and direct conflict may be based on the misapplication of a decision. Engle v. Liggett Group, Inc., 2006 WL 1843363 (Fla. 2006). See also Aguilera v. Inservices, Inc., 905 So.2d 84 (Fla. 2005).

The district court decision which is the subject of Mr. Kyser's application for review by this Court meets the criteria set forth above.

First, the controlling facts on which the Third District Court of Appeal reached its decision in State v. Overton, 970 So.2d 359 (Fla. 3d DCA 2007) are the same as the controlling facts in the instant case. Overton and Mr. Kyser were both charged in one judicial circuit and tried in a different judicial circuit subject to a change of venue. Overton and Mr. Kyser both mistakenly filed their Florida Rule of Criminal Procedure 3.850 postconviction motions in the circuit where the charges originated, the motions were unsuccessful, and the circuit court's denial of postconviction relief was affirmed on appeal. Overton and Mr. Kyser both subsequently filed petitions for writ of habeas corpus in the circuits where their charges originated, alleging that the circuit court's order denying postconviction relief is a nullity and should be set aside because the circuit court was without jurisdiction to entertain and rule on their postconviction motions due to the fact that they were tried and convicted in a different circuit. It is only at this point that the facts of the two cases diverge, thereby creating conflict. In Overton, the circuit judge agreed with Overton, set aside his order dismissing the postconviction motion, and transferred the motion to the circuit in which Overton was tried. The state appealed, and the Third District upheld the circuit court's grant of habeas corpus relief. Contrarily, in the instant case, the circuit court denied Mr. Kyser's petition for writ of habeas corpus, Mr. Kyser appealed, and the

First District upheld the circuit court's denial of habeas corpus relief.

Thus, there is a "fair implication" that the Third District's decision in Overton is contrary to the First District's decision in the instant case, see Hardee, *supra*, because the First District "reached the opposite result on [the same] controlling facts," see Crossley, *supra*, and the two decisions are therefore "irreconcilable," see Aravena, *supra*, such that this Court has discretionary jurisdiction to review the First District's decision in the instant case and settle the conflict between it and the Third District's decision in Overton, *supra*.

Second, the First District Court of Appeal misapplied this Court's decisions in Breedlove v. Singletary, 595 So.2d 8 (Fla. 1992); and Mills v. Dugger, 574 So.2d 63 (Fla. 1990) in reaching its decision in the instant case. Breedlove stands for the proposition that "habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues that could have been . . . or were raised on direct appeal;" and Mills stands for the proposition that habeas corpus is not available as an additional appeal of issues which could have been or were raised in prior postconviction proceedings.

It is axiomatic that Mr. Kyser could not have raised on direct appeal the issue of whether the circuit court had jurisdiction to entertain and rule on his postconviction motion which, in any case, could not even be filed until mandate issued on Mr. Kyser's direct appeal. Likewise, because Mr. Kyser's rule 3.850 postconviction motion was denied and that denial was affirmed on appeal long before the Third District's decision in Overton, and considering the absence of any case law on the subject and controlling facts prior to

the decision in Overton, it would be unrealistic to conclude that Mr. Kyser should have discovered the error earlier and raised it in prior postconviction proceedings or on appeal therefrom.

Moreover, both the factual situations and issues in Breedlove and Mills are wholly different from those in the instant case, such that those cases are distinguished and are not controlling in this instance.

Thus, the First District Court of Appeal misapplied this Court's decisions in Breedlove, *supra*; and Mills, *supra*, in deciding the instant case, such that this Court has discretionary jurisdiction to review the First District's decision and correct its misapplication of said Florida Supreme Court cases. See Engle, *supra*; and Aguilera, *supra*.

CONCLUSION

Based on the foregoing facts and authorities, Mr. Kyser respectfully submits that this Court has discretionary jurisdiction to review the First District Court of Appeal's decision in case no. 1D09-3932, and should do so in order to both insure uniformity in decisions rendered by the district courts of appeal in the future on the same issue and same or similar facts, and to correct the First District's misapplication of this Court's decisions in Breedlove, *supra*; and Mills, *supra*, in the instant case.

Respectfully Submitted,

Walter Kyser

Walter Kyser #104847

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I handed to prison mail room personnel at Jackson Correctional Institution a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction for mailing to the Attorney General, The Capitol PL 01, Tallahassee, Florida 32399-1050, on this 12th day of November, 2010.

Walter Kyser

Walter Kyser # 104847

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DECLARATION

I declare under the penalties of perjury that I have read the foregoing Petitioner's Brief on Jurisdiction and Certificate of Service, and that all of the facts stated therein are true.

Executed on this 12th day of November, 2010, by the undersigned.

Walter Kyser

Walter Kyser # 104847