

IN THE SUPREME COURT OF FLORIDA

65-700

STATE OF FLORIDA,  
Petitioner,

v.

JOHN S. BUCHERIE,  
Respondent.

4th DCA CASE NO: 83-315

**FILED**

SID J. WHITE

AUG 8 1984

CLERK, SUPREME COURT

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Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner herein was the Appellee and the Respondent, the Appellant, in the Fourth District Court of Appeal. In this brief, STATE OF FLORIDA will be referred to as the "Petitioner" and JOHN S. BUCHERIE, the "Respondent."

"A" means Petitioner's Appendix to the Jurisdictional Brief, and "e.a." means emphasis added.

STATEMENT OF THE CASE AND FACTS

On appeal to the Fourth District Court of Appeal, Respondent challenged the trial court's denial of his Rule 3.850 Motion to vacate a judgment conviction for strong-arm robbery, and sentence of nine years for said crime. (A, 1).

The Fourth District panel, in a per curiam decision, reversed the trial court's denial of Respondent's petition for collateral relief, finding that, "after a thorough review of the record, that the defendant did make a prima facie showing of prejudice," (A, 2), and vacated the order of denial, with remand for further proceeding. (A, 2). In its conclusion, the appellate court, in express reliance upon the Florida Supreme Court's enunciated procedure, governing disposition of claims of ineffective assistance of counsel, in Knight v. State, 397 So.2d 997 (Fla. 1981), found that the first two prongs of the Knight "test" had been "clearly satisfied." (A, 2). The court then rejected the trial court's conclusion that the ineffective assistance by Respondent's trial counsel had not prejudiced Respondent:

It is never possible to know precisely what will affect a jury's determination of guilt or innocence. It is only necessary that the defendant show a substantial deficiency which 'presents a prima facie showing of prejudice." (A, 2).

Petitioner subsequently invoked its Notice of Discretionary Jurisdiction in this cause, on July 27, 1984. (A,3).

POINT ON APPEAL

WHETHER PETITIONER HAS PROPERLY INVOKED JURISDICTION OF FLORIDA SUPREME COURT IN THIS CAUSE, SINCE OPINION OF FOURTH DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER STATE APPELLATE COURTS?

ARGUMENT

PETITIONER HAS PROPERLY INVOKED JURIS-  
DICTION OF FLORIDA SUPREME COURT IN  
THIS CAUSE, SINCE OPINION OF FOURTH  
DISTRICT COURT OF APPEAL DIRECTLY AND  
EXPRESSLY CONFLICTS WITH DECISIONS OF  
OTHER STATE APPELLATE COURTS.

In order to properly invoke the "conflict certiorari" jurisdiction of this Court, pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980), and Rule 9.030(a)(2)(A)(iv) Fla.R.App.P. (1980), Petitioner must demonstrate that there is "express and direct conflict" in the decision sub judice, with the holding of another prior state District Court of Appeal decision on the same rule of law. Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1156 (Fla. 1980); Mancini v. State, 312 So.2d 732 (Fla. 1975). The Supreme Court's discretionary certiorari jurisdiction is also properly invoked, based on conflict, when a particular state appellate court applies a particular rule of law to produce a different result, in a case with substantially the same facts, as those considered by the other court in developing or applying said rule of law. Mancini, supra, at 733 (e.a.).

It is apparent that the decision by the Fourth District, in the case sub judice, expressly conflicts with the rule of law announced in Knight, and reiterated in the

Florida Supreme Court in Messer v. State, 439 So.2d 875 (Fla. 1983), and Ford v. State, 407 So.2d 907 (Fla. 1981). In Knight, supra, the Florida Supreme Court addressed the question of prejudice to be shown by a defendant claiming ineffective assistance of counsel:

... the defendant has the burden to show that this specific, serious deficiency [omissions or acts of counsel, below that of competent counsel], when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

Knight, supra, at 1001 (e.a.). This burden upon a defendant was even more stringently applied and enforced in Ford, supra, and Messer, supra, which interpreted the burden, as to this element, to require a defendant to demonstrate that, "but for" the allegedly deficient act of counsel, the result would have probably differed. Messer, supra, at 877; Ford, supra, at 909. The Ford decision expressly required a showing of "serious doubt of the defendant's guilt," Ford, supra, at 909, to warrant to requisite element of the Knight "prejudice" test.

However, the Fourth District herein, in applying the dictates of Knight, and its progeny, indicated, in rather broad terms, that as to the "prejudice" element requirement,



it can never be known whether a particular deficiency affected the outcome of a jury verdict. (A, 2). Since the Florida Supreme Court has specifically delineated the test to apply, so as to ascertain the level of prejudice in terms of claims of ineffective assistance, it appears the Fourth District opinion does expressly and directly conflict with these decisions in Knight, Ford and Messer. Mancini, supra.

Furthermore, the Fourth District's opinion appears to place the burden of demonstrating prejudice on the State, in a manner contrary to the rule of Knight, since Respondent herein has been viewed, at least impliedly, of never being able to sustain a specific showing of prejudice, yet has benefitted and prevailed, based upon this perspective.

(A, 2).

Finally, Petitioner submits that the Fourth District's opinion sub judice is in express and direct conflict with the United States Supreme Court's decision in Strickland v. Washington, \_\_\_ U.S. \_\_\_, 104 S.Ct 2052, \_\_\_ L. Ed.2d \_\_\_ (1984), as subsequently applied by this Court in Jackson v. State, (Case No. 62,429), [9 FLW 223][Fla.Sup. Court, June 12, 1984], to the extent that the Strickland decision (as applied), requires a demonstration of prejudice, that "...but for counsel's unprofessional errors, the result of the proceeding would have been different'." Jackson, at 224, citing Strickland, supra, or that the Ap-

pellant was deprived of a fair trial, because of the alleged deficiency. Id.

Thus, since the opinion of the Fourth District in Bucherie is in direct and express conflict, on its face, with those opinions, on the same point of law, presented and decided by the Florida Supreme Court in Knight, Messer and Ford, supra, Petitioner has appropriately invoked the jurisdiction of this Court, on the basis of conflict certiorari.

CONCLUSION

Based on the argument and authorities cited herein, Respondent respectfully requests that this Honorable Court ACCEPT jurisdiction and certiorari review of this cause, and proceed to decide said cause on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been mailed to MICHAEL SALNICK, ESQUIRE, of Kohl, Springer, Springer, Mighdoll and Salnick, P.A., 3003 South Congress Avenue, Suite 1A, Palm Springs, Florida 33461, this 6th day of August, 1984.

Richard G. Bartmon

Of Counsel