IN THE SUPREME COURT OF FLORIDA

BILLY WAYNE DANIELS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,537

JURISDICTIONAL BRIEF OF RESPONDENT

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COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent State of Florida, the Appellee in the First District Court of Appeal, will be referenced in this brief as Respondent or the State. Petitioner Daniels, the Appellant in the First District Court of Appeal and the petitioner in the trial court, will be referenced in this brief as Petitioner or by proper name.

JURISDICTIONAL STATEMENT

Article V, Section 3(b)(3) of the Florida Constitution provides, in pertinent part, as follows:

> 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 appear within the four corners of the majority decision," and "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither will a concurring opinion support jurisdiction under Section 3(b)(3). Further, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review be certiorari." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

STATEMENT OF THE CASE AND FACTS

Petitioner Daniels filed a motion pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court challenging his conviction while a direct appeal from that conviction was still pending in the district court. The trial court denied the motion on the merits and petitioner sought review in the district court. The district court correctly recognized that the trial court did not have jurisdiction to consider the rule 3.850 motion while a direct appeal was pending. However, reasoning that a trial court should be affirmed if right for any reason, the district court affirmed the trial court's denial of the rule 3.850 motion on the merits. Daniels v. State, 22 Fla. L. Weekly D1678 (Fla. 1st DCA 11 July 1997). Petitioner seeks review on the ground that the affirmance on the merits directly and expressly conflicts with Hall v. State, 22 Fla. L. Weekly D1877 (Fla. 5th DCA 1997).

SUMMARY OF ARGUMENT

The state agrees that there is direct and express conflict and that the district court below erred in affirming the trial court judgment on the merits.

ARGUMENT

I.

IS THERE DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT OR ANOTHER DISTRICT COURT?

Absence of jurisdiction is a threshold issue which must be addressed immediately without further examination of the merits, even if not raised by the parties. Mendez v. Ortega, 134 So.2d 247 (Fla. 1961); Stein v. Darby, 126 So.2d 313 (Fla. 1961); Cohen v. State, 121 So.2d 155 (Fla. 1960); Bohlinger v. Higginbotham, 70 So.2d 911 (Fla. 1954); Ford Motor Company v. Averill, 355 So.2d 220 (Fla. 1st DCA 1978); Mapoles v. Wilson, 122 So.2d 249 (Fla. 1st DCA 1960).

The district court below has a history of failing to appreciate, or refusing to accept, that the absence of jurisdiction in either the appellate or lower court is a threshold issue which ends all appellate review and requires that

the appeal either be dismissed if jurisdiction is absent in the appellate court or quashed if the jurisdiction is absent in the lower court. See, Ford v. State, 575 So. 2d 1335 (Fla. 1st DCA), rev. denied, 581 So. 2d 1381 (Fla. 1991)(Absence of jurisdiction will not be addressed on direct appeal until full briefing and appellate review is completed); Stone v. State, 688 So.2d 1006 (Fla. 1st DCA); petition for review denied, ___ So.2d ___ (Fla. 20 June 1997) (ditto). This legal blind spot appears to be caused by a failure of the First District Court of Appeal to recognize that while its own convenience may be served by affirming on the merits the legitimate interests of the parties and other courts who may subsequently address the district court's disposition of the case are not served by misapplying the law.

The state agrees with petitioner that the district court misapplied the law and erred in affirming the trial court judgment on the merits because the trial court lacked jurisdiction to entertain the rule 3.850 motion. When the district court determined, correctly, that the trial court did not have jurisdiction to consider the rule 3.850 motion, it should have immediately ceased review, addressed the threshold jurisdictional issue **sua sponte**, and quashed the trial court judgment. [This was an appeal from a summary denial pursuant to Florida Rule of Appellate Procedure 9.140(i) and neither party briefed the district court]. As petitioner points out, this

conflicts with the decision in Hall and State v. Meneses, 392 So.2d 905 (Fla. 1981). Moreover, as petitioner also points out, the affirmance on the merits, as opposed to a proper quashal, would have the effect of denying him his right to seek collateral review by treating such motion as a successive motion. Similarly, from the viewpoint of the state, the affirmance on the merits seems to hold that the issue which petitioner wishes to raise in state court has been disposed of on the merits, i.e., exhausted, and that he is now entitled to raise the exhausted issue in federal court as a federal habeas claim. This is not so; the issue has not been raised on the merits, is not exhausted in state court, and is not cognizable in federal court. Thus, the error of the district court misleads any subsequent court addressing the issue in either state or federal court and harms the interests of both parties by denying both their legal rights. The state suggests it would be helpful to the orderly administration of justice to instruct the First District Court of Appeal on the law controlling jurisdictional issues.

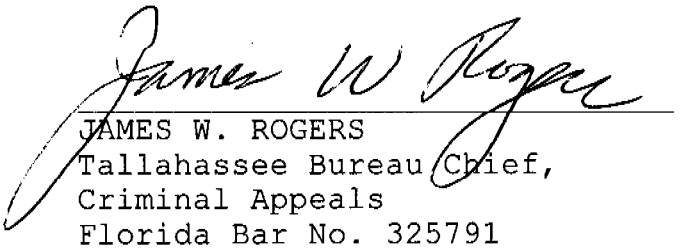
The state agrees that discretionary review should be exercised and does not object to a summary quashal of the district court decision with instructions that lack of jurisdiction is a threshold issue which mandates that review cease and that any review of the merits, whether in the appellate or trial court, is a nullity.

CONCLUSION

Discretionary review should be exercised.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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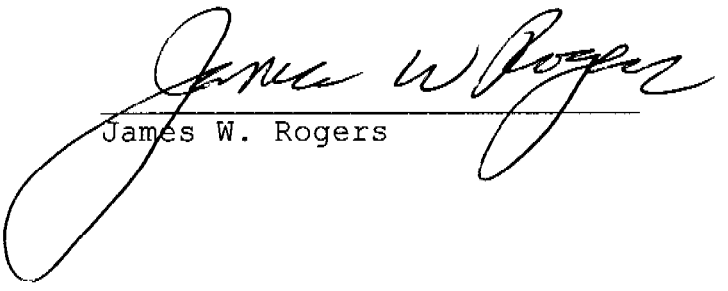
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Billy Wayne Daniels #580723, Holmes Correctional Institution, 3142 Thomas Drive, Bonifay, Florida 32425, this 3rd day of November 1997.



James W. Rogers