

IN THE SUPREME COURT OF FLORIDA

HENRY MARTIN STEIGER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC20-1404
LT Case No. 1D19-3217

RESPONDENT'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, Henry Martin Steiger, was the Appellant in the First District Court of Appeal (“First District”) and the defendant in the trial court. This brief refers to Petitioner as Petitioner or by his proper name. Respondent, the State of Florida, was the Appellee in the First District and the prosecution in the trial court. This brief refers to Respondent as Respondent or the State.

“(PJB.____)” designates Petitioner’s Jurisdictional Brief, followed by the appropriate page number. “(P. App.____)” designates the Appendix to Petitioner’s Jurisdictional Brief, followed by the appropriate page number.

All ***bold-type emphasis*** is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND OF THE FACTS¹

The relevant history and facts are set out in the opinion of the First District, filed in slip opinion form to Petitioner's Appendix. The opinion can also be found at 45 Fla. L. Weekly D2013b and 2020 WL 5001827 (Fla. 1st DCA August 25, 2020). Respondent will cite to (i) Petitioner's Appendix, and (ii) the Westlaw version of the opinion, in this brief.

Petitioner was convicted of second-degree murder and appealed his conviction to the First District. (P. App. 6); *Steiger v. State*, 2020 WL 5001827 *4 (Fla. 1st DCA August 25, 2020). In his Initial Brief, rather than adhere to the requirements of § 924.051(3), Fla. Stat. and argue fundamental error for unpreserved claims, Petitioner raised four claims of ineffective assistance of counsel. The First District did not allow Petitioner to do so. Petitioner now claims the First District's decision conflicts with *Howard v. State*, 288 So. 3d 1239 (Fla. 2nd DCA 2020) and *Kruse v. State*, 222 So. 3d 13 (Fla. 4th DCA 2017).

¹ Petitioner's Statement of the Case and Facts reargues his contested claims of ineffective assistance of counsel raised on direct appeal, suggesting that they were "thoroughly briefed" and, accordingly, the First District was obligated to rule upon them. (PJB 1-2)

SUMMARY OF ARGUMENT

Petitioner claims an entitlement on direct appeal to ignore the fundamental error standard of review for unpreserved claims; however, the First District's opinion is in accordance with § 924.051(3), Fla. Stat. and not in express and direct conflict with either *Howard* or *Kruse*. Petitioner also incorrectly cites *Pardo v. State*, 596 So. 2d 665 (Fla. 1992) as authority that the First District was bound by another district court's opinion. Because no direct and express conflict exists in the First District's decision when compared to *Howard* and *Kruse*, there is no basis for this Court to exercise its conflict jurisdiction.

ARGUMENT

ISSUE: WHETHER THE FIRST DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *HOWARD OR KRUSE?* (RESTATED)

(i)

Petitioner contends that this Court has jurisdiction pursuant to Article V, § 3(b)(3), Florida Constitution, which 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.

Long ago, this Court explained,

This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term “express” include: “to represent in words”; “to give expression to.” “Expressly” is defined: “in an express manner.” Webster’s Third New International Dictionary, (1961 ed. unab.).

Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); *Valladares v. Bank of America Corp.*, 197 So. 3d 1, 14 (Fla. 2016) (Canady dissenting) (“This Court’s jurisdiction to review decisions of courts of appeal for express and direct conflict is invoked by ‘the application of a rule of law to produce a different result in a case which involves substantially the same [controlling] facts as a prior case’ or ‘the announcement of a rule of law which conflicts with a rule previously announced by this court or another district[.]’ *Mancini v. State*, 312 So.2d 732, 733 (Fla.1975); *see Adams v. Seaboard*

Coast Line R.R. Co., 296 So.2d 1, 3 (Fla.1974).”). Moreover, the conflict between decisions “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). Additionally, “[a]s stated by Justice Adkins in *Gibson v. Maloney*, 231 So.2d 823, 824 (Fla.1970), ‘(i)t is conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari.’ (Emphasis in original).]” *Jenkins*, at 1359. Finally, the conflict must be “on the same question of law.” Art. V, § 3, Florida Constitution.

(ii)

The First District wrote as follows relevant to Petitioner’s claim in this Court:

In his first claim of error, Steiger asserts that the face of the record shows that his counsel rendered ineffective assistance. To prevail on a claim of ineffective assistance of counsel on direct appeal, the defendant must show “ineffectiveness obvious on the face of the record, indisputable prejudice, and an inconceivable tactical explanation for the conduct.” *Morales v. State*, 170 So. 3d 63, 67 (Fla. 1st DCA 2015).

Steiger asserts that his trial counsel was ineffective in four respects: (1) by allowing the jury to hear a recording of a police interview without redacting references to a federal investigation of Steiger, his federal probation, and issues Steiger was having out of state; (2) by not objecting to the admission of an unauthenticated recording of a police interview; (3) by not objecting when the State called Steiger’s former counsel to testify about privileged communications; and (4) by causing cumulative error through his failure to properly cross-examine the State’s witnesses, to object when the State did not lay a proper predicate for DNA testimony, to object when the latent print examiner failed to explain why seven of nine lifts were of no value and how she linked

two prints to Shelby Johnson, to object to the admission of cell phone mapping data, and to object the State’s burden-shifting argument during closing.

But Steiger did not preserve any of the errors he advances on appeal and he does not make any claim of fundamental error. *See Latson v. State*, 193 So. 3d 1070, 1072 (Fla. 1st DCA 2016) (Winokur, J., concurring) (observing that “if the defendant does not properly preserve a claimed error, the only statutorily-authorized basis² for appellate relief is a showing that the error is fundamental”). Still, Steiger maintains that this Court may address on direct appeal his claims that his counsel was ineffective, even without a claim of fundamental error. But as Judge Winokur explained in his concurring opinion in *Latson*, an appellate court should not allow an appellant to avoid application of the fundamental error standard by asserting that his trial counsel’s “failure to raise issues constitutes ineffective assistance, which entails a different standard that could provide an easier path to reversal, and which deprives trial counsel of the opportunity to defend themselves against allegations of unprofessional conduct.” *Id.* at 1074; *see also Marshall v. State*, 291 So. 3d 614, 616 (Fla. 1st DCA 2020) (holding that an appellant may not claim ineffective assistance of counsel “as a means to avoid application of the fundamental error standard on direct appeal”). We agree. And so, because Steiger makes no claim of fundamental error, we decline to consider his claims of ineffective assistance of counsel in this direct appeal. (P. App. 6-7); *Id.* at *4.

(iii)

Petitioner fails to establish a basis for this Court to exercise its discretionary

² The statutory basis to which reference is made is § 924.051(3), Fla. Stat., which reads as follows:

An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

conflict jurisdiction. First, the decision of the First DCA does not expressly and directly conflict with either *Howard* or *Kruse*. Specifically, the First DCA's opinion does not reference either decision. "[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 [v. State]*, 838 So. 2d 529,[]533[(Fla. 2003)]. The facts included in the First DCA's opinion do not help Petitioner in his attempt to show express and direct conflict with *Howard* or *Kruse* because the facts of the cases are not the same. Additionally, neither *Howard* nor *Kruse* announced a rule of law.

Second, Petitioner's claim of conflict does not appear within the four-corners of the First District's decision when compared with the *Howard* and *Kruse* decisions.

Third, although all the opinions discuss ineffective assistance of counsel claims on direct appeal, the decisions reached by the respective districts are not in conflict. The First District applied § 924.051(3), Fla. Stat. in deciding that because Petitioner failed to make a fundamental error argument on direct appeal with respect to his unpreserved claims, it would not consider his claims of ineffective assistance of counsel. Comparatively, both *Howard* and *Kruse* addressed the appellants' claims

on direct appeal without considering the impact of § 924.051(3), Fla. Stat.³

Fourth, there is no conflict “on the same question of law.” The question of law discussed and applied in the First District’s opinion was that “...because Steiger makes no claim of fundamental error, we decline to consider his claims of ineffective assistance of counsel in this direct appeal.” (P. App. 7); *Id.* at *4. By contrast, both the Second and Fourth Districts addressed claims of ineffective assistance of counsel on direct appeal; however, the fact that they did so does not mean they rendered a decision on the same question of law decided by the First District.⁴

(iii)

Petitioner’s remedy is not to seek conflict jurisdiction in this Court; rather, it is to file a motion pursuant to Fla. R. Crim. P. 3.850 in the trial court and address his claims in that venue. This Court should dismiss Petitioner’s petition for lack of jurisdiction.

³ The Second District in *Howard* in its second footnote did note, “Mr. Howard has not argued that the evidence and argument amount to fundamental error, which, if it existed, would permit us to reach the issue regardless of the lack of preservation. *See Fletcher v. State*, 168 So. 3d 186, 208 (Fla. 2015).” Notably, it appears from the *Fletcher* opinion that Fletcher’s appellate counsel argued fundamental error unlike Petitioner’s appellate counsel in the instant case.

⁴ The State did not concede in the First District, nor does it concede in this Court, that trial counsel for Petitioner was ineffective on the face of the record in his representation of Petitioner. In fact, to the contrary, the State contested each of Defendant’s arguments.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court dismiss Petitioner's petition to invoke this Court's discretionary conflict jurisdiction for lack of jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE
OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was
furnished by efileing to all counsel of record on October 27, 2020.

Respectfully submitted, served and certified,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in 14-point Times New Roman
and thereby satisfies the font requirements of Florida Rule of Appellate Procedure
9.210.

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