

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-107
DCA CASE NO. 3D01-573

FILED
THOMAS D. HALL

JUN 03 2002

ALWIN J. JACOBS,

CLERK, SUPREME COURT
BY DA

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Bureau Chief
Florida Bar No. 0239437

MEREDITH L. BALO
Assistant Attorney General
Florida Bar No. 0360340
Office of the Attorney General
444 Brickell Avenue, Suite 950
Miami, FL 33131
Telephone:(305) 377-5441
Facsimile: (305) 377-5655

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INTRODUCTION

Petitioner, ALWIN J. JACOBS, was the defendant in the trial court and Appellant in the District Court of Appeal of Florida, Third District. Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "App." followed by the appropriate letter and a colon to indicate the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the Third District Court of Appeals which affirmed the trial court's summary denial of post conviction relief. The Defendant was convicted of burglary of an unoccupied dwelling. The Defendant filed a motion for post conviction relief alleging eight counts of ineffective assistance of counsel. The Third District Court of Appeals held that the Defendant's claims were meritless where the Defendant failed to meet his burden under *Strickland v. Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In regards to one of Defendant's claims of ineffective assistance of counsel, in which a dissenting opinion was filed, the Court found that Defendant's claim was facially insufficient. Specifically, the Defendant argued that his counsel was

ineffective for failing to call two witnesses who would have testified that he was at home with them during the time of the burglary. However, the Court held “other eyewitness testimony placed the defendant at the scene of the crime and there was overwhelming evidence of the defendant’s burglary of the unoccupied dwelling.” *Jacobs v. State*, 800 So. 2d 322, 323 (Fla. 3d DCA 2001); (Appendix A). The Court additionally commended the trial court’s detailed order denying Defendant’s motion as facially insufficient and stating:

Given the overwhelming evidence against the Defendant, consisting of an eyewitness identifying the Defendant at the scene of the crime and at trial and the Defendant being found within two blocks of the crime scene, the outcome of the trial would not have been altered by the proposed witnesses testimony even assuming the witnesses would have testified as the Defendant alleges.

Id. at 324 n.1. The Court further found that the failure of counsel to call these witnesses constituted a sound tactical decision and was not ineffectiveness.

Subsequently, the Defendant filed the instant appeal in this Court seeking jurisdiction. The State’s brief on jurisdiction follows.

QUESTION PRESENTED

**WHETHER THIS COURT SHOULD DECLINE
DISCRETIONARY JURISDICTION IN THIS CAUSE
SINCE THE DECISION BELOW DOES NOT
EXPRESSLY AND DIRECTLY CONFLICT WITH
THE DECISIONS CITED BY THE DEFENDANT.**

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court to decline to accept jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Third District Court of Appeal expressly and directly conflicts with a decision of this Court or of another district court of appeal on the same question of law, or that it falls under any of the subdivisions provided in Fla. R. App. P. 9.030(a)(2), or Art. V, Section 3(b)(3), Fla. Const. (1980).

ARGUMENT

**THIS COURT SHOULD DECLINE
DISCRETIONARY JURISDICTION IN THIS CAUSE
SINCE THE DECISION BELOW DOES NOT
EXPRESSLY AND DIRECTLY CONFLICT WITH
THE DECISIONS CITED BY THE DEFENDANT.**

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

The Defendant contends that the appellate court's decision conflicted with *Palmer v. State*, 683 so. 2d 678 (Fla. 4th DCA 1996); *Flores v. State*, 662 So. 2d 1350 (Fla. 2d DCA 1995); *Phillips v. State*, 687 So. 2d 915 (Fla. 3d DCA 1997); *Cohen v. State*, 775 So. 2d 336 (Fla. 2d DCA 2000), *Honors v. State*, 752 So. 2d 1234 (Fla. 2d DCA 2000), and *Highsmith v. State*, 617 So. 2d 825 (Fla. 1st DCA 1993). First, as to the alleged conflict with *Phillips v. State*, it is well settled that for this Court to exercise its discretionary jurisdiction based on conflict, the conflict must be between the district court's opinion and this Court's opinion or *another* district courts'

opinion. Conflict jurisdiction can not lie if it alleged to be within a single district as the Petitioner herein alleges. *Little v. State*, 206 So. 2d 9 (Fla. 1968).

Next, there is no conflict between the instant opinion and the opinions in *Palmer* and *Flores*. The *Palmer* court reversed on the basis of a lack of record, so it was unable to determine whether the outcome of trial would have been different. The *Flores* opinion concerned ineffective assistance of counsel for failure to discuss different defenses and for failing to object to the lack of a jury instruction on premeditation.

Lastly, there is no conflict between the instant opinion and the opinions in *Cohens*, *Honors*, and *Highsmith*. Rather, the instant opinion is in accordance with these opinions. The Defendant argues that the "failure to investigate or call exculpatory witnesses presents a prima-facie showing of entitlement to relief, subject to rebuttal by evidence from the record or testimony at an evidentiary hearing." (Petitioner's Brief: 6); *See, Honors v. State*, 752 So.2d 1234, 1236 (Fla. 2d DCA 2000); *Cohens v. State*, 775 So. 2d 336, 337 (Fla. 2d DCA 2000). However, the court below in the instant opinion found that the overwhelming contrary evidence would not have changed the outcome of the trial, so the Defendant was, hence, not entitled to relief. It is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." *Jenkins v. State*, 385 So. 2d 1356,

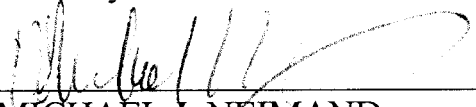
1359 (Fla. 1980). Therefore, no conflict exists where the instant opinion clearly follows the law and found that the Defendant's allegations were rebutted by the overwhelming evidence presented at trial. *Cf. Highsmith, supra* (Court found that outcome of proceedings could have been affected through defense attorney's failure to interview and call witnesses at trial, that such error was compounded by prosecutor's comment on failure to call these witnesses, and that testimony concerning whether defendant had knowledge of firearm under his seat in car could have affected the outcome.) In the instant case, though, there is no indication that the defense attorney failed to interview the witnesses, only that he declined to call them to testify. Additionally, there is no evidence that the defense attorney's decision not to call the witnesses was compounded by any comments on the failure to call such witnesses. Therefore, there is no conflict within the four corners of the opinions.

CONCLUSION

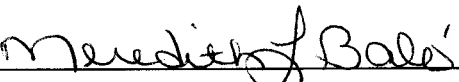
WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court decline jurisdiction to review this cause.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General



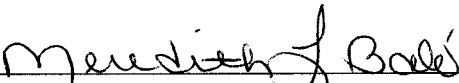
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Bureau Chief



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Florida Bar Number 0360340
Office of the Attorney General
444 Brickell Avenue, Suite 950
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Telephone:(305) 377-5441
Facsimile: (305)377-5655

CERTIFICATE OF SERVICE

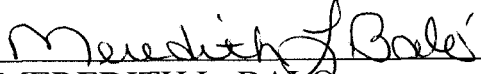
I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to Alwin J. Jacobs, #230659, Everglades Correctional Institution, P.O. Box 949000, B2-1445, Miami, FL 33194, this 31st day of May, 2002.



MEREDITH L. BALO
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla.R.App.P. Rule 9.210(a)(2).



MEREDITH L. BALLO
Assistant Attorney General