

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No.

5 DCA Case No. 5D04-1338

CURTIS JAMES,

Respondent.

-----/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

James filed a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, claiming that

counsel

was ineffective for failing to request a jury instruction on a lesser included offense. The trial court summarily denied the motion based on the decision of the First District Court of Appeal in Sanders v. State, 847 So. 2d 504 (Fla. 1st DCA

2003),

where the court had held that in collateral proceedings under Rule 3.850 regarding a claim for ineffective assistance of counsel, a defendant cannot establish that there is a

reasonable

probability that the result would have been different had

trial

counsel requested and received the instruction regarding the lesser offense. The Fifth District Court of Appeal stated:

However, in Vickery v State, 869
So. 2d 623 (Fla. 5th DCA 2004),
this

Court held that Sanders conflicts
with this Court's decision holding
that the failure of counsel to
request a lesser included jury
instruction states a colorable
claim of ineffective assistance of
counsel.

James v State, 29 Fla. L. Weekly D129 (Fla. 5th DCA August 20, 2004). In Vickery, the Fifth District Court of Appeal

certified

conflict with the First District Court of Appeal. Both

Sanders

and Vickery are pending before this Court.

SUMMARY OF ARGUMENT

The decision in the present case relied on Vickery v State, 869 So. 2d 623 (Fla. 5th DCA 2004). In Vickery, the Fifth District Court of Appeal certified conflict with the First District Court of Appeal's opinion in Sanders v State, 847 So.

2d

1504 (Fla. 1st DCA 2003). Therefore, the present decision of the

district court expressly and directly conflicts with the decision

of the First District Court of Appeal in Sanders. Both

Sanders

and Vickery are currently pending before this Court. Sanders

v.

State, Case No. SC03-640; Vickery v State, SC04-605.

In Sanders, the First District Court of Appeal certified conflict with the Fifth District 's opinion in Oehling v.

State,

659 So. 2d 1226 (Fla. 5th DCA 1995), which was relied upon by

the

Fifth District in the instant case. In addition, the Fourth District Court of Appeal, which is aligned with the Fifth

District, has certified conflict with the First District in

Sanders, supra. Willis v. State, 840 So. 2d 1135 (Fla. 4th DCA 2003). That case is also pending before this Court. State v.

Willis, Case No. SC03-642. The First, Fourth and Fifth

Districts

have all acknowledged conflict on this issue, and these cases

are

currently before this Court, so Petitioner submits that this

Court should exercise its discretionary jurisdiction to review

the instant case as well.

ARGUMENT

THE DECISION OF THE DISTRICT
COURT
EXPRESSLY AND DIRECTLY CONFLICTS
WITH THE DECISION OF THE FIRST
DISTRICT COURT OF APPEAL IN
SANDERS
V. STATE, WHICH IS CURRENTLY
PENDING REVIEW IN THIS COURT.

Under Article V, Section 3(b)(3) of the Florida
Constitution,
and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv),
this
Court may review any decision of a district court of appeal
that
expressly and directly conflicts with a decision of another
district court or of the Supreme Court on the same question of
law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this
Court
held that the only facts relevant to the decision to accept or
reject petitions for review are those facts contained within
the
four corners of the majority decision; neither the dissenting
opinion nor the record may be used to establish jurisdiction.
The State respectfully contends that the decision below
conflicts
with the decision of the First District Court of Appeal in
Sanders v. State, 847 So. 2d 504 (Fla. 1st DCA 2003).

James filed a motion for post conviction relief pursuant to

Florida Rule of Criminal Procedure 3.850, claiming that
counsel
was ineffective for failing to request a jury instruction on a
lesser included offense. The trial court summarily denied the
motion based on the decision of the First District Court of
Appeal in Sanders v. State, 847 So. 2d 504 (Fla. 1st DCA
2003),
where the court had held that in collateral proceedings under
Rule 3.850 regarding a claim for ineffective assistance of
counsel, a defendant cannot establish that there is a
reasonable
probability that the result would have been different had
trial
counsel requested and received the instruction regarding the
lesser offense. The Fifth District Court of Appeal stated:

However, in Vickery v State, 869
So. 2d 623 (Fla. 5th DCA 2004),
this
Court held that Sanders conflicts
with this Court's holding that the
failure of counsel to request a
lesser included jury instruction
states a colorable claim of
ineffective assistance of counsel.

James v State, 29 Fla. L. Weekly D129 (Fla. 5th DCA August 20,
2004).

In Vickery, supra, the Fifth District Court of Appeal
certified conflict with the First District Court of Appeal in
Sanders. The First District Court of Appeal has certified

conflict with the Fifth District's Oehling, supra. In addition, the Fourth District Court of Appeal, which is aligned with the Fifth District, has certified conflict with Sanders, supra. Willis v. State, 840 So. 2d 1135 (Fla. 4th DCA 2003). That case is also pending before this Court. State v. Willis, Case No. SC03-642. The First, Fourth and Fifth Districts have all acknowledged conflict on this issue, and these cases are currently before this Court, so Petitioner submits that this Court should exercise its discretionary jurisdiction to review the instant case as well.

CONCLUSION

Based upon the foregoing argument and authority, petitioner respectfully requests this Honorable Court to accept jurisdiction in this case.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above
and
foregoing brief has been furnished by U.S. Mail to Curtis
James,
DC#445553, Holmes Correctional Institution, 3142 Thomas Drive,
Bonifay FL 32425 this ___ day of September, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in
this
brief is 12-point Courier New, in compliance with Fla. R. App.
P.
9.210(a)(2).

Allison L. Morris
Of Counsel

