

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC04-605  
5 DCA Case No. 5D03-3128

WYLIE M. VICKERY,

Respondent.

-----/

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

PETITIONER'S BRIEF ON JURISDICTION

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

KELLIE A. NIELAN  
ASSISTANT ATTORNEY GENERAL  
Fla. Bar # 618550  
444 Seabreeze Blvd.  
Fifth Floor  
Daytona Beach, FL 32118  
(386) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii	
STATEMENT OF THE CASE AND FACTS . . . . .	1	
SUMMARY OF ARGUMENT . . . . .	2	
ARGUMENT:		
THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN <i>SANDERS V. STATE</i> , WHICH IS CURRENTLY PENDING REVIEW IN THIS COURT . . . . .		3
CONCLUSION . . . . .	5	
CERTIFICATE OF SERVICE . . . . .	5	
CERTIFICATE OF COMPLIANCE . . . . .	5	

TABLE OF AUTHORITIES

*Betha v. State*,  
767 So. 2d 630 (Fla. 5th DCA 2000) . . . . . 1,4

*Oehling v. State*,  
659 So. 2d 1226 (Fla. 5th DCA 1995) . . . . . 1,2,4

*Reaves v. State*,  
485 So. 2d 829 (Fla. 1986) . . . . . 3

*Sanders v. State*,  
847 So. 2d 504 (Fla. 1st DCA 2003) . . . . . 1,2,3,4

*Vickery v. State*,  
29 Fla. L. Weekly D676 (Fla. 5th DCA March 19, 2004) . . . . . 1

*Willis v. State*,  
840 So. 2d 1135 (Fla. 4th DCA 2003) . . . . . 2,4

OTHER AUTHORITIES:

Article V, Section 3(b)(3), Fla. Const. . . . . 3

Fla. R. App. P. 9.210(a)(2) . . . . . 5

Fla. R. App. P. 9.030(a)(2)(A)(iv) . . . . . 3

Fla. R. Crim. P. 3.850 . . . . . 1

STATEMENT OF THE CASE AND FACTS

Vickery 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, the decision in *Sanders* conflicts with our decisions in *Betha v. State*, 767 So. 2d 630 (Fla. 5th DCA 2000), and *Oehling v. State*, 659 So. 2d 1226 (Fla. 5th DCA 1995), wherein this court held that failure of trial counsel to request a lesser included offense is a basis for a colorable claim of ineffective assistance of counsel under Florida Rule of Criminal Procedure 3.850. Because the trial court summarily denied Vickery's motion, we reverse and remand for a hearing regarding this specific claim.

*Vickery v. State*, 29 Fla. L. Weekly D676 (Fla. 5th DCA March 19, 2004).



### SUMMARY OF 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*, 847 So. 2d 504 (Fla. 1st DCA 2003), which is currently pending before this court. *Sanders v. State*, Case No. SC03-640. 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 two of those 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).

Vickery 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. In the instant case, the Fifth District Court of Appeal stated:

However, the decision in *Sanders* conflicts with our decisions in *Betha v. State*, 767 So. 2d 630 (Fla. 5th DCA 2000), and *Oehling v. State*, 659 So. 2d 1226 (Fla. 5th DCA 1995), wherein this court held that failure of trial counsel to request a lesser included offense is a basis for a colorable claim of ineffective assistance of counsel under Florida Rule of Criminal Procedure 3.850. Because the trial court summarily denied Vickery's motion, we reverse and remand for a hearing regarding this specific claim.

*Vickery v. State*, 29 Fla. L. Weekly D676 (Fla. 5th DCA March 19, 2004).

The First District Court of Appeal has certified conflict with the Fifth District's *Oehling, supra*, case, 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 *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 two of those 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,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

\_\_\_\_\_  
Kellie A. Nielan  
Assistant Attorney General  
FL Bar No. 618550  
444 Seabreeze Blvd. 5th Floor  
Daytona Beach, FL 32118  
(386) 238-4990

COUNSEL FOR PETITIONER

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 Wylie M. Vickery, DC# V10538, Wakulla Correctional Institution, 110 Melaleucka Drive, Crawfordville, FL 32327-4963, this \_\_\_\_ day of April, 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).

Kellie A. Nielan  
Of Counsel