

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC

**State of Florida,**

Petitioner,

vs.

**Emmanuel Charles,**

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are those set forth in the appellate opinion sought to be reviewed. A copy of the opinion is contained in the appendix to this brief.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal conflicts with decisions of another district court of appeal.

ARGUMENT

POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL **EXPRESSLY AND DIRECTLY** CONFLICTS WITH THE DECISION IN Sanders v. State, 847 So. 2d 504 (Fla. 1<sup>st</sup> DCA 2003).

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Art. V, Sect. 3(b)(3) Fla. Const.; Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The State submits that this Court has jurisdiction. In this case the Fourth District Court of Appeal affirmed the summary denial of all claims except for claim six, in which Charles alleged ineffective assistance of trial counsel for failure to request jury instructions on permissive lesser included offenses such as aggravated assault, aggravated battery and grand theft. The Court found that Charles' claim was colorable under rule 3.850, and the trial court erred in summarily denying it without conducting an evidentiary hearing or attaching portions of the record to refute it. Citing Willis v. State, 840 So. 2d 1135 (Fla. 4th DCA 2003); Smith v. State, 807 So. 2d 755 (Fla. 4th DCA 2002); Peffley v. State, 766 So. 2d 418 (Fla. 4th DCA 2000). The Court acknowledged conflict with the First District on this

issue, as it did in Willis, 840 So. 2d at 1137. However, in Willis the Fourth District **certified** conflict with Sanders v. State, 847 So. 2d 504 (Fla. 1<sup>st</sup> DCA 2003)(emphasis added).

In Sanders, the First District found that trial counsel's failure to request an instruction on a one-step-removed lesser included offense of one of the crimes for which Sanders was convicted did not create a reasonable probability that, had the jury been instructed, the jury would have returned a verdict of guilty only as to lesser included offense, as required to support claim of ineffective assistance of counsel. The First District certified conflict with the Fourth District's decision in Peffley v. State, 766 So.2d 418 (Fla. 4th DCA 2000).

Based on the foregoing, Petitioner submits that the Fourth District's decision in the instant case is contrary to the First District's decision in Sanders. Accordingly, it is respectfully submitted that jurisdiction exists in this Court to accept review of the lower court's decision.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court GRANT Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished to: Emanuel Charles, DC# M14638, Everglades Correctional Institution, P.O. Box 949000, Miami, Florida 33194, John H. Lipinski, Esquire, 20836 N.W. 2<sup>nd</sup> Ave, Miami, Florida 33169 this \_\_\_ day of January 2005.

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MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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MELANIE DALE SURBER