IN THE SUPREME COURT OF FLORIDA

STEPHEN SCIPIO,

Petitioner,

v. CASE NO. SC04-647

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The record below reflects that Petitioner committed premeditated murder. The victim was shot four times, and during the shooting, while the victim was crawling, Petitioner walked alongside the victim, kicking him. Petitioner was overheard threatening or talking about the victim prior to the shooting. And Petitioner left the bar to obtain a weapon and then returned to shoot the victim. (R11 851-852, 865-866, 920-921, 923, 925-926, R12 983-984, 1072) Moreover, Richard Hogan testified that he saw Petitioner shortly after the shooting, that Petitioner was "breathing kind of heavy," and Petitioner said that he had just killed a "nigger." (R12 1026) Petitioner further stated that he was on the drug ecstasy and drinking alcohol and that he would use that as a defense to the crime. (R12 1027) Hogan saw Petitioner with a gun and also heard Petitioner say that he was going to New York. (R12 1028-1029, 1031) Two days later, Hogan again saw Petitioner but Petitioner had changed his appearance. (R12 1030-1031) Petitioner was arrested wearing a hat and a wig. (R13 1189)

Petitioner appealed raising five issues. Only one issue – whether the State committed a discovery violation – was determined to have merit. The appellate court included a lengthy rendition of the facts in its opinion with special emphasis on the testimony of four eyewitnesses. (Appendix 2-4) The appeals court utilized the harmless error rule and held that the discovery error did not materially hinder Petitioner's trial preparation or strategy.

Petitioner now seeks to invoke the discretionary jurisdiction of this Court based upon an alleged conflict in the application of the harmless error rule.

SUMMARY OF ARGUMENT

This court should decline to accept jurisdiction in this case. The decision of the Fifth District Court of Appeal does not expressly and directly conflict with a decision of this Court or any other Florida court.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER FLORIDA COURT.

This Court has jurisdiction under Article V, Section (3)(b)(3) of the Florida Constitution only where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The "four corners" of the opinion in this case not only include a lengthy recitation of facts unique to this case, but clearly cite as binding authority two of the three cases upon which Petitioner bases his allegation of conflict. First, Petitioner argues that the decision below is in conflict with State v. Schopp, 653 So.2d 1016 (Fla. 1995) and Pender v. State, 700 So.2d 663 (Fla. 1997) which hold that

> In determining whether a Richardson violation is harmless, the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered

> materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered.

State v. Schopp, 653 So. 2d at 1020; Pender, supra, 700 So.2d at 666.

Page 6 of the opinion below includes the verbatim language cited above together with citations to both cases. The district court relied upon these cases to render its ultimate decision. Petitioner therefore does not have a true conflict within the "four corners" of the opinion; rather, he is alleging a *misapplication* of the approved rule of law found in said cases. (see Petitioner's brief on jurisdiction at page 5: "this appellate court correctly identified the [Pender] analysis but then failed to apply it.") (See also Id. at page 8, (emphasis supplied): "[d]iscretionary review should be granted based on clear conflict caused by *misapplication* of [precedent].")

This is insufficient to confer conflict jurisdiction. It is a conflict of *decisions*, not a conflict of opinions or reasons, that supplies jurisdiction for review by this Court. See Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970). When the facts of the cases are distinguishable, jurisdiction does not lie. See Jacksonville v. Florida First National Bank, 339 So.2d 632 (Fla. 1976).

As noted in Schopp and Pender, the appellate court must determine whether trial strategy *reasonably could have benefited*

the defendant had the discovery violation not occurred. Necessarily, such a determination requires the appellate court to assess the weight of the evidence. Where, as here, the trial court and district court find the evidence overwhelming, there is little chance that a minor change in trial strategy would benefit the defendant. First and last closing argument does not win cases hopelessly lost due to overwhelming evidence. Thus, the alleged conflict with Williams v. State, 863 So.2d 1189 (Fla. 2003) is nonexistent. The district court did not simply substitute itself as the trier of fact and re-weigh the evidence, it properly determined that Petitioner could not have reasonably benefitted from a different trial strategy (such as first and last closing) given the overwhelming nature of the evidence. In addition, if the two witness were *not* called, the evidence would have been even more overwhelming.

Moreover, Petitioner did not lose the first and last portions of closing argument because the witness at issue in this cause was the ***second*** witness called by the defense. Petitioner did not testify. The testimony of the two witnesses did not appear to be interrelated. Even though Petitioner never claimed in the trial court or in its initial brief below that he was prejudiced because he lost first and last closing argument, the question was discussed during oral argument and in the reply brief. The district court nevertheless found that if the witness in question had not been called, "[c]learly the outcome of the this case would not have been affected given the multiple

eyewitness testimonies..." (slip opinion at 6) Therefore, it was tacitly held by the district court that first and last closing argument would not have reasonably benefitted Petitioner. This finding is supported by the record and the overwhelming nature of the evidence.

Discretionary conflict jurisdiction is not conferred where this Court must review the record in order to resolve factual claims, disputes, or stratagems. The conflict must exist within the "four corners" of the opinion under review and it must be "clear and distinct." Here, the supposed "conflict" cases were used to arrive at the ruling below. Where the district court cites with authority the very cases Petitioner alleges are in conflict, it is difficult to perceive how a "direct and express" conflict exists between the decisions.

This Court, in Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983), initially accepted jurisdiction but then discharged jurisdiction because the case was distinguishable on its facts from those cited as being in conflict with it. Similarly, in Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980) this Court quoted from its earlier decision in Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed...**It was never intended that the district courts of appeal should be intermediate courts**...To fail to recognize that these are

> courts primarily of **final appellate jurisdiction** and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

(emphasis supplied) Given the fact that the Fifth District Court is a court of final appellate jurisdiction and given the very limited and restricted bases for this Court's exercise of its discretionary jurisdiction based upon conflict, it cannot be said that Petitioner has established any good cause for the exercise of that jurisdiction. There is no express or even implied conflict.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to decline jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on jurisdiction in case number SC04-647 has been furnished by basket delivery at the Fifth District Court of Appeal to Noel A. Pelella, Assistant Appellant Public Defender, Seventh Judicial Circuit, this _____ day of May, 2004.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL