

IN THE SUPREME COURT OF FLORIDA

JESSIE MILTON,

Petitioner,

v.

CASE NO.: SC04-848

STATE OF FLORIDA,

DCA CASE NO.: 5D03-0179

Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

KELLIE A. NIELAN  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR #618550

PAMELA J. KOLLER  
ASSISTANT ATTORNEY GENERAL  
Fla. Bar #0775990  
444 Seabreeze Blvd.  
Fifth Floor  
Daytona Beach, FL 32118  
(386) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

|                                |    |
|--------------------------------|----|
| TABLE OF AUTHORITIES . . . . . | ii |
| STATEMENT OF FACTS . . . . .   | 1  |
| SUMMARY OF ARGUMENT . . . . .  | 2  |
| ARGUMENT . . . . .             | 3  |

THIS COURT SHOULD NOT ACCEPT JURISDICTION  
OF THIS CASE

|                                     |   |
|-------------------------------------|---|
| CONCLUSION . . . . .                | 5 |
| CERTIFICATE OF SERVICE . . . . .    | 6 |
| CERTIFICATE OF COMPLIANCE . . . . . |   |

TABLE OF AUTHORITIES

**CASES:**

Jollie v. State,  
405 So. 2d 418 (Fla. 1981) . . . . . 3

Milton v. State,  
29 Fla. L. Weekly D950 (Fla. 5<sup>th</sup> DCA April 16, 2004) . . . 1

Nelson v. State,  
No. SC02-1418 (Fla. June 3, 2004) . . . . . 2,3

Nelson v. State,  
816 So. 2d 694 (Fla. 5th DCA), rev. granted,  
837 So. 2d 411 (Fla. 2003) . . . . . 1,2,3

**OTHER AUTHORITIES:**

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

STATEMENT OF CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the four corners of the opinion of the District Court.<sup>1</sup> Respondent, therefore, offers the following as a substitute for Petitioner's statement of the case and facts.

In Milton v. State, 29 Fla. L. Weekly D950 (Fla. 5<sup>th</sup> DCA April 16, 2004), the Fifth District Court of Appeal affirmed the summary denial of Petitioner's claims of ineffective assistance of counsel raised in his motion for post-conviction relief. The district court, in denying relief for the claim that counsel failed to call a witness, relied upon Nelson v. State, 816 So. 2d 694, 695-96 (Fla. 5th DCA), rev. granted, 837 So. 2d 411 (Fla. 2003), wherein the district court concluded that a post-conviction petitioner must allege that the witness was available in order to state a prima facie claim. It is from that finding that Petitioner now seeks discretionary review by this Court in the above-styled case.

---

<sup>1</sup>Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Therefore, Petitioner's references to the record on appeal as contained within his statement of the case should be disregarded as not relevant.

SUMMARY OF ARGUMENT

This Court affirmed the Fifth District Court's ruling in Nelson v. State, 816 So. 2d 694 (Fla. 5th DCA), rev. granted, 837 So. 2d 411 (Fla. 2003) that an allegation must be made in a claim of ineffective assistance of counsel for failure to call a witness that the witness was available. Nelson v. State, No. SC02-1418 (Fla. June 3, 2004). As such, this Court should not accept jurisdiction in this case.

ARGUMENT

THIS COURT SHOULD NOT ACCEPT  
JURISDICTION OF THIS CASE.

This Court has jurisdiction under article V, section 3(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. Moreover, where the district court's decision cites as controlling law a decision that is either pending review in or has been reversed by this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981).

This Court recently affirmed the Fifth District Court's ruling in Nelson v. State, 816 So. 2d 694 (Fla. 5th DCA), rev. granted, 837 So. 2d 411 (Fla. 2003), that a post-conviction petitioner must allege that the witness is available where the claim is ineffective assistance of counsel for failure to call a witness. Nelson v. State, No. SC02-1418 (Fla. June 3, 2004). Since Petitioner's basis for seeking this Court's acceptance of jurisdiction has been resolved, this Court should not accept jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, the Respondent respectfully suggests that this Court should not accept jurisdiction of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by delivery via U.S. Mail to Jessie Milton, DC# VD8089, Everglades Correctional Institution, P.O. Box 949000, Miami, FL 33194, this 4th day of June, 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.

Respectfully submitted,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

---

KELLIE A. NIELAN  
ASSISTANT ATTORNEY GENERAL  
Fla. Bar #618550

---

PAMELA J. KOLLER  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR #0775990  
444 Seabreeze Boulevard  
Fifth Floor  
Daytona Beach, FL 32118  
(386) 238-4990  
FAX: (386) 238-4997

COUNSEL FOR RESPONDENT