

IN THE SUPREME COURT OF FLORIDA

THEODORE SPERA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC06-1304  
4th DCA Case No. 4D04-4535

\*\*\*\*\*

RESPONDENT'S BRIEF ON JURISDICTION

\*\*\*\*\*

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL  
Tallahassee, Florida

JAMES J. CARNEY  
Senior Assistant Attorney General  
Florida Bar No. 475246

MARK J. HAMEL  
Assistant Attorney General  
Florida Bar No. 0842621  
1515 North Flagler Drive  
Ninth Floor  
West Palm Beach, FL 33401  
(561) 837-5000

Counsel for Respondent

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.	
CONCLUSION	4
CERTIFICATE OF SERVICE	5
CERTIFICATE OF TYPEFACE COMPLIANCE	6

**TABLE OF AUTHORITIES**

**STATE CASES**

Ackers v. State, 614 So. 2d 494 (Fla. 1993) ..... 3

Frazier v. State, 912 So. 2d 54 (Fla. 4th DCA 2005) ..... 1

Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005) ..... 2, 3

Spera v. State, 923 So. 2d 543 (Fla. 4th DCA 2006) ..... 1, 2, 3

**COURT RULES**

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

## STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of burglary. Petitioner raised two claims in a rule 3.850 motion for post-conviction relief in the trial court. Spera v. State, 923 So. 2d 543, 544 (Fla. 4th DCA 2006). In his first claim, Petitioner asserted that his defense attorney failed to call witnesses in his defense or to present a case-in-chief. Id. However, Petitioner failed to identify any of the witnesses or describe what testimony would support his defense, or to confirm that the witnesses were available to testify at the time of trial. Id. In his second claim, Petitioner argued that his attorney failed to adequately discuss the case with him prior to trial. Id. There is also no explanation as to how this prejudiced his case. Id. The trial court summarily denied Petitioner's motion as substantively insufficiently, in a detailed order which did not provide leave to amend. Id.

On February 22, 2006, the Fourth District Court issued an en banc decision, receding from its decision in Frazier v. State, 912 So. 2d 54 (Fla. 4th DCA 2005) and affirming the trial court's decision in Petitioner's case. Spera, 923 So. 2d 543. The Fourth District Court of Appeal receded from Frazier to the extent that it recognized a per se requirement that trial courts must deny relief with leave to amend whenever the pleading is

deficient by omission and the omitted claims go beyond a simple technical failure. Spera, 923 So. 2d at 545-46. Additionally, the Fourth District Court of Appeal recognized conflict with Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005). Spera, 923 So. 2d at 546.

**SUMMARY OF THE ARGUMENT**

The opinion of the Fourth District Court of Appeal does not announce a rule of law which expressly and directly conflicts with the opinion from the Second District Court of Appeal.

**ARGUMENT**

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

Petitioner seeks the discretionary review of this Court on the basis that the decision of the Fourth District Court of Appeal expressly and directly conflicts with a decision of this Court or another district court of appeal on the same question of law pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv). More specifically, Petitioner argues that the holding of the Fourth District Court of Appeal conflicts with Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005).

There is no express and direct conflict. In Keevis, the appellant claimed that "his counsel was ineffective for failing

to call two defense witnesses to testify on his behalf." Id. at 553. However, "Keevis did not allege in his motion that the witnesses were available to testify at trial." Id. The Second District Court of Appeal determined that the trial court should have granted Keevis leave to amend his claim. Id.

Like Keevis, Petitioner failed to allege that witnesses were available to testify at trial. Spera, 923 So. 2d at 544. However, Petitioner additionally "failed to identify any of the witnesses or describe what testimony would support his defense." Id. Therefore, unlike the claim in Keevis, Petitioner's claim goes beyond a mere technical omission to a complete failure to assert any facts to establish prejudice. Therefore, the instant case does not directly conflict with Keevis. See Ackers v. State, 614 So. 2d 494, 495 (Fla. 1993) (there is no conflict jurisdiction where two cases are factually distinguishable).

Furthermore, the second claim raised in Keevis is similar to Petitioner's claims. The second claim alleged ineffective assistance of counsel for failing to impeach two witnesses. Keevis, 908 So. 2d at 554. This claim was denied by the trial court because Keevis failed to allege either deficient performance or prejudice. Id. The Second District Court of Appeal affirmed the denial of the second claim without leave to amend. Id. The second claim in Keevis was denied, just like

Petitioner's claims, as substantively insufficient and without leave to amend.

**CONCLUSION**

Based on the foregoing argument, Respondent requests that this Honorable Court refuse to accept jurisdiction in this cause.

Respectfully submitted,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL  
Tallahassee, Florida

---

JAMES J. CARNEY  
Senior Assistant Attorney General  
Florida Bar No. 475246

---

MARK J. HAMEL  
Assistant Attorney General  
Florida Bar No. 0842621  
1515 North Flagler Drive  
Ninth Floor  
West Palm Beach, FL 33401  
(561) 837-5000

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to Theodore Spera, DC # 952256, Glades Work Camp, 2600 North Main Street, Belle Glade, Florida 33340, this 1st day of September 2006.

---

MARK J. HAMEL  
Of Counsel



**CERTIFICATE OF TYPEFACE COMPLIANCE**

I HEREBY CERTIFY that this brief has been prepared in  
Courier New font, 12 point, and double spaced.

---

MARK J. HAMEL  
Of Counsel