

IN THE SUPREME COURT OF FLORIDA

JASON PAUL BOUDREAUX,

Petitioner,

v.

CASE NO. SC10-2069

STATE OF FLORIDA,

Respondent.

_____ /

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, JASON PAUL BOUDREAUX, the Appellant in the District Court of Appeal (DCA) and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name. Respondent, the State of Florida, the Appellee in the DCA and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State.

The Petitioner's jurisdictional brief will be referred to as "PJB" followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached to the Petitioner's jurisdictional brief. In an opinion authored by Judge Brad Thomas, a three judge panel of the First District Court of Appeal concluded:

We affirm the order dismissing Appellant's motion for postconviction relief and amended motion for postconviction relief as untimely. Appellant filed a timely eleven-claim motion pursuant to Florida Rule of Criminal Procedure 3.850. The postconviction court found that two of Appellant's claims were facially insufficient and, pursuant to Spera v. State, 971 So.2d 754 (Fla.2007), permitted Appellant to file an amended motion within 60 days. Spera requires that a movant be given a "reasonable opportunity to amend insufficient claims" and implies that the period not exceed 30 days. In the instant case, instead of filing a timely amended motion, Appellant moved for an

extension of time to file his amendment, which was denied, and caused further delay by appealing to this court. When Appellant did file his amended motion, both the two-year window for rule 3.850 motions and the 60-day period given to amend his motion had passed, and the amended motion was therefore untimely filed. Furthermore, Appellant waived his arguments concerning his nine claims which were originally timely filed because he failed to specifically address these claims in his Initial Brief.

Boudreaux v. State, ____ So.3d ____, 2010 WL 3168294 (Fla. 1st DCA 2010).

SUMMARY OF THE ARGUMENT

The appropriate focus upon the operative facts, as contained within the "four corners" of the First District Court of Appeal's decision in Boudreaux v. State, ____ So.3d ____, 2010 WL 3168294 (Fla. 1st DCA 2010) reveals no express and direct conflict between this case and the cases to which Boudreaux cites.

ARGUMENT

WHETHER CONFLICT JURISDICTION EXISTS

A. Standard of Review/Jurisdiction

The applicable standard of review for claims of direct and express conflict is *de novo* subject to the constraints of Florida's constitution. Petitioner seeks discretionary review pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and

directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and the only relevant facts for the determination of discretionary jurisdiction must appear within the four corners of the majority decision. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict; dismissing petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra. It is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Conflict jurisdiction is not present when the case asserted to be in conflict is distinguishable on its facts from those cited as conflicting. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

In Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958), this Court explained:

... It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a

Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute. Accordingly, the determination of conflict jurisdiction distills to whether the district court's decision in the instant case reached a result opposite Bozeman v. State, 698 So. 2d 629 (Fla. 4th DCA 1997) and Cooper v. State, 659 So.2d 442 (Fla. 2d DCA 1995) on indistinguishable facts.

B. Application of Conflict Jurisdiction in this Case

Boudreaux avers the First District Court of Appeal's decision in his case conflicts with decisions from two different district courts of appeal in this state. Boudreaux first alleges that the First District Court of Appeal's decision conflicts with the Second District Court of Appeal's decision in Christner v. State, 984 So.2d 561 (Fla. 2d DCA 2008).¹ Boudreaux claims that "[t]he first conflict is that the First District Court of Appeal will not rescue a premature appeal from its jurisdictional problem." (PJB 1).

¹ In Christner, the defendant filed an appeal from an order denying one ground for post-conviction relief and striking another ground as legally sufficient, with leave to amend. The trial court incorrectly noted, in its order, that the order was final and the defendant had 30 days to appeal. Christner did not file an amended claim within the time period authorized by the trial court. The Second District ruled that Christner's appeal of the non-final order was premature. Rather than dismiss it, however, the 2d DCA chose to hold Christner's premature notice of appeal in abeyance. The 2d DCA remanded with directions to the trial court to enter a final appealable order, which would "rescue this premature appeal from its jurisdictional shortcomings." Christner v. State, 984 So.2d at 563.

Although not apparent from his initial brief, it appears that Boudreaux's allegation of conflict actually stems from the 2009 dismissal of Boudreaux's previous appeal. In that case, the First District Court of Appeals, apparently, dismissed Boudreaux's appeal of the circuit court's non-final order denying his motion for an extension of time, pursuant to Spera v. State, 971 So.2d 754 (Fla. 2007), to "fix" two legally insufficient claims that he had presented in his initial motion for post-conviction relief. Boudreaux v. State, 27 So.3d 662 (Table)(Fla. 1st DCA 2009).

Of course, the problem with this alleged conflict is that the case allegedly in conflict with Christener is not the case currently before the Court and attached to Boudreaux's jurisdictional brief. Instead, it is a case decided nearly one year ago, on December 29, 2009. Boudreaux v. State, 27 So.3d 662 (Table)(Fla. 1st DCA 2009).

Boudreaux's attempt to invoke the jurisdiction of this Court to review that conflict is more than nine months too late. *See Rule 9.120(b), Florida Rules of Appellate Procedure (providing that to invoke discretionary jurisdiction in this court, the petitioner must file a notice in the lower tribunal within 30 days of rendition of the order to be reviewed).* Even so, there is no conflict because the First District's decision consisted of one word, "DISMISSED." Boudreaux v. State, 27

So.3d 662 (Table)(Fla. 1st DCA 2009). Accordingly, there can be no conflict with Christner. Jollie v. State, 405 So.2d 418 (Fla. 1981)(PCAs without more, not reviewable by the Florida Supreme Court on conflict jurisdiction).

Boudreaux complains next that the First District Court of Appeal's decision, in his case, conflicts with several cases from the Fifth District Court of Appeal. Boudreaux avers the conflict stems from the fact that the circuit court, in his case, did not attach portions of the record conclusively refuting his claims nor did it hold an evidentiary hearing. (PJB 2). Boudreaux cites to cases from the Fifth District Court of Appeal, which stand for the proposition that, in cases where the trial court summarily denies a motion for post-conviction relief in a non-capital case, the trial court must attach portions of the record conclusively refuting the defendant's claims.

However, none of the cases to which Boudreaux cites helps his cause. This is so because, even if it were true that the collateral court did not attach portions of the record to support a summary denial, there is no conflict on the face of the First District's decision in Boudreaux's case and the ones to which he cites. The First District did not even address the record in this case.

This Court may exercise conflict jurisdiction only when the conflict between decisions is express and direct. Moreover, the

only relevant facts for the determination of discretionary jurisdiction must appear within the four corners of the majority decision. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

Boudreaux attempts to inject "facts" not appearing in the four corners of the First District's decision in Boudreaux v. State, ____ So.2d 3d ____, 2010 WL 3168294 (Fla. 1st DCA 2010). As such, this Court should decline to exercise jurisdiction in this case.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court to decline jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Jason Boudreaux, DC #21402, South Bay Correctional Facility, P.O. Box 7171, South Bay, Florida 33493-7171 this 8th day of November 2010.

MEREDITH CHARBULA
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

MEREDITH CHARBULA
Assistant Attorney General