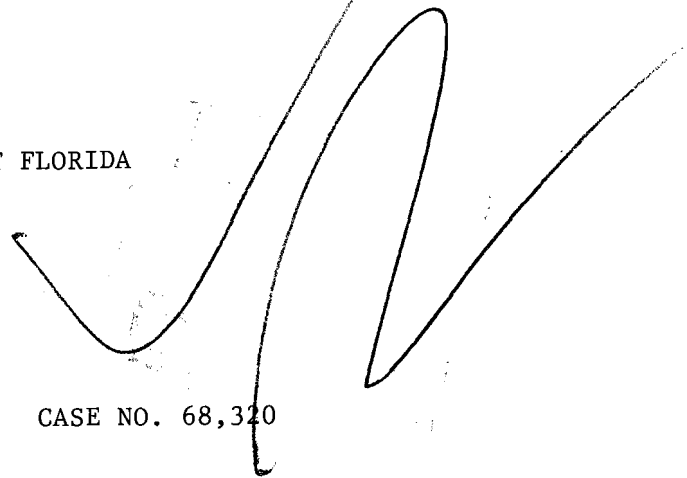


IN THE SUPREME COURT OF FLORIDA

PHILLIP DYLAN HOLLAND,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 68,320



RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner herein, PHILLIP DYLAN HOLLAND, was the Appellant, and the Respondent, STATE OF FLORIDA, the Appellee, in the Fourth District Court of Appeal. In this brief, the parties will be referred to as the "Petitioner" and the "Respondent."

"R A" means Respondent's Appendix to its Jurisdictional Brief, and "e.a." means emphasis added.

STATEMENT OF THE CASE AND FACTS

Because Petitioner's Statement is confusing and irrelevant, Respondent offers its own Statement, as follows:

Petitioner was convicted, adjudicated and sentenced, for first-degree murder, to life imprisonment, with a minimum mandating 25 year term. His conviction and sentence were upheld, in a unanimous per curiam affirmance by the Fourth District Court of Appeal. Holland v. State, Case No. 82-2179 (Fla. 4th DCA, July 25, 1984). (RA, 1).

Subsequently, Petitioner filed a post-conviction motion to vacate his conviction and sentence, which was denied without an evidentiary hearing. (RA, 2-3). In its opinion, the Fourth District concluded that, while Petitioner was "facially" correct, in urging that he was entitled to a hearing, under this Court's decision in Morgan v. State, 475 So.2d 681 (Fla. 1985), such error was harmless. (RA, 4). Holland v. State, 11 FLW 206 (Fla. 4th DCA, January 15, 1986). The Court further concluded that "no purpose would be served by remanding for a hearing." (RA, 4); Holland, supra, at 206-207. In support of its holding, the Fourth District cited the decisions of Palmes v. State, 397 So.2d 648 (Fla. 1981), and Recinos v. State, 420 So.2d 95 (Fla. 3rd DCA 1982), as well as the "harmless error" statute. (RA, 4). Holland, at 207.

Petitioner appears to have filed a "petition for review" on February 11, 1986, but has not included same in his brief, or in an Appendix, which Petitioner has omitted.

POINT ON APPEAL

WHETHER DECISION OF FOURTH DISTRICT COURT OF APPEAL PRESENTS "DIRECT AND EXPRESS CONFLICT" UNDER MEANING OF ARTICLE V OF FLORIDA CONSTITUTION, SINCE PETITIONER HAS NOT PROPERLY INVOKED THIS COURT'S JURISDICTION?

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that the Fourth District's opinion in this case, on its face, created express and direct conflict with prior decisions of this Court, or other district courts, on any of the issues raised by Petitioner.

ARGUMENT

DECISION OF FOURTH DISTRICT COURT OF AP-
PEAL DOES NOT PRESENT "DIRECT AND EXPRESS
CONFLICT" UNDER MEANING OF ARTICLE V OF
FLORIDA CONSTITUTION; THEREFORE, PETI-
TIONER HAS NOT PROPERLY INVOKED THIS
COURT'S JURISDICTION.

In reviewing Petitioner's allegation of conflict to invoke this Court's discretionary certiorari jurisdiction, it is crucial to note that Article V, Section 3(b)(3) of the Florida Constitution requires a showing by Petitioner that there is "express and direct conflict" herein with the holding of another state District Court of Appeal, based upon the opinion, in this case, on its face. Dodi Publishing Company v. Editorial America, S.A., 285 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Furthermore, such conflict certiorari may properly be established only by demonstrating that a present rule of law, announced in the present case by the District Court of Appeal, expressly conflicts with the rule of law, in a prior appellate decision. Mancini v. State, 312 So.2d 732 (Fla. 1975). Hollywood, Inc. v. Broward County, 108 So.2d 752 (Fla. 1959).

It is clear that Petitioner has thus not established any basis for conflict certiorari. All of the arguments contained therein, merely constitute de facto attempts to re-argue and re-litigate Petitioner's assertions on appeal of the denial of his post-conviction motion, by means of a second direct appeal. Sanchez v. Wimpy, 409 So.2d 20 (Fla. 1982). Petitioner's approach is thus clearly an example of what the 1980 amendments to Article V, supra, was designed to prevent, as a means of invoking this Court's jurisdiction. Jenkins, supra, at 1360.

Furthermore, it can hardly be said that the Fourth District's

opinion is in conflict, on its face, with the decision in Morgan v. State, 475 So.2d 681 (Fla. 1985). On its face, the Fourth District agreed with Petitioner's viewpoint, specifically concluding that he was "facially correct" in his reliance on the Morgan decision. A finding by the Fourth District, in this proceeding, that an error, under Morgan, should be deemed harmless, with no point to ordering a remand for an evidentiary hearing, (RA, 5), does not conflict with Morgan itself, supra, when it is clear that the Morgan decision was applied herein. Mancini, supra; Dodi Publishing Company, supra; Jenkins, supra. A conclusion that an error by the trial court, did not, in essence, affect the resulting ruling (RA, 5), cannot be said to conflict with the prior decision in Morgan, that such an error occurred.

Petitioner has also urged conflict between this decision, and this Court's holding in Livingston v. State, 458 So.2d 235 (Fla. 1984). In Livingston, supra, this Court determined that jurors deliberating a capital case, must be sequestered from the outset of such deliberations. Livingston, supra, at 239. The case sub judice, on its face, does not even remotely consider the same rule of law, thus clearly defeating Petitioner's claim of a basis for conflict certiorari. Jenkins; Dodi Publishing Company.

Additionally, Petitioner alleges conflict between the Fourth District's opinion and the decision of the First District in Allen v. State, 11 FLW 299 (Fla. 1st DCA, January 30, 1986). In Allen, supra, the First District noted that the trial court therein had summarily denied the defendant's post-conviction motion, without attaching any portion of the trial record or transcript in support. Id. Its remand in

the case, was for the purpose of affording the trial court an opportunity to attach such Record substantiation, in support of the summary denial, or to hold a hearing. Id. It is clear from the face of the opinion in Holland, supra, that the present case does not involve, in any way, a ruling on the same or similar rule of law. Jenkins; Dodi Publishing Company. Thus, conflict certiorari has not been properly invoked, with respect to Allen, supra.

Petitioner's claims of conflict, with those cases cited other than Morgan, represent an attempt to improperly "go behind" the face of the Fourth District's opinion, to establish conflict certiorari. Sanchez, supra; Jenkins.

Since Petitioner has completely failed to make any showing of the existence of direct and express conflict between the Fourth District's opinion, and those cases cited by Petitioner, the pending request for discretionary review should be denied.

CONCLUSION

Based on the argument and authorities cited herein, Respondent respectfully requests that this Honorable Court DENY jurisdiction and certiorari review of this case.

Respectfully submitted,

JIM SMITH
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Tallahassee, Florida 32301

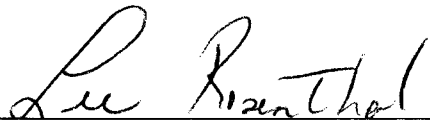


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction, and Appendix, has been mailed to PHILLIP DYLAN HOLLAND, Petitioner pro se, 500 Orange Avenue Circle, Glades Correctional Institution, Belle Glade, Florida 33430, this 21st day of April, 1986.



Of Counsel