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IN THE SUPREME COURT OF FLORIDA

ERVIN EUGENE WILLIAMS,
Petitioner,

v.

CASE NO. 79,976

STATE OF FLORIDA,
Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

RESPONDENT'S JURISDICTIONAL BRIEF

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SUMMARY OF ARGUMENT

The petitioner has not shown direct and express conflict between the Fifth District Court's decision in this case and the First District Court's decision in State v. Agee, 588 So.2d 600 (Fla. 1st DCA), jurisdiction accepted, no. 78,950 (Fla. 1991). The cases are distinguishable, and there is accordingly no direct conflict although the Fifth District Court declined to apply the per se rule established by the court in Agee.

ARGUMENT

THE PETITIONER HAS NOT SHOWN DIRECT
AND EXPRESS CONFLICT BETWEEN
DECISIONS.

The petitioner, Ervin Williams, seeks review of the decision of the Fifth District Court of Appeal in this case, alleging that it is in direct and express conflict with the decision of the First District Court of Appeal in State v. Agee, 588 So.2d 600 (Fla. 1st DCA), jurisdiction accepted, no. 78,950 (Fla. 1991). The decisions are not in direct conflict, although the Fifth District Court in this case declined to apply the per se rule established by the First District Court in Agee. The state further submits that the per se rule announced in Agee is inconsistent with this court's decisions in Zabrani v. Cowart, 506 So.2d 1035 (Fla. 1987) and Bloom v. McKnight, 502 So.2d 422 (Fla. 1987), and that the Fifth District Court's decision in this case correctly applies the rule of McKnight and Zabrani. This court accordingly need not exercise its discretionary review in this case.

The First District Court held in Agee that if the state in a felony case files a nolle prosequi, refiles charges, and fails to bring the defendant to trial within 175 days, the defendant is entitled to automatic release without filing the motion for discharge contemplated in Rule 3.191(i). The court reasoned that 3.191(i), which provides for a 15-day "window of recapture" after filing of a motion for discharge, is altogether inapplicable, because of Rule 3.191(h), to cases in which the state files a nolle prosequi. 3.191(h) provides that "[t]he intent and effect

of this Rule shall not be avoided by the State by entering a nolle prosequi." The Fifth District Court in this case declined to follow Agee's per se rule, holding in effect that a two-week delay occasioned by a nolle prosequi filed in good faith and not for the purpose of delay does not amount to avoidance of the intent and effect of Rule 3.191.¹

The decision in this case is not in direct conflict with the decision in Agee, as the cases are distinguishable. Conflict must be both express and direct. Department of Revenue v. Johnson, 442 So.2d 950, 951-2 (Fla. 1983). This court has strictly construed the constitution's jurisdictional requirement that conflict between decisions be express and direct. See Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986); Reaves v. State, 485 So.2d 829 (Fla. 1986); Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

Moreover, as the Fifth District Court noted in its opinion in this case, this court held in Zabrani v. Cowart, supra, and Bloom v. McKnight, supra, that filing a motion for discharge is the "operative event" that triggers a right to release under Rule 3.191, Florida Rules of Criminal Procedure. Agee is inconsistent

¹ In this case, had the state not filed a nolle prosequi, Mr. Williams could have filed a motion for discharge on September 13, 1991. That motion would have required the state to bring petitioner to trial by Monday, September 30. The state filed its nolle prosequi, refiled charges, and rearrested Mr. Williams on September 26. He could then have filed a motion for discharge at his first appearance on September 27 or 28, requiring the state to bring him to trial by Monday, October 14. Agee involved a similar sequence of events with the significant difference that a two-year delay, rather than a two-week delay, was occasioned by the state's nolle prosequi. 588 So.2d at 602.

with Zabrani and McKnight, and should be reversed. The decision in this case is consistent with this court's decisions and with a sensible construction of Rule 3.191. This court accordingly need not grant discretionary review in this case. See generally Woodward v. State, 379 So.2d 664 (Fla. 1980) (declining to accept jurisdiction; no substantial question raised where this court had already "at least implicitly" ruled on issue raised by petitioner).

CONCLUSION

The Respondent requests this court to decline to exercise its discretionary power to review this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Jurisdictional Brief has been delivered by hand to Assistant Public Defender Daniel J. Schafer, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 30th day of June, 1992.



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