

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

JANUARY TERM 2005

**EMMANUEL CHARLES,**

Appellant,

v.

**STATE OF FLORIDA,**

Appellee.

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CASE NO. 4D03-3972

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portions of the record to refute it. *See Willis v. State*, 840 So. 2d 1135 (Fla. 4th DCA 2003); *Smith v. State*, 807 So. 2d 755 (Fla. 4th DCA 2002); *Peffley v. State*, 766 So. 2d 418 (Fla. 4th DCA 2000). We acknowledge conflict with the First District on this issue, as we did in *Willis*, 840 So. 2d at 1137.

AFFIRMED in part, REVERSED in part and REMANDED.

KLEIN, STEVENSON and GROSS, JJ., concur.

Opinion filed January 12, 2005

***NOT FINAL UNTIL DISPOSITION OF ANY  
TIMELY FILED MOTION FOR REHEARING.***

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dorian Damoorgian, Judge; L.T. Case No. 99-20225 CF10A.

John H. Lipinski of The Law Offices of J.H. Lipinski, Pembroke Pines, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Melanie Dale Surber, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Appellant Emmanuel Charles was convicted of six counts of robbery with a firearm and was sentenced to concurrent terms of twenty-five years in prison. Here, he appeals the trial court's summary denial of his motion for post conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the summary denial of all claims except for claim six, in which Charles alleged ineffective assistance of trial counsel for failure to request jury instructions on permissive lesser included offenses such as aggravated assault, aggravated battery and grand theft. Appellant's claim was colorable under rule 3.850, and the trial court erred in summarily denying it without conducting an evidentiary hearing or attaching