

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1353

IKE HESTER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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**BRIEF OF RESPONDENT ON JURISDICTION**

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## **STATEMENT OF THE CASE AND FACTS**

The State rejects the Statement of Case and Facts contained in Petitioner's Amended Jurisdictional Brief as it goes beyond the four (4) corners of the Third District's opinion below. In its entirety, the Third District's decision below stated:

Ike Hester appeals an order denying his motion for postconviction relief, asserting the existence of newly discovered evidence. We have taken judicial notice of this court's file in Hester v. State, 763 So. 2d 333 (Fla. 3d DCA 2000). As the trial court's order explained, there were two separate shootings in close proximity. Assuming for purposes of discussion that the affidavit of Russell Williams could be viewed as newly discovered evidence, the affidavit does not contradict the State's evidence and may, in fact, corroborate it.

Hester v. State, 902 So. 2d 181 (Fla. 3d DCA 2005).

## **SUMMARY OF ARGUMENT**

Based upon Florida Rule of Appellate Procedure 9.030(a), this Court is without jurisdiction to entertain Petitioner's motion where there is no conflict between the decision of the lower court here and a decision of another district court of appeal or this Court.

## ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION WHERE THE LOWER COURT'S DECISION DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR WITH A FLORIDA SUPREME COURT DECISION.

This Court has jurisdiction to review a decision from a district court of appeal which expressly or directly conflicts with a decision from this Court or from another district court of appeal on the same question of law. *See* Rule 9.030(a)(2)(iv), Fla.R.App.Pro. (2004). “Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.” Reeves v. State, 485 So. 2d 829, 830 (Fla. 1986). This Court cannot exercise its discretionary jurisdiction to review the decision below because it is not in direct conflict with any decision from this Court or any other district court of appeal on the same question of law.

Petitioner's argument does not stay within “the four corners of the majority decision.” Id. Furthermore, the Third District's opinion cannot possibly conflict expressly or directly with a decision from this Court or from another district court of appeal on the same question of law given the paucity of facts cited in the Third District's opinion. Below, the Third District wrote:

Ike Hester appeals an order denying his motion for postconviction relief, asserting the existence of newly discovered evidence. We have taken judicial notice of this court's file in *Hester v. State*, 763 So. 2d 333 (Fla. 3d DCA 2000). As the trial court's order explained, there were two separate shootings in close proximity. Assuming for purposes of discussion that the affidavit of Russell Williams could be viewed as newly discovered evidence, the affidavit does not contradict the State's evidence and may, in fact, corroborate it.

Hester, 902 So. 2d at 181. The only facts presented in the decision below were that two (2) separate shootings occurred in close proximity to one (1) another. There can be no conflict here because no details were provided by the Third District regarding the affidavit of Russell Williams that could possibly conflict with McLin v. State, 827 So. 2d 948 (Fla. 2002), the case Petitioner argues is in express and direct conflict with the Third District's decision below. McLin, after all, holds that a trial court must hold an evidentiary hearing when a defendant introduces newly discovered evidence unless the allegations are conclusively refuted by the record or **obviously immaterial to the verdict**. Id. at 955. Certainly, nothing in the decision below holds otherwise. By stating that the affidavit of Russell Williams did "not contradict the State's evidence and may, in fact, corroborate it," the Third District clearly held below that the contents of the affidavit were immaterial to the verdict. Id. If anything, the Third District's decision corroborated the precedent of McLin and certainly did not conflict with it.

As previously stated, the conflict “must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.” Reeves, 485 So. 2d at 830. The decision below did not provide sufficient facts to establish an express and direct conflict. Since Petitioner fails to cite a case that conflicts with the “four corners” of the decision below, this Court does not have jurisdiction to entertain Petitioner’s appeal.



**CONCLUSION**

Based on the foregoing argument and cited authorities, this court should decline to exercise its discretionary jurisdiction to review the decision below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was mailed this \_\_\_\_ day of November, 2005, to IKE HESTER, *pro se*, DC# 564109, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026-1000.

\_\_\_\_\_  
MICHAEL E. HANTMAN  
Assistant Attorney General

**CERTIFICATE REGARDING FONT SIZE AND TYPE**

The undersigned attorney certifies that the foregoing Answer Brief of Appellee has been typed in Times New Roman, 14-point type.

\_\_\_\_\_  
MICHAEL E. HANTMAN  
Assistant Attorney General