IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1394

ELECK WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In its entirety regarding this issue, the Third District's decision below stated:

> Williams first argues that during voir dire the court abused its discretion in permitting the State to pose various hypothetical scenarios to prospective jurors, to inquire whether the jurors would convict under those theoretical circumstances. While it is certainly well settled that attorneys "may not have jurors indicate, in advance, what their decision will be under a certain state of evidence or upon a certain state of facts," Franqui v. State, 699 So. 2d 1312, 1322 n.5 (Fla. 1997), the State's hypotheticals in this case did not attempt to elicit any such responses. Rather, the State's questions were geared towards eliciting whether the jurors would find reasonable doubt based upon an extreme set of unrelated hypothetical facts or sympathy. The jurors were not presented with the facts of this case, nor asked to offer their decisions during voir dire. These hypotheticals, designed to determine whether the jurors could correctly apply the law, are permissible. Cave v. State, 899 So. 2d 1042, 1056 (Fla. 2005); Mosely v. State, 842 So. 2d 279 (Fla. 3d DCA 2003). *Compare* Saulsberry v. State, 398 So. 2d 1017 (Fla. 5th DCA 1981) (hypothetical embodying facts of case designed to obtain tacit commitment from jurors to convict improper and merited granting mistrial motion). Thus, the court did not abuse its discretion in permitting this line of questioning.

Williams v. State, 31 Fla. L. Weekly D 1579, *1-*2 (Fla. 3d DCA June 7, 2006).

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.

Below, the Third District wrote:

> Williams first argues that during voir dire the court abused its discretion in permitting the State to pose various hypothetical scenarios to prospective jurors, to inquire whether the jurors would convict under those theoretical circumstances. While it is certainly well settled that attorneys "may not have jurors indicate, in advance, what their decision will be under a certain state of evidence or upon a certain state of facts," Franqui v. State, 699 So. 2d 1312, 1322 n.5 (Fla.

> 1997), the State's hypotheticals in this case did not attempt to elicit any such responses. Rather, the State's questions were geared towards eliciting whether the jurors would find reasonable doubt based upon an extreme set of unrelated hypothetical facts or sympathy. The jurors were not presented with the facts of this case, nor asked to offer their decisions during voir dire. These hypotheticals, designed to determine whether the jurors could correctly apply the law, are permissible. Cave v. State, 899 So. 2d 1042, 1056 (Fla. 2005); Mosely v. State, 842 So. 2d 279 (Fla. 3d DCA 2003). *Compare* Saulsberry v. State, 398 So. 2d 1017 (Fla. 5th DCA 1981) (hypothetical embodying facts of case designed to obtain tacit commitment from jurors to convict improper and merited granting mistrial motion). Thus, the court did not abuse its discretion in permitting this line of questioning.

Williams v. State, 31 Fla. L. Weekly D 1579, *1-*2 (Fla. 3d DCA June 7, 2006). Petitioner argues that the Third District's opinion below conflicted with this Court's decision in Dicks v. State, 83 So. 717 (1922).

The holding in Dicks prohibited the presentation of hypotheticals during *voir dire* that embodied the testimony to be presented in order to obtain tacit commitments to convict from the *venire* under a similar set of facts. In relevant part, this Court wrote in Dicks:

> Prospective jurors are examined on their *voir de dire* for the purpose of ascertaining if they are qualified to serve, and it is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of the

> testimony. Such questions are improper, regardless of whether or not they correctly epitomize the testimony intended to be introduced.
>
> To propound to a juror a question purporting to contain an epitome of the testimony subsequently to be introduced, and ask whether he would acquit or convict upon such testimony, would have the effect of ascertaining his verdict in advance of his hearing the sworn testimony of the witnesses.

Id. at 719. Petitioner takes issue with the first paragraph above, specifically the second sentence. However, the Third District's opinion was consistent with the first paragraph. In the first sentence of the first paragraph, this Court wrote: "Prospective jurors are examined on their *voir de dire* for the purpose of ascertaining if they are qualified to serve, and it is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of the testimony." Id. This Court was referencing hypotheticals that would embody "testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of the testimony." Id. In the second sentence of the first paragraph, this Court wrote: "Such questions are improper, regardless of whether or not they correctly epitomize the testimony intended to be introduced." "Such questions are improper" modified "hypothetical questions purporting to embody testimony

that is intended to be submitted." The "regardless of whether or not they correctly epitomize the testimony intended to be introduced" language provided that whether or not the testimony was actually presented at trial, hypotheticals that embodied testimony that a party **intended** to introduce were improper.

The Dicks holding only applies when the hypotheticals embody the facts of the case. That was not the case here, as the Third District stated: "The jurors were not presented with the facts of this case, nor asked to offer their decisions during voir dire." And, this Court later wrote in Dicks:

> Whether or not a prospective juror is impartial and has the necessary qualifications for jury duty, which is the sole purpose of the examination of talesmen on their voir dire, cannot be determined by propounding hypothetical questions containing what purports to be the testimony subsequently to be introduced and eliciting from him a reply as to whether he would acquit or convict on such testimony.

Id. at 720. Petitioner misstates this Court's holding in Dicks. The facts in Dicks involved the State asking questions during *voir dire* that embodied testimony that was intended to be presented during trial. The trial court in Dicks sustained an objection, and this Court affirmed that ruling. Therefore, Dicks only applies when the *voir dire* examination intends to embody testimony to be presented at trial. As the Third District wrote, that was not the case here.

The Dicks holding was only referencing an attempt to seek commitments from prospective jurors based upon hypotheticals that embodied the facts of the

case. The Third District's decision below did not violate Dicks as the facts differed. The Third District wrote:

> While it is certainly well settled that attorneys "may not have jurors indicate, in advance, what their decision will be under a certain state of evidence or upon a certain state of facts," Franqui v. State, 699 So. 2d 1312, 1322 n.5 (Fla. 1997), the State's hypotheticals in this case did not attempt to elicit any such responses.

The facts presented in the Third District's decision prohibit any conflict from existing as "the State's hypotheticals in this case did not attempt to elicit any such responses."

In order for the Dicks holding to apply, the hypotheticals must purport "to contain an epitome of the testimony subsequently to be introduced." Id. The Third District complied with the Dicks holding, writing: "**The jurors were not presented with the facts of this case**, nor asked to offer their decisions during voir dire." (emphasis added).

Additionally, Petitioner's argument that the Third District construed Franqui v. State, 699 So. 2d 1312 (Fla. 1997), as overruling Dicks is illogical. This Court relied upon the following passage from Franqui:

> In earlier cases, we have stated this same rule. In Dicks, we asserted that it is improper to ask jurors hypothetical questions purporting to embody testimony that is intended to be submitted for the purpose of ascertaining from the jurors how they will vote on such a state of the testimony. 93 So. at 138.

> Counsel may not have jurors indicate, in advance, what their decision will be under a certain state of evidence or upon a certain state of facts. Id. Vining v. State, 637 So. 2d at 921, also provides some guidance.

Id. at 1322, n. 5. Franqui relied upon and reaffirmed Dicks. Petitioner's claim that the Third District construed Franqui as overruling Dicks is contrary to the express citation relied upon by the Third District. The Third District correctly applied the applicable law here and analyzed the facts under this Court's decisions in Dicks and Franqui.

Lastly, Petitioner agrees that the holdings in Pope v. State, 94 So. 865 (Fla. 1922), Pait v. State, 112 So. 2d 380 (Fla. 1959), and Lavado v. State, 492 So. 2d 1322 (Fla. 1986), provided that the purpose of the *voir dire* questions in those cases was to determine if the prospective jurors would be able to follow a principle of law. The Third District's decision below held likewise. The Court below wrote: "The jurors were not presented with the facts of this case, nor asked to offer their decisions during voir dire. These hypotheticals, designed to determine whether the jurors could correctly apply the law, are permissible." The Third District's decision was consistent with this Court's holdings in Pope, Pait, and Lavado.

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 July, 2006, to SHANNON P. McKENNA & COLLEEN BRADY WARD, Assistant Public Defenders, 1320 N.W. 14 Street, Miami, Florida 33125.

_____
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