

IN THE SUPREME COURT OF FLORIDA

EDUARDO I. FILOMENO,
Petitioner,

v.

CASE NO. SC06-1412

STATE OF FLORIDA
Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE FIFTH
DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This matter comes before the Court on Petitioner's notice to invoke discretionary jurisdiction. Petitioner seeks jurisdiction in this Court based on express and direct conflict with decisions of this Court and of the First District Court of Appeals.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal's opinion does not conflict with any decision of this or any other court. The Fifth District resolved this case based on a finding that any error in excluding the proffered evidence was harmless beyond a reasonable doubt. This Court has never held that the harmless error analysis should not be applied to questions of admission or exclusion of evidence.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER COURT.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Filomeno cannot establish that such a conflict appears in the opinion of the court below.

Filomeno asserts that the opinion of the Fifth District Court of Appeal in this case conflicts with this Court's opinion in *State v. Hickson*, 630 So. 2d 172 (Fla. 1993) and the opinion of the First District Court of Appeal in *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000). Specifically, Filomeno asserts that those opinions held that expert testimony was admissible to assist the jury, and that the Fifth District opinion in the case below conflicts with those holdings. Examination of the opinion in this case contradicts that assertion.

The Fifth District discussed the admissibility of the proffered expert testimony in the case below and found that it may have been properly admitted. (App. p. 4). In so doing, the Fifth District Court cited with approval to the holding in *Mizell*. The Fifth District's opinion is therefore consistent with the holdings in *Hickson* and *Mizell*. The Fifth District went on to find that even though the trial court may have erred in excluding the expert testimony, any such error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). (App. P. 4). This is the true basis of the decision below. This basis does not conflict with any decision of this Court or any other court.

CONCLUSION

Based on the arguments and authorities presented herein, the State asserts that this Court does not have jurisdiction to review the decision in this case.

Respectfully submitted this 7th day of August, 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction has been furnished by delivery the Public Defender's mail box at the Fifth District Court of Appeal to Assistant Public Defender Anne Moorman Reeves, counsel for Filomeno, this 7th day of August, 2006.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced, in compliance with Fla. R. App. P. 9.210(a)(2).

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