

IN THE SUPREME COURT OF FLORIDA

KENNETH ROBINSON,

Petitioner,

v.

CASE NO. SC07-1428

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The following facts are set forth in the opinion below:

Robinson was accused and convicted of soliciting another jail inmate (expected to soon be released) to kidnap and kill a thirteen-year old child. The young girl had been the victim of a sexual battery, and Robinson was charged with that crime. While Robinson was in jail pending trial on the sexual battery charge, law enforcement officers came to collect a DNA sample from him, to test against DNA evidence collected from the girl's body following her rape. It was after Robinson was notified of the existence of DNA evidence, when law enforcement collected the DNA sample from him, that he attempted to arrange for the girl's kidnapping and murder. However, the inmate who Robinson attempted to hire for the killing notified law enforcement instead. Robinson was arrested on the solicitation charges after law enforcement further investigated to corroborate the informant's account. This investigation included the surreptitious recording of a conversation between the informant and Robinson, to arrange details of the murder for hire.

With respect to the sexual battery charge, the State inexplicably failed to complete its DNA testing prior to trial. Therefore, the only evidence against Robinson, at that trial, was the girl's testimony. And, Robinson was acquitted. After the sexual battery acquittal, the DNA testing was performed. According to the expert who testified at Robinson's solicitation trial, the DNA sample taken from Robinson matched the semen swabbed from the vagina of the girl shortly after she reported the sexual battery. The expert estimated the chance of a random match between the DNA found in the semen sample and the DNA of someone other than Robinson at one in 120 quadrillion. The DNA evidence was admitted at the solicitation trial for the limited purpose of showing that Robinson had a motive to arrange a murder for hire, with the girl as a target. Appropriately, a limiting instruction was read to the jury. On appeal, Robinson argues that because he was acquitted of the sexual battery charge, it violated the Fifth Amendment's double jeopardy clause to use any evidence of the acquitted crime, for any purpose, at his solicitation trial.

Robinson v. State, 32 Fla. L. Weekly D1245 (Fla. 5th DCA May 11, 2007). The district court went on to find that since trial counsel never objected to the DNA evidence on Fifth Amendment grounds, the issue was not preserved for appellate review. *Id.* The Court alternatively stated that even if the issue was properly before it, Robinson would not be entitled to relief. The court observed that the only issue to which the DNA evidence was relevant in the solicitation trial was Robinson's motive to solicit the murder for hire, and because this issue was not decided by the prior acquittal, there was no double jeopardy violation when the DNA evidence was admitted on the limited issue of motive. *Id.*

SUMMARY OF ARGUMENT

This court does not have jurisdiction to review this case. The decision of the Fifth District Court of Appeal in this case does not expressly and directly conflict with any district court decision. The district court found that the issue was not preserved for appellate review, and any additional statements are simply *dicta*.

ARGUMENT

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

Robinson asserts that the decision of the Fifth District Court of Appeal expressly conflicts with the decisions in *Ashe v. Swenson*, 397 U.S. 436 (1970), *Lawson v. State*, 304 So. 2d 522 (Fla. 3d DCA 1974), and *Taylor v. State*, 508 So. 2d 1265 (Fla. 1st DCA 1987). 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). In *Jenkins v. State*, 385 So.2d 1356, 1357 (Fla. 1980) this Court quoted from its earlier decision in *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958):

We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed...**It was never intended that the district courts of appeal should be intermediate courts...**To fail to recognize that these are courts primarily of **final appellate jurisdiction** and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of

justice than that which the system
was designed to remedy.

(emphasis supplied).

Respondent would first point out that there is no provision for this Court to review a district court decision based upon conflict with a decision from the United States Supreme Court. Further, there is no conflict between the instant decision and the district court decisions cited by Robinson. The district court in the instant case held that Robinson's Fifth Amendment claim was not preserved for appellate review. The district court's further discussion of the issue is merely *dicta*, so there can be no conflict.

Even if the alternate discussion by the district court could be considered a ruling, there is no conflict with the cases cited by Robinson. The *Lawson, supra*, Court interpreted the *Ashe, supra*, rule that the Double Jeopardy Clause does not forbid the admission of all evidence of acquitted collateral crimes, but only that evidence which the state is collaterally estopped from introducing. This Court later determined that *Lawson* correctly decided this issue. *State v. Perkins*, 349 So. 2d 161 (Fla. 1977). *Taylor, supra*, did not even involve a double jeopardy issue. In that case, the district court reversed after agreeing with the appellant that the evidence was introduced was for the purpose of character assassination, was inflammatory and was not relevant to any element of the crime charged, or in other words, was simply irrelevant.

Given the fact that the Fifth District Court is a court of final appellate jurisdiction and given the very limited and restricted bases for this Court's exercise of its discretionary jurisdiction based upon conflict, it cannot be said that Petitioner has established any good cause for the exercise of that jurisdiction. There is no express or direct conflict, and in fact, the decision of the Fifth District in this case is consistent with the decisions of this 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by U.S. Mail to Petitioner Kenneth Robinson, DC# U26112, Dorm F1-111L, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, FL 32465, this ___ day of August, 2007.

CERTIFICATE OF FONT AND TYPE SIZE

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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