

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC08-9

**SEAN CASEY,**

Petitioner,

- versus -

**STATE OF FLORIDA,**

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

BILL McCOLLUM  
Attorney General  
Tallahassee, Florida

CELIA A. TERENCE  
Assistant Attorney General  
Chief, West Palm Beach Bureau  
Florida Bar No. 0656879

HEIDI L. BETTENDORF  
Assistant Attorney General  
Florida Bar No. 0001805  
1515 North Flagler Drive, Ninth Floor  
West Palm Beach, FL 33401  
Tel: (561) 837-5000  
Fax: (561) 837-5099  
Counsel for Respondent

**Table Of Contents**

**Page:**

Table Of Contents ..... i

Table Of Citations..... ii

Preliminary Statement..... iv

Statement Of The Case And Facts ..... 1

Summary Of The Argument..... 5

Argument And Citations Of Authority:

THE DECISION OF THE FOURTH DISTRICT COURT OF  
APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH  
THIS COURT’S DECISIONS IN OCCHICONE V. STATE, 768 So.  
2d 1037 (Fla. 2000), STEPHENS V. STATE, 748 So. 2d 1028 (Fla.  
2000), OR ROSE v. STATE, 675 So. 2d 567 (Fla. 1996) ..... 6

Conclusion..... 10

Certificate Of Service..... 11

Certificate Of Type Size And Style ..... 11

## Table Of Citations

<u>Cases:</u>	<u>Page:</u>
<u>Casey v. State</u> , 969 So. 2d 1055 (Fla. 4th DCA 2007).....	1-3, 6, 8, 9
<u>Ford Motor Co. v. Kikis</u> , 401 So. 2d 1341 (Fla. 1981).....	7
<u>Hardee v. State</u> , 534 So. 2d 706 (Fla. 1988) .....	1, 7
<u>Jenkins v. State</u> , 385 So. 2d 1356 (Fla. 1980) .....	7
<u>Mancini v. State</u> , 312 So. 2d 732 (Fla. 1975) .....	6-7
<u>Occhicone v. State</u> , 768 So. 2d 1037 (Fla. 2000).....	6
<u>Reaves v. State</u> , 485 So. 2d 829 (Fla. 1986) .....	8
<u>Rose v. State</u> , 675 So. 2d 567 (Fla. 1996) .....	6
<u>School Board of Pinellas County v. District Court of Appeal</u> , 467 So. 2d 985 (Fla. 1985) .....	8
<u>State, Department of Health v. National Adoption Counseling Service, Inc.</u> , 498 So. 2d 888 (Fla. 1986) .....	8
<u>Stephens v. State</u> , 748 So. 2d 1028 (Fla. 2000).....	6
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984) .....	8
<u>The Florida Star v. B.J.F.</u> , 530 So. 2d 286 (Fla. 1988) .....	7
<u>White Constr. Co. v. Dupont</u> , 455 So. 2d 1026 (Fla. 1984).....	7
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003) .....	3

**Constitutional Provisions:**

**Page:**

Article V, § 3(b)(3), Fla. Const. ....6

## **Preliminary Statement**

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

**Statement Of The Case And Facts**  
(limited to the issue of jurisdiction)

Noting that in determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1988), Respondent will present the facts as they appear in the opinion below:

“Casey was convicted of premeditated murder and robbery with a deadly weapon. During the trial, Casey's attorney considered, but elected not to raise, a voluntary intoxication defense notwithstanding evidence that Casey had been taking drugs prior to the killing and the availability of such a defense at that time.” Casey v. State, 969 So. 2d 1055, 1057 (Fla. 4<sup>th</sup> DCA 2007) (footnote omitted).

Casey subsequently filed a motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850. Id.

At the start of the evidentiary hearing, Casey's post-conviction attorney informed the court that he intended to call an attorney as an expert witness to offer an opinion on whether trial counsel rendered ineffective assistance. The court announced that it would not allow Casey to call the expert/attorney witness. Casey's attorney claimed the expert attorney's testimony was necessary to prove trial counsel's performance fell below that of a competent attorney.

Id.

At the evidentiary hearing, a forensic toxicologist testified that a person taking Ecstasy would respond in an "irrational way" and "impulsively." On the night of the murder, Casey took Ecstasy, "Special K" (Ketamine), and marijuana. The expert said that a person

taking this combination of drugs would "react to a given stimulus and it's an impulsive response rather than a rational response." Supposedly, if Casey took Ecstasy and Ketamine at three in the morning, he would be expected to be in the "impulsive" stage at 6:30 in the morning, approximately the time he killed the victim.

On cross-examination, the toxicology expert acknowledged that the drug user will have hallucinations and "may imagine certain things and then later refer to [them] as a memory but they're not, they're hallucinetic-hallucinogenic" thoughts. However, he could not point to any comments in Casey's statement as constituting a hallucinogenic memory. Casey's medical records were also introduced. He was a long time addict, who had been placed in eight to ten treatment centers since the age of twelve.

The record reflects substantial evidence that trial counsel considered a voluntary intoxication defense strategy, discussed it with the client and his father, and rejected it.

During the evidentiary hearing, Casey attempted to present the testimony of the criminal law expert and, again, the court denied the request. The defense expert was prepared to testify that, in his opinion, voluntary intoxication was Casey's only reasonable defense. At no point did Casey's attorney suggest the expert would testify as to the reasonableness of the investigation or any avenue of investigation not taken.

Casey's trial counsel testified that he considered the voluntary intoxication defense based upon his investigation, and he knew that it was a legal defense to the crimes charged. However, it appeared to him by the time of trial, that voluntary intoxication would be an inappropriate defense to assert at the trial, as it would be detrimental to their primary claim that the victim made unwelcome sexual advances toward Casey and pushed him, at which point Casey "just snapped and he stabbed" the victim. Trial counsel did not believe Casey acted with premeditation. Instead, it was his theory that the killing was "something that happened spontaneously as a reaction to being pushed

for homosexual activity that he didn't want."

On cross-examination, Casey's post-conviction attorney showed trial counsel a letter from a Dr. Milo, who had reviewed Casey's medical records and suggested a brain scan. Three months before the trial began, Dr. Milo suggested that a voluntary intoxication defense may be viable. Another doctor also had written that drug induced intoxication was indicated. However, trial counsel's ultimate decision was that it was "not going to help us, it might hurt us, it is inconsistent with our presentation," and the decision was reached jointly with Casey and his father.

The trial court decided Casey had failed to show ineffective assistance of counsel because, despite the expert's disagreement with trial counsel's strategy decision, "alternate courses were considered and rejected and trial counsel's decision was reasonable."

Id. at 1057-58.

Petitioner appealed the trial court's denial of his 3.850 motion to the Fourth District Court of Appeal. By opinion dated October 3, 2007, the Fourth District affirmed the trial court's refusal to allow Petitioner's expert to testify as to the reasonableness of trial counsel's strategic decision to forgo a voluntary intoxication defense. Id. at 1059-60. The Court held that "[w]here, as here, the trial court determines that the trial attorney conducted a thorough investigation of law and facts relevant to plausible options,' the trial court is free, as a matter of law, to conclude that the strategic decision was reasonable." Id. at 1059 (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)).

Petitioner now seeks review of the decision of the Fourth District Court of Appeal based on conflict jurisdiction.

### **Summary Of The Argument**

This Court does not have jurisdiction to review the instant case. The decision of the Fourth District Court of Appeal in the instant case does not expressly and directly conflict with the decisions of this Court and other courts of this State. Therefore, this Court should not review the case at bar and should dismiss the Petitioner's case.

## Argument

**THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN OCCHICONE V. STATE, 768 So. 2d 1037 (Fla. 2000), STEPHENS V. STATE, 748 So. 2d 1028 (Fla. 2000), OR ROSE v. STATE, 675 So. 2d 567 (Fla. 1996).**

Petitioner alleges that the decision of the Fourth District Court of Appeal in Casey v. State, 969 So. 2d 1055 (Fla. 2007), expressly and directly conflicts with the decisions of this Court in Occhicone v. State, 768 So. 2d 1037 (Fla. 2000), Stephens v. State, 748 So. 2d 1028 (Fla. 2000), and Rose v. State, 675 So. 2d 567 (Fla. 1996).

Article V, § 3(b)(3) of the Florida Constitution restricts this Court's review of a district court of appeal's decision only if it expressly conflicts with a decision of this Court or of another district court of appeal. It is not enough to show that the district court's decision is effectively in conflict with other appellate decisions. This Court's jurisdiction to review the Fourth District's decision in this case may only be invoked by either the announcement of a rule of law which conflicts with a law previously announced by this Court or another district court of appeal or by the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733

(Fla. 1975).

The term "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). A decision of a district court of appeal is no longer reviewable on the ground that an examination of the record would show that it is in conflict with another appellate decision; it is reviewable if the conflict can be demonstrated from the district court of appeal's opinion itself. The district court of appeal must at least address the legal principles which were applied as a basis for the decision. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981).

When determining whether conflict jurisdiction exists, this Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d at 708, n.1; White Constr. Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984). In the past, this Court has held that it would not exercise its discretion where the opinion below established no point of law contrary to the decision of this Court or of another district court of appeal. The Florida Star v. B.J.F., 530 So. 2d 286, 289 (Fla. 1988). "'Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction."

State, Department of Health v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (quoting Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)). See also School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).

In the case at bar, Petitioner contends that conflict exists on the issue of whether an appellate court is required to accord any deference to the legal conclusion of a trial court's determination of either prong of Strickland v. Washington, 466 U.S. 668 (1984). Petitioner claims that in concluding that a trial court is "free" to make a legal conclusion that a strategic decision was reasonable, the Fourth District has abrogated its duty to independently review the trial court's legal conclusion (Petitioner's Brief on Jurisdiction at p. 4)

However, in order to set forth this argument, Petitioner has completely misconstrued the Fourth District's opinion and legal analysis therein. In this case, the Fourth District was presented with the question of whether the trial court abused its discretion by refusing to allow an expert/attorney witness to provide his opinion on whether trial counsel was ineffective. Casey v. State, 969 So. 2d at 1058. The language relied upon by Petitioner was not presented in the context of an appellate court's review of a trial court's determination of whether trial counsel's trial

strategy was reasonable. Thus, the Fourth District properly applied the abuse of discretion standard of review to the trial court's exclusion of the expert testimony:

In the instant case, if Casey was presenting the expert to comment on the reasonableness of the investigation, there are grounds for allowing this testimony. However, because the expert was asked to testify as to the reasonableness of the attorney's strategic decision (or whether he or any other attorney would have made this same decision), **it was not an abuse of discretion to exclude the testimony as irrelevant or to consider it speculative as infringing on the province of the court.** We note that, although Casey's brief on appeal does assert that trial counsel failed to thoroughly investigate Casey's past history, the proffered expert testimony did not address this topic, and it was not argued to the trial court.

Id. at 1059-60 (emphasis added). Since the issue presented in the case at bar was completely different than the issue presented in the cases relied upon by Petitioner to establish conflict, there can be no conflict.

Accordingly, this Court should decline to review the decision of the Fourth District in this case.

**Conclusion**

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should decline to grant review in the above-styled cause.

Respectfully submitted,

BILL McCOLLUM  
Attorney General  
Tallahassee, Florida

---

CELIA A. TERENCE  
Assistant Attorney General  
Chief, West Palm Beach Bureau  
Florida Bar No. 0656879

---

HEIDI L. BETTENDORF  
Assistant Attorney General  
Florida Bar No. 0001805  
1515 North Flagler Drive,  
Ninth Floor  
West Palm Beach, FL 33401  
Tel: (561) 837-5000  
Fax: (561) 837-5099

Counsel for Respondent

**Certificate Of Service**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Sharon Lee Stedman, Esquire, 3015 Albert Street, Orlando, Florida, 32806, this \_\_\_\_ day of February, 2008.

-----  
HEIDI L. BETTENDORF  
Assistant Attorney General

**Certificate Of Type Size And Style**

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

-----  
HEIDI L. BETTENDORF  
Assistant Attorney General

