

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-1131

**KEVIN NICHOLSON,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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### PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. 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.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

### STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are those set forth in the appellate opinion sought to be reviewed. A copy of Nicholson v. State, 2009 WL 763429 (Fla. 4<sup>th</sup> DCA 2006) is in Petitioner's appendix.

### SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal does not expressly and directly conflict with decisions from this Court.

## ARGUMENT

### POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION THIS COURT.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Art. V, Sect. 3(b)(3) Fla. Const.; Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

For two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[if] the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then

conflict cannot arise." Id. at 887. See also Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority's decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.") and Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 210 (Fla. 1976) (This Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

Petitioner contends the present case conflicts with McLean v. State, 934 So. 2d 1248, 1255 (Fla. 2006). In Nicholson the Fourth District held the evidence was admissible to show motive and intent. Nicholson, 2009 WL 763429 at \*4. Petitioner claims conflict with McLean because he claims "propensity" is synonymous with "motive" and "intent." (petitioner's brief p. 8).

McLean did not hold that motive and intent were synonymous with propensity. It held the opposite. McLean stated:

In Williams, we enunciated the general rule on the admissibility of collateral crime evidence: "[ R]elevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy." 110 So.2d at 659-60. In other words, "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." Id. at 663.FN4

**FN4. This rule is codified at section 90.404(2)(a), Florida Statutes (2005), which provides:**

**Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including,** but not limited to, proof of **motive**, opportunity, **intent**, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

McLean, 934 So. 2d at 1255.

Petitioner also claims in passing that Nicholson also conflicts with Johnson v. State, 432 So. 2d 583 (Fla. 4<sup>th</sup> DCA 1983) and Billie v. State, 863 So. 2d 323 (Fla. 3d DCA 2003). Johnson is a Fourth District case. In 1980, Rule 9.030(a) Fla. R. App. P. was extensively revised; one change was to eliminate this Court's jurisdiction in cases of intradistrict conflict. See Committee Notes to 1980 Amendments to Rule 9.030(a). Intradistrict conflict is resolved by a request for en banc review of the decisions. Even where the district court declines to resolve the conflict within its district, the latest decision is deemed to overrule the former decision. See State v. Walker, 593 So. 2d 1049 (Fla. 1992); Little v. State, 206 So. 2d 9, 10 (Fla. 1968).

Moreover, there is no conflict. Johnson did not hold that intent and motive are synonymous with propensity. In Johnson the murder victim had been living in a room in Johnson's apartment for about a month. On the day of the criminal incident the two had a quarrel in the morning and that evening the victim came into Johnson's bedroom to renew the discussion. There were harsh

words and Johnson shot the victim four times.

At trial the prosecution introduced evidence that approximately two days before this shooting Johnson had evicted his stepfather from Johnson's mother's home at gunpoint, firing two shots in the process. The purpose of this evidence was said to be to show Johnson's intent and that this is his own bizarre form of evicting people from premises. Johnson did not hold that intent and motive were synonymous propensity. It held that the previous act was not relevant to intent because there was no suggestion that Johnson was attempting to evict the victim, nor was there any relationship shown between the victim and Johnson's stepfather. Id. at 584.

Billie v. State, 863 So. 2d 323, 327 (Fla. 3d DCA 2003) specifically held that "This Court has approved the introduction of collateral crimes, or prior bad acts, evidence where the evidence is relevant and intended to show motive, intent or premeditation." However, the court held that none of the evidence sought to be introduced was relevant to those issues. Id. at 329. There is no conflict.



CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court DENY Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing  
"Respondent's Brief on Jurisdiction" has been by mail on July 10,  
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned  
hereby certifies that the instant brief has been prepared with 12  
point Courier New Type.

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James J. Carney