

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALISHA NICOLE VICE,

Respondent.

CASE NO. SC10-_____

JURISDICTIONAL BRIEF OF PETITIONER

BILL MCCOLLUM
ATTORNEY GENERAL

EDWARD C. HILL, Jr.
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 238041

MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 177008

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	2

ISSUE

DOES THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S DECISION IN <i>PAUSCH V. STATE</i> , 596 So. 2d 1216 (Fl. 2d DCA 1992)?.....	2
CONCLUSION.....	10
SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE.....	11
CERTIFICATE OF COMPLIANCE.....	11

APPENDIX

TABLE OF CITATIONS

CASES

PAGE(S)

STATE CASES

<i>Bryan v. State</i> , 533 So. 2d 744 (Fla. 1988).....	2
<i>Dixon v. State</i> , 691 So. 2d 515 (Fla. 1st DCA 1997).....	9
<i>Evans v. State</i> , 693 So. 2d 1096 (Fla. 3d DCA 1997).....	6
<i>Rivera v. State</i> , 561 So. 2d 536 (Fla. 1990)	8
<i>Robertson v. State</i> , 829 So. 2d 901 (Fla. 2002).....	9
<i>Pausch v. State</i> , 596 So. 2d 1216 (Fla. 2d DCA 1992)	passim
<i>State v. Savino</i> , 567 So. 2d 892 (Fla. 1990)	8
<i>Washington v. State</i> , 737 So. 2d 1208 (Fla. 1st DCA 1999)...passim	
<i>Wooten v. State</i> , 398 So. 2d 963 (Fla. 1st DCA 1981)	10
<i>Worden v. State</i> , 603 So. 2d 581 (Fla. 2d DCA 1992).....	6

DOCKETED CASES

<i>Vice v. State</i> , Case No. 1D08-5622 (Fla. 1st DCA Jun. 9, 2010) .	
.....	passim

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Alisha Nicole Vice, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form as *Vice v. State*, Case No. 1D08-5622 (Fla. 1st DCA Jun. 9, 2010).

SUMMARY OF ARGUMENT

ISSUE.

Petitioner asserts that this Court enjoys jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), as the decision below expressly and directly conflicts with the decision of the Second District Court of Appeal in *Pausch v. State*, 596 So. 2d 1216 (Fla. 2d DCA 1992), on the following question of law: Can a court exclude evidence of a similar, collateral act of child abuse (i.e. "shaken baby") if the victim of that act did not sustain similar injuries to those sustained by the victim of the charged offense?

ARGUMENT

ISSUE

DOES THE DECISION BELOW EXPRESSLY AND DIRECTLY
CONFLICT WITH THE SECOND DISTRICT'S DECISION IN
PAUSCH V. STATE, 596 So. 2d 1216 (Fl. 2d DCA 1992)?

Section 90.404(2)(a), Florida Statutes

Section 90.404(2), Florida Statutes, permits trial courts to admit evidence of similar crimes, wrongs, or acts if that evidence: (1) remains relevant to prove a material fact in issue; and, (2) does not derive its relevancy solely from its tendency to prove defendant's bad character or propensity to engage in criminal behavior. See *Bryan v. State*, 533 So. 2d 744, 746 (Fla. 1988). In plain terms, *Section 90.404(2)* focuses on the actions of the defendant, not the injuries sustained by the victims of those actions.

Vice v. State, Case No. 1D08-5622 (Fla. 1st DCA Jun. 9, 2010)

Despite the plain language of the statute, the First District, in the decision below, analyzed the admissibility of collateral crime evidence by focusing on the similarities, *vel non*, between the injuries sustained by the victim of the previous instances of child abuse and the injuries sustained victim of the child abuse alleged in the Information; after identifying purported dissimilarities between injuries, the First District concluded that the trial court abused its discretion when it admitted evidence of two, prior bad acts in order to show identity and/or absence of mistake. See *Vice v. State*, Case No. 1D08-5622 *8 (Fla. 1st DCA Jun. 9, 2010) ("Here the

trial court abused its discretion by admitting evidence of the alleged prior shakings to show identity."); see also *ibid* at *10 ("[T]he trial court abused its discretion in admitting the similar fact evidence to prove the absence of mistake or accident.").

The collateral act evidence consisted of the testimony of the appellant's ex-husband as well as the appellant's ex-mother-in-law.

See *Vice* at *4:

The *Williams* rule evidence consisted of testimony by Daniel Cooper (Ms. Vice's former husband) and Melissa Lindsey (Daniel Cooper's mother). Mr. Cooper (who acknowledged he had been an abusive husband whose abuse contributed to the dissolution of his marriage to Ms. Vice) testified at trial that, when he arrived home from work one day in early 2001, Ms. Vice "had [the child] up in the air, like, in front of her face, about like this, and was shaking him rapidly, screaming at him to shut up while he was crying." Mr. Cooper did not report the incident to the authorities and testified that the child did not suffer any harm.

Ms. Lindsey testified at trial that, one day in the spring of 2001 when she approached their apartment, she saw Ms. Vice through the curtains "sitting with [the infant] on the couch and she was shaking him violently" close to her face while yelling at him to shut up. Ms. Lindsey did not report the incident to the authorities at the time, and testified that the child did not require medical attention.

Despite the fact that the victim in this case suffered injuries "as a result of 'classic non-accidental trauma,' of a type formally said to characterize Shaken Baby Syndrome," the decision below found that the collateral act evidence remained too dissimilar for admission into evidence. *Vice* at *2. Instead of focusing on the similarity between the acts of the appellant in 2001 and the alleged act in 2007, the decision below focused on the dissimilarity between

the injuries sustained by the 2001 victim and the injuries sustained by the 2007 victim. See *ibid* at *8-9:

In contrast to the charged offense, the shakings of the other child did not cause any injury or result in any need for medical attention. This is not a case where two infants sustained "strikingly similar" injuries and symptoms within the same short period of time...

Evidence that Ms. Vice shook a different child six years earlier without injuring him does not meet this similarity requirement. In the absence of any evidence of injury or the need for medical treatment attributable to the two shakings six years earlier, the "similar fact evidence" adduced below was not relevant to show intent or absence of mistake or accident.

***Pausch v. State*, 596 So. 2d 1216 (Fla. 2d DCA 1992)**

Instead of focusing on the similarities, *vel non*, between the injuries sustained by the victims, the Second District addressed the admissibility of a collateral act of child abuse by analyzing the similarities, *vel non*, between the actual acts of abuse. See *Pausch v. State*, 596 So. 2d 1216 (Fla. 2d DCA 1992).

In *Pausch*, a jury found the defendant guilty of second degree murder and aggravated child abuse for death of the defendant's infant son. See *Pausch* at 1217 ("Jolene Pausch was found guilty of the second degree murder of her son and sentenced to a life term of imprisonment. She was also convicted of aggravated abuse of the child..."). In that case, the infant victim died from "cerebral trauma" with symptoms strikingly similar to those sustained by the victim in this case. Compare *Pausch* at 1217:

Sara went to Christopher's bedroom, where she found him lying face upward on the bed. According to Sara, Christopher was gasping for breath. His lips were swollen and his face seemed

discolored, almost blue. Jack rushed the child to the hospital, where he was placed on a life-sustaining device. Two days later, the attending physician determined Christopher was brain dead and removed him from life support. An autopsy revealed that Christopher sustained cerebral trauma and his body revealed multiple contusions.

with Vice at *2-3:

Dr. Alexa Canady, the pediatric neurosurgeon called to the Intensive Care Unit to treat then three-month-old J.C.H. upon his admission to the hospital on April 5, 2007, described the baby's injuries as the result of "classic non-accidental trauma," of a type formerly said to characterize Shaken Baby Syndrome. The jury heard evidence that J.C.H. sustained a subdural hematoma along with hemorrhaging in the back of his eyes; that blood and bruising were found in the right frontal portion of his brain; and that the bleeding appeared to have occurred at different times...

... Later, after Ms. Vice joined them at home and heard the sleeping baby inhale "raspy breaths," Ms. Vice and Chris H. took him to the hospital, where his injuries were diagnosed and treated.

Also similar to the case *sub judice*, a witness testified in *Pausch* that he observed the defendant shake her infant in anger. Compare *Pausch* at 1219 ("Robert Erwin testified that he had once witnessed Pausch "shaking" Christopher in anger, causing Erwin to intervene on the child's behalf.") with Vice at *4:

The *Williams* rule evidence consisted of testimony by Daniel Cooper (Ms. Vice's former husband) and Melissa Lindsey (Daniel Cooper's mother). Mr. Cooper (who acknowledged he had been an abusive husband whose abuse contributed to the dissolution of his marriage to Ms. Vice) testified at trial that, when he arrived home from work one day in early 2001, Ms. Vice "had [the child] up in the air, like, in front of her face, about like this, and was shaking him rapidly, screaming at him to shut up while he was crying." Mr. Cooper did not report the incident to the authorities and testified that the child did not suffer any harm.

Ms. Lindsey testified at trial that, one day in the spring of 2001 when she approached their apartment, she saw Ms. Vice

through the curtains "sitting with [the infant] on the couch and she was shaking him violently" close to her face while yelling at him to shut up. Ms. Lindsey did not report the incident to the authorities at the time, and testified that the child did not require medical attention. (Emphases added)

Implicit in the Second District's decision in *Pausch*, the interruption truncated the defendant's opportunity to inflict, on the prior occasion, the level of injury ultimately sustained by the infant. In other words, the fact that the victim did not sustain severe injuries during the prior shaking had no bearing on the question of admissibility because the acts, irrespective of the injuries, remained the same.

Clearly, both *Pausch* and the decision below involve a previous act of child abuse wherein the defendant shook an infant without that victim suffering the severe injuries that gave rise to the charged offense. Despite the strikingly similar facts between the two cases, however, the Courts arrived at opposite conclusions. In stark contrast to the decision of the First District below, the Second District expressly held that the trial court properly admitted the evidence of the prior, non-traumatic shaking¹. Compare *Vice* at *11

¹The Second District even concluded that the trial court properly admitted evidence that the infant victim appeared malnourished and underweight. See *Pausch* at 1219. Additionally, in the case of *Worden v. State*, 603 So. 2d 581 (Fla. 2d DCA 1992), the Second District affirmed the trial court's decision to admit evidence of previous instances of child abuse in a murder/aggravated child abuse prosecution even though the prior acts of abuse did not involve the same act upon the same location of the victim's body. See *Worden* at 583. In the case of *Evans v. State*, 693 So. 2d 1096 (Fla. 3d DCA 1997), the Third District reached a similar conclusion in a case involving a single victim of both the collateral acts and the charged

("In sum, the testimony of appellant's ex-husband and his mother about shaking another baby six years earlier was not relevant to any material fact properly in issue, and the trial court erred by allowing the state to adduce the testimony.") with *Pausch* at 1219 ("Pausch challenges the testimony indicating that Christopher appeared undernourished when brought to the hospital and that, on one occasion, she had used excessive force to discipline him. We do not agree that *Williams* was violated."). These divergent holdings present a clear incidence of express and direct conflict. Consequently, the State respectfully requests that this Honorable Court accept jurisdiction in order to resolve the conflict between the two decisions.

***Washington v. State*, 737 So. 2d 1208 (Fla. 1st DCA 1999)**

Also worth considering, the decision below embraces an argument expressly rejected by the First District nearly eleven years ago, namely: the admissibility of evidence of collateral acts of child abuse hinges on the similarity, *vel non*, of the injuries sustained by the respective victims, as opposed to the similarities, *vel non*, of the perpetrator's actions. Compare *Washington v. State*, 737 So. 2d 1208, 1225 (Fla. 1st DCA 1999):

offense. See *Evans* at 1102 ("To summarize, we hold that in a case charging the accused with the physical abuse of a child, where the state seeks to present evidence of prior physical abuse committed by the defendant upon the same child for the purpose of proving intent and/or absence of mistake or accident, there is no need for factual similarity between the charged offense and the prior abusive conduct beyond the existence of physical abuse in all instances.").

We are simply unable to conclude that the evidence of Howard's very recent, ongoing violent acts upon the same 11-month-old child would have to rise to the level of aggravated child abuse---that is, cause great bodily harm, permanent disability, or permanent disfigurement---before they became relevant to suggest who fatally injured the child shortly thereafter, on December 4, 1996.

with *Vice* at *8-9:

In contrast to the charged offense, the shakings of the other child did not cause any injury or result in any need for medical attention. This is not a case where two infants sustained "strikingly similar" injuries and symptoms within the same short period of time...

Evidence that Ms. Vice shook a different child six years earlier without injuring him does not meet this similarity requirement. In the absence of any evidence of injury or the need for medical treatment attributable to the two shakings six years earlier, the "similar fact evidence" adduced below was not relevant to show intent or absence of mistake or accident.

In *Washington*, the defendant appealed the trial court's decision to exclude "'reverse' *Williams* Rule evidence" offered to prove that someone other than the defendant committed the charged offenses. See *Washington* at 1222 ("[T]he defense sought to use so-called 'reverse *Williams* Rule' evidence to exculpate Washington.").

In reaching its decision in *Washington*, the First District recognized this Court's precedent and noted that reverse collateral act evidence submits to the same test of admissibility as traditional collateral act evidence. See *Washington* at 1224, citing *State v. Savino*, 567 So. 2d 892, 893 (Fla. 1990); *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990); see also *ibid* at 1225. In other words, what's good for the goose is good for the gander. If the State seeks to introduce traditional *Williams* Rule evidence, it must demonstrate by

clear and convincing evidence that the defendant committed a collateral act sufficiently similar to but not too remote in time from the charged offense. See generally *Robertson v. State*, 829 So. 2d 901, 907-08 (Fla. 2002). Likewise, if a defendant seeks to introduce reverse *Williams* Rule evidence, he must demonstrate by clear and convincing evidence that some other person committed a collateral act sufficiently similar to but not too remote in time from the charged offense. As a direct result of the identical test outlined above, appellate court decisions addressing the admissibility of reverse collateral act evidence apply equally to cases involving the admissibility of traditional collateral act evidence. Hence, *Washington* remains indistinguishable from the decision below with respect to type of evidence at issue.

In *Washington*, the State attempted to support the trial court's decision to exclude the reverse collateral act evidence by arguing that, at a minimum, such evidence in a murder prosecution must rise to the level of aggravated child abuse. See *Washington* at 1225:

The State argues that, given the tragic incidence in today's society of children's being physically battered, with sufficient frequency that medical experts have identified a condition known as "shaken baby syndrome," see *Dixon v. State*, 691 So. 2d 515, 516 (Fla. 1st DCA 1997), the extensive and rough physical mistreatment of baby A.H. is not unique or even unusual, so as to be relevant to establish the identity of the perpetrator. The trial court ruled that the proffered evidence of Howard's recent, repeated physical attacks upon the victim was not relevant because it did not constitute aggravated child abuse.

In other words, the State argued in *Washington*, as the First District held below, that a dissimilarity in child victim injuries precluded the admission of the collateral act evidence.

Yet, the First District **expressly rejected** the argument, raised in *Washington*, that a dissimilarity in the severity level of injuries could preclude the admission of evidence of a collateral act of child abuse when that evidence is offered to establish the **identity** of the perpetrator. See *Washington* at 1225:

We are simply unable to conclude that the evidence of Howard's very recent, ongoing violent acts upon the same 11-month-old child would have to rise to the level of aggravated child abuse---that is, cause great bodily harm, permanent disability, or permanent disfigurement---before they became relevant to suggest who fatally injured the child shortly thereafter, on December 4, 1996.

Accord *Wooten v. State*, 398 So. 2d 963, 968 (Fla. 1st DCA 1981):

Appellant's contention that it was error to admit evidence that appellant beat or physically mistreated the victim or the victim's sister, a two-year old, prior to the date of the alleged offense [of second degree murder] is disposed of by recent as well as established case law.

Nonetheless, despite the First District's outright rejection of the State's argument in *Washington*, the decision below expressly embraces that exact argument.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court exercise its jurisdiction in this cause.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David Lee Sellers, Esq., 919 North 12th Avenue, Pensacola, Florida 32501, by MAIL on July 8, 2010.

Respectfully submitted and served,

BILL MCCOLLUM
ATTORNEY GENERAL

EDWARD C. HILL, Jr.
Tallahassee Bureau Chief,
Criminal Appeals
FLORIDA BAR NO. 238041

MICHAEL T. KENNETT
Assistant Attorney General
Florida Bar No. 177008

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)
[AGO# L09-1-4024]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

Michael T. Kennett
Attorney for State of Florida

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INDEX TO APPENDIX

A. *Vice v. State*, Case No. 1D08-5622 (Fla. 1st DCA Jun. 9, 2010)

Appendix A