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IN THE SUPREME COURT OF FLORIDA

CECIL L. TOLBERT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC13-

L.T. Case No. 4D12-309

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On April 2, 2009, the Appellant was charged by information with, Count I, armed kidnapping; Count II and Count III, armed sexual battery. The crimes were committed on July 11, 1996. Trial was held on November 11, 2011. The State called five witnesses.

Petitioner did not testify and did not call any witnesses. The jury found the Appellant guilty as charged in the information, and specifically found that he used a firearm or threatened the use of a firearm. The trial court found the Appellant to be a Habitual Felony Offender. The Appellant was adjudicated guilty and sentenced to life in prison on Count I, thirty years in prison on Count II and Count III, all counts to run concurrent.

Petitioner appealed, filing an Initial Brief on May 15, 2012, containing one issue: Did the judge abuse her discretion and reversible err in allowing Florida's DNA expert to bolster herself with a non-testifying expert's opinion. The Fourth District Court of Appeal denied issued a written opinion, denying relief. (4D12-309).

Petitioner files the instant Jurisdictional Brief citing the Fourth District Court of Appeal decision "conflicts with the previous decision of Dufour v. State, 69 So. 3d 235 (Fla. 2011) quoting Linn v. Fossum, 946 So. 2nd 1032 (Fla. 2011)".

SUMMARY ARGUMENT

This Court should decline to review the instant case because there is no express and direct conflict between the instant case and any decision of this Court, or any other District Court of Appeal. The merits of substantive matters in the case have already been addressed and disposed of by the appropriate courts. Accordingly, this Court should decline to exercise its jurisdiction over this case.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT

Petitioner claims that this Court should grant review because

> the decision by the Fourth District Court of Appeal conflicts with the previous decision of Dufour v. State, 69 So. 3d 235 (Fla. 2011) quoting Linn v. Fossum, 946 So. 2nd 1032 (Fla. 2011) an expert may not testify that the expert opinion was formed by conferring with others in the same field, and expert may not bolster own opinion with another expert's opinion.

(Petitioner's Jurisdictional Brief, p. 3). This Court should decline to accept jurisdiction as the Fourth District Court of Appeal decision does not expressly and directly conflict with any decision of this Court or any other District Court of Appeal.

The Fourth District's opinion issued May 1, 2013, was a well reasoned written opinion. Tolbert v. State, ___So. 3d ___, 2013 WL 1810609 (Fla. 4th DCA 2013). The Fourth District's opinion found that

> Tolbert argues that Baird's discussion of Noppinger's findings was harmful because she improperly bolstered her finding that there was a male profile in the sample. "Bolstering" can be harmful error when the expert indicates that another expert reached the same conclusion as the testifying expert, or when the testifying expert testifies that the expert relied on a non-testifying expert's opinion. *See Miller v. State*, 37 Fla. L. Weekly D2780, *5–6 (Fla. 4th DCA Dec. 5, 2012) (determining error was harmful when handwriting expert testified that non-testifying expert also determined handwriting belonged to defendant); *Potts v. State*, 57 So. 3d 292, 294 (Fla. 4th DCA 2011) (determining error was harmful when fingerprint analyst testified that another fingerprint expert determined fingerprints belonged to defendant); *Telfort v. State*, 978 So. 2d 225, 226–27 (Fla. 4th DCA 2008) (determining error was harmful when handwriting expert bolstered his testimony).
>
> In contrast to *Miller*, *Potts*, and *Telfort*, ***in this case the discussion of the non-testifying expert's findings did not directly implicate Tolbert.*** Baird's discussion of Noppinger's findings established why Baird chose to retest the victim's sample after Bowdy did not find male DNA in the sample; ***Noppinger's findings did not independently establish Tolbert's guilt. Baird did not consult with Noppinger to reach her conclusion or rely on any of his conclusions*;** she independently tested the victim's sample and determined that the male profile matched Tolbert. Baird's discussion of the 1996 testing bolstered her expert opinion only to the extent that it supported her finding that there was male genetic material in the sample taken from the victim. The more important portion of Baird's testimony was that the male profile in the victim's sample matched Tolbert, and the 1996 test results were never matched to Tolbert.
>
> Tolbert argues the hearsay evidence was harmful because the DNA evidence was essentially the only evidence of Tolbert's guilt and

> because Bowdy did not find a male profile in the victim's sample. Tolbert argues that if the jury had not heard that Noppinger found male DNA in the victim's sample in 1996, the jury would have disbelieved Baird's assertion that there was male DNA in the sample or the jury would have believed the victim's sample was contaminated.
>
> Baird testified that she tested the samples taken from the victim, she found and isolated male DNA in the sample, and she determined that the male DNA from the victim's sample matched Tolbert's DNA. Baird and the analyst from Bowdy both testified that it was possible to miss a male DNA profile in a sample, they offered explanations for how the male profile was missed in this case, and the Bowdy analyst testified that she had missed such profiles in the past. Most importantly, Noppinger's findings did not implicate Tolbert because Noppinger only found an un-matched DNA profile. We determine, under the facts of this case, that the error in admitting the hearsay evidence was harmless.

Tolbert v. State, ___So. 3d ___, 2013 WL 1810609 (Fla. 4th DCA 2013). (emphasis added). The opinion does not illustrate conflict with any decision of this Court or any other District Court of Appeal.

Pursuant to the Florida Rules of Appellate Procedure 9.030 (a)(2)(A), the discretionary jurisdiction of this Court may be sought to review decisions of the District Court which:

> (i) expressly declare valid a state statute;
> (ii) expressly construe a provision of the state or federal constitution;
> (iii) expressly affect a class of constitutional or state officers;
> (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
> (v) pass upon a question certified to be of great public importance;
> (vi) are certified to be in direct conflict with decisions of other district courts of appeal . . .

Id; Art. V, § 3(b)(3), (4), and (5), Fla. Const. Clearly, the decision of the Fourth District in this case does none of the above. The decision is only reviewable if the conflict can be demonstrated from the district court of appeal's opinion. It cannot be implied. *See* Dep't of Health and Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986).

In Dufour, the lower court allowed the State to project the documents that were introduced solely for identification and were not admitted into evidence, and were relied upon by Dr. McClaren, onto a screen in the courtroom. Dufour v. State, 69 So. 3d 235, 254-255 (Fla. 2011). This Court found that "Under these circumstances, the circuit court did not abuse its discretion by allowing the challenged documents to be published on the screen." Dufour at 255.

Linn v. Fossum, 946 So. 2d 1032 (Fla. 2011) was cited by Petitioner for the premise that "an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion. Schwarz v. State, 695 So. 2d 452 (Fla. 4th DCA 1997) was cited by Petitioner for the premise that "an expert may not testify that the expert formed the opinion by conferring with others. (Petitioner's Jurisdictional Brief, p. 4).

Here, Baird did not confer with Noppinger, she did not rely on any of his conclusions, and she did not bolster her own opinion with another expert's opinion. Noppinger's findings did not implicate, nor independently establish Petitioner's guilt.

The Fourth District's order below does not expressly and directly conflict with any decision of this Court or any other District Court of Appeal. Therefore, this Court should decline to accept jurisdiction.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable Court to decline to exercise its jurisdiction to hear this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished via U.S. MAIL to: CECIL TOLBERT, pro se, DC# 037846, Jackson Correctional Institute, 5563 10th Street, Malone, FL 32445 on July 16, 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

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