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IN THE SUPREME COURT OF FLORIDA

BRANDON HOLLOWAY, Petitioner,	)	
vs.	)	CASE NO: DCA Case No: 4D09-4264
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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PRELIMINARY STATEMENT

Petitioner, Brandon Holloway, was the Defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. He was the Appellant in the Fourth District Court of Appeal. The District Court decision is reported as: *Brandon Holloway v. State,* 114 So. 3d 296 (Fla. 4th DCA 2013), *rehearing denied* June 7, 2013. A timely notice to invoke this Court's jurisdiction was filed with the District Court on July 8, 2013 [The Fourth District was closed on July 4 and 5, 2013, and July 6 and 7 were a Saturday and Sunday]. A copy of the District Court's decision is included as Appendix A.

STATEMENT OF THE CASE AND FACTS

In the circuit court, Petitioner was indicted for first degree murder with a firearm. His first two jury trials resulted in hung juries. A jury found Petitioner guilty after his third trial. The trial court sentenced Petitioner to life in prison.

On appeal to the Fourth District, Petitioner argued that the trial court erred by:

> (1) denying his motion for judgment of acquittal on the murder charge; (2) admitting a witness's statement as past recollection recorded; (3) admitting a box of ammunition found in Holloway's home; (4) admitting Holloway's statement to police without redacting statements made by the interrogating officer; and (5) taking judicial notice of the fact that Holloway was on probation.

Holloway, 114 So. 3d at 296. In its opinion, the Fourth District addressed only Point (3) admitting a box of ammunition found in Holloway's home. *Id.*

At issue in Point 3 was the introduction, over a Defense objection, of a box of ammunition found in Petitioner's home shortly after the victim's death. Although no murder weapon was recovered, A state firearm's expert testified that the "bullets found were the same caliber and material as those used to kill the victim and that the bullets were for a revolver or pistol, and the evidence established that the murder weapon was most likely a revolver." *Id.* at 297. The expert could not definitively state that the bullets found in the victim came from the case of bullets found in Petitoner's home. *Id.*

The Fourth District relied on its earlier decision in *Herman v. State*, 396 So. 2d 222, 229 (Fla. 4th DCA 1981), and this Court's decision in *Delhall v. State*, 95 So. 3d 134 (Fla. 2012), to find that

> there was an adequate nexus between the ammunition found in Holloway's home and the crime to establish relevancy. The bullets found were the same caliber and material as those used to kill the victim. This in itself is probative. *Herman*, 396 So. 2d at 229. Further, the bullets were for a revolver or pistol, and the evidence established that the murder weapon was most likely a revolver. Finally, unlike *Cooper* [778 So. 2d 542, 544 (Fla. 3d DCA 2001)], where the evidence was not discovered until nine months after the murder, here the bullets were found on the day of the murder. 778 So. 2d at 544. These facts created a sufficient nexus to the crime to establish relevance.

Holloway, 114 So. 3d at 297. In its opinion, the Fourth District distinguished this case from the Third District's decisions in *Cooper*, 778 So. 2d at 544; and *Sosa v. State*, 639 So. 2d 173, 174 (Fla. 3d DCA 1994). The Fourth District also concluded that:

> the fact that the ballistics expert could not definitively state that the bullets found in the victim came from the case of bullets found in his home. However, as we held in *Herman*, this went to the weight of the evidence, not its relevancy. 396 So. 2d at 229.

Holloway, 114 So. 3d at 297.

SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction to review a District Court decision which expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

In this case, the District Court cited two decisions of the Third District, *Cooper,* 778 So. 2d 542 (Fla. 3d DCA 2001); and *Sosa*, 639 So. 2d at 173. The Fourth District found it necessary to distinguish both cases on their facts without considering the complete legal basis for those decisions. Those decisions reach opposite conclusions on similar facts. In addition to the Third District opinions, the opinion below also conflicts with a decision of the Fifth District, *Moore v. State*, 1 So. 3d 1177 (Fla. 5th DCA 2009).

The decision also creates and ***intra***- district conflict with earlier Fourth District decisions on the same point of law. Although such conflicts are not an independent basis for conflict jurisdiction, they do add impetus to the need for this Court to exercise its jurisdiction to provide uniformity in decisions statewide.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO RESOLVE THE DIRECT AND EXPRESS CONFLICT RESULTING FROM THE FOURTH DISTRICT OPINION IN THIS CASE.

JURISDICTIONAL BASIS

This Court has jurisdiction to review a District Court decision which expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. *See* Fla. R. App. P. 9.030(2)(A)(iv).

THE DECISION BELOW ATTEMPTS TO DISTINGUISH *COOPER* AND *SOSA.*

In the decision below, the Fourth District was apparently aware of a possible conflict with other District Court decisions because the Court took pains to distinguish its decision from the Third District's decisions in *Cooper*, 778 So. 2d at 544; and *Sosa*, 639 So. 2d at 173. While the Fourth District was correct that the *Cooper* Court found the ammunition evidence was inadmissible because of the amount of time that had passed between the crime and the discovery of the ammunition, the *Cooper* Court also gave an additional reason for reversal. The other reason was that:

> …the nexus between the crime charged and the ammunition taken from defendant was too attenuated to

> make the ammunition relevant. First, the state's evidence that the ammunition is unusual or rare was woefully inadequate. Mr. Kennington testified that the major manufacturers of ammunition are Winchester, Remington and Federal. He added that A-merc is a small, local manufacturer based in Miami. Although he testified that he had not come across this type of ammunition before this case, he also testified that one of his colleagues at the crime lab *had* encountered it in other cases. Additionally, Mr. Kennington admitted that there are a total of seven examiners in the lab and that he had not asked the other five whether they had any experience with this brand. There were no inquiries directed to the manufacturer to determine how many cartridges such as the ones in the present case had been manufactured, nor were any other law enforcement agencies questioned about their experiences with this type of ammunition. In short, the fact that Mr. Kennington has had little contact with this type of ammunition does not establish that it is unique or rare.

Cooper, 778 So. 2d at 544. Thus, the Third District concluded that there was nothing particularly unique or rare about the ammunition and there was nothing to make it relevant to the crime charged.

The same can be said of *Sosa*, 639 So. 2d at 173, where the Third District concluded that:

> …we agree with the defendant that the trial court erred in allowing the .380 cartridges found in the defendant's vehicle into evidence. No weapon was found, no ballistics tests performed, and no link whatsoever established between these rounds and the case at bar. *See Huhn v. State,* 511 So. 2d 583 (Fla. 4th DCA 1987). The testifying officer conceded that the rounds retrieved from the victim's

> car were more consistent with a .22 caliber than with a .380 caliber, and conceded to defense counsel's observation that: "the bullets [from defendant's car] could not have been fired in the gun that was fired at Mr. Bollinger." Thus, as to the rounds, with nothing to connect them to the crime for which Sosa was charged, the rounds are not relevant to the case. *Id.* at 589. § 90.401, Fla.Stat. (1993).

Id. at 174. In the case below, like *Sosa*, no murder weapon was ever found and no evidence directly connected ***this particular box of ammunition*** to the crime.

The Fifth District reached a similar conclusion in *Moore v. State*, 1 So. 3d 1177 (Fla. 5th DCA 2009), and held that:

> …if there was no evidence linking any of these firearms to the charged crime, evidence of the firearms would be *irrelevant,* and should have been excluded upon proper objection. *See, e.g., Sosa v. State,* 639 So. 2d 173 (Fla. 3d DCA 1994) (holding that it was error to admit into evidence .380 cartridges found in defendant's car where there was no link established between the cartridges and the crime charged); *Huhn v. State,* 511 So. 2d 583 (Fla. 4th DCA 1987) (holding that it was error to admit into evidence a gun purchased by the defendant which was not connected with the charged crimes); *Rigdon v. State,* 621 So. 2d 475 (Fla. 4th DCA 1993) (reversing a conviction for aggravated assault with a firearm where the trial court admitted into evidence a semi-automatic weapon found on the defendant's bed because there had been no connection established between the weapon and the crime).

Id. at 1178-79. *See also Garcia v. State*, 655 So. 2d 194, 195 (Fla. 3d DCA 1995) (holster and the cash, found on defendant was not relevant to any portion of the case).

INTRA-DISTRICT CONFLICT

It should be noted that other District Court cases such as those quoted above, which excluded irrelevant firearms and ammunition often make reference to cases decided by the Fourth District itself, citing for example *Huhn v. State,* 511 So. 2d 583 (Fla. 4th DCA 1987); *Rigdon v. State,* 621 So. 2d 475 (Fla. 4th DCA 1993). Other Fourth District opinions also appear to be in conflict with the decision in the instant case. *See Jones v. State*, 32 So. 3d 706 (Fla. 4th DCA 2010)(gun cleaning kit seized from defendant's home was not relevant and inadmissible in prosecution for attempted first degree murder); *Metayer v. State*, 89 So. 3d 1003, 1007-08 (Fla. 4th DCA 2012) (State failed to show a sufficient link between the shootings and firearm and ammunition found in defendant's mother's home); *O'Connor v. State*, 835 So. 2d 1226 (Fla. 4th DCA 2003)(bulletproof vest and shotgun seized were not relevant to crime charged). Although ***intra***-district conflict is not an independent grounds for jurisdiction, here, it strongly indicates the muddled state of the decisional law on this legal issue and supports this Court's exercise of its jurisdiction to create uniformity statewide.

In light of the conflicts in District Court decisions, Petitioner asks this Court to accept this case for review to resolve the conflicts cited in this brief.

CONCLUSION

Based upon the foregoing argument and authorities cited, this Court should exercise its discretionary jurisdiction to review the Fourth District Court of Appeal's opinion, below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that this Petitioner's Jurisdictional Brief with Appendix was electronically filed with the Supreme Court and served on Counsel for Appellee, the State of Florida, at its designated address for service of process at 'CrimAppWPB@MyFloridaLegal.com' in accordance with Fla. R. Jud. Admin. 2.516, this 18th day of July, 2013.

/S/ JOHN M. CONWAY
Attorney for Petitioner

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

/S/ JOHN M. CONWAY
Attorney for Petitioner