

RECEIVED, 12/8/2014 11:28:42, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

MICHAEL HASPEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-2037

ON DISCRETIONARY REVIEW FROM THE  
THE DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI  
ATTORNEY GENERAL

CELIA A. TERENCE  
SENIOR ASSISTANT ATTORNEY GENERAL  
Fla. Bar No. 656879

JEANINE GERMANOWICZ  
ASSISTANT ATTORNEY GENERAL  
Fla. Bar No. 0019607

Office of the Attorney General  
1515 N. Flagler Drive, Ste. 900  
West Palm Beach, FL 33401  
Primary E-Mail:  
CrimAppWPB@myfloridalegal.com  
(561)837-5016  
(561)837-5108

COUNSEL FOR RESPONDENT

**TABLE OF CONTENTS**

	<b>PAGE#</b>
TABLE OF CONTENTS .....	ii
TABLE OF CITATIONS .....	iii
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE AND FACTS .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
THE FOURTH DISTRICT'S OPINION HEREIN IS IN NOT EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF ANOTHER DISTRICT COURT OR OF THIS COURT. (Restated) .....	2
CONCLUSION .....	7
CERTIFICATE OF SERVICE .....	7
CERTIFICATE OF COMPLIANCE .....	8

## **TABLE OF CITATIONS**

### **AUTHORITIES CITED**

### **PAGE#**

#### **Cases**

<u>Ansin v. Thurston</u> , 101 So. 2d 808, 810 (Fla. 1958) .....	4
<u>Bartlett v. State</u> , 993 So. 2d 157 (Fla. 1 <sup>st</sup> DCA 2008) .....	6
<u>Battle v. State</u> , 19 So.3d 1045 (Fla. 4th DCA 2009) .....	4, 5
<u>Blackwell v. State</u> , 79 So. 731, 739 (Fla. 1918) .....	8
<u>Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.</u> , 498 So.2d 888, 889 (Fla. 1986) .....	3
<u>Haspel v. State</u> , __ So. 3d __, 39 Fla. L. Weekly D2067 (Fla. 4 <sup>th</sup> DCA 2014) .....	1, 2, 5
<u>Huck v. State</u> , 881 So. 2d 1137, 1149 (Fla. 5 <sup>th</sup> DCA 2004) .....	7
<u>Jenkins v. State</u> , 385 So.2d 1356, 1359 (Fla. 1980) .....	3
<u>Reaves v. State</u> , 485 So.2d 829, 830 (Fla. 1986) .....	2, 3
<u>Sosa-Valdez v. State</u> , 785 So. 2d 633 (Fla. 3d DCA 2001) .....	5
<u>Spradley v. State</u> , 442 So. 2d 1039 (Fla. 2d DCA 1983) .....	7
<u>Stallworth v. Moore</u> , 827 So.2d 974 (Fla. 2002) .....	3

#### **Rules**

Fla. R. App. P. 9.030(a)(2)(A)(iv) .....	2
--	---

#### **Other Authorities**

Article V, §3(b)(3), of the Florida Constitution .....	2
--	---

### **PRELIMINARY STATEMENT**

Respondent, 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 Respondent, the prosecution, or the State. Petitioner, Haspel, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"IB" will designate Petitioner's Initial Brief on Jurisdiction. That symbol will be followed by the appropriate page number.

### **STATEMENT OF THE CASE AND FACTS**

The pertinent history and facts are set out in the decision of the lower tribunal which is included in the appendix. It also can be found at Haspel v. State, \_\_ So. 3d \_\_, 39 Fla. L. Weekly D2067 (Fla. 4<sup>th</sup> DCA 2014).

### **SUMMARY OF ARGUMENT**

The appropriate focus upon the operative facts, as contained within the "four corners" of the district court's decision, reveals no express and direct conflict with this Court or with another district court. Therefore, there is no expressed and direct conflict, and this Court must dismiss this case for lack of jurisdiction.

## ARGUMENT

**THE FOURTH DISTRICT'S OPINION HEREIN IS IN NOT EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF ANOTHER DISTRICT COURT OR OF THIS COURT. (RESTATED)**

Petitioner alleges that the opinion of the Fourth District in Haspel v. State, \_\_ So. 3d \_\_, 39 Fla. L. Weekly D2067 (Fla. 4<sup>th</sup> DCA 2014), is in direct and express conflict with the decisions of other district courts and of this Court. Petitioner therefore contends that this Court has jurisdiction pursuant to Article V, §3(b)(3), of the Florida Constitution. The Constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Also see Fla. R. App. P. 9.030(a)(2)(A)(iv).

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a

dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So.2d 974 (Fla. 2002). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Here, the decision below is not in "express and direct" conflict with any of the opinions cited by Petitioner.

In this case, the Fourth District stated in the opinion below:

At the trial, the investigating detective was asked, "[D]uring the course of your investigation, did you determine that the **alleged** incidents occurred as early as 2001?" He responded, "Yes." No objection was made, but on appeal, appellant claims that this amounted to the detective giving an improper opinion on the appellant's guilt. In no way do we find that the question and answer could be construed as the

detective giving his opinion on the guilt of the appellant. The question merely sought to establish the earliest date that the "**alleged**" incidents occurred, as the time was relevant to the issue of the age of the victim.

This is entirely different than Battle v. State, 19 So.3d 1045 (Fla. 4th DCA 2009), upon which appellant relies. There, the officer was allowed to testify that, although he had not witnessed the burglary, "[d]efinitely, one hundred percent, [Battle] is the guy that committed the burglary." Id. at 1046. We concluded that this was clearly opinion evidence and could have conveyed to the jury the impression that the officer had other evidence of Battle's guilt. Id. at 1047-48. In the present case, however, the officer's comment was not opinion evidence, nor did it convey to the jury that the detective may have possessed additional information which led to a conclusion of appellant's guilt. As this did not constitute opinion evidence, appellant's contention lacks merit.

Haspel, 2014 WL 4840756 at \*1 (emphasis added).

Petitioner takes issue with the Fourth District's opinion on this issue and claims that it conflicts with the decisions of other district courts and of this Court. Contrary to Petitioner's protestations, there is no such conflict.

Petitioner claims the Fourth District's opinion is in conflict with Sosa-Valdez v. State, 785 So. 2d 633 (Fla. 3d DCA 2001). The officer in Sosa-Valdez testified that, based on his investigation, the information he received, and his training and experience, the victim was not involved in a setup of the defendant. By so doing, the officer in Sosa-Valdez essentially gave his opinion as to the guilt of the defendant.

In contrast, the officer in the instant case did not, as in Sosa-Valdez, in effect say that Petitioner was guilty. As was made very clear by the use of the word "**alleged**" during the questioning, the officer was simply testifying as to the date which had been provided for the "alleged" incidents. Contrary to Petitioner's attempts to interpret the officer's testimony thusly, the officer was not testifying, obliquely or otherwise, that the incidents had in fact occurred, nor was he testifying that Petitioner had in fact committed them. He was not thus giving his opinion on Petitioner's guilt. Therefore, Sosa-Valdez is distinguishable.

Petitioner also cites Bartlett v. State, 993 So. 2d 157 (Fla. 1<sup>st</sup> DCA 2008), wherein the appellate court reversed the defendant's conviction after an officer testified he ruled out self-defense based on the nature of the victim's stab wound. The district court noted in Bartlett that this was opinion testimony given that the officer had not personally observed "whether self defense was a viable defense for Appellant."

But, in the instant case, in contrast to Bartlett, the officer did not represent that he believed that the incidents had, in fact, occurred; it was always clear that they were only **alleged** incidents. Further, the officer's testimony in this case was merely a statement of fact, not an opinion. The officer was not, through this exchange, testifying that, in his opinion, the



incidents had **in fact** occurred as early as 2001; the officer was only testifying that the incidents had been **alleged** to have occurred as early as 2001. Bartlett is distinguishable.

Petitioner also cites Spradley v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983), which held that the medical examiner could not testify that the victim's demise was caused by a homicide rather than an accident. The court reasoned that, by doing so, the doctor effectively eliminated the appellant's viable defense of excusable homicide, and that this was error because a witness could not offer an opinion as to the guilt or innocence of an accused. However, it must be noted that the medical examiner admitted in Spradley that he did not have any knowledge about the shooting incident or the investigation of the incident; consequently, no factual predicate had been laid nor was the doctor qualified to render an expert opinion as to the cause and manner of death. See, Huck v. State, 881 So. 2d 1137, 1149 (Fla. 5<sup>th</sup> DCA 2004) (distinguishing Spradley on this basis).

In contrast, in the instant case, the officer was merely relating the details of his investigation, rather than rendering an expert opinion of any kind such as the medical examiner did in Spradley. Further, the officer here had the personal knowledge to testify that the victim and her mother alleged the incidents occurred as far back as 2001 since he actually spoke

with them in the course of his investigation. Spradley is simply not relevant.

Petitioner also claims that the Fourth District's opinion conflicts with the opinion of this Court in Blackwell v. State, 79 So. 731, 739 (Fla. 1918). As Petitioner points out, the sheriff in that case testified that it was his opinion that there was sufficient evidence to convict the prisoners. But, as has been repeatedly stated, *supra*, the officer's testimony herein was not opinion testimony, nor was it an assertion that the alleged incidents had in fact occurred, nor was it an expression of belief as to the guilt of the defendant. The officer's testimony in the instant case can in no way be compared to the testimony of the sheriff in Blackwell.

In sum, there is no express and direct conflict between this case and any of the cases cited by Petitioner. This Court must dismiss this case for lack of jurisdiction.

#### **CONCLUSION**

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

#### **CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by E-MAIL on December 8, 2014: Gary Caldwell at [gcaldwel@pd15.state.fl.us](mailto:gcaldwel@pd15.state.fl.us), [cgload@pd15.state.fl.us](mailto:cgload@pd15.state.fl.us), and [appeals@pd15.state.fl.us](mailto:appeals@pd15.state.fl.us).

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using  
Courier New 12 point font.

Respectfully submitted and certified,  
PAMELA JO BONDI  
ATTORNEY GENERAL

/s/ Celia A. Terenzio  
SENIOR ASSISTANT ATTORNEY GENERAL  
Fla. Bar No. 656879

/s/ Jeanine Germanowicz  
By: JEANINE GERMANOWICZ  
ASSISTANT ATTORNEY GENERAL  
Fla. Bar No. 0019607  
Attorney for Respondent, State of Fla.  
Office of the Attorney General  
1515 N. Flagler Drive, Ste. 900  
West Palm Beach, FL 33401  
Primary E-Mail:  
CrimAppWPB@myfloridalegal.com  
(561)837-5016  
(561)837-5108