# ORIGINAL



IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

Petitioner,

v.

CASE NO. 91,078
5DCA CASE NO. 96-2926

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

Petitioner pled nolo contendere to battery, attempted first degree premeditated murder with a firearm and possession of a firearm by a convicted felon. On direct appeal, Petitioner argued that it was error to include on his sentencing guidelines scoresheet 18 points for possession of a firearm during the commission of his offenses because possession of a firearm is an essential element of possession of a firearm by a convicted felon.

Petitioner's convictions and sentences were affirmed per curiam on April 29, 1997. On June 27, 1997, the Fifth District Court of Appeal granted rehearing and again affirmed per curiam adding that the affirmance was based on Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996) and noting conflict between Smith and White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997). Asbell v. State, 22 Fla. L. Weekly D1542 (Fla. 5th DCA June 27, 1997). On July 15, 1997, Petitioner filed a notice to invoke this Court's discretionary jurisdiction.

## SUMMARY OF THE ARGUMENT

There is no conflict within the four corners of the majority decision.

## ARGUMENT

### POINT ON APPEAL

THE DISTRICT COURT OF APPEAL'S DECISION BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH WHITE V. STATE, 689 SO. 2D 371 (FLA. 2D DCA 1997).

Petitioner's convictions and sentences for battery, attempted first degree premeditated murder with a firearm and possession of a firearm by a convicted felon were affirmed per curiam on April 29, 1997. On June 27, 1997, the Fifth District Court of Appeal granted rehearing and again affirmed per curiam adding that the affirmance was based on Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996) and noting conflict between Smith and White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997). Asbell v. State, 22 Fla. L. Weekly D1542 (Fla. 5th DCA June 27, 1997). (Appendix)

Under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may 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. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the

majority decision.

In the instant case, there is no conflict within the four corners of the majority decision. The Fifth District notes conflict between the case relied upon to affirm, Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996) and White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997). Asbell, supra. However, upon review of the decision in White, the decision affirms the addition of the eighteen points to the defendant's sentencing guidelines scoresheet for possession of a firearm. Smith, supra, also affirms the addition of the eighteen points. The Second District in White does certify conflict with Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). In the instant case, however, no conflict exists between Smith, White and Asbell. They all affirm the inclusion of the 18 points for possession of a firearm.

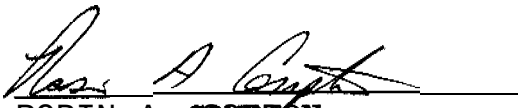
Respondent does acknowledge that there is apparent conflict with the instant case and Galloway, supra. The Fifth District, however, did not refer to Galloway in the instant decision. There is not any express **and** direct conflict within the four corners of the majority decision. Reaves, supra. This Court should decline to accept jurisdiction.

## CONCLUSION

Based on the arguments and authorities presented herein, Respondent would suggest that this honorable Court should decline to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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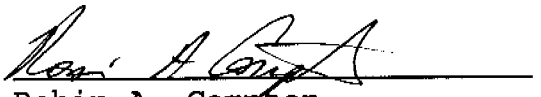
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by interoffice mail/delivery to Brynn Newton, Assistant Public Defender, this 5th day of August, 1997.



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Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

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CASE NO.
5DCA CASE NO. 96-2926

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APPENDIX

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subsection (e), the legislature *intended* to also amend the definition of "domestic violence," it is not our place to amend clear and unambiguous *statutory* language.[3]

It appears, therefore, that in order for Ms. Sharpe to qualify for a domestic violence injunction, she must be a relative by marriage of appellant and must have resided with him in a single dwelling unit. Since there **is "living issue" of** Ms. Sharpe's marriage to her deceased husband, she continues to be related by marriage to appellant. See Crosby *v.* Stare, 90 Fla. 381, 106 So. *741* (Fla. 1925). However, there is nothing in Ms. Sharpe's petition which claims that she and the appellant ever resided in the same household. Under the current, law, statutory domestic violence between the pair has not occurred and cannot occur.

In order to be entitled to a domestic violence injunction, it seems axiomatic that one must both plead and prove one's entitlement to the protection of the statute. Ms. Sharpe simply failed todoso.

REVERSED and REMANDED. (PETERSON, C.J.. and GRIFFIN, J., concur.)

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'Wc recognize that this language is inconsistent with the provision5 of the form authorized by section 741.30(3)(b), but it appears that legislative intent is better reflected in its statutory language than in its forms.

[2]But set the alternative basis for possible relief contained in section 901.01 Florida Statutes as discussed in *Oliver v. Haspil, 152* So. 2d 758 (Fla. 3d DCA 1963): and *Drake v. Henson. 448 So.* 2d 1205 (Fla. 3d DCA 19841.

[3]*State v. Jen, 626 So.* 2d 691 (Fla. 1993): it is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language.

* * *

MICHAEL ASBELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2926. Opinion filed June 27, 1997. Appeal from the Circuit Court for Putnam County, Stephen L. Boyles, Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender. Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

(PER CURIAM.) We grant the motion for rehearing and affirm based on Smith *v. State,* 683 So. 2d 577 (Fla. 5th DCA 1996). *although we* note *Smith* conflicts with *White v. State,* 22 F.L.W. D485 (Fla. Feb. 21, 1997).

AFFIRMED. (COBB, SHARP, W., and GRIFFIN, JJ., concur.)

* • ✉

**Criminal law—Appeals—Defense counsel's objection sufficient to preserve for appellate review error in admitting expert testimony that child's behavior was consistent with child who had been sexually abused-Evidence-Polygraph**

RICHARD BEAULIEU, Appellant/Cross-Appellee, v. STATE OF *FLORIDA.* Appellee/Cross-Appellant. 5th District. Case No. 95-605. Opinion filed June 27, 1997. Appeal from the Circuit Court for Orange County, John H. Adams, Sr., Judge. Counsel: William F. Jung, of Black & Jung, P.A., Tampa, for Appellant/Cross-Appellee. Robert A. Butterworth, *Attorney* General, Tallahassee, and Steven J. Guardiano, Sr. Assistant Attorney General, Daytona Beach, for Appellee/Cross-Appellant.

ON REMAND
MOTION FOR REHEARING
[Original Opinion at 22 Fla. L. Weekly D1240d]

(HARRIS. J.) We grant rehearing solely to address the cross appeal filed by the State. The trial court admitted evidence of a polygraph on the basis of *United* Stares *v. Piccinonna,* 885 F. 2d *1529* (11th Cir. 1989). We decline to adopt *Piccinonna* which conflicts with our more recent decision in *Cassamassima v. State,* 657 So. 2d 906 (Fla. 5th DCA 1995), and direct the court to follow *Cassamassima* on remand. We do not change our position on the sufficiency of Defendant's objection below.

The supreme court has remanded this case to us to determine testimony on the basis that it was not reliable" in order to preserve the issue for appeal,

We cannot help but compare the dilemma facing defense counsel below with the dilemma faced by Orr in Joseph Hcller's *Catch-22:*

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded, All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions . . . If he flew them he was crazy and didn't have to; but if **he didn't** want **to he was sane and had to . . . "That's some catch,** that Catch-22." he [Yossarian] observed. "It's the best there is." Doc Daneeka agreed.

At the time of the trial below, we had issued our opinion in Toro *v.* Stare, 642 So. 2d 78, 82 (Fla. 5th DCA 1994), citing that portion of *Stare* v. *Townsend,* 635 So, 2d 949,958 (Fla. 1994). which held:

> If relevant, a medical expert wimess may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused.

Defense counsel's dilemma, therefore, was whether to object to this type testimony in face of *Toro* and *Townsend* and have his competency questioned or to not object only to see the supreme court recede from *Townsend*[1] and have all doubt removed. The defense counsel took a middle ground.

Defense counsel objected as follows:

> MR. GOODMAN [Defense Counsel]: I think he is about to elicit an answer which would be an improper answer. She [the psychologist] can't-she can give a diagnosis, if she can. She can't testify what she believes as to whether the child has been molested. . . She can give a diagnosis, for example, stress syndrome or whatever, or any other recognized psychological diagnosis, but she can't testify about whether in her opinion the child has been molested.
>
> MR. SAVITZ: She can testify and I think the case law backs us up-she did testify that he shows signs consistent with being sexually abused.
>
> MR. GOODMAN: I don't think it says that.

We fmd that the admission of the profile testimony was not harmless, and under the facts of this case and under the law as it existed at the time of the trial below, we hold that the objection was sufficient to preserve the issue for appeal and reverse Beaulieu's conviction and remand to the trial court for further action consistent with the opinion of the supreme court in *Hadden v. State,* 22 Fla. L. Weekly S55 (Fla. February 6. 1997).

REVERSED and REMANDED. (SHARP, W., and ANTOON. JJ., concur:)

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[1]The supreme court has now held: "That expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused should not be admitted." *Hadden v. State,* 22 Fla. L. Weekly S55, 56 (Fla. February 6. 1997).

* * *

**Criminal law-Probation revocation—Sentencing—Guidelines—Departure-Increase in sentence mare than one cell-Belated appeal**

ROBERT WILSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 962691. Opinion filed June 27, 1997. Appeal from the Circuit Coun for Volusia County, Gayle Graziano, Judge. Counsel: Robert Wilson. Blountstown, pro se. Robert A. Butterworth, Attorney General, Tallahassee. and Roberta J. Tylke, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Robert Wilson files this belated appeal to correct an improper departure sentence.' The trial court sentenced Wilson for violation of probation in two separate cases in 1991 and ordered him to serve concurrent five year departure sentences in each case Because none of the reasons given by the