

IN THE SUPREME COURT OF FLORIDA

TIMOTHY ANDERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC18-1059

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

JURISDICTIONAL BRIEF OF RESPONDENT

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### 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, Shepard, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number. 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 decisions of the lower tribunals, and this Court's prior decision.

**SUMMARY OF ARGUMENT**

The operative facts, as contained within the "four corners" of the First DCA's decision reveals conflict with the Fourth DCA, but does not show any express and direct conflict with this Court.

## ARGUMENT

**WHETHER THE FIRST DISTRICT'S OPINION IN ANDERSON V. STATE, \_\_\_ SO. 3D \_\_\_, (NO. 1D15-5433) (FLA. 1ST DCA, MAY, 2018) IS IN EXPRESS AND DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN PIGGOT V. STATE, 140 SO. 3D 666 (FLA. 4TH DCA 2014)?**

### A. Standard of Review.

The applicable standard of review for claims of direct and express conflict is de novo subject to the following criteria.

### B. Jurisdictional Criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv), which parallels Article V, §3(b)(3), Fla. Const. The Florida 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."

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 (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.

*Ansin* at 810.

#### C. The First DCA's Decision in *Anderson*

In *Anderson v. State*, \_\_\_ So. 3d\_\_\_ (no. 1D15-5433) (Fla. 1st DCA May 25, 2018) the Petitioner was convicted of aggravated assault with a deadly weapon after Petitioner followed his girlfriend in his truck, drove erratically and eventually hit his girlfriend's vehicle. The information charging Petitioner stated that he "did unlawfully and intentionally make an assault upon [his girlfriend] with a motor vehicle, a deadly weapon without intent to kill, contrary to Section 784.021 (1)(a), Florida Statutes." Petitioner's defense at trial was that he did not intentionally strike his girlfriend's vehicle, but admitted to

driving recklessly. Petitioner requested a lesser included offense of reckless driving.

The First DCA relied on the recent opinion in *State v. Knighton*, 235 So. 3d 312 (Fla. 2018) in its analysis. "Upon request, a trial judge is required to instruct the jury on a permissive lesser-included offense if two conditions are met: **(1) the charging document alleges all the statutory elements of the lesser offense,** and (2) there is some evidence presented at trial establishing each element of the requested lesser-included offense." *Id.* At 1.

The First DCA stated in its opinion that "it is not enough that there was undisputed evidence at trial that Anderson was driving his truck at the time of the assault. The first step in the analysis asks only whether the charging document alleges all the statutory elements of the lesser offense, without consideration of the evidence presented at trial." The court held that the element of driving may not be inferred from the charging document simply because driving "might be the most common manner in which an assault with a motor vehicle occurs." *Id.* At 3.

#### D. The Fourth Circuit's Decision in *Piggot*

In *Piggot v. State*, 140 SO. 3D 666 (FLA. 4TH DCA 2014), the defendant was convicted of aggravated battery with a deadly weapon. The charging document in *Piggot* alleged that the defendant "did unlawfully and intentionally touch or strike [the victim] against

his will with a deadly weapon, to wit: a Kia Sephia four-door automobile." Id. At 668. The victim testified that he saw "the defendant drive up in a car, exit the car, and take a hedge trimmer from his next door neighbor's driveway. When the victim approached the defendant, the defendant jumped back into the car's driver's seat. The victim ran up next to the car's passenger side mirror, and the defendant begin driving away. The defendant's car swerved and struck the victim's hip, sending him to the ground. According to the victim, the defendant then 'took off, down the street. Almost plowed straight into a van." Id. At 668. The defendant requested a jury instruction for the lesser included offense of reckless driving, which the trial court denied.

The Fourth DCA held that the trial court erred and that reckless driving is a permissive lesser included offense of aggravated battery with a deadly weapon, stating "the facts alleged in the information are such that the lesser included offense of reckless driving cannot help but be perpetrated once the greater offense of aggravated battery with a deadly weapon has been committed when the alleged deadly weapon is an automobile." Id. At 669. The Fourth DCA found that "the State's information alleged all of the statutory elements of the permissive lesser included offense of reckless driving." Id at 669.

**CONCLUSION**

Based on the foregoing reason, the State respectfully requests this Honorable Court review the merits of the conflict between the First DCA's decision in *Anderson* and the Fourth DCA's decision in *Piggot*.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by email on August 20, 2018 to Kathleen Stover, Esq. at Kathleen.stover@flpd2.com.

**CERTIFICATE OF COMPLIANCE**

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

Respectfully submitted and certified,  
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