

TABLE OF CONTENTS

TABLE OF CITATIONS.....ii

PRELIMINARY STATEMENT1

CERTIFICATE OF TYPE SIZE AND STYLE.....1

STATEMENT OF THE CASE AND FACTS2

SUMMARY OF THE ARGUMENT.....:3

ARGUMENT.....4-6

THIS COURT LACKS JURISDICTION OVER THE
INSTANT DECISION OF THE FOURTH DISTRICT COURT
OF APPEALS SINCE THERE IS NO DIRECT AND
EXPRESS CONFLICT WITH THE DECISIONS OF THIS
COURT (Restated).

CONCLUSION.....7

CERTIFICATE OF SERVICE.....7

TABLE OF AUTHORITIES

STATE CASES

Ansin v. Thurston,
101 So. 2d 808 (Fla. 1958) , 4,5

Banks v. State,
755 so. 2d 142 (Fla. 4th DCA) 5

Breedlove v. State,
413 so. 2d 1 (Fla. 1982) 3,5

Consalvo v. State,
697 So. 2d 805 (Fla. 1996) 3,5,6

Florida Power and Light Co. v. Bell,
113 so. 2d 697 (Fla. 1959) 5

Kyle v. Kyle,
139 so. 2d 885 (Fla. 1962) . , 5

Nielsen v. City of Sarasota,
117 so. 2d 731 (Fla. 1960) 5

MISCELLANEOUS

Art. V, § 3(b) (3) 4,5

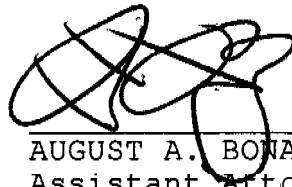
PRELIMINARY STATEMENT

Petitioners were the Defendants and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioners were the Appellants and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.



AUGUST A. BONAVITA
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STATEMENT OF THE CASE AND FACTS

The State accepts Petitioners' Statement of the case and facts for purposes of this Brief,

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over the instant decision of the Fourth District Court of Appeals since there is no "direct and express conflict" with decisions of this Court. Similar to Breedlove¹ the extrajudicial statements admitted in this case and later referred to by the prosecutor were used solely to prove a verbal act, and not to prove the truth the matters asserted. Further, Consalvo² is distinguishable from the case at bar. Consequently, those cases are not in "direct and express conflict" with the lower court's decision in this case, and, accordingly, this Court should decline to accept jurisdiction.

¹Breedlove v. State, 413 So.2d 1 (Fla. 1982).

²Consalvo v. State, 697 So.2d 805 (Fla. 1996).

ARGUMENT

THIS COURT LACKS JURISDICTION OVER THE INSTANT
DECISION OF THE FOURTH DISTRICT COURT OF
APPEALS SINCE THERE IS NO DIRECT AND EXPRESS
CONFLICT WITH THE DECISIONS OF THIS COURT
(Restated).

This Court lacks jurisdiction over the instant decision of the Fourth District Court of Appeals since there is no direct and express conflict with the decisions of this Court. Petitioner essentially argues that the decision of lower court "directly and expressly conflicts with the decisions of this Court" (IB 5). The State respectfully disagrees.

Petitioner is correct in that Art, V, § 3(b)(3), Fla. Const. confers upon this Court jurisdiction to review a decision of a district court of appeal which "expressly and directly" conflicts with a decision of this Court. As this Court has said:

The test of our jurisdiction in such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents. We have said that conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). If the two cases are distinguishable in controlling factual elements or if the points of law settled by

the two cases are not the same, then no conflict can arise. Florida Power and Light co. v. Bell, 113 So.2d 697 (Fla. 1959); Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

Kvle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

The State submits that the lower court's decision in the case at bar is not "out of harmony with" Breedlove. Contrary to Petitioner's claim, the prosecutor did not mention Goodman's statements during closing argument in order to prove the truth of the matters contained therein. Instead, as the lower court found, the purpose of Goodwin's statements was to, "prove [the State's] case against Banks as a principal, [since] the state was required to show that Banks did some act to assist Goodman in the commission of the crime [and] mere knowledge or presence at the scene are insufficient to establish participation." Banks v. State, 755 So.2d 142 (Fla. 4th DCA). This Court, in Breedlove, permitted the extrajudicial statements since they "show[ed] the effect on Breedlove rather than for the truth of those comments." Id. at 7. Therefore, Breedlove and the lower court's decision in this case are "in harmony," and consequently, there is no direct and express conflict upon which to confer jurisdiction. Kyle, supra., 139 So.2d at 887; Ansin; Art V, § 3(b)(3), Fla. Const.

To the contrary, in Consalvo, this Court held that the prosecutor's closing argument wherein he used the "Walker burglary" as "similar crimes evidence," was improper since this exceeded its

permissible use³. Id. at 813. Therefore, Consalvo is distinguishable from the case at bar since, as previously argued, the prosecutor properly used Goodwin's statements as "verbal acts" in order to prove that Petitioner's was involved in the crime as a principal and they were not offered to prove the truth of the matters asserted. Consequently, since this **case** and Consalvo are "distinguishable in controlling factual elements," there is no "direct and express conflict." Accordingly, this Court should decline to review the lower court's decision in this case.


³The trial court permitted this evidence to be used by the State only because it was "inextricably intertwined with the instant murder." Id. at 813.

CONCLUSION

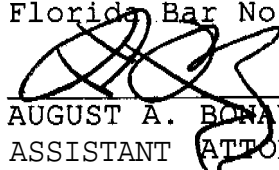
The State respectfully requests this Court to DECLINE to accept jurisdiction to review the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by Courier to: MARCY K. ALLEN, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on this 22nd day of June, 2000.



Of Counsel