

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

CASE NO.: SC08-1240
LOWER CASE NO.: 2D03-3894

RANDOLPH WIGHTMAN,
Respondent.

_____ /

RESPONDENT'S BRIEF ON JURISDICTION

On Discretionary Review from the
Second District Court of Appeal

James T. Miller
Florida Bar No. 0293679
233 E. Bay Street, Suite 920
Jacksonville, Florida 32202
904/791-8824 Telephone
904/634-1507 Facsimile

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of the Case and Facts.....2

Summary of the Argument.....3

Argument.....4

I. WHETHER THE SECOND DISTRICT COURT OF APPEAL’S DECISION IN WIGHTMAN V. STATE, 2008 WL 1830367, (FLA. 2D DCA APRIL 25, 2008), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN STATE V. GENERAZIO, 691 SO.2D 609 (FLA. 4TH DCA 1997) AND LAZAROWICZ V. STATE, 561 SO.2D 392 (FLA. 3D DCA 1990)?.....4

 A. Standard of review.....4

 B. A direct and express conflict does not exist: the bases of the decision in this cause are different from the points of law decided in State V. Generazio, supra, and Lazarowicz V. State, supra.....4

Conclusion.....7

Certificate of Service.....7

Certification of Typeface Compliance.....7

TABLE OF AUTHORITIES

CASES	PAGE
<u>Dell'Orfano v. State,</u> 616 So.2d 33 (Fla. 1993).....	5
<u>Florida Star v. B.J.F.,</u> 530 So.2d 286 (Fla. 1998).....	4
<u>Kennedy v. Kennedy,</u> 641 So.2d 408 (Fla. 1998).....	4
<u>Lazarowicz v. State,</u> 561 So.2d 392 (Fla. 3d DCA 1990).....	4,5,6
<u>Seaboard AirLine R.R. v. Branham,</u> 104 So.2d 356 (Fla. 1958).....	4
<u>State v. Generazio,</u> 691 So.2d 609 (Fla. 4 th DCA 1997)	4,5,6
<u>Tippens v. State,</u> 897 So.2d 1278 (Fla. 2005).....	4
<u>Wightman v. State,</u> 982 So.2d 74 (Fla. 2 nd DCA 2008)	2

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in Petitioner's Brief with the following additions:

The Second District Court of Appeal noted in its opinion:

"On appeal, the State does not attempt to defend the prosecutor's position at trial that the allegations were "representative counts", and that general testimony of repeated abuse was permitted to prove the two counts alleged. Instead, the State advances two arguments that were not made below to justify the victim's general testimony of numerous abusive acts." Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008).

The Second District Court of Appeal rejected the state's new argument on appeal that the evidence in question was not Williams Rule Evidence because it was inextricably intertwined evidence. Wightman v. State, *supra*. The Court also rejected the new argument that the evidence was admissible pursuant to Section 90.404(2)(b)(1) Florida Statutes - the Court held that the state could not rely upon this argument because the State had not filed a Notice to Rely Upon Such Evidence pursuant to Section 90.404(2)(b). Wightman v. State, *supra*.

SUMMARY OF ARGUMENT

There is no express and direct conflict between this case and the cases relied upon by Petitioner to establish conflict jurisdiction. The basis of the opinion in this cause is different from the issue ruled upon in State v. Generazio v. State, 691 So.2d 609 (Fla. 4th DCA 1997) and Lazarowicz v. State, 561 So.2d 392 (Fla. 3d DCA 1990). The decision in this case did not even consider the issue presented in Generazio and Lazarowicz. Consequently, there is no conflict for this Court to resolve.

I.

WHETHER THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN WIGHTMAN V. STATE, 2008 WL 1830367, (FLA. 2D DCA APRIL 25, 2008), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN STATE V. GENERAZIO, 691 SO.2D 609 (FLA. 4TH DCA 1997) AND LAZAROWICZ V. STATE, 561 SO.2D 392 (FLA. 3D DCA 1990)?

A. Standard of review.

Petitioner has not fully delineated the appropriate standard of review. This Court has conflict jurisdiction when there are express and direct conflicts as to the same points of law which constitute the bases for the decisions in question. See Tippens v. State, 897 So.2d 1278 (Fla. 2005); Kennedy v. Kennedy, 641 So.2d 408 (Fla. 1998). See also Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988); Seaboard AirLine R.R. v. Branham, 104 So.2d 356 (Fla. 1958)

The issue in this case is whether the decision in this case directly and expressly conflicts with State v. Generazio, 691 So.2d 609 (Fla. 4th DCA 1997) and Lazarowicz v. State, 561 So.2d 392 (Fla. 3d DCA 1990) on the same points of law which formed the bases of the decisions in those cases.

B. A direct and express conflict does not exist: the bases of the decision in this cause are different from the points of law decided in State v. Generazio, supra, and Lazarowicz v. State, supra.

Petitioner argues, in a tautological manner, that there is an express and direct conflict because this cause excluded certain evidence and State v. Generazio, *supra*, and Lazarowicz v. State, *supra*, permitted the introduction of this type of evidence (a charge of sexual abuse which occurred over a lengthy period of time). Petitioner's argument lacks merit because the basis for the decision in Generazio and Lazarowicz was that the informations were not too vague pursuant to the holding in Dell'Orfano v. State, 616 So.2d 33 (Fla. 1993).

The decision in this case does not rest, in any way, upon the Dell'Orfano issue. In this cause, The Second District Court of Appeal rejected **new** arguments on appeal that the evidence in question was not Williams Rule Evidence because it was inextricably intertwined evidence. The Second District Court of Appeal also rejected a new argument on appeal that the evidence was alternatively admissible under Section 90.404(2)(b)(1), Florida Statutes - the Court rejected this argument because the State failed to file Notice of its intent to use this evidence.

The basis of the opinion in this case was **not** whether the information was too vague. Consequently, there is no conflict between this case and Generazio, *supra*, and Lazarowicz, *supra*. This case did not involve that issue. The bases of the opinion in this case were not considered in any way in Generazio and Lazarowicz. The decision below is based upon the unique facts and

circumstances of this case. Consequently, there is no direct and express conflict on the same points of law between this case and Lazarowicz and Generazio. The fact that Generazio and Lazarowicz permitted the use of 90.404 evidence and this case did not (under the circumstances of this case) is not a conflict because the rationale for these decisions was different. Therefore, there is no conflict for this Court to resolve.

CONCLUSION

This Court should decline to accept jurisdiction in this case.

Respectfully submitted,

/S/ James T. Miller
James T. Miller
Florida Bar No. 0293679
233 E. Bay Street, Suite 920
Jacksonville, Florida 32202
904/791-8824 Telephone
904/634-1507 Facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 22nd day of July, 2008 to: Elba Caridad Martin, AAG, Attorney General's Office, Concourse Center 4, 3507 E. Frontage Road, Ste. 200, Tampa, Florida 33607-7013.

/S/ James T. Miller
James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.