

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Appellant,)
)
 vs.)
)
 JOSEPH MCFADDEN,)
)
 Petitioner.)
)
)
)
 _____)

CASE NO. SC09-1755
DCA CASE NO. 4D08-2098
LT. CASE NO. 2007-625CFA

RESPONDENT’S ANSWER BRIEF
ON DISCRETIONARY JURISDICTION

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ARGUMENT

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CASES

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FLORIDA RULES OF CRIMINAL PROCEDURE

3.220(b)(1)(B)4

FLORIDA CONSTITUTION

Article V, Section 3(b)(3)3

PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the 19th Judicial Circuit, Martin County County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

“PB” will denote Petitioner’s Brief on Jurisdiction.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found in Petitioner's Brief on jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should deny review of this case because the Fourth District's decision does not expressly and directly conflict with the decisions in *State v. Evans*, 770 So. 2d 1174 (Fla. 2000), *Burkes v. State*, 946 So. 2d 34 (Fla. 5th DCA 2006), *Olson v. State*, 705 So. 2d 687 (Fla. 5th DCA 1998), or *Johnson v. State*, 545 So. 2d 411 (Fla. 3d DCA 1989). *Evans* and *Olson* address the Petitioner's proposition, that oral statements of a witness are not subject to discovery under Rule 3.220(b)(1)(B), in dicta only and the issue decided in those cases is not the same issue decided in the instant case. The facts of *Burkes* are so different from the instant case that they produced a different result while still recognizing the same principal of law. Finally, *Johnson* appears to no longer be applicable because it relies upon a principal of law that has since been changed by this Court. In sum, none of Petitioner's cited cases expressly and directly conflict with this case and this Court should deny Petitioner's request for discretionary review.

ARGUMENT

THE FOURTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL ON THE ISSUE OF WHETHER CRIMINAL RULE OF PROCEDURE 3.220(b)(1)(B) REQUIRES DISCLOSURE BY THE PROSECUTION OF A WITNESS'S ORAL STATEMENTS.

This Court should not exercise its power of discretionary jurisdiction to review this case because there is no express and direct conflict between decisions. This Court has discretion pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980), to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or this Court on the same question of law. *See The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

This Court's "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance." *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

In this case, the Fourth District held that Florida Rule of Criminal Procedure 3.220(b)(1)(B) requires the State to disclose an oral statement made by a defense witness to a deputy on the day before the crime occurred that was used at trial to impeach the defense witness. *See McFadden v. State*, --- So. 3d ----, 2009 WL 2031286, 34 Fla. L. Weekly D1431 (Fla. 4th DCA July 15, 2009). The Fourth District relied upon the rule of law announced by this Court in *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006), where this Court held that the “spirit” of the discovery rules requires the State to disclose oral statements of a witness that change the substance of the witness’s previously disclosed statements. *McFadden*, 2009 WL 2031286 at 1-2.

There is no express and direct conflict between this case and *State v. Evans*, 770 So. 2d 1174, 1180-81 (Fla. 2000). The portion of *Evans* quoted in Petitioner’s brief is dicta: “Court’s construing rule 3.220(b)(1)(B) have determined that the State is not required to disclose to the defendant a witness’s oral statement when such statement has not been reduced to writing or recorded in a manner prescribed by the rule.” (PB 4). *Evans* actually held that the State *was* required to disclose an oral statement that changed the witness’s previously known statement. *Id.* at 1182. Therefore, the decision in *Evans* does not conflict with this case and in fact lends support to the Fourth District’s decision.

Additionally, there is no conflict between this case and *Burkes v. State*, 946 So. 2d 34 (Fla. 5th DCA 2006). In *Burkes*, the Fifth District held that the oral statements of a police officer about his continuing investigation after trial began were not discoverable. *Id.* Importantly, as the court noted, the officer's continuing investigation and subsequent oral statement were a response to a defense witness's previously undisclosed expert trial testimony. *Id.*

The facts of *Burkes* are distinctly different from the instant case; here, the State knew that the witness was going to testify for the defense and the State also knew prior to the witness's testimony that the witness had the impeaching conversation with the deputy. *McFadden*, 2009 WL 2031286 at 1. The deputy's testimony was not based on further investigation done after hearing the witness's surprise testimony, as in *Burkes*. There is no conflict between this case and *Burkes* because they reach a different conclusion based upon different facts.

Further, there is no conflict between this case and *Olson v. State*, 705 So. 2d 687 (Fla. 5th DCA 1998). In *Olson*, two Assistant State Attorneys testified at trial that they reduced the initial charges after speaking with the victim in the case. *Id.* at 689. In dicta, the court stated that oral statements of witnesses are not subject to discovery and *Olson* could not find out what the victim told the prosecutors to reduce the charges. *Id.* at 691. However, the actual holding of *Olson* is that it was error for the prosecutors, who testified as witnesses themselves at trial, to give their

opinions that the victim was telling the truth. *Id.* at 690. The holding is not the same as in the instant case. As such, there is no express and direct conflict between the instant decision and *Olson*.

Finally, there is no conflict between the instant case and *Johnson v. State*, 545 So. 2d 411, 412 (Fla. 3d DCA 1989), which holds that a *Richardson* hearing was not required where the State failed to disclose an oral statement of a witness made to the prosecutor. First, the opinion does not give facts specific to this issue, so it is difficult to determine if there is a conflict with the instant case. *Id.* Second, it appears that the oral statement in *Johnson* was actually a change in the witness's known testimony. *Id.* at n.1. In that situation, *Evans* and *Scipio* have subsequently mandated that the oral statement must be disclosed. Thus, the rule of law relied upon in *Johnson* has changed and is no longer applicable. Third, the version of Rule 3.220 that *Johnson* cites is prior to a 1989 Amendment that changed the definition of "statement." *Id.* Thus, the instant case and *Johnson* do not interpret the same rule. Therefore, there is no direct conflict between the rule of law announced in the instant case and *Johnson*.

In sum, there is no express and direct conflict between the Fourth District's decision in *McFadden* and the decisions of this Court or other District Courts.

CONCLUSION

Based upon the foregoing, this Court lacks jurisdiction to review the Fourth District's decision in the instant case based upon express and direct conflict. Accordingly, Respondent requests this Court to decline review of the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Answer Brief on Discretionary Jurisdiction has been furnished to MYRA J. FRIED, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of September, 2009.

Of counsel.

CERTIFICATE OF TYPE SIZE AND STYLE

Appellate counsel for Respondent, Mr. Joseph McFadden, hereby certifies that the instant brief has been prepared with 14 point Times New Roman, a font that is not spaced proportionately.

Of counsel