

IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC09-1755

DCA CASE NO. 4D08-2098

LT. NO. 97-625 CFA

**STATE OF FLORIDA,**

Petitioner,

vs.

**JOSEPH EUGENE McFADDEN,**

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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**PRELIMINARY STATEMENT**

Respondent was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal.

**STATEMENT OF THE CASE AND FACTS**

Respondent was charged with robbery with a deadly weapon (count one), burglary of a conveyance while armed (count two), third degree grand theft (count three), and aggravated battery (count four). Respondent was tried by jury, and found guilty of all counts as charged. Respondent was sentenced, as a prison releasee reoffender, to life in prison for counts one and two. He was sentenced to 15 years in prison on the aggravated battery charge. Count three was dismissed and the jury verdict was set aside.

Respondent filed a notice of appeal on May 16, 2008. (R.211). Respondent raised four allegations. One of those allegations dealt with an alleged Richardson discovery violation. The Fourth District Court of Appeal (Fourth DCA) reversed this case and remanded it for a new trial. The Fourth DCA focused its attention on Respondent's claim that a discovery violation had occurred. In this case, a detective testified on rebuttal about a conversation that he had with a

witness (Respondent's sister) on the day **before** the crimes in this case occurred. Respondent objected, claiming that the State committed a discovery violation because the statement had never been disclosed to the defense. The Fourth DCA held that the State committed a discovery violation by failing to comply with Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure, and thus reversed for a new trial. Id.

In its opinion, the Fourth DCA ruled as follows:

The State argues that rule 3.220(b)(1)(B) did not cover the oral statement of the police detective because it was not a written statement. The rule's operative term is includes ("term 'statement' as used herein includes..."). The State would have us understand that includes is here synonymous with comprise. We reject this interpretation.

(Emphasis in the original.). Id. Further, the Fourth DCA extensively discussed the definition of the term "includes," and ultimately found that the State's position would produce an "unnecessary ambiguity." Id.

Petitioner now seeks this Court's discretionary jurisdiction to review the lower court's decision in this case.

#### SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to review this case because the order of the Fourth District Court of Appeal expressly and directly conflicts with a decision of another

district court of appeal as well as this Court on the same question of law.

#### ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN STATE V. EVANS, 770 So. 2d 1174, 1180 (Fla. 2000); BURKES V. STATE, 946 So. 2d 34 (Fla. 5<sup>th</sup> DCA 2006); OLSON V. STATE, 705 So. 2d 687 (Fla. 5<sup>th</sup> DCA 1998); AND JOHNSON V. STATE, 545 So. 2d 411 (Fla. 3d DCA 1989).

The opinion of the Fourth DCA in this case, McFadden v. State, \_\_\_So. 3d \_\_\_, 2009 WL 2-31286 (Fla. App. 4 Dist), 34 Fla. L. Weekly D1431 (a copy of the Fourth District's opinion is attached hereto as Appendix "A"), expressly and directly conflicts with a decision of another district court of appeal and of this Court on the same question of law [pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.].

In this case, a detective testified on rebuttal about a conversation that he had with a witness (Respondent's sister) on the day **before** the crimes in this case occurred. Respondent objected, claiming that the State committed a discovery violation because the statement had never been disclosed to the defense. The Fourth DCA held that the State committed a discovery violation by failing to comply with Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure, and thus reversed for a new trial. Id.

In its opinion, the Fourth DCA ruled as follows:

The State argues that rule 3.220(b)(1)(B) did not cover the oral statement of the police detective because it was not a written statement. The rule's operative term is includes ("term 'statement' as used herein includes..."). The State would have us understand that includes is here synonymous with comprise. We reject this interpretation.

(Emphasis in the original.). Id. Further, the Fourth DCA extensively discussed the definition of the term "includes," and ultimately found that the State's position would produce an "unnecessary ambiguity." Id.

The Fourth DCA's holding that rule 3.220(b)(1)(b) covers both written and oral statements of a witness is in direct conflict with decisions from this Court, the Fifth District Court of Appeal, and the Third District Court of Appeal. Thus, the Fourth DCA's decision on this issue expressly and directly conflicts as to the proper application and use of Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure.

In State v. Evans, 770 So. 2d 1174, 1180 (Fla. 2000), this Court acknowledged that "Courts 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." Cf. Watson v. State, 651 So. 2d 1159 (Fla.

1994)(the reference to "statements" is limited to written statements or contemporaneously recorded oral statements).

In Burkes v. State, 946 So. 2d 34 (Fla. 5<sup>th</sup> DCA 2006), the Fifth District Court of Appeal determined that Rule 3.220(b)(1)(B) does not require the State 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. Id. at 37. Further, the Fifth District Court of Appeal held that "[t]o do otherwise would require the prosecutor to record and disclose virtually any case related conversation with an investigator." Id.

In Olson v. State, 705 So. 2d 687 (Fla. 5<sup>th</sup> DCA 1998), the Fifth District Court of Appeal found that "[t]he oral and unrecorded statements of witnesses to a state attorney are privileged as work product and not subject to discovery. Id. at 69. The Fifth DCA also held that Rule 3.220(b)(1)(B) provides for discovery of written or recorded witness statements. "The clear implication of this rule is that such statements, if not written or recorded, are not discoverable." Id.

In Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA 1989), the Third District Court of Appeal held that the trial court did not commit reversible error in failing to conduct a Richardson hearing on the state's failure to disclose to the defense an oral, unrecorded statement of a state witness made to the



prosecuting attorney. The Third DCA held that the state was not required to reveal such a statement to the defendant under Fla. R. Crim. P. 3.220(a)(1)(ii), and accordingly, there was no discovery violation by the state upon which to conduct a Richardson hearing.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create a conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). In the case at bar, it is quite clear that the Fourth DCA's opinion in this matter expressly and directly conflicts with State v. Evans, 770 So. 2d 1174, 1180 (Fla. 2000); Burkes v. State, 946 So. 2d 34 (Fla. 5<sup>th</sup> DCA 2006); Olson v. State, 705 So. 2d 687 (Fla. 5<sup>th</sup> DCA 1998); and Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA 1989).

Accordingly, jurisdiction is invoked under Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

#### **CONCLUSION**

Wherefore, Petitioner respectfully requests this Court 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 "Petitioner's Brief on Jurisdiction" has been furnished by courier to: **CHRISTINE C. GERAGHTY**, Assistant Public Defender, Counsel for Appellant, Criminal Justice Building, 421 Third Street, 6<sup>th</sup> Floor, West Palm Beach, Florida 33401, on September \_\_\_\_, 2009.

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Of Counsel

**CERTIFICATE OF TYPE SIZE AND STYLE**

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on September \_\_\_\_\_, 2009.

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MYRA J. FRIED

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PETITIONER'S APPENDIX

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App. A.....McFadden v. State, \_\_\_So. 3d \_\_\_, 2009 WL 2-31286  
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