

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-223

TERESA SCHLABACH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner is the Defendant and Respondent is the prosecution. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

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

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement of the case and facts, but reserves the right to include additions and clarifications in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction. The two cases in question are distinguishable.

ARGUMENT

POINT I

THE FOURTH DISRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH CHILDERS V. STATE, 972 So.2d 307 (Fla. 2d DCA 2008).

For two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

However, "[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 conflict cannot arise." Id. at 887. See also Mystal Marine, Inc. v. Harrington, 339 So. 2d 200, 210 (Fla. 1976) (This Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

Here, the two cases are distinguishable. In Childers, the defendant filed a motion for enlargement of time with his motion to mitigate. Childers, 972 So.2d

at 308-309. The court held that under those circumstances the trial court should have considered the motion to mitigate. Id.

In State v. Schlabach, 34 Florida L. Weekly D104 (Fla. 4th DCA Jan. 5, 2009) there was no indication that the defendant filed a motion to extend the time to rule. The opinion did not state that the trial court could not consider a motion to mitigate had a timely motion to extend been filed. The opinion found that because no hearing was scheduled *and* no "action" was taken within the sixty day period there was no jurisdiction. It did not hold that the period could not have been extended had the trial court or the defendant taken steps to enlarge the time prior to the expiration of the sixty days. Accordingly, there is no conflict.

Respondent acknowledges that certification of conflict is an independent ground for discretionary jurisdiction. However, this Court requires jurisdictional briefs to be filed in such cases, presumably to determine if there is actual conflict before accepting jurisdiction. Moreover, this Court routinely declines to review certified conflict cases if no conflict actually exists. See, e.g., Hobbs v. State, 863 So. 2d 167 (Fla. 2003). As no actual conflict exists, this Court should decline to exercise its jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court DENY Petitioner's request for discretionary review over the instant cause.

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 Barbara Wolfe , Criminal Justice Building\6th Floor, 421 Third Street, W. Palm Beach, FL 33401 on March 25, 2009.

James J. Carney

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

James J. Carney