IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-536

ANTHONY KOVALESKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

Prior to the victim's trial testimony in the instant case, the trial court ordered a partial closure of the courtroom pursuant to §918.16(2), Florida Statutes. See, Kovaleski v. State, 1 So.3d 254 (Fla. 4th DCA 2009). Petitioner objected for the record without further explanation. Id.

After Petitioner's and his defense witness's testimony, the State recalled the victim as a rebuttal witness. Id. Petitioner began his re-cross of the victim by asking "Did you ever make an accusation about someone else having sex with you and later withdraw it?" Id. The State objected arguing that the question was beyond the scope of the victim's testimony. Id. The trial court sustained the objection concluding it was improper impeachment, irrelevant or extrinsic evidence of a collateral matter. Id. The instant Notice to Invoke Discretionary Jurisdiction followed.

SUMMARY OF THE ARGUMENT

This Court should decline jurisdiction. The decision of the Fourth District is not in express and direct conflict with the decision of another district court or the supreme court. The cases cited by Petitioner as in conflict with the instant decision is factually dissimilar to the instant decision and is therefore not in conflict.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DECISION OF THE FOURTH DISTRICT; THE INSTANT DECISION IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW

The discretionary jurisdiction of this Honorable Court may be exercised to review, among other matters, decisions of district courts of appeal which expressly and directly conflict with the decisions of another district court of appeal or the supreme court on the same question of law. Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030 (a)(2)(A)(iv). A decision is considered to be in express and direct conflict when the conflict appears within the four corners of the majority decision. See, Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). To be "express", the conflict must be present "in an express manner." See, Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). "[I]t is not enough to show that the district court decision is effectively in conflict with other appellate decisions." Id.

On appeal below, Petitioner took issue with the fact that the trial court did not allow defense counsel to question the victim, who had been recalled by the State as a rebuttal witness on another matter, about prior allegations of sexual misconduct. See, Kovaleski v. State, 1 So.3d 254. In their opinion, the Fourth

District Court of Appeal expressed it's inability to determine the admissibility of such evidence because of the fact that the record was silent as to whether the minor victim had ever made such an accusation or withdrawn it. Id. Accordingly, the issue was deemed unpreserved for review. Id.

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., by arguing that the instant decision is in express and direct conflict with Cliburn v. State, 710 So.2d 669 (Fla. 2d DCA 1998) and Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988). An analysis of these cases, however, confirms that there is no conflict. In both Cliburn and Jaggers, the Second District Court of Appeal found error in the trial court's acts of excluding evidence of a witness's prior false allegations of criminal conduct against other individuals. See, Cliburn, 710 So.2d at 670; Jaggers, 536 So.2d at 327. In both cases, the fact that the witnesses had made the prior false accusations was a certainty. See, Cliburn, 710 So.2d at 670; Jaggers, 536 So.2d at 327. Thus, the Second District Court of Appeal had a basis to determine whether the evidence at issue was admissible. In the instant cause, the Fourth District Court of Appeal was not able to reach the question of admissibility based on the fact that the record was void of any indication that the child victim had, in fact, made a prior false allegation.

Petitioner cannot demonstrate that the Fourth District Court of Appeal's opinion in the instant matter "expressly and directly conflict[s]" with Cliburn and Jaggers. This is because Cliburn and Jaggers are not 'on all fours' factually in all material respects with the instant cause. See, Florida Power & Light Co. v. Bell, 113 So. 2d 697, 698 (Fla. 1959). Whereas the Cliburn and Jaggers court determined the admissibility of the evidence at issue, the Fourth District Court of Appeal did not get past preservation. As such, discretionary review on such a basis should be denied.

Alternatively, Petitioner contends that the Fourth District Court of Appeal's opinion that the issue was unpreserved directly and expressly conflicts with the proposition in Reaves v. State, 531 So.2d 401 (Fla. 5th DCA 1988) that "a proffer is unnecessary where the substance of the excluded testimony is apparent from the context within which it was offered". In Reaves, the State was allowed to reopen their case for the purpose of introducing a witness to rebut the defendant's claim of entrapment. See, Reaves, 531 So.2d at 402. After this testimony, defense sought to introduce surrebuttal testimony but was precluded from doing so by the trial court. Id. On appeal, the State argued that, because the defendant did not proffer his surrebuttal testimony, the issue was unpreserved. See, Reaves, 531 So.2d at 403. The Fifth District Court of Appeal disagreed reasoning that, in the context of the

trial, "the defendant's precluded surrebuttal testimony would have been necessarily limited to refuting the state's evidence tending to prove predisposition on the issue of entrapment." Id. Because, the appellate court "was not required to speculate as to the substance of the defendant's testimony", the failure to proffer the evidence was not fatal. Id.

At bar, defense counsel posed his question during the recross examination of the victim on rebuttal. Because the context of the trial did not suggest or provide the Fourth District Court of Appeal with the victim's answer, it would have been required to speculate as to the substance of the witness's testimony in order to determine it's admissibility. Discretionary review on this argument should be denied as well.

Finally, Petitioner argues that the Fourth District Court of Appeal's decision below is in express and direct conflict with Alonso v. State, 821 So.2d 423 (Fla. 3d DCA 2002) on the issue of partial courtroom closures pursuant to §918.16(2), Florida Statutes. Prior to the victim's trial testimony in the instant case, a partial closure of the courtroom was conducted pursuant to §918.16(2), Florida Statutes. Id. Petitioner objected for the record. On appeal, Petitioner argued that the trial court erred in ordering the partial courtroom closure without making findings pursuant to Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The Fourth District

Court of Appeal disagreed, expressing hesitance over preservation, but ultimately holding that the findings required by Waller are not applicable to a partial closure under section 918.16. See, Kovaleski.

In Alonso, the State moved to partially close the courtroom during the victim's as well as two child witnesses' testimony under authority of section 918.16, Florida Statutes (1999). See, Alonso, 821 So.2d at 425. Alonso objected that clearing the courtroom would violate his constitutional right to a public trial, specifically objecting to the exclusion of his cousin, minister, girlfriend, and several other friends. Id.

On appeal, the Third District Court of Appeal opined that the four-part constitutional test pronounced in Waller was necessary regardless of whether the courtroom closure was total or partial. Id. Noting that the trial court itself expressed reservations as to whether the courtroom should be closed under the circumstances, the Third District Court of Appeal reversed Alonso's conviction and remanded it for a new trial. Id.

Petitioner is unable to demonstrate that the instant cause merits discretionary review under the relevant standards. Respondent respectfully submits that the instant cause is not "on all fours" factually with Alonso. In Alonso, the defense specifically objected to the closure citing his right to a public trial. Alonso, 821 So.2d at 425. Also, the opinion in Alonso is clear that Alonso specifically objected

to the exclusion of various individuals that he wanted to be present at his trial. Id. Conversely, here, Petitioner made no such objections. See, Kovaleski v. State, 1 So.3d 254 (Fla. 4th DCA 2009). The opinion and record are silent as to whether closure included any parties which Petitioner sought to be there. See, Kovaleski, 1 So.3d 254 (Fla. 4th DCA 2009). Finally, the Fourth District expressed hesitance on the issue of preservation. Id.

Moreover, a review of the opinion in the instant cause reveals that Fourth District made no reference to Alonso in it's decision. Thus, Petitioner is unable to demonstrate that the Fourth District considered and rejected the Third District's position in Alonso. While the opinion might arguably appear to conflict, it by no means rises to the level of an express and direct conflict necessary for this Court's jurisdiction to vest. Accordingly, jurisdiction must be denied.

CONCLUSION

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

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 to: Tatjana Ostapoff, Office of the Public Defender, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on April 2, 2009.

_____
KATHERINE Y. MCINTIRE

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 14 point Times New Roman.

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KATHERINE Y. MCINTIRE