IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY KOVALESKI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC09-536
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
_____	)	

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner as the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted after jury rial of two counts of lewd and lascivious acts on a minor. The fifteen-year-old alleged victim, J.L., testified that he fell in love with Petitioner's wife, Missy, after moving in with the couple. He said that he had sex with Missy on several occasions while Petitioner watched and that he, Missy, and Petitioner once engaged in three-way sex. J.L. reported the activity to police three days after moving out when he discovered that Missy was having sex with someone else. He also admitted that he was mad at Petitioner for reporting his school absences. Missy, having entered a plea to the charges against her and then remarried, also testified against Petitioner at his trial.

On direct appeal, the Fourth District Court of Appeal affirmed Petitioner's conviction in a decision dated January 5, 2009. The Court rejected Petitioner's arguments, *inter alia*, that the trial court should have permitted him to cross examine J.L. about a prior accusation of sexual abuse which he had withdrawn and that the trial court erred in partially closing his trial, over defense objection, when J.L. testified. Respondent's motion for rehearing was denied on February 20, 2009. Notice that Petitioner was seeking this Court's discretionary review was filed March 10, 2008. This jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case directly and expressly conflicts with the decisions of other district courts of appeal as to whether evidence of prior false accusations of sexual misconduct is admissible to impeach a witness, whether a proffer is required where the nature of the testimony sought to be introduced is apparent, and whether an inquiry as mandated in Waller v. Georgia , 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) is required before a trial may be partially closed under the authority of Section 918.16, Fla. Stat.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

During his cross examination of the alleged victim in this case, J.L., Petitioner asked him: "Did you ever make an accusation about someone else having sex with you and later withdraw it?" The trial court sustained the State's objection to this question, and, on direct appeal, the Fourth District Court of Appeal refused to find error. The Court concluded that "the credibility of witness may not be attacked by proof of specific act of misconduct which did not end in a criminal conviction," relying on its previous decision in Washington v. State, 985 So. 2d 51 (Fla. 4th DCA), *review denied* 994 So. 2d 307 (Fla. 2008) and on Roebuck v. State, 953 So. 2d 40 (Fla. 1st DCA 2007), *review dismissed* 982 So. 2d 683 (Fla. 2008).

However, in Cliburn v. State, 710 So. 2d 669 (Fla. 2d DCA 1998) and Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988), the Second District Court of Appeal held that, because the credibility of the complainant is "a crucial issue," evidence of such a witness's prior false complaint is admissible: "When assessing

a key witness's credibility, the jury must know about any improper motives." Cliburn, 710 So. 2d at

670. While a very broad general principle of law provides that a witness may not be impeached by proof that he has committed specific acts of misconduct, an exception to that principle exists where evidence is offered to prove a particular character trait. Section 90.405(2), Fla. Stat.

> In this case, that trait of character was that the witness may be inclined to lie about sexual incidents and charge people with those acts without justification.

Jaggers, 536 So. 2d at 327. Moreover,

> evidence that is relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is nearly always not only admissible, but necessary, where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility. This is particularly true in the case of allegations of sexual abuse where there is no independent evidence of the abuse and the defendant's sole defense is either fabrication or mistake on the part of the alleged victims.

Id.

The decision of the Fourth District Court of Appeal in the instant case, and the decisions on which it relies, Washington v. State, 985 So. 2d 51, and Roebuck v. State, 953 So. 2d 40, therefore expressly and directly conflict with the decisions of the Second District Court of Appeal in Cliburn v. State, 710 So. 2d 669 and Jaggers v. State, 536 So. 2d 321, on the question of whether evidence of prior false accusations of sexual misconduct are admissible to impeach the testimony of a witness, even in the absence of a criminal conviction.

The Fourth District Court of Appeal further held that Petitioner did not preserve the restriction of his cross examination because he did not proffer the evidence. The Court recognized, but declined to follow Reaves v. State, 531 So. 2d 401 (Fla. 5th DCA 1988), holding that although evidence sought to be admitted was not proffered, substance of statements were apparent from context of questions posed to defendant by trial counsel. *See also* Hansen v. State, 585 So.2d 1056, 1059 at n. 5 (Fla. 1st DCA 1991); O'Shea v. State, 585 So.2d 405 (Fla. 1st DCA 1991); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994); G.A. v. State, 549 So.2d 1203 (Fla. 3d DCA 1989). Further, when proffer "would be useless ceremony, or the evidence is rejected as a class, or where the court indicates such an offer would be unavailing," it will not be required. O'Shea v. State, 585 So.2d

405. On this issue, too, the decision of the Court in the instant case is in direct and express conflict with decisions of other district courts of appeal.

Finally, the Fourth District Court of Appeal followed Clements v. State, 742 So. 2d 338 (Fla. 5th DCA 1999) in holding that the requirement for an inquiry before closing the courtroom which was mandated in Waller v. Georgia , 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) is not applicable to the partial closure of trial authorized by Section 918.16, Fla. Stat. This portion of the Court's decision in this case is in direct and express conflict with Alonso v. State, 821 So. 2d 423, 426 (Fla. 3d DCA 2002), where the Third District Court of Appeal held that the Waller test applied to cases like the instant one where partial closure of the courtroom was ordered based on Section 918.16.; *accord* Whitson v. State, 791 So. 2d 544 (Fla. 2d DCA 2001); Pritchett v. State, 566 So. 2d 6, 7 (Fla. 2d DCA 1990); *see also* Lena v. State, 901 So. 2d 227 (Fla. 3d DCA 2005).

Because the decision of the Fourth District Court of Appeal in the instant case is in direct and express conflict with the decisions of other district courts of appeal in matters affecting significant legal issues, as to which the decisions of the district courts of this State remain incompatible, this Court should therefore exercise its discretion and accept jurisdiction to

review the decision below so that consistency in the law of this State may be maintained between all its districts.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court exercise its discretion and accept jurisdiction of the instant cause for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Katherine Y. McIntire, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of MARCH, 2009.

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TATJANA OSTAPOFF
Assistant Public Defender

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2).

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TATJANA OSTAPOFF
Assistant Public Defender