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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-

Lower Case No.: 4D14-0172

STATE OF FLORIDA,

Petitioner,

v.

ERIC LUCAS,

Respondent.

****

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

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

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND FACTS

The decision of the Fourth District Court of Appeal describes the facts as following:

> In the claim at issue, appellant alleged that his counsel was ineffective in failing to consult and hire an ophthalmologist expert to rebut the State's claim that the victim suffered "permanent damage" as an element of aggravated battery. The trial court agreed with the State that the claim was facially insufficient because appellant did not identify a specific witness, explain the testimony that could be elicited, or allege that the witness was available to testify at trial. Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). The court struck the entire motion with leave to amend. Neither the court, nor the State, addressed appellant's other three claims. No records were attached.

Lucas v. State, No. 4D14-172, slip op. at 1-2 (Fla.

4th DCA September 10, 2014).

The Fourth District Court of Appeal concluded with the following:

> The trial court erred in failing to follow our binding precedent. We confronted this issue in Terrell v. State, 9 So. 3d 1284 (Fla. 4th DCA 2009), and explained:
>
> > As a threshold matter, the state asserts that this claim was facially insufficient because the defendant did not name the expert whom he wished to testify. Although the defendant is usually required to identify fact witnesses by name, we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims that trial counsel failed to secure an expert in a named field of expertise. We thus do not agree that the defendant's postconviction claim was facially insufficient.
>
> Id. at 1289. Appellant's motion sufficiently explained the relevance and substance of the expected testimony and alleged that the outcome of the proceedings would have been different.

Id., slip op. at 2.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal incorrectly concluded that the opinion of Nelson v. State, 875 So. 2d 579 (Fla. 2004) only applies to fact witnesses and not expert witnesses. This Court should accept jurisdiction because the decision of the Fourth District Court of Appeal is contrary to Nelson v. State, 875 So. 2d 579 (Fla. 2004).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH NELSON V. STATE, 875 So. 2d 579 (Fla. 2004).

In Nelson v. State, 875 So. 2d 579 (Fla. 2004), this Court has stated in order to succeed in a claim of ineffective assistance of counsel for failing to call a particular witness, defendant must allege the name of the witness, the testimony counsel could have elicited from the witness, that s/he would have been available to testify at the time of the hearing and how Appellant was prejudiced. Id. at 583.

Despite this Court's clear intention, the Fourth District Court of Appeal held that "Appellant's motion sufficiently explained the relevance and substance of the expected testimony and alleged that the outcome of the proceedings would have been different." Id., slip op. at 2. Thus, the witness did not need to be named, nor did the Appellant have to state whether said

witness was available to testify. The Fourth District Court of Appeal based that reasoning on Terrell v. State, 9 So. 3d 1284 (Fla. 4th DCA 2009) which states the following:

> As a threshold matter, the state asserts that this claim was facially insufficient because the defendant did not name the expert whom he wished to testify. Although the defendant is usually required to identify fact witnesses by name, we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims that trial counsel failed to secure an expert in a named field of expertise. We thus do not agree that the defendant's postconviction claim was facially insufficient.

Id. at 1289.

The Lucas decision is flawed. Nowhere in the Nelson opinion does it distinguish fact witnesses from expert witnesses. This is because it is a distinction without a difference as the identity of any witness must be asserted. Further, as Nelson pointed out, "[t]hat a witness would have been available to testify at trial is integral to the prejudice allegations. If a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness." 875 So. 2d at 583. To

allow a defendant to merely allege the relevance and substance of the expected testimony and the explain how the outcome of the proceeding would be different, without identifying the witness and stating whether the witness would be available is nothing more then conjecture or speculation in which postconviction relief cannot be based. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) ("Reversible error cannot be predicated on such conjecture."); Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility."); Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974) ("Reversible error cannot be predicated on conjecture.").

This misapplication of Nelson provides this Court with jurisdiction. See Delgado v. State, 71 So. 3d 54, 56 (Fla. 2011) ("We conclude that the Third District misapplied our decision in Faison, and, accordingly, we have jurisdiction."); State v. Hankerson, 65 So. 3d 502, 503 (Fla. 2011) (accepting jurisdiction based on conflict created by misapplication of decisional law).

This Court should accept jurisdiction.

CONCLUSION

Based on the foregoing argument, Petitioner requests that this Honorable Court accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served by United States postal service on Eric Lucas, DC#W07313, Santa Rosa Correctional Institution, 5850 East Milton Road, Milton, FL 32583, on October 1, 2014.

_____
/s/ MONIQUE ROLLA
Counsel for Petitioner

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
/s/ MONIQUE ROLLA
Counsel for Petitioner