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SID J. WHITE

IN THE SUPREME COURT OF FLORIDA AUG 5 1985

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By [Signature]
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STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v.

CASE NO: 67,240

CHARLES WESLEY PRICE,

Respondent/Cross-Petitioner.

RESPONDENT/CROSS-PETITIONER'S
BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

At about 9:00 P.M. on the evening of May 22, 1981, pursuant to a search warrant authorizing a search for a .22 caliber pistol, several SWAT team members of the Orlando Police Department burst unannounced into an apartment rented jointly by Robert Parker and the Respondent/Cross-Petitioner, Charles Wesley Price. (R 7-9, 30, 6). After the forced entry, the SWAT team came upon five persons in the apartment, including two females and three males (R 52-53, 84), and Officer Richard Grim purportedly saw Price sitting in a chair up against a sliding glass door pointing a .22 caliber handgun at him. (R 9, 31). Grim shot at Price, placing some shrapnel in his side. (R 9-10). However, the accompanying officers never saw Price with a gun in his hand. (R 23, 31). After a search of the whole apartment, Officer Wenger stumbled upon a shopping bag in the living room containing 643 pills. (R 31-34, 63-64). The SWAT team searched Price, but found no contraband on his person. (R 84-85).

Almost five months after the aforementioned search and seizure, Price was arrested and charged on October 15, 1981 for Trafficking in Methaqualone and Aggravated Assault (by supposedly pointing a handgun at Officer Grim as the SWAT team burst in). (R 371, 366). The State Attorney's Office subsequently nol-prossed the aggravated assault count for "insufficient evidence." (R 448).

A first trial of the cause before Orange Circuit Judge Lon S. Cornelius ended in a mistrial. (R 463). At the second trial

on the trafficking charge before Judge Ted P. Coleman, Sonya Whitlow (Miller) was the state's key witness against Price. Whitlow worked as a topless dancer in a topless bar. (R 132-134). Whitlow stated that on the evening in question prior to the SWAT team's visit (May 22, 1981), Price had answered the door and she walked in, telling Price that she needed two Quaaludes. (R 148, 90). According to Whitlow, Price picked up a plastic shopping bag from underneath the coffee table in the living room, and they both walked back into the bedroom with Price carrying the bag. (R 147-149, 91-92). Price then reached into the bag, took two Quaaludes out, and handed them to Whitlow. (R 92, 149). Whitlow stuck them in her back pocket, and walked out the door and left. (R 93, 149).

During Whitlow's direct examination, over Price's objections to the state's impeachment of its own witness on direct examination, the prosecutor asked her whether she had testified "differently" as to this incident at Price's earlier first trial. (R 94-95). Whitlow had testified at the first trial that she had not gotten two Quaaludes from Price while inside the apartment, nor did she ever go into the back bedroom with Price carrying the aforementioned plastic [shopping] bag. (2nd Supp. Record, P.20). Whitlow also stated that she had never told the police officers that she initially had received two Quaaludes from Price. (Id. at Page 21). According to Whitlow at the first trial, she had later given the police a written statement saying otherwise, only as a result of the SWAT team's harassment and threats to lock her

up and charge her and everybody else if she didn't do just what they told her. (Id. at Page 42). When the police officers had gone off to search Price, she happened to hear that "it was a personal vendetta against [Price]." (Id. at Pages 42-43). After the mistrial, Whitlow was charged with perjury for her testimony in Price's first trial. (R 159-160).

Whitlow continued to testify during her direct examination in Price's second trial that she had "lied" in Price's first trial because a person named James Elliot had threatened to shoot her. (R 107, 158-159). However, Whitlow emphasized in her testimony that it was not Price who threatened her, only Elliot had. (R 96). Whitlow testified further that just two or three weeks before the second trial date, she saw Price with his brother in a cocktail lounge where she worked called the "Fox Hunter." (R 141-143). Whitlow and Price just said "hi and bye". to each other (R 142). When asked if Price had threatened her in any way, Whitlow testified, "No." (R 143).

Price's counsel asserted in support of a mistrial that this testimony of Elliot's threats was improper, since they were not linked to Price, and thus irrelevant and prejudicial to show Whitlow's supposed "motivation for lying" in Price's first trial. (R 97). Judge Coleman denied Price's motion for mistrial, holding:

"I can't accept the theory that somebody, the simple expedient of having a third person make a threat on a witness can therefore insulate themselves from the testimony of that witness; or, on the other hand, can insulate themselves from any explanation why the witness gave a contradictory statement. That just belies any logic or reason." (R 99-100).

During Whitlow's cross-examination, she stated that as part of her "deal" with the state on various perjury charges, she had been recently required to testify against James Elliot in his (Elliot's) unrelated robbery trial. (R 114-115, 151). After hearing Whitlow's testimony against Elliot, the jury found Elliot "not guilty." (R 115). Whitlow was then asked by Price's counsel if she was "certain that it wasn't Mr. Elliot threatening her about testifying against him (Elliot) in that robbery trial, and Whitlow answered, "I wouldn't really care if it was or not." (R 115). Price's counsel asked her if "it didn't worry [her]," and she answered, "No." (R 115). She was next questioned, "So the threats that you're talking about didn't cause you to lie before, is that what you're telling us," and Whitlow responded, "No." (R 115-116). Whitlow also admitted that she had never previously sought any help or assistance from any law enforcement agency concerning "threats." (R 116-117). Near the close of Whitlow's cross-examination, Price's counsel informed Whitlow that he had counted 34 lies that she had told in prior judicial proceedings under oath. (R 157). She responded, "I don't count them." (R 157).

At the conclusion of Price' second trial, the jury found Price guilty of the lesser included charge of attempted trafficking in methaqualone. (R 428, 350-351). Subsequently, Judge Coleman imposed a 12-year sentence, which was five times the maximum presumptive sentence under the guidelines of 12 to 30 months, on the sole basis that Price had "intimidated witnesses, threatened witnesses, coerced witnesses." (R 363).

The Fifth District Court of Appeal thereafter reversed Price's conviction for a new trial, holding that the State had improperly introduced Whitlow's testimony concerning Elliot's "threats" on direct examination, which was "highly prejudicial and harmful" because "the implication is clear that because [Price] was guilty the defendant had caused James Elliot to threaten the witness not to tell the truth." Price v. State, 469 So.2d 210 (Fla. 5th DCA, 1985). However, the Fifth District held regarding the State's claim that it offered Whitlow's statements concerning Elliot's threats only to "explain" why she had inconsistently testified: "The State's argument might have merit if the testimony had come after [Whitlow] had in fact been impeached by the defense with her prior inconsistent statement and the State was seeking to rehabilitate her." 469 So.2d at 211.

REASONS TO DENY THE STATE'S
APPLICATION FOR REVIEW:

(a) No "conflict" jurisdiction can exist where those decisions purportedly conflicting had not been final nor rendered upon the filing of the notice to invoke this Court's discretionary jurisdiction.

Fla.R.App.Pro. 9.030(a)(2)(A)(iv) provides that the Supreme Court has discretionary jurisdiction to review district court decisions that "expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law." The Supreme Court's discretionary jurisdiction is invoked by filing a notice "within 30 days of

rendition of the order to be reviewed." Rule 9.120(b). A final decree is not "rendered" until an order denying a motion to rehearing is entered. Pilgrim v. Melvin, 141 So.2d 296 (Fla. 1st DCA, 1962); An appeal from a judgment is "not authorized until it is final and the court's judicial labors are at end." Snyder v. Gulf, 224 So.2d 405 (Fla. 2nd DCA, 1969). The appellate courts generally only review orders which have been rendered. Belmont v. State, 370 So.2d 1173 (Fla. 4th DCA, 1979).

On (Monday) June 24, 1985, 32 days after rendition of the Fifth District's panel decision sub judice, the State filed its notice of intention to invoke this Court's discretionary jurisdiction on the basis of an "express and direct conflict" with the two Second District decisions, Bell v. State, 10 FLW 1396 (Fla. 2nd DCA, Opinion filed June 7, 1985) and Sloan v. State, 10 FLW 1402 (Fla. 2nd DCA, opinion filed June 7, 1985). Thereafter, on July 12, 1985, the state filed in this cause its jurisdictional brief with this Court. However, the Bell and Sloan opinions were neither rendered nor final when the State filed its of notice for review in this cause and jurisdictional brief, since timely petitions for rehearing were filed and pending in the Second District by Bell and Sloan on June 14, 1985 and June 11, 1985, respectively. No final disposition on said motions for rehearing has apparently been published to date.

Since the aforementioned Second District decisions had not been "rendered" nor "final" at the time the State filed its notice to invoke jurisdiction in this cause, and the Second District's judicial labors in those two cases not at end, there can be no

"express and direct conflict" of decisions. As a matter of policy, in light of the fact that a district court can always modify, reverse or retract a non-final decision on rehearing, it is futile and wasteful of this Court' judicial efforts to allow or authorize the filing of notices to invoke this Court's jurisdiction where a decision purportedly in "conflict" has not been finally resolved. This Court should decline to grant the State's application for a writ for this reason.

(b) There is no express and direct conflict.

In enacting F.S. §90.608(1)(a)[1978], the Florida legislature expressly provided that "[a]ny party, except the party calling the witness, may attack the credibility of a witness by . . . [i]ntroducing statements of the witness which are inconsistent with his present testimony." The Law Revision Counsel Note concerning the foregoing provision states that this "section retains the traditional rule against impeaching a party's own witness and enumerates the methods of attacking witness credibility." Volume 6C, Florida Statutes Annotated at Page 59. A party cannot introduce its own witness's prior inconsistent statement unless "the witness fails to give the testimony expected of him," and the party is "surprised or entrapped" by his witness's testimony. Id.

Notwithstanding the legislature's express enactments, the Second District thinks otherwise in its Bell decision written by newly appointed appellate Judge Richard Frank, that a party can anticipatorily introduce its own witness's prior inconsistent statements on direct examination when its purpose is to "explain"

away a prior inconsistency to "bolster" its witness's credibility.

In this cause, the Fifth District held that the State's introduction in its case-in-chief of Whitlow's inconsistent testimony in Price's first trial to "explain" the inconsistency was "untimely and improper," in violation of Florida Statutes Section 90.608(1)(a).

Even if Judge Frank's Bell opinion could be deemed as and inconsistent with the Fifth District's application of Section 90.608(1)(a) in this cause and in Erp v. Carroll, 438 So.2d 31, 36-38 (Fla. 5th DCA, 1983), or inconsistent with the Fourth District's decision in Ryan v. State, 457 So.2d 1084, 1092 (Fla. 4th DCA, 1984), there are such substantial and material factual differences between this case and Judge Frank's decision that make it most doubtful that the Bell decision could have any dispositive effect on of this case. A major distinction is that in this cause this Court found the testimony in question regarding Elliot's threats not linked to Price to be "highly prejudicial and harmful," while in Bell the court found "no prejudice" flowing from the testimony.

Furthermore, the State's evidence in this cause purportedly presented to "bolster" Whitlow's credibility after introducing her prior inconsistent testimony was legally irrelevant for any such rehabilitative efforts, and was inadmissible for any purpose. The Law Revision Council Notes to Section 90.608(1) [Vol. 6C F.S.A. at Page 60] expressly provides a "limitation" in that impeachment and rehabilitation evidence must be relevant and material to be admissible. Cf.: Johnson v. State, 178 So.2d

724, 729 (Fla. 2nd DCA, 1965); Brown v. State, 13 So.2d 3 (Fla., 1943). The Council Note adopts the test in Johnson, 178 So.2d at 729: "the test of relevancy and materiality is whether the cross-examining party could have, for any purpose other than impeachment, introduced evidence on the subject in chief." Vol. 6C F.S.A. at 60. Furthermore, the Florida Evidence Code (F.S. §90.401 and 90.402) allows only "relevant evidence" to be presented at trial. Even when evidence is wholly relevant, Section 90.403 excludes its admission "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury." Under Florida law, evidence that a third person had induced a witness to testify falsely is "irrelevant and collateral" absent an evidentiary link to the defendant. Reeves v. State, 423 So.2d 1017, 1018 (Fla. 4th DCA, 1981); Johnson v. State, 355 So.2d 200 (Fla. 3rd DCA, 1978); Jones v. State, 385 So.2d 1042 (Fla. 1st DCA, 1980). Evidence of such third party threats is inadmissible under Section 90.403 since Florida law emphatically deems it as creating "undue prejudice in the minds of the jury against the accused." Reeves, 423 So.2d at 1018; Coleman v. State, 335 So.2d 364 (Fla. 4th DCA, 1976).

Accordingly, since Whitlow's "explanation" for her prior inconsistent testimony was legally irrelevant and prohibited under Florida law as being too highly prejudicial, this Court's approval of the Second District's decisions could not have consequence on this cause. This Court should deny the State's application for review.

ARGUMENT IN SUPPORT OF CROSS-PETITION
FOR DISCRETIONARY REVIEW

The panel decision sub judice expressly and directly conflicts with other district court decisions in that evidence of third party threats, not linked to a defendant, is inadmissible and too highly prejudicial for any purpose.

In the panel decision reversing Price's conviction for admission of Elliot's threats on direct examination, the panel held:

"The State argues that it was merely anticipating that the defense was going to impeach Ms. Miller by her prior inconsistent statement and thus sought to explain her inconsistent statements citing United States v. Cochran, 499 F.2d 380 (5th Cir., 1974), which held that a witness impeached on the basis of a prior inconsistent statement may endeavor to explain that the prior statement was made when the witness feared bodily harm [from the defendant]. The State's argument might have merit if the testimony it elicited had come after Ms. Miller had in fact been impeached by the defense with her prior inconsistent statement and the State was seeking to rehabilitate her. However, here the testimony came in during the State's case in chief and thus was untimely and improper."
-- 469 So.2d at 211.

Thus, the decision apparently approves presentation of evidence during a State's rebuttal of third party threats not linked to a defendant to "explain" prior inconsistent testimony, if the prosecution witness is impeached with it on cross-examination.

It is indelibly established in Florida law that the admission, over objection, of a witness's testimony that someone

other than the defenant, or someone not shown to be acting with the defendant's actual participation, knowledge or authorization, had induced that witness to testify falsely for the defendant is grounds from a mistrial, and the denial thereof is reversible error. Johnson v. State, 355 So.2d 100, 201 (Fla. 3rd DCA, 1978); Coleman v. State, 335 So.2d 364, 365 (Fla. 4th DCA, 1978); Reeves v. State, 423 So.2d 1017 (Fla. 4th DCA, 1981); Jones v. State, 385 So.2d 1042 (Fla. 1st DCA, 1980). "Absent a link to the defendant, the issue of whether a witness is subject to improper influence is irrelevant and collateral to the issue of whether the defendant committed the crime for which he is charged." Reeves, 423 So.2d at 1018. As already noted, "the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused." 423 So.2d at 1018.

The admission in this cause of Whitlow's testimony for any purpose as to James Elliot's alleged "threats" is reversible error since Whitlow had emphasized at the second trial that Price had never before threatened her (R 96, 143), and the record is devoid of any evidence showing that Price had actual knowledge or participation in these claimed threats to induce false testimony. Nor was Whitlow even certain whether Elliot had threatened her to testify "falsely" at Price's trial, or at Elliot's own unrelated robbery trial at which Elliot had been acquitted. (R 115).

Judge Coleman admitted Whitlow's testimony of Elliot's threats as evidence-in-chief and for "explanation" purposes, notwithstanding these missing links, based upon an unsupported

speculative finding that Price had somehow caused Elliot's threats and had "insulated" himself. (R 99-100). And Judge Coleman exceeded Price's maximum presumptive sentence by almost five times on the sole basis that Price had "intimidated witnesses, threatened witnesses and coerced witnesses." (R 363). Imagine how the jury had perceived the evidence, being Price's constructive possession was the jury's key question of fact to determine at trial. The admission of Whitlow's testimony in question was so devastatingly prejudicial to Price, that it may have been the primary and only cause of the jury's guilty verdict on the lesser included charge.

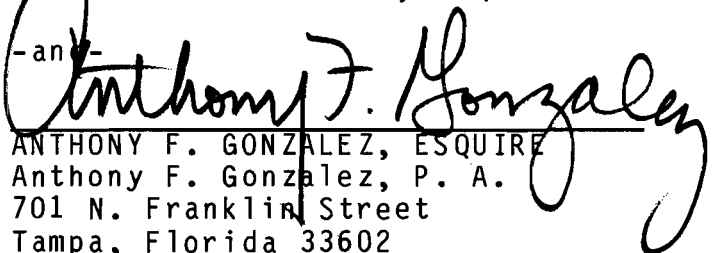
The panel decision apparently approving admission of the evidence in question "after [Whitlow] had in fact been impeached by the defense with her prior inconsistent testimony" conflicts with the above cases deeming such evidence to be legally irrelevant and too highly prejudicial. This Court should accept jurisdiction to settle the apparent conflict.

Respectfully submitted,



SAMUEL R. MANDELBAUM, ESQUIRE

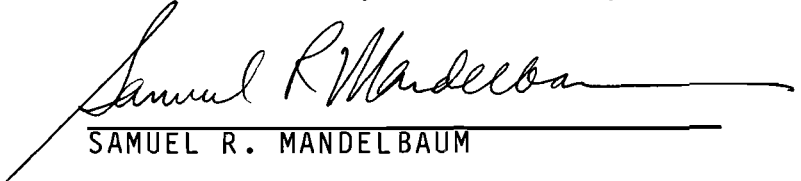
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Paula C. Coffman, Esquire, Assistant Attorney General, 125 North Ridgewood, 4th Floor, Daytona Beach, Florida 32014, and Edward R. Kirkland, Esquire, 126 E. Jefferson Street Orlando, Florida 32801, by United States Mail, this 1st day of August, 1985.



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