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IN THE SUPREME COURT OF FLORIDA

FILED  
NOV 23 1986  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
CASE NO. 86-19, 036

BILLY JOE KIRKLAND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

PETITIONER'S BRIEF ON JURISDICTION

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	2
III ARGUMENT	4
<u>ISSUE PRESENTED</u>	
THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN <u>KIRKLAND V. STATE</u> , SO. 2d __, 11 FLW 2118 (FLA. 1ST DCA OCTOBER 6, 1986) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN <u>STATE V. DELGADO-SANTOS</u> , SO.2d __, 11 FLW 565 (FLA. OCTOBER 30, 1986)	
IV CONCLUSION	5
CERTIFICATE OF SERVICE	5
APPENDIX	

TABLE OF CITATIONS

CASES

PAGE

Delgado-Santos v. State, 471 So.2d 74 (Fla. 3d DCA 1985) 2

Robinson v. State, 455 So.2d 481 (Fla. 5th DCA 1984) 2

State v. Delgado-Santos, \_\_\_ So.2d \_\_\_, 11 FLW 565 (Fla. October 30, 1986) 2

STATUTES

90.801(2)(a), Florida Statutes (1985) 2

810.02(2)(a), Florida Statutes (1985) 2



## II STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of burglary with assault under section 810.02(2)(a), Florida Statutes (1985) (A-1). At trial the alleged victim denied remembering the facts as set forth in the complaint, and the court declared her to be an adverse witness (A-2). Over objection a type written complaint signed by the victim in her hospital room was admitted for both impeachment purposes and as substantive evidence under section 90.801(2)(a) Florida Statutes (1985) (A-2). Petitioner argued that the complaint was not executed in an "other proceeding" as required by section 90.801(2)(a) in that a police interrogation does not meet the formal requirements of a proceeding (A-4).

The First District Court of Appeal recognized the "bright light" approach in Delgado-Santos v. State, 471 So.2d 74 (Fla. 3d DCA 1985) which held a police interrogation cannot qualify as a 90.801(2)(a) "proceeding," but chose not to follow the logic. Petitioner's conviction was affirmed (A-2). There was one dissent in which Judge Joanos agreed with the Third District in Delgado-Santos, supra (A-3).

Petitioner filed a Motion for Rehearing in part questioning the factual findings that there was other substantial evidence to support a conviction besides the complaint (A-4-6). On October 30, 1986, this court issued an opinion in State v. Delgado-Santos, \_\_\_ So.2d \_\_\_, 11 FLW 565 (Fla. October 30, 1986) approving the Third District's opinion in Delgado-Santos v. State, supra and rejecting Robinson v. State, 455 So.2d 481 (Fla. 5th DCA 1984), the decision upon which the First District relied sub judice (A-2). Petitioner then filed a notice of

supplemental authority that same day (A-7). The next day the First District denied his motion for rehearing (A-8).

Petitioner filed a Motion for Extraordinary Relief, which he acknowledges is not specified by the Appellate Rules, seeking equitable relief (A-9-10). On November 17, 1986, without ruling on that motion, the First District issued a mandate affirming petitioner's conviction (A-11). The next day petitioner filed a timely notice to invoke discretionary jurisdiction (A-12).

Subsequently on November 20, 1986, the First District vacated its October 31, 1986, order denying the motion for rehearing (A-13) and substituted an opinion on the motion for rehearing with which Judge Joanos again dissented (A-14-15). The Court did not vacate the November 17 mandate.

III ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN KIRLAND V. STATE, SO.2d, 11 FLW 2118 (FLA. 1ST DCA OCTOBER 6, 1986) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN STATE V. DELGADO-SANTOS, SO.2d, 11 FLW 565 (FLA. OCTOBER 30, 1986)

The original opinion and the order on the motion for rehearing demonstrate on their face that the First District disagreed with Delgado-Santos v. State, supra, and relied upon Robinson v. State, supra. The First District acknowledged this Court had the identical issue pending, i.e. the conflict between Delgado-Santos and Robinson in State v. Delgado-Santos, supra (A-2-3). Despite this Court's affirmance of the Third District in the former case and rejection of the Fifth District in the latter case, subsequently the First District sub judice cast its lot with the disapproved decision in Robinson v. State, supra.

Because of this acknowledged and unrefuted conflict with the Third District and the Supreme Court of Florida, this Court should accept jurisdiction.

IV CONCLUSION

For the reasons stated, this Court should accept jurisdiction in this cause and quash the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, and mailed to Billy Joe Kirkland, #073143, Post Office Box 699, Sneads, Florida, 32460, on this 25<sup>th</sup> day of November, 1986.



ANN COCHEU

INDEX TO APPENDIX

	<u>PAGE(S)</u>
Opinion of First District Court of Appeal in <u>Kirkland v. State</u>	1-3
Motion for Rehearing and Motion for Rehearing En Banc	4-6
Notice of Supplemental Authority	7
Order Denying Motion for Rehearing	8
Motion for Extraordinary Relief	9-10
Mandate	11
Notice to Invoke Discretionary Jurisdiction	12
Order Vacating Order Denying Motion for Rehearing	13
Order on Motion for Rehearing	14-15