

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

NOV. 3 1988 C

DERINDA EDWARDS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CLERK, SUPREME COURT

By \_\_\_\_\_ Deputy Clerk

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Case No. 73,286

PETITIONER'S BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of aggravated battery with a deadly weapon in Broward County in 1987. She appealed the conviction to the Fourth District Court of Appeal and raised three points on appeal. On July 13, 1988 the court affirmed with an opinion (Appendix). Petitioner moved for rehearing, which was denied by an order filed October 5, 1988 (Appendix). Petitioner then filed Notice to Invoke Discretionary Jurisdiction on November 1, 1988 (Appendix).

The following facts are taken from the written opinion of the Fourth District Court of Appeal (Appendix), except where noted (references to the record on appeal are by the symbol "R").

The first point on appeal was that the trial court erred in denying Petitioner the opportunity to cross examine the victim regarding the victim's drug addiction and treatment. Petitioner argued that cross examination of the victim should have been permitted to show that the victim's drug use and treatment, which occurred prior to the time of the offense, adversely or detrimentally affected her recollection of the events in question. The Fourth District declined, as it said, to "extend" the scope of cross examination in this area, but cited the contrary cases of Cruz v. State, 437 So.2d 692 (Fla. 1st DCA 1983) and Morrell v. State, 335 So.2d 836 (Fla. 1st DCA 1976).

As reflected in the record on appeal, the defense proffered its cross examination of the victim, Sandra Day. In her proffered testimony, Day admitted she had used drugs, including heroin and cocaine, continuously for 25 years since she was 15, with a few intervals of treatment and detoxification. Until the week before trial she had been taking a prescribed drug to combat her craving for heroin and cocaine. She claimed that during the month of the incident she had not been using drugs; however, her injuries in the incident gave her an excuse to start again about a week later (R 89-99). The trial court ruled to exclude evidence of all drug use by Day except on the actual day of the incident (R 81-83, 102-109).

The second point discussed by the District Court of Appeal in its opinion was Petitioner's claim that the trial court erred in overruling her objections to testimony regarding her use of a knife in a prior violent incident involving a state's witness, James Jackson. In the prior incident, another man, while shooting at Petitioner, had missed, and had instead shot and killed a friend of Jackson's. The defense elicited this testimony (from Jackson (R 45)) to bring out Jackson's alleged bias against Petitioner. However, the defense asked that the state be prevented from bringing out the fact that Petitioner had, prior to the shooting, pulled a knife on the man. The trial court ruled that cross examination of Jackson on this incident would "open the door" for the state to inquire further on redirect. In

spite of this ruling, Petitioner proceeded with the proposed cross examination and the state, on redirect, brought out the fact that Petitioner had a knife.

On this second point, the Fourth District stated: "Appellant had sufficient warning from the trial court that she would 'open the door' if she brought up the prior incident. Appellant cannot initiate error and then seek reversal based on that error."

### SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case conflicts with prior decisions of other District Courts of Appeal on two points: (1) Whether cross examination should be permitted on a state witness' drug use at times prior to the crime. (2) Whether, to preserve for appeal a ruling on the scope of redirect examination, the defense must refrain from its proposed cross examination, or go ahead with the cross which "opens the door" for the redirect. Both of these are important procedural issues which this Court should settle.

## ARGUMENT

### POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CONFLICTS WITH PRIOR DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL HOLDING THAT DRUG USE PRIOR TO THE TIME OF THE OFFENSE IS WITHIN THE PROPER SCOPE OF CROSS EXAMINATION OF A STATE WITNESS.

Petitioner seeks to establish this Court's "conflict" jurisdiction. Article V, Section 3(b)(3), Florida Constitution; Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The decision of the Fourth District Court of Appeal on the issue in this point conflicts with these two prior decisions of the First District Court of Appeal: Cruz v. State, 437 So.2d 692 (Fla. 1st DCA 1983) and Morrell v. State, 335 So.2d 836 (Fla. 1st DCA 1976). The conflict is express and direct and appears in the written opinion of the Fourth District. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

In the instant case, the defense sought to cross examine the victim, Sandra Day, regarding her drug addiction and treatment which occurred prior to the time of the offense. The defense proffered cross examination questioning in which Day testified that she had used drugs, including heroin and cocaine, continuously for 25 years since she was 15, with a few intervals of treatment and detoxification. Until the week before trial she had been taking a prescribed drug to combat her craving for heroin and cocaine. Day claimed that during the month of the incident she had not been using drugs; however, her injuries in

the incident gave her an excuse to start again about a week later (R 89-99). Petitioner argued in the District Court of Appeal that the cross examination should have been permitted to show that Day's drug use and treatment adversely or detrimentally affected her recollection of the events in question. The District Court of Appeal stated that it declined to "extend" the scope of cross examination in this area, but cited the contrary cases of Cruz and Morwell..

In Cruz, the First District Court of Appeal cited Morrell and stated that evidence of a witness's drug taking at times other than during the occurrence of the offense was permitted. The decision of the Fourth District in the instant case not to permit evidence of drug use prior to the time of the offense is in direct conflict with these decisions from the First District. This Court therefore has jurisdiction, which it should exercise in order to resolve the conflict between the First and Fourth Districts. It is important to settle the point because the issue is likely to arise in many criminal trials.

## ARGUMENT

### POINT II

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CONFLICTS WITH A PRIOR DECISION OF THE THIRD DISTRICT COURT OF APPEAL ON THE ISSUE OF "OPENING THE DOOR" AND PRESERVATION FOR APPEAL.

In this point Petitioner again seeks to establish this Court's "conflict" jurisdiction. Article V, Section 3(b)(3), Florida Constitution; Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The conflict is with State v. Wilson, 509 So.2d 1281 (Fla. 3d DCA 1987). Although the Fourth District did not explicitly identify Wilson as a conflicting decision, its discussion of the relevant legal principle supplies a sufficient basis for conflict review. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

At issue is how the defense must proceed after an adverse evidentiary ruling in order to preserve its motion or objection for appeal. In the instant case, the Fourth District held in effect that Petitioner had "opened the door" to redirect examination, which she had previously sought to exclude, by proceeding with cross examination of a state's witness after being warned by the trial court that this would open the door. The cross examination concerned an incident where another man, while shooting at Petitioner, had missed, and had instead shot and killed a friend of the witness, James Jackson. The testimony was elicited to bring out Jackson's bias against Petitioner. Prior to the cross examination, the defense asked that the state be prevented from bringing out the fact that Petitioner had, prior

to the shooting, pulled a knife on the man. In spite of the trial court's "open the door" ruling, Petitioner proceeded with her cross examination, and the state then brought out on redirect the fact that Petitioner had a knife. The Fourth District held, "Appellant cannot initiate error and then seek reversal based on that error." Thus, the Fourth District effectively ruled that the defense would have had to refrain from its cross examination in order to preserve its argument for appeal.

In Wilson, on the other hand, the defendant decided not to present character witnesses because of a trial court ruling that the state could cross examine them about specific instances of the defendant's prior violent conduct. The Third District held that the trial court ruling was not preserved for appeal because the witnesses did not testify.

The conflict between Wilson in the instant case establishes a dilemma for the defense. Petitioner here was held to have invited the error by introducing testimony about the prior incident, whereas had she not done so then under Wilson she could have been held to have waived the issue for appeal. This dilemma requires resolution by this Court. The conflict between the instant case and Wilson gives this Court jurisdiction. The point is an important one because it will govern trial and appellate procedure relative to cross examination in virtually every criminal and civil case.

CONCLUSION

This Court's "conflict" jurisdiction is established. This Court should exercise that jurisdiction and accept this case for review.

Respectfully Submitted,

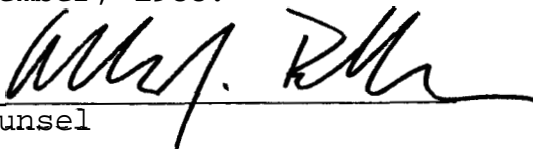
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Carolyn McCann, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 10<sup>th</sup> day of November, 1988.



Of Counsel