OF 4-14-86

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner
Cross-Respondent,

v. CASE NO. 67,240

CHARLES WESLEY PRICE,

Respondent
Cross-Petitioner.
_____/

Portions of Brief referring to & relying upon such appendix as stricken are hereby stricken

RESPONDENT/CROSS-PETITIONER'S (PRICE)
MAIN BRIEF ON THE MERITS
(with Appendix)

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STATEMENT OF THE CASE

Preliminary Statement

Counsel for the Respondent/Cross-Petitioner, CHARLES WESLEY PRICE ("Price"), objects to the inclusion of certain matters in the State's merit brief at pages 2 and 3. In particular, the State recites as "evidence" the statements made in an informal 8-page unauthenticated copy of a tape recorded jail interview of Sonya Whitlow Miller, which was never placed into evidence or referred to at either of the two trials in this cause. [See Evidence Volume of Trial Court Record on Appeal, Document 2, filed April 5, 1982]. It appears that this informal 8-page copy was filed by the State at some type of hearing (not a trial) on April 5, 1982. Accordingly, Price would furnish the following statements of case and facts:

The Case

Acting on the suspicion that Price was involved in a burglary and attempted murder two days earlier, several SWAT team members of the Orlando Police Department obtained a search warrant on May 22, 1981, authorizing the seizure of a .22 caliber pistol from Price's jointly-leased apartment. (See Record on Appeal "Evidence" Volume, Exhibit "B" to Search Warrant filed May 3, 1982). An Officer Gaultett testified that Price "was considered armed and dangerous" (R 19), according to their source of information, Sonya Whitlow Miller ("Miller"). (R 23). At about 9:00 that evening of May 22, 1981, the SWAT team members burst into the apartment rented jointly Price and Robert Allan Parker. (R 7-9, 30, 6). After kicking the door of the

apartment in (R 20, 22), the SWAT team came upon five persons in the apartment, including two females and three males. (R 52-53, 84). According to SWAT team Officer Richard Grim, Grim "looked right into the living room," and saw Price sitting in a chair up against a sliding glass door purportedly pointing an automatic rifle or handgun at him. (R 9). Upon seeing this, Grim yelled "Gun" and shot at Price, hitting the chair and placing some shrapnel in Price's side. (R 9-10). However, the accompanying officers never saw Price with a gun in his hand. (R 23, 31).

As the five persons were lying down on the floor in a prone position in custody, Officer Michael Wenger seized what appeared to be the .22 caliber handgun that Price had been purportedly holding. Nonetheless, Wenger continued his search throughout the apartment on the premise that he "did not know" that the .22 handgun found was the "same" .22 caliber gun he was looking for pursuant to the search warrant. (R 31). At the "conclusion" of their search, Wenger claimed he saw some white tablets through the top of a white and blue shopping bag containing 7 or 8 small clear plastic bags in the living room, and searched and seized the contents. (R 31-34). Wenger thought these to be Quaaludes because of information he already had from Ms. Miller. (R 36-37). The shopping bag had contained 643 pills, later determined to be methaqualone. (R 63-64, 200-221). However, the SWAT team searched Price but found no contraband on his person. (R 84-85). The police found no usable prints on the shopping bag. (R 83, 60).

Price was 29 years of age, and had been then employed through the Ironworker's Union as a foreman on various construction projects. (R 268-269, 258-259).

About three months after the search, on August 14, 1981, Price was charged by Information with the May 20, 1981 burglary/attempted murder offenses that served as basis for the May 22, 1981 search at the apartment. (R 485-486). After a trial of these burglary/attempted murder charges, judgments of acquittal were entered on November 4, 1981 as to all counts, adjudicating Price "not guilty." (R 488).

Almost five months after the May 22, 1982 search at which the 643 pills were discovered, Price was arrested and charged in the case sub judice on October 15, 1981 with 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 jury trial of this trafficking cause took place on May 6, 1982 before the Honorable Lon S. Cornelius, Jr., Circuit Judge for Orange County. (R 463; Second Supplemental Record at Page 1). After six (6) state witnesses and no defense witnesses were presented, a mistrial was declared. (R 463).

A second trial of the trafficking case took place almost two years later on March 12 - 14, 1984 before the Honorable Ted P. Coleman, Circuit Judge for Orange County. (R 426). Seven prosecution witnesses and three defense witnesses had testified at the second trial. (R 426-428). After hearing arguments of

counsel and receiving instructions on the law, the jury returned with a verdict finding Price "guilty" of the lesser-included charge of attempted trafficking in methaqualone, based upon Count I of the information. (R 428, 350-351).

Two weeks after the trafficking trial, on March 28, 1984, a sentencing hearing was held before Judge Coleman. (R 357). The presumptive sentence for Price under the sentencing guidelines had been calculated at "community control or 12 to 30 months." (R 438). Notwithstanding, Judge Coleman imposed a twelve (12) year sentence of imprisonment for Price on the attempted trafficking in methaqualone conviction, five times Price's maximum presumptive sentence. (R 438).

Immediately after being sentenced on March 28, 1984, Price filed a timely notice of appeal from his conviction and sentence that same date. (R 443).

In his direct appeal of the attempted trafficking conviction to the Fifth District, Price argued five points. On May 23, 1984, the Fifth District Court of Appeal reversed Price's conviction for a new trial, holding that the State had improperly introduced its key witness's (Miller's) prior inconsistent statements and explanation why she "lied" on her direct examination. Price v. State, 469 So.2d 210 (Fla. 5th DCA, 1985). The State never filed a motion for rehearing or reconsideration of the reversal decision in the Fifth District.

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, 473 So.2d 734 (Fla. 2nd DCA, 1985) and Sloan v.State, 472 So.2d 488 (Fla. 2nd DCA, 1985). On June 26, 1985, Price filed his cross-notice seeking review on a related point due to conflict with different cases. However, the Bell and Sloan opinions were neither rendered nor final when the State filed its notice for conflict review in this cause and jurisdictional brief, since timely petitions for rehearing were then filed and pending in the Second District by Bell and Sloan on June 14, 1985 and June 11, 1985, respectively.

Subsequently, on July 19, 1985 and July 10, 1985, the Second District entered final orders in Bell and Sloan, respectively, modifying the original Bell decision and denying a rehearing. See 10 FLW 1765 (Fla. 2nd DCA, decision filed July 19, 1985); 472 So.2d 488 (Fla. 2nd DCA, 1985).

On January 29, 1986 this Court entered an order accepting jurisdiction on both the State's Petition and Price's Cross-Petition.

STATEMENT OF FACTS

At the second trial on the methaqualone trafficking charge taking place on March 12th through 14th, 1984 before the Honorable Ted P. Coleman, the following evidence was presented:

Sonya Whitlow Miller testified as the State's key witness against Price. She worked as a topless dancer in a topless bar. (R 132-134). Miller stated at the second trial that she was asked by Officer Cunningham on the night in question (May 22, 1981) to go into the apartment only to make sure Price was there. (R 88). Price answered the door and Miller walked in, telling him that she needed two Quaaludes. (R 148, 90). According to Miller, Price then 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 reached into the bag, took two Quaaludes out, and handed them to Miller. (R 92, 149). Miller stuck them in her back pocket, and walked out the door and left. (R 93, 149). She did not pay Price since he did not ask for any payment. (R 93).

During Miller's direct examination at this trial, the prosecutor asked her if she had given prior statements under oath about this before, and if she had ever told a different story. (R 94-95). Price's counsel immediately objected. (R 95). After the trial judge overruled Price's objection, Miller responded that she had not told the same story earlier because her "life was in danger." (R 94-95). The prosecutor thereafter asked Miller if someone had communicated a threat to her if she didn't

lie in the Price's Quaalude case sub judice. (R 96). Miller responded over Price's repeated requests for a mistrial that in November 1981 at the Orange County Courthouse a James Elliot had communicated a threat to her that if she did not lie in Price's Quaalude possession case (R 96, 103), she "would be a dead person." (R 104). According to Whitlow, she was warned by James Elliot, "I'd be shot, he flat told me that, and said he'd be the one to pull the trigger." (R 107). Later, in May of 1982, Elliot just told her that she was "not supposed to testify." (R 112). Miller stated that it was because of these claimed threats from Elliot that she "lied on behalf of [Price]" twice in two different proceedings, including Price's first trial in this cause. (R 158-159). And she was charged with perjury for "lying" in these proceedings. (R 159-160). However, Miller emphasized during the trial that it was not Price who threatened her, only Jimmy Elliot had. (R 96). Price's counsel strenuously argued that there was absolutely no evidence that Elliot's "threats" had in any way emanated from Price, but Miller's testimony as to these "threats" creates a false impression on the jury that Elliot was in fact Price's agent, causing him serious prejudice on the trafficking in Quaaludes charge. (R 98). However, the prosecutor expressly stated that he was not offering [it] as evidence-in-chief of Price's guilt, but rather only to "explain" why Miller had given prior inconsistent testimony. (R 98).

However, Price's counsel stated he had planned not to try to impeach Miller with her prior inconsistent testimony, but rather

to impeach her testimony only "with general character, reputation, what other witnesses know about her reputation." (R 109-110).

In considering the objection and request for a mistrial, the trial judge expressed:

> "You mean by the simple expedient of a third person, call a witness and threaten them, can effectively eliminate that witness from a trial." (R 97).

Judge Coleman eventually denied Price's motion for a mistrial, holding, "Going to permit the line of inquiry to take my chances." (R 99-100).

On Miller's cross-examination, she stated that she had recently testified in an (unrelated) case against James Elliot for robbery (R 114-115), as part of her plea bargain "deal" with the State in a perjury case filed against her before Judge Michael F. Cycmanick. (R 151). The jury thereafter in Elliot's trial had totally disregarded her testimony and found Elliot "not guilty." (R 115). Miller was then asked by Price's counsel if she was "certain that it wasn't Mr. Elliot threatening her about testifying against <u>him</u> (Elliot)" in that robbery trial, and she 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, "<u>No</u>." (R 115-116). Miller also admitted that she did <u>not</u> seek any help or assistance from any law enforcement agency about the "threat." (R 116-117). Notwithstanding, Miller claimed at the second trial

that she "knew" that Price and James Elliot had lived together as roommates and were "friends." (R 108-109).[1]

Miller further mentioned that about two or three weeks before that (second) trial, she saw Price and his brother in a cocktail lounge called the "Fox Hunter." (R 141, 143). She was then talking on a microphone, "goofing off." (R 142). In a conversation at that time, Miller and Price just said "hi and bye" to each other. (R 142). When asked if Price threatened her in any way, she testified, "No." (R 143).

Price's cross-examination of Miller focused on her prior testimony at his first trial of this cause on May 6, 1982. (R 121-129, 151-158). At that first trial she had been "under criminal prosecution for perjury," and at that time understood what the penalties for perjury were. (R 118). Miller had testified at that first trial that under "police pressure" she was asked simply to go in the Greentree Apartments to see if Price was in there. (Second Supplemental Record at Pages 42, 19). She went inside, and saw Price. (Id. at Page 20). According to Miller, she had <u>not</u> 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. (Id. at Page 20). Whitlow testified also that after she went back

[1]Price testified at the second trial that James Elliot had actually been Ms. Miller's "boyfriend," and Elliot was just an "acquaintance" of his. (R 296, 283). Price emphasized that he had never suggested to or authorized Elliot to threaten Ms. Miller on his behalf, and it was only at the second trial that he first heard of it. (R 283-284). In the informal copy of the taped jail interview of Miller, she stated that it was actually <u>she</u> who "was living with him [Elliot]." (Evidence Volume of Record, taped interview Page 3).

outside, she told the police officers that Price was in the apartment, but never stated to the officers that she had received two Quaaludes from him in the bedroom. (Id. at Page 21). She was searched outside by an officer who found two Quaaludes on her person, but did not tell the officer where they came from. (Id. at Pages 21-22). Miller also testified at the first trial that she had later given the police a written statement saying otherwise as a result of the police officers' "harassment" and "threats to lock [her up]" and charge her for the Quaalude pills and everybody else if she didn't do just what they told her. (Id. at Page 42). When the officers had gone to search Price, she happened to hear that "it was a personal vendetta against [Price]. " (Id. at Pages 42-43).

Also during Miller's cross-examination, the prosecutor stipulated that Whitlow had been previously convicted of perjury after a "no contest" plea. (R 137-138). Adjudication was withheld, and she was placed on probation. (R 137-138). Her attorney had reached a plea agreement with the State that for Miller's "cooperation" in four other cases, one of which was specifically "the Charles Price drug deal in Orange County," no jail time of any kind would be imposed. (R 139-140). Her obligation under the plea agreement was to offer testimony against Price and "to tell the truth." (R 160). Additionally, the State agreed not to prosecute Miller for any stolen property cases filed against her through April, 1983. (R 140). Miller understood the plea agreement to be that she would not be

prosecuted for any other charges in exchange for her testimony against Price. (R 141).

The State also sought to admit into evidence a written statement which Miller claimed she had written on May 22, 1981, purportedly about 30 to 45 minutes after she had gone into the Greentree Apartments. (R 160-161; 166-171). During her cross-examination at Price's second trial, Miller could not remember her prior testimony under oath at Price's first trial in May 1982 at which she had stated that this written statement was the product of police harassment and threats to lock her up and charge her for the pills if she didn't do what she was told. (R 155). The written statement recited:

> "He and I went in the bedroom. I asked him for two Quaaludes, and he went out in the living room and got two out of the bag beside the chair he was sitting in." (R 166; See also State Exhibit #3 in Evidence Volume to Record on Appeal).

Miller testified on her re-cross examination (at the second trial) that this written statement constituted "the truth of what actually happened." (R 167). However, Price's counsel then asked Miller to explain the discrepancies between her representations at that second trial and in the May 22, 1981 written statement (R 166-169): At the second trial, Miller testified that the Quaaludes were "retrieved in the <u>bedroom</u>" from Price (R 167-168), while in the written statement, she claimed that the two Quaaludes were retrieved "out in the <u>living room</u>." (R 166). When asked by Price's counsel to explain this inconsistency, Miller responded, "it's the same thing." (R 169). She also testified at the second trial that the [pill-laden]

shopping bag had been located "under the coffee table" (R 92), while in the written statement she noted that it had been "beside the chair." (R 166). She explained this discrepancy: "Beside the chair, under the table, whichever." (R 168). And when asked at the second trial by Price's counsel if she was under any kind of police pressure on the evening in question that she gave this written statement (as she had testified in the first trial), Miller responded, "I don't recall if I was or not." (R 151).

In summary, Price's counsel informed Miller at the second trial that he had counted 34 lies that she had told in prior judicial proceedings in court under oath. (R 157). She responded, "I don't count them." (R 157).

Investigator Bell's testimony:

Investigator Dennis Bell of the Orlando Police Department also testified on behalf of the State at Price's second trial. (R 191). Bell stated that he was present when Miller prepared the aforementioned written statement. (R 192). According to Bell, he did not threaten her or tell her what she was supposed to write. (R 192). Bell also testified that they immediately wrote the statement once they got back to the station, but he couldn't say how long after the statement was written that Whitlow was taken home. (R 193).

Debra Brown's testimony:

Debra Brown testified at trial as a State witness that she and her friend "Susie" (Susan Assaid) went to an apartment on the night in question. (R 195-196). When they arrived at the apartment, there were two other males there, neither of which was

Price. (R 108-209). They engaged in a four-way conversation. (R 209). Brown assumed that Price was then taking a shower since she saw him in a towel when he came out about five minutes after her arrival. (R 109). According to Brown, Price then "went to another room," out of her sight. (R 210). Brown was not aware of the presence of any bag at that time. (R 210). Within minutes, an unidentified female came to the door (i.e. Miller), and Brown couldn't recall whether she knocked or just came right in. (R 211). The unidentified female "went directly to another room and didn't stop or anything. She just kind of looked over and kept right walking to another room." (R 211). Brown testified further that when the unidentified female entered the apartment, Price "was in the other room." (R 211). The next time Brown saw her just a few minutes later, the unidentified female was leaving the apartment. (R 212-213). When asked if Price came into the [living] room to get something like a bag, and go back out of her sight, Brown answered, "no, not that I recall." (R 213). The unidentified female left the apartment before Price reentered the area where she was present. (R 213).

Brown stated further that a couple of minutes after the unidentified female left, Price came out wearing a polo shirt and a pair of dress jeans. (R 213-214). Price sat down to her left, and had some kind of bag in his hand. (R 214). Brown didn't know if the bag had anything in it at the time. (R 214). Nor was she certain if the shopping bag in evidence at trial was the

same bag she had referred to. (R 215).[2] Brown couldn't recall anything Price said, other than the five of them "chitchatting." (R 215).

The State rests . . .

After the State rested its case (R 236), Price renewed his motion for mistrial, which was denied. (R 237).

Three witnesses thereafter testified for the defense: Susan Assaid, Elton Buettner, and Price himself. (R 189-190).

Susan Assaid's testimony:

Susan Assaid, who was subpoenaed to trial by the State (R 145), testified that she and Debra Brown had gone to the Greentree Apartments on the night in question at about 8:00 P.M. (R 143). When they arrived at the apartment, a couple of young men were there, and Price was in the other room somewhere. (R 244). Eventually that evening there were about six people in the apartment at the same time. (R 245). While in the front room of the apartment, a white slender blonde female came into the apartment, who Assaid never had seen before. (R 245-246). When the blonde female entered, Assaid was seated on the couch with Debra Brown sitting to her left, and Price was also seated on a chair in that room where everyone else was. (R 245-247).

According to Assaid, after the blonde female came in, the blonde female and Price went into the other room. (R 247). Assaid testified that she did not see Price carry anything with

[2]During the search of the apartment on the evening of May 22, 1981, the officers found some blue pills, marijuana, a pipe and a hemostat in Debbie Brown's purse. (R 279-280). Brown apparently was never charged with possession of this contraband, and thereafter became a prosecution witness.

him such as a large bag. (R 247). A couple of minutes later, the blonde female exited the other room first and left the apartment. (R 248). Thereafter, Assaid saw Price reenter the front room. (R 248). When Assaid was asked as to whether Price had any plastic bag in his hands when he first left the living room, or when he later reentered the living room after a couple of minutes, Assaid testified: "I didn't see a plastic bag." (R 248). Assaid was then asked, "Would you have seen it if he had it in his hands?" (R 248). Assaid answered, "Yes, I would have seen it." (R 248). She also stated that at the time she was seated on the couch she did not observe the large blue and white plastic bag between her and the coffee table. (R 248).

Elton Buettner's testimony:

Elton Buettner, who was also subpoenaed to trial by the State, testified on behalf of the defense. (R 252). Buettner was in the apartment with the others when the police officers came in. (R 2520254). He remembered Ms. Miller coming into the apartment that evening, whom he had met once or twice before. (R 254). Buettner answered the door, and at the threshold asked Miller where Price was since she wanted to speak to him. (R 255-256). After he stated that Price was in the shower or somewhere in back of the apartment getting dressed, Miller went on back and knocked, leaving Buettner's view. (R 255-256). She departed the apartment a minute or two later, saying "bye" to the others before she left. (R 256). During the entire time Miller was there, Price was in the shower and getting dressed in his room. (R 256). Price and Miller were not together in the

living room at any time, nor did Price ever reenter the living room to get anything while Miller was there. (R 256). About five or ten minutes after Miller departed, Price came out of his bedroom, and Buettner did not see anything in Price's hand similar to a large plastic bag. (R 257-258). When the police eventually entered, things got "real excited," and the police moved things around such as chairs and the coffee table. (R 257, 263). The plastic bag was "more under the table," and "when [the police] moved the coffee table out of the way, you could see it more clearly." (R 263). The occupants were all handcuffed and told to sit in front of the closet until "they got everything the way they wanted it." (R 257).

On cross-examination by the State, Buettner acknowledged his handwriting being on a certain written statement notarized on February 16, 1982. (R 261-262). In this statement, it was written that "when Shannon . . . came by, [Price] carried the bag with him to the bedroom. I have seen a bag like it before with pot and ludes in it." (R 260). However, Buettner testified at the trial that he was "mistaken at the time," and that around the time he talked to the police, he was "scared to death," (R 266-267).

Buettner testified further that the fifth person in the room that night was John Bodine, whom Buettner had worked with a few times as an ironworker. (R 258-259). Buettner knew Price from working on a few different jobs in the Ironworker's Union, noting that Price was his foreman. (R 258-259).

Price's testimony:

Price, 29 years of age, testified on his own behalf. (R 268). He stated that he was employed through the Ironworkers Union on various construction projects, but was on workmens compensation at the time of his second trial in 1984 due to an accident on the job. (R 269). Price occupied the apartment with his roommate, Robert Parker. (R 269). On the night in question, Buettner, Bodine, Debbie and Susan had arrived at his apartment at around 8:00, and they were making plans to go out that Friday evening. (R 269-270). Price didn't notice if any of them brought anything with them (i.e. the shopping bag), since he was in the back in the shower when they came. (R 270).

Earlier that same evening, Price had received a phone call from Ms. Miller, in which she asked to borrow money. (R 271). When she arrived later, someone else answered the door as Price was getting dressed in the back room. (R 271). His first awareness of Miller's arrival was when she knocked on his bedroom door, and Price said, "come in." (R 272). At this point, Price had on his jeans and boots, and was fixing to put on his shirt. (R 272). Miller asked to borrow $10.00 since she had just lost her job. (R 272). Price had loaned her money before, which she paid back. (R 273). Price gave her the $10.00, but he did not give her any Quaaludes or anything else. (R 273). After about a minute to a minute and a half in the bedroom, Whitlow turned around and left, saying she was in a hurry since her ride was waiting. (273). About three to five minutes after she left and he finished getting dressed, Price walked out into the living

room, took a seat, and started talking to his four guests. (R 273-275).

Price testified further that prior to his shower, he did not see the shopping bag in question. (R 274). When asked if he ever got fingerprints on the shopping bag by holding it in his hands, Price answered, "I was never close to it." (R 274).

When the police came in, Price moved directly to the floor and Officers Gautlett and Grim told him "not to move or they were going to blow [his] head off." (R 278). The officers moved the coffee table back and said, "what have we got here." (R 278). The first time Price ever saw the plastic bag was when the officers moved the coffee table. (R 274). The officers opened the bag up and looked down in it. (R 282). They set it up for pictures, with one guy holding it open while the other was taking the pictures. (R 282). The officers moved the bag around several times. (R 282).

Price further stated that as the officers were searching the girls' purses, they removed some blue pills, marijuana, a pipe and a hemostat from Debbie Brown's purse, which were reflected in a photograph introduced at the trial. (R 279-280). As the officers were searching the girls, one of them started to get up. (R 281). One of the officers "told her he'd shoot her if she moved," and she "urinated [on] herself." (R 281).

During Price's direct examination, he stated that he saw Miller two days after the night in question with her boyfriend, James Elliot. (R 283). Elliot was just an acquaintance of his. (R 296). Price emphasized that he had <u>never</u> suggested to or

authorized Elliot, nor was he aware of any "threats" that may have been made in reference to him (Price). (R 283-284). The first Price had ever heard of these "threats" was at trial when Miller commented about it. (R 284). Price also testified that about three weeks before trial he went to see Miller in the Foxhunter Lounge where she was dancing on stage, for the purpose of asking her if she was going to be able to testify in his case. (R 284, 287). Miller then told Price that she had been harassed by a Special Investigator named Mr. Rhodes from the State's Attorneys Office, and she stated, "they've done all they could to me. I'm going to stick to my story." (R 284-285). The meeting was "friendly and cordial," and there was nothing intimidating about it. (R 288).[3] Miller gave Price a big kiss when he was there. (R 288).

Price also stated during his testimony that he had been convicted of a crime one time before. (R 289).

The Close of the Trial . . .

During the State's closing argument, the prosecutor argued the following to the jury:

> "I'll admit to you right out, Sonja Whitlow, Sonja Whitlow-Miller's a liar. She has lied up and down and across. She's lied for Charlie Price, she lied for him in November, November of 1981. She lied for Charles Price because of Jimmy Elliott's threats.
>
> * * *
>
> Well, when a liar says something, doesn't

[3]Ms. Miller testified at trial that when she conversed with Price that night at the "Fox Hunter" lounge they just said "hi and bye," and Price had not threatened her in any way. (R 142-143).

make it always false. It just means you can't tell whether it's true or not.

And, so, Sonja Whitlow has lied. But the question is which is true now?" (R 314-315).

After receiving jury instructions, the jury set out to deliberate. (R 349). The jury deliberated for almost 2-1/2 hours, and returned with a verdict finding Price guilty of the lesser-included crime of attempted trafficking in methaqualone. (R 350-351). Price was thereafter sentenced to twelve (12) years of imprisonment, almost five times the maximum presumptive sentence under the new guidelines of community control to 30 months, with the trial judge stating as reason for his departure:

"I find that you're a serious threat to the community. More specifically, I find that you have intimidated witnesses, threatened witnesses, coerced witnesses and done just about everything you could to show a trial on a scenario that you would have like to have put together." (R 363, 438-439).

On Appeal to the Fifth District Price argued the following five points:

(1) The search of the apartment and seizure of the pill-laden shopping bag was an unlawful general exploratory search, far beyond the hand gun seizure authorization of the search warrant. See West v. State, 439 So.2d 907, 911 (Fla. 2nd DCA, 1983); Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Miller, 769 F.2d 554 (9th Cir., 1985) et al.

2. The trial judge erroneously allowed the prosecutor to impeach and rehabilitate its key State witness (Sonya Whitlow Miller) on direct examination with her prior "false" inconsistent testimony exonerating Price furnished at Price's first trial in this cause, and her explanation that she had "lied" at the first trial due to threats of a third person (James Elliot), absent evidence that Price had solicited or participated in these claimed threats. See Reeves v. State, 423 So.2d 1017, 1018 (Fla.

4th DCA, 1981); Ryan v. State, 457 So.2d 1084, 1092 (Fla. 4th DCA, 1984),; et al.

(3) Erroneous admission of Miller's prior written incriminating statement to "bolster" her credibility. See McElveen v. State, 415 So. 2d 746, 748 (Fla. 1st DCA, 1982); Kellam v. Thomas, 287 So.2d 733, 735 (Fla. 4th DCA, 1974); et al.

(4) Fundamental error for the State's agents to coerce Miller with favorable treatment and dismissal of perjury charges to change her testimony exonerating Price, and hence incriminate Price. See United States v. Waterman, 732 F.2d 1527 (8th Cir., 1984); Reese v. State, 382 So.2d 141, 143 (Fla. 4th DCA, 1980); Davis v. State, 334 So.2d 823 (Fla. 1st DCA, 1976), cert. den. 345 So.2d 427 (Fla., 1977).

(5) The trial judge improperly exceeded by five times Price's maximum presumptive guideline sentence, since the record id devoid of "clear and convincing" evidence that Price had threatened witnesses.

The Fifth District reversed Price's conviction on just the second point, holding that the State had improperly introduced Miller's prior inconsistent testimony and explanation concerning Elliot's supposed "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 Miller'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 [Miller] 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.

STATE'S ARGUMENT

THE FIFTH DISTRICT DECISION SUB JUDICE PROPERLY DECIDED IT WAS "HIGHLY PREJUDICIAL" REVERSIBLE ERROR AND VIOLATIVE OF F.S. 90.608 FOR THE STATE TO PRESENT ITS KEY WITNESSES'S (MILLER'S) PRIOR INCONSISTENT TRIAL TESTIMONY AND EXPLANATION THEREFOR DURING HER DIRECT EXAMINATION UNDER THE GUISE OF "ANTICIPATORY" IMPEACHMENT/REHABILITATION; AND NOTWITHSTANDING, THE DEFENSE ATTORNEY HAD NOT INTENDED TO IMPEACH MILLER WITH THAT INCONSISTENT TRIAL TESTIMONY IN QUESTION.

The Fifth District reversed Price's conviction for a new trial on the ground that the trial court improperly permitted the state attorney to question Miller on her direct examination as to her prior inconsistent trial testimony and her explanation why she then "lied" due to Elliot's threats. Price, 469 So.2d at 211. The panel decision expressly rejected the State's "anticipatory" impeachment/rehabilitation argument. (Id.). For the following reasons the Fifth District panel decision is correct:

(a) Since Price's counsel unequivocally stated at trial that he did not intend to impeach Miller with her prior inconsistent testimony, the prosecutor's presentation on her direct examination of such inconsistency and "explanation" therefor cannot legitimately constitute "anticipatory rehabilitation," even if allowed:

At the onset, Price must stress that the record does not arguably support the State's claim that the trial prosecutor had presented Ms. Miller's prior inconsistent first trial testimony and explanation therefor in "anticipation" of defense impeachment of Miller with this testimony on cross-examination.

Price's counsel consistently maintained that the prosecutor's elicitation of Ms. Miller's first trial testimony and Elliot's "threats" was a pretextual effort by the State to present clearly inadmissible and highly prejudicial evidence to the jury. (R 109-110). See Erp v. Carrol, 438 So.2d 31, 39 (Fla. 5th DCA, 1983) (condemning procedure used by a party as "a device or artifice to get into evidence before the jury that which would otherwise be inadmissible"). Demonstrating the trial prosecutor's improper purpose is the fact that Price's attorney clearly stated on the record that he had not intended to present or impeach Ms. Miller with her prior first trial testimony:

> "MR. HESS [the prosecutor]: Your Honor, that's what I intend to offer.
>
> MR. KIRKLAND [Price's attorney]: That last part of it, certainly now he's trying to taint Mr. Price with it. Instead of showing what she did and how she responded to this person named Elliott, by the last question, you know, they know each other, trying to get some guilt of threats by association.
>
> If you're only introducing the hearsay to establish what she did, or that action she took, that's far enough. I don't think now attempting to bootstrap it into some vicarious act on Mr. Price's part is relevant.
>
> We certainly would object to that portion of the proffer.
>
> THE COURT: Willing to just accept her testimony today as being the truth and not try to impeach her?
>
> MR. KIRKLAND: Plan not to.
>
> THE COURT: Wait a minute, just answer the question. As I heard you say something a moment ago, that's a yes or not question. Sir, can you answer that? Are you going to accept her testimony as truth, not try to impeach her testimony?
>
> MR. KIRKLAND: If he had stopped when she testified when she got the Quaalude pill and put it in her

pocket and walked outside, may not.

My trial strategy or plan, to ask one single question, not try to impeach her.

An entirely different theory of defense in this case. Created the straw man by bringing out on direct examination her previous inconsistent statement. Now going to have to open it up and go into it.

Not my intent to even ask her one single question, when she completed the statement I put these pills in my pocket and went outside.

I was going to impeach her testimony with general character, reputation, what other witnesses know about her reputation. But now the State is attempting --

THE COURT: Bear in mind all she said in front of the jury so far, her life was threatened.

MR. KIRKLAND: Connecting up Jim Elliott and the Defendant, getting it into the feature of the case and not the sidelight. The feature of this case is whether or not he possessed the Quaaludes, not if somebody who she's indicated made some authorized or unauthorized --" (Emphasis added) (R 109-110).

Obviously, the damage of jury speculation caused by admission of the evidence in question clearly outweighs any potential benefit gained by impeachment with her prior inconsistent trial testimony.

Thus, since Price's counsel had never planned to impeach Miller with her prior inconsistent statements, rather only with general character evidence, the State cannot legitimately argue before this Court that the trial prosecutor's presentation in question during Miller's direct examination was allowable under the guise of "anticipatory rehabilitation."

> (b) A party calling a witness cannot on direct examination impeach that witness and thereafter rehabilitate him with the witness's "explanation" for the discrediting evidence:

Even if Price's counsel would have indicated at trial that he had actually planned to impeach Ms. Miller with her prior trial testimony on cross-examination, a party is nonetheless prohibited under Florida law from impeaching and rehabilitating its own witness on direct examination. Generally, rehabilitation of a witness who gave prior inconsistent testimony is not allowed "unless and until an effort is made to impeach his testimony." Cf.: Teffeteller v. State, 439 So.2d 840, 843 (Fla., 1983); Trainer v. State, 346 So.2d 1081, 1082 (Fla. 1st DCA, 1977).

In enacting F.S. §90.608, 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" [subsection (1)(a)], or by presenting evidence that the witness has previously been convicted of a crime [subsection (1)(c); See also F.S. §90.610]. 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 witnesses' 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.

In Wingate v. New Deal, 217 So.2d 612, 614 (Fla. 1st DCA, 1969), the court explained the traditional theory behind this procedure of witness examination:

> "When a witness has testified to facts material in the case, it is provable by way of impeachment that he has previously made statements relating to these same facts which are inconsistent with his present testimony. The making of these previous statements may be drawn out in cross-examination of the witness himself, of if on such cross-examination the witness has denied making the statment, or has failed to remember it, the making of the statement may be proved by another witness.
>
> * * * * *
>
> "The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the motion that talking one way on the stand and another way previously is blowing hot and cold and raises a doubt as to the truthfulness of both statements."

Notwithstanding the legislature's express enactments and traditional judicial views, 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. The State of Florida, through its Attorney General, urges this Court in this particular cause to ratify Bell as the law of this state, and to reject the Fifth District's Price decision and the Fourth District's Ryan v. State, 457 So.2d 1084, 1092 (Fla. 4th DCA, 1984). As will be subsequently stressed in this argument, the State of Florida's Attorney General has in this cause suddenly done an astonishing 180-degree flip from its current position in Lawhorne v. State, 481 So.2d 19 (Fla. 3rd DCA, 1986), where it is currently zealously maintaining that "anticipatory rehabilitation" on

direct examination is improper and violative of F.S. §90.608. (See State's briefs in Lawhorne, attached, at Appendix pages 5-25].

There are several reasons why "anticipatory rehabilitation" is not and should not be approved in the State of Florida.

First, Judge Frank's Bell decision, effectively carving out a judicially-created exception to F.S. §90.608, constitutes a judicial encroachment on the legislature's authority and enactments. The Florida legisture in F.S. 90.608 has expressly and unequivocally prohibited a party from introducing statements of his own witness which are inconsistent with the witness's present testimony. In Florida Gulf v. Commission on Ethics, 354 So.2d 932, 933 (Fla. 2nd DCA, 1978), the court stressed:

> "The legislature is charged with the responsibility of making the law. The courts, on the other hand, are mandated to follow the law and follow the law they must. In doing so we must interpret and construe a statute according to the precise language adopted by the legislature."

"Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent." Citizens v. Public Service Commission, 435 So.2d 784, 786 (Fla., 1983). "It is not the function of a court to search out ways to strike an act down or to defeat its purpose." Overman v. State Board of Control, 62 So.2d 696, 701 (Fla., 1953).

The Bell panel has effectively displaced the legislative prohibition of 90.608-- that a party cannot introduce its own witness's prior inconsistment. As justification for a judicially-created "anticipatory rehabilitation" exception to

§90.608, the Bell panel stated it did not "perceive" the procedure as actual "impeachment." By ignoring the particular examination procedure used-- and looking only to the final strategic intent of the party calling its witness-- the Bell panel has defeated the procedural bar of the §90.608.

Second, under the facts of the case sub judice, presentation of Miller's inconsistent first trial testimony to the jury on direct examination certainly could not have enhanced her credibility with the jury-- and obviously diminished or "attacked" it. The only purpose of Miller's explanation was to vitiate and mitigate the substantial impeachment effect of her first trial testimony. The State cannot be serious in claiming that by presenting Miller's earlier testimony it had not effectively "attacked" her credibility.

Third, as held in Ryan, 457 So.2d at 1092, the anticipatory impeachment/rehabilitation practice "scramble[s] the orderly procedure laid out by the Florida Rules of evidence," and "robs the defense counsel of an important strategic tool used in cross-examination." The Fourth District recognized in Ryan that while the State may not have the specific intention of attacking the witness' credibility, the prosecutor's questioning had the effect of impeaching in one breath by showing the inconsistent statement and rehabilitating in the next breath by allowing the witness to explain why he lied. The Ryan, Price and Lawhorne panels all found the reasoning of Erp v. Carroll, 438 So.2d at 37, most persuasive:

> "The purpose of impeachment is to attack the credibility of a witness so that the trier of fact

> will accord his testimony less weight than otherwise. Accordingly, there is a good reasons for a party to impeach a witness giving testimony harmful or adverse to that party but there is no proper purpose of impeachment in order to attack a witness that has not given testimony prejudicial to the person seeking to impeach the witness, and this is true without regard to who called the witness or the adverse witness' status."

Lastly, the "anticipatory" impeachment/rehabilitation procedure as purportedly used in this case on direct examination affirmatively misleads the jury as to the true believability of a witness such as Miller, since it gives the jury the false impression that the witness's "voluntary" disclosure of prior "lies" shows candor and forthrightness. Accordingly, the jurors are naturally inclined to perceive such forthrightness as affirmative evidence that the witness is now telling the truth. In reality, however, the pre-emptive dislosure is nothing more than a sophisticated strategic attempt by a skilled trial lawyer to "soften the blow" of an attack against its witness's credibility, and is in no way indicative of greater credibility at the time of trial. Hence, there is ample good reason for the legislature's preclusion of impeachment of one's own witness, since it falsely suggests that the witness had "turned over a new leaf," and is no longer dishonest.

> (c) Even if "anticipatory" impeachment/rehabilitation is to be sanctioned under Florida law, admission of Miller's testimony as to Elliot's threats is too highly prejudicial to outweigh any relevancy for rehabilitation purposes:

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 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).

Since the Fifth District in the case sub judice found that the evidence in question "was highly prejudicial and harmful," 469 So.2d at 212, admission for anticipatory impeachment/rehabilitation purposes is precluded.

> (d) The State of Florida, through its Attorney General's Office, is estopped from advocating the approval of "anticipatory" impeachment/rehabilitation of a party's own witness on direct-examination, after zealously maintaining the reverse in other cases that such procedure is improper and violative of F.S. §90.608:

In Lawhorne v. State, 481 So.2d 19 (Fla. 3rd DCA, 1986), Pet. for review filed February 19, 1986, Case No. 68,365 (Fla. Sup. Ct.), the Third District held that it is improper and violative of §90.608(1) for a defense attorney to impeach and rehabilitate a defense witness on direct examination, in anticipation that the prosecutor would subsequently impeach the defense witness on cross-examination. In its brief on appeal in Lawhorne, the State of Florida's Attorney General expressly urges the Third District to follow the Ryan decision prohibiting anticipatory impeachment/rehabilitation:

> "The State would urge this court to adopt the view set forth in Ryan, supra. Clearly, by asking one's own witness to 'explain away' his prior convictions, as defense counsel attempted herein, an (sic) improper bolstering would have resulted.
>
> Bolstering occurs when one item of evidence is improperly used by a party to add credence or weight to some earlier unimpeached piece of evidence affected by the same party." (Appendix infra, pages 13-14).

Now in this cause, the State of Florida's Attorney General takes the complete about face by urging this Court to find Ryan

erroneous and to quash the Fifth Circuit's Price reversal. The State's position can be summed up as follows: if anticipatory impeachment/rehabilitation benefits the prosecution, it is a valid procedure; if it benefits the defense, it is violative of §90.608. This inconsistency suggests that the State is less than seriously committed to its stance in this cause urging approval of anticipatory impeachment/rehabilitation.

(e) The Fifth District properly ruled on the merits of the issue reversed upon sub judice.

For the first time in its merit brief at Page 8, the State suddenly suggests that "the issue decided by the court of appeal was not the same one Price specifically raised." Notwithstanding, the State had ample opportunity to challenge the Fifth District's May 23, 1985 reversal with this procedural contention by filing a timely motion for rehearing a request for reconsideration, but never did so. Nor in the State's "Motion to Recall and Modify Mandate, or to Withdraw and Stay Mandate Pending Review," filed in the Fifth District on or about June 24, 1985, had the State ever raised the point or even hinted that the Fifth Distict's May 23, 1985 opinion may have exceeded the issues as presented on appeal or preserved [See Appendix infra, pages 1-2]. Likewise, this was never the State's ground for challenge in its Jurisdictional Brief filed with this court and served on July 8, 1985. In fact, the State's argument in its July 8th Jurisdictional brief at page one effectively concedes a proper objection by Price on the grounds reversed upon:

> "During the second trial, the state attorney disclosed, over objection, Ms. Whitlow's prior inconsistent statement by querying whether Ms. Whitlow had ever testified under oath concerning the same subject, whether she had ever made a prior inconsistent statement, and then permitting Ms. Whitlow to explain the inconsistency."

The obvious reason why the Assistant Attorney General formerly handling this case (prior to Richard Prospect, Esq.) had never raised this new technical challenge earlier before the Fifth District or this Court, is because it is without record support. The record shows that during the State's direct-examination of Miller, the prosecutor asked her whether she had previously given statements under oath telling the "story" differently, and if so, why she did not tell the same story as related to the jury at that second (1984) trial. (R 94-95). Price's counsel immediately responded before the inconsistent statements or explanation was furnished to the jury:

> "MR. KIRKLAND: Your Honor, we object to that.
>
> THE COURT: Overruled." (R 95).

In Price's second point on appeal raised in his main Appellant's brief before the Fifth District, Price challenged elicitation of this line of questioning "on direct examination." [See Appellant's 5th DCA Brief, page 32]. In Price's Reply Brief at Page 7 (Appendix page 37, infra), Price maintained as follows:

> "Moreover, since the prosecutor elicited Whitlow's testimony in question during her direct examination, this factor alone seems to evidence that these "threats" were presented as part of the State's case-in-chief. Generally, rehabilitation of a witness who gave prior inconsistent testimony is not allowed 'unless and until an effort is made to impeach his testimony'."

Subsequent to the filing of Price's main and reply briefs he filed a notice of supplemental authority [Appendix pages 3-4, infra], citing the then-newly rendered decision, Ryan v. State, 457 So.2d 1048 (Fla. 4th DCA, 1984), for the point that the trial court in this cause had erred through "[i]mproper admission of key state witness Whitlow's testimony on direct examination of third party threats to 'explain' prior inconsistent testimony." (Appendix, pages 3-4). And at the oral argument before the Fifth District on April 1, 1985, the improper impeachment/rehabilitation issue as per Ryan was substantially argued by the undersigned and discussed by the panel.

In sum, the State's suggestion that the Fifth Circuit exceeded its scope of review is unfounded, and in any event the State is barred from suddenly raising it at this late time.

Accordingly, the State's presentation of Miller's testimony of Elliot's threats under the guise of anticipatory impeachment/rehabilitation was improper and highly prejudicial, and this Court should approve the Fifth District panel decision on this ground.

PRICE'S ARGUMENTS ON CROSS-APPEAL

POINT I

THE PANEL DECISION IMPROPERLY CONDONES ADMISSION OF MS. MILLER'S TESTIMONY OF ELLIOT'S "THREATS" FOR REHABILITATION PURPOSES FOLLOWING DEFENSE IMPEACHMENT WITH HER PRIOR INCONSISTENT FIRST TRIAL TESTIMONY, SINCE THE RECORD IS DEVOID OF EVIDENCE SHOWING THAT PRICE HAD ACTUALLY SOLICITED OR PARTICIPATED IN ELLIOT"S "THREATS" AND MILLER WAS UNCERTAIN IF THESE THREATS EVEN PERTAINED TO TESTIFYING FALSELY AT PRICE'S TRIAL.

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 States 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 on its face seemingly approves presentation of evidence during a State's rebuttal of third party threats to "explain" prior inconsistent testimony, if the prosecution witness is first 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 defendant, 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, 210 (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 hs 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 Miller's testimony for any purpose as to James Elliot's alleged "threats" is reversible error since she had emphasized that Price had never before threatened her (R 96, 143), and the record is devoid of any evidence showing that Price had actually solicited or participated in these claimed threats to induce false testimony. Moreover, Miller's testimony is uncertain as to whether Elliot's threats pertained to her testimony at Price's trial. (R 115).

At Price's first trial in this cause on May 16, 1981, Ms. Miller testified that she had not received the two Quaaludes from

Price on the night in question, nor did she ever go into the back bedroom with Price carrying the plastic bag. (Second Supplemental Record at Page 20). Miller testified also that after she went back outside, she was searched by an officer who found the two Quaaludes on her person, but she did not tell them that she had received the tablets from Price. (Id. at Pages 21-22). She only gave the police a written statement implicating Price as a result of their (the police officers') "harrassment" and threats to lock her up and charge her if she didn't do just what they told her [i.e. subscribe to a false written statement]. (Id. at Page 42).

At Price's second trial, Miller completely reversed her story. She stated that on the evening in question Price had answered the door and she walked in, telling him that she needed two Quaaludes. (R 148, 90). According to Miller, Price then 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 reached into the bag, took two Quaaludes out, and handed them to her. (R 92-149). Miller stuck them in her back pocket, and walked out the door and left. (R 93, 149).

During Miller's direct examination at the second trial, she claimed that she had not told the same story earlier because her life was purportedly "in danger." (R 94-95). Miller testified over Price's repeated objections and motion for a mistrial that in November 1981 in the Orange County Courthouse, James Elliot had communicated a threat to her that if she did not lie in

Price's Quaalude possession case (R 96, 103), she "would be a dead person." (R 104). According to Whitlow, she was warned by James Elliot, "I'd be shot, he flat told me that, and said he'd be the one to pull the trigger." (R 107). Later, in May of 1982, Elliot just told Whitlow that she was "not supposed to testify." (R 112). Whitlow stated that it was because of these claimed threats from Elliot that she "lied on behalf of [Price]" twice in two different proceedings, including Price's first trial in this cause. (R 158-159). And she was charged by the State of Florida with perjury for lying in these proceedings. (R 159-160). However, Whitlow emphasized during the trial that it was <u>not</u> Price who threatened her, only Jimmy Elliot had. (R 96). Miller admitted at the second trial that she had seen and conversed briefly with Price and his brother 2 or 3 weeks earlier at the "Foxhunter," and emphasized that Price had not then threatened her in any way. (R 142-143).

After more scrutinizing cross-examination as to these supposed "threats" from Elliot, Miller's testimony was uncertain and equivocal as to whether these threats from Elliot even concerned giving "false" testimony at Price's trial, as opposed to Elliot's <u>own</u> unrelated robbery trial at which Elliot was acquitted despite Miller's testimony against him. On Miller's cross-examination, she stated that she had recently testified in the robbery case against Elliot. (R 114-115), as part of her "deal" with the State in another perjury case filed against her. (R 151). The jury there had totally disregarded her testimony

and found Elliot "not guilty." (R 115). Price's counsel inquired further:

> "Q Now, are you, you're certain that it wasn't Mr. Elliott threatening you about testifying against, testifying about him [Elliot] back some months ago?
>
> A I wouldn't really care if it was nor not.
>
> Q What do you mean by that, Mrs. Miller?
>
> A Just what I said, I wouldn't care.
>
> Q You didn't, it didn't worry you?
>
> A No." (R 115).

Miller admitted further that she had never requested any help from the law enforcement authorities concerning Elliot's supposed deadly threats:

> "Q Did you seek any help from any law enforcement agency about that threat?
>
> A No, because they didn't believe me the first time.
>
> Q Just please answer my questions yes or no.
>
> A No.
>
> Q Did you seek any assistance from any law enforcement?
>
> A No." (R 116-117).

And Price's counsel mentioned to the Court that the former Assistant State Attorney on this case, Dorothy Russell, stated in a prosecutorial summary that she had talked to Miller some time right after the alleged "threat" and offered her protection, to which Miller resisted. (R 235). Russell's comments "were adamant, [Miller] was not in fear of anything." (R 135). Mr.

Hess, the prosecutor at the instant trial, did not refute this information. (R 135-136).

As prosecutor Hess was direct examining Miller at trial concerning these threats from Elliot, the prosecutor wished to continue Miller's questioning outside the jury's presence as a proffer, noting, "This witness is not, not the most consistent. And I'm not sure I know where she's going." (R 103-104). After removing the jury, Circuit Judge Coleman inquired of Whitlow as to the nature of Elliot's supposed threats:

> "THE COURT: Ask her a couple myself.
>
> Were these threats to which you have testified made to you specifically related to this case?
>
> THE WITNESS [Miller]: To any case that had anything to do with Charlie Price.
>
> THE COURT: What did the follow [Elliot] say to you?
>
> THE WITNESS: He told me that if I talked into a courtroom and ever told the truth about anything that that man did and that caused him to get locked up, I would be a dead person.
>
> THE COURT: This caused you to have some fear of testifying in this case?
>
> THE WITNESS: Any case. The man beat the shit out of me five years ago and cut all my hair off.
>
> THE COURT? Who did?
>
> THE WITNESS: Charlie Price, along with John Elliott and his brother Jimmy Elliott." (R 104).

The prosecutor also asked Miller on her direct examination over Price's objection, "Do you know if Mr. Elliot knows Mr. Price?" (R 108-109). Miller responded that she "knew" they were "friends" and roommates. (R 108-109).

However, subsequently during the defense case at trial, Price denied this relationship, testifying that Elliot was actually Miller's "boyfriend" and just an "acquaintance" of his. (R 196-183). According to an informal transcript of a 1982 tape-recorded jail interview between Miller and an investigator named Dusty Rhodes, Miller stated that she was in fact the one living with Elliot. (Record on Appeal Evidence Volume, Document 2, page 3). Price emphasized at trial that he had never suggested to Elliot or authorized him to threaten Miller, and the first time he had ever heard of these "threats" was at the second trial. (R 183-184).

Price's counsel repeatedly objected to this testimony about Elliot's supposed "threats" and moved for a mistrial. (R 95, 96, 101, 102, 102, 109, 110, 111, 112, 112). As basis for a mistrial, Price argued that it was improper to admit evidence of Miller's supposed "motivation for lying" (at the prior proceedings), unless there's some evidence the State can show that the "threat" actually emanated from Price. (R 97). He also argued that it creates an impression on the jury that if Elliot had threatened Miller then Elliot must have been the agent of Price; therefore, not only did Price possess Quaaludes, but he goes around threatening witnesses. (R 98). The prosecutor responded that he didn't offer it to prove consciousness of guilt on the part of the defendant;" Rather, the state offered it only in anticipation that the defense is going to impeach Miller by prior inconsistent statements, and as an "explanation as to why she told a different story [at Price's first trial]." (R 98).

However, Price's counsel stressed that he had not planned to try to impeach Miller with her prior inconsistent first trial testimony, only with general character and reputation evidence. (R 109-110). Since the prosecutor brought out the inconsistent testimony on direct examination, Price's counsel noted that he was "[n]ow going to have to open it up and go into it." (R 110). Price's counsel maintained that Miller's testimony in quesion makes Elliot's threats a main feature of the case, and creates an issue as to whether these alleged threats were actually authorized or unauthorized by Price. (R 110).

Judge Coleman decided to admit the evidence of Elliot's threat and denied a mistrial, holding:

> "THE COURT: Going to permit the line of inquiry, take my chances.
>
> You made a motion for mistrial, I think. Or were you -- ?
>
> MR. KIRKLAND [Price's consel]: Yes, sir, I did.
>
> THE COURT: I'm denying it.
>
> 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 for why the witness gave a contradictory statement." (R 99-100).

Indeed, the record as a whole shows that the issue placed by the State into the limelight by innuendo was whether the police officers and prosecutors, or Price through Elliot, had coerced Ms. Miller into lying. In light of the dramatic inconsistencies in Miller's incriminations of Price regarding the

contraband, the record strongly suggests that she may well have falsely implicated Price due to police coercion:

For example, Miller's original May 22, 1981 written statement incriminating Price, which she later recanted as the product of police harrassment and threats to lock her (R 155), was even substantially inconsistent with her second trial testimony. At the second trial, Miller testified that the Quaaludes were "retrieved in the bedroom" from Price (R 167-168), while in the written statement, she claimed that the two Quaaludes were retrieved "out in the living room." (R 166). When asked by Price's counsel to explain this inconsistency, Miller responded, "it's the same thing." (R 169). She also testified at the second trial that the [pill-laden] shopping bag had been located "under the coffee table" (R 92), while in the written statement she noted that it had been "beside the chair." She explained this discrepancy: "Beside the chair, under the table, whichever." (R 168). And when asked at the second (1984) trial by Price's counsel if she was under any kind of police pressure on the evening in question that she gave the written statement (as she had testified in the first trial), Miller responded, "I don't recall if I was or not." (R 151). Price's counsel thereafter informed Miller at the second trial that he counted 34 lies that she had told in prior judicial proceedings in court under oath. (R 157). She responded, "I don't count them." (R 157). Thus, these dramatic discrepancies in Miller's statements as to the critical question for the jury, i.e. whether Price had knowledge and possession of the contraband, lend

support to Miller's prior testimony that she had falsely imputed possession to Price through police coercion and charges.

Nor can there be any serious doubt that a major feature of the State's case-in-chief was that Price was in some way behind Elliot's threats. At Price's sentencing hearing for the attempted trafficking in methaqualone conviction, the prosecutor argued:

> "As experienced prosecutors and people before the Court have seen, that drugs and guns and violence tends to go together. As Your Honor heard from the testimony in this case, we had a witness who testified and told the jury here that she'd lied to another jury because of intimidation in this case. And that she lied on behalf of Mr. Price because of threats and intimidation made to her." (R 360).

Judge Coleman thereafter exceeded Price's maximum presumptive sentence by almost five times, on the sole basis that Price had purportedly "intimidated witnesses, threatened witnesses, coerced witnesses . . ." (R 363). Imagine how the jury perceived this evidence at trial.

In sum, Miller's uncertain testimony as to Elliot's "threats" was irreparably prejudicial to Price in his trial for trafficking in methaqualone. Undoubtedly this line of testimony created the unsupported impression on the jury that Price had somehow solicited or participated in these claimed "threats," and it was devastating to him. Moreover, it was irrelevant and collateral to the issue of whether Price had dominion, control and knowledge of the shopping bag of methaqualone. Price received an inherently unfair trial.

The panel decision improprly condones admission of this evidence on re-trial for rebuttal purposes, and this Court should remand the Fifth District's decision with instructions to disallow the testimony in question for any purpose. Johnson, supra, Coleman, supra, Reeves, supra, and Jones, supra.

POINT II

THE TRIAL JUDGE ERRONEOUSLY EXCEEDED PRICE'S MAXIMUM PRESUMPTIVE GUIDELINE SENTENCE BY ALMOST FIVE TIMES ON THE GROUNDS THAT PRICE HAD THREATENED, COERCED AND INTIMIDATED WITNESSES, WHEN THE RECORD IS DEVOID OF CLEAR AND CONVINCING EVIDENCE THAT PRICE HAD ACTUALLY THREATENED, SOLICITED OR PARTICIPATED IN ANY SUCH THREATS.

Since the Fifth District reversed Price's conviction for a new trial, it never addressed the sentencing guideline issue posed by Price in his Point V. Pursuant to this Court's plenary powers to review all of the issues posed in this cause, and since this issue is related to the two foregoing questions herein, the undersigned would respectfully request this Court to make a determination concerning the propriety of Price's excessive sentence.

Rule 3.701, Florida Rules of Criminal Procedure, prescribes new guidelines as to presumptive sentences for criminal offenders. Paragraph 11 of that Rule states the requirements placed on a trial judge in order to exceed the presumptive sentence:

> "11. Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the

> sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained."

In this cause, the presumptive sentence for Price's conviction of attempted trafficking in methaqualone ranged from "community control or 12 to 30 months incarceration." The trial judge sentenced Price to 12 years. (R 438) As reason for his departure, the trial judge found that Price had "intimidated witnesses, threatened witnesses, coerced witnesses." (R 363).

The record is wholly devoid of "clear and convincing" evidence to factually support the trial judge's gross departure from the new sentencing guidelines, as stated by him in his findings. Miller repeatedly testified in the second trial that Price had <u>not</u> threatened or coerced her "to lie" in his Quaalude case. (R 96). Nor was Miller even certain if James Elliot's "threats" against her actually concerned giving "false" testimony in <u>Price's</u> case, rather than Elliot's unrelated robbery trial. (R 115-116). Miller further testified that when she saw Price and his brother about two or three weeks before the March 1984 trial in the Fox Hunter cocktain lounge, she and Price just said "hi and bye." (R 142). When asked at the second trial if Price had threatened her in any way at the Foxhunter, Miller testified, "No." (R 143). Nor is there evidence of any threats as to other witnesses at trial.

Most importantly, the trial prosecutor specifically represented to the trial court that the State was not presenting Miller's testimony of Elliot's threats for that purpose:

> "I'm not offering this, that as evidence of Mr. Price's guilt, I'm offering it to explain inconsistent statements.
>
> I believe in the limited function I went to it's not improper." (R 98-99).

In Lindsey v. State, 453 So.2d 485, 486 (Fla. 2nd DCA, 1984), the court held that it is error for a trial judge to depart from the sentencing guidelines based upon "speculation." The court explained that speculation does not constitute "a clear and convincing reason for departure from the guidelines."

The State had not presented the requisite "clear and convincing" evidence that Price had threatened, solicited or participated in Elliot's threats against Miller or any other witness, nor were Elliot's threats even offered for that purpose. (R 98-99). The trial judge' transgression of Price's maximum presumptive sentence is based wholly on speculation and innuendo, and is erroneous.

The trial judge erred in exceeding Price's presumptive sentence, and Price's 12-year sentence should be vacated and remanded for resentencing within the guidelines.

CONCLUSION

Based upon the foregoing arguments and authorities, Price respectfully requests this Court to approve the Fifth District's reversal based upon the State's improper "anticipatory" impeachment and rehabilitation, and to remand with instructions to bar admission of the testimony in question under any circumstances. Alternatively, if this Court determines that a new trial should not be forthcoming and the conviction affirmed, Price respectfully requests the Court to remand the cause for resentencing within his presumptive guidelines.

Respectfully submitted,

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-and-

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard W. Prospect, Esquire, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, by United States Mail, this 10th day of March, 1986.

Samuel R Mandelbaum

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