IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES WESLEY PRICE,

Respondent.

CASE NO. 67,240

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On May 22, 1981, the Orlando Police Department executed a search warrant at the respondent's residence. Said warrant authorizied a search for a .22 caliber pistol believed to have been used by the respondent in an attempted murder and burglary which occurred on May 20, 1981. During the course of the search, authorities seized a shopping bag containing 643 pills later found to include methaqualone.

On September 30, 1981, respondent was charged by information with trafficking in methaqualone and aggravated assault arising out of events surrounding the aforementioned search. Respondent's jury trial resulted in a mistrial on May 2, 1982. However, respondent was convicted of attempted trafficking in methaqualone in a second jury trial held on March 12-14, 1984, and received a sentence of twelve (12) years.

During respondent's second trial, a witness for petitioner, Sonya Whitlow, testified that respondent gave her two quaaludes. (This testimony was in direct contradiction to Ms. Whitlow's testimony during respondent's first trial). 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. Ms. Whitlow testified that she had perjured herself at respondent's first trial as a result of two threats made by one James Elliot that if she testified against the respondent, she would be shot.

Respondent timely appealed his conviction and sentence. Petitioner cross-appealed; however, the Fifth District Court of Appeal reversed respondent's conviction and remanded the cause for retrial on the authority of Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984). This appeal timely follows as a result of direct and express conflict between two recent decisions of the Second District Court of Appeal which reject Ryan, supra, and the instant case.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the instant case clearly conflicts with two recent decisions of the Second District Court of Appeal. While the former relies upon the authority of Ryan v. State, infra, in its denunciation of "anticipatory rehabilitation," the latter expressly reject the Ryan rationale, despite the absence of definitive precedent in the area.

These cases present irreconcilable constructions of the Florida Rules of Evidence. Consequently, this court should exercise its discretionary jurisdiction in order to clarify a significant issue concerning trial strategy and prosecutorial candor.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF BELL v. STATE, 10 F.L.W. 1396 (Fla. 2d DCA June 7, 1985) AND SLOAN v. STATE, 10 F.L.W. 1402 (Fla. 2d DCA June 7, 1985).

The decision of the Fifth District Court of Appeal in the instant case expressly and directly conflicts with two recent decisions of the Second District Court of Appeal, Bell v. State, 10 F.L.W. 1396 (Fla. 2d DCA June 7, 1985) and Sloan v. State, 10 F.L.W. 1402 (Fla. 2d DCA June 7, 1985).

In the instant case, the Fifth District Court of Appeal ruled that the state's attempted rehabilitation of its own witness during the state's case-in-chief, prior to any impeachment by the defense, was untimely and improper. Price v. State, 10 F.L.W. 1292 (Fla. 5th DCA May 23, 1985). The opinion in Price, supra, expressly relies upon Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), in support of such a conclusion.

Conversely, in Bell, supra, the Second District Court of Appeal sanctioned the trial technique denominated as "anticpatory rehabilitation," notwithstanding the noted condemnation of such technique in Ryan, supra. Although the Bell court was without "definitive precedent" with respect to resolution of the issue in favor of the state, the Bell court refused to subscribe to the opinion of the Ryan court that "anticipatory rehabilitation" not only "scramble(s) the orderly procedure laid out by the Florida Rules of Evidence, but it robs the

defense counsel of an important strategic tool used in cross-examination, that of impeachment of a witness through the use of prior inconsistent statements." Bell, at 1397, citing Ryan, at 1092.

In rejecting the Ryan rationale, the Bell court noted that the challenged interrogation was not intended to attack the credibility of the state's own witness, but was intended to enhance the credibility of such witness through candid disclosure of a prior inconsistent statement. Consequently, the Bell court did not find "anticipatory rehabilitation" to be barred by the Florida Rules of Evidence.

Likewise, in Sloan, supra, the Second District Court of Appeal rejected the contention that the state's questioning of its own witness concerning a prior inconsistent statement constituted impeachment. The Sloan court further held that the state's attempt to bolster the credibility of its own witness in such a manner was not offensive to section 90.608, Florida Statutes (1984). In contrast, the opinion in the instant case expressly declares "anticipatory rehabilitation" to be "vulnerable to the assertion that (the state) is attacking the credibility of its own witness which is impermissible" [under section 90.608(1)(a), Florida Statutes (1984)]. Price, supra.

Clearly, the decision of the Fifth District Court of Appeal in the instant case is in direct and express conflict with the recent decisions of the Second District Court of Appeal. Consequently, this court should exercise its discretionary jurisdiction in order to resolve a significant issue involving

statutory construction of the Florida Rules of Evidence. In so doing, this court will provide that "definitive precedent" concerning the issue of prosecutional candor sought by the Bell court and so essential to the future consistency of the District Courts of Appeal of the State of Florida.

CONCLUSION

Based on the arguments and authorities cited herein, petitioner respectfully prays this honorable court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on jurisdiction has been furnished by mail to: Samuel R. Mandelbaum, Esquire, Anthony F. Gonzalez, P.A., 701 N. Franklin Street, Tampa, Florida 33602 on this 8th day of July, 1985.

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