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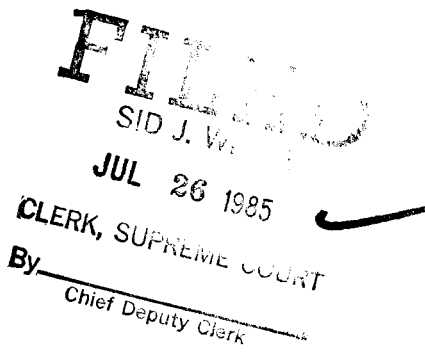

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67419

THE STATE OF FLORIDA,

Petitioner,

vs.

MARIO DELGADO-SANTOS,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the Appellee in the court below and the prosecution in the trial court. Respondent, MARIO ENRIQUE DELGADO-SANTOS, was the Appellant below and the Defendant in the trial court. The Opinion of the Third District Court of Appeal concerned herein and contained in the appendix will be referred to as "The Opinion."

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT'S OPINION, HOLDING THAT THE TEST FOR DETERMINING WHETHER A WITNESS' PRIOR INCONSISTENT STATEMENT IS ADMISSIBLE PURSUANT TO F.S.§90.801(2)(a) (1981), IS A "BRIGHT LINE" TEST, HOLDING THAT A POLICE INTERROGATION CAN NOT BE AN "OTHER PROCEEDING" WITHIN THE MEANING OF THE STATUTE, IS IN CONFLICT WITH ROBINSON V. STATE, 455 So.2d 481 (Fla. 5th DCA 1984)?

STATEMENT OF THE CASE AND FACTS

The defendant was charged by indictment with first-degree murder and armed robbery.

The defendant was originally brought to trial in June, 1983, but a mistrial was declared due to a deadlocked jury.

Defendant was tried again, during which trial, the co-defendant, Pizarro-Ortiz, testified as a court witness. He testified that he previously made a voluntary statement to the police, under oath, taken by a notary public, subject to perjury. However, he denied, in court, that the statement was true.

There was substantial corroborating evidence to the original statement made to the police, and which was contradictory to the witness' in-court testimony. The trial court permitted the use of the prior inconsistent statement as substantive evidence, over defense objection.

Defendant was convicted of both first-degree murder and armed robbery.

Defendant subsequently appealed and the Third District Court of Appeal reversed and remanded for a new trial. Appellee's Motion for Clarification and Certification of Questions and Conflict was denied and a timely Notice to Invoke Discretionary Jurisdiction was filed.

SUMMARY OF ARGUMENT

The Opinion concerned herein is in express and direct conflict with Robinson v. State, 455 So.2d 481 (Fla. 5th DCA 1984), specifically rejecting the "case by case approach to the problem" set forth in the above case for a "bright line" test which precludes any prior inconsistent statement to the police from being admissible as substantive evidence under F.S.90.801(2)(a)(1981).

ARGUMENT

THE DISTRICT COURT'S OPINION, HOLDING THAT THE TEST FOR DETERMINING WHETHER A WITNESS' PRIOR INCONSISTENT STATEMENT IS ADMISSIBLE PURSUANT TO F.S.§90,801(2)(a)(1981), IS A "BRIGHT LINE" TEST, HOLDING THAT A POLICE INTERROGATION CAN NOT BE AN "OTHER PROCEEDING" WITHIN THE MEANING OF THE STATUTE, IS IN CONFLICT WITH ROBINSON V. STATE, 455 So.2d 481 (Fla. 5th DCA 1984).

This case turns upon the definition of the term "other proceeding" as it is used in F.S.§90,801(2)(a) which states in pertinent part:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (emphasis supplied)
>
> F.S.§90.801(2)(a)

This term was specifically examined by the court in Robinson v. State, 455 So.2d 481 (Fla. 5th DCA 1984) which cited, with approval, the case of Smith v. State, 97 Wash.2d 856, 651 P.2d 207 (Wash. 1982) which held that such a prior statement made to the police was admissible as substantive evidence, while declining to hold that such an interrogation is always an "other proceeding" within the

meaning of the statute. The Opinion of the Washington Supreme Court was quoted by the Fifth District, as follows:

> We likewise decline to answer the issue broadly. We do not interpret the rule to always exclude or always admit such affidavits. The purpose of the rule and the facts of each case must be analyzed. In determining whether evidence should be admitted, reliability is the key. In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness. One commentator has addressed the question of admissibility as follows:
>
> > Inquiry into what other statements are encompassed by the Rule should be informed by the two purposes Congress had in mind in narrowing the provision originally proposed by the Court. The first was to remove doubt as to the making of the prior statement. . . . The second purpose was to provide at least the minimal guarantees of truthfulness which an oath and the circumstances of a formalized proceeding tend to assure. Clearly, however, the prior statement need not have been subject to cross-examination at the time made, for Congress was satisfied to rely upon delayed cross-examination of the declarant at trial to expose error or falsehood in the statement.
>
> (Footnotes omitted.) D.Louisell & C. Muller, supra §419, at 169-71.

Robinson v.State, 455 So.2d 481, 483-484 (Fla. 5th DCA 1984)

Although the Fifth District did not find the statement to have been made in an "other proceeding" within the meaning of the statute, they did specifically state; "While under some circumstances, as in State v. Smith,[sic] a police interrogation may qualify as an 'other proceeding', such circumstances are not present here. . . ." Robinson v. State, 455 So.2d 481, 484 (Fla. 5th DCA 1984).

In the case sub judice, the Third District specifically rejects applying this rationale in the following language; ". . . because we disagree with its case-by-case approach to the problem, we decline to do so. . . . " (The Opinion, 7). The Third District goes on to say:

> Robinson, and, even more, Smith, which the fifth district followed and which is the only decision which actually permits the admission of a police statement under 801 (d) (1) (A), purport to make the question turn on the "reliability" of the contents of the particular statement and of the conditions under which it was given. In our view, the basic flaw in this conclusion is that it finds no basis in the statute. While the legislature and Congress may have been ultimately concerned with the "reliability" of a particular statement, they sought to vindicate that concern only by establishing given and objective criteria as to the circumstances, including the kind of forum, under which it was given. And it is for the legislature, not the courts, to determine not only the policy to be promoted, but the means by which that end is to be achieved.

> 10 Fla.Jur.2d Constitutional Law §147 (1979). By suggesting, without statutory authority, that the determination that the existence of a proceeding can depend upon what is said before it, the Robinson-Smith test of reliability violates this basic principle.
>
> In sum, we think that a "bright line" test is mandated by the statute: in this context, this means that a police interrogation either is or is not an "other proceeding." Since, for the reasons outlined, we conclude that it is not, the Ortiz statement was incorrectly admitted as substantive evidence, and the judgment below is therefore reversed for a new trial. (footnotes omitted)
>
> (The Opinion, 7-8).

Also, it appears that the Third District is incorrect in stating that the Smith case is the only case which permits the admission of a police statement under the applicable rule; United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976); Cert denied, 429 U.S. 983 (1970); United States v. Payne, 492 F.2d 449 (4th Cir. 1974); Cert. denied, 419 U.S. 876 (1974); See, also, Starchk v. Wittenberg, 411 So.2d 1000 (Fla. 5th DCA 1982).

It therefore, seems clear that the opinion in this case conflicts with the opinion of the Fifth District Court of Appeal cited above.

CONCLUSION

The Opinion of the Third District Court of appeal in the case sub judice, directly and expressly conflicts with the Opinion of the Fifth District Court of Appeal in Robinson v. State, 455 So.481 So.2d 481 (Fla. 5th DCA 1984), and; therefore, this Court should exercise its discretionary jurisdiction over the matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION, was furnished by mail to: ARTHUR W. CARTER, ESQ., 1441 N.W. North River Drive, Miami, Florida 33125, and to JOHN H. LIPINSKI, ESQ., 1441 N.W. North River Drive, Miami, Florida 33125, on this 24th day of July, 1985.

CHARLES M. FAHLBUSCH
Assistant Attorney General

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