IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,419

THE STATE OF FLORIDA,

Petitioner,

-vs-

MARIO DELGADO-SANTOS,

Respondent.

---

ON PETITION FOR DISCRETIONARY REVIEW

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# RESPONDENT'S BRIEF ON JURISDICTION

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## INTRODUCTION

The Petitioner, State of Florida, was the appellee in the District Court of Appeals and the prosecution in the trial court. The Respondent, Mario Delgado-Santos, was the appellant in the Third District Court of Appeals and the defendant in the trial court. The parties will be referred to as they stood before this Court. The symbol "A." will be utilized to designate the appendix attached hereto. All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

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

During the defendant's trial, his co-defendant, Pizarro, was called as a state's witness. Pizarro testified that the robbery was his (Pizarro's)idea and that the defendant had nothing to do with the robbery. The prosecution then showed Pizarro a prior statement in which he (Pizarro) had implicated the defendant. Pizarro, who was sixteen years old when he was taken into custody, had given this statement to the police after he had been transported in handcuffs first to one and then to another police station for "questioning". At the end of a long process of "pre-statement interrogation," while confined in a holding cell, Pizarro made the statement. The statement was transcribed by a stenographer.

At trial, Pizarro testified that he did not give the statement freely and voluntarily and that the statement was a lie.

Over the defendant's objection, Pizarro's statement was admitted into evidence as direct substantive evidence of the defendant's guilt.

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

The defendant appealed to the Third District Court of Appeal, which reversed the defendant's conviction and remanded the case for a new trial.

This appeal follows.

## QUESTION PRESENTED

WHETHER THE INSTANT OPINION OF THE THIRD DISTRICT COURT OF APPEAL, DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN ROBINSON v. STATE, 455 So.2d 481 (Fla. 5th DCA 1984) IN THAT BOTH DECISIONS HELD INADMISSIBLE AS DIRECT SUBSTANTIVE EVIDENCE STATEMENTS MADE DURING POLICE INTERROGATIONS?

## SUMMARY OF ARGUMENT

The statement of co-defendant Pizarro-Ortiz made during a police interrogation was introduced as substantive evidence, over the defendant's objection. Pizarro-Ortiz stated the statement was a lie and had not been freely and voluntarily made. In both the District Court opinion reversing the defendant's conviction and Robinson v. State, supra, the Courts held that a police interrogation was not such an "other proceeding" within the meaning of §90.801(2)(A) as to allow a statement made during police interrogation to be admitted as direct, substantive evidence.

In Robinson v. State, supra, relied upon by the State, the Court found a similarly made statement also to be inadmissible. As in both cases, the statements were ruled inadmissible, there is no "express and direct conflict" necessary for discretionary review before this Court. See, Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); Neilson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

## ARGUMENT

THE INSTANT OPINION OF THE THIRD DISTRICT COURT OF APPEAL DID NOT DIRECTLY AND EXPRESSLY CONFICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN ROBINSON v. STATE, 455 So.2d 481 (Fla. 5th DCA 1984) IN THAT BOTH DECISIONS HELD INADMISSIBLE AS DIRECT SUBSTANTIVE EVIDENCE STATEMENTS MADE DURING POLICE INTERROGATIONS.

In the instant case, the District Court held:

> The controlling question, presented is whether a police interrogation is a "proceeding" under section 90.801(2)(a), Florida Statutes (1981), so as to permit the admission as substantive evidence of a trial witness' prior inconsistent statement made during such questioning. On the conclusion that it is not, we reverse the judgment below for a new trial.

(A. 1).

In the case of Robinson v. State, supra, on which the Petitioner relies upon for conflict, the Court also reversed a defendant's conviction finding a statement made during police interrogation was inadmissible as substantive evidence, stating:

> Unlike a trial, hearing, grand jury proceeding or even immigration interrogation, a formalized proceeding is not presented in a police interrogation context and it is this, along with the oath, which tends to assure the trustworthiness of the statement. It is difficult to believe that Congress, in enacting Rule 801(d)(1)(A) or our legislature, in passing section 90.801 (2)(a) intended police questioning, such as occurred here, to be equated with a trial or grand jury proceeding.

(P. 484).

In both Robinson and the instant case, the District Courts

reversed the defendant's conviction finding statements made during a police interrogation inadmissible. There is no express and direct conflict between these cases so as to vest this Court with jurisdiction.

## CONCLUSION

Based on the foregoing facts, arguments and authorities, Respondent requests this Court to deny discretionary review in this cause.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief of Jurisdiction was delivered by mail to the Office of the Attorney General, CHARLES M. FAHLBUSCH, Assistant, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 16 day of September, 1985.

John Lipinski