IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,365

RUBEN LAWHORNE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

HOWARD K. BLUMBERG
Assistant Public Defender

Counsel for Petitioner

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INTRODUCTION

Petitioner, Ruben Lawhorne, was the defendant in the trial court and the appellant in the District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. All references are to the defendant's appendix, paginated separately and identified as "A", followed by the page numbers.

STATEMENT OF THE CASE AND FACTS

At the defendant's trial, he admitted to six prior convictions in response to questions posed by defense counsel during direct examination (A. 1). Defense counsel then sought to question the defendant further on direct examination about the specifics of those prior convictions, but the trial judge disallowed any such inquiry (A. 1).

On appeal to the District Court of Appeal, Third District, the trial judge's restriction of the questioning of the defendant was upheld, and the defendant's convictions were affirmed (A. 1-5). The majority opinion based its affirmance on the following grounds:

> In the present case, the defendant's position might have merit if the testimony sought to be elicited had come after the defendant had been impeached by the state with his prior convictions and defense counsel was seeking to rehabilitate him. The testimony, however, was sought during the direct examination of the defendant. Thus, the questions concerning the specifics of the defendant's six prior convictions were both untimely and improper and the trial court correctly sustained the state's objection thereon. See Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985). See also Ryan v. State, 457 So.2d 1084, 1092 (Fla. 4th DCA 1984).

(A. 2-3) (footnote omitted). The majority opinion then expressly condemned the practice of "anticipatory rehabilitation," quoting with approval from Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) and Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985), review granted Case No. 67,240.

In a specially concurring opinion, Chief Judge Schwartz expressly sanctioned "anticipatory rehabilitation" and recognized

the conflict of decisions created by the majority opinion in this case:

> [C]ontrary to Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985) and the majority opinion, I agree with the second district's conclusions in Bell v. State, 473 So.2d 734 (Fla. 2d DCA 1985), and Sloan v. State, 472 So.2d 488 (Fla. 2d DCA 1985), that there is nothing magical about the order in which admissible impeachment and explanatory evidence is introduced at trial.
>
> * * *
>
> I think this case should be disposed of on grounds, [1] which would make unnecessary both the majority's erudite discussion on the merits, including the conflict it creates with Bell and Sloan, and the statement of my quite different views.

(A. 4-5).

The defendant's motion for rehearing was denied on January 20, 1986 (A. 6). Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed February 19, 1986.

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1 Chief Judge Schwartz would have upheld the exclusion of the evidence because he felt it was inadmissible either on direct examination or re-direct examination (A. 4-5). He also expressed the opinion that any error on this evidentiary issue was harmless (A. 5).

SUMMARY OF ARGUMENT

A conflict of decisions presently exists in Florida concerning the propriety of "anticipatory rehabilitation". The Fourth and Fifth District Courts of Appeal have condemned "anticipatory rehabilitation", see Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) and Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985), review granted, Case No. 67,240, while the Second District Court of Appeal has sanctioned the practice. See Bell v. State, 473 So.2d 734 (Fla. 2d DCA 1985), review granted, Case No. 67,434 and Sloan v. State, 472 So.2d 488 (Fla. 2d DCA 1985), review granted, Case No. 67,421. By aligning itself with the decisions in Ryan and Price and condemning "anticipatory rehabilitation", the majority opinion of the Third District Court of Appeal in the present case stands in express and direct conflict with the decisions in Bell and Sloan.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN BELL v. STATE, 473 So.2d 734 (Fla. 2d DCA 1985), review granted, Case No. 67,434 and SLOAN v. STATE, 472 So.2d 488 (Fla. 2d DCA 1985), review granted, Case No. 67,421.

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In the instant case, the Third District Court of Appeal announced a rule of law which conflicts with a rule previously announced by the Second District Court of Appeal in Bell v. State, 473 So.2d 734 (Fla. 2d DCA 1985), review granted, Case No. 67,434 and Sloan v. State, 472 So.2d 488 (Fla. 2d DCA 1985), review granted, Case No. 67,421. Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

In the case at bar, the district court held that the trial court did not err in precluding defense counsel from questioning the defendant on direct examination about the specifics of six prior convictions where the defendant had just admitted the convictions during the same direct examination (A. 1-2). A majority of the district court based this holding on the fact

that the questioning occurred during direct examination:

> In the present case, the defendant's position might have merit if the testimony sought to be elicited had come after the defendant had been impeached by the state with his prior convictions and defense counsel was seeking to rehabilitate him. The testimony, however, was sought during the direct examination of the defendant. Thus, the questions concerning the specifics of the defendant's six prior convictions were both untimely and improper and the trial court correctly sustained the state's objection thereto. See Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985). See also Ryan v. State, 457 So.2d 1084, 1092 (Fla. 4th DCA 1984).

(A. 2-3) (footnote omitted). In support of this holding, the majority opinion joined in the condemnation of "anticipatory rehabilitation" previously expressed by the Fourth District Court of Appeal in Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) and by the Fifth District Court of Appeal in Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985), review granted, Case No. 67,240:

> "Anticipatory rehabilitation" not only "scrambles the orderly procedure laid out by the Florida Rules of Evidence," Ryan, 457 So.2d at 1092, but it also secures the admission of testimony that otherwise might not be permitted to be placed before the jury. In reversing a trial court for permitting the state to anticipatorily rehabilitate a state witness concerning a prior inconsistent statement, the court in Price explained:
>
> > The State "anticipates" impeachment of its own witness by the defense at the State's peril because the option is always with the defense to impeach or not. The defense often quite reasonably does not impeach a particular witness because the defense knows that the evidence that the State is entitled to present on rehabilitation of its witness will be much more harmful to the defense than any benefit derived from an impeachment of that

> witness. In addition, in such circumstances the State is always vulnerable to the assertion by the defense counsel that he was going to forego impeachment.
>
> 469 So.2d at 211-12.

(A. 3).

The Second District Court of Appeal, in express and direct conflict with the decisions in Price and Ryan,[2] has sanctioned "anticipatory rehabilitation" in Bell v. State, supra, 473 So.2d at 735:

> Our research discloses no definitive precedent upon which we sanction the trial technique followed by the prosecutor in this case. It does appear, however, that the Fourth District, in dictum, has condemned anticipatory rehabilitation upon the grounds that it 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." Ryan v. State, 457 So.2d 1084, 1092 (Fla. 4th DCA 1984). We do not subscribe to our sister court's view.

and in Sloan v. State, supra, 472 So.2d at 490:

> Finally, we reject the contention that the trial court erred in permitting the state to question one of the co-perpetrators, Grant, in connection with his prior inconsistent testimony. It is evident from the record that the state was not seeking to impeach Grant, but rather to bolster his credibility by revealing his earlier inconsistent statements. In Bell v. State, ___ So.2d ___, Case No. 84-1616 (Fla. 2d DCA June 7, 1985), we sanctioned that form of trial strategy, and

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2 Based on this conflict of decisions, this Court has granted review in Bell (Case No. 67,434), Price (Case No. 67,240) and Sloan (Case No. 67,421). Oral arguments in Bell and Price are scheduled for April 8, 1986.

found it not offensive to section 90.608, Florida Statutes.

By condemning anticipatory rehabilitation based on the decisions in Ryan and Price, the district court of appeal in the present case has announced a rule of law which expressly and directly conflicts with the rule announced by the Second District Court of Appeal in Bell and Sloan. The specially concurring opinion of Chief Judge Schwartz in this case expressly recognizes this conflict:

> [C]ontrary to Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985) and the majority opinion, I agree with the second district's conclusions in Bell v. State, 473 So.2d 734 (Fla. 2d DCA 1985), and Sloan v. State, 472 So.2d 488 (Fla. 2d DCA 1985), that there is nothing magical about the order in which admissible impeachment and explanatory evidence is introduced at trial.
>
> * * *
>
> I think this case should be disposed of on grounds, [3] which would make unnecessary both the majority's erudite discussion on the merits, including the conflict it creates with Bell and Sloan, and the statement of my quite different views.

(A. 4-5). This Court's exercise of its discretionary jurisdiction is necessary to remedy the conflict of decisions created by the majority opinion in this case.

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3 See n. 1, supra.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 28th day of February, 1986.

HOWARD K. BLUMBERG
Assistant Public Defender