IN THE SUPREME COURT OF FLORIDA

OLGA ROMANI, M.D.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO: 72,947

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEALS

INITIAL BRIEF OF PETITIONER OLGA ROMANI, M.D.

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INTRODUCTION

This is an appeal by petitioner, Olga Romani, M.D., from a jury verdict of guilty before the Honorable Robert Kaye in the Circuit Court of the Eleventh Judicial Circuit. Petitioner was convicted of conspiracy to commit first degree murder and first degree murder. Petitioner's conviction was affirmed on appeal.

In this appeal petitioner argues that erroneously admitted double and triple hearsay statements denied her a fair trial. Without these erroneously admitted statements there is no evidence to support the conviction of first degree murder.

Parties will be referred to as they appear in this court, although respondent may be referred to as the State. The symbol "R" refers to the record on appeal. The symbol "T" refers to the trial transcript.

All emphasis has been supplied.

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STATEMENT OF THE CASE

PETITIONER, OLGA ROMANI, M.D., was named as an unindicted co-conspirator on June 22, 1982, and was indicted by the same Grand Jury, despite no presentation of additional evidence on September 14, 1982. Petitioner was charged with the first degree murder and conspiracy to commit the first degree murder of Dr. Gerardo DeMola. At trial petitioner was represented by Ms. Carin Kahgan, Esq..

Trial began on January 26, 1983. Petitioner was convicted both of first degree murder and conspiracy to commit first degree murder. Judgment and Sentence were entered on February 3, 1983.

On March 29, 1983 petitioner filed a Notice of Appeal. Petitioner was represented by the Office of the Public Defender. The appeal was dismissed without prejudice to the re-filing of an appeal at a later date. The Office of the Public Defender was substituted by Special Assistant Public Defender, Carin Kahgan, Esq.. Undersigned counsel filed a substitution of counsel for Ms. Kahgan simultaneously with the filing of the brief in the lower court. The Third District Court of Appeals affirmed petitioner's conviction. Romani v. State, 528 So. 2d 15 (Fla. 3rd DCA 1988).

This court accepted conflict jurisdiction and has set oral argument for February 9, 1989.

STATEMENT OF FACTS

Petitioner was indicted for murder and conspiracy to commit the murder of Dr. Gerardo DeMola. (R1-5a). This conspiracy is charged to have occurred between January 1, and February 20, 1981. (R6-8a). Dr. DeMola was murdered on February 18, 1981.

Prior to trial petitioner made a Motion For Pre-trial Determination Of Conspiracy objecting to the admission of co-conspirator statements and the violation of petitioner's right to confront witnesses pursuant to Article 1, Section 16 of the Florida Constitution. This motion was denied. (R33-37a).

Trial began on January 26, 1983. During opening and closing arguments the prosecutor stated that the testimony of state witnesses would be inconsistent. (T 75,784,795).

Ms. Mercedes Hortensia Alvarez was the State's first witness. Both Ms. Alvarez and her son, Mr. Anthony Anderson, were unindicted co-conspirators. (R6-8a).

Ms. Alvarez testified that she met petitioner as a patient. (T 96). In January of 1981, Ms. Alvarez and later her son became employees. (T 96,97). On February 5, 1981, a search warrant was executed at the clinic in connection with a Medicaid fraud investigation. (T 99,166). Petitioner would later be convicted of Medicaid fraud. (T 173).

Ms. Alvarez testified that petitioner asked her if she knew of anyone who could "get rid of these people." (T 102). Petitioner gave her a piece of paper with the names of Messers. John Nulty, Richard Harris and Dr. Gerardo DeMola. (T 103) Ms.

Alvarez also testified that another employee, Mr. Julio Garcia, was also present. (T 137). Mr. Garcia testified at trial and denied being present at any discussion involving homicide. (T 439-40).

Ms. Alvarez testified that she asked her son, Mr. Anthony Anderson, whether his friend, Mr. Roger Ibarra, would be willing to commit the murders. Mr. Anderson agreed to approach Mr. Ibarra with this offer. (T 103).

Ms. Alvarez testified that Messers. Anderson, Garcia, and Ibarra met to discuss the murders of Mr. Nulty, Mr. Harris, and Dr. DeMola (T 103) and that Mr. Ibarra agreed to commit these murders at the price of $10,000 per person. (T 104). According to Ms. Alvarez, petitioner agreed to these terms and provided a $5,000 initial payment to Ms. Alvarez who gave it to Mr. Ibarra. (T 105).

Ms. Alvarez stated that she contacted Mr. Ibarra, confirmed the agreement and gave Mr. Ibarra the $5,000. (T 105). Mr. Ibarra was given a list of victims and specific instructions that Mr. Nulty was to be the first victim.

Ms. Alvarez heard of Dr. DeMola's death on the radio. (T 106). Sometime later Ms. Alvarez, Mr. Garcia, Mr. Ibarra and petitioner ate dinner together. (T 106). Ms. Alvarez stated that she gave the second $5,000 payment to Mr. Garcia who was to give it to Mr. Ibarra. (T 107). Mr. Garcia denies that this conversation occurred and denies ever receiving the $5,000 or giving any money to Mr. Ibarra. (T 443).

Ms. Alvarez testified that she did not know who actually committed the murder of Dr. DeMola (T 151), and has never met co-conspirator Mr. Antonio Gonzalez-Valdibia. (T 127).

This testimony is contrary to Mr. Ibarra's testimony that Mr. Gonzalez-Valdibia and Ms. Alvarez together conducted surveillance of Mr. Nulty and Mr. Harris. (T 314). Ms. Alvarez testified that she expected Mr. Ibarra himself to commit the murders. (T 151).

Mr. Roger Ibarra also testified for the State. (T 284). Mr. Ibarra claimed great success in manipulating women and admitted attempting to get "close" to appellant to use "physical means to obtain money." (T 330). Mr. Ibarra volunteered during a break in his deposition that "if she (petitioner) had helped me, none of this would have happened." (T 621). According to the prosecutor Mr. Roger Ibarra is a "hood-type" and an "idiot". (T 795). Mr. Ibarra , "no question... would hustle anybody, you better believe that. He is not a man of principle." (T 796).

Mr. Ibarra admitted to a history of psychiatric illness that has required continual treatment and medication since he was thirteen years of age. Mr. Ibarra was hospitalized for two years because of psychiatric illness. (T 342). Mr. Ibarra is the primary source of the hearsay statements now challenged on appeal.

Mr. Ibarra testified that he became involved in the homicide of Dr. DeMola at the invitation of his friend, Mr. Anderson.

(T 292). Mr. Ibarra related that Ms. Alvarez told him that she worked for a lady doctor who wanted someone killed (T 293), and agreed to commit the murder. (T 293).

Mr. Ibarra subsequently contacted Mr. Antonio Gonzalez-Valdibia to subcontract the murder. (T 293). Mr. Gonzalez-Valdibia related to Mr. Ibarra that he would ask his friend Mr. Alberto Vinas if he also wished to participate in the homicide. (T 294). According to Mr. Ibarra, Mr. Vinas was ultimately contacted and agreed to participate in the homicide. (T 294). It was Mr. Ibarra's intention to keep $2,000 and forward the remaining $8,000 to Mr. Gonzalez-Valdibia and Mr. Vinas for the commission of the homicide. (T 296).

Mr. Ibarra contacted Ms. Alvarez and confirmed their agreement. (T 295). Ms. Alvarez gave Mr. Ibarra a list of three names and addresses. (T 295). Contrary to the testimony of Mr. Ibarra, the list of names given to him did not contain any addresses. (T 140). Mr. Ibarra received the first payment with the understanding that Mr. John Nulty was the intended victim. (T 295). According to Mr. Ibarra, he passed the list and $4,000 to Mr. Gonzalez-Valdibia. (T 296).

Mr. Ibarra further related that he and Mr. Gonzalez-Valdibia and Ms. Alvarez together surveilled Mr. Nulty. (T 314). According to Mr. Ibarra, they drove to a building and surveilled a man who fit the description of Mr. Nulty. (T 315). Ms. Alvarez denied that this surveillance occurred. (T 127-8).

Of his own accord, Mr. Ibarra chose not to follow the instructions to kill Mr. Nulty. Mr. Ibarra alone decided that Dr. DeMola would be the target of the homicide. (T 317). Mr. Ibarra did not communicate this change to anyone. (T 297,317,320).

Mr. Ibarra testified that he met petitioner prior to the homicide of Dr. DeMola. Mr. Ibarra related that during this conversation petitioner mentioned that Mr. Nulty was an auditor conducting an investigation for Medicaid fraud. (T 298). This testimony is contrary to Mr. Ibarra's own testimony during cross-examination, Ms. Alvarez' and petitioner's testimony. Mr. Ibarra confirmed during cross-examination that he did not meet petitioner until after Dr. DeMola's death. (T 299-300).

Ms. Alvarez, Mr. Garcia and Mr. Ibarra met at a restaurant to celebrate petitioner's birthday. (T 527). This dinner was after the homicide. According to Mr. Ibarra, this meeting was also to receive the final payment for the homicide. (T 322).

Mr. Ibarra testified that he learned of Dr. DeMola's death from Mr. Gonzalez-Valdibia and Mr. Vinas. (T 299). This conversation transpired after the death of Dr. DeMola. (T 299). This is the only testimony regarding the persons responsible for the killing of Dr. DeMola.

Co-defendant Gonzalez-Valdibia also testified for the State. (T 243). Mr. Gonzalez-Valdibia stated that Mr. Ibarra asked him to participate in a job to "kill a doctor" (T 247), but emphatically denied participating in the murder of Dr. DeMola.

(T 261). Mr. Gonzalez-Valdibia pled guilty to lesser charges. (T 244).

After Mr. Valdibia refused to participate in the homicide, Mr. Ibarra asked him if Mr. Vinas would commit the crime. (T 247). At the request of Mr. Ibarra, Mr. Gonzalez-Valdibia gave Mr. Ibarra directions to Mr. Vinas' home. (T 248). Mr. Gonzalez-Valdibia was not present for this conversation between Mr. Ibarra and Mr. Vinas. (T 248). Several days after this conversation, Mr. Vinas told Mr. Gonzalez-Valdibia that the conversation with Mr. Ibarra concerned "killing a doctor." (T 248).

Mr. Gonzalez-Valdibia's next involvement in this case occurred when Mr. Ibarra gave him an envelope to give to Mr. Vinas. (T 249). Mr. Vinas opened the envelope in the presence of Mr. Gonzalez-Valdibia and saw that it contained $5,000. (T 249).

Mr. Gonzalez-Valdibia asked Mr. Vinas for a $2,000 car loan but testified that he later thought Mr. Vinas made this loan to "keep his mouth shut." (T 249). Mr. Gonzalez-Valdibia testified that after the homicide, he was told by Mr. Vinas that a Mr. Herbierto Nodarse and Mr. (William-Popo) committed the crime. (T 250). It is not clear whether (William-Popo) refers to one or two individuals. According to Mr. Gonzalez-Valdibia, Mr. Nodarse drove a white pick up truck with a purple bird on the hood. (T 256-7).

During cross-examination Mr. Gonzalez-Valdibia emphatically denied participating in the death of Dr. DeMola. (T 258-9,261-263). He also denied being a co-conspirator in the homicide of

Dr. DeMola, being present when Mr. Ibarra gave the list of intended victims to Mr. Vinas as Mr. Ibarra claims, discussing the arrangement of money with Mr. Ibarra for the killing of Dr. DeMola as Mr. Ibarra claims, or receiving money with the understanding that it was for the purpose of killing Dr. DeMola. (T 261-3). Like Mr. Ibarra and Ms. Alvarez, Mr. Gonzalez-Valdibia did not have any personal knowledge regarding the perpetrators of the homicide.

Mr. Freddy Cruz, a North Miami General Hospital employee, also testified for the State. (T 181). Mr. Cruz related that he was at the hospital emergency room entrance at 11:45 P.M. on February 18, 1981. Mr. Cruz saw two men, a white male and a latin male with a dark complexion walking toward the doctors' parking lot. He heard these people "cracking some windshields, or breaking windows." (T 188). Upon hearing the noise, Mr. Cruz ran across the parking lot and saw the two men jump into the back of an approaching white pick-up truck. Mr. Cruz discovered the body of Dr. DeMola in the hospital parking lot. (T 190). None of the glass in Dr. DeMola's vehicle was damaged. (T 201). Mr. Cruz did not see a purple bird on the hood of the get-away vehicle, unlike the vehicle Mr. Gonzalez-Valdibia described as Mr. Nodarse's.

Police Officer Scott was the first law enforcement officer to arrive at the scene. (T 198). Officer Scott did not note any broken glass in the victim's automobile. (T 201).

MDPD Technician James Casey obtained eleven latent fingerprints from the victim's vehicle. (T 224). MDPD Technician Richardson found one fingerprint "to be of value" and compared it with the fingerprints of Messers. Ibarra, Gonzalez-Valdibia, Vinas, Anderson, and Nodarse. The comparison provided negative results. (T 237-8).

MDPD Criminalist Kennington examined the spent casings and projectiles and determined that their markings were consistent with having being fired from a weapon with a silencer. (T 368).

Mr. John Nulty, an investigator for the Medicaid Fraud Control Unit of the State of Florida, Auditor's General's Office, stated that he investigated petitioner's medical practice. (T 162). The investigation covered the period during which petitioner practiced without a partner. (T 165). Dr. DeMola was not a potential witness in the Medicaid investigation. Mr. Nulty did not take any statements from Dr. DeMola, who also had been the target of two earlier Medicaid fraud investigations. (T 169).

Medicaid Fraud Investigators took statements of petitioner's employees and her patients. Search warrants were executed at petitioner's medical clinic on February 5, 1981. (T 166). The State of Florida paid petitioner $184,000.68 in Medicaid billings. (T 172). Petitioner was convicted of the wrongful receipt of $20,400.00 (T 173).

Agent Edward Richardson of the FBI testified that petitioner had registered a complaint of Medicaid fraud against Dr. DeMola.

(T 357). Agent Richardson testified that his resulting investigation of Dr. DeMola concluded in December 1980. (T 358).

After the State rested its case, petitioner moved for A Judgement of Acquittal and renewed her Motion To Exclude the Hearsay Statements of Co-Conspirators because of a lack of independent evidence establishing their admissibility. Both motions were denied. (T 378-383).

Petitioner called MDPD Detective Daniel Berrigo who arrested Mr. Anthony Anderson in November 1982, on a warrant for violation of probation and as a suspect in several burglaries. (T 391). Although Mr. Anderson was not cooperative regarding the burglaries, he did offer information regarding the death of Dr. DeMola. (T 398).

Mr. Anderson testified that he contacted Mr. Ibarra to participate in the murder of Dr. DeMola. (T 399) Mr. Anderson claimed the ability to buy the murder weapon. (T 401). Mr. Anderson described a different caliber of murder weapon than was actually used in the homicide. (T 401).

Dr. Olga Romani, M.D. testified on her own behalf. (T 504). She explained that she quit working with Dr. DeMola in June 1979, because of his financial irregularities. (T 505).

Petitioner filed a complaint against Dr. DeMola with the FBI. (T 357). Petitioner first learned of the Medicaid investigation through discussions with her new patients who related interviews by Medicaid Investigators. (T 520). It was clear to petitioner that the investigation concerned her new

patients and therefore Dr. DeMola could not be a witness in the Medicaid investigation of petitioner. (T 520).

Petitioner knew that there were many Medicaid investigators in the State of Florida and that no benefit could be derived from the death of one of these investigators. (T 521). The Medicaid investigation was common knowledge among employees of the medical clinic.

Dr. Romani testified that Ms. Alvarez and Mr. Garcia often visited petitioner's home to process medicaid forms. (T 514,517). Petitioner discovered that $12,000 was taken from her home in the beginning of 1981. (T 530). This fact was corroborated by petitioner's former husband. (T 661).

Petitioner did recall a conversation with Ms. Alvarez in which Ms. Alvarez broached the subject of "getting rid of people." (T 514). Ms. Alvarez stated to petitioner that "if I had that problem, I would get rid of them, I would pay." (T 515). Petitioner did not know that Ms. Alvarez intended to pursue the murder of potential Medicaid witnesses and petitioner did not provide money for the murder of Dr. DeMola. (T 516).

Ms. Sylvia Viyate, petitioner's accountant, testified that she introduced petitioner to spiritualist Jose Kendelton. (T 632). Mr. Kendelton instructed petitioner to write three lists containing the names of people involved in her life. (T 525,654).

In the presence of Ms. Alvarez, petitioner drafted the list of five or six names. (T 525). This list included Dr. DeMola,

Mr. Nulty, Ms. Maria Castro and Mr. Harris. (T 525). Petitioner gave this list to Ms. Alvarez for delivery to Mr. Kendelton. (T 526).

Mr. Ibarra also was invited to petitioner's birthday dinner with Ms. Alvarez and Mr. Garcia. (T 527). Petitioner's birthday was on the eleventh day of February. (T 527).

The State's cross-examination of petitioner focused upon her bank withdrawals on February 5, 1981 (T 583), the date a search warrant was executed at petitioner's clinic. Petitioner withdrew money from her account to avoid its seizure. The State implied during cross-examination that this money was to pay for the murders. (T 591). The State, over petitioner's objection, informed the jury it was refreshing petitioner's recollection with bank statements that were never introduced into evidence. (T 583). Petitioner's testimony was that she did not remember the transactions but whatever happened was reflected in the bank statements. (T 587, 590,591,597,598). The prosecutor was allowed to impeach petitioner with alleged bank statements that were not introduced into evidence. (T 583-98).

Ms. Sylvia Viyate testified that she had been petitioner's accountant for many years and confirmed petitioner's allegations of irregularities on the part of Dr. DeMola. (T 631). Ms. Vilate also confirmed that she introduced petitioner to Mr. Kendelton, who was a spiritualist. (T 632). Ms. Vilate is the mother of Circuit Court Judge Maria Korvic. (T 628).

Ms. Sylvia Evans testified she was the court reporter who transcribed the deposition of Mr. Ibarra. (T 620). During a break in his deposition, Mr. Ibarra volunteered to petitioner's counsel that he had tried to call the petitioner, but that she would not talk to him. (T 621). Mr. Ibarra stated that "if she had helped me this wouldn't have happened." (T 621).

Mr. Julio Garcia testified that he was a former employee of petitioner and lover of Ms. Alvarez. (T 433-4). Ms. Alvarez and Mr. Garcia frequently visited petitioner's home where Ms. Alvarez processed Medicaid claims. Mr. Garcia remembered petitioner asking a rhetorical question, after the subject had been raised by Ms. Alvarez, regarding "getting rid of people." (T 439). Mr. Garcia denied knowing these type of people and the subject was never again discussed. (T 439).

Mr. Garcia never saw Ms. Alvarez receive $5,000 or a list of potential victims from petitioner. (T 440). Mr. Garcia was never present for any conversations between Ms. Alvarez, Mr. Ibarra and Mr. Anderson concerning murder. (T 444-5). Contrary to the testimony of Ms. Alvarez, Mr. Garcia never received any money from Ms. Alvarez and never discussed the murder of Dr. DeMola. (T 443). Mr. Garcia testified that petitioner's investigation for Medicaid fraud was common knowledge among employees. (T 453). Mr. George Cardet, Esq., testified that he represented petitioner during the Medicaid fraud investigation. (T 485-6).

After the defense rested, petitioner renewed her Motion For Judgement Of Acquittal And Motion To Exclude The Hearsay Statements Of Co-Conspirators because there was no independent evidence to establish their admissibility. These motions were denied. (T 669-673). Petitioner was found guilty on both counts.

SUMMARY OF ARGUMENT

I. CO-CONSPIRATORS' STATEMENTS ARE NOT ADMISSIBLE BECAUSE THEY DO NOT SATISFY THE REQUIREMENTS OF FLA. STAT. 90.803(18)(e)

A. FLA. STAT. 90.803(18)(e) CODIFIES FIFTY YEARS OF PRECEDENT REQUIRING INDEPENDENT NON-HEARSAY TESTIMONY

None of the state witnesses in the case before the court had direct knowledge as to the perpetrators of the homicide. Since 1937, this court has required that independent non-hearsay testimony establish the out-of-court declarant's participation in the conspiracy prior to the admission of co-conspirator statements. Brown v. State, 175 So. 515 (Fla. 1937). This precedent was codified into Fla. Stat. 90.803(18)(e). As a matter of statutory interpretation this court has consistently interpreted the legislative intent of the independent evidence requirement of Fla. Stat. 90.803(18)(e) to mean non-hearsay testimony. Nelson v. State, 490 So. 2d 32 (Fla. 1986).

B. THERE WAS NO EVIDENCE EXCEPT HEARSAY STATEMENTS THEMSELVES THAT ESTABLISH THE OUT-OF-COURT DECLARANTS' PARTICIPATION IN THE CONSPIRACY

There is no independent evidence, whether non-hearsay or hearsay from another source, that establishes the out-of-court declarants' participation in the conspiracy with the exception of one ambiguous fact. Mr. Gonzalez-Valdibia learned that Mr. Nadorse drove a white pick up truck with a purple bird painted on the hood. Mr. Freddy Cruz heard two men breaking the windshields of cars in the doctor's parking lot. Mr. Cruz saw these two men jump into an approaching white pick up truck and drive away. Mr. Cruz discovered Dr. DeMola's body. None of the windows in Dr.

DeMola's vehicle were damaged. Thus there was virtually no evidence except the hearsay statements themselves establishing the participation of out-of-court declarant Mr. Vinas, Nadorse, (Popo and William's) participation in the conspiracy.

C. THIS COURT CANNOT IGNORE THE CLEAR LANGUAGE OF FLA. STAT. 90.803(18)(e) AND THIS COURT'S PREVIOUS INTERPRETATION OF THE STATUTE'S LEGISLATIVE INTENT

The rationale of Bourjaily v. United States, 483 U.S. ____,107A S. Ct. 2775 (1987) is inapplicable to the case before the court. Bourjaily interprets Fed. R. Evid. 801(d)(2)(e) in light of the subsequent enactment of Fed. R. Evid. 104.

Fla. Stat. 90.803(18)(e) specifically requires an instruction to the jury that independent evidence must establish the out-of-court declarants' participation in the conspiracy while Fed. R. Evid. 801(d)(2)(e) has no such requirement. Further, Fed. R. Evid. 104 requires that the court make determinations of admissibility and specifically allows that the court may consider hearsay. This reasoning is contrary to the explicit requirements of Fla. Stat. 90.803(18)(e) and 105. As a matter of statutory interpretation, this court has consistently interpreted the legislative intent of independent evidence in Fla. Stat. 90.803(18)(e) as referring to non-hearsay testimony. Stare decisis precludes this court from re-examining the legislative intent of Fla. Stat. 90.803(18)(e) and 105.

D. THE CO-CONSPIRATOR STATEMENTS WERE NOT MADE IN FURTHERANCE OF THE CONSPIRACY

Mr. Gonzalez-Valdibia testified he had nothing to do with the death of Dr. DeMola, was not paid to participate in any

homicide, and was never present for any conversation between Mr. Vinas and Mr. Ibarra regarding homicide. Thus, the statements of Mr. Gonzalez-Valdibia were not in furtherance of the conspiracy because he was not a co-conspirator. In addition, all of the out-of-court statements by Mr. Vinas, Nadorse, (William and Popo) were made after the death of Dr. DeMola and thus after the consumation of the object of the conspiracy. Thus these statements were not made during and in furtherance of the conspiracy. Finally, it must be noted that the lower court mischaracterized the record when it described the statements as being made in an effort to collect the final payment for the homicide. There is absolutely no evidence in the record to support this argument.

II. HEARSAY TESTIMONY DEPRIVED PETITIONER OF A RIGHT TO CONFRONT WITNESSES

Mr. Vinas was a co-defendant who did not testify at trial. Mr. Vinas is the source of the hearsay statements now challenged on appeal. This violates the principle of Bruton v. United States, 391 U.S. 123 (1968). The admission of the hearsay statements in the case before the court violates both petitioner's right to confront witnesses pursuant to Article 1, Section 16, Fla. Const. and the sixth amendment of the United States Constitution.

ARGUMENT

I. CO-CONSPIRATORS' STATEMENTS ARE NOT ADMISSIBLE BECAUSE THEY DO NOT SATISFY THE REQUIREMENTS OF FLA. STAT. 90.803(18)(e)

A. FLA. STAT. 90.803(18)(e) CODIFIES FIFTY YEARS OF PRECEDENT REQUIRING INDEPENDENT NON-HEARSAY TESTIMONY

Over the objection of petitioner, the court admitted the hearsay testimony of Mr. Roger Ibarra and Mr. Gonzalez-Valdibia.[1] (Appendix A). The prosecutor admitted to the jury that there were inconsistencies in the testimony of co-conspirators Alvarez, Ibarra, and Gonzalez-Valdibia. (T 75). The prosecutor described Mr. Ibarra as your "typical hood-type," "idiot," "not a man of principle." He "would hustle anybody." (T 796). Mr. Ibarra admitted to a history of psychiatric illness that has required continual treatment and medication since he was thirteen years of age. Mr. Ibarra was hospitalized for two years because of psychiatric illness. (T 342). Mr. Ibarra and Mr. Gonzalez-Valdibia said that non-testifying co-defendant, Mr. Alberto Vinas said that out-of-court declarants, Mr. Nodarse and (William, Popo) admitted to committing the murder of Dr. DeMola. (T 50,249,255,298-302). [2] None of the state's witnesse in the

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1. Some of Mr. Ibarra's statements contain double and triple hearsay. Mr. Ibarra also testified that Mr. Gonzalez-Valdibia said that Mr. Vinas said that Messers. Nodarse, (William and Popo) admitted committing the crime. (T 298-302).

2. It is not clear whether the names of Herberto Nodarse and (William-Popo) refers to two or three individuals. Petitioner uses brackets around the name (William,Popo) to denote this ambiguity. Mr. Gonzalez-Valdibia claims that he met three individuals who were to commit the homicide. (T 250). Mr. Ibarra referred to two individuals named Nodarse and (William-

case before the court had direct knowledge as to the perpetrators of the homicide. (T 151, 298-9, 258-9). After the testimony of Ms. Hortensia Alvarez, the state's first witness, the court ruled that all co-conspirator statements were admissible. (T 241-2). Ms. Alvarez did not know and did not mention Messers. Gonzalez-Valdibia, Vinas, Nodarse, (William or Popo).[3]

Fla. Stat. 90.803(18)(e), requires that each member's participation in the conspiracy "must be established by independent evidence." As a matter of statutory interpretation, this court has consistently interpreted the legislative intent of independent evidence to mean non-hearsay testimony. Nelson v. State, 490 So. 2d 32 (Fla. 1986). Prior to the adoption of Fla. Stat. 90.803(18)(e), the common law required that independent non-hearsay evidence establish each out-of-court declarant's participation in the conspiracy prior to the admission of co-conspirator statements. Briklod v. State, 365 So. 2d 1023 (Fla. 1978); Damon v. State, 289 So. 2d 720 (Fla. 1973); Honchell v. State,257 So. 2d 889 (Fla. 1971); Duke v. State, 185 So. 422 (Fla 1938); Brown v. State,175 So. 515 (Fla 1937). **See also,**

Popo). (T 299). Similarly, the lower court refers to "two individuals who were introduced as Herberto Nodarse and Popo." Romani v. State , 528 So. 2d 15,18 (Fla. DCA 1988). Later the court refers to "Three individuals... Nodarse, (William, and Popo)." Id.at 18. Petitioner challenges the State to establish the number and names of these individuals who are supposedly the source of this reliable hearsay. Petitioner also challenges the State to establish which individual made the statements now challenged on appeal.

3. Petitioner made numerous objections to the admissibility of co-conspirator statements. **See e.g.** (R33-7a; T 92-5, 241,285).

Farnell v. State,214 So. 2d 753 (Fla. 2d DCA 1968) (Farnell provides a historical survey of the independent non-hearsay requirement).[4] See generally, C. Ehrhardt, Florida Evidence 803.18 (e) (2d Ed. 1984). Thus the independent non-hearsay requirement of Fla. Stat. 90.803(18)(e) is independent of Bourjaily v. United States, 483 U.S.____,107A S. Ct. 2775 (1987) and its interpretation of the Federal Rules of Evidence.

B. THERE WAS NO EVIDENCE EXCEPT THE HEARSAY STATEMENTS THEMSELVES THAT ESTABLISH THE OUT-OF-COURT DECLARANTS' PARTICIPATION IN THE CONSPIRACY

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4. The lower court erroneously held that the independent evidence requirement of Fla. Stat. 90.803 (18)(e) derives from the requirements of United States v. Apollo 476 F. 2d 156 (5th Cir. 1973). Romani, 528 So. 2d at 19 n. 7. As authority for this proposition the lower court erroneously cites State v. Morales 460 So. 2d 410 (Fla. 2d DCA 1984). **Id.**at 20. However, Morales merely notes that the instruction in Fla. Stat. 90.803 (18)(e) is similar to the Apollo instruction, but makes no mention of Apollo being the origin of the statutory requirement. Clearly, fifty years of common law precedent since 1937 was codified into Fla. Stat. 90.803 (18)(e). Thus the lower court's argument that because Apollo has been overruled and because Bourjaily requires a preponderance of evidence, not just at the conclusion of the evidence but prior to the admission of any co-conspirator statements, the statutory requirement of independent non-hearsay testimony in Fla. Stat. 90.803 (18)(e) can somehow be disregarded is fallacious.

The lower court also erroneously argued that because Bourjaily overrules United States v. James, 590 F. 2d 575 (5th Cir.) cert. denied, 442 U.S. 917 (1979) and provides for a more rigorous burden concerning the admissibility of co-conspirator statements, that the independent evidence instruction to the jury may be disregarded. Romani, 528 So. 2d at 20 n. 11. The court misinterprets Bourjaily which in fact provides less protection to a defendant and only overrules part of James. United States v. Ascarrunz, 838 F. 2d 759, 762 (5th Cir. 1988); United States v. Williams, 837 F 2d 1009, 1014, n. 9 (11th Cir. 1988).

There is no evidence, either independent non-hearsay or hearsay from another source, that establishes the out-of-court declarant's participation in the conspiracy with the exception of one ambiguous fact.[5] Mr. Gonzalez-Valdibia testified that Mr. Nodarse drove a white pickup truck with a purple bird painted on the hood. (T 256-7). Mr. Freddy Cruz testified that prior to finding the victim, he observed a white male and latin male of dark complexion walking toward the hospital parking lot. Later Mr. Cruz heard these people "cracking some windshields, or breaking windows." (T 188). Upon hearing the windshields breaking, Mr. Cruz ran across the parking lot and saw the two men jump into the back of an approaching white pick-up truck. (T 189-90). None of the glass in the victim's vehicle was damaged. (T 201). Mr. Cruz made no mention of a purple bird. Clearly this evidence does not establish Messers. Vinas, Nodarse, and (William-Popo's) participation in the conspiracy. [6]

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5. The lower court continually misinterpreted the issue petitioner raised on appeal. Despite arguing that there was no independent non-hearsay evidence of the **out-of-court declarant's** participation in the conspiracy, the lower court insisted upon characterizing petitioner's argument as being that there was no independent evidence of the **defendant's participation** in the conspiracy. Romani, 528 So. 2d at 16. The trial court similarly misinterpreted the law when it held that the state's first witness provided the basis for the admission of all co-conspirator's statements, although Ms. Alvarez never heard of out-of-court declarants Messers. Vinas, Nodarse,(William and Popo).

6. Because we are not sure as to the number of out-of-court declarants and as to which individuals made the statements now challenged on appeal, the evidence regarding Mr. Nodarse's pick-up truck, besides being too ambigious to establish Mr. Nodarse's participation in the conspiracy, does not establish the admissibility of statements made by (Mr. Popo or Mr.

The hearsay statements are inadmissable because there is no independent evidence, whether it be non-hearsay or hearsay from another source,that establishes the out-of-court declarants' participation in the conspiracy. The hearsay statements themselves may not "bootstrap" themselves into admissibility. Bourjaily does not change the rule that hearsay statements alone may not lift themselves "into admissibility entirely by tugging on its own bootstraps." Id. at ____, 107A S. Ct. at 2783. The concurring and dissenting opinions in Bourjaily also note that hearsay statements alone may not establish their own admissability. Id. at____, 107A S. Ct. at 2781, 2783, 2791. Thus, regardless of the applicability of Bourjaily, the statements before this court are inadmisssible.

C. THIS COURT CANNOT IGNORE THE CLEAR LANGUAGE OF FLA. STAT. 90.803(18)(e) AND THIS COURT'S PREVIOUS INTERPRETATION OF THE STATUTE'S LEGISLATIVE INTENT

The rationale of Bourjaily is incompatible with Fla. Stat. 90.803(18)(e), because Bourjaily involves the statutory interpretation of Fed. R. Evid. 801(d)(2)(e) in light of the subsequent enactment of Fed. R. Evid. 104. Both of these federal statutes differ from Fla. Stat. 90.803(18)(e) and 105.

First, Fed. R. Evid. 104 specifically states that the trial judge "is not bound by the rules of evidence" in making

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William).

determinations of admissibility.[7] Fla. Stat. 90.105 does not contain this language.

Secondly, Fla. Stat. 90.105 specifically provides for the court to instruct the jury on the requirement of independent evidence prior to the admissibility of co-conspirator statements. Thus even if we accept the lower court's rationale that Fla. Stat. 90.105 should be interpreted in a manner as Bourjaily interpreted Fed. R. Evid. 104, it is clear that any rule of law established by this strained interpretation was superceded by the specific languge of Fla. Stat. 90.803 (18)(e) which provides for an instruction to the jury as to the requirement of independent evidence.[8]

Bourjaily notes that Fed. R. Evid. 104 is controlling because it was enacted by Congress after Glasser articulated

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7. Bourjaily notes that Fed. R. Evid. 104 was enacted after the Glasser v. United States, 315 U.S. 60 (1942) interpretation of Fed. R. Evid. 801(d)(2)(e) in which the court held that "some proof aliunde" was required before co-conspirator statements were admissible. Bourjaily 483 U.S. at ____,107A S.Ct. at 2780. Thus Bourjaily relies upon the subsequent enactment of Fed. R. Evid. 104 and the Advisory Committee notes which specifically state that in determining the admissibility of evidence the court may consider any relevant evidence including hearsay. Bourjaily Id. Both of these considerations are lacking in Florida law.

8. The clear language of Fla. Stat. 90.803(18)(e), provides for an instruction to the jury for the determination of admissibility. Bourjaily interprets Fed. R. Evid. 104 to require that the trial judge alone determines the admissibility of co-conspirator statements. The lower court noted that it is unclear as to whether a judge or jury should determine the admissibility of co-conspirator statements. This confusion as to who should determine the admissibility of co-conspirator statements illustrates the inapplicability of Bourjaily's reasoning to Fla. Stat. 90.803(18)(e).

language that Fed. R. Evid. 801(d)(2)(e), precluded the consideration of hearsay. A different scenario transpired in Florida. The Florida legislature passed Fla. Stat. 90.105 in 1976, two years prior to the enactment of the current form of Fla. Stat. 90.803(18)(e). Both statues took effect in 1979. Thus Bourjaily's reliance upon the subsequent enactment of Fed. R. Evid. 104 is inapplicable to Fla. Stat. 90.803(18)(e).

Finally, as a matter of statutory interpretation, this court has consistently interpreted the legislative intent of independent evidence in Fla. Stat. 90.803(18)(e), as referring to non-hearsay testimony. Thus the statements are inadmissible because stare decisis precludes any argument that the rationale of Bourjaily allows this court to re-examine the legislative intent of Fla. Stat. 90.803(18)(e) and 105.[9]

D. THE CO-CONSPIRATOR STATEMENTS WERE NOT MADE IN FURTHERANCE OF THE CONSPIRACY.

The trial court erroneously admitted the hearsay testimony of Mr. Gonzalez-Valdibia despite his testimony that he did not knowingly participate in the conspiracy to kill Dr. DeMola. Mr. Gonzalez-Valdibia testified that he had nothing to do with the death of Dr. DeMola (T 257), was not paid to participate in any

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9. The lower court erroneously considered hearsay statements themselves in determining the admissability of the co-conspirator statements. Romani, 528 So. 2d at 22. It should be noted that it is more consistent for the federal courts to consider the statements themselves because by definition co-conspirator statements are not hearsay and therefore not presumed to be unreliable. In Florida, co-conspirator statements are by definition hearsay and therefore presumed unreliable.

homicide (T 258), and was never present for any conversations between Mr. Vinas and Mr. Ibarra regarding homicide. (T 258). Mr. Gonzalez-Valdibia had no personal knowledge of Mr. Vinas's participation in the conspiracy (T 259) and did not know (Mr. Popo's) connection with the death of Dr. DeMola. (T 259). Mr. Gonzalez-Valdibia was not a co-conspirator at the time the statements were made and his hearsay testimony is inadmissible. Statements made to a person prior to joining the conspiracy are not admissible as being in furtherance of the conspiracy. Moore v. State, 503 So. 2d. 923 (Fla. 5th DCA 1987).

Mr. Gonzalez-Valdibia and Mr. Ibarra testified to conversations that transpired after the death of Dr. DeMola. Retrospective statements are not conversations in furtherance of the conspiracy. United States v. Posner, 764 F. 2d 1535 (11th Cir. 1985); United States v. Snider, 720 F. 2d 985 (8th Cir. 1983); United States v. Haldeman, 559 F. 2d 31 (D.C. Cir. 1976); United States v. Moore, 522 F. 2d 1068 (9th Cir. 1975). The conversation between Mr. Gonzalez-Valdibia and Mr. Vinas did not communicate information that furthered the object of the conspiracy because Dr. DeMola was already dead. See United States v. Provenzano, 620 F. 2d 985 (2d Cir. 1980); United States v. Eubanks, 591 F. 2d 513 (9th Cir. 1979).

The trial court correctly held that any statements that transpired after the conspiracy were inadmissible. (T 252). The trial court misapplied it's ruling. It held that although the object of the conspiracy was the murder of Dr. DeMola, because

the indictment charged that the conspiracy continued for two days after the object of the conspiracy had been accomplished, these statements were admissible. (T 254). It is clear that the issue of admissibility of co-conspirator statements is separate and apart from the charging document. Tresvant v. State, 396 So. 2d 733 (Fla. 3d DCA 1981).[10]

The lower court mischaracterized the record when it held that the co-conspirator statements were in furtherance of the conspiracy because they agreed to collect the balance of payments after the murder, Romani, 528 So. 2d at 22, and that with "the final five-thousand-dollars ($5,000) in hand, Ibarra again met with Vinas to give him his share of the spoils." Id.at 23. There is absolutely no support for this characterization of the record by the lower court.[11]

The record is devoid of any statements regarding the manner of payment to Messers. (Popo, William), and Nodarse; or the amount of money they received; and when or if they received any money at all.[12] It is impossible to determine whether the

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10. If the dates of the charging document determined the admissibility of co-conspirator statements, then the prosecutor could manipulate the dates in the charging document to make any statement after the consummation of the object of the conspiracy admissible i.e., there would be no end to a conspiracy.

11. In the lower court the state accepted petitioner's statement of facts. The statement of facts does not support the lower court's characterization of the record.

12. It is reasonable that if Messers. (Popo, William) and Nodarse were paid at all, they were paid in full prior to the commission of the homicide and therefore their participation in the conspiracy terminated with the death of Dr. DeMola. Since Mr. Vinas received all of the initial $5,000 (T 249), it is

hearsay statements attributed to Messers. (William, Popo), and Nodarse transpired before or after petitioner's birthday party and thus the final payment to Mr. Ibarra. In contrast to the court's characterization of the record, Mr. Ibarra testified that sometime after receiving final payment after the death of Dr. DeMola, he met Mr. Vinas and Gonzalez-Valdibia to have a few drinks and go to a go-go bar. (T 303). There was not a hint in Mr. Ibarra's testimony that this meeting was to provide final payment for the homicide. This was confirmed by Mr. Gonzalez-Valdibia, who stated that he never saw Mr. Ibarra give any money to Mr. Vinas. (T 262). It is important to note that Mr. Garcia, the source of the final $5,000 payment according to Ibarra, denied receiving or passing any money to Mr. Ibarra. (T 443).

Having mischaracterized the record to the effect that the hearsay statements transpired in a meeting in which the balance of payments were made in return for the homicide, the lower court then relied upon Echols v. State, 484 So. 2d 568 (Fla. 1985) to establish their admissibility.[13] In Echols, this court held that statements made after a homicide and during a meeting arranged to effect final payment for the homicide were admissible because all

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reasonable to infer that Mr. Ibarra, Mr. Anderson, and Ms. Alvarez kept the final $5,000 payment. Thus, the statements of Messers. (Popo) and Nodarse which transpired after the death of Dr. DeMola were not in furtherance of the conspiracy. It is also reasonable to infer that Mr. Vinas committed the homicide and Mr. Nodarse, (Popo and William) did not participate.

13. Nelson was a co-defendant of Echols. A complete understanding of Echols requires review of Nelson v. State, 490 So. 2d 32 (Fla. 1986).

participants were involved in a conspiracy to commit murder so as to collect insurance proceeds. Factually, Echols is distinguishable from the case at bar because there is not one shred of evidence supporting the lower court's characterization of the record that the statements were made during a meeting to receive the final payment. Instead, the case at bar is similar to Wells v. State, 492 So. 2d 712 (Fla. 1st DCA 1986) in which a co-defendant told a gun shop owner, who sold ammunition used in the homicide, "I don't give a damn what comes down, don't you budge." Id.at 718. Because this conversation transpired after the homicide, it was inadmissible. See also Moore v. State, 503 So. 2d 923 (Fla. 5th DCA 1987). Thus the hearsay statements are inadmissible because they occurred after the death of Dr. DeMola, the object of the conspiracy.

II. HEARSAY TESTIMONY DEPRIVED PETITIONER OF A RIGHT TO CONFRONT WITNESSES

Even prior to trial, petitioner objected to the admissibility of co-conspirator statements as violations of her right to confront witnesses pursuant to Art. 1, Section 16, Fla. Const. and the sixth amendment of the United States Constitution. See Motion For Pre-trial Determination Of Conspiracy. (R 33-7a).[14] This court has held that any hearsay statement attributed

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[14]. Bruton v. United States, 391 U.S. 123 (1968) prohibits the admission of a non-testifying co-defendant's statement that implicates a defendant. Florida courts have expanded the scope of Bruton. This expanded scope has it's basis in a defendant's right to confront witnesses pursuant to the Florida Constitution, separate and apart from a defendant's sixth amendment right under the United States Constitution.

to a non-testifying declarant violates an accused's right to confront witnesses. Nelson v. State, 490 So. 2d 32 (Fla. 1986); Hall v. State, 381 So. 2d 683 (Fla. 1978).[15]

Even if there was no difference between Fla. Stat. 90.803(18)(e) and Fed. R. Evid. 801(d)(2)(e), because there is no evidence other than hearsay statements to establish the out-of-court declarants' participation in the conspiracy, the sixth amendment requirements of Bourjaily are not satisfied in the case before the court.

Mr. Vinas was a co-defendant whose trial was severed from that of petitioner. Mr. Vinas is the out-of-court declarant whose hearsay statements are now challenged on appeal. Mr. Vinas's statements do no mention petitioner. It is clear that petitioner's name need not be expressly mentioned to trigger a Bruton violation. Nelson, 490 So. 2d at 34; Molina v. State, 406 So. 2d 57 (Fla. 3d DCA 1981); Mims v. State, 367 So. 2d 706 (Fla. 1st DCA 1979); Cook v. State ,353 So. 2d 911 (Fla. 2d DCA 1977), cert. denied, 362 So. 2d 1052 (Fla. 1978).

In evaluating the severity of a violation of petitioner's right to confront witnesses, the court must find the violation was harmless error beyond a reasonable doubt. McClain v. State, 411 So. 2d 316 (Fla. 3d DCA 1982). **Compare** Priestly v. State, 450 So. 2d 289 (Fla. 4th DCA 1984) (Error must be devastating or critical to require).

CONCLUSION

The trial court improperly admitted co-conspirator statements made by Messers. Vinas, Nodarse (William) and (Popo). These statements transpired after the death of Dr. DeMola and therefore are not in furtherance and during the pendency of the conspiracy. There is no independent non-hearsay testimony to establish the participation of these persons in the conspiracy. The statements may not bootstrap themselves into admissibility. Without these statements there is no evidence to establish that Dr. DeMola died as a result of petitioner's actions.

Petitioner's conviction for first degree murder must be reversed and remanded to the trial court to enter a judgment of acquittal. When the weight of the evidence, excluding the impermissible hearsay, is insufficient to establish a defendant's guilt, the conviction must be reversed and the cause remanded to the trial court with directions to enter a judgment of acquittal. Briklod v. State, 365 So. 2d 1203 (Fla. 1979).

Petitioner's conviction for conspiracy to commit murder must be remanded for a new trial. Although there is evidence to support petitioner's participation in the conspiracy, the State cannot meet the burden of proving that the improperly admitted hearsay statements did not influence the jury's deliberations regarding the conspiracy. This court cannot conclude that the statements by Messers. Vinas, Gonzalez-Valdibia, Nodarse and (William-Popo) were harmless error beyond a reasonable doubt. See McClain v. State, 411 So. 2d 316 (Fla. 3d DCA 1982).

Respectfully submitted,

BY: _____
Bradley R. Stark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Federal Express and U.S. mail, hand-delivery, this 29th day of November, 1988 to: Michael J. Neimand, Bureau Chief, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue, Suite 820, Miami, Florida, 33128.

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