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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: 72,947

OLGA ROMANI, M.D.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED
AUG 30 1988
CLERK, SUPREME COURT
By ________ Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S AMENDED BRIEF REQUESTING JURISDICTION

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INTRODUCTION

This is a petition asking this court to invoke its discretionary jurisdiction and review the opinion of the Third District Court of Appeal before the Honorable Hendry, Hubbart and Ferguson, J.J.. The opinion was authored by Judge Hendry. At trial petitioner was convicted by a jury 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.

The parties will be referred to as they appear in this court. The Third District Court of Appeal's Opinion appears in the Appendix of this Brief as Exhibit A and shall be referred to as Romani.

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of the conspiracy to commit first degree murder and the first degree murder of Dr. Gerardo DeMola. Romani at 1. There is no physical evidence that petitioner participated in the conspiracy. The conspiracy amongst Dr. DeMola's assailants was proven by the out of court statements of co-defendants who did not testify at trial.[1]

The court in Romani notes that the testimony of the co-conspirators was conflicting. Romani at 1,1 n.1,4 n.4,5,12. All of the co-conspirators who testified at trial denied ever meeting Dr. DeMola. Romani at 5. Ms. Alvarez testified that petitioner spoke to her about "getting rid of people." Romani at 2. Mr. Julio Garcia denied being present for this conversation as Ms. Alvarez testified. Romani at 2. Mr. Ibarra testified that Mr. Gonzalez agreed to commit the murders but enlisted the assistance of his friend, Mr. Alberto Vinas. Mr. Gonzalez Valdibia contradicted Mr. Ibarra and said that he did not agree to participate in any scheme involving homicide. Romani at 5.

Mr. Ibarra testified that he and Ms. Alvarez and Mr. Gonzalez participated in the surveillance of Mr. Nulty. Ms. Alvarez denied ever meeting Mr. Gonzalez Valdibia and participating in the surveillance of Mr. Nulty. Romani at 4. Mr. Gonzalez similarly denied participating in any surveillance of Mr. Nulty. Romani at 5.

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[1] Petitioner believes the Romani court mischaracterizes the facts and arguments presented on appeal. Petitioner believes that these facts and issues were misconstrued in a manner adverse to her arguments. But petitioner also realizes that she can only present to this court the facts as characterized in the "four corners" of the District Court of Appeal's opinion in Romani. Reaves v. State, 485 So.2d 829 (Fla. 1986).

Mr. Antonio Gonzalez Valdibia denied participating in the murder of Dr. DeMola. Romani at 5. All of the information he learned of the murder was hearsay received from Mr. Vinas. Romani at 5. Mr. Ibarra testified that Mr. Vinas said that Mr. Popo and Nodarse committed the murder of Dr. DeMola. Romani at 4. This conversation transpired after the death of Dr. DeMola. Romani at 4.

SUMMARY OF ARGUMENT

I. **ROMANI HELD THAT IN DETERMINING THE INDEPENDENT EVIDENCE REQUIRED FOR THE ADMISSIBILITY OF COCONSPIRATOR STATEMENTS THE TRIAL COURT MAY CONSIDER HEARSAY TESTIMONY. THIS RULING CONFLICTS WITH OVER FIFTY YEARS OF PRECEDENT THAT REQUIRES THAT A DECLARANT'S PARTICIPATION IN THE CONSPIRACY MUST BE ESTABLISHED BY INDEPENDENT (NON-HEARSAY) TESTIMONY.**

The court in Romani relied upon the out-of-court statements themselves sought to be admitted as hearsay exceptions to establish the independent evidence of the declarant's participation in this conspiracy. This court has consistently forbid the `bootstrapping' of hearsay testimony to establish it's own admissibility. Romani held that this court's `bootstrapping' rule was "no longer viable."

II. **THE OPINION IN ROMANI SPECIFICALLY NOTES THAT IT CREATES A CONFLICT WHEN IT STATES "FEDERAL AND STATE COURTS PROVIDED NO CONSENSUS ON THE APPROPRIATE QUANTUM OF PROOF; THE COURTS HAD ADOPTED TESTS RANGING FROM SLIGHT EVIDENCE, SUBSTANTIAL EVIDENCE, OR A PREPONDERANCE OF THE EVIDENCE. Briklod v. State, 365 So.2d 1023,1026 n.5 (Fla. 1978); Tresvant, 396 So.2d at 740 n.10" AND HELD THAT Morales AND Saavedra ARE "NO LONGER SOUND LAW"**

This court similarly observed in Briklod and Tresvant that there is a conflict as to the quantum of proof required of co-conspirator statements.

The Romani court specifically rejects the test for the quantum of evidence followed by the Fourth and Second District Courts of Appeal. In

Romani the court held that the test set forth by the Fourth and Second District Courts of Appeal is "no longer sound law."

III. ROMANI'S HOLDING THAT HEARSAY WITHIN HEARSAY STATEMENTS MADE BY AN ALLEGED CO-CONSPIRATOR AFTER THE OBJECT OF THE CONSPIRACY HAD BEEN CONSUMMATED (THE DEATH OF DR. DEMOLA) WERE NONETHELESS IN FURTHERANCE OF THE CONSPIRACY, DIRECTLY AND EXPRESSLY CONFLICTS WITH THE INTERPRETATION OF "IN FURTHERANCE" AS ENUNCIATED BY THE FIFTH AND FIRST DISTRICT COURT OF APPEALS

The court in Romani held that statements made after the consummation of the conspiracy (the death of Dr. DeMola) were nonetheless in furtherance of the conspiracy.

This interpretation of the `in furtherance' requirement of Fla.Stat. 90.803(18)(e) conflicts with Moore and Wells which hold that a conspiracy terminates upon consummation of the object of the conspiracy.

IV. THE COURT'S OPINION IN ROMANI SPECIFICALLY CONSTRUES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION

The court in Nelson held that "the admission of a confession of a co-defendant who does not take the stand deprives the defendant of his rights under the Sixth Amendment confrontation clause." Nelson at 34.

The Romani court disregarded this court's precedent in Nelson and held that the hearsay within hearsay statements of a non-testifying co-defendant in the case before the court satisfied the confrontation clause of the U.S. Constitution.

I. ARGUMENT

ROMANI HELD THAT IN DETERMINING THE INDEPENDENT EVIDENCE REQUIRED FOR THE ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS THE TRIAL COURT MAY CONSIDER HEARSAY TESTIMONY. THIS RULING CONFLICTS WITH OVER FIFTY YEARS OF PRECEDENT THAT REQUIRES THAT A DECLARANT'S PARTICIPATION IN THE CONSPIRACY MUST BE ESTABLISHED BY INDEPENDENT (NON-HEARSAY) TESTIMONY. Nelson v. State, 490 So.2d 32 (Fla. 1986); Briklod v. State, 365 So.2d 1023 (Fla. 1978); Honchell v. State, 257 So.2d 889 (Fla. 1971); Damon v. State, 289 So.2d 720 (Fla. 1973); Moore v. State, 503 So.2d 923

(Fla. 5th DCA 1987); Wells v. State, 492 So.2d 712 (Fla. 1st DCA 1986); Farnell v. State, 214 So.2d 753 (Fla. 2d DCA 1968)

For the last fifty years the Florida Supreme Court has required that independent (non-hearsay) testimony establish each co-conspirator declarant's participation in a conspiracy before the admission of his hearsay statements. Duke v. State, 185 So.2d 422 (Fla. 1938); Brown v. State, 175 S. 515 (Fla. 1937). **See** Honchell v. State, 257 So.2d 889 (Fla. 1971); Damon v. State, 289 So.2d 720 (Fla. 1973). **See also** Farnell v. State, 214 So.2d 753 (Fla. 2d DCA 1968) (Farnell provides a survey of Florida cases that require independent (non-hearsay) testimony).

This precedent was codified by the legislature in Fla.Stat. 90.803 (18)(e), which is consistently interpreted as requiring non-hearsay testimony. Nelson v. State, 490 So.2d 32 (Fla. 1986); Briklod v. State, 365 So.2d 1023 (Fla. 1978).

In Nelson this court observed that "there is insufficient non-hearsay evidence that Nelson was involved in the conspiracy to murder Baskovitch. Therefore, the state did not lay the required predicate for the admission of the hearsay conversations in question." Id. at 35. Similarly in Briklod this court stated "such testimony of hearsay statements is admissible only if the conspiracy itself has been established by independent evidence, i.e., not adduced from the hearsay testimony". **See also** Moore v. State, 503 So.2d 923 (Fla. 5th DCA 1987); Wells v. State, 492 So.2d 712 (Fla. 1st DCA 1986) also holding that each declarant's participation in the conspiracy must be established by non-hearsay testimony.

Disregarding fifty years of precedent the Romani court stated that "accordingly, we hold that a judge, `in making a preliminary factual

determination under [section 90.803(2)(e)], may examine hearsay statements sought to be admitted[,]' Bourjaily, 107 S.Ct. at 2782, and `give [the evidence] such weight as his judgment and experience counsel'". Romani at 11.[2] The court in Romani considered the hearsay within hearsay statements themselves in determining their admissibility and concluded that when considered individually they "were perhaps insufficient and unreliable when considered individually" but were nonetheless admissible when considered as a group. Romani at 12.[3]

This court has held that "(t)o allow this testimony alone to support the existence of a conspiracy would permit `hearsay [to] lift itself by its own bootstraps to the level of competent evidence'." Briklod at 1026.[4] The court in Romani rejected this court's `bootstrapping' rule when it stated the "bootstrapping rule was no longer viable." Romani at 10.[5] This ruling also creates a conflict with this court's

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[2]The Assistant Attorney General suggested during oral argument in Romani that the court, in light of Bourjaily, consider certifying the case to the Florida Supreme Court.

[3]There was no evidence as to who committed the murder and that the murder was linked to a conspiracy involving petitioner except for the hearsay within hearsay statements challenged in Romani. Petitioner argued to the District Court of Appeal that there was no independent evidence to establish the out-of-court declarant's participation in the conspiracy, to wit, Mr. Vinas who said Messrs. Popo, Nodarse, and William said they killed Dr. DeMola. The Romani court failed to address this issue and instead mischaracterized petitioner's argument as being there was no independent evidence of the "defendant's participation in the conspiracy." Romani at 2.

[4]The Romani court notes that the conspirator testimony was conflicting. Romani at 1,1n.1,4,n.4,5.

[5]Romani justifies it's disregard of precedent by arguing that it follows Bourjaily v. U.S., 483 U.S. _ 107 S.Ct. 2775,97 L.Ed. 2d 144 (1987). Bourjaily held that "a court must have some independent proof, but it could also look at the hearsay statements provided in reaching it's preliminary determination." Romani at 10. The court reasoned that

holding in Briklod.

II. THE OPINION IN ROMANI SPECIFICALLY NOTES THAT IT CREATES A CONFLICT WHEN IT STATES "FEDERAL AND STATE COURTS PROVIDED NO CONSENSUS ON THE APPROPRIATE QUANTUM OF PROOF; THE COURTS HAD ADOPTED TESTS RANGING FROM SLIGHT EVIDENCE, SUBSTANTIAL EVIDENCE, OR A PREPONDERANCE OF THE EVIDENCE. Briklod v. State, 365 SO.2d 1023,1026 n.5 (FLA. 1978); Tresvant, 396 SO.2d AT 740 n.10" AND HELD THAT Morales AND Saavedra ARE "NO LONGER SOUND LAW."

The court in Romani noted that the quantum of independent evidence required to determine the admissibility of co-conspirator statements is conflicting. Briklod and Tresvant also note that there is no consensus on the quantum of proof needed to admit co-conspirator statements. Id. at 740 n.10.

Romani observes that Saavedra v. State, 421 So.2d 725 (Fla. 4th DCA 1982), did not address the quantum of proof that should be applied by a court in a preliminary determination of admissibility of co-conspirator statements but that "this issue was addressed by the Second District Court, in State v. Morales, 460 So.2d 410 (Fla. 2d DCA 1984). The court in Romani rejected the "substantial evidence standard" of Morales and instead held that the independent evidence must be established by a "preponderance of the evidence". Romani at 9. The court in Romani

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because Bourjaily interpreted the Federal Rules of Evidence and the Florida Rules of Evidence were patterned after the Federal Rules of Evidence, since "no Florida cases have had an opportunity to construe this difference between the Federal and Florida Rules of Evidence", Bourjaily's interpretation of Federal Rule of Evidence applies to the Florida Rules of Evidence. This reasoning is fallacious. First, Fla.Stat. 90.803(18)(e) specifically requires "independent evidence" before the admissibility of co-conspirator statements unlike Fed.R.Evid. 801(d)(2)(e). Secondly, Bourjaily relies on Fed.R.Evid. 104(a) which specifically allows the court to consider hearsay evidence in making preliminary determinations of admissibility. The Florida Evidence Code again contains no corresponding provision.

notes a conflict when it states that "the correctness of the Morales and Saavedra holdings have now been called into question". The court holds that this precedent is "no longer sound law". Romani at 9.[6]

III. ROMANI'S HOLDING THAT HEARSAY WITHIN HEARSAY STATEMENTS MADE BY AN ALLEGED CO-CONSPIRATOR AFTER THE OBJECT OF THE CONSPIRACY HAD BEEN CONSUMMATED (THE DEATH OF DR. DEMOLA) WERE NONETHELESS IN FURTHERANCE OF THE CONSPIRACY, DIRECTLY AND EXPRESSLY CONFLICTS WITH THE INTERPRETATION OF "IN FURTHERANCE" AS ENUNCIATED BY THE FIFTH AND FIRST DISTRICT COURT OF APPEALS.

Romani conflicts with the holdings in Moore v. State, 503 So.2d 923 (Fla. 5th DCA 1987); Wells v. State, 492 So.2d 712 (Fla. 1st DCA 1986).

The court in Romani held that the hearsay within hearsay statements that transpired after the death of Dr. DeMola were during the course and in furtherance of the conspiracy. Romani at 13-14. This holding conflicts with Moore in which the court held that "the statements made by co-conspirators after completion of the crime, hence after the conspiracy, do not meet the statutory requirements that such statements be, to be admissible, must be made during the course and in furtherance of the conspiracy'". Id. at 924. In Wells the court held that "these statements were made after the criminal acts which were the object of the conspiracy had occurred" and are therefore inadmissible. Id. at 719.

The court in Wells further held that "(s)tatements made which tend to shield `co-conspirators' after the objective of the conspiracy is complete do not give rise to an additional conspiracy to cover up the

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[6] The Romani court also noted a conflict with other courts when it stated "(w)hether a judge, a jury, or both should make these determinations was also unclear." Romani at 6. The court in Romani held that the judge should make the determination of admissibility. Romani at 11. This holding conflicts with the text of Fla.Stat. 90.803(18)(e) that "the court shall instruct the jury that the conspiracy itself...before evidence is admitted..".

original crime." Id. at 719. Thus the Third District Court's rationale in Romani that there was an additional conspiracy after the death of Dr. DeMola for payment conflicts with Wells besides being unsupported by the evidence.

IV. THE COURT'S OPINION IN ROMANI SPECIFICALLY CONSTRUES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION

This court has jurisdiction when a District Court expressly construes the U.S. Constitution. State v. Glosson, 462 So.2d 1082 (Fla. 1985); See Broward County v. LaRosa, 505 So.2d 422 (Fla. 1987).[7]

The court in Romani held that "when the evidence sought to be admitted falls within one of the firmly rooted hearsay exceptions, as is the case with the co-conspirator exception, the need to independently establish the reliability of the evidence is also not required." Romani at 14. The court held that "following Bourjaily, we reject defendant's confrontation clause argument." Id. at 14. The court's holding in Romani that hearsay statements that satisfy Bourjaily for the admissibility of co-conspirator statements also automatically satisfy the confrontation clause, conflicts with this court's ruling in Nelson v. State, 490 So.2d 32 (Fla. 1986); Hall v. State, 381 So.2d 683 (Fla. 1978). See also Mims v. State, 367 So.2d 706 (Fla. 1st DCA 1979); Haynes v. State,, 502 So.2d 507 (Fla. 1st DCA 1987); Molina v. State, 406 So.2d 57 (Fla. 3d DCA 1981) and Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981).

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[7] Romani specifically declares Fla.Stat. 90.803(18)(e) valid, in that hearsay which satisfies this statute by definition satisfies a constitutional challenge to its admissibility by the confrontation clause. This also confers jurisdiction on this court. Fla.R.App.P. 9030(a)(2)(A)(i)(ii).

In Nelson the court held that "the admission of a confession of a co-defendant who does not take the stand deprives the defendant of his rights under the sixth amendment confrontation clause." Id. at 34. Similarly in Hall v. State, 381 So.d 683 (Fla. 1978) this court held that the admission of statements made by a co-defendant who was tried separately from appellant violated the defendant's right to confrontation. See Haynes v. State, 502 So.2d 507 (Fla. 1st DCA 1987); Mims v. State, 367 So.2d 706 (Fla. 1st DCA 1979).

There is also a conflict as to the standard to be applied to a violation of a defendant's right to confront witnesses. **Compare** Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1984)("Error must be devastating or critical to require reversal"); Molina v. State, 406 So.2d 57 (Fla. 3d DCA 1981) (Hearsay testimony "harmfully affected defendant's trial"); Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981) (Admission of Hearsay testimony "(s)ubstantially affected defendant's right to a fair trial").

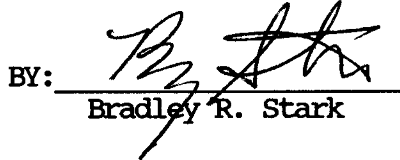
CONCLUSION

The Third District Court of Appeal does not have the authority to disregard over fifty year of precedent established by this court. The District Court of Appeal had an obligation to follow the precedent of this court. If the District Court of Appeal believed that this court's precedent needed to be re-examined because of Bourjaily, it should have certified these issues to this court as being in conflict or of great public importance.

Petitioner requests that this court exercise its discretionary authority and hear this case on its merits. The issues in this case are vital to all criminal proceedings. A large percentage of criminal

prosecutions in this state will be affected by the confusion caused by <u>Romani</u>.

Respectfully submitted,

BY: 
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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a copy of the foregoing was mailed this 29 day of August, 1988 to: Michael J. Neimand, Esq., Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

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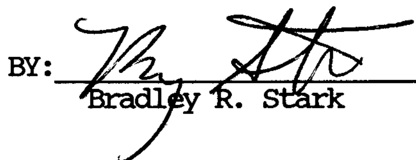
BY: 
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