IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MARY JOYCE ROGERS,

Respondent.

CASE NO. 81,727
1st DCA Case No.: 91-854

RESPONDENT'S BRIEF ON JURISDICTION

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RESPONDENT'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the State. Respondent, MARY JOYCE ROGERS, the defendant in the trial court and appellant below, will be referred to in this brief as Ms. Rogers or Respondent. References to the appendix will be noted by the symbol "A," followed by the appropriate page number(s), all in parentheses.

For purposes of this brief, Respondent accepts the State's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

There is no express and direct conflict for this Court's jurisdiction. The court below did not even cite two of the cases with which the State claims conflict and only cited the third in support of a general proposition. The State is simply attempting to get this Court to accept jurisdiction to reverse the holding below that the Battered Woman's Syndrome is henceforth admissible as a matter of law, subject to its relevancy to the individual case and the qualification of the expert.

ARGUMENT

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

A. There is no "express and direct conflict."

The Supreme Court of Florida has jurisdiction to review, at its discretion, a decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv). This Rule comports with Article V, Section 1(b)(3), Florida Constitution, amended in 1980, which now requires an "express" as well as a "direct" conflict of district court of appeal decisions as a prerequisite to discretionary review by the Supreme Court.[1]

In Griffin v. State, 367 So. 2d 736 (Fla. 4th DCA 1979), the Fourth District found that a "flagrant and fundamental departure from basic law is required to achieve the discretionary and extraordinary review" of so-called "conflict" certiorari. Id. at 737. This was so even though Griffin was decided under the more lenient standard of review which existed prior to the 1980 amendment of Article V which added the requirement of "express" conflict. In the instant case, there is no such flagrant and

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[1] It has been noted that, if the Supreme Court disagrees with a district court of appeal as to the existence of a conflict, it may review a decision "even in the absence of" district court of appeal certification, under Fla. R. App. P. 9.030(a)(2)(A)(iv). Cushen v. Grossman Holdings, Ltd., 424 So. 2d 79 n. 1.

fundamental departure to warrant even the label of "direct" much less "express" conflict.

Since the decision below of the First District Court of Appeal did not recognize or create any express and direct conflict with another district court of appeal, there is no basis for this Court's jurisdiction. First, the decision below did not even cite two of the cases with which the State claims "express" conflict and only cited the third in support of a general proposition. Second, the court below recognizes the distinction between the relevancy test and the Frye "sufficiently established" test and makes evidence of the Battered Woman's Syndrome admissible as a matter of law "subject to its relevancy." Rogers v. State, 18 Fla. L. Weekly D930, 931 (Fla. 1st DCA April 8, 1993).

In Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982), denied mem., 415 So. 2d 1361 (Fla. 1982), the court held that evidence of Battered Woman's Syndrome would only be admitted after relevancy to the case at hand was established. The court then set out a two-part test for the trial court, and the holding below merely removed part two of that test.

There is likewise no conflict with the decisions of this Court, because, contrary to the State's argument, this Court expressly adopted the Frye test in Stokes v. State, 548 So. 2d 188 (Fla. 1989):

> [W]e believe that the test espoused in Frye properly addresses the issue of the admissibility of posthypnotic testimony.

> Because our determination centers on the application of the Frye rule, we must examine the scientific research and literature to see whether opinions within the scientific community . . . have changed since [1992].

Id. at 195.

Although Stokes makes passing mention of relevancy, noting that procedural safeguards were based in part on the premise that courts have an aversion to the exclusion of relevant evidence, the cases cited by the State is support of the relevancy test were all decided prior to Stokes.

B. The decision below does not "adopt" the *Frye* standard.

The court below, explaining Hawthorne's qualified approval of evidence of Battered Woman's Syndrome, distinguished Frye as "the usual requirement for the admission of novel scientific evidence." The case below simply did away with the previously unnecessary and time-consuming case-by-case analysis required by Hawthorne and did not expressly adopt the Frye test for this type evidence. Frye was not even cited except in a footnote quoting Stokes.

In Stokes, the court further noted that novel scientific evidence (hypnotically refreshed testimony) is per se inadmissible subject to a case-by-case review to see whether opinions within the scientific community have changed. Stokes recognized that the state of the art or scientific knowledge relative to the proffered evidence may at some point be sufficiently developed to have gained general acceptance within the scientific community. However, when a previously

unrecognized syndrome is firmly established and widely accepted within the relevant scientific community, a case-by-case analysis is no longer necessary, and the syndrome becomes accepted as a matter of law. This is precisely what the court below has done for Battered Woman's Syndrome - still subject to the prerequisite tests of its relevancy and the qualification of the expert.

C. The State's petition is a ruse to attack admissibility of the Battered Woman's Syndrome.

The State's true purpose in seeking this Court's jurisdiction is to challenge the decision below that the Battered Woman's Syndrome is admissible as a matter of law. See Petitioner's Brief on Jurisdiction at 9 n. 1. Contrary to the assertion therein, this case and State v. Hickson, 589 So. 2d 1366, 1369-70 (Fla. 1st DCA 1991), now pending before this Court as Case No. 79,222, do not address the same issue. Rather, the issue certified in Hickson is whether a criminal defendant who intends to present expert testimony on the battered woman's syndrome may be compelled to submit to an examination by a putative expert witness for the State without violating the defendant's right to be free from compulsory self-incrimination. Thus, since that was not an issue in the instant case, there is no basis for reviewing these cases jointly.

CONCLUSION

Respondent urges this Court that jurisdiction does not exist in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Gypsy Bailey, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 7th day of June, 1993.

GWENDOLYN SPIVEY