ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,673

THE STATE OF FLORIDA,

Petitioner,

-versus-

BERNARD EVANS,

Respondent.

ON PETITION FOR DISCRETIONARY REVEIW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

LAW OFFICE OF
JOHN H. LIPINSKI
Florida Bar No. 151805
1455 N.W. 14th Street
Miami, Florida 33125
(305) 324-6376

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, Bernard Evans, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "App." followed by the appropriate letter and appropriate page number.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in 14 point Time New Roman size and style.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts as true and correct the Statement of the Case and Facts as stated (p. 2-4) in Petitioner's Brief.

QUESTION PRESENTED

I

WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH *BUSH V. STATE*, 461 So.2d 936 (Fla. 1984)?

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal does not expressly and specifically conflict with that of *Bush v. State*, 461 So.2d 936 (Fla. 1984). In *Bush* a witness did not change from deposition "that she did not see the defendant shoot the victim and that she did not know anything about the case" to someone who "witnessed the defendant shooting at the victim". In *Bush*, the witness did not change from someone who "did not know anything about the case" to someone who " testified that the night before the victim was shot, defendant commented that he wanted to kill someone". *Bush* did not concern a situation where the witness "went to the police approximately one (1) year after the deposition and told them that she saw the defendant shoot the victim (which information was not imparted to the defense) *Bush* did not deal with a situation where the same witness changed from "no eyewitnesses" to "an eyewitness to the crime". *Bush*, thus, does not expressly and directly conflict with a decision of this Court (*Bush*).

ARGUMENT

I

THE DECISION OF THE LOWER COURT DOES NOT CONFLICT WITH *BUSH V. STATE*, 461 So.2d 936 (Fla. 1984)

This Court should deny jurisdiction as the decision of this Court in *Bush v. State*, 461 So.2d 936 (Fla. 1984), does not expressly and directly conflict with the instant opinion. As stated by this Court in *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986), "conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision".

A comparison of the facts in the instant case and *Bush*, supra, clearly shows no express or direct conflict between the decisions.

In *Bush*, the discrepancy between deposition and trial testimony "arose from defense counsel having asked two different questions". In the instant case, the change was from deposition where the witness "did not see the defendant shoot the victim and that she did not know anything about the case" to trial where the same witness "testified that the night before the victim was shot, defendant commented that he wanted to kill someone" and

"that she witnessed the defendant shooting at the victim". The change was thus both from no eyewitness to an eyewitness and from no inculpatory statement the night before to an extremely inculpatory undisclosed statement allegedly made by Mr. Evans.

Mr. Evans submits that the District Court was correct in holding "It has long been the law in this State that upon learning of a potential discovery violation the trial court has an obligation to conduct a *Richardson* hearing". The state has not contested the District Court's finding (concretely supported by the Record) that, at trial, "defense counsel argued that Green changed her testimony since the deposition and the changed testimony had not been disclosed to the defense". *Bush* does not recite any facts of that trial as to objections or trial court proceedings and, thus, does not conflict with the holding "that upon learning of a potential discovery violation the trial court has an obligation to conduct a *Richardson* hearing".

The instant decision found "First, it (trial court) failed to conduct the hearing upon being advised that Green changed her testimony." As argued, Bush contains no facts showing defense objections or trial procedure.

The instant opinion also holds "when the hearing was conducted, it was inadequate." *Bush* does not deal with the adequacy of a *Richardson* hearing.

Bush does not deal with a situation in which a non-witness became an eyewitness. Here, the District Court found "Green's changed testimony immediately changed the type of case defense counsel was dealing with. With an eyewitness to the crime, defense counsel's strategy would surely be different."

Bush did not deal with a defendant's previously undisclosed inculpatory statement. Here, Green, at deposition "did not know anything about the case". At trial she "testified that the night before the victim was shot, defendant commented that he wanted to kill someone". Rule 3.220(b)(1)(c) mandates disclosure of "any oral statements made by the defendant". As argued in the District Court, the non-disclosure of the Defendant's statement, by itself, would compel Reversal. Again, this issue did not arise in *Bush*.

The Florida Rules of Discovery are submittedly to avoid "trial by ambush". Counsel submits that there can be no clearer example of "trial by ambush" than in the instant case where a non-witness becomes an eyewitness and, at trial, a previously undisclosed inculpatory statement of the defendant "suddenly appears".

If the State were correct, "trial by ambush" would become common where witnesses (both State and defense) could, with no consequence to the

parties, change (to 180 degree) their testimony from deposition to trial. Trial proceedings would be needlessly extended as in more and more cases inconsistent depositions would be read (some at great length or entirely) to the jury to show ever more frequent changes between deposition and trial testimony.

The obligation to avoid a "trial by ambush" exists on both sides. The reasoned, logical and fairness engendering opinion of the District Court emphasizes, reaffirms and holds that belief. There, too, there is no conflict with *Bush*.

Factually, there is no conflict with the holding in *Bush*. The *Bush* facts are radically different.

Legally, there is no conflict with *Bush* as *Bush* does not contradict the *Richardson* holding (the crux of the instant opinion) that "upon learning of a potential discovery violation the trial court has an obligation to conduct a *Richardson* hearing".

Mr. Evans respectfully submits that there is no express and direct conflict between the instant opinion and *Bush* and that this Honorable Court should decline to accept jurisdiction.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, the petition for discretionary review must be Denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General, Lara Edelstein, Esquire, at 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 1 day of February, 1999.

Respectfully submitted,

LAW OFFICE OF
JOHN H. LIPINSKI
Florida Bar No. 151805
1455 N.W. 14th Street
Miami, Florida 33125
(305) 324-6376

JOHN H. LIPINSKI, ESQUIRE