IN THE

SUPREME COURT OF FLORIDA

VINCENT J. ROEBUCK, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC07-807 District Court Case No. 1D05-2882

REPLY BRIEF OF PETITIONER

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The trial court erred by preventing Petitioner Roebuck from impeaching the alleged victim with her prior false accusation.

In its Answer Brief, the State asserts that this issue was not preserved for appeal. *See* Answer Brief at 12-13. Contrary to the State's assertion, defense counsel, prior to the trial, informed the trial court that he intended to introduce evidence that A.B had previously made a false criminal accusation against another person. (T1-19). During the trial, defense counsel proffered the testimony of A.B. and A.B. acknowledged that she had previously made a false accusation against her brother. (T1-95-97). Despite defense counsel's proffer, the trial court ruled that Petitioner Roebuck would not be able to present to the jury the testimony regarding A.B.'s previous false accusation. (T1-103). The trial court *specifically ruled* that this issue was preserved for appeal and the trial court directed defense counsel to not proffer or ask any further questions of the witnesses regarding A.B.'s previous false accusation. (T2-164-65). Clearly the trial court was on notice regarding the issue and the trial court had an opportunity to correct the error. *See Marquard v. State*, 850 So. 2d 417, 433 n.16 (Fla. 2002) ("[T]he purpose of preservation is to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of

the proceedings") (citation omitted). Accordingly, this issue was properly preserved for appellate review.[1]

Turning to the merits, the State argues that "the statute at issue, F.S. 90.610, is clear as to its provisions and the State submits that there is no need to resort to interpretation, as did the Second District Court of Appeal to create an exception to the statute not contemplated by the Legislature." Answer Brief at 14. Contrary to the State's assertion, section 90.610, Florida Statutes, does not prohibit the exception recognized by the Second District Court of Appeal permitting a criminal defendant to impeach a victim/witness with the victim/witness' prior false accusation. Section 90.610 merely addresses one way to "attack the credibility" of a witness (i.e., by evidence that the witness has previously been convicted of certain crimes). There is nothing in section 90.610 that states that a witness'

[1] The State claims that Petitioner Roebuck's "constitutional" argument was not preserved below. *See* Answer Brief at 12-13. Petitioner Roebuck submits that defense counsel's presentation below properly put the trial court on notice of Petitioner Roebuck's attempt to impeach A.B. with her previous false accusation. Accordingly, all aspects of this claim were properly preserved for appeal. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("[T]he government argues that the standard of review should be plain error because Pallares did not urge in the district court the particular argument presented on appeal . . . . We reject the government's contention because Pallares' argument is not a new claim; rather, it constitutes an alternative argument to support what has been his consistent claim from the beginning: that his state Annoy/Molest conviction cannot qualify as an aggravated felony for deportation purposes. As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments.").

credibility cannot be attacked in other ways. Indeed, there are other sections of the Florida Evidence Code that relate to permissible ways to attack the credibility of witnesses. *See, e.g.*, § 90.609, Fla. Stat. (stating that a party may "attack . . . the credibility of a witness" by presenting evidence of the witness' character relating to truthfulness).

Moreover, the different sections of the Florida Evidence Code must be considered as a whole. As the Second District recognized in *Jaggers v. State*, 536 So. 2d 321, 327 (Fla. 2d DCA 1988), one section of the Florida Evidence Code may provide an exception to a general principle set forth in another section:

> The state succeeded in persuading the trial court to restrict appellant's cross-examination on the basis of the very broad general principle of law that the credibility of a witness may not be impeached by proof that the witness has committed specific acts of misconduct . . . . *See* [] §§ 90.608 and 90.609, Fla. Stat. (1985). However, for every broad general principle of law, there seems to be an exception applicable to particular circumstances. Section 90.405(2), Florida Statutes (1985) allows proof of specific incidents of conduct where that evidence is offered to prove a particular trait of character. In this case, that trait of character was that the witness may be inclined to lie about sexual incidents and charge people with those acts without justification.

(Some citations omitted).[2]

Finally, as explained in section 2e of the Initial Brief, Petitioner Roebuck's constitutional right to confront A.B. trumps the provisions of the Florida Evidence

[2] As in *Jaggers*, the relevant trait of character in the instant case was that A.B. was inclined to lie about criminal incidents and charge people with such incidents without justification.

Code. The Second District's interpretation of the Florida Evidence Code to allow a criminal defendant to impeach a victim/witness with the victim/witness' prior false accusation was proper in order to uphold the constitutionality of the Florida Evidence Code. *See Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 51 (Fla. 2000) ("This Court is bound to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent.") (internal quotation marks and alteration omitted). Recognizing that a criminal defendant may impeach a victim/witness with the victim/witness' prior false accusation renders the Florida Evidence Code constitutional and is a fair construction of the Florida Evidence Code.

Next, the State argues that the decisions from the Second District[3] are distinguishable from the instant case. *See* Answer Brief at 15-16. In particular, the State asserts that in *Cliburn*, *Jaggers*, and *Williams*, the witnesses either filed a false police report or made false reports to law enforcement officers. *See* Answer Brief at 16. Petitioner Roebuck submits that the State's attempt to distinguish the instant case from *Cliburn*, *Jaggers*, and *Williams* is without merit. The rule announced by the Second District is that a witness is subject to impeachment if the

[3] *Cliburn v. State*, 710 So. 2d 669 (Fla. 2d DCA 1998), *Jaggers*, and *Williams v. State*, 386 So. 2d 25 (Fla. 2d DCA 1980).

witness has previously made a false criminal accusation.[4] It is irrelevant whether the witness made the allegation directly to the police[5] – the test is: (1) that the

[4] In *Baker v. State*, 804 So. 2d 564, 567 (Fla. 1st DCA 2002), when the First District Court of Appeal recognized the existence of the Second District's "false accusation" exception, the First District did *not* characterize the exception as being one where the witness has "filed a false police report" *see* Answer Brief at 17; rather, the court stated that "the Second District Court of Appeal has recognized an exception to this rule permitting impeachment with prior acts of misconduct that involve *prior false accusations of a crime by the witness*." (Emphasis added). *See also Reeves v. State*, 862 So. 2d 60, 61 (Fla. 1st DCA 2003); Charles W. Ehrhardt, Florida Evidence, § 610.8 at 617 (2006) ("Occasionally, decisions . . . permit impeachment with prior acts of misconduct of a witness *when they involve prior false accusations of a crime by the witness*.") (emphasis added). In the instant case, the record is undisputed that A.B. made a "prior false accusation of a crime."

[5] The State claims that A.B. "never reported any crime whatsoever to law enforcement officials." Answer Brief at 18. The State also argues that A.B. did not "execute an affidavit[] or provide sworn testimony falsely." Answer Brief at 18. The problem with the State's contention is that not all criminal allegations are made directly to the police, nor are all allegations executed by affidavit or provided through sworn testimony – especially allegations that are made by children. In cases of abuse, children are usually interviewed by psychologists or child protection team counselors rather than the police. It would be rare for a child's statement to be written or sworn. For example, in *Jaggers*, the Second District held that a child witness who testified regarding similar sexual acts committed by the defendant could be impeached based on her prior false accusation of sexual assault. There is nothing in the *Jaggers* opinion indicating that the child witness made the false allegation directly to the police or that the witness' allegation was written or sworn.

A.B. was a child at the time of the previous false accusation (she stated she was in fourth grade). (T1-96). Although the record is not clear whether A.B. made the allegation directly to the police, the record is clear that A.B. made the allegation to people who A.B. believed were in positions of authority (her teacher, her mother, and a nurse). Moreover, the record is clear that the allegation was immediately relayed to law enforcement officials, as A.B.'s brother was quickly prosecuted and placed in a juvenile detention center. (T1-97). The State acknowledges that A.B.'s false allegation was reported to law enforcement

witness made a criminal allegation and (2) the criminal allegation was false. A third prong of the test could be whether the allegation resulted in an investigation or charges. In the instant case, the record is clear that A.B.'s brother was *prosecuted and convicted* based on A.B.'s false allegation and he was sent to a juvenile detention center for six months. (T1-97).

In its Answer Brief, the State asserts the following:

> Additionally, as noted by the prosecutor,[6] had appellant sought to introduce this evidence, it would have fallen within the requirements of F.S. 90.404(2) as evidence of other crimes, wrongs or acts. Appellant did not provide notice of his intent to rely on this evidence as required by F.S. 90.404(2)(c) and as such, it properly should have been excluded for this reason.

Answer Brief at 18-19. Section 90.404(2)(c)1., Florida Statutes, provides in relevant part:

> When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a) or paragraph (b), no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. *No notice is required for evidence of offenses used for impeachment or on rebuttal.*

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officials. *See* Answer Brief at 18 ("They [the school teacher and A.B.'s mother] in turn apparently took the story to juvenile authorities . . . .").

Finally, the State argues that A.B.'s false accusation did not subject A.B. "to criminal liability as a result of making the statement." Answer Brief at 18. For all of the reasons set forth above, Petitioner Roebuck submits that most allegations made by children would not subject the children to criminal liability if the allegation was later proven to be false.

[6] (T1-102)

(Emphasis added.) The purpose of questioning A.B. regarding the previous false criminal accusation was to impeach A.B.'s credibility. Hence, according to the plain language of the statute, defense counsel was not required to provide notice to the State.[7] *See, e.g.*, *Pompa v. State*, 635 So. 2d 114, 116 (Fla. 5th DCA 1994) ("In addition, as the statute provides, the State is not required to file a notice of intent to offer similar fact evidence where the evidence is offered only to impeach.").

The State contends that "the proffered evidence did not establish a motive on A.B.'s part to lie about the charged offense." Answer Brief at 17. As explained in footnote 21 of the Initial Brief, Petitioner Roebuck submits that A.B. did have a motive to lie about the allegation in the instant case. First, at the time of the allegation, A.B. was being threatened by her guardians with the possibility of being sent back to the Virgin Islands due to her improper behavior. The allegation against Petitioner Roebuck allowed A.B. to remain in the United States (because it shifted her family's focus from her to Petitioner Roebuck). (T1-10). Second, at the time of the allegation, Petitioner Roebuck was seemingly angry with A.B.'s brother (and possibly A.B. as well) because A.B.'s brother owed money to Petitioner Roebuck. (T1-74). Notably, A.B. made the prior false accusation

[7] Moreover, the notice requirement of section 90.402(2)(c)1. applies to the State, not the defense.

against her brother because, at the time of the prior allegation, her brother was angry with her: "I knew that he was angry with me." (T1-96).

Petitioner Roebuck continues to rely upon the New Jersey Supreme Court's well-reasoned opinion in *State v. Guenther*, 854 A.2d 308 (N.J. 2004), wherein the court held that a victim in a criminal case can be impeached with evidence of a prior false accusation.[8] For all of the reasons set forth in the Initial Brief, Petitioner Roebuck requests the Court to adopt the holding in *Guenther*.[9]

Petitioner Roebuck also continues to assert that his constitutional right of confrontation was denied by the trial court's refusal to allow Petitioner Roebuck to

[8] The State notes that effective July 1, 2007, New Jersey Rule of Evidence 608 was amended to add subsection (b), which allows a party to attack the credibility of a witness in a criminal case with evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged. *See* Answer Brief at 19. Petitioner Roebuck submits that the adoption of rule 608(b) does not detract from the holding and reasoning of *Guenther*. Petitioner Roebuck notes that in *Cliburn*, the Second District applied the prior false accusation exception even though the prior false accusation involved a third party and a different crime (crime charged was burglary and prior false accusation was kidnapping). *See Cliburn*, 710 So. 2d at 669-70.

[9] The State argues that the Second District's recognition of a prior false accusation exception amounted to the "creat[ion of] a substantive right," which the State contends can only be done by the Legislature. Answer Brief at 20-21. As explained in footnote 15 of the Initial Brief, Petitioner Roebuck submits that the existence of a prior false accusation exception is procedural in nature and therefore this Court has exclusive jurisdiction to recognize such an exception. *See Guenther*, 854 A.2d at 325 ("In this case, we are not creating a new rule of evidence, but merely carving out a narrow exception to the common law rule embodied in N.J.R.E. 608 for the purpose of permitting the jury to consider relevant evidence – in clearly defined circumstances – that may affect its estimation of the credibility of a key witness.").

cross-examine A.B. regarding the prior false accusation. In its Answer Brief, the State's response to this claim is limited to a quotation of the opinion below, wherein the First District concluded that Petitioner Roebuck's due process rights were not violated because the prior false accusation did not involve Petitioner Roebuck and did not involve a claim of sexual abuse. *See* Answer Brief at 21-22 (quoting *Roebuck v. State*, 953 So. 2d 40, 44 (Fla. 1st DCA 2007)). Contrary to the First District's conclusion, the constitutional right to confront a witness with evidence of a prior false accusation is not limited to prior accusations that are identical to the crime charged. *See Cliburn*, 710 So. 2d at 669-70 (crime charged was burglary and prior false accusation was kidnapping). In the instant case, the prior false accusation of aggravated battery was sufficiently similar to the sexual battery charge to require its admission.

Petitioner Roebuck submits that principles of due process and fairness require that he be afforded a new trial wherein the jury is informed about A.B.'s prior false accusation. Petitioner Roebuck was charged with a very serious crime (ultimately resulting in a twelve-year prison term). Petitioner Roebuck had the right to defend himself with all relevant information. A.B. was the State's *only* witness to the events constituting the charged crime. The credibility of A.B. was

the crucial issue in this case. When judging her credibility, the jury had a right to know that she had previously made a false criminal accusation.[10]

Accordingly, for all of the reasons set forth above and contained in the Initial Brief, Petitioner Roebuck respectfully requests the Court to adopt the prior false accusation exception recognized by the Second District and the New Jersey Supreme Court. Petitioner Roebuck is entitled to a new trial wherein he is afforded his constitutional right of confrontation.

[10] The prior false accusation evidence was relevant to prove a particular character trait of A.B. – that she was inclined to lie about criminal incidents and she was inclined to charge people with such incidents without justification. *See Jaggers*, 536 So. 2d at 327 ("Section 90.405(2), Florida Statutes (1985) allows proof of specific incidents of conduct where that evidence is offered to prove a particular trait of character. In this case, that trait of character was that the witness may be inclined to lie about sexual incidents and charge people with those acts without justification."). This type of evidence is admissible to prove the "corruptness" of the alleged victim. *See id*.

D. CONCLUSION.

Petitioner Roebuck respectfully requests that the First District's decision in *Roebuck* be quashed and that this case be remanded with directions that Petitioner Roebuck receive a new trial wherein he is permitted to impeach the alleged victim with her prior false accusation. All appropriate relief is respectfully requested

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Giselle Lylen Rivera
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by U.S. mail delivery this 10th day of September, 2007.

Respectfully submitted,

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F. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Reply Brief of Petitioner complies with the type-font limitation.

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