IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RANDOLPH WIGHTMAN, Respondent.	Case No.: DCA NO.: 2D06-5055

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal. Wightman v. State, 2008 WL 1830367, (Fla. 2d DCA April 25, 2008).

The State charged Wightman with Count One - sexual battery alleging penetration of and/or union with the vagina of R.B. by the mouth of Wightman and Count Two sexual battery alleging penetration of and/or union of Wightman by the mouth of R.B. occurring between the five-year time span of October 1984 and July 1989. At the time of trial in 2006, the victim was twenty-six years old.

The prosecutor asked R.B. if she could recall how many times Wightman "had put your mouth on his penis." R.B. indicated she could not recall, prompting the prosecutor to ask, "More than a handful?" The defense then moved for mistrial, which was argued at the bench.

During the discussion on the motion, the defense pointed out that the State had not filed a notice of intent to rely on Williams[1] rule evidence. The prosecutor asserted that the State had charged "representative counts," and argued the defense has "known all along there are no specific dates and times." The defense argued: "At this point she has testified to collateral acts and I

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1 Williams v. State, 110 So. 2d 654 (Fla. 1959).

don’t know under what authority she can...elicit testimony about collateral acts. There’s one specific act that is charged.” The prosecutor countered: “Again, they’re on notice of these incidents as one representative count. [The victim] can’t give a specific date and time; she can say it happened multiple times. That gives the act.”

On April 25, 2008, the Second District Court of Appeal reversed Wightman’s convictions finding that the trial court erred in allowing the victim to testify to general allegations of repeated acts of abuse and that it appeared that the testimony contributed to the verdict.

On May 6, 2008, Petitioner filed a motion for rehearing which was denied by the Second District Court of Appeals on May 29, 2008.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction in the instant case because the Second District Court of Appeal's decision expressly and directly conflicts with decisions of the other districts.

The Second District Court's opinion is in direct and express conflict with the Fourth District Court's opinion in State v. Generazio, 691 So. 2d 609 (Fla. 4th DCA 1997) and the Third District Court's opinion in Lazarowicz v. State, 561 So. 2d 392 (Fla. 3d DCA 1990), which allowed a victim to testify to multiple acts of sexual abuse by a defendant where the State properly charged the defendant with representative counts of distinct acts which occurred over a span of time.

ARGUMENT

WHETHER THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN WIGHTMAN V. STATE, 2008 WL 1830367, (FLA. 2D DCA APRIL 25, 2008), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN STATE V. GENERAZIO, 691 SO. 2D 609 (FLA. 4TH DCA 1997) AND LAZAROWICZ V. STATE, 561 SO. 2D 392 (FLA. 3D DCA 1990)?

I. Standard of Review:

Under the Florida Constitution, article V, section 3(b)(3), this Court has the authority to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court or another district court of appeal.

This Court has identified two basic forms of decisional conflict which properly justify the exercise of jurisdiction under section 3(b)(3) of the Florida Constitution. Either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case. . . ." Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). Furthermore, it is not necessary that a district court explicitly identify conflicting district court decisions in its opinion in order to create an express conflict under section 3(b)(3). Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

II. Argument:

The Second District's opinion conflicts with the opinion in State v. Generazio, 691 So. 2d 609 (Fla. 4th DCA 1997). The Fourth District quoted this Court in Dell'Orfano v. State, 616 So. 2d 33 (Fla. 1993) and found that Generazio posed two conflicting public policy concerns. Id. at 610.

> First is the strong interest in eliminating the sexual abuse of children through vigorous enforcement of child-abuse laws. We recognize that young children often are unable to remember the specific dates on which they were abused. Second is the strong interest of defendants in being apprised of the charges against them such that they can prepare an adequate defense. The latter concern has been codified to some extent in Florida Rules of Criminal Procedure 3.140(d)(3) and 3.140(*o*), although there is also a due-process basis for it. Art. I, § 9, Fla. Const.
>
> *Dell'Orfano v. State*, 616 So.2d 33, 34 [sic, 35] (Fla. 1993).

Id. at 610-611. The Fourth held that the prosecutor did not abuse his discretion in charging one count for each type of sexual act, where the victim had been continually abused over an eight-month period. Id. The victim testified that he was unable to remember when certain acts occurred and could only testify that they happened every day. Id. The State did "identify several different types of sexual abuse, charging, for example, all acts of fellatio committed upon the child as a single course of criminal conduct."

Id. Logically, the victim can testify to multiple acts of sexual abuse, if the charges are representative counts of distinct acts occurring over a span of time. Therefore, the Second District Court of Appeal's holding that the trial court erred in allowing the victim to testify to allegations of repeated acts of abuse is in conflict with the Fourth District.

Further, the Second District's opinion is in conflict with Lazarowicz v. State, 561 So. 2d 392, 393 (Fla. 3d DCA 1990). Lazarowicz was charged with sexual battery against his daughter which occurred on December 6, 1985. In Lazarowicz, the Third District found that the victim's testimony as to prior similar sexual acts committed against her by her father was admissible to show both the existence of a particular relationship between the two and the fact that the charged crime was not an isolated incident. Id. at 395. The Lazarowicz court cited Gibbs v. State, 394 So. 2d 231 (Fla. 1st DCA), aff'd, 406 So. 2d 1113 (Fla. 1981), where the First District

> observed that evidence of similar sex acts against the victim in a case being tried is far less subject to objection than evidence of similar acts against other victims. Prior sex acts against the same victim shows, as the much cited authority Julius Stone states, the defendant's 'lust toward the girl with whose rape he is charged, only one step removed from the main issue, namely whether he indulged that lust.'"

Id. at 396. Most importantly, "proof of other sex crimes has been

traditionally deemed admissible in prosecutions involving the same parties." Id. See also, Padgett v. State, 551 So. 2d 1259 (Fla. 5th DCA 1989). Consequently, the Second District Court's holding that the trial court erred in allowing the victim to testify to allegations of repeated acts of abuse by Wightman is in conflict with the Third District.

The State charged Wightman with two distinct acts of sexual abuse that occurred between October 1984 and July 1989. These were representative counts of multiple acts of abuse. The victim was between the ages of five and nine when the abuse occurred and twenty-six at trial. The victim testified as to allegations of multiple acts of sexual abuse by Wightman, confining her testimony to the two distinct acts charged. The State, therefore, submits that the Second District Court's decision below is in direct and express conflict with the Fourth District in State v. Generazio, 691 So. 2d 609 (Fla. 4th DCA 1997) and the Third District in Lazarowicz v. State, 561 So. 2d 392 (Fla. 3d DCA 1990). The Second District Court of Appeal's opinion will result in a victim of sexual abuse not being able to testify to multiple acts of abuse by a defendant even when the State properly charges a defendant with representative counts of distinct acts which occurred over a span of time. Given this express and direct conflict, the State respectfully requests that this Court exercise its discretionary jurisdiction and accept the instant case for review.

CONCLUSION

Petitioner respectfully requests that this Honorable Court accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to James T. Miller, Special Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000 this 27th day of June, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
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