

IN THE SUPREME COURT OF FLORIDA

No. SC16-1534

DOMINIQUE WRIGHT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Discretionary Review from the District Court of Appeal,
Fourth District of Florida

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case arises in an unusual procedural posture. After Petitioner was convicted and sentenced for murder and aggravated battery in Palm Beach County, he appealed his convictions and the state cross-appealed. The lower court affirmed Petitioner's convictions, and granted the state's cross-appeal, ruling that the trial court erred in that it failed to impose consecutive sentences pursuant to the 10-20-Life statute (section 775.087(2)(d), Florida Statutes). *Wright v. State*, 143 So. 3d 995 (Fla. 4th DCA 2014) (*Wright I*).

At trial, the state introduced an unavailable witness's hearsay testimony under section 90.804(2)(a), Florida Statutes. An issue on appeal concerned the defense's efforts to impeach this hearsay testimony.

The unavailable witness was the victim of the attempted murder. He testified at a suppression hearing and was murdered four days later. At Petitioner's trial, the state put in evidence his suppression hearing testimony. Petitioner sought to impeach his testimony with his deposition. The judge refused to allow the impeachment. The Fourth District affirmed, writing:

We find no error in the trial court's ruling that the defense had sufficient opportunity to cross-examine the victim at the hearing on the motion to suppress. *See Thompson v. State*, 995 So. 2d 532 (Fla. 2d DCA 2008) (finding murdered witness's prior testimony admissible where defendant was present, motivated to probe witness's recollection and credibility, and had

an opportunity to cross-examine witness at first hearing). We also find no error in the trial court's ruling not to allow the use of certain portions of victim one's deposition as inconsistent statements. See § 90.614(2), Fla. Stat. (2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement"); see also *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (finding the court properly excluded alleged inconsistent statement as the defendant could not lay a proper foundation).

Wright I, 143 So. 3d at 997 (emphasis added).

In granting the state's cross-appeal as to Petitioner's sentence, the Fourth District certified to this Court the question of whether the 10-20-Life statute requires consecutive sentence. *Id.* at 998. In this regard, the Fourth District relied on its previous decision in *Williams v. State*, 125 So. 3d 879 (Fla. 4th DCA 2013) (*Williams I*), which had certified the same question.

Prior counsel for Petitioner then sought discretionary review in this Court, raising the sentencing issue, but raising no issue as to the convictions. In due course, this Court quashed both the *Williams I* decision and the *Wright I* decision, holding that the statute did not require consecutive sentences. *Williams v. State*, 186 So. 3d 989 (Fla. 2016); *Wright v. State*, SC14-1609 (Fla. 2016) (*Wright II*) (summary opinion).

On remand, the Fourth District entered a new decision. As to the sentencing issue, it rejected the state's argument and

affirmed the concurrent sentences imposed by the trial court. As to the convictions, it affirmed in language identical to that quoted above as to the issue of impeachment of the unavailable witness:

We find no error in the trial court's ruling that the defense had sufficient opportunity to cross-examine the victim at the hearing on the motion to suppress. See *Thompson v. State*, 995 So. 2d 532 (Fla. 2d DCA 2008) (finding murdered witness's prior testimony admissible where defendant was present, motivated to probe witness's recollection and credibility, and had an opportunity to cross-examine witness at first hearing). We also find no error in the trial court's ruling not to allow the use of certain portions of victim one's deposition as inconsistent statements. See § 90.614(2), Fla. Stat. (2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement"); see also *Mattox v. United States*, 156 U.S. 237 (1895) (finding the court properly excluded alleged inconsistent statement as the defendant could not lay a proper foundation).

Wright v. State, 4D12-1124 (Fla. 4th DCA June 29, 2016) (*Wright III*) (Appendix A, page 2). Petitioner's timely motion for rehearing was denied on July 22. App. B.

Petitioner now seeks review of the decision in *Wright III* affirming his convictions. His notice to invoke discretionary review was filed on August 18.

SUMMARY OF THE ARGUMENT

The decision below directly and expressly conflicts with prior decisions of this Court on the same question of law. Despite the unusual posture of this case, discretionary jurisdiction should be granted to maintain the uniformity of Florida law.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW.

This Court has jurisdiction to review "any 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." Art. V, § 3(b)(3), Fla. Const. The decision of the lower court at bar directly and expressly conflicts with this Court's decisions in *Reaves v. State*, 639 So.2d 1 (1994) and *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005).

The issue concerns the impeachment of hearsay evidence. At Petitioner's trial, the state introduced the prior testimony of an unavailable witness (the deceased victim) pursuant to the hearsay exception for prior testimony in section 90.804(2)(a), Florida Statutes. The judge ruled that Petitioner could not impeach this testimony with inconsistent statements of the deceased witness because the witness had not been confronted with them. The Fourth District affirmed, writing: "We also find no

error in the trial court's ruling not to allow the use of certain portions of victim one's deposition as inconsistent statements. See § 90.614(2), Fla. Stat. (2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement"); see also *Mattox v. United States*, 156 U.S. 237 (1895) (finding the court properly excluded alleged inconsistent statement as the defendant could not lay a proper foundation)." *Wright III* (Appendix A, page 2).

This ruling is contrary to *Reaves* and *Fitzpatrick*.

In *Reaves*, this Court addressed an identical issue. As at bar, the state presented the prior testimony of an unavailable witness (Hinton). As at bar, the judge refused to let the defense impeach this testimony with prior consistent statements of the declarant because he had not been confronted with them.

This Court ruled that the judge's ruling was contrary to the express language of section 90.806(1), Florida Statutes, although it found the error harmless under the facts of the case (the defendant had confessed to a deputy):

Reaves argues to this Court that several statements made by Hinton, under oath, prior to his 1987 trial testimony, were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991).⁵ We agree that Hinton's prior inconsistent testimony should have been admitted, but we find that the trial court's exclusion of the testimony was harmless error. Hinton's incon-

sistent statements pertained to details and did not repudiate the significant aspects of his testimony.

⁵ Section 90.806, Florida Statutes (1991), provides:

(1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

(2) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Reaves, 639 So. 2d at 3-4 (one footnote omitted).

Fitzpatrick was a murder case. When the victim was found, she said someone other than the defendant had attacked her. These statements were put in evidence by the defense. Over objection, the state then impeached this statement with statements she made at a hospital. This Court affirmed, writing that under section 90.806(1) it was not necessary to confront the hearsay declarant with the prior inconsistent statements. *Id.* at 515.

As in *Reaves*, this Court cited the provision of section 90.806(1) allowing use of an inconsistent statement to impeach the hearsay of an unavailable declarant "regardless of whether or not the declarant has been afforded an opportunity to deny or explain it." *Id.* at 515.

Hence, the Fourth District's decision at bar is directly and expressly contrary to this Court's decisions in *Reaves* and *Fitzpatrick* on the same question of law.

Although the Fourth District cited section 90.614, Florida Statutes, and *Mattox v. United States*, 156 U.S. 237 (1895), they offer no support for the court's ruling. Section 90.614 simply sets out the procedure for confronting a testifying witness with an inconsistent statement. It does not address the issue covered by section 90.806(1) - impeachment of hearsay with an inconsistent statement. *Mattox* is based on the common-law rule requiring confrontation of a witness with inconsistent statements and does not address our statutory rule that allows such impeachment of a hearsay declarant.

Admittedly, this issue was not raised in the petition for review from the decision in *Wright I*. Nonetheless, the Fourth District's decision is directly and expressly contrary to decisions of this Court on the same question of law. Petitioner was denied his right to impeach the witness under Florida law, the decisions of this Court, and the Confrontation and Due Process Clauses of the state and federal constitutions. Art. I, §§ 9, 16, Fla. Const.; Amends. VI, XIV, U.S. Const. This Court should accept jurisdiction and reverse the decision below in order to maintain the uniformity of decisions in this state.

CONCLUSION

This Court should exercise its jurisdiction to grant review of the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 25 August 2016 a copy hereof has been electronically filed with this Court and furnished to Melynda L. Melear, Esq., Assistant Attorney General, Counsel for Respondent, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, by email to CrimAppWPB@MyFloridaLegal.com.

/s/ Gary Lee Caldwell
Attorney for Petitioner

CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

/s/ Gary Lee Caldwell
Attorney for Petitioner