

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1823

CHARLES STRONG,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

FROM THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

CHARLES J. CRIST, JR.

Attorney General

RICHARD L. POLIN,

Bureau Chief, Criminal Appeals

Florida Bar No. 0230987

THOMAS C. MIELKE

Assistant Attorney General

Florida Bar No. 0153834

Office of the Attorney General

Appellate Division

444 Brickell Avenue, Suite 950

Miami, Florida 33131

Telephone:(305)377 5441

Facsimile:(305) 377 5655

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
POINTS INVOLVED ON APPEAL	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF ANY DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW	4
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF FONT AND TYPE SIZE	11

TABLE OF AUTHORITIES

STATE CASES

<u>Bayer v. State</u>	
788 So. 2d 310 (Fla. 5th DCA 2001)	7
<u>Carpenter v. State</u>	
785 So. 2d 1182 (Fla. 2001)	8
<u>Coney v. State</u>	
653 So. 2d 1009 (Fla. 1995)	5
<u>Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.</u>	
498 So. 2d 888 (Fla. 1986)	4, 8
<u>Gilliam v. State</u>	
817 So. 2d 768 (Fla. 2002)	6
<u>Leavine v. State</u>	
147 So. 897 (1933)	6
<u>Perriman v. State</u>	
731 So. 2d 1243 (Fla. , 1999)	5, 8
<u>Raulerson v. State</u>	
102 So. 2d 281 (Fla. 1958)	6
<u>Reaves v. State</u>	
485 So. 2d 829 (Fla. 1986)	4, 9
<u>Roberts v. State</u>	
510 So. 2d 885 (Fla. 1987)	6
<u>Soles v. State</u>	
97 Fla. 61, 119 So. 791 (1929)	5

<u>State v. Bryan</u>	
287 So. 2d 73 (Fla. , 1973)	6
<u>State v. Rolle</u>	
560 So. 2d 1154 (Fla. 1990)	8
<u>The Florida Star v. B.J.F.</u>	
530 So.2d 286, 288-289 (Fla. 1988)	9
<u>Wilhelm v. State</u>	
568 So. 2d 1 (Fla. 1990)	7

OTHER AUTHORITY

Article V, Section 3(b)(3), Fla. Const.	5
Fla. R. App. P. 9.030(a)(2)	4
Fla. R. App. P. 9.030(a)(2)(A)(iv)	5

INTRODUCTION

The Petitioner, **CHARLES STRONG**, was the Defendant below, and the State of Florida was the prosecution. In this brief, the parties will be referred to as they stood in the proceedings below, or as Petitioner and Respondent. All references to the attached appendix will be designated "App." followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with sexual battery and kidnapping. At trial, the victim testified that she was grabbed from behind as she was walking home after dark. (App. 2). She was forced at knifepoint to a nearby clearing in the woods where the Petitioner attempted to have sex with her. He placed a condom on his penis but it came off as he could not maintain an erection. After demanding oral sex from the victim, he attempted intercourse a second time. The victim produced a condom and Petitioner put it on. Again, the condom came off. (App. 2).

Petitioner tied the victim's hands and led her down a pathway toward the beach. Petitioner had intercourse with the victim without the use of a condom. The victim, fearing violence from Petitioner, attempted to talk to him in hopes that he would let her go or that she could escape. (App. 2-3). After about two hours, Petitioner's wife came down the pathway and as Petitioner went to talk to his wife, the victim escaped.

(Id.).

Police identified Petitioner as the suspect in the case on the following day and interviewed him at the station. He admitted to the sexual encounter but insisted that it was consensual and that he used no force and no knife. The victim was unable to identify Petitioner from a photograph or in court because it had been dark and Petitioner covered her face part of the time. At trial, the victim testified and photographs of bruises on the forehead, chin, and upper arms along with cuts and abrasions were introduced. The Petitioner's statement was admitted through the testimony of the police detective. (App. 3).

The trial court agreed to the State's request to instruct the jury on § 794.022(5), Fla.Stat. (2001), which provides:

An offender's use of a prophylactic device, or a victim's request that an offender use a prophylactic device, is not, by itself, relevant to either the issue of whether or not the offense was committed or the issue of whether or not the victim consented.

The trial court read the statute to the jury verbatim and emphasized the words "by itself." Petitioner was found guilty. (App. 3).

The Third District Court affirmed the judgment and sentence on August 13, 2003. (App. 1). The court specifically found that the instruction was proper and agreed with the trial court's ruling. (App. 7). Petitioner thereafter timely filed his intent

to seek discretionary review from this Court.

POINTS INVOLVED ON APPEAL

**WHETHER THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF ANY DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW?
(Restated)**

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court, in its discretion, to decline to accept jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Third District Court of Appeal expressly and directly conflicts with a decision of this Court on the same question of law, or that it falls under any of the subdivisions provided in Fla. R. App. P. 9.030(a)(2), or Art. V, Section 3(b)(3), Fla. Const. (1980). Express and direct conflict simply does not appear within the four corners of the Third District's decision.

ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF ANY DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which **expressly and directly conflicts** with a decision of another district court of appeal **or of the Supreme Court** on the **same question of law**. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id.

Here, Petitioner submits that the decision of the Third District Court below expressly and directly conflicts with decisions of this Court. However, Petitioner's allegation fails. It is well established that inherent or "implied" conflict cannot serve as a basis for the discretionary jurisdiction of this Court. Department of Health &

Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

The Petitioner claims that the decision of the Third District Court of Appeals is in direct conflict with this Court's decisions in Coney v. State, 653 So. 2d 1009 (Fla. 1995). Coney dealt with the admissibility of a dying declaration. In Coney, this Court quoted Soles v. State, 97 Fla. 61, 119 So. 791 (1929),

That the judge is to pass on the preliminary condition necessary to the admissibility of evidence is unquestioned. It follows, as of course, that, since a consciousness of impending death is according to the foregoing principles legally essential to admissibility, the judge must determine whether that condition exists before the declaration is admitted.

Coney at 1012. The question in Coney and Soles was whether the declarant was aware of impending death in order to give reliability to the hearsay statement. The trial judge was to determine in the first instance whether the declarant did indeed know that death was imminent. That is not the issue in the present case.

The State agrees that the trial court is not permitted to invade the decision making realm of the jury by inappropriate comments. However, the instruction given in this case was not inappropriate. "The yardstick by which jury instructions are measured is clarity, for jurors must understand fully the law that they are expected to apply fairly." Perriman v. State, 731 So. 2d 1243, 1247 (Fla. , 1999).

Next, Petitioner alleges that the decision below conflicts with this Court's decisions regarding comments by the trial court on the evidence in the case. Petitioner's reliance on Raulerson v. State, 102 So.2d 281 (Fla. 1958) and Leavine v. State, 147 So. 897 (1933) is misplaced. In Raulerson the defendants claimed that the trial court improperly commented within the hearing of the jury that a conspiracy existed between the defendants. Defense counsel in Leavine sought to discredit the testimony of the witness, a co-defendant, by showing that he was testifying in hopes that his death sentence might be commuted. The judge, sua sponte, denied the question, stating that it was not material. Here, there is no comment by the judge as to the materiality of any evidence or that a conspiracy existed. The judge simply instructed the jurors on the law to be applied to the facts before them. "What is important is that sufficient instructions - not necessarily academically perfect ones - be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before them. The evidence presented in particular cases will, of course, often vary what instructions apply, or whether certain instructions apply." State v. Bryan, 287 So. 2d 73, 75 (Fla. , 1973).

Petitioner cites to Gilliam v. State, 817 So.2d 768 (Fla. 2002) and Roberts v. State, 510 So.2d 885 (Fla. 1987) and contends that the decision below is in conflict. Petitioner intimates that the giving of the instruction in this case infringed upon his right

to confrontation or to present a full and fair defense. In both Gilliam and Roberts, the trial courts disallowed defense evidence that the victim was a prostitute. In both cases, this Court found no abuse of discretion. This case does not present the issue of whether it was improper to exclude evidence that purported to show the victim was a prostitute. Furthermore, in both cited cases it was found that the exclusion of evidence under the rape shield law did not infringe upon the defendants' constitutional rights.

Petitioner also objects to the Third District's statement that jury instructions that quote an applicable statute have been upheld. Petitioner casts this statement as a "blanket approval" of instructions that recite statutory language. Bayer v. State, 788 So. 2d 310, 311 (Fla. 5th DCA 2001) found that there was no standard jury instruction for the newly enacted offense of aggravated manslaughter of an elderly person section under §782.07(2)Fla.Stat. The court went on to find that there was no error in the thorough instruction given. However, nowhere in the contested opinion does the Third District suggest that a "blanket approval" is given for any instruction that is taken from statute. Petitioner's reliance on this Court's decision in Wilhelm v. State, 568 So.2d 1 (Fla. 1990) is unavailing. In Wilhelm, this Court found that the use of the term "prima facie" in a jury instruction concerning evidence of blood-alcohol content was reversible error as the term is a technical legal one without a common meaning to the

lay person. However, this Court noted in the case that State v. Rolle, 560 So.2d 1154 (Fla. 1990) approved the jury instruction on blood alcohol content as it contained no undefined legal terms. In the present case, there is no undefined, technical legal terms that could potentially force the jurors to guess at its meaning.

Finally, Petitioner claims that the decision below conflicts with Carpenter v. State, 785 So.2d 1182 (Fla. 2001). However, the district court relied on that very case for the proposition that trial courts have wide discretion in instructing a jury. Petitioner properly quotes the decision that giving a non-standard jury instruction that misleads the jury is reversible error. However, this Court also stated “it is preferable that a standard jury instruction be given if it adequately explains the law.” Here, as in Bayer, supra, there is no standard jury instruction. The jury instruction given in this case did not mislead the jury and it correctly explains the applicable law. Perriman v. State, 731 So. 2d 1243, 1247 (Fla. , 1999). There is no conflict. “As we recently noted in Reaves v. State, 485 So.2d 829, 830, (Fla.1986), ‘[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.’ In other words, inherent or so called ‘implied’ conflict may no longer serve as a basis for this Court's jurisdiction.” Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). The Third District’s holding in this case does not conflict with any decision

of this Court or any other District Court of Appeals.

Here, Petitioner would have this Court find that the Third District impliedly created a conflict by their decision. This course is forbidden by Reaves v. State, supra. “While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.” The Florida Star v. B.J.F., 530 So.2d 286, 288-289 (Fla. 1988). The State submits that the decision below establishes no point of law contrary to the decisions of this Court or another District Court of Appeals.

Accordingly, since Petitioner has not shown any **express and direct conflict** within the four corners of the district court’s opinion, this Court’s jurisdiction has not been established and Respondent respectfully requests that jurisdiction be declined.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Respondent respectfully requests that this Honorable Court decline to exercise discretionary jurisdiction in this cause.

Respectfully Submitted,

CHARLES J. CRIST, JR.

Attorney General

RICHARD L. POLIN,

Bureau Chief,

Criminal Appeals

Florida Bar No. 0230987

THOMAS C. MIELKE

Florida Bar No. 0153834

Assistant Attorney General

Department of Legal Affairs

444 Brickell Avenue, Suite 950

Miami, Florida 33131

Telephone:(305)377 5441

Facsimile:(305) 377 5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to BILLIE JAN GOLDSTEIN, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 this ____ day of November, 2003.

THOMAS C. MIELKE

Assistant Attorney General

CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this response complies with Fla.R.App.P. requirements in that Times New Roman 14 point was utilized.

THOMAS C. MIELKE

Assistant Attorney General

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APPENDIX

Appendix "A" Third District's Opinion in case number 3D01-3589 of August
13, 2003.

APPENDIX A