IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1362
DCA CASE NO. 3D03-975

DENNIS IRIZARRY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Dennis Irizarry, was the defendant in the trial court and Appellant in the District Court of Appeal of Florida, Third District. Respondent, The State of Florida, was the prosecution in the trial court and the Appellee 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 a colon to indicate the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged with kidnapping, burglary with assault or battery, aggravated battery with great bodily harm, and aggravated stalking. (App. A: 2). After hearing a pretrial motion, the trial court permitted the State to introduce evidence that in August 1992, the Defendant broke into a domestic violence shelter in New York where the victim was living with her children, and raped and beat her until she was unconscious. (App. A: 2-3).

The victim testified that in 1992, while she stayed at a shelter, the Defendant broke in, raped her, and beat her unconscious. (App. A: 2-3). On November 12, 2001, the Defendant came over, even though the victim had told him he was not allowed in the apartment when she was not there. However, he convinced Daniel

to let him in, saying he wanted to surprise his mother. When the victim came home, she found the Defendant hiding in Daniel's room. She testified that the Defendant looked sweaty and upset, and she was afraid something might happen. She told him that they should go outside. After they exited the apartment, the Defendant grabbed her by the hair, pulled her back inside, locked the door, and punched her until she lost consciousness. When she awoke, she realized that she was no longer by the front door, but now in the living room. (App. A: 3-4). Christopher's testimony as to the Defendant's attack on the victim was consistent with the victim's testimony. (App. A: 4).

The Defendant testified in his defense and denied raping the victim in 1992. He further testified that he had permission to enter the apartment on November 12, 2001, since Daniel asked him to come in. The Defendant testified that when the victim came home and as they were going outside, he accidentally grabbed her hair when he grabbed her shoulder. The Defendant claims that the victim hit him, and that he hit her in self defense. The Defendant further testified that the victim came to visit him at the Dade County jail numerous times. (App. A: 5).

As to the *Williams* rule evidence, which is the subject of Petitioner's brief, the appellate court held that the trial court did not abuse its discretion in admitting the 1992 attack. (App. A: 6). The court reasoned:

> The State introduced evidence of the 1992 attack in which the defendant beat the victim until she lost consciousness and raped her to show the controlling nature of defendant's relationship with the victim, which included beating her until she lost consciousness, and his intent. We conclude that the collateral evidence was relevant to prove the defendant's intent, the absence of mistake, and the controlling nature of his relationship with the victim, to dispute his claim that he had accidentally pulled the victim's hair, and that he did not intent to harm her and had only struck her in self-defense…. Additionally, we find that the probative value of this relevant evidence substantially outweighs the danger of unfair prejudice especially since it did not become a feature of the trial, § 90.403, Fla. Stat. (2001), and the 1992 attack was not too remote in time…. Finally, we find that any error in the introduction of the collateral crimes evidence was harmless based upon the overwhelming evidence of guilt. (App. A: 7-8)(Citations omitted).

This appeal now follows.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT OR OF OTHER COURTS.

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal does not conflict with that of any of the decisions cited by the Defendant, and, instead, is in conformance with them. Further, the Defendant attempts to present new argument concerning the adequacy of the *Williams* rule instruction. However, this Court should decline to accept jurisdiction where that issue neither appears within the appellate court's opinion, nor was presented to the appellate court. Lastly, the appellate court used the proper analysis in finding that any possible error in admitting the collateral crime evidence was harmless error, and was, in fact, in accordance with this Court's own case law.

ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT OR OF OTHER COURTS.

Article V, Section 3(b)(3) of the Florida Constitution delineates the circumstances under which this Court may exercise its discretionary jurisdiction to review a decision of a district court of appeal. Conflict jurisdiction can be obtained only if a question of law in the case presented expressly and directly conflicts with

a decision of the Florida Supreme Court or another district court. 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).

As to the first point whether the *Williams* rule evidence was more prejudicial than probative, the Defendant contends that the appellate court case conflicts with decisions of this Court and of other districts. (Brief: 5). However, the defense never cites a case that is directly and expressly in conflict with the Third District's opinion. Instead, the defense cites *Gore v. State*, 719 So. 2d 1197, 1199-1200 (Fla. 1998); *Steverson v. State*, 695 So. 2d 687, 688-90 (Fla. 1997); *Henry v. State*, 574 So. 2d 73, 74-75 (Fla. 1991); and *Farrell v. State*, 682 So. 2d 204, 206 (Fla. 5th DCA 1996), which are distinguishable.

In *Gore, supra*, this Court found that the State's introduction of evidence relating to the kidnapping and abandonment of a prior victim's son, and questioning concerning whether the defendant had sex with a thirteen-year-old girl were more prejudicial than probative. The line of questioning concerning a prior victim's son was prohibited by the trial court in a pretrial ruling, and questioning concerning the thirteen-year-old girl was irrelevant. Further, this Court reversed for a new trial based on the cumulative effect of the improper questioning and the

prosecutorial comments made during closing argument.

In *Steverson, supra*, the State presented extensive testimony and exhibits pertaining to the Defendant's shooting of a detective four days after the murder of Mr. Lucas, that trial's victim. The State presented extensive testimony about the detective's injuries, how he staggered down the street dripping blood, the frantic response by other officers, his hospital treatment, and twelve photographs of his injuries. Based on the extensiveness of the collateral crime evidence, this Court found that it unfairly prejudiced the defendant.

In *Henry v. State, supra*, evidence of a collateral crime was also extensive where the State introduced testimony and evidence concerning the killing of Eugene Christian, the son of the victim in the case at trial. The State introduced testimony about the search for the child, how his body was found, the defendant's confession as to how he killed the child, and an 8x14 inch color photograph of the child's upper torso showing the five stab wounds.

Last, in *Farrell v. State, supra*, the State presented testimony from the child victim that he was afraid of the defendant because he told the child that he had been in prison for fondling another child. However, the court held that the testimony was more prejudicial than probative where the case was based on whom the jury would believe.

These cases are distinguishable where the facts are different from those in the instant case, and cannot possibly provide the basis for an express or direct conflict on the issue of whether prejudice outweighed probative value given the unique facts in the instant case. The collateral crime evidence in the instant case was minimal, not made a focal point of the trial, and was relevant to prove Defendant's intent, absence of mistake, and the controlling nature of his relationship with the victim. Therefore, this Court should decline to accept jurisdiction where the cases cited by the Defendant are not expressly and directly in conflict with the instant case.

Next, the Defendant contends that the *Williams* rule instruction was inadequate. However, the Defendant failed to cite to any cases that directly or expressly conflict with the appellate court's decision. The only case cited by the Defendant is *Robertson v. State*, 829 So. 2d 901, 908 (Fla. 2002), which requires a cautionary instruction to be given to the jury, specifically apprising them of the limited purpose for which the jury is to consider the evidence. However, in the instant case as the Defendant concedes, the trial court gave an instruction to the jury to consider the collateral crime evidence for the limited purpose of proving motive and the absence of mistake or accident. (Brief: 7).

Further, this Court should decline jurisdiction where the appellate court's decision does not address the adequacy of the trial court's instruction to the jury where it was never raised on appeal. Since it was never addressed at the appellate level, there is no direct or express conflict with *Robertson*, and this Court should decline to accept jurisdiction. *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982)(This Court declined to address claim that was not raised in any court below but that was being presented for the first time in the Supreme Court).

Lastly, the Defendant argues that the appellate court's harmless error analysis is in conflict with decisions of this Court. The appellate court found that any error in admitting the collateral crime evidence would have been harmless "based upon the overwhelming evidence of guilt. DiGuilio, 491 So. 2d 1129 (Fla. 1986). However, there is no express or direct conflict with *DiGuilio* based solely on the Third District's language in the opinion.

Merely because the Third District referenced the overwhelming evidence in the case does not place it in conflict with *DiGuilio*. It is entirely possible that the appellate court believed that the evidence was overwhelming and based on the totality of the circumstances, the error did not affect the outcome of the proceedings. The mere fact that the court did not reference other factors does not mean that it did not consider the remaining circumstances. The appellate court's

holding is fully consistent with the error being one which could not possibly have affected the outcome of the proceedings.

DiGuilio is so well known and so established that a district court can apply it, *sub silentio*, without spelling out each and every one of its principles, through verbatim quotes, when the appellate court finds an error to be harmless. In the instant opinion, the appellate court immediately after citing the overwhelming evidence, cites *DiGuilio*. Clearly, the appellate court is aware of *DiGuilio*, and using its citation is a shorthand reference for all that it embodies. Further, the appellate court's wording and citation to *DiGuilio* matches this Court's opinion in *Gorby v. State*, 819 So. 2d 664 (Fla. 2002), where this Court held, "Given the overall context in which Gorby's trial occurred, including the overwhelming evidence of his guilt presented by the State, we determine that any error which occurred was harmless…."

Therefore, the State would request that this Court decline to accept jurisdiction where no express or direct conflict appears within the four corners of this opinion and any of the opinions cited by the defense.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court decline jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to Roy A. Heimlich, Office of the Public Defender, 1320 NW 14th Street, Miami, FL 33125, this ___ day of August, 2005.

_____
MEREDITH L. BALO
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla.R.App.P. Rule 9.210(a)(2).

_____

MEREDITH L. BALO
Assistant Attorney General