IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC12-143**
Lower Tribunal Case No. 3D09-1403

CHARLES WHITE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The State accepts the Statement of the Case and Facts offered by Petitioner, and with the following pertinent additions, agrees that they form a sufficient basis for this Court's consideration of the Petition. In discussion of the challenged testimony in the lower court opinion, it was specifically noted that Petitioner was not arrested at the time that police confronted him with information provided by the co-defendant, and further noted that the police were then following a number of leads. (Slip Opinion at 17). The opinion then noted that the evidence against Petitioner was both substantial and included "his detailed admissions." *Id*. The opinion then cited to two cases with parenthetical explanations that focused on a balancing between either "the vague nature of this testimony" or "the brief and abbreviated nature of the challenged hearsay" and the other evidence of guilt in the case. *Id*. at 17-18. The opinion then examined other evidence it determined to be improperly admitted at trial and concluded that "the same kind of analysis applied to White's *Postell* claim leads us to the conclusion that the polygraph evidence beyond a reasonable doubt could not [have] contributed to the verdict and thus was legally harmless." *Id*. at 20 (*quoting, Cooper v. State*, 43 So. 3d 42, 43 (Fla. 2010)("[T]he test is whether there is a reasonable possibility that the error affected the verdict")).

SUMMARY OF THE ARGUMENT

The district court opinion clearly stated both the correct test for harmless error and the facts necessary to determine that the error could not have contributed to the verdict considering the permissible evidence of guilt.

ARGUMENT

I. THE DECISION BELOW IS CLEARLY BASED UPON VALID PRECEDENT FROM THIS COURT AND CORRECTLY APPLIES THE ESTABLISHED RULE OF LAW CONCERNING HARMLESS ERROR.

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also*, Art. V, § 3(b)(3) - (4), Fla. Const. This Court's discretionary review is limited to the facts contained within the four-corners of the lower court decision. *See, Reaves v. State*, 485 So. 2d 829 (Fla. 1986). "[J]urisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). Neither the record, nor a concurring opinion, nor a

dissenting opinion can be used to establish jurisdiction. *Reaves*, *supra*; *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). It is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins*, 385 So. 2d at 1359.

Petitioner's Jurisdictional Brief cites this Court's opinion in *Ventura v. State*, 29 So. 3d 1086 (Fla. 2010), as being in direct and express conflict with the opinion below. (Ptr's Juris. Br. at 5). However, the opinion below explicitly and correctly cites both this Court's opinion in *Ventura* and the rule of law stated therein. (Slip Op. at 17, 20). While the opinion agrees that the danger of inferential hearsay suggesting that the co-defendant provided the police with evidence inculpating Petitioner was unfairly prejudicial to the defense, the opinion also notes the State's argument that the evidence was not inculpatory because the police did not use it to arrest Petitioner and continued to follow a number of other leads. *Id*. at 17.

While the opinion concludes that the State's argument on this point was not sufficient to render the evidence admissible, it necessarily considers these facts argued by the State along with the inculpatory evidence that was properly admitted against Petitioner: his own "detailed admissions." (Slip Op. at 17). The purported inferential hearsay is also explicitly quoted in the opinion: "an investigative lead came in that took you in a different direction"; and it is carefully examined in

context with subsequent testimony from another detective that raised the possibility that the jury could infer the lead came from the co-defendant. (Slip Op. at 15 n.23). By virtue of the citations and attendant parentheticals in the opinion, it is clear that the district court found the inferential hearsay in this case vague, brief and abbreviated in nature when balanced against the other evidence of guilt in this case. *See, e.g., State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)(application of harmless error test requires examination of both permissible evidence upon which jury could legitimately rely and impermissible evidence which might possibly have influenced the jury verdict).

The opinion cites to *Hernandez v. State*, 547 So. 2d 138, 138 (Fla. 3d DCA 1988), and parenthetically quotes: "Given the ***vague nature of this testimony*** and the other evidence of guilt in this case, we are unwilling to upset this conviction on this and other technical errors." (Slip Op. at 18)(*emphasis added*). The *Hernandez* opinion applied this Court's seminal decision in *DiGuilio*, *supra*, and specifically reasoned that "the alleged hearsay portion of this evidence, added little to the State's case" and concluded that "the error in admitting such testimony was therefore entirely harmless. 547 So. 2d at 139. The careful reader of the opinion below therefore discerns that the inferential hearsay portion of the evidence in this case was vague in nature and added little to the State's case.

The opinion also cites to *Barnes v. State*, 470 So. 2d 851, 852 (Fla. 1st DCA 1985), and parenthetically quotes from that case: "Given the substantial evidence establishing Barnes' guilt, and the ***brief and abbreviated nature of the challenged hearsay***, we find that the officer's references to the anonymous phone call were harmless error." (Slip Op. at 18)(*emphasis added*). In other words, whatever the co-defendant may have said to the police, on which the only proper inference could be that it raised suspicions but did not convince the police of Petitioner's guilt or even focus their attention exclusively on Petitioner, the jury was left with an inference so vague and brief that it could not have impacted upon their consideration of Petitioner's own admissions as to his guilt.

Therefore, a careful reading of the opinion below clearly results in the understanding that the district court did not apply an "overwhelming evidence" test, as suggested by Petitioner. (Ptr's Juris. Br. at 6-7). Rather, the district court applied the correct test, "whether there is a reasonable possibility that the error affected the verdict," (Slip Op. at 20), to its examination of both the permissible and impermissible evidence, explicitly stating the relevant facts in order to reach the proper conclusion that the inference complained of could not have contributed prejudicially to the verdict obtained, (Slip Op. at 15 n.23, 17-18). No more is required by *Ventura*, and this Court should decline to find either conflict or misapplication.

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should decline to accept the instant case for review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 27th day of February, 2012 to Philip L. Reizenstein, Esq., Assistant Regional Counsel, 401 N.W. 2nd Ave., Suite S-310, Miami, FL, 33128.

I FURTHER CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

TIMOTHY R.M. THOMAS