

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 RANDY EUGENE KINCHEN,)
)
 Respondent.)
 _____)

CASE NO. 64,043

FILED

AUG 25 1983

SID J. WHITE
CLERK SUPREME COURT

Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and the Defendant in the Circuit Court. Petitioner was the Appellee in the Fourth District Court of Appeal and the Prosecution in the Circuit Court. In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

"A"	Appendix of Petitioner
"R"	Record on Appeal

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts Petitioner's Statement of the Case and of the Facts in so far as it is not argumentative.

POINT INVOLVED/ARGUMENT

WHETHER THIS HONORABLE COURT
SHOULD DECLINE TO REVIEW THE
DECISION OF THE FOURTH DISTRICT
COURT OF APPEAL.

POINT INVOLVED/ARGUMENT

WHETHER THIS HONORABLE COURT
SHOULD DECLINE TO REVIEW THE
DECISION OF THE FOURTH DIS-
TRICT COURT OF APPEAL.

This case involves the decision of the Fourth District Court of Appeal reversing Respondent's conviction for a new trial; due to a comment made by a co-defendant's attorney concerning Respondent's failure to testify. (A 1) Respondent acknowledges that the decisions of Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982) and State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980) conflicts with the long established rule, consistently used by this Honorable Court and by the Fourth District Court of Appeal. David v. State, 369 So.2d 943 (Fla. 1979); Trafficante v. State, 92 So.2d 811 (Fla. 1957). This rule was employed by the Fourth District Court of Appeal in resolving this case. (A 1-2) Thus, this Honorable Court may review this case. However, there is no compelling need for this Honorable Court to review this case.

The legal standard followed by the Fourth District Court of Appeal in this case is completely consonant with the existing caselaw from this Honorable Court. The "fairly susceptible" test has been consistently and unwaveringly utilized by this Honorable Court. David v. State, 369 So.2d 943 (Fla. 1979); Trafficante v. State, 92 So.2d 811 (Fla. 1957). This is clearly the test in Florida. Thus, the law in this area is clear. There is no need for this Honorable Court to

revisit the well-established law in this area.

Assuming arguendo, that this question should be revisited in any case; this case is not an appropriate one. This case is an inappropriate one, as Petitioner never raised the test it is now raising until the rehearing of this case. In fact, counsel for Petitioner had previously stated that the test ultimately utilized by the Fourth District Court of Appeal is the proper test. Petitioner thus waived any argument that a different test should be employed.

It is well settled in Florida that no new ground or position, not taken in the original argument, can be submitted in a petition for rehearing. Jacksonville, T. and K. W. Ry.Co. v. Peninsular Land, Transportation and Manufacturing Co., 27 Fla. 157, 9 So. 661 (1891). In this case, Petitioner argued for the first time, on rehearing, that the Fourth District Court of Appeal should adopt a legal test first espoused in a 1980 case from the Second District Court of Appeal. The case, and its underlying rationale, have been available during the entire appellate proceedings.

During oral argument of this case, Judge Anstead specifically asked counsel for Petitioner, if the "fairly susceptible" test was the law. Counsel agreed that it was. Judge Hersey later asked counsel for Respondent the same question and he also agreed with this test. The Fourth District Court of Appeal explicitly gave Petitioner an opportunity to challenge this test, or propose a different one, and it specifically agreed

with the test employed by this Court. Thus, Petitioner is clearly barred from completely changing legal theories on rehearing. Furthermore, the comment in the present case would be found to be a comment on silence even under the test proposed by Petitioner. (R 1555-1556) (See briefs and oral argument herein) Thus, factually this is a poor case in which to reveal this question.

Therefore, Respondent urges this Honorable Court to decline to accept discretionary jurisdiction of this case.

CONCLUSION

Based on the foregoing argument and authorities cited, Respondent urges this Honorable Court to decline to review the decision of the Fourth District Court of Appeal below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Jurisdiction, filed on behalf of RANDY E. KINCHEN, Case No. 64,043, has been furnished to the Hon. James McLane, Assistant Attorney General, at 111 Georgia Avenue, West Palm Beach, Florida, this 23rd day of August, 1983, by Courier.

Richard B. Greene
Of Counsel.