OA 4-4-84

IN THE SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 64,043 |
| | ) | |
| RANDY EUGENE KINCHEN, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

# PETITIONER'S BRIEF ON THE MERITS

FILED
SID J. WHITE
JAN 9 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

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## PRELIMINARY STATEMENT

The Petitioner was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellant and the defendant, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal.

All emphasis has been added by Petitioner unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

Respondent, Randy Eugene Kinchen, was charged, along with a co-defendant, by a refiled information with kidnapping, sexual battery, and attempted first degree murder on August 25, 1981 (R 1703-1704). Respondent was tried by a jury from October 5, 1981 to October 16, 1981 (R 69-1646).

During the trial, Respondent's co-defendant called a witness by the name of Brett Knesz who testified that he had known both of them for eight or nine years (R 1132). He testified that Respondent had told him that he had been the agressor, not his co-defendant, and that he had beat the victim (R 1142-1143, 1152-1153). Mr. Knesz testified that there had been bad feelings between himself and respondent (R 1150), that he had told Respondent's father that he thought there would be separate trials (R 1161), and that he had said Respondent's co-defendant was his friend and that he was going to come forward to help him out (R 1163).

Respondent called his father as his witness (R 1447). He testified that Mr. Knesz approached him in a restaurant and stated that he thought there would be separate trials and that he would do everything he could for the co-defendant and would leave when Respondent's trial came up (R 1449).

During closing argument, Respondent's co-defendant's attorney stated:

> Besides all of the physical, tangible proof we have, I did something the State didn't do. I brought up a confession, an admission. Weigh it for what you think it is worth. Did Brett come across to you as a liar? The State is in a position here, should they question his credibility or not. On one hand, they are using him to support the statement of Randy Kinchen's guilt; and, on the other hand, they are saying that he is not credible because now he is my client's best friend. Well, there is such a charge which is perjury, with lying under oath; and you heard Brett testify. You decide if he is credible or not.
>
> Besides all of the physical evidence then, with all of the inconsistencies we have now, the statements from this man's own mouth that were unrefuted, let's say it is the truth. I have no reason to doubt Randy Kinchen's father. Brett did not deny he made that statement, that, 'I would do anything I could...'
> (R 1555-1556).

Respondent was found guilty as charged on all counts (R 1772-1774) and was so adjudicated (R 1775). Respondent was sentenced to thirty years in prison on the attempted first degree murder conviction (R 1789-1792) and two ten year terms of probation on the other counts, to run concurrently, on December 17, 1981 (R 1647-1648). Respondent then filed a notice of appeal to the Fourth District Court of Appeal (R 1779).

On appeal, Respondent argued that the above-quoted statement by his co-defendant's attorney was a comment on Respondent's right to remain silent. Petitioner argued that Respondent's co-defendant's attorney was only attempting to explain why Respondent's father's testimony did not refute Mr. Knesz's testimony in his client's behalf when he was cut off by Respondent's objection.

On May 11, 1983, the Fourth District Court of Appeal filed its opinion in this cause reversed and remanded for a new trial because of its conclusion that this comment was fairly susceptible of being interpreted by the jury as referring to Respondent's failure to testify. Kinchen v. State, 432 So.2d 586 (Fla. 4th DCA 1983).

On June 29, 1983, the Fourth District Court of Appeal denied Petitioner's motion for rehearing but acknowledged that the first and second districts have, on at least two occasions, apparently invoked a different standard of review than that established by this Honorable Court and followed by the Fourth District in resolving the case sub judice. Id.

Petitioner timely filed its notice to invoke discretionary jurisdiction on July 27, 1983, which was accepted by this Honorable Court by its order entered December 15, 1983.

## POINT INVOLVED ON APPEAL

WHETHER THIS HONORABLE COURT SHOULD ADOPT THE STANDARD USED BY THE FEDERAL COURTS IN DETERMINING WHETHER AN INDIVIDUAL'S FEDERAL CONSTITUTIONAL RIGHT TO REMAIN SILENT HAS BEEN VIOLATED AS THE STANDARD TO BE USED BY THE STATE COURTS IN MAKING SUCH A DETERMINATION?

## ARGUMENT

THIS HONORABLE COURT SHOULD ADOPT THE STANDARD USED BY THE FEDERAL COURTS IN DETERMINING WHETHER AN INDIVIDUAL'S FEDERAL CONSTITUTIONAL RIGHT TO REMAIN SILENT HAS BEEN VIOLATED AS THE STANDARD TO BE USED BY THE STATE COURTS IN MAKING SUCH A DETERMINATION.

At the outset, Petitioner recognizes, as pointed out by the Fourth District in its opinion sub judice, that this Honorable Court has held that "[a]ny comment which is 'fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error...." David v. State, 369 So.2d 943, 944 (Fla. 1979). Petitioner directs the court's attention, however, to the standard used by the federal courts in determining whether an individual's federal constitutional right to remain silent has been violated, i.e. whether the manifest intention of the comment was directed to silence or the remark was such that the jury would naturally and necessarily take it to be such a comment, Samuels v. United States, 398 F.2d 964, 967 (5th Cir. 1968), United States v. Garcia, 655 F.2d 59, 64 (5th Cir. 1981), United States v. Vera, 701 F.2d 1349, 1362 (5th Cir. 1983), and respectfully submits that this Honorable Court should adopt this standard as the one to be used by the state courts in making such a determination.

The First and Second District Courts of Appeal have already adopted the federal standard in holding that the granting of a new trial, on the basis of an alleged comment on the right to remain silent, is not required unless the manifest intention of the comment was directed to silence or the remark was such that the jury would naturally and necessarily take it to be such a comment. Gains v. State, 417 So.2d 719, 724 (Fla. 1st DCA 1982) and State v. Bolton, 383 So.2d 924, 928 (Fla. 2d DCA 1980), respectively. Petitioner submits that these holdings, being consistent with the federal holdings, should be given statewide validity by this Honorable Court, since they apply to a federal constitutional right. Petitioner recognizes the authority of this Honorable Court to give continued validity to the more stringent "fairly susceptible" standard but submits there is no reason to do so in light of the contrary federal authority.

Should this Honorable Court adopt the "manifest intention"/"naturally and necessarily" standard advocated by Petitioner here, Petitioner would further submit that the decision of the Fourth District Court of appeal in the case sub judice, finding an impermissible comment on Respondent's failure to testify, i.e. the exercise of his right to remain silent, must be reversed. This is so because in applying this standard, the court must look to the context in which

the comment was made to determine the manifest intention which prompted it and its natural and necessary impact upon the jury. United States v. Vera, supra at 1362; Williams v. Wainwright, 673 F.2d 1182, 1184 (11th Cir. 1982). The complained of comment by Respondent's co-defendant's attorney in the case at bar (R 1555-1556; Statement of the Case and Facts, supra) was clearly not manifestly intended as a comment on Respondent's right to remain silent that would naturally be interrupted as such by the jury but was, rather, merely an attempt to explain why Respondent's father's testimony (R 1447-1449) did not refute Mr. Knesz's testimony in his client's behalf (R 1142-1143, 1152-1153) when he was cut off by Respondent's objection. United States v. Jobon-Builes, 706 F.2d 1092, 1103 (11th Cir. 1983). Thus, this complained-of comment by Respondent's co-defendant's attorney was clearly only an attempt to explain away the damaging effect of Respondent's father's testimony on the testimony of Mr. Knesz and as such was wholly proper. Compare White v. State, 377 So.2d 1149, 1150 (Fla. 1979). The decision of the Fourth District Court of Appeal in the case sub judice should therefore be reversed.

## CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that this Honorable Court adopt the standard used by the federal courts in determining whether an individual's federal constitutional right to remain silent has been violated and that it, in applying this standard in the case sub judice, reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 5th day of January, 1984 by Mail/ Courier to RICHARD B. GREENE, ESQUIRE, Assistant Public Defender, Harvey Building, 13th Floor, West Palm Beach, Florida 33401.

James P. McLane
OF COUNSEL