IN THE SUPREME COURT OF FLORIDA

CASE NO. 64 269

THE STATE OF FLORIDA,

Petitioner,

vs.

RICHARD WAYNE SHEPHERD,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner was the prosecution at the trial court level and the appellee on appeal. Respondent was the defendant at the trial level and the appellant in the Third District Court of Appeal. Parties will be referred to in this brief as they appear before this Court. The symbol "A" followed by a number will constitute a page reference to the appendix being filed by Petitioner along with this brief. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Pursuant to jury verdict, Respondent was adjudged guilty of the crimes of sexual battery, burglary, and attempted second degree murder. (A.1-2) He appealed to the District Court of Appeal of Florida, Third District, contending that the following statement made by the prosecutor during closing argument was improper:

> We've heard a lot of allegations with respect to a defense and I must confess to you, when I sat down to prepare my closing remarks, I had a lot of difficulty in trying to figure out exactly what the defense was going to be, because, frankly, for my purpose, I haven't heard any. (A.1)

Respondent objected and moved for a mistrial. The motion was denied by the trial court. (A.1)

The district court of appeal filed an opinion on July 5, 1983, reversing the case and remanding the cause for a new trial. (A.1-2) Shepherd v. State, ___So.2d___(Fla. 3d DCA 1983)(Case No. 82-2113; Opinion filed July 5, 1983)[8 F.L.W. 1814]. The Court stated that it reversed the case "because the prosecutor's comment was clearly susceptible of being interpreted by the jury as referring to the defendant's failure to testify."(A.1-2)

A motion for rehearing was filed on or about July 18, 1983. Said motion was denied on September 7, 1983. On August 5, 1983, Respondent filed a Notice Invoking the Discretionary Jurisdiction of this Court.

QUESTIONS PRESENTED

I

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN CONFLICT WITH THIS COURT'S DECISIONS IN WHITE V. STATE, 377 So.2d 1149 (Fla. 1979) AND WILSON V. STATE, ___ So.2d ___ (Fla. 1983)(Case No. 61,365; Opinion filed July 21, 1983)[8 F.L.W. 265]?

II

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN CONFLICT WITH THE OPINIONS IN STATE V. BOLTON, 383 So.2d 924 (Fla. 2d DCA 1980) AND GAINS V. STATE, 417 So.2d 719 (Fla. 1st DCA 1982)?

ARGUMENT

I

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN CONFLICT WITH THIS COURT'S DECISIONS IN WHITE V. STATE, 377 So.2d 1149 (Fla. 1979) AND WILSON V. STATE, ___So.2d___ (Fla. 1983) (Case No. 61,365; Opinion filed July 21, 1983)[8 F.L.W. 265].

The decision of the District Court of Appeal of Florida, Third District, in the cause sub judice is contrary to this Court's decisions in White v. State, 377 So.2d 1149 (Fla. 1979), cert.denied 449 U.S. 845 (1980) and Wilson v. State, ___So.2d___ (Fla. 1983)(Case No. 61,365; Opinion filed July 21, 1983)[8 F.L.W 265]. In both White, supra, and Wilson, supra, this Court upheld convictions and sentences, notwithstanding comments made by the prosecutors during closing argument.

In Wilson v. State, supra, this Court held that the prosecutor's comments during closing arguments, when read in context, were merely comments upon the uncontradicted nature of the evidence and thus did not constitute prejudicial error. This Court stated in White v. State, supra, at 377 So.2d 1150, that it is firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury.

Contrary to the pronouncements of White and Wilson, the Third District Court of Appeal apparently viewed the prosecutor's statements in isolation, as though made in a vacuum. Thus, the Court declined to ackowledge that the prosecutor's comments could be viewed as a statement as to the uncontroverted nature of the evidence before the jury. Moreover, unlike the situation in the instant case, White and Wilson are easily reconcilable to the recent pronouncements of the United States Supreme Court in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, ___L.Ed.2d___ (1983), to the effect that prosecutor's comments should be viewed in their proper context (even where error of a Constitutional magnitude has occurred).

Petitioner therefore submits that this Court should accept jurisdiction in the cause sub judice to resolve the conflict between this Court's pronouncements and holdings in White v. State, supra and Wilson v. State, supra and the Third District's opinion in the present case.

II

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN CONFLICT WITH THE OPINIONS IN STATE V. BOLTON, 383 So.2d 924 (Fla. 2d DCA 1980) AND GAINS V. STATE, 417 So.2d 719 (Fla. 1st DCA 1982).

The test applied by the Third District Court of Appeal in determining whether error had occurred was whether the comment was "susceptible of being interpreted by the jury as referring to the defendant's failure to testify." (A.1-2). The use of this test conflicts with the test[1] followed by the Second District Court of Appeal in State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980) and by the First District in Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982). In Bolton and Gains, the test followed was "whether the remark was manifestly intended or was 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'"

This Court is therefore urged to accept jurisdiction in the instant cause to resolve the conflict which currently

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1 The Fourth District Court of Appeal has acknowledged that the standard that it followed in Kinchen v. State, ___ So.2d ___ (Fla. 4th DCA 1983)(Case No. 81-2133; Opinion filed May 11, 1983)[8 F.L.W. 1360]; (Opinion on rehearing filed June 29, 1983)[8 F.L.W. 1787] is contrary to be test followed in Gains, supra and Bolton, supra. The State of Florida is currently seeking discretionary review of that decision (Fla. Case No. 64,043).

exists among the district courts of appeal as to which test should be followed for determing whether a statement by a prosecutor constitutes a comment on the silence of of the accused.

CONCLUSION

Based upon the foregoing argument and authorities, Petitioner respectfully submits that this court should accept jurisdiction due to conflict of decisions pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furinshed by mail to STEPHEN A. GLASS, Esq., GELBER, GLASS, DURANT, CANAL & DARBY, P.A., 1250 N.W. 7th Street, Suite 203-205, Miami, Florida 33125, on this 13th day of October, 1983.

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CPL/sah