IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ALVIN TYRONE THORNTON, Respondent.	)	CASE NO. 64 899

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

MARLYN J. ALTMAN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel For Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

On February 19, 1982 the State charged Respondent with second degree murder with a firearm in the Seventeenth Judicial Circuit in Florida. On May 7, 1982, a jury found him guilty as charged and the court adjudged him to be guilty that day. The court sentenced him to fifty years imprisonment and retained jurisdiction over the first third of the sentence.

On appeal to the Fourth District Court of Appeal, Respondent/Appellant assigned as error comment made by the arresting officer during cross-examination. On April 13, 1983 the Fourth District Court of Appeal affirmed the decision of the lower court in a per curiam opinion with one dissenting opinion (A. 1). The lower court then issued an opinion on rehearing which superseded the original opinion and which reversed the decision of the lower court and remanded the matter for a new trial (A. 2). It is this decision of the District Court which Petitioner seeks to have reviewed by this Honorable Court. On February 8, 1984, Petitioner's Motion for Rehearing was denied by the lower court (A. 3).

STATEMENT OF THE FACTS

At trial the prosecutor attempted to show that Respondent was warned of his constitutional rights, that he waived those rights and voluntarily made a statement in which he admitted killing the victim but only in self-defense. The prosecutor asked Officer Ciani about the first time he read Respondent his Miranda rights at the time of his arrest.

> Q Did Mr. Thornton, the first time you read him his rights, give you an indication that he did not understand what you were saying?

Officer Ciani's answer was not confined to the question asked:

> A No, sir. He replied, "yes," that he understood, and he did not answer any questions at the initial time of arrest.

Counsel for Respondent timely objected and moved for a mistrial on the ground that the witness commented on Respondent's right to remain silent. The trial judge denied the motion. However, the Fourth District Court of Appeal found error in the denial of that motion.

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of the district court of appeal below which expressly and directly conflicts with other decisions of this Court and other district courts of appeal. This Court should grant discretionary review to consider and settle the law as applied to this case.

REASONS FOR GRANTING THE WRIT

The Opinion of the Fourth District Court of Appeal sub judice, is in direct and express conflict with other Opinions of this Court in several different aspects. These points will be addressed sequentially.

Initially, Petitioner would point out that the lower court erroneously construed the remark of the police officer as an improper comment on Respondent's right to remain silent. The relevant portion of the transcript is excerpted below:

> Q Did Mr. Thornton, the first time you read him his rights, give you an indication that he did not understand what you were saying?
>
> A No, sir. He replied, "yes," that he understood, and he did not answer any questions at the initial time of arrest (R. 187-188).

In the case of Donovan v. State, 417 So. 2d 674 (Fla. 1982), this Court determined that it was not error for the State to mention that the defendant remained initially silent in the face of questioning.

> Donovan first hesitated to sign the waiver form, but several minutes later signed the form and gave an incriminating statement. The totality of the circumstances indicates that he did not exercise his right to remain silent.
>
> The second objection came after Deputy Smith was asked if Donovan had indicated that he he understood the Miranda warnings. Standing alone, Smith's answer, "No, sir, Tim didn't say anything," could be interpreted as an

> exercise of his right, but when read in context it becomes clear that the answer is not objectionable. The State sought to introduce Donovan's statements through Deputy Smith, and, therefore, it was proper to elicit testimony from him that Miranda warnings were given. Such testimony is relevant to prove that the subsequent statement was made voluntarily.
>
> . . . .
>
> Deputy Smith's answers were clearly relevant to the final determination of the voluntariness of the statement.

Id.

The holding in the Donovan case mandates that the Fourth District Court of Appeal should have properly found that the officer's comment was not an improper reference to Respondent's right to remain silent. In the instant case, as in Donovan, Respondent's statement was made during his initial questioning and was made directly after the officer reviewed his rights with him (R. 9-24). Consequently, Petitioner maintains that the officer's comment at trial did not refer to Respondent's right to remain silent. Rather, the statement was relevant to show the circumstances under which the inculpatory statement was made and that Respondent freely and voluntarily chose not to exercise his right to remain silent.

In context, it is readily apparent that this statement was elicited only as part of the process of examining the circumstances under which the inculpatory statement was made. The testimony of the police officer did not constitute an impermissible reference to Respondent's right to remain silent, as the record

demonstrates a waiver of that right. Accordingly, the trial court did not err by denying the motion for mistrial, and the Fourth District Court of Appeal improvidently reversed the trial court order in contravention of the law set out in the Donovan case.

In its opinion sub judice, the Fourth District Court of Appeal stated that the standard to be applied in measuring whether a comment impinges upon the constitutionally guaranteed right to remain silent is expressed in their recent opinion of Kinchen v. State, 432 So. 2d 586 (Fla. 4th DCA 1983). In the Kinchen case, on rehearing, that court acknowledged that the First and Second District Courts have, on at least two occasions, invoked a different standard on review than was followed in the Kinchen case. See Gains v. State, 417 So. 2d 719 (Fla. 1st DCA 1982) and State v. Bolton, 383 So. 2d 924 (Fla. 2nd DCA 1980). This Court accepted jurisdiction over the Kinchen case and will hear oral argument on April 4, 1984 (a copy of the order accepting jurisdiction and setting oral argument is attached hereto as A.4). Petitioner would ask that since the conflict in the instant cause is certainly as clear as that in the Kinchen case that this Court also accept conflict jurisdiction over the instant case so that it might travel along with the Kinchen case to be resolved by this Court's determination as to the proper standard of review to be applied herein.

One final issue to note is that subsequent to the opinion on rehearing in the case sub judice but prior to the denial of

the motion for rehearing, this Court issued its opinion in State v. Murray, ___ So. 2d ___, (Fla., Case No. 63,364, Opinion filed January 12, 1984), specifically agreeing with the recent analysis of the United States Supreme Court in United States v. Hastings, ___ U.S. ___, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) holding that prosecutorial comment on the failure of an accused to testify does not require automatic reversal if the court concludes that, on the whole record, the error was harmless beyond a reasonable doubt. In its petition for rehearing, Petitioner sub judice asked the court to review the case in light of the clear duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. As the appellate court failed to even consider how the harmless error doctrine might apply to the instant case, its decision conflicts with that of the United States Supreme Court in United States v. Hastings, supra and this Court in State v. Murray, supra.

CONCLUSION

Based on the foregoing presentation, supported by the authorities and circumstances cited therein, Petitioner respectfully maintains that the decision of the Fourth District Court of Appeal in the instant case is in conflict with the decisions of this Court and decisions of other district courts of appeal. Petitioner urges this Court to find that the District Court of Appeal below improvidently decided the case sub judice and therefore requests this Court to enter an order quashing the decision of the District Court of Appeal below and reinstating the judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

MARLYN J. ALTMAN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel For Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief On Jurisdiction has been furnished to GARY CALDWELL, ESQUIRE, Assistant Public Defender,

Attorney For Respondent, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 15th day of February, 1984.

Marilyn J Altman
OF COUNSEL