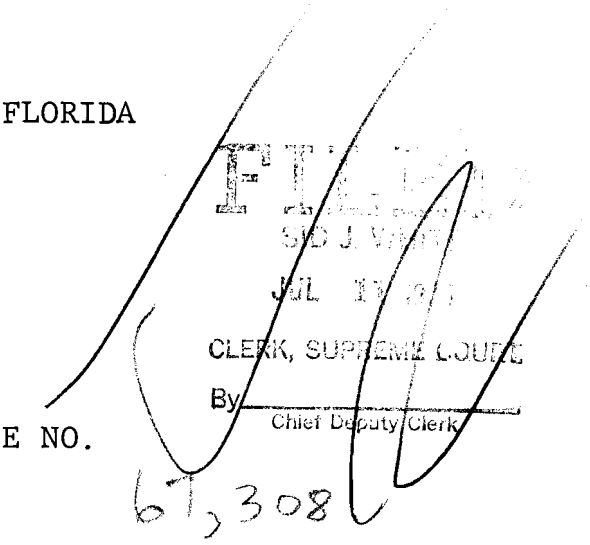
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

RICHARD LEON LOWRY,

Respondent.

CASE NO. 67,308

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was Appellee in the Fourth District Court of Appeal and prosecution, in the Circuit Court of the Nineteenth Judicial Circuit in and for Okeechobee County, Florida; Respondent was Appellant and Defendant respectively in those courts. In this brief the parties will be referred to as Petitioner and Respondent.

The symbol "A" will be used to denote Petitioner's Appendix attached hereto. All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with one count of a lewd and lascivious act upon a child and one count of performing a lewd and lascivious act in the presence of a child. The record is not specific but at some point in time prior to trial the second count was nolle prossed. The defendant was tried and convicted of committing a lewd and lascivious act upon a child (Appendix I).

During closing argument, defense counsel attacked the credibility of the State's case by calling the victim's mother a liar and by arguing that the State had failed to call some six (6) witnesses, who had information about the case, to testify. The prosecutor responded by pointing out that the witnesses had been in court and available to the defense if he had wanted to call them. The prosecutor further replied:

> You heard [defense counsel] say that he has talked to the witnesses in this case many times and that is true. Until Mr. Lowry testified in here the other day I had no idea whatsoever what he was going to say but he knew exactly what all of the State witnesses were going to say before he got up and testified. They had no idea what he was going to say. Keep that in mind.

The Petitioner argued that this comment by the prosecutor was a fair response to Respondent's closing remarks and directed towards Respondent's credibility. The Fourth District agreed, but found the remarks were susceptible of construction as a comment upon Respondent's right to remain silent, hence reversible without resort to the harmless error doctrine.

The Petitioner's motion for rehearing, rehearing en banc and for certification of question was denied. The Petitioner timely filed its Notice of Intent to Invoke Discretionary Jurisdiction and this appeal follows:

POINT INVOLVED

WHETHER PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT IN THE INSTANT CASE AND DECISIONS OF THE FLORIDA SUPREME COURT AND DECISIONS OF OTHER STATE APPELLATE COURTS?

SUMMARY OF ARGUMENT

The decision of the Fourth District, applying a per se reversible rule to the prosecutor's remarks in closing, directly and expressly conflicts with this Court's hold in State v. Murray, 443 So.2d 955 (Fla. 1984).

The decision of the Fourth District also directly and expressly conflicts with cases which hold that a prosecutor in closing argument may respond to remarks of defense counsel and comment on the evidence as it exists before the jury without necessarily violating a defendant's Fifth Amendment rights.

ARGUMENT

PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT IN THE INSTANT CASE AND DECISIONS OF THE FLORIDA SUPREME COURT AND DECISIONS OF OTHER STATE APPELLATE COURTS.

Petitioner seeks to establish this court's "conflict" jurisdiction under Art. V, § 3(b)(3), Fla. Const. (1980) and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P. Conflict exists between the instant decision and the decisions in State v. Murray, 443 So.2d 955 (Fla. 1984); White v. State, 377 So.2d 1149 (Fla. 1980) cert. denied 449 U.S. 845; Gaines v. State, 417 So.2d 719 (Fla. 1st DCA 1982) pet. for rev. denied 426 So.2d 26 (Fla. 1983); State v. Bolton, 383 So.2d 924 (Fla. 2nd DCA 1980).

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the Supreme Court or another district, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). The court below created conflict in the former way by announcing a rule of law contrary to that announced in Murray, supra, and in the latter way by applying a rule of law set out in White, supra; Gaines, supra, and

Bolton, supra to produce a different result in a case which involves substantially the same facts as those cases.

Petitioner submits that conflict exists between these decisions and the decision sub judice because in the instant case the Fourth District held that the prosecutor's remarks in closing, while directed to Respondent's credibility were also susceptible of construction as a comment on the Respondent's right to remain silent and thus reversible per se without regard to the harmless error rule.

In State v. Murray, 443 So.2d 955, 956 (Fla. 1984), this Court adopted the reasoning of the United States Supreme Court in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). In holding that improper prosecutorial argument could and did in that instance constitute mere harmless error:

> ...Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a

> conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opinion here contains no indication that the district court applied the harmless error rule. The analysis is focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any conclusion as to whether this evidence was or was not dispositive.
>
> We have reviewed the record and find the error harmless. The evidence against the defendant was overwhelming . . .

(Emphasis added).

This Court's opinion in State v. Murray, supra, clearly embraces the Hasting and Chapman opinions and rationale and similarly determines that prosecutorial misconduct through improper comment does not involve any error "so basic to a fair trial" that it can never be treated as harmless. 443 So.2d at 956. Given this Court's acceptance of the Hasting decision and rationale in Murray, it has been made clear that an improper comment by a prosecutor - including an improper comment on the exercise by a defendant of his Fifth Amendment right of silence does not mandate, per se, reversal of a conviction by an appellate court in its supervisory power, but that rather the error must first be evaluated in light of the evidence presented to determine if

the offensive conduct was in fact harmless. Accordingly, the per se reversal rule reiterated in Clark v. State, 363 So.2d 331 (Fla. 1973), Bennett v. State, 316 So.2d 41 (Fla. 1975), and Trafficante v. State, 92 So.2d 811 (Fla. 1957), have lost their import due to this Court's embracing of the Supreme Court's clear pronouncement that the harmless error doctrine is applicable to appellate review in the context of the Fifth Amendment rights and an alleged comment on a defendant's exercise of his right to remain silent. Hence, the Fourth District's decision in the instant case to apply a per se reversible rule without regard to the harmless error rule is in express and direct conflict with this Court's decision in Murray, supra.

The Fourth District's decision further conflicts with the holdings in White, supra, Gains, supra and Bolton, supra. This Court in White, supra at 1150 stated:

> It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue.

In Gaines, supra, and Bolton, supra, the courts, following White, noted that it was patent from the content of the remarks that the prosecutor was referring to defense counsel's previous statements, rather than the appellant's assertion of his right to remain silent, a practice which is proper.

The Fourth District, despite finding the prosecutor's remarks below to be in direct response to defense counsel's

remarks, and despite finding they were directed towards Respondent's credibility, misapplied the rule set out in White, supra, Gains, supra, and Bolton, supra, to the substantially similar facts of this case, creating express and direct conflict with those cases.

Finally the State calls this Court's attention to the following cases, presently pending before it, each of which was certified by a district court of appeal on this issue:

State v. Marshall, FSC No. 66,374

State v. Rowell, FSC No. 65,417

State v. DiGuilio, FSC No. 65,490

Crawford v. State, FSC No. 66,808

CONCLUSION

Based on the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner respectfully requests this Honorable Court ACCEPT Jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 8th day of July, 1985, by mail to: LESTER W. JENNINGS, ESQUIRE, P. O. Box 237, Okeechobee, Florida 33472.

Sarah B Mayer

Of Counsel