IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,308

STATE OF FLORIDA,

Petitioner

vs.

RICHARD LEON LOWRY,

Respondent

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts except for the following:

Testimony was adduced at the trial that the victims mother, who lived with the Defendant for several years, had stated before this matter arose, she was going to get what she needed out of the Defendant then have him thrown in jail. The mother denied this at the trial leading to defense counsel's statement that she was lying.

Contrary to Petitioner's statement of the case and facts, the District Court did not state that the prosecutor's remarks were a fair response to Respondent's closing argument but stated that it would not disagree that the comments were directed to Respondent's credibility but that they were fairly susceptible of construction as a comment on Appellant's right to remain silent. (See Petitioner's Brief Appendix I).

ARGUMENT

THERE IS NO 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 AND THIS COURT HAS NO JURISDICTION TO HEAR THE INSTANT CASE.

The Petitioner, STATE OF FLORIDA, argues that the instant decision of the Fourth District Court of Appeals is in conflict with a rule of law announced by this Court in State v. Murray, 443 So. 2d 955 (Fla. 1984). This is not correct. In the Murray case, supra, the Defendant was convicted of possession of a firearm by a felon. Evidence against the Defendant was overwhelming. Evidence was presented showing the Defendant had previously been convicted of felony robbery. Two witnesses testified they saw him with a firearm preceeding the arrest and one witness testified he hid the firearm under the passenger seat in which he was sitting in an automobile. A police officer testified he stopped the automobile with the Defendant in it and found the firearm under Defendant's seat. Another officer testified that the Defendant admitted to him that he had the firearm in his possession. The Defendant testified at the trial he did not possess the firearm.

The prosecuting attorney in the Murray case, supra, argued to the jury that the Defendant though he could twist and bend the law and lie to you (the jury), so as not to be sent to prison.

This was a comment on the Defendant's state of mind and not on the Defendant's right to remain silent. This Court stated in the Murray case, supra, that a comment on the Defendant's state of mind is improper but found the error harmless because of the overwhelming evidence against the Defendant.

Petitioner argues that the harmless error doctrine applied in the Murray case supra, should have been applied in the instant case by the Fourth District Court of Appeals. This is not correct. This Court has always held that a comment on the Defendant's right to remain silent is reversible error. Hall v. State, 403 So. 2d 1321; David v. State, 369 So. 2d 943; Bennett v. State, 316 So. 2d 41 (Fla. 1975); Donovan v. State, 417 So. 2d 674 (Fla. 1982); State v. Burdick, 442 So. 2d 944 (Fla. 1983). To show that this Court in the Murray case supra, never intended to apply the harmless error doctrine to comments of the prosecutor as to the Defendant's right to remain silent, Respondent cites, State v. Strasser, 445 So. 2d 322 (Fla. 1984), released a month after the Murray decision in which this Court cited its prior decision in State v. Burdick, 442 So. 2d 944 (Fla. 1983), that it was reversible error to admit evidence at the trial that a Defendant had intelligently exercised his constitutional right to remain silent.

There is no conflict between the Murray case supra, and the decision of the Fourth District Court in the instant case.

The instant case is also different from the Murray case supra, in that in the Murray case evidence was strong and conclusive as to the guilt of the Defendant while in the instant

case the only evidence against the Defendant was testimony of a 6 year old child who did not have the maturity to answer questions and who changed her testimony depending upon who was asking the questions.

Petitioner in its jurisdictional brief also argues that the decision in the instant case in in conflict with this Court's decision in White v. State, 377 So. 2d 1149 (Fla. 1979). In the White case supra, this Court held that a prosecutor could comment on evidence before the jury and to comment on an absence of evidence on a certain point. In the White case supra, the prosecutor had stated in closing argument, "you haven't heard one word of testimony to contradict what she (State's witness) said, other than the lawyers argument." This is quite different from the instant case where the prosecutor advised the jury to keep in mind that he did not know what the Defendant would testify to at the trial while defense counsel had talked to the State's witnesses many times. The White decision contained no mention of the Defendant's right to remain silent and whether this issue was considered is not shown. So therefore, Petitioner can show no conflict between the District Court's decision in the instant case and the White case supra.

Petitioner also argues that the decision in the instant case is in conflict with the decision of the First and Second District Court of Appeals in Gaines v. State, 417 So. 2d 719 (1st DCA 1982) and State v. Bolton, 383 So. 2d 924 (2nd DCA 1980).

In the Gaines case supra, the prosecutor commented on defense attorney's closing arguments and then stated "they,

(defense attorneys) don't want to talk to you about where certain stolen property found in Defendant's car came from." The District Court held that these comments were to defense counsel's previous statements and not to the Defendant's right to remain silent. This is quite different from the instant case where the Assistant State's Attorney told the jury to keep in mind he didn't know what the Defendant would testify to until the trial while the Defendant's attorney had talked many times to the State's witnesses.

The Bolton case supra, contained a comment by the prosecutor that the defense counsel in arguing before the jury, "hasn't told us what his defenses are." In holding, there was not reversible error, the Second District Court of Appeal held the remarks were clearly directed at defense counsel and not at the failure of the Defendant to testify. This is again, quite different from the instant case where the prosecuting attorney told the jury to keep in mind while defense counsel had talked to the State's witnesses many times, he, the prosecutor, did not know what the Defendant would testify to until the trial.

The Bolton decision stated:

> "The Federal Courts have clearly supported the right of the prosecutor to comment on the failure of the defense, as opposed to the defendant, to explain testimony...."

The Bolton case supra, and the Gaines case supra, are both distinguishable from the instant case in that the former decisions contained comments by the prosecutors going to the defense attorneys failure to explain in argument before the jury certain crucial things while in the instant case, the remark of the prosecutor is clearly a remark about his not

being able to question the Defendant previous to the trial.

The conflict jurisdiction of the Supreme Court is not whether the Court would have arrived at a conclusion different from that reached by the District Court, but whether the decision of the District Court, on its face, conflicts with a prior decision of the Supreme Court or that of another District Court of Appeals on the same point of law so as to create an inconsistency or conflict among precedents. Nielsou v. Sara Sofa (1960 Fla.), 117 So. 2d 731; Kyle v. Kyle, 139 So. 2d 885 (1962 Fla.) and Kincaid v. World Insurance Co., 157 So. 2d 517 (1963 Fla.).

In conclusion, the Respondent would respectfully show from the above cited authorities, that this Court does not have jurisdiction to review the decision of the Fourth District Court of Appeals and respectfully requests this Court to decline to accept jurisdiction of this cause.

Respectfully Submitted,

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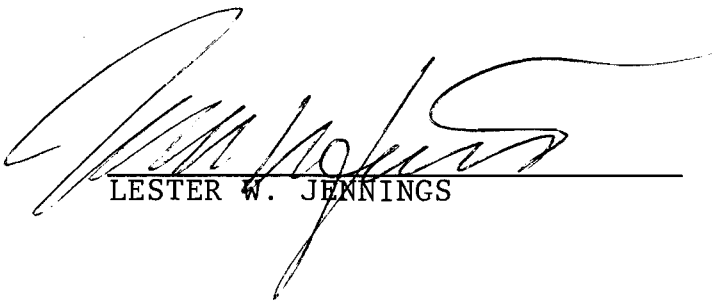
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to SARAH B. MAYER, ESQUIRE, Assistant Attorney General, at 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 8th day of August, 1985.



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