IN THE SUPREME COURT OF FLORIDA.

CASE NO. 67,330

TIMOTHY MICHAEL JOYCE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF THE DISTRICT COURT OF APPEAL OF
FLORIDA FOR THE FOURTH DISTRICT

# BRIEF OF PETITIONER ON JURISDICTION

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## JURISDICTIONAL STATEMENT

Timothy Michael Joyce petitions for discretionary review by the Supreme Court of Florida of the opinion by the District Court of Appeal, Fourth District, affirming the conviction of the Petitioner in the trial Court for conspiracy to traffick in cannabis and carrying a concealed firearm, (A 1-5) and the Order entered by the District Court of Appeal, Fourth District, denying the Petitioner's Motion for Rehearing, Motion for Rehearing En Banc, and alternative Motion to Certify Conflict of Decisions and Question of Great Public Importance entered June 6, 1985. (A 6) The Petitioner invokes the jurisdiction of this Court, pursuant to Article V of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure. The decision expressly and directly conflicts with decisions of the Supreme Court on the same question of law. Following the entry of the order denying the Petitioner's Motion for Rehearing, Motion for Rehearing En Banc, and Alternative Motion to Certify Conflict of Decisions and Question of Great Public Importance, the Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction of this Honorable Court.

## FACTS NECESSARY TO SHOW JURISDICTION

The opinion from which discretionary review is sought by the Petitioner expressly reveals that the Petitioner had specifically availed himself of Florida Rule of Criminal Procedure 3.220(a)(1)(iii)[1]. (A 2). The State furnished Petitioner with a copy of a tape recording claiming it to be a complete copy of the oral communications electronically intercepted between the Petitioner and an undercover police officer. Prior to trial, the Petitioner deposed the officer who recorded the communications who confirmed that the tape contained the complete conversation. (A 3) In an abundance of caution, the undersigned counsel, trial counsel for the Petitioner as well, wrote a letter to the State Attorney questioning whether or not the tape was complete. (A 2) To this letter, the State Attorney failed to reply. (A 2) Subsequent to the depositions, both the police officer who recorded the tape and the Assistant State Attorney who tried the case became aware that the tape was incomplete, long before the trial commenced. (A 3) Neither the Officer, nor the

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[1] Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements. Rule 3.220(a)(1)(iii) Fla.R.Crim.P.



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Assistant State Attorney communicated this to the Petitioner. (A 3) Upon undersigned counsel's becoming aware for the first time that the tape previously furnished by the State was incomplete upon cross-examining the recording Officer during the middle of a three-week trial, the undersigned counsel moved for a mistrial on the grounds of the discovery violation. (A 3) The trial judge, the Honorable Arthur Franza, failed to hold a Richardson hearing and denied the Motion for a mistrial and immediately thereafter allowed the testimony of the undercover officer as to the remaining forty minutes of conversation not included in the tape previously furnished as a complete record of the conversation. (A 3) The District Court of Appeal held in its opinion that the undersigned counsel waived the Petitioner's right for review of the discovery violation on appeal by requesting a mistrial instead of objecting to the admissibility of the non-disclosed conversations. (A 4-5) The opinion of the District Court makes clear that the trial judge was fully aware that an objection was being made and that the grounds therefor were fully enunciated to the trial judge, (A 3) yet, the District Court of Appeal held in its Opinion that the failure of undersigned counsel to say "I object," even though the undersigned counsel moved for a mistrial and argued



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the grounds therefor at length outside the presence of the jury, waived the Petitioner's right for review of the discovery violation on appeal. (A 4-5)

In the opinion from which the Petitioner seeks discretionary review, the District Court of Appeal, Fourth District, succinctly reasoned as follows:

> At trial the officer who had been responsible for recording the meeting testified before the undercover officer. [The significance of the order of witnesses will be apparent in a moment.] The "recording officer" stated that the motel room meeting had lasted for an hour and ten minutes, but the tape contained only a half-hour of conversation. This discrepancy resulted from the officer's unfamiliarity with the tape recorder and his failure to switch tapes when the first ran out. On cross-examination, the recording officer admitted that, at his pre-trial deposition, he had testified that the tape was complete. Only later did he realize the error, but he did not communicate further with defense counsel. The record also disclosed that the prosecutor became aware of the problem with the tape sometime after a pre-trial hearing on the defendant's motion to suppress the tape. However, he did not convey this information to defense counsel.
>
> Defense counsel moved for a mistrial at the conclusion of the recording officer's testimony. Counsel argued that the prosecutor's failure to notify the defense that the tape did not reflect the entire meeting constituted a discovery violation. The trial court denied the motion for mistrial without conducting a full Richardson hearing. Thereupon, the state called the undercover officer



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> as its next witness. He recounted the meeting in detail and ascribed several incriminating statements to each defendant. His testimony was received without objection predicated on an alleged discovery violation.

(A 2-3)

> [I]f the undercover officer, who had been present at the motel room meeting, attempted to testify at trial about defendants' statements, which were not on the tape and which had not been otherwise disclosed to the defense, there would have been a discovery violation. And, upon proper and timely objection, the trial court would have been required to conduct a Richardson hearing. As indicated, however, the defendants did not interpose a discovery objection to any portion of the undercover officer's testimony. Thus, we have not been presented with, and do not reach, the question of whether the state satisfied its obligation under Rule 3.200(a)(1)(iii), Fla.R.Crim.P. (sic) (Emphasis supplied)

(A, 4-5)

## SUMMARY OF ARGUMENT

The Petitioner argues that the Supreme Court should accept jurisdiction of this Petition for Discretionary Review as the decision rendered below directly and expressly conflicts with this Honorable Court's decision in Richardson v. State, 246 So.2d 771 (Fla. 1971), Cumbie v. State, 345 So.2d 1061 (Fla. 1977), Thomas v. State, 419 So.2d 634, (Fla. 1982), and Spurlock v. State, 420 So.2d 875 (Fla. 1982).



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## ARGUMENT IN SUPPORT OF JURISDICTION

In Cumbie v. State, supra., this Honorable Court held that the failure of the trial Court to conduct a hearing as mandated by Richardson, supra, could not be dismissed as harmless error and that the failure of the trial Court to conduct an inquiry into the question of prejudice is reversible as a matter of law. The opinion from which the Petition seeks review in the court below recognized that there in fact was a discovery violation in the instant case, and that the violation was brought to the attention of the trial court by the undersigned counsel's motion for a mistrial. However, the court below held that the Petitioner waived his right to a Richardson hearing due to his attorney's requesting a mistrial on the basis of the exact grounds the court indicated should have been raised by objection: "[A]nd, upon proper and timely objection, the trial Court would have been required to conduct a Richardson hearing. As indicated, however, the Defendants did not interpose a discovery objection to any portion of the undercover officer's testimony." (A, 4-5)

In Cumbie, supra, this Court held that the failure to hold a Richardson hearing could never be considered "harmless error." The District Court of Appeal, Fourth District, in the decision of which the Petitioner seeks review, has held



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that although an objection would have required an appellate court to reverse a conviction unless the trial court made an inquiry into all the circumstances surrounding the breach, a motion for a mistrial would not. Perhaps next the requirement of taking an exception to an overruled objection should be reinstated as a condition of appellate review were the logic of the court below to be extended to its conclusion.

Upon becoming aware for the first time that additional conversation took place other than that recorded on the tape, after the recording witness had testified at deposition that the tape was complete, the undersigned counsel asked that the jury be excused from the room and made a lengthy motion for a mistrial knowing that the next witness to be called by the State was the undercover officer whose transmissions were being recorded by the testifying officer, whose testimony had been completed. The undersigned counsel's motion for a mistrial was denied, and the testimony of the "missing" conversations was allowed immediately after the denial of the Motion for Mistrial by the trial judge upon the jury's being returned. Undersigned counsel fully believed he had preserved the issue, and the Record from the trial court fully supports that belief as does the opinion of the court below, as can be seen from the following in its opinion:



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> Defense counsel moved for a mistrial at the conclusion of the recording officer's testimony. Counsel argued that the prosecutor's failure to notify the defense that the tape did not reflect the entire meeting constituted a discovery violation. The trial court denied the motion for mistrial without conducting a full Richardson hearing. Thereupon, the state called the undercover officer as its next witness. (Emphasis supplied)

(A 3)

The court below went on to rule that the motion for mistrial was insufficient, and that instead undersigned counsel should have stood up in front of the jury and said the magic words, "I object."[2]

> [A]nd, upon proper and timely objection, the trial court would have been required to conduct a Richardson hearing. As indicated, however, the defendants did not interpose a discovery objection to any portion of the undercover officer's testimony.

(A 4-5)

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[2] It is interesting to note that the same District Court of Appeal, the Fourth District, speaking through another panel in an opinion authored by Judge Anstead stated the following: "Rule 3.220 of the Florida Rules of Criminal Procedure requires the State to furnish the defense with the reports or statements of experts on a continuing basis. Richardson strictly requires the trial Court to conduct a mini-hearing at trial if a discovery violation is alleged and to determine what sanction, if any, including possible exclusion of the evidence or mistrial may be appropriate." (citations omitted, emphasis supplied). Alfaro v. State, So.2d _____, 10 FLW 1577 (4th DCA 1985)

It is interesting to note this opinion was filed by the District Court of Appeal on June 26, 1985, subsequent to the instant opinion.



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In Thomas v. State, 419 So.2d 634 (Fla. 1982), this Court reaffirmed its holding in Brown v. State, 206 So.2d 377, 384 (Fla. 1968), by stating:

> This Court has stated that "a lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless.

Thomas v. State, supra, at 635.

In Thomas, supra, this Honorable Court went on to approve the decision of the First District Court of Appeal in Hubbard v. State, 411 So.2d 1312 (1st DCA 1982), by stating:

> "[C]ounsel need not use the magic words 'I object,' so long as it is clear that the trial judge was fully aware that an objection had been made, that the specific grounds for the objection were presented to the judge, and that he was given a clear opportunity to rule upon the objection."

Id. at 636.

This Court, in Thomas, supra, stated the following which could clearly be applied to the case at bar:

> [T]he Court, therefore, clearly understood Thomas' position, and further argument or objection would have been futile. This factual situation satisfies the objectives of the contemporaneous objection rule - "to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Castor v. State, 365 So.2d at 703. We agree with both the fourth and first districts that, in a situation such as this, it is not necessary to say, "I object," and state the grounds therefor



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> where the record shows, clearly and unambiguously, that the request was made and that the trial court clearly understood the request and, just as clearly, denied that specific request. (Emphasis supplied)

Id. at 636.

In Spurlock v. State, 420 So.2d 875 (Fla. 1982), this Court reaffirmed its earlier decision in Thomas, supra, quashing the District Court's ruling and remanding the case for a new trial observing:

> [T]he trial judge was aware of petitioner's objection regarding jury instructions and had an opportunity to rule thereon. The missing "magic words" do not concern us because the necessary substance was present.

Id. at 877.

In the instant cause, undersigned counsel submits on behalf of the Petitioner that the necessary substance is present here so that this Honorable Court should exercise its discretionary jurisdiction in favor of hearing the Petitioner's cause on the merits.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on Jurisdiction and Appendix was served on the Respondent this 15th day of July, 1985, by mailing a copy to Honorable Sarah B. Mayer, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401.

by: MILTON M. FERRELL, JR.



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