IN THE SUPREME COURT OF FLORIDA

TIMOTHY MICHAEL JOYCE, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. 67,330

ANSWER BRIEF ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

SARAH B. MAYER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida; Respondent was the Appellee and Prosecution respectively in those courts. In this brief the parties will be referred to as they appear before this Court.

In this brief the opinion of the Fourth District in this case will be denoted by the symbol "O" and the page number of the opinion as it is cited in Southern Reporter; references to the record below will be denoted by the symbol "R". All emphasis in this brief is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent rejects Petitioner's statement of the case and facts as many of those asserted facts are not contained in the Fourth District Court's opinion in the present case and thus are improperly presented to this Court in an attempt to demonstrate conflict jurisdiction.

The course of procedural events and facts adduced below, as recited by the Fourth District in its opinion are as follows:

Petitioner was convicted of conspiracy to traffic in cannabis and carrying a concealed firearm in the trial court (O.1012). Petitioner's arrest and conviction stemmed from a motel room meeting between an undercover officer and the defendants (O.1012). At the meeting the officer was outfitted with a Unitel transmitter which enabled another officer, outside the room, to record the meeting (O.1012). However, due to the recording officer's unfamiliarity with the tape recorder and his failure to switch tapes when the first ran out, only a half-hour of the hour and ten minute meeting was recorded (O.1012-1013). At trial the recording officer admitted that, at his pre-trial deposition, he had testified that the tape was complete; although the officer later realized his error, he did not communicate further with defense counsel (O.1013).

In response to the Petitioner's pre-trial discovery request, the state filed its answer indicating that the de-

fendants had made oral statements and provided the defense with a duplicate copy of the tape recording (0.1012). After hearing the tape defense counsel, by letter, inquired of the prosecutor whether another tape existed because his copy ended at a point which obviously was not the end of the transmission or recording (0.1012). The prosecutor did not answer defense counsel's letter (0.1012).

At the conclusion of the recording officer's testimony, defense counsel moved for a mistrial, arguing that the state's failure to notify the defense that the tape was incomplete was a discovery violation (0.1013). The trial court denied the motion without conducting a full Richardson hearing (0.1013).

Thereafter the undercover officer testified to the meeting in detail, including recounting several incriminating statements made by Petitioner (0.1013). His testimony was received without any objection predicated on an alleged discovery violation (0.1013-1014).

The Fourth District affirmed Petitioner's conviction and sentence (0.1014).

POINT ON APPEAL

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH ANY OPINION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL?

SUMMARY OF ARGUMENT

This Court should decline jurisdiction of the instant case because the Fourth District's opinion does not create conflict with decisions of this or another district court of appeal; the Petitioner's objection below, to the state's failure to inform him that the tape was incomplete, was properly denied as the state's failure did not constitute a discovery violation, nor did said objection pertain to statements made by Petitioner (O.1013). His testimony was received without any objection predicated on an alleged discovery violation (O.1013-1014).

The Fourth District affirmed Petitioner's conviction and sentence (O.1014).

ARGUMENT

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OPINION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL. (Restated).

Petitioner asserts the decision of the Fourth District in the instant case "directly and expressly" conflicts with decisions of this Court and other courts of appeal.

Respondent disagrees.

This Court in Mancini v. State, 312 So.2d 732, 733 (Fla. 1975), held that conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule of law 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. The decision of the Fourth District in the instant case does neither, thus Respondent asserts there is no conflict created by the Fourth District's opinion and this Court should decline to accept this case. As stated by Justice Adkins in Gibson v. Malony, 231 So.2d 823, 824 (Fla. 1970), "[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari. [Emphasis in original].

Petitioner argues that his motion for mistrial on the ground that the state committed a discovery violation by failing to inform defense counsel that the tape was incomplete,

constitutes a sufficient objection to the undercover officer's testimony regarding inculpatory statements made by Petitioner. Thus Petitioner contends the Fourth District's opinion conflicts with decisions which hold it is not necessary to intone the magic words "I object" to preserve an error for appeal.

As noted by Petitioner in his jurisdictional brief, this Court in Castor v. State, 365 So.2d 701 (Fla. 1978) held that the objectives of the contemporaneous objection rule are met by an objection which is "sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal". Id. at 703. The state asserts the Fourth District properly found that the Petitioner's objection and motion for mistrial based upon the state's failure to notify the defense that the tape was incomplete was not an objection to the admissibility of the undercover officer's testimony regarding the defendant's statements.

Petitioner does not assert that he was not apprised during discovery, of the fact that he had made statements which the state was going to use as evidence; indeed, the Fourth District specifically found that Petitioner made no such discovery violation objection (O.1013-1014). The Fourth District further found that the state, in response to Petitioner's discovery request, had informed the defense that Petitioner had made oral statements (O.1012). Petitioner's

sole basis for objection and mistrial was that the state failed to notify him that the tape was incomplete. Hence, if Petitioner had some ground for objecting to the admission of his statements through the testimony of the undercover officer i.e. that he had not been informed of the existence of those statements during pretrial discovery, he did not make an objection or motion for mistrial on that ground and the Fourth District properly refused to reach that issue on appeal.

Thus the Fourth District's opinion does not conflict with the decisions of this Court or other courts of appeal which hold that the magic words "I object" are unnecessary to preserve the issue for appeal so long as the trial judge is clearly apprised of the purported error and clearly denies the objection or motion. See: Castor, supra; Thomas v. State, 419 So.2d 634 (Fla. 1982); Spurlock v. State, 420 So.2d 875 (Fla. 1982); State v. Heathcoat, 442 So.2d 955 (Fla. 1983).

Furthermore, Petitioner does not assert that the Fourth District's decision, that the state's failure to inform the defense that the tapes were incomplete did not constitute a discovery violation, is in conflict with decisions of this Court or another court of appeal. This Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), held that the state's burden in responding to discovery requests is to inform defense of evidence and witness of which the state is aware Id. at 1138; the state's duty is not to inform the de-

fense of the lack of evidence. See also: Sireci v. State, 399 So.2d 964 (Fla. 1981); State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981); State v. Banks, 418 So.2d 1059 (Fla. 2nd 1982). A discovery violation occurs when the state fails to disclose statements made by the defendant or witnesses who have knowledge of the offense. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977); Richardson v. State, 246 So.2d 771 (Fla. 1971). Petitioner below, did not complain that the state failed to inform him he made statements or that the state failed to provide him with a witness list; therefore no discovery violation occurred or Petitioner made no objection or motion for mistrial based upon such representations.

As the state was not obligated to inform defense counsel that the tape was incomplete and as Petitioner made no objection to the testimony of the undercover officer regarding his statements on the ground that he was previously unaware of the statements, the state asserts, as the Fourth District and the trial court properly held, no discovery violation occurred and no Richardson inquiry was required. Indeed the Fourth District expressly restricted their holding in the instant case so that it would not conflict with Richardson, supra and other cases involving discovery violations and objections thereto (O.1013-1014).

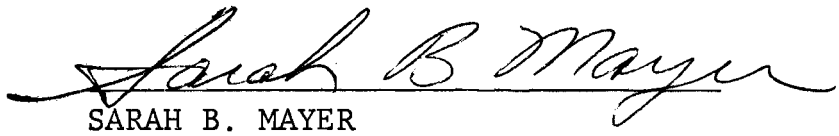
Therefore, Respondent asserts, the Fourth District's opinion clearly does not conflict with decisions of this Court or other district appellate courts and this Court should decline to accept jurisdiction of this case.

CONCLUSION

WHEREFORE based on the foregoing arguments cited therein, Respondent respectfully requests this Honorable Court DECLINE to accept jurisdiction in this case.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida



SARAH B. MAYER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief on Jurisdiction has been furnished by United States mail to MILTON M. FERRELL, JR., 66 West Flagler Street, Suite 700, Miami, FL 33130 this 9th day of August, 1985.

Of Counsel