IN THE SUPREME COURT OF FLORIDA

RANDY EUGENE KINCHEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 70,780
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

ANSWER BRIEF ON THE MERITS

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LIST OF CITATIONS

PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County County, Florida. Petitioner was the appellant in his appeal to the Fourth District Court of Appeal and on remand to that court.

Respondent, State of Florida, was the prosecution in the Circuit Court, and the appellee in the Fourth District Court of Appeal. The State of Florida was the Petitioner on the previously certified question.

In the brief, the State will be referred to as either the Respondent or Appellee, and Petitioner will be referred to either by name, or as Petitioner, or as Appellant.

The following symbols will be used:

R Record on Appeal

AB Appellant's Initial Brief on the Merits herein.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court with the following clarifications:

The victim, P[redacted] L[redacted] was confused as to the defendant's hair color (R 630, 721). However, P[redacted] did testify, with no uncertainty, that Appellant unzipped his pants to allow her to perform oral sex (R 762), which she unwillingly obliged Appellant with (R 574). She further described how Appellant drove them to a sandy area where she was forced to perform sex on the passenger, James Marino (R 578), and she noted that Appellant was not forced to drive the car (R 757), that he did not try to stop Marino (R 759), and that Appellant said nothing when Marino initially dragged her into the car.

While Ms. L[redacted] could not be certain if Appellant ever struck her (R 644, 741), she did recall Appellant placing a bag over her head (R 677), and she further recalled Appellant telling James Marino that the oral sex she was performing on Appellant was not being done right and how that statement furnished Marino with an excuse for beating her (R 764).

P[redacted] L[redacted] recalled being hit with a belt and then a chain (R 581-582) while Appellant was present, and Detective Richtarcik testified that the fingerprints found on the belf buckle found matched Appellant's (R 974, 977). John Holland testified that the shouts he heard came from a girl and several men (R 803). He testified that upon going out to investigate, he saw two white males throwing bottles,

and one of them swinging a chain at a girl in the water who was saying, "Don't hurt me. Leave me alone." (R 804-805). Holland testified that he saw the two defendants at the Intercoastal, with one defendant beating the victim with a chain, while the other split open her skull with a Miller's bottle (R 806). These acts occurred while the victim was in approximately eight feet or more of water and clinging to a piling (R 806).

Officer Fred West spoke to the victim shortly after the incident, while she was in the hospital (R 1230). He was told that suspect #2 had a medium build with dark brown hair (R 1240)(Marino), while suspect #1 was slimmer, with light brown hair (R 1236)(Kinchen). The victim then related, to Officer West, how both defendants hit her with a chain (R 1249).

At the close of the case, the jury was, in pertinent part, instructed:

> If two or more persons help each other commit or attempt to commit a crime and the defendant is one of them, the defendant must be treated as if he had done all of the things the other person or persons did. If the defendant, (#1) knew what was going to happen, (#2), intended to participate actively or by sharing in an expected benefit; and (#3) actually did do something by which he intended to help or commit or attempt to commit the crimes alleged. Help means to aid, plan or assist.
>
> (R 1627).

Detective Edel of the Dania Police Department, never testified that "he removed P[redacted] L[redacted] from the Ocean" (AB 8). He did not testify that Ms. L[redacted] had told him that one of the individuals in-

volved "wanted no part of the situation" (AB 9), but he did testify that Ms. [redacted] had told him that this individual had brought the chain to the other individual (R 1029, 1031).

SUMMARY OF THE ISSUES

Point I. This Court's previous holding in State v. Kinchen should be considered res judicata regarding all issues previously raised, including the issue of harmless error. Appellee/Respondent submits that there is absolutely no reason to use the certification of a question involving the internal operating procedures of the district court to provide a full second review of issues previously raised in appeals.

Point II. It is not necessary, in evaluating an assertion of harmless error in a criminal appeal, that each appellate judge independently read the entire trial record. It is presumed that courts do what is necessary to discharge their duties. Considerations of judicial economy must lead this Court to the conclusion that it is not necessary for each judge to read the entire record.

Point III. The comment that a witness' testimony was unrefuted was, at most, harmless error. Co-counsel's closing remark had no adverse affect on Appellant/Petitioner's case, because it was irrelevant as to whether or not Appellant was the leader or the follower in the commission of the criminal acts. The jury instruction regarding aiding and abetting leads to the inescapable conclusion that the comment by Mr. Smith had no significant effect on the jury.

Point IV. The trial court did not err in denying Respondent's motion for severance because in view of the overwhelming evidence the jury's determination of guilt or innocence would not have been affected absence a joint trial.

Point V. The trial judge did not err in denying Respon-

dent's motion for a continuence as Respondent's trial counsel had the opportunity to depose Mr. Knesz before he was called at trial.

Point VI. The hypnotizing of a prosecution witness, prior to trial, should not result in reversal of this case because this Court's decision in Bundy v. State, infra, held that its application was prospective and since this case occurred before the Bundy decision, no relief should be granted.

ARGUMENT

POINT I

THIS COURT'S HOLDING IN STATE v. KINCHEN, 490 So.2d 21 (FLA. 1986), SHOULD BE CONSIDERED RES JUDICATA REGARDING ISSUES PREVIOUSLY RAISED, INCLUDING THE ISSUE OF HARMLESS ERROR. (restated).

It is Appellee's position that Appellant should not obtain a second review of matters previously resolved by the Fourth District Court of Appeal and by this Court, through a procedural fortuity. Appellee submits the doctrine of res judicata applies to prevent repetitious applications upon the same matter to either successive courts or, in this case, to the same court. Johnson v. State, 390 So.2d 1234 (Fla. 5th DCA 1980); see also, Florida Parole and Probation Commission v. Baker, 346 So.2d 640 (Fla. 2nd DCA 1977); Weeks v. State, 181 So.2d 746 (Fla. 1st DCA 1966). There is absolutely no reason to use the certification of an internal operating question certified by the district court to provide a full second review of issues raised in previous appeals. See generally, Berezovsky v. State, 350 So.2d 80, 81 (Fla. 1977); see also, Sobel v. State, 437 So.2d 144 (Fla. 1983).

POINT II

IS IT NECESSARY, IN EVALUATING AN ASSERTION OF HARMLESS ERROR IN A CRIMINAL APPEAL, THAT EACH APPELLATE JUDGE INDEPENDENTLY READ THE COMPLETE TRIAL RECORD?

This case is before this Court pursuant to the Fourth District certifying the above question as being one of great public importance. In certifying this question, the Fourth District held that the prosecutor's comment at trial was harmless. In Kinchen v. State, 508 So.2d 51 (Fla. 4th DCA 1987), the district court certified the same question as it did in Ciccarelli v. State, 508 So.2d 52 (Fla. 4th DCA 1987).

Respondent submits that the concerns expressed by the Fourth District in its opinion below, as evidenced by the question certified, relate solely to the internal operating procedures of the courts of appeal in this state. Namely, does each appellate judge have to independently read the complete trial record in evaluating as asssertion of harmless error? Although Petitioner would not presume to tell this Court or any other court how to operate internally, Petitioner would point out that the Fourth District, as this Court, has its own manual of Internal Operating Procedures (appended hereto as exhibit "A"). Further, the Fourth District, like all of the other District Courts of Appeal, and this Court, has a legal staff which assists the court in handling their staggering caseload. It was out of concern for this tremendous caseload as well as this Court's obvious concern that appeals proceed in a timely fashion as evidenced by the recent amendments to the Florida Rules of Appellate Procedure, that the instant question was certified. Ciccarelli, supra.

Recently this Court in Holland v. State, 503 So.2d 1250 (Fla. 1987), addressed the procedure by which a court may examine a case for harmless error:

> Lastly, we are once again compelled to caution appellate courts that the burden upon the state to prove harmless error whenever the doctrine is applicable is most severe. See State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). It is the duty of the panel of appellate judges to read the record in its entirety and review the issues with careful scrutiny in order to apply the test.

Holland makes clear that in determining whether an error is harmless, the panel of appellate judges must read the entire record. However, Holland does not state whether every member of that panel must read the entire record. To suggest that every member of an appellate panel must read the entire record on appeal to determine if an error is harmless would place an exorbitant burden on the appellate judges and courts of this state, including this Court and its seven (7) members, with the result undoubtedly being that the appellate process in this State would proceed at a snail's pace. Justice would certainly not be "swift." Respondent thus submits that the question certified deserves an answer based on concern for or a criminal appellant's right to an appeal as well as pragmatic sensibilities necessary for the disposition of that appeal. Respondent submits that the review afforded for the district court of appeal was accurate and complete for purposes of determining harmless error and that the following considerations will lead to a proper answer to the question certified.

First, although the State's burden to prove an error as harmless, where the doctrine is applicable, is most severe, it is an

appellant's burden to demonstrate that error occurred at all. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), that error must appear from the face of the record. In re Estate of Max Lieber, 103 So.2d 192 (Fla. 1958). Florida Rules of Appellate Procedure, R. 9.210, sets forth the form and content of briefs filed in appellate proceedings in the state. An initial brief filed by an Appellant must contain a statement of the case and facts which shall include the nature of the case, the course of the proceedings, and the disposition below. When the Appellant states the facts, it is the responsibility of the Appellee to point out the specific areas of disagreement in the Appellee's statement of the facts. Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983). Further, it is the duty of counsel to prepare an appellate brief so as to acquaint the court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. Polyglycoat Corporation v. Hirsh Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1984). Thus, the parties' briefs should, and must, accurately set forth the facts of the case as well as the principles of law germane to its resolution by the appellate court.

Further, the court of appeals below, as well as this Court, has its own internal review procedures for deciding cases. The Fourth District stated in its opinion that in determining whether an error is harmless, its legal staff directly examines the trial record to be certain that the court is presented with an accurate description of the evidence. In addition, the district court suggested that some members of the panel, if not all, had read the record in its entirety for pur-

poses of determining harmless error. It should be noted that the district court did not state that the entire panel had not read the record.

Thus, it is apparent that the district court relied on the parties' briefs as well as on its own internal review process, in determining whether the error in the instant case was harmless. To suggest that this process of review is not sufficient for purposes of determining harmless error, and that all members of a panel must read the entire record, is to presume that the court's legal staff selectively edits the record to reach desirous results or that one judge hoodwinks the other into believing the record says something it does not. Of course, this Court cannot abide by this presumption. Rather, as this Court reiterated in Porter v. State, 160 So.2d 104 (Fla. 1964):

> "The presumption is that those charged with administering the laws have properly discharged their duty, and against any misconduct on their part, until the contrary is made to appear."

Thus, it is assumed that courts, including the district courts below, do what is necessary to discharge their duties. See, Harris v. Rivera, 454 U.S. 339 (1981).

Additionally, Respondent would also remind this Court that in State v. Overfelt, 457 So.2d 1385 (Fla. 1984), this Court affirmed the Fourth District's opinion, stating that the court would not make an independent inspection of the transcript. Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983).

Respondent submits that these considerations should and

must be viewed in context with the burgeoning caseloads experienced by all of the appellate courts of this state and will this lead to an appropriate answer to the question certified.

POINT III

THE COMMENT THAT A WITNESS' TESTIMONY WAS UNREFUTED WAS, AT MOST, HARMLESS ERROR. (restated)

In State v. Marshall, 476 So.2d 150 (Fla. 1985), this Court adopted the harmless error rule of Chapman v. California, 368 U.S. 18 (1967), and United States v. Hasting, 461 U.S. 499 (1983). As a result of the Marshall holding, this Court remanded this case to the Fourth District Court of Appeal for reconsideration. State v. Kinchen, 490 So.2d 21, 22 (Fla. 1986).

On remand, the Fourth District Court of Appeal affirmed the trial court's decision, thus concluding that the error was harmless. Kinchen v. State, 12 F.L.W. 1453 (Fla. 4th DCA, June 10, 1987).

It is Appellee's view that the evidence in the record at bar shows no reasonable possibility that the alleged error contributed to Appellant's conviction.

Appellee agrees that Appellant's "entire defense ... was that ... co-defendant, "James Marino, was the aggressor in this incident" (AB 33). That is precisely why co-counsel's closing remark had no adverse effect, because whether or not Appellant was the leader or the follower in the commission of these criminal acts was irrelevant. Before the jury made its finding of guilt, it was instructed:

> If two or more persons help each other commit or attempt to commit a crime and the Defendant is one of them, the Defendant must be treated as if he had done all of the things the other person or persons did. If the Defendant, (1) knew what was going to happen; (2) intended to participate actively or by sharing in an expected benefit; and (3) actually

> did do something by which he intended to help or commit or attempt to commit the crimes alleged. Help means to aid, plan or assist.
>
> (R 1627).

While the victim, P[redacted] L[redacted] was confused as to the defendants' hair color (R 630, 721), and could not recall if Appellant hit her with a chain (R 741), she was unswerving in her depiction of the elements of the sexual battery, kidnapping, and attempted murder. P[redacted] also testified that Appellant unzipped his pants to allow her to perform oral sex (R 762), which she unwillingly obliged Appellant with (R 574). She described how Appellant drove them to a sandy area, where she was forced to perform sex on the passenger, James Marino (R 578), and she noted that Appellant was not forced to drive the car (R 757), that he did not try to stop Marino (R 757), and that he said nothing when Marino initially dragged her into the car (R 757).

While Ms. L[redacted] could not be certain if Appellant ever struck her (R 644, 741), she did recall him placing a bag over her head (R 677), and she further recalled Appellant telling Jimmy Marino that the oral sex she was performing on him was not being done right and how that statement furnished Marino with an excuse for beating her (R 764).

P[redacted] L[redacted] recalled being hit with a belt and then a chain (R 581-582), while Appellant was present, and Detective Richtarcik testified that the fingerprints on the belt buckle found matched Appellant's (R 974, 977).

John Holland testified that when he saw the two defendants at the Intercoastal, one was beating the victim with a chain, while the other split open her skull with a Miller's bottle (R 806). These

acts occurred while the victim was in eight (8) feet or more of water and clinging to a piling (R 806).

Officer Fred West spoke to the victim shortly after the incident, while she was in the hospital (R 1230). He was told that suspect #2 had a medium build with dark brown hair (R 1240) (Marino), while suspect #1 was slimmer, with light brown hair (R 1236) (Kinchen). The victim then related how both defendants hit her with a chain (R 1249).

Appellee submits that the remark made by Marino's counsel pales in comparison with the evidence adduced against Appellant. This combination of overwhelming evidence, coupled with the jury instruction on aiding and abetting (R 1627), lead to the inescapable conclusion that the comment by Mr. Smith had no significant effect on the jury. The testimony of Brett Knesz was highly suspect, and totally unnecessary for the State to make its case. That is why the State did not need Mr. Knesz as its witness, and why the judgment and sentence should be affirmed.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT'S MOTION FOR SEVERANCE.

"Granting or denying a motion for severance is normally a discretionary matter for the trial judge." Crum v. State, 398 So.2d 810, 811 (Fla. 1981). It is immaterial whether any of the judges on this Court might have granted a severance; the test is whether the trial judge abused his discretion at the time he made his ruling. Menendez v. State, 368 So.2d 1278, 1280 (Fla. 1979).

Petitioner maintains that the trial court in the case sub judice did not abuse its discretion in denying Respondent's motion to sever. Respondent contends that since his co-defendant accused him of committing the offense, and this danger was raised in Respondent's motion to sever (BR 29-30), his conviction must be reversed. This Honorable Court has held that the mere fact that one defendant may attempt to escape punishment by shifting the blame for the crime to a co-defendant is insufficient to require a severance. McCray v. State, 416 So.2d 804, 806 (Fla. 1982); Hawkins v. State, 199 So.2d 276, 278 (Fla. 1967), vacated on other grounds, at 408 U.S. 941 (1972). See also, Sylvia v. State, 210 So.2d 286, 288 (Fla. 3rd DCA 1968), cert. denied, 393 U.S. 981. Besides Respondent's co-defendant's testimony in the case sub judice, there was testimony by Ms. [redacted] the victim, that she had been beaten with a belt and chain by the same individual (R 580-581), that Respondent was at the scene, that he had earlier unzipped his pants, had her perform oral sex on him, and was not forced into having her do so by his co-defendant (R 762-763). There was testimony by John Holland, who rescued Ms. [redacted] from the canal in

which she had been thrown, that he saw two white males throwing bottles and one of them swinging a chain at her (R 804-805). He testified that the one using the chain was the taller of the two (R 835) and then indicated Respondent as being the taller (R 840). Finally, Detective Richtarcik testified that a fingerprint lifted off of the belt found at the crime scene matched Respondent's fingerprint. In light of this testimony Petitioner maintains that the failure to grant Respondent's motion to sever was not prejudicial. In view of this testimony Petitioner maintains Respondent would have been convicted regardless of his co-defendant's self-severing testimony and a trial court abuses its discretion in denying severance only if the jury's determination of guilt or innocence might have been different absent a joint trial. Menendez, supra, 368 So.2d at 1280. Again, Petitioner maintains that in view of the overwhelming evidence no other result was possible but that Respondent be convicted whether his co-defendant testified or not.

Respondent's claim that the failure to sever was prejudicial in that it changed the whole character of his defense, is inappropriate. This is obviously a question of trial strategy and Respondent has no one but himself to blame for not raising an alibi defense if he thought it meritorious. Respondent was free to put his alibi witness (i.e., his father) on the stand. The issue would then have been one for the jury, which may have accepted the alibi evidence or rejected it as is its province (in light of the aforementioned evidence involving Respondent with the crime). Dove v. State, 287 So.2d 384, 385 (Fla. 1st DCA 1973).

Petitioner maintains that Respondent has failed to meet his

difficult burden of showing a likelihood that he did not get a fair trial as a result of his co-defendant's presence at trial and consequently that there was no clear showing of abuse of discretion by the trial judge in denying his motion to sever. Abbott v. State, 334 So.2d 642, 646 (Fla. 3rd DCA 1976), cert. denied, 345 So.2d 420. Stirpling v. State, 349 So.2d 187, 193 (Fla. 3rd DCA 1977).

In conclusion, Petitioner maintains that this was a case where judicial efficiency and economy dictated one trial and Respondent was not prejudiced thereby. Tifford v. State, 334 So.2d 91 (Fla. 3rd DCA 1976). This issue has been fully briefed and argued before the Fourth District Court of Appeal and that court has obviously found no merit in Respondent's argument. Petitioner respectfully maintains this Honorable Court should find none either.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT'S MOTION FOR A CONTINUANCE.

The fundamental principle that runs throughout the subject of continuance is that the granting or refusal thereof rests in the sound discretion of the court to which the application is addressed, Robinson v. State, 325 So.2d 427, 429 (Fla. 1st DCA 1976), and good cause therefor must be shown. Fla.R.Crim.P. 3.190(g)(2). A criminal defendant has the right to a fair trial and is entitled to a sufficient time to prepare for trial, which time is governed by the facts of the individual case. Lowe v. State, 95 Fla. 81, 116 So.2d 240 (1928); Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct 841, 11 L.Ed.2d 921, 931 (1964).

Petitioner maintains that under the facts of the case sub judice Respondent's trial counsel had sufficient time to make adequate preparation and did in fact do so. Respondent's trial counsel told the trial court at Respondent's arraignment on August 31, 1981, that he would be gone on vacation from September 12, 1981 to September 27, 1981 (R 15), the trial court said no, that he should not have taken the case (R 15, 34), Respondent's trial counsel then told the court that he was only here for arraignment (R 15) but handled the entire case and went on vacation anyway (R 19, 1720) filing for a continuance through another attorney while he was gone (R 18-20, 1718-1722); there was a continuance to October 5, 1981 (R 22-68); Respondent's trial counsel then asked for another continuance on October 5, 1981 (R 1748-1761); Respondent's trial counsel never called Vicki English although the Assistant State Attorney stated that he had pro-

vided him with a list of the witnesses who would testify as to her credibility or lack thereof (R 1425). The Assistant State Attorney further said that he had gone through his list with Respondent's trial counsel telling him what he thought the witnesses would say (R 1426), and Respondent's trial counsel said that assuming that to be true he still had the right to talk to the witnesses (R 1426-1427); the judge pointed out that he had had at least two weeks to do so (R 1427); the witnesses Respondent's trial counsel was informed of by his co-defendant during trial (R 517-518) were never used; there was no evidence presented from the Sexual Assault Treatment Center; Respondent's trial counsel had the opportunity to depose Mr. Knesz at lunch before he was called (R 74-75); and Respondent's trial counsel reserved his right to make an opening statement (R 517).

Again, under these facts, Petitioner maintains that Appellant has failed to show a palpable abuse of judicial discretion appearing clearly and affirmatively on the record, so as to justify his claim of error in the denial of his motion for a continuance. Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980). Again, this issue has been fully briefed and argued before the Fourth District Court of Appeal and that court has obviously found no merit in Respondent's argument. Petitioner respectfully maintains this Honorable Court should find none either.

POINT VI

THE HYPNOTIZING OF A PROSECUTION WITNESS, PRIOR TO TRIAL, SHOULD NOT RESULT IN REVERSAL OF THIS CASE. (restated).

Point 6 of Petitioner's brief, is an issue not presented in any of Petitioner's prior pleadings. Respondent therefore maintains that this issue should not be decided on the merits now.

Moreover, in Bundy v. State, 471 So.2d 9, 18 (Fla. 1985), this Court specifically held that the need for finality in criminal cases was its reason for holding that any posthypnotic testimony "is inadmissible in a criminal case if the hypnotic session took place after this case becomes final." 471 So.2d, at 18. Therefore, since there is no retroactive application of the Bundy decision, the Court should deny relief on the point presented in the instant appeal.

CONCLUSION

Based on the foregoing arguments and the authorities cited herein, Respondent respectfully requests this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been furnished, by courier delivery, to RICHARD B. GREENE, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 2nd day of November, 1987.

Of Counsel