IN THE SUPREME COURT OF FLORIDA

RANDY EUGENE KINCHEN,

Petitioner,

CASE NO. 70,780

STATE OF FLORIDA,

Respondent

REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Randy Eugene Kinchen, was the Defendant in the Circuit Court of Seventeenth Judicial Circuit, In and For Broward County, Florida; Appellant in the original appeal to the Fourth District Court of Appeal, and on the remand to that court; and was the Respondent in the previous discretionary review (based on a different certified question) before this Honorable Court.

Respondent, State of Florida, was the prosecution in the trial court; Appellee in front of the Fourth District Court of Appeal; and was Petitioner on the previous certified question.

In the brief, the parties will be referred to as they appear before this Honorable Court and/or by name.

The following symbol will be used:

R = Record on Appeal

AB = Answer Brief of Respondent

STATEMENT OF THE CASE

Mr. Kinchen will rely on the Statement of the Case in his Initial Brief.

STATEMENT OF THE FACTS

Petitioner will rely on the Statement of Facts in his Initial Brief; and would add the following matters in reply to Petitioner's Answer Brief.

1. Detective Edel did testify that he had written in his police report that one of the two people, "did not want to take part in it." (R1029).

SUMMARY OF ARGUMENT

Petitioner's first point raises the issue of whether Florida should return to its traditional rule that a comment on silence is reversible error,without regardless to the harmless error test. This was the law in Florida for many years. Gordon v. State, 104 So. 2d 524 (Fla. 1958); Trafficante v.State, 92 So. 2d 811 (Fla. 1957); Way v. State, 67 So.2d 32 (Fla. 1953); Rowe v. State, 87 Fla. 17, 98 So. 613 (1924). In August, 1985 this Honorable Court overruled more than fifty years of unbroken precedent in a narrow four (4) to three (3) decision. State v. Marshall, 476 So.2d 150 (Fla. 1985). This experiment in a harmless error test has been a failure and should be ended. Other states have followed such experiments; found them unworkable, and returned to a per se rule. Westmark v. State, 693 P.2d 220 (Wyo. 1984). The traditional law of Florida should be restored.

The second issue concerns the certified question itself. Assuming arguendo that this Honorable Court decides to maintain a harmless error analysis; thorough review of the entire record is essential. In Holland v. State, 503 So.2d 1250 (Fla. 1987), this Court stated:

> "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 (harmless error) test".

Id. at 1253 (italicized material added)

The United States Supreme Court and other state courts have also emphasized the need to review the entire record in detail, to determine whether an error is harmless beyond a reasonable

doubt. United States v. Hasting, 461 U.S. 499 (1983); State v. Zimmerman, 479 N.E. 2d 862 (Ohio 1985). Thus, the certified question must be answered in the affirmative.

The third issue concerns whether the acknowledged comment on silence, by the Co-defendant's counsel, is harmless, beyond a reasonable doubt. This Honorable Court and the Fourth District Court of Appeal have both determined that the Co-defendant's counsel commented upon Petitioner's failure to testify. The only issue is whether the error is harmless, beyond a reasonable doubt.

Appellant would initially point out that Respondent never originally argued that the error in this case was harmless; either in this Honorable Court, or in the Fourth District Court of Appeal. This Court raised this possibility, sua sponte, in the prior certified question. Thus, Respondent has waived the defense of harmless error.

Assuming arguendo, that the question of harmless error is properly before this Honorable Court; the error in the present case, is clearly not harmless beyond a reasonable doubt. The harm from this comment is clear from only a brief review of the testimony in this case. Petitioner's entire defense to these charges was that his Co-defendant, James Marino,was the aggressor in this incident; and that he did not possess the required intent. Petitioner's defense was that although he was present; he had little, if any, participation in this incident. Petitioner's defense was completely confirmed by the prosecution's primary witness, P[redacted] L[redacted] the alleged victim in this case (R558-744).

P[redacted] L[redacted] identified James Marino as the man who beat her, forced her to perform oral sex, and who had pretended to be a police officer (R614-615). She stated that Petitioner had not initiated any violence during the evening (R614-615). She testified that Marino initiated all of the violence (R643-654). She stated that Petitioner was the passive recipient of oral sex (R671-672).

The only direct contradiction of Petitioner's defense case came from the Co-defendant, James Marino, and one of Marino's witnesses, Brett Knesz. Marino testified that he was present and that Petitioner was the aggressor in this incident (R1256-1396). Marino's testimony was directly contrary to that of the victim, P[redacted] L[redacted]. P[redacted]a L[redacted] had no connection with either Marino or the Petitioner. Thus, she had no reason to lie concerning the issue of who was the aggressor in this case. Marino had an obvious reason to lie. He was facing charges of three very serious felonies (attempted first degree murder; sexual battery with a knife; and kidnapping). Thus, it is clear that, absent corroboration of Marino, there was no reason for the jury to believe Marino and disbelieve the victim, P[redacted] L[redacted]

The only witness who substantially corroborated Marino was Brett Knesz. He testified that Marino was a close friend of his (R1132). He stated that he had been convicted of a crime (1133). He claimed that Petitioner had told him that he had been the aggressor and that he had shaved all the victim's hair off of her entire body and beat her (R1142-1143, 1152-1153).

He testified that he had gone to Marino's house and read the victim's statement (R1160). He had told Petitioner's father that he thought there would be separate trials (R1161). He admitted that he had said Marino was his friend and that he was going to come forward to help him out (R1163). He spoke to Marino approximately ten times prior to trial (R1166). He admitted offering to help Marino get a job and offered to move to Houston with him (R1170). Thus, Brett Knesz's credibility was crucial. His testimony was the only testimony corroborating Marino on the key issue in the case. If Knesz was to be believed; then Petitioner had admitted to being the aggressor in the incident.

Marino's attorney knew that this testimony was the most crucial testimony available in order to attempt to show that Petitioner, and not Marino, was the aggressor. This is why he commented on Petitioner's failure to testify. (R1555-1556). Co-defendant's counsel stated that Petitioner had allegedly confessed and no one had refuted it. Petitioner and Knesz wee the only parties to the conversation involved. Therefore, only Petitioner could refute the statement (R1555-1556).

This comment was severely and directly prejudicial on the primary issue in the case; i.e. whether Petitioner or Marino was the aggressor in this case. It directly and explicitly pointed out that Petitioner had not taken the stand to refute Knesz's testimony that he had allegedly admitted being the aggressor. Only Petitioner could refute this, as only he and Knesz were parties to this conversation.

It cannot be determined, beyond a reasonable doubt, that this comment was harmless. If the jury, had believed that Petitioner was not the aggressor, it may well have found him not guilty of one or more counts, or only guilty of a lesser included offense, on one or more counts. It may have felt that he did not possess the required level of intent. Therefore, it is immediately apparent that the harmless error standard of DiGuilio, supra cannot be met.

Petitioner's fourth point raises the issue of whether the trial court erred in denying Petitioner's motion for severance. The failure to sever Petitioner and his Co-defendant was severely prejudicial to Petitioner. The testimony of the Co-defendant provided the most damaging evidence against Petitioner (R1256-1394). His testimony was virtually the only evidence that Petitioner was the aggressor during the incident;indirect contradiction to the victim, P[redacted] L[redacted] testimony. The Co-defendant provided virtually the only evidence that would support the verdict of attempted first-degree murder, under either a felony-murder or premeditated murder theory. See Amlotte v. State, 456 So.2d 448 (Fla. 1984). Thus, the failure to sever was highly prejudicial and constitutes reversible error. Crum v. State, 398 So.2d 810, 811 (Fla. 1981); Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981); United States v. Crawford, 581 F.2d 489, 491 (5th Cir. 1978).

The fifth issue concerns the trial court's refusal to grant him a continuance to allow him adequate time to prepare. Defense counsel had been unable to depose numerous prosecution witnesses

and had deposed seventeen (17) prosecution witnesses during the seventy-two (72) hours prior to trial (R1422-1427, 1748-1761). This denied Petitioner the effective assistance of counsel. Valle v. State, 394 So.2d 1004 (Fla. 1981); Westbrook v. State, 439 So.2d 1039 (Fla. 4th DCA 1983).

The sixth issue concerns the hypnosis of the key prosecution witness, P[redacted] I[redacted] This requires reversal under Bundy v. State, 471 So.2d 9 (Fla. 1985)

ARGUMENT

POINT I

THIS COURT SHOULD RETURN TO ITS WELL-SETTLED POSITION THAT COMMENT IN A DEFENDANT'S RIGHT TO REMAIN SILENT REQUIRES REVERSAL UPON TIMELY OBJECTION THERETO.

Respondent relies on Johnson v. State, 390 So.2d 1234 (Fla. 5th DCA 1980); Florida Parole and Probation Commission v. Baker, 346 So.2d 640 (Fla.2nd DCA 1977); and Weeks v.State, 181 So.2d 746 (Fla. 1st DCA 1966) for the idea that res judicata should foreclose this Honorable Court from considering this issue. However, these cases are clearly distinguishable from the present case. All of these cases involve the filing of either successive habeas corpus petitions or simultaneous habeas petitions in different courts whereas this case involves a direct appeal. A post-conviction motion is subject to the limitation of the doctrine of finality; which does not apply on direct appeal. See Witt v. State, 387 So.2d 922 (Fla. 1980).

The doctrine of res judicata does not apply at all to this issue. Petitioner has never had a chance to brief this issue before this Honorable Court or any other court. The issue which was before this Court in this case previously was the test to be applied in determining whether a comment was a comment on silence. State v. Kinchen, 490 So.2d 21 (Fla. 1985). The issue of whether a harmless error test is even applicable to a comment on silence was litigated in State v. Marshall, 476 So.2d 150 (Fla. 1985). This case was remanded on harmless error even though Respondent had never argued harmless error in any court.

Both this Court and the federal courts have recognized exceptions to the "law of the case" (or res judicata) doctrine. Preston v. State, 444 So.2d 939 (Fla. 1984); W.G. Roe and Company v. Armour and Company, 414 F.2d 869 (5th Cir. 1969). Clearly, where the issue was never litigated in the case; but was imported from another case, such an exception would apply.

Respondent relies on Berezovsky v. State, 350 So.2d 80 (Fla. 1977) to argue that Petitioner is not entitled to "a full second review of issues raised in previous appeal" (AB7). However, this issue was never before this Court previously. Additionally, it has long been held that when this Honorable Court accepts discretionary review of a case it has jurisdiction over the entire case. State v. Strasser, 445 So.2d 322 (Fla. 1983); Savoie v. State, 4422 So.2d 308 (Fla. 1982), Bould v. Touchette, 349 So.2d 1181 (Fla. 1977).

Respondent chooses not to reply to the merits of this issue. Mr. Kinchen would rely on his Initial Brief, as to the merits of the issue, but would point out the following matters. In his Initial Brief, Petitioner pointed out the continual abuse violation of the comment on silence prohibition, by prosecutors. A cursory review of Florida Law Weekly in recent months indicates that this abuse continues unabated. Garcia v. State, ___ So.2d ___, 12 FLW 2225 (Fla. 2nd DCA, September 11, 1987); Abreu v. State, ___ So.2d ___, 12 FLW 2150, Fla. 2nd DCA September 4, 1987); Hosper v. State, ___ So.2d ___, 12 FLW 2335 (Fla. 3rd DCA October 9, 1987); Murphy v. State, ___ So.2d ___, 12 FLW 1845 (Fla. 4th DCA July 29, 1987); Lowry v. State, ___ So.2d ___, 12

FLW 1981 (Fla. 4th DCA August 12, 1987). Thus, the need to return to Florida's traditional prophylactic rule continues and should be heeded by this Honorable Court.

POINT II

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE AND THE RULE OF HOLLAND V. STATE, 503 So.2d 1250 (Fla. 1987) SHOULD BE MAINTAINED.

Respondent asserts that Holland v. State, 503 So.2d 1250 (Fla. 1987) does not require that each appellate judge read the entire record (AB8-9). However, Holland clearly states:

> "It is the duty of the panel of appellate judges to read the record in its entirety."
>
> Id. at 1253.

Thus, this Court has clearly stated that it is the duty of the judge to read the record; not of one assigned judge, or of a judicial aide. Indeed, the Fourth District Court of Appeal obviously interpreted Holland to require each appellate judge to read the record, through its opinions and certified questions in Kinchen v. State, 508 So.2d 51 (Fla. 4th DCA 1987) and Ciccarelli v. State, 508 So.2d 52 (Fla. 4th DCA 1987). Respondent also claims that this Honorable Court's opinion in State v. Overfelt, 457 So.2d 1385 (Fla. 1984) somehow approves a different procedure from Holland. (AB11). This is completely false. This Court's opinion in Overfelt contained no discussion of the process of appellate review and affirmed the lower court's decision in part, and reversed it in part.

Respondent never attempts to argue that the form of appellate review required by this Court in Holland, supra is not preferable but only that appellate review would not be "swift enough" if the district courts of appeal follow Holland. The answer is this argument is twofold. First, this can easily be

solved by the Florida Legislature's appropriating funds for additional appellate judges. The additional cost that this would entail is not a reason to fail to comport with due process of law. As this Court has stated:

> "We, however, are convinced that, when a man's liberty, is at stake, considerations of due process of process outweigh those of economics" Land v. State, 293 So.2d 704, 708 (Fla. 1974).

Secondly, "swiftness" is not the primary value of our legal system; it is due process of law. This Honorable Court's motto is "Sat Cito Si Recte"; which means fast enough, if right. It is more imperative that cases be decided justly than quickly. Demos v. Walker, 126 So. 305, 306 (Fla. 1930). Every dictatorship, on the planet, has swift justice; none of them have the foundation of American system of justice; which is due process of law. It is clear that due process can be a little slower and require more work than some other concept; but it is the foundation of all of our liberties.

POINT III

THE DIRECT COMMENT ON A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent relies primarily on a jury instruction to say that this issue was harmless, beyond a reasonable doubt.

> 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 something by which he intended to help or commit or attempt to commit the crimes alleged. Help means to aid, plan or assist.
>
> (AB12-13).

Respondent claims that these three elements were proven, beyond a reasonable doubt, even if Mr. Marino was the sole aggressor throughout the entire incident; as the victim, P[redacted] L[redacted] testified. This is simply false. If Ms. [redacted]'s testimony was accepted by the jury, there would be seriuos doubt as to all three of these issues; especially as to whether "knew what was going to happen" and "intended to participate actively." As this Court stated in Holland, supra on the question of harmful or harmless error:

> Uncertainty should almost always be resolved in favor of the criminal defendant. Holland, supra at 1252.

Thus, this case must be reversed for a new trial.

POINT IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR SEVERANCE.

Petitioner will rely on his Initial Brief herein.

POINT V

THE TRIAL COURT ERRED IN DENYING PETITIONER A CONTINUANCE, THUS DENYING HIM THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner will rely on his Initial Brief herein.

POINT VI

PETITIONER'S CONVICTION SHOULD BE REVERSED FOR A NEW TRIAL DUE TO THE HYPNOTIZING OF THE KEY PROSECUTION WITNESS, PRIOR TO TRIAL.

Petitioner will rely on his Initial Brief herein.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier toLee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 23rd day of November, 1987.

Richard B. Greene
Of counsel