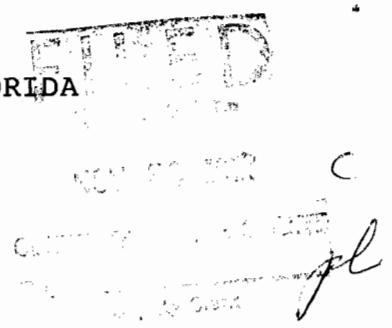
IN THE SUPREME COURT OF FLORIDA



JOSEPH ANTHONY CICCARELLI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,811

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner.

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES

Constitutional Provisions

Florida Rules of Appellate Procedure

ARGUMENT

WHETHER THE TRIAL COURT ERRED PREJUDICIALLY IN DENYING APPELLANT'S MOTION FOR MISTRIAL BY ADMITTING APPELLANT'S STATEMENT WHICH WAS OBTAINED AFTER THE POLICE FAILED TO SCRUPULOUSLY HONOR DEFENDANT'S FIFTH AMENDMENT RIGHTS?

And

WHETHER THE DISTRICT COURT ERRED IN NOT REVIEWING THE ENTIRE RECORD WHEN FINDING THE ERROR TO BE HARMLESS?

The respondent contends alternatively that there was no violation in the admission of petitioner's statements because the statement was intended to be exculpatory or because petitioner initiated the exchange with the officer and thus did not indicate a desire to remain silent. It is proper to consider this issue initially since a ruling on the issue of harmless error presupposes that a right has been violated. See Holland v. State, 503 So.2d 1250 (Fla. 1987), at 1251, where this Court indicated that use of the harmless error test is a concession that there has been a violation.

Respondent's assertion that the statement was not harmful is an unmeritorious argument. First of all the trial court admitted the statement as an admission against interest therefore being an exception to the hearsay rule (R-59). Secondly, the officer in testifying indicated that petitioner's denial of ownership of the dollar bill and the quarter was falsely self-serving (R-64). The officer said "of course" the petitioner denied ownership of those items. This indicated that petitioner's denial was false since petitioner was supposedly attempting to deny possession of the

drugs also found on the ground. Third, the officer testified that he observed petitioner reach into his pocket and remove three objects, a dollar bill, a quarter and a packet containing the cocaine and throw them to the ground, and the prosecutor argued expressly this to the jury (R-150-151).

The officer testified that he retrieved the dollar bill and the quarter and the packet of suspected cocaine and put them in his pocket (R-60-61,64). This was after petitioner had been arrested (R-60). Then after the officer "went inside," he did not see any reason to keep the dollar bill and the quarter so he offered it back to the petitioner (R-64).

The officer testified that he did not advise the petitioner of his rights following petitioner's arrest and prior to offering the items that he said petitioner dropped on the ground with the cocaine to the petitioner, and respondent asserts that there was no need to read petitioner his rights at that moment because he was not being subjected to any questioning (Respondent's Brief -12).

Petitioner submits that he was being subjected to the functional equivalent of interrogation under Rhode Island v. Innis, 446 U.S. 291 (1980), because petitioner was being asked questions that were (1) admitted into evidence as admissions against interest, (2) utilized by the officer to explain petitioner's denial of ownership as an admission, and (3) the officer's actions were designed to elicit some response from the petitioner under Tierney v. State, 404 So.2d 206 (Fla. 2d DCA 1981). When petitioner was confronted with the evidence of the

dollar bill and the quarter, which the officer expressly said he saw being dropped by the petitioner along with the cocaine, this action elicited a response which whether incriminating or exculpatory was used against the petitioner as an indication of his guilt. Nothing could be clearer that the offering of those items to the petitioner was the functional equivalent of questioning, and it also could not be clearer that the answer was utilized in trial as an indication of petitioner's untruthful denial of possession of the cocaine.

The district court, while indicating there was a "serious question as to the admissibility of the statement" nevertheless treated it as error because the court indicated that "the error involved herein was harmless" (Opinion below p.-1-2). Under any view of the Miranda decision, and particularly in light of Rhode Island v. Innis, supra, there was a Miranda violation because petitioner was not advised of his rights and was asked questions bearing upon the question of his guilt or innocence to possession of various items, including contraband, which the officer said petitioner dropped on the ground all at the same time.

The application of the harmless error doctrine to these facts where the District Court of Appeal did not review the entire record is the issue that has been certified for review here. Petitioner agrees with Judge Stone of the district court that if an error under Miranda occurred it was not harmless under these facts. The difficulty with the certified question is that it is difficult to determine exactly what independent review of

the record the deciding judges of the District Court of Appeal actually gave. The court states unequivocally, slip opinion at page 2:

> Each judge on the panel has not independently read the record in its entirety.

Later on the same page the district court stated that Holland v. State, supra, "appears to hold that it is the duty of each appellate judge to read the entire trial court record before determining whether trial error may be harmless." Then the court at the bottom of page 2 of the slip opinion states:

> Notwithstanding our concerns we will, of course, rigorously apply the standard of review mandated by the Supreme Court.

This seems to be a contradictory statement of the review that the District Court of Appeal has given. If the District Court of Appeal as a panel has not independently reviewed the record in its entirety, yet the court believes Holland does require same, how can the court have applied the standard of review that it believed the Court has mandated?

Petitioner submits that the district court is correct in its interpretation of Holland v. State, supra. We submit also that the court is incorrect in believing that it may rely upon the work of its legal staff, and upon the briefs of the parties, to fully base review of harmless error issues in lieu of reference to the record itself. The difficulty with relying upon briefs of the parties to the exclusion of an independent review of the entire record by the judges themselves on the deciding panel is

shown by the decision in Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983), where the court on rehearing, id. at 949, stated that the court will not make an independent inspection of the transcript to determine the facts where there is no direct dispute of the facts in briefs of the parties. The court stated, id.: "Accepted or uncontested facts will be relied upon by the Court."

Determinations of harmless error involve more than resolution of contested facts. The basic facts of the case should be accurately stated by the parties, but that is no substitute for the court reviewing the transcript of testimony in order to determine the nature of the error in light of the overall strength of the case for the prevailing party and defenses asserted for resolution by the trier of fact. The determination of harmless error is more than a mere totaling of the testimony or recitation of the facts most favorable to the prevailing party below. The determination of harmless error is an evaluation not recitation of the facts of the case. The nature of the error and its potential for harm in resolution of the relevant issues is a different inquiry from the statement of the facts in the briefs of the parties. Although the briefs of the parties may and should discuss this aspect of the case, it cannot substitute for the court's determination by first hand appraisal of the potential impact of an error affecting substantial rights, and in particular the constitutional rights contained in the Fifth Amendment.

The necessity of the district court actually reviewing the record in order for accurate determinations of its appellate cases is shown by the decision in Polyglycoat Corporation v. Hirsch Distributors Inc., 442 So.2d 958 (Fla. 4th DCA 1984), where on rehearing the district court indicated that its reversal for a new trial on the issue of damages was erroneous but, because the parties had not adequately or accurately stated the true facts in the briefs that the court would let the decision stand. The court indicated in its decision on rehearing, id. at 960 that the omitted fact would have been "favorably dispositive" for Hirsch had the fact been included in its brief. But the court stated it would "not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel ... has chosen not to mention."

The petitioner would urge this Court to conclude that it is not sufficient for the Court to incorrectly decide issues of law simply because parties are remiss in pointing out in their briefs dispositive matters of fact contained in the record. In Polyglycoat one of the parties was excluded from a portion of the trial concerning the issue of damages. There was no objection to the exclusion. On appeal the district court concluded that the exclusion was error and reversed on the issue of damages. When it was pointed out on rehearing that no objection had been made at trial, the District Court of Appeal issued the decision discussed above. Although the district court as much as admitted that the decision was incorrect, its basis for adhering to the

reversal on the issue of damages was to retain its role as a dispassionate arbiter of justice rather than an advocate for the parties. We believe this is fallacious reasoning because an accurate ascertainment of the material facts upon which a decision should be based is not a departure from the dispassionate role of the courts. Secondly, the question whether the raising of the lack of objection is a proper matter for rehearing is also at least arguably within the provisions of Rule of Appellate Procedure 9.330, in which a party is permitted to point out an omission or oversight by the court in reaching its decision. This is not the same as creating a new substantive issue for review on rehearing.

The respondent has made the further argument in its brief that the staggering case load of the appellate court justifies appellate panels omitting to review the records in the very cases they are deciding. We respectfully submit that it is the duty of the appellate courts to review the records and that the "exorbitant burden" referred to by the respondent may indeed be the result of unnecessary motions for rehearing in cases where there has been less than record review. Rehearing motions are filed because of the oversight or omissions of the kind shown by the decisions in Overfelt and Polyglycoat. It is perhaps problematic whether the burden on the appellate courts is greater by reviewing the record, with the aid of the briefs and the summaries prepared by the court's legal staff, or by later resorting

to opinions on rehearing, and even in the case of Overfelt by oral argument on the rehearing motion, due solely to the court not having inspected the transcript before decision.

Whether it is or is not more time consuming for the appellate courts to follow the decision in Holland is not the basis upon which petitioner seeks resolution of the issue. It is submitted that the decision in Holland, which followed the careful and lengthy analysis in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), discussing harmless error analysis, was a considered determination that the balancing required to correctly apply the harmless error doctrine necessitated judicial review of the record to correctly determine the appellate issues before the court. In Holland this Court carefully discussed the fact that a proper harmless error determination on appeal is necessary in order to prevent unnecessary retrials and to protect the rights of persons whose trials have been prejudiced by harmful legal rulings at trial. This Court stated, citing and quoting Holloway v. Arkansas, 435 U.S. 475 (1978), that a proper harmless error analysis cannot rest upon "unguided speculation." Holland v. State, supra, at 1252.

In conclusion, it is respectfully submitted that although Florida's appellate courts are unquestionably operating under a heavy workload, that it is far from certain that record review by the deciding panel of district courts of appeal would heighten rather than lessen the overall judicial workload. The real question is how appellate courts go about deciding the difficult questions of harmless error without resort to the "unguided

speculation" that this Court disapproved in Holland and that the Supreme Court has condemned in Holloway v. Arkansas. The answer has been provided in the decision in Holland v. State, and the district courts need and deserve clear guidance. We respectfully urge the Court to adhere to the careful record review expressly set forth in Holland.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

Louis G. Carres

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to CAROLYN McCANN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 25th day of November, 1987.

Louis G. Carres

LOUIS G. CARRES
Assistant Public Defender