IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs. Case No. 93,037

ROBERT HARBAUGH,
Respondent.
_____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court below in the 17th Judicial Circuit in and for Broward County and appellee in the fourth district court of appeal and will be referred to herein as "petitioner" or "the State." Respondent, Robert Harbaugh, was the defendant in the trial court below and appellant in the fourth district court of appeal and will be referred to herein as "respondent." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to any supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner relies on its statement of the case and facts in the initial brief.

SUMMARY OF ARGUMENT

Issue I - Once a question is certified by a district court either party may invoke this Court's discretionary jurisdiction. The certified question by the fourth district must be addressed and resolved by this Court, because only this Court can resolved it. Resolution of this issue is especially important in this case because the district court granted respondent a new trial on another ground. Further, remanding this case for a retrial without resolution of the issue by this Court would only cause an unnecessary piecemeal litigation.

Issue II - If this Court accepts jurisdiction to review the certified question, this Court may review *all* issues raised in the appellate process.

ARGUMENT

ISSUE I

WHETHER THIS COURT'S DECISION IN STATE V. RODRIGUEZ, 575 SO. 2D 1262 (FLA. 1991), SHOULD BE AFFECTED BY THE SUPREME COURT'S DECISION IN UNITED STATES V. GAUDIN, 515 U.S. 506 (1995).

Without citing any case to support its argument, respondent contends that petitioner could not file a notice to invoke this Court's jurisdiction because it was not the aggrieved party. Petitioner agrees with respondent that Florida courts have said that if the aggrieved party does not take an affirmative initiative to pursue a certified question then the issue dies. However, that does not stand for the proposition that *only* the aggrieved party may invoke this Court's discretionary jurisdiction. It only means that such an affirmative initiative must be taken in order for a certified question to be reviewed by a superior court. E.g. Gillaim v. Stewart, 291 So. 2d 593, 594 (Fla. 1974)(if the **parties** may elect not to take certiorari once a question is certified by the district court, the decision of the district court becomes final).

In this case, the Fourth District Court of Appeal sua sponte certified a question of great public importance. Petitioner contends that this question must and can be resolved only by this Court. It is clear from the fourth district's opinion that the district court believed that it and the trial court could do nothing but follow the procedures outlined in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) by this Court. The fourth district specifically said that only this Court could recede from Rodriguez,

and thus the issue had to come before this Court for review and resolution. See Gilliam v. Stewart, 291 So. 2d 593 (only the Supreme Court may overrule its own decisions).

In this specific case, resolution of this question is particularly important, because the district court granted respondent a new trial. If on re-trial, respondent again objects to the Rodriguez procedure and request a bifurcated trial, the issue would still not have been resolved, and the trial court will again have to abide by the Rodriguez procedure. Again, respondent will appeal it to the fourth district, and this litigation will unnecessarily linger. Thus, the state submits this Court should accept jurisdiction to resolve the question certified by the district court to be of great public importance, and which affects all felony DUI cases that follow Rodriguez procedure in Florida.

ISSUE II

WHETHER THE TRIAL COURT'S ABSENCE DURING THE REPLAY OF THE VIDEOTAPE TO THE JURY WHILE BOTH COUNSEL WERE PRESENT CONSTITUTE ERROR.

Respondent contends that because the state filed the notice to invoke discretionary jurisdiction based upon the question certified by the fourth district, it may not raise any other argument. The state disagrees.

In Savoie v. State, 422 So. 2d 308,312 (Fla. 1982), speaking for the Court, Justice Overton said that once the Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, the court may, in its discretion, consider other issues properly raised and argued before the court. This Court summarized this issue as follows:

> We have jurisdiction, and, once this Court has jurisdiction of a cause, it has jurisdiction to consider **all** issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case. In *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594, 596 (Fla.1961), Justice Drew explained the reasons why, once it has jurisdiction, this Court should exercise its discretion and dispose of the entire cause when the issues are properly before it:
>
> > Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay." Piecemeal determination

> of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here.... "[m]oreover, the efficient and speedy administration of justice is ... promoted" by doing so.
>
> We have concluded that, based upon these principles, we can appropriately address the correctness of the trial judge's denial of the motion to suppress on its merits. Both parties have fully briefed and argued the issue before this Court, and our action in resolving this question will avoid a piecemeal determination of the case. [e.s.]

422 So. 2d at 312.

Likewise here, once the Court accepts jurisdiction to decide the certified question of great public importance by the fourth district, it has discretion to review the second issue raised by petitioner. In this particular case, this Court should review the jury issue as this was the basis the fourth district granted respondent a new trial.

On the merits, the state would once again assert that the facts herein are distinguishable from Bryant v. State, 656 So. 2d 426 (Fla. 1995). Therein, the issue was the presence of the judge at a jury read back. In the case at bar, the error involved the presence of counsel in the jury room while the jury was viewing the tape, which was properly introduced and admitted into evidence. As such the facts sub judice are more analogous to facts in United States v. Acevedo, 141 F. 3d 1421 (11th Cir. 1998), and the issue is properly characterized as harmless under this analysis.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm respondent's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail to ALAN LIPSON, ESQUIRE, 18305 Biscayne Blvd., Ste. 400, Aventura, Florida 33160, on July 22, 1998.

Ettie Feistmann
Assistant Attorney General