

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 RANDY EUGENE KINCHEN,)
)
 Respondent.)
 _____)

CASE NO. 64,043
(4DCA 81-2133)

FILED

PETITIONER'S BRIEF ON JURISDICTION AUG 4 1983

SID J. WHITE
CLERK SUPREME COURT

Chief Deputy Clerk

JIM SMITH
Attorney General
Tallahassee, Florida

JAMES P. McLANE
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE OF THE FACTS	2
POINT INVOLVED ON APPEAL	3
ARGUMENT	4 - 5
PETITIONER PROPERLY INVOKES THE DIS- CRETIONARY JURISDICTION OF THIS HONOR- ABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISIONS OF OTHER STATE APPELLATE COURTS AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE.	
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Gains v. State</u> , 417 So.2d 719, 724 (Fla. 1st DCA 1982)	4, 5
<u>Mancini v. State</u> , 312 So.2d 732, 733 (Fla. 1975)	4
<u>State v. Bolton</u> , 383 So.2d 924, 928 (Fla. 2d DCA 1980)	4, 5

OTHER AUTHORITY

Florida Constitution Art.V, §3(b)(3) (1980) . .	4
Florida Rules of Appellate Procedure Rule 9.030(a)(2)(A)(iv) . .	4

PRELIMINARY STATEMENT

The Petitioner was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellant and the defendant, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Petitioner's Appendix, which is a conformed copy of the appellate court's opinion and a copy of the appellate court's opinion on re-hearing.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

On appeal, the Fourth District Court of Appeal reversed Respondent's judgment of conviction and remanded for a new trial because a comment was made during closing arguments which was fairly susceptible of being interpreted by the jury as referring to the Appellant's failure to testify (A 1). On rehearing, the fourth district acknowledged that the first and second district courts have, on at least two occasions, apparently invoked a different standard on review than that established by this Honorable Court and followed by the fourth district in resolving the case sub judice (A 2).

POINT INVOLVED ON APPEAL

WHETHER THERE IS EXPRESS AND DIRECT
CONFLICT BETWEEN THE DECISIONS OF
OTHER STATE APPELLATE COURTS AND
THE DECISION OF THE FOURTH DISTRICT
COURT OF APPEAL ISSUED IN THE IN-
STANT CASE?

ARGUMENT

PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISIONS OF OTHER STATE APPELLATE COURTS AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE.

Petitioner seeks to establish this Court's "conflict" jurisdiction under Art.V, §3(b)(3), Fla. Const. (1980) and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P. Conflict exists between the instant decision and the decisions in State v. Bolton, 383 So.2d 924, 928 (Fla. 2d DCA 1980) and Gains v. State, 417 So.2d 719, 724 (Fla. 1st DCA 1982).

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule 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. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). The court below created conflict in the former way by announcing a rule of law contrary to that announced in Bolton, supra and Gains, supra.

Petitioner submits that conflict exists between these decisions and the decision sub judice because in the instant case the fourth district court held that a new trial was required because a comment was made during closing

arguments which was fairly susceptible of being interpreted by the jury as referring to the Appellant's failure to testify (A 1) while in Bolton, supra, and Gains, supra, the second and first district courts, respectively, held that the granting of a new trial on the basis of such a comment was not required unless the manifest intention of the comment was directed to silence or the remark was such that the jury would naturally and necessarily take it to be such a comment. 383 So.2d at 928 and 417 So.2d at 724. Petitioner submits the Fourth District Court of Appeal itself recognized this conflict in its opinion on rehearing (A 2).

Since there is express and direct conflict between the holding in the instant case and the holdings of State v. Bolton, supra, and Gains v. State, supra, and since this issue involves an important point of law, the instant issue is and will continue to be a recurring legal problem.

This Honorable Court needs to resolve the issue so that appellate and trial courts will have a well-defined and workable rule of law to guide them. Petitioner therefore respectfully requests this Honorable Court accept jurisdiction in this cause.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court accept discretionary jurisdiction in the instant cause.

Respectfully sybmitted,

JIM SMITH
Attorney General
Tallahassee, Florida

James P. McLane
JAMES P. McLANE
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief of Jurisdiction has been furnished, by courier/mail, to RICHARD B. GREENE, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 2nd day of August, 1983.

James P. McLane

Of Counsel