

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,828

FILED

SID J. WHITE

JUL 1 1985

THE STATE OF FLORIDA,

Petitioner,

vs.

ERNEST GRISSOM,

Respondent.

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

* * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

REPLY BRIEF OF PETITIONER ON THE MERITS

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QUESTION PRESENTED

WHETHER THE HARMLESS ERROR RULE SET FORTH IN
UNITED STATES v. HASTING AND APPROVED IN
STATE v. MURRAY APPLIES IN THE INSTANT CASE.

ARGUMENT

THE HARMLESS ERROR RULE SET FORTH IN UNITED STATES v. HASTING AND APPROVED IN STATE v. MURRAY APPLIES IN THE INSTANT CASE.

Respondent's Brief has argued that the Florida Constitution permits this Court to set standards higher than those established by the Supreme Court of the United States under comparable provisions of the Bill of Rights. Respondent further argues that it is difficult to determine whether evidence of guilt is overwhelming, and therefore, the harmless error rule should not apply, and Florida's standards should exceed those of the Supreme Court of the United States.

The absence of any compelling reasons to exceed the standards set forth in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) is clearly highlighted by a review of the cases of other states. A review of those cases will reveal that at least 28 states have applied the harmless error rule in comment-on-silence cases, or clearly recognized the applicability of the rule in appropriate cases; only two states have a per se rule of reversal; 11 states have opinions from which it can be inferred that the harmless error rule would apply either in appropriate cases or some classes of cases; and the remaining states do not appear to have any decisions suggesting the applicability or non-applicability of the harmless error rule.

A. States applying or recognizing harmless error rule in comment-on-silence cases.

1. Arizona. State v. Mata, 609 P.2d 48 (Ariz. 1980).
2. Arkansas. Weaver v. State, 271 Ark. 853, 612 S.W.2d 324 (Ark. App. 1981).
3. California. People v. Jackson, 168 Cal. Rpts. 603, 618 P.2d 149 (Cal. 1980).
4. Colorado. People v. Cornelson, 616 P.2d 173, 176 (Colo. Ct. of App. 1980) ("Not every reference to the exercise of the right to remain silent is an error requiring reversal").
5. Connecticut. State v. Anonymous, 356 A.2d 187, 33 Conn. Sup. 505 (Super. Ct. 1974) (A comment on silence "requires reversal if the error is not harmless beyond a reasonable doubt.").
6. Delaware. Tyre v. State, 412 A.2d 326, 329 (Del. 1970) ("Not every reference to the exercise of the right to remain silent mandates reversal."); Shantz v. State, 344 A.2d 245 (Del. 1975).
7. Hawaii. State v. Melear, 630 P.2d 619 (Haw. 1981).
8. Idaho. State v. Hodges, 105 Idaho 588, 671 P.2d 1051 (1983).
9. Illinois. People v. McNair, 429 N.E.2d 1233 (Ill. App. 1981).
10. Iowa. State v. Nelson, 234 N.W.2d 368 (Iowa 1975) (Comment required reversal, but acknowledged such errors could be harmless in appropriate cases).
11. Kansas. State v. Ponds, 608 P.2d 946 (Kan. 1980).
12. Kentucky. James v. Commonwealth, 679 S.W.2d 238 (Ky. 1984).
13. Louisiana. State v. Jackson, 454 So.2d 116 (La. 1984).

14. Maryland. Dill v. State, 10 Md. App. 362, 270 A.2d 489, 490 (Ct. of Sp. App. 1970) (Comment required reversal, but noted that "In the heat of argument such comment by the State upon the failure of the Appellant to testify, although improper, might not necessarily call for an absolute reversal where the court stepped in and quickly and surely instructed the jury to disregard the comment.").
15. Massachusetts. Commonwealth v. Hawley, 380 Mass. 70, 401 N.E.2d 827 (1980) (reversible unless harmless beyond a reasonable doubt).
16. Mississippi. Canaday v. State, 455 So.2d 713 (Miss. 1984).
17. Missouri. State v. Martin, 624 S.W.2d 879 (Mo. App. 1981).
18. Nebraska. State v. Brooks, 189 Neb. 592, 204 N.W.2d 86 (1973) (Comment not prejudicial where evidence of guilt is conclusive).
19. Nevada. Williams v. State, 566 P.2d 417 (Nev. 1977).
20. New York. People v. Crimmins, 367 N.Y.S. 2d 213, 326 N.E.2d 787 (Ct. of App. 1975).
21. North Carolina. State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979). (Instruction can cure prejudice).
22. Oregon. State v. Macomber, 524 P.2d 574 (Or. App. 1974).
23. Pennsylvania. Commonwealth v. Lowery, 269 A.2d 724 (Pa. 1970).
24. Texas. Davis v. State, 634 S.W.2d 366 (Tex. Ct. of App. 1982).
25. Utah. State v. Moraine, 475 P.2d 831 (Utah 1970).
26. Wisconsin. State v. Spring, 179 N.W.2d 841 (Wis. 1970).

27. Virginia. Dunn v. Commonwealth, 284 S.E.2d 807 (Va. 1981).
28. Wyoming. Cyrus v. State, 639 P.2d 900 (Wyo. 1982).

B. States which imply harmless error rule may apply in appropriate cases or in limited circumstances.

1. Alabama. Ex parte Yarber, 375 So.2d 1231 (Ala. 1979) (Comment required reversal, but court noted reversal required because trial court did not promptly cure with instruction. Implies that instruction could cure).
2. Indiana. Bland v. State, 303 N.E.2d 61 (Ind. Ct. of App. 1973) (Notes that there was no admonition to jury, implying that curative instruction could eliminate prejudice).
3. Maine. State v. Tibbets, 299 A.2d 883 (Maine 1973) (Indirect comments can be harmless; direct comments are per se reversible).
4. Montana. State v. Gladue, 677 P.2d 1028 (Mont. 1984) (Court could not say that comment was harmless beyond a reasonable doubt, implying that comment could be harmless in factually appropriate cases).
5. New Jersey. State v. Nittolo, 476 A.2d 1253 (N.J. Super. 1984). (Comment not harmless based on paucity of evidence. Implies that comment would be harmless with strong evidence).
6. New Mexico. State v. Henry, 681 P.2d 51 (N. Mex. 1984) (Holds that comments on silence generally require reversal - does not say always).
7. Ohio. State v. Smith, 470 N.E.2d 883 (Ohio 1984). (Cites Hasting, but finds error prejudicial under facts of case).

8. Washington. State v. Reed, 25 Wash. App. 46, 604 P.2d 1330 (Ct. of App. 1979) (Comment not harmless beyond reasonable doubt under facts of case).
9. Tennessee. State v. Hale, 672 S.W.2d 201 (Tenn. 1984). (Seems to recognize harmless error rule, but not harmless in facts of particular case).
10. Minnesota. State v. Spencer, 248 N.W.2d 915 (Minn. 1976). (Indirect comment).
11. Michigan. People v. Murphy, 337 N.W.2d 70 (Mich. App. 1983) (Indirect comment).

C. States applying per se rule of reversal in all cases.

1. Georgia. Morton v. State, 308 S.E.2d 41 (Ga. 1983) (But uses federal test for determining whether comment is one on silence, and the federal test requires reversal only if comment would necessarily be taken by jurors as a comment on failure to testify).
2. South Dakota. State v. Wilson, 297 N.W.2d 477 (S. Dak. 1980) (But for indirect comments, only reversible if jurors would understand comment to allude to failure to testify).

The remaining eight states - New Hampshire, North Dakota, Oklahoma, Rhode Island, South Carolina, Vermont, Alaska and West Virginia - do not appear to have any cases in which the harmless error rule is applied, rejected or considered; nor do they have any cases from which it could be implied that the harmless error rule might apply; nor do they have any cases which specify a per se rule of reversal.

As Respondent has argued that the Florida Constitution has a provision comparable to the Fifth Amendment of the United States Constitution, and that this Court has the power to interpret the Florida position in a different manner, it should be noted that virtually all states appear to have comparable state constitutional clauses and that nevertheless only two states apply per se rules of reversal in all cases, and the relevant decisions of those two states - Georgia and South Dakota - pre-date Hasting.

Those states having state constitutional provisions granting a state right against self-incrimination include the following: Alabama Const., Art. I, §7; Alaska Const., Art. I, §9; Ariz. Const., Art. 2, §10; Ark. Const., Art. 2, §8; Cal. Const., Art. 1, §15; Colo. Const., Art. II, §18; Conn. Const., Art. 1, §8; Del. Const., Art. I, §7; Ga. Const., Art. I, Ch.2-1; Idaho Const., Art. I, §13; Ill. Const., Art. I, §10; Ind. Const., Art. I, §14; Iowa Const., Art. I, §10; Kan. Const., Bill of Rights, §10; Ky. Const., Bill of Rights, §11; La. Const., Art. 1, §13; Me. Const., Art. I, §6; Md. Const., Art.22, Decl. of Rights; Mass. Const., Part 1, Art. XII; Mich. Const., Art. I, §17; Minn. Const., Art. I, §7; Miss. Const., Art. 3, §26; Mo. Const., Art. I, §19; Mont. Const., Art. II, §25; Nev. Const., Art. I, §8; N.H. Const., Part 1, Art. 15; N.Y. Const., Art. 1, §6; N. Car. Const., Art. I, §23; N. Dak. Const., Art. I, §12; Okla. Const., Art. 2, §21; Pa. Const., Art. I, §9; R.I. Const., Art. I, §13; S. Car. Const., Art. I,

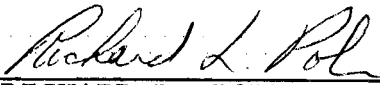
§12; S. Dak. Const., Art. VI, §9; Tenn. Const., Art. I, §9; Tex. Const., Art. I, §10; Utah Const., Art. I, §12; Vt. Const., Ch. I, Art. 10; Va. Const., Art. I, §8; W. Va. Const., Art. 3, §5; Wis. Const., Art. 1, §8.

Thus, the failure of the overwhelming majority of states to adopt per se rules of reversal cannot be attributed to the absence of state constitutional provisions which theoretically enable state courts to go beyond interpretations of the federal constitution. The constitutional provisions exist for virtually all states to apply different criteria under state law, but it is clear that most states are abiding by the principles of Hasting.

Petitioner relies on the initial brief in all other respects.

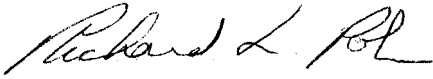
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER ON THE MERITS was furnished by mail to MAY L. CAIN, ESQ., 11755 Biscayne Boulevard, Suite 401, N. Miami, Florida 33181, on this 28th day of June, 1985.



RICHARD L. POLIN
Assistant Attorney General

/pg