IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )
Petitioner, )
vs. ) CASE NO.: 66,906
JAMES B. KEARSE, )
Respondent. )

# PETITIONER'S BRIEF ON JURISDICTION

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## PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below is now the petitioner, and will be referred to as the "State". JAMES B. KEARSE, the defendant and appellant below, will be referred to as the defendant or as the "Respondent".

The opinion of the Court of Appeal, First District, is appendixed hereto pursuant to Rule 9.120(d), F.R.App.P. The opinion is reported as follows:

> Kearse v. State, No. AY-216 (Fla. 1st DCA, February 18, 1985) [10 FLW 439-440] (rehearing denied March 25, 1985, suggestion to certify noted)

A motion to stay mandate is currently pending before this Court.

## STATEMENT OF JURISDICTION

The State filed notice to invoke the discretionary jurisdiction of this Court on April 22, 1985, pursuant to Article V, Section 3(b)(4), Florida Constitution. The decision of the Court of Appeal, First District, is in direct and express conflict with Rowell v. State, 450 So.2d 1229 (Fla. 5th DCA 1984) cert. pending, State v. Rowell, No. 65,417 and State v. Murray, 443. So.2d 955 (Fla. 1984). Rules 9.030(a)(2)(iii), (iv), and 9.120 F.R.App.P.

## STATEMENT OF THE CASE AND FACTS

Those details relevant to resolution of the jurisdictional question are adequately set forth in the opinion of the First District which the State accepts. The district court noted this case was "factually indistinguishable" from Rowell v. State, but felt constrained to follow Donovan v. State, 417 So.2d 674 (Fla. 1982).

## ISSUE

THE FIRST DISTRICT'S HOLDING THAT THE POLICE OFFICER'S SPONTANEOUS, UNSOLICITED REMARK THAT THE DEFENDANT, AT THE TIME OF HIS ARREST, HAD BEEN "VERY UNCOOPERATIVE AND WOULDN'T TALK", WAS AN IMPROPER COMMENT UPON THE RIGHT TO SILENCE WITHOUT REGARD TO THE HARMLESS ERROR DOCTRINE AND OVERWHELMING EVIDENCE OF GUILT. CONFLICTS WITH THIS COURT'S DECISION IN STATE V. MURRAY, 443 SO.2D 955 (FLA. 1982), AND WITH THE FIFTH DISTRICT'S OPINION IN ROWELL V. STATE, 450 SO.2D 1226 (FLA. 5TH DCA 1984) CERT. PENDING, STATE V. ROWELL, NO. 65,417.

## ARGUMENT

The issue presented by this appeal is whether State v. Murray, 443 So.2d 955 (Fla. 1982), modified the absolute rule that "any comment on the accused's exercise of his right to remain silent is reversible error without regard to the harmless error rule", Donovan v. State, 417 So.2d 674 (Fla. 1982), or whether the harmless error doctrine may apply to cases where the challenged comment was a spontaneous, unsolicited remark from a state witness and there is independent and overwhelming evidence of guilt. See, Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984) cert. pending, State v. Rowell, No. 65,417.

This precise question has been certified to this Court in Rowell and in the recent opinions of the Fifth District in Barry v. State, No. 84-485 (Fla. 5th DCA, April 11, 1985) [10 FLW 934-936] and of the Third District

in Burns v. State, No. 84-947 (Fla. 3d DCA, April 9, 1985) [10 FLW 904-905][1]. The First District declined the State's request in this case to await this Court's resolution of the issue or to certify the question. See, State's brief at page 17. The First District also declined to rule on the separate Suggestion to Certify filed with the motion for rehearing. Instead, the Suggestion was "noted", leaving the State without recourse should this Court decline to permit briefing on the merit.

In State v. Murray, this Court adopted the rationale of the United States Supreme Court in United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), which affirmatively rejected a per se reversal rule citing to its earlier opinion of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Admittedly State v. Murray, involved prosecutorial misconduct during closing argument where an attack had been made on the credibility of the defendant who had testified at trial. Burns v. State, at 905; Rowell v. State, at 1227. However both Hastings and Chapman, upon which State v. Murray is based, involved comments upon silence in which the United States Supreme Court held a reviewing court must consider the trial record as a whole and ignore errors which are harmless including the most constitu-

[1] At this juncture, notices to invoke and for rehearing have not yet been filed in Barry and Burns and time for filing has not yet expired.

tional errors. This rationale was adopted in State v. Murray. Id. at 956. The question which remains is whether this Court will hold the same reasoning applicable to factual circumstance found in Hastings and Chapman, i.e., comments upon silence. To fail to extend the legal principle to an unsolicited slip of the tongue by a state witness under circumstances which establish overwhelming evidence of guilt would afford state Fifth Amendment protections not enforced or required by the federal courts.

In the defendant's case, there can be no doubt that the officer's comment was unsolicited or spontaneous. When asked if the defendant was uncooperative, the officer stated:

> Yes, sir, he was very uncooperative and wouldn't talk.

T183 [The entire colloquy between the prosecutor and the officer is appendixed hereto; Compare, Rowell at page 1226.] Likewise the record of Appellant's trial demonstrates overwhelming evidence of guilt: an on scene show-up identification by the victim immediately after the robbery; immediate on scene identification by an eyewitness to the robbery who chased the victim's assailant and identified the defendant as the man observed in the woods where he retrieved the victim's purse; the testimony of the responding police officers; and the defendant's non-presentation of evidence. T129-133, 144-146,155-194. It is the State's position that an unintended comment

should not reverse per se an otherwise proper conviction supported by ironclad testimony, physical and circumstantial evidence which provides unequivocal and uncontroverted proof of the defendant's guilt. The First District relied upon the principle of per se reversal espoused in Donovan v. State. Donovan, of course, was decided pre-Murray.

The State submits that the following question, certified by the Fifth District, is as applicable to the instant cause as to the circumstances of State v. Rowell:

> Has the Florida Supreme Court, by its agreement in State v. Murray, 443 So.2d 955 (Fla. 1984), with the analysis of the supervisory powers of appellate courts as related to the harmless error rule as set forth in United States v. Hastings, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) receded by implication from the per se rule of reversal explicated in Donovan v. State, 417 So.2d 674 (Fla. 1982)?

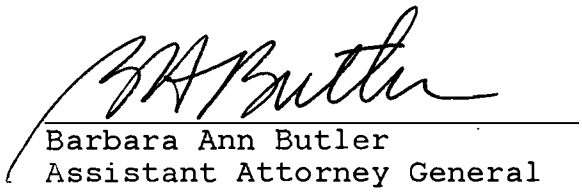
Rowell v. State at 1228. See also Burns v. State at 905, Barry v. State at 936. Accordingly, this Court should accept review of this cause to preclude prejudice to the State's position pending resolution of the issue presented herein, in State v. Rowell, and soon to be presented in Burns and Barry. To do otherwise will preclude full review of the legal issue in this case while affording review in Rowell, Burns and Barry.

## CONCLUSION

WHEREFORE based on the foregoing argument and authority, the State respectfully urges this Court to accept certiorari review over the decision of the First District to eliminate existing conflict and to ensure full review of this case while the legal issue is, or soon will be, pending in other cases before this Court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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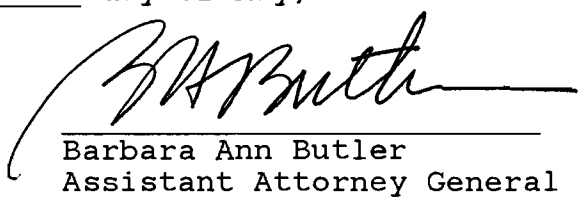
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Michael Minerva, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32301, this 1st day of May, 1985.



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