

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,  
Petitioner,  
v.  
JAMES B. KEARSE,  
Respondent.

**FILED**  
SID J. WHITE  
CASE NO. ~~906~~ 10 1985  
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Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM  
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

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II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts at PB 2.

### III SUMMARY OF ARGUMENT

Although petitioner would have this Court accept review of the question of whether a comment on silence can ever be harmless error, respondent will argue in this brief that this Court has not jurisdiction to accept this case for review at this point in time.

#### IV ARGUMENT

##### ISSUE PRESENTED

THIS COURT HAS NO JURISDICTION TO GRANT DISCRETIONARY REVIEW SINCE THE FIRST DISTRICT'S OPINION PRESENTS NO EXPRESS OR DIRECT CONFLICT WITH ANY OTHER REPORTED CASE. (ISSUE RESTATED BY RESPONDENT).

In the instant case, the First District held that the improper comment upon respondent's post-arrest silence was reversible error, without regard to the harmless error doctrine on authority of Donovan v. State, 417 So.2d 674 (Fla. 1982). Donovan reaffirmed the long-standing rule in Florida, that because a comment on silence has such a serious impact upon the jury, the harmless error doctrine cannot be applied. See also Bennett v. State, 316 So.2d 41 (Fla. 1975); Shannon v. State, 335 So.2d 5 (Fla. 1976); and Clark v. State, 363 So.2d 331 (Fla. 1978). Thus, there is no conflict with Donovan.

Petitioner claims conflict with Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984), discretionary review pending, Case No. 65,417. In Rowell, the Fifth District properly followed Bennett and Donovan, as well as State v. Burwick, 442 So.2d 944 (Fla. 1983), in rejecting the state's harmless error argument, on authority of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Thus, because the Fifth District followed Donovan, as did the First District in the instant case, there is no conflict with Rowell.

The only conflict between the instant case and Rowell is in the manner of disposition by the appellate court. The First District here reversed the conviction and refused to certify the question; the Fifth District in Rowell reversed the convic-

tion but did certify the question. Since Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Article III, Section 3(b)(3), Florida Constitution require a conflict of decisions, and not a conflict in the manner of disposition, there is no conflict between the decision of the First District and the decision of the Fifth District. See also Kyle v. Kyle, 139 So.2d 885 (Fla. 1962) and Florida Greyhound v. West Flagler Association, 347 So.2d 408 (Fla. 1977), especially Justice England's opinion at 411. The state is really seeking review of the First District's refusal to certify the question or its anticipation that this Court will announce a harmless error rule when it decides Rowell. Such prospective conflict cannot serve as a basis for this Court's jurisdiction. Cf. Jollie v. State, 405 So.2d 418 (Fla. 1981).

Finally, petitioner claims conflict with State v. Murray, 443 So.2d 955 (Fla. 1984). That case did apply the harmless error doctrine. But it was not a case involving a comment on silence. It was a prosecutorial misconduct case. Moreover, as the Fifth District noted in Rowell, 450 So.2d at 1228, this Court would have used Murray or State v. Strasser, 445 So.2d 322 (Fla. 1984) to overrule Burwick and Donovan if it had intended to apply the harmless error doctrine to comment on silence cases. Since this Court did not announce a harmless error rule pertaining to comment on silence cases in Murray, no conflict exists between the instant case and that decision in Murray.



V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent urges this Court to decline to accept jurisdiction. This Court should vacate the stay entered on April 29, 1985, and remand for respondent to receive his new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Assistant Attorney General Barbara Ann Butler, Suite 513, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida 32202; and to respondent, James B. Kearse, #B-040956, Post Office Box 747, Starke, Florida 32091 on this 10<sup>th</sup> day of May, 1985.



P. DOUGLAS BRINKMEYER