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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT PEOPLES,  
Petitioner,

v.

Case No. 77,851

STATE OF FLORIDA,  
Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The decision of the District Court of Appeal, Fifth District, recounts the case and facts **as** follows:

Robert Peoples appeals his judgment and sentence imposed following a jury verdict. Peoples was convicted of trafficking in fourteen to eighteen grams of Dilaudid and conspiracy to traffic in four to fourteen grams of Dilaudid in violation of sections 893.135(1)(c)1 and 893.135(5), Florida Statutes (1987).

On February 27, 1988, a Rockledge police detective responded to a telephone call from a pharmacist who suspected that a customer's prescription for a narcotic was forged. Without arousing the suspicion of the customer, the pharmacist delayed filling the prescription and gave the detective time to travel to the pharmacy. The detective parked near the pharmacy and observed the actions of Peoples and two co-conspirators, Virgilio and Sawyer. The surveillance culminated in the arrest of the three **as** they attempted to drive away after Virgilio had paid for and obtained the drugs from the pharmacist. The detective found several forged prescriptions and 19.8 grams of Dilaudid in the car occupied by the three. Peoples' fingerprint was found on one of the prescriptions.

After he was arrested and given his Miranda warning, Peoples invoked his right to be silent and to have an attorney. After making his first appearance pursuant to rule 3.130, Florida Rules of Criminal Procedure, Peoples posted bond and was released. Virgilio, who was the only one of the three unable to **make** bond, eventually advised police that he would cooperate and offered to allow them to record his **calls** to Peoples. Over a period of three days, two **calls** were made by Virgilio to Peoples. During the last phone conversation, Peoples told Virgilio that he was sure the conversation was being taped **since** Virgilio was calling from the jail.

Sawyer testified at trial in exchange for a waiver of a minimum mandatory sentence. Sawyer testified that Peoples and one Michael Giadona were partners in the scheme and that Giadona supplied the false prescriptions. Sawyer testified that he was addicted to Dilaudid and that he had been purchasing it from the partners since 1985. The record does not reflect testimony by Virgilio other than proffered testimony to explain the manner in which the two phone conversations were recorded...Peoples v. State, 16 F.L.W. D588 (Fla. 5th DCA February 28, 1991).

Peoples presented four issues on appeal, including the issue relied upon **far** conflict jurisdiction. Peoples contended that the trial court erred in denying his motion to suppress the recording of his phone conversations with Virgilio. Peoples relied upon both the sixth amendment right to counsel and the corresponding provision of the Florida Constitution, Article I, section 16. The District Court of Appeal, Fifth District, determined that the sixth amendment was not implicated as the federal right to counsel did not arise until after charges have been filed. Since Peoples had not been formally charged at the time, the court concluded that adversary judicial proceedings had not been initiated and therefore, the sixth and fourteenth amendment was not violated.

In resolving Peoples' claim under the Florida Constitution, the district court held that his right to counsel had not attached at the time the statements were made even though Peoples had attended first appearance, and had been appointed counsel. In so holding, the court "acknowledge(d) conflict" with State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984). The district court

concluded that neither the state nor federal right to counsel had been violated by admission of Virgilio's testimony, and so the trial court was correct in denying Peoples' motion to suppress.

SUMMARY OF ARGUMENT

Although the decision of the district court acknowledged conflict with another district court on the same point of law, this court should nevertheless decline to exercise review of this case for several reasons. There are procedural bars to review of the issue on the merits. Moreover, the result in this case would be unchanged as the testimony at issue is harmless error at best, and cumulative to other, properly admitted testimony.

## ARGUMENT

WHETHER THIS COURT SHOULD EXERCISE  
ITS DISCRETIONARY JURISDICTION TO  
REVIEW A CASE BASED UPON EXPRESS  
AND DIRECT CONFLICT.

Peoples **seeks** to invoke this honorable court's discretionary review to resolve the apparent conflict between the decision in this case and another district court's decision on the legal question of whether a person's right to counsel under the Florida Constitution attaches at first appearance. Respondent agrees that the district court's decision in this case, while not certifying a conflict or certifying a question as one of great public importance, nevertheless "acknowledges conflict" with the fourth district's decision in State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984). However, respondent respectfully suggests that exercise of this court's discretionary review is nonetheless inappropriate in this case.

First, this issue is pending in other **cases** before this court.' The extent of the state constitutional right to counsel is an issue in at least two pending capital cases, one of which has been pending for some time. Owen v. State, Case No. 68,549; Hayes v. State, Case No. 75,040. By the time that this case is briefed, **argued** and decided, the question of law will have been settled. This court has twice before declined to review this issue. State v. Delgado, 458 So.2d 20 (Fla. 3d DCA 1984),

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<sup>1</sup> The federal sixth amendment right may be illuminated when the pending case of McNeil v. Wisconsin, Case No. 90-5319, is decided by the United States Supreme Court.



pet. for rev. denied, 467 So.2d 999 (Fla. 1985); Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), pet. for rev. denied, 469 So.2d 750 (Fla. 1985).

Second, this **case** is not in the most advantageous procedural posture to review this issue. **As** noted by the district court, the **record** does not reflect the manner in which the conversations were recorded. Without full factual development, the legal issues become more difficult if not impossible to determine.

**There** is an additional procedural **bar** in this particular case which presents another hurdle to review of this issue. When Virgilio and Peoples spoke on the telephone, Sawyer **was** present with Peoples. When the state attempted to elicit from Sawyer testimony concerning what he overheard, defense counsel objected on the ground that the tape recordings were the best evidence. Therefore, Peoples should be precluded on appeal from arguing that the tapes were improperly admitted.

Finally, this case would not be an appropriate vehicle to determine this legal issue because the result in this case would not be changed. As argued below, even if an error occurred, alleged violations of the right to counsel in the Massiah<sup>2</sup> context are subject to harmless error analysis. Milton v. Wainwright, 407 U.S. 371 (1972); Chapman v. California, 386 U.S. 18 (1967); See also, Satterwhite v. Texas, 486 U.S. 249 (1989). Even if Peoples could demonstrate a violation of his right to

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<sup>2</sup> Massiah v. United States, 377 U.S. 201 (1964)

counsel in this case, any error would be **harmless** at **best**. Virgilio's testimony was cumulative to that of co-conspirator Sawyer, **who** was present with Peoples during the conversation, and testified to what Peoples said. During the conversations, Peoples did not say anything incriminating, and indeed, **was** suspicious that **the** calls were taped as Virgilio was calling from **the** jail.

Although **the** extent of the state constitutional right to counsel is an important legal question, this court should nevertheless decline to exercise **its** extraordinary jurisdiction in this **case**. For the reasons outlined above, the factual development of this claim in **this** particular case renders it a less than ideal vehicle to consider this claim. There are procedural impediments to reaching the merits. **The** result of **the** case would be unchanged even if error had occurred **as** any error was invited or harmless since the improperly admitted testimony was cumulative to other, properly admitted evidence.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to decline to accept this case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished, by delivery via the basket at the Fifth District Court of Appeal to Brynn Newton counsel for petitioner at 112A Orange Avenue, Daytona Beach, FL 32114, this 29<sup>th</sup> day of May, 1991.

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