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IN THE SUPREME COURT OF FLORIDA

RICHARD NAGEL

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96900

PETITIONER'S BRIEF ON JURISDICTION

CHARLES W. MUSGROVE
CONGRESS PARK, SUITE 1-D
2328 South Congress Avenue
West Palm Beach, FL. 33406
561/968-8799 / Fla.Bar #095137

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Circuit Court in and for Palm Beach County, Florida, and the Appellant is the District Court of Appeal, Fourth District. Respondent was the Prosecution in the Circuit Court and the Appellee is the District Court. The parties will be referred to as they appear before this Court.

The symbol A followed by a number will refer to the appendix to this brief.

STATEMENT OF THE CASE AND THE FACTS

Petitioner was charged with and convicted of driving under the influence. He was sentenced to probation with jail time as a condition (A5-7).

After Petitioner testified on his own behalf, the prosecutor asked him, over objection. if he had friends at the Riviera Beach police department call Lake Park police to get the charges dropped. Petitioner denied making any such effort. He knew Riviera Beach officers who dropped in where he worked, and had discussed his case with them, but was unaware of any calls (A8-10).

Under the guise of impeachment, she then recalled the arresting officer to say he'd been called by a Riviera Beach officer and asked to cut Petitioner a break. Petitioner's objection was overruled, even though the Judge seemed to perceive that there was no evidence Petitioner asked the officer to call, or even knew he did so (A11-14).

Petitioner argued on appeal that this was improper impeachment because there was no evidence that he caused the alleged call to the arresting officer. Respondent contended that Petitioner had the burden to prove the error harmful, and cited Goodwin v. State, 721 So.2d 728 (Fla.4DCA 1998),rev.gr.729 So.2d 391 (Fla.1998).

The District Court of Appeal affirmed, citing Goodwin v.State, supra, and Doherty v. State, 726 So.2d 837 at 838 (Fla.4DCA 1999) (A1).

Petitioner timely sought rehearing (A2-3) and was denied on October 4 (A4). Petitioner filed his notice to invoke discretionary jurisfiction on October 22.

SUMMARY OF ARGUMENT

In a case where the prosecutor conceded the issue was who the jury believed (A15), she was allowed to improperly impeach Petitioner with evidence that the arresting officer received a call on Petitioner's behalf from another police department. There was no evidence Petitioner instigated or even knew about any such call.

The appeal turned into a dispute over whether State v DiGiulio, supra, continues to apply to "nonconstitutional" errors. The same issue was certified by the Fourth District in Goodwin v. State, supra, and review is pending in this Court. Because review of the case cited by the Fourth District is pending in this Court, this Court has jurisdiction to review the instant decision as well.

POINT INVOLVED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN THAT PETITIONER HAD THE BURDEN TO PROVE THE ERROR IN HIS CASE HARMFUL IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN STATE V. DIGIULIO, 491 So.2d 1129 (Fla. 1986)?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN THAT PETITIONER HAD THE BURDEN TO PROVE THE ERROR IN HIS CASE HARMFUL IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN STATE V. DIGIULIO, 491 So.2d 1129 (Fla. 1986).

That there was error in the trial court is clear. The questions and evidence presented by the prosecution suggested that Petitioner tampered with the arresting officer and the case against him. That is tantamount to charging him with a crime under Section 914.22 Fla. Stat. It amounts to obstruction of justice. Some consider it grounds for impeachment. If there were competent evidence that Petitioner put police friends up to making the call, it would have been powerful evidence for the State. However, there was no competent evidence, only suggestion and innuendo.

There is no basis in the law for allowing evidence of efforts to influence the case or the witness to be used against the accused absent proof that the efforts are attributable to him. See Freeman v. State, 538 So.2d 936 at 937 (Fla. 2DCA 1989). Coleman v. State, 335 So.2d 364 (Fla. 4DCA 1976), Manuel v. State, 524 So.2d 734 (Fla. 1DCA 1988) and Duke v. State, 142 So. 886 (Fla. 1932). It was error to allow the State to plant the suggestion and then to shore it up with evidence of a phone call which could not be attributed to Petitioner.

The State made no effort to defend the actions of its prosecutor on appeal. Instead it argued that it was Petitioner's burden to prove the error harmful. The appeal thus turned on the standard of review in the District Court.

Petitioner argued for this Court's pronouncement:

> "The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." (State v DiGiulio, supra, 491 So.2d at 1138.)

The State argued successfully for the contrary rule of Goodwin v. State, supra, which the Fourth District also cited in Doherty v. State, supra.

Though State v DiGiulio, supra, involved a comment on the right to remain silent, this Court did not limit its scope to constitutional errors. The decision has been applied to all types of errors.

Petitioner believes the error in his case was harmful under any standard. A similar charge, attempting to bribe a witness, was held to require a new trial in Madison v. State, 726 So.2d 835 (Fla. 4DCA 1999). The Court rejected the State's harmless error argument, saying:

> "We also reject the state's argument that the admission of the offer of a bribe was harmless. The erroneous admission in evidence of other uncharged criminal offenses can amount to a denial of a defendant's'constitutional right to a fair trial.' Thompson v. State, 494 So.2d 203, 204 (Fla. 1986). This type of evidence is presumed harmful. Gore v. state, 719 So.2d 1197, 23 Fla.L. Weekly §518 (Fla. 1998); Holland v. State, 636 So.2d 1289 (Fla.1994)." (emphasis added) (726 So.2d at 836).

However, that goes to the merits, not to jurisdiction.

In citing to a decision which the Fourth District certified to involve a question of great public importance involving the continuing application of State v. DiGiulio, supra, the Fourth District has made it clear that the instant decision also conflicts with DiGiulio.

Where, as here, the case cited in a PCA is pending review in this Court, this Court has jurisdiction to review the PCA as well, Jollie v. State, 405 So.2d 418 (Fla. 1981). It should exercise it here to avoid denying Petitioner equal protection.

CONCLUSION

Because Goodwin v. State, supra, is pending review in this Court, this Court can and should review the instant decision, which relies on Goodwin.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor, West Palm Beach, Florida 33401 by U.S. Mail, this 1st day of November, 1999.

Charles W. Musgrove

CHARLES W. MUSGROVE, ESQUIRE
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561/968-8799
Florida Bar No. 095137

Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

RICHARD NAGEL

Petitioner,

v.   CASE NO. ____________

STATE OF FLORIDA,

Respondent.

____

PETITIONER'S APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1999

RICHARD NAGEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 98-4144

Opinion filed August 11, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard L. Oftedal, Judge; L.T. Case No. 98-4010CF A02.

Charles W. Musgrove, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED. See Doherty v. State, 726 So. 2d 837, 838 (Fla. 4th DCA 1999); Goodwin v. State, 721 So. 2d 728, 729 (Fla. 4th DCA 1998), rev. granted, 729 So. 2d 391 (Fla. 1999).

DELL, STONE and SHAHOOD, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

RECEIVED 8-12-99

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

RICHARD NAGEL,

Appellant

vs CASE NO. 98-4144

STATE OF FLORIDA,

Appellee

MOTION FOR REHEARING AND/OR FOR CERTIFICATION

Appellant, by and through his undersigned attorney, respectfully moves this Court to grant rehearing and/or to certify this decision pursuant to Rule 9.330 Fla.R.App.Pr. and would show this Court that:

1. In Goodwin v. State, 721 So.2d 728 (Fla. 4DCA 1998), rev.granted, 729 So.2d 391 (Fla. 1999), this Court sought to distinguish State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). It nonetheless certified the question of continued applicability of that decision to nonconstitutional error to be of great public importance.

2. In doing so, this Court has virtually acknowledged that it is overruling State v. DiGuilio, supra. In citing Goodwin v. State, supra, in the instant case, it is doing the same thing again.

3. This Court has thus overlooked the prohibition of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) - district courts are not authorized to overrule Supreme Court decisions.

4. If this Court disagrees, it should at least certify the same question it did in Goodwin v. State, supra, to avoid denying Appellant equal protection of the law.

WHEREFORE, Appellant prays this Court will grant rehearing or will at least certify the question.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor, West Palm Beach, Florida, 33401, by U.S. Mail, this 25th day of August, 1999.

CHARLES W. MUSGROVE, ESQUIRE
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561/968-8799
Fla. Bar No. 095137

Counsel for Appellant

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

October 4, 1999

CASE NO.: 98-4144
L.T. No. : 98-4010 CF

Richard Nagel v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed August 25, 1999, for rehearing and/or for certification is hereby denied; further,

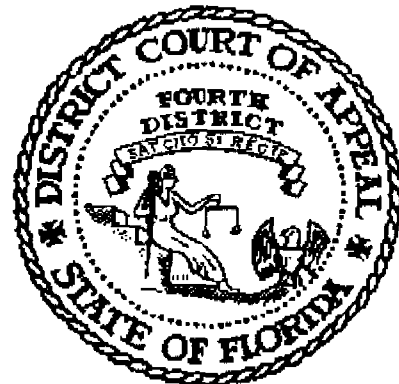
ORDERED that appellant's motion filed August 25, 1999, to stay issuance of mandate is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Charles W. Musgrove Attorney General-W.P.B.

ch



Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

RECEIVED
10-5-99

12-7-98

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Officer: 15-3

JUDGMENT OF GUILT
AND PLACING DEFENDANT ON PROBATION

STATE OF FLORIDA

VS Plaintiff

RICHARD C. NAGEL
Defendant

In The Circuit Court
of Palm Beach County, Florida
Case No. 98-4010CFA02

FILED
98 DEC -7 PM 2:41
DOROTHY H. WILKEN, CLERK
CIRCUIT CRIMINAL
CO. CTS P.B. CO. FL

This cause coming on this day to be heard before me, and you, the defendant RICHARD C. NAGEL, being now present before me, and you having:
FOUND GUILTY TO
the offense of COUNT 2. DRIVING UNDER THE INFLUENCE the court hereby adjudges you to be guilty of said offense; and

It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law:

Now, therefore, it is ordered and adjudged that the imposition of sentence are hereby withheld, and that you are hereby placed on probation for a period of ONE (1) YEAR AS TO COUNT 2 under the supervision of the Department of Corrections and its Officers, such supervision to be subject to the provisions of the laws of this State.

It is further ordered that you shall comply with the following conditions of probation:

(1) Not later than the fifth day of each month, you will make a full and truthful report to your Probation Officer on the form provided for that purpose.
(2) You will pay to the State of Florida the amount of **$50.00 FIFTY DOLLARS** per month, plus a 4% surcharge, toward the cost of your supervision, unless otherwise exempted in compliance with Florida Statutes.
(3) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Probation Officer.
(4) You will neither possess, carry or own any weapons or firearm without first securing the consent of your Probation Officer.
(5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.
(6) You will submit to Urinalysis, Breathalyzer or Blood Tests, as directed by your Probation Officer or the Professional Staff of any treatment center where you may be receiving treatment, to determine the possible use of alcohol, drugs, or controlled substances.
(7) You will work diligently at a lawful occupation and support any dependents to the best of your ability as directed by your Probation Officer.

AMH

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(8) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you.

(9) COURT COSTS $161.00
(10) FINE $500.00
(11) DUI $135.00
(12) SUBSTANCE ABUSE EVALUATION AND SUCCESSFULLY COMPLETE RECOMMENDED TREATMENT - AS RECOMMENDED DUI SCHOOL
(13) RANDOM DRUG/ALCOHOL TESTING AT DEFENDANT'S EXPENSE
(14) COMPLETE 50 HOURS OF COMMUNITY SERVICE, TO BE DONE AT A RATE OF 5 HOURS PER MONTH
(15) SUSPENDED LICENSE ONE (1) YEAR
(16) ATTEND ADVANCE DUI
(17) 1 SESSION VIP PANEL
(18) IMPOUNDMENT ORDER FILED
(19) AIDS AWARENESS PROGRAM
(20) COURT COST DEDUCTED FROM BOND

SIXTY (60) DAYS MAY SERVE LONG WEEKENDS WITH CREDIT FOR ONE (1) DAY SUSPENDED

MAY REPORT TO PROBATION BY 11/2/98 4:00 P.M.

DEFENDANT SENTENCED TO SIXTY (60) DAYS TO BE SERVED LONG WEEKENDS TO COMMENCE 11/13/98 BY 6:00 P.M.

Probation Officer is hereby authorized to collect drug testing reimbursement costs from the defendant at the officer's discretion.

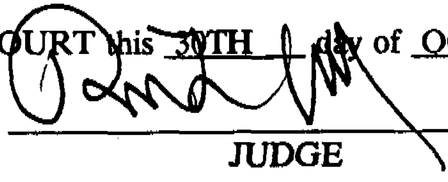
You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

It is further ordered that when you have reported to the Probation Officer and have been instructed as to the conditions of probation you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT this 30TH day of OCTOBER, 1998

Signed this 7th day of Dec, 1998.



JUDGE

I acknowledge receipt of a certified copy of this order and that the conditions have been explained to me.

Date: ______________________ Probationer ______________________

Instructed by: ______________________

Original: Court
Copies: Probationer/File
AP 11/2/98

DC4-900A
Rev 6/85

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1 Q. You didn't do that, did you?

2 A. No, I did not.

3 Q. You did not take the test, after the officer

4 told you, look, Mr. Nagel, you're going to lose your

5 license, up to a year, if not eighteen months --

6 A. Yes, ma'am.

7 Q. -- if you don't take this -- and you made a

8 decision, because they were railroading you, not to take

9 that test.

10 A. Yes, I did.

11 Q. And, certainly, taking the test would have

12 shown the results of your breath alcohol.

13 A. If the machine would have been accurate, yes,

14 ma'am.

15 Q. Do you have friends who belong to the Riviera

16 Beach Police Department?

17 A. Yes, I do.

18 Q. How many friends?

19 MR. MABIE: Objection, materiality, Your

20 Honor.

21 MS. PATULLO: I'll tie it up, Judge.

22 THE COURT: Approach, a second.

23 (A discussion was had at the sidebar and out

24 of the hearing of the jury.)

25 THE COURT: Tie it up.

1 MS. PATULLO: Judge, he's going to -- I have
2 information that says that this defendant talked to
3 Riviera Beach Police Department, after his arrest,
4 to reach Officer Crowell to try to get the charges
5 dropped. And it goes to consciousness of guilt.
6 THE COURT: Response?
7 MR. MABIE: The question is, does he have a
8 lot of friends in the Riviera Beach Police
9 Department. If they're going to get on to asking
10 who -- material things.
11 THE COURT: Well, I think it's just a
12 preliminary question to what -- apparently, it was
13 going to lead to -- tried to, in some way, use his
14 influence, to try to get his charges dropped. I'll
15 overrule it.
16 (The sidebar was concluded and the proceedings
17 resumed in open court as follows:)
18 CROSS EXAMINATION (Continued)
19 BY MS. PATULLO:
20 Q. How many friends with Riviera Beach Police
21 Department do you have?
22 A. I'd say friends -- a couple friends and a few
23 acquaintances.
24 Q. Isn't it true that you tried to get your
25 friends from Riviera Beach Police Department to call

1 Officer Crowell to get the charges dropped?
2 A. No, ma'am. That's not correct.
3 Q. You're saying that no Riviera Beach police
4 officer ever called Officer Crowell to get the charges
5 dropped.
6 A. I have no idea.
7 Q. Never to call them?
8 A. Do what?
9 Q. You never asked -- you never called your
10 Riviera Beach Police friends about this case?
11 A. No. They stop by the dock.
12 Q. And what?
13 A. Sit around, watch the boats come in, watch the
14 fish, B.S., they take their lunch break there.
15 Q. And did they know that you had a DUI pending?
16 A. I mentioned that to them. Yes, I did.
17 Q. Did you tell them you were worried about it?
18 A. No.
19 Q. You didn't talk about the DUI at all.
20 A. No. Talked about the illegal drug charge.
21 Q. What you felt was the illegal drug charge.
22 A. Yes, ma'am.
23 Q. Had conversation about that whole incident with
24 them.
25 A. Yes, ma'am.

1 U.S. 1, the first time, did you see a police officer's
2 car in that parking lot?
3 A. The first time? I don't recall if I had seen
4 a police car in there, the first time.
5 Q. What about the second time?
6 A. The second time -- I don't recall if the car
7 was there, but there was a police officer inside the
8 restaurant.
9 Q. Where did that police officer -- what
10 department did he belong to?
11 A. Riviera Beach.
12 Q. And did you know that officer?
13 A. I don't even recall who it was, at this point.
14 Q. At some point -- since April 12, 1998 -- let me
15 go back.
16 Your car, where did you park it?
17 A. The first time?
18 MR. MABIE: Objection, improper rebuttal.
19 Testimony was offered, case in chief.
20 THE COURT: Sustained.
21 BY MS. PATULLO:
22 Q. Did you ever park next to the defendant?
23 A. Not that I know of, no.
24 Q. Since April 12, 1998, did you ever receive a
25 call from a Riviera Beach police officer?

1 A. Yes.

2 MR. MABIE: Objection. Calls for hearsay.

3 THE COURT: Well, it was whether he received a

4 call. Let him answer that question.

5 MS. PATULLO: And it's for impeachment

6 purposes.

7 THE COURT: Well, I'll let him answer this

8 question. We'll see where we go.

9 BY MS. PATULLO:

10 Q. Did you get a call?

11 A. Yes, ma'am, I have.

12 Q. Were you ever requested to look into your case?

13 MR. MABIE: Objection. This clearly calls for

14 hearsay. I mean --

15 THE COURT: Well, let's approach, a second.

16 (A discussion was had at the sidebar and out

17 of the hearing of the jury.)

18 THE COURT: If I understand your response,

19 Ms. Patullo, this it not being offered for the

20 truth of the matter, therefore it's not hearsay.

21 This matter -- it's impeachment testimony that

22 impeaches a prior inconsistent statement?

23 MS. PATULLO: That's just --

24 THE COURT: That was represented -- I mean,

25 I --

1 MS. PATULLO: That's what it's for.

2 THE COURT: Is he going to say that somebody

3 -- because I need to know. What is it that you

4 intend to ask him so I can determine --

5 MS. PATULLO: Whether or not an officer asked

6 the charges to be dropped.

7 THE COURT: Well, assuming that's the truth,

8 how does that imply an inconsistent statement?

9 MS. PATULLO: Because he's saying that he

10 never contacted or talked to the officers about

11 doing that.

12 THE COURT: Well, that doesn't show what he

13 did do.

14 MS. PATULLO: Yes, it does. He said he talked

15 to the officers about the DUI at the dock --

16 THE COURT: Well, was this conversation

17 something that he's saying that he asked this

18 person to do.

19 MS. PATULLO: That he was -- that the Riviera

20 Beach police officers were contacted by this

21 defendant to contact this officer.

22 MR. MABIE: That is hearsay, which is not

23 within that, Judge.

24 THE COURT: Well, it's hearsay -- it's not

25 hearsay if it's, again, for impeachment. It's a

1 prior inconsistent statement.

2 MS. PATULLO: Yes.

3 MR. MABIE: But -- yes, sir, but just -- it is

4 a prior inconsistent statement, but you can't prove

5 that by hearsay. This is pure hearsay. This

6 officer is offering -- the impeachment is by

7 testimony from a third party making an out-of-court

8 statement which is offered for the truth of it.

9 THE COURT: No, it's not. It's offered to

10 impeach his prior inconsistent statement. I

11 believe it's allowable. I'll overrule the

12 objection.

13 (The sidebar was concluded and the proceedings

14 resumed in open court as follows:)

15 DIRECT EXAMINATION (Continued)

16 BY MS. PATULLO:

17 Q. You got a call from a Riviera Beach police

18 officer?

19 A. Yes, I have.

20 Q. And it was regarding this case.

21 A. Yes, ma'am.

22 Q. And it was regarding having the case dropped?

23 A. It was regarding information on the case and

24 whether I could possibly cut someone a break or not.

25 MS. PATULLO: No further questions.

1 mention that to call your attention to, were they
2 correct, or was Dick Nagel correct, when he told
3 you, I parked it. Dick Nagel was correct, because
4 he didn't park correctly. These guys wouldn't give
5 him credit for that, so they said, oh, he took up
6 several spaces.
7 Anyway, I'm going to listen. And thank
8 you for your attention. I'll be back after the
9 Prosecutor's through.
10 THE COURT: Thank you, Mr. Mabie.
11 Ms. Patullo?
12 MS. PATULLO: Thank you, Your Honor.
13 Comes down to this, who do you believe,
14 what do you believe, and why do you believe it?
15 Ask yourself that, those three things. Why do you
16 believe it? Because your job is to find out the
17 truth, what happened on April 12, 1998. That's
18 your job. All you can consider -- and this is an
19 important fact, because you're going to be
20 instructed on it. All that you can consider is
21 only evidence that you have seen in this trial.
22 You're not allowed to speculate outside of that.
23 You're not allowed to question outside of that.
24 You have to take the facts and the evidence of what
25 you have heard and seen and apply it to the law.

STATE of Florida, Petitioner,

v.

Angelo John DiGUILIO, Respondent.

No. 65490.

Supreme Court of Florida.

July 17, 1986.

Defendant was convicted in the Circuit Court, Volusia County, C. McFerrin Smith, III, J., of conspiracy to traffic in cocaine, and defendant appealed. The District Court of Appeal, 451 So.2d 487 reversed and remanded. On petition for review, the Supreme Court, Shaw, J., held that: (1) comments on defendant's silence are subject to harmless-error analysis; (2) comment by police officer that "[A]fter that, he advised me he felt like he should speak to his attorney" was susceptible to conclusion it was comment on right to remain silent; and (3) erroneous admission of comment on defendant's postarrest silence was not harmless.

Decision of district court approved and cause remanded.

Adkins, J., filed concurring in part and dissenting opinion in which Ehrlich and Barkett, JJ., concurred.

1. Criminal Law ⇐1171.5

Comments on defendant's silence are subject to harmless-error analysis; receding from *Donovan v. State*, 417 So.2d 674 (Fla.); *Shannon v. State*, 335 So.2d 5 (Fla.), and *Bennett v. State*, 316 So.2d 41 (Fla.); and overruling *Clark v. State*, 363 So.2d 331 (Fla.). U.S.C.A. Const.Amend. 5.

2. Witnesses ⇐305(2)

Fact that defendant answers few questions does not constitute waiver of Fifth Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐721(1)

Comment on defendant's invocation of his right to remain silent after he has answered some questions is constitutional error. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐407(1)

Comment "[A]fter that, he advised me he felt like he should speak to his attorney," which arose during examination of police officer to determine whether defendant had been given his *Miranda* warnings, was fairly susceptible of being interpreted by jury as comment on silence, and therefore, was constitutional error. U.S.C.A. Const.Amend. 5.

5. Constitutional Law ⇐70.1(10)

Contraposed to authority of legislature to enact harmless error statutes is authority of courts to establish rule that certain errors always violate right to fair trial and are, thus, per se reversible.

6. Criminal Law ⇐721(1), 1171.5

Prohibition of prosecutorial comment on failure to testify is constitutional; however, there is no constitutional right to per se reversal of conviction.

7. Criminal Law ⇐1163(1)

Harmless-error test places burden on State, as beneficiary of error, to prove beyond reasonable doubt that error complained of did not contribute to verdict or, alternatively stated, that there is no reasonable possibility that error contributed to conviction.

8. Criminal Law ⇐1169.1(1)

Application of harmless-error test requires examination of entire record by appellate court, including close examination of permissible evidence on which jury could have legitimately relied, and in addition, even closer examination of impermissible evidence which might have possibly influenced jury verdict.

9. Criminal Law ⇐721(3)

Any comment which is fairly susceptible of being interpreted as comment on silence will be treated as such.

10. Criminal Law ⟹1166.11(5)

Denial of counsel is always harmful, regardless of strength of admissible evidence, and can be properly categorized as per se reversible. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⟹1171.5

Comment on defendant's postarrest silence was not harmless, where permissible evidence against defendant was not clearly conclusive, comment put before jury fact that defendant declined to offer any plausible explanation at time of his arrest for his suspicious presence in midst of drug deal, and comment at least indirectly also highlighted for jury fact that defendant was not testifying at trial and still had offered no plausible explanation.

12. Criminal Law ⟹1165(1)

Harmless-error test is not sufficiency-of-the-evidence, correct result, not clearly wrong, substantial evidence, more probable than not, clear and convincing, or even overwhelming-evidence test, but rather, question is whether there is reasonable possibility that error affected verdict.

13. Criminal Law ⟹1162

Harmless error is not device for appellate court to substitute itself for trier-of-fact by simply weighing evidence.

14. Attorney and Client ⟹32(3)

When there is overzealousness or misconduct on part of either prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring matter to Florida Bar for disciplinary investigation.

Jim Smith, Atty. Gen., and Richard B. Martell and Sean Daly, Asst. Attys. Gen., Daytona Beach, for petitioner.

John W. Tanner, Daytona Beach, for respondent.

ON REHEARING GRANTED

SHAW, Justice.

[1] Respondent petitions for rehearing of our decision of August 29, 1985, wherein we held that comments on a defendant's silence were subject to harmless error analysis and remanded the case to the district court for application of the harmless error analysis. We reaffirm our holding but grant rehearing in order to apply harmless error analysis and to more fully explicate the application of harmless error. We substitute this opinion for our earlier opinion.

The following question has been certified as being of great public importance:

> 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. Hasting,* 461 U.S. 499, 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); *Shannon v. State,* 335 So.2d 5 (Fla.1976); and *Bennett v. State,* 316 So.2d 41 (Fla.1975)?

DiGuilio v. State, 451 So.2d 487, 491 (Fla. 5th DCA 1984). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question in the affirmative and apply the harmless error doctrine to a comment on a defendant's remaining silent.

A jury convicted Angelo John DiGuilio of conspiracy to traffic in cocaine. The district court reversed, finding that the prosecutor elicited testimony from a witness which could be interpreted by the jury as a comment on DiGuilio's right to remain silent. Applying *Donovan, Shannon,* and *Bennett,* the district court found the comment to be per se grounds for reversal.

The comment in question arose during the prosecution's examination of a police officer to determine whether DiGuilio had been read his *Miranda* [1] warnings. The following exchange then took place:

1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Q. [Prosecutor] Did he indicate whether or not he would be willing to answer any questions?

A. At that point, he didn't say.

Q. Did Mr. DiGuilio make any statements to you at that time?

A. Only to the effect that the driver of the car picked him up at his home and he had come directly to the Howard Johnson's. That he lived in South Daytona. He refused to give me an address. He refused to identify the name of the driver. He also indicated to me that the driver had parked the car and walked north to the southeast doors to the motel and had entered. After that, he advised me he felt like he should speak to his attorney. And there was no further questioning.

Q. No further questioning?

A. No.

[illegible]4] The district court found the state[illegible], "After that, he advised me he felt [illegible] he should speak to his attorney," sus[illegible]ble to the conclusion that it was a [illegible]ent on the right to remain silent. [illegible] fact that DiGuilio answered a few [illegible]ions first does not constitute a waiver [illegible] his fifth amendment privilege. *Mi[illegible]* states that an individual can invoke [illegible] right to remain silent "at any time prior [illegible] during questioning." *Miranda v. Ar[illegible]*, 384 U.S. 436, 473–74, 86 S.Ct. 1602, [illegible]–28, 16 L.Ed.2d 694 (1966); *Michigan [illegible] Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 [illegible]2d 313 (1975). Thus, comment on a [illegible]dant's invocation of his right to re[illegible] silent after he has answered some [illegible]ions is constitutional error. *See Pe[illegible] v. State*, 405 So.2d 997 (Fla. 3d DCA [illegible]); *Thompson v. State*, 386 So.2d 264 [illegible] 3d DCA 1980), *review denied*, 401 [illegible] 1340 (Fla.1981). We agree that the [illegible]ent here is fairly susceptible of being [illegible]preted by the jury as a comment on [illegible]. *State v. Kinchen*, 490 So.2d 21 [illegible]1985).

Florida has long followed a per se reversal rule when a prosecutor comments on a defendant's failure to testify. *Gordon v. State*, 104 So.2d 524 (Fla.1958); *Trafficante v. State*, 92 So.2d 811 (Fla.1957); *Way v. State*, 67 So.2d 321 (Fla.1953); *Rowe v. State*, 87 Fla. 17, 98 So. 613 (1924). Prior to *Miranda*, however, Florida followed the rule that a defendant's silence, when faced with accusatory statements while in custody, was admissible as evidence tending to show guilt. *Albano v. State*, 89 So.2d 342 (Fla.1956). The per se reversal rule for comments on the right to remain silent was first adopted in *Jones v. State*, 200 So.2d 574 (Fla. 3d DCA 1967). This Court adopted *Jones* and the per se rule in *Bennett v. State*, 316 So.2d 41 (Fla. 1975), and has approved the rule in other cases. *E.g., Donovan v. State*, 417 So.2d 674 (Fla.1982); *Shannon v. State*, 335 So.2d 5 (Fla.1976). Because comment on a defendant's failure to testify and comment on a defendant's silence violate the same constitutional provision and are grounded on the same rationale, we reexamine both the *Rowe* and *Jones* line of cases to determine if a rule of per se reversal should be followed.

The problem of prosecutorial comment on a defendant's failure to testify is of fairly recent vintage. Under the common law at the time the United States and Florida Constitutions were adopted, an accused not only could not be compelled to testify, but was considered to be incompetent to testify even if he wished to do so. Because of this legal disability, no inference could be drawn from a failure to testify and there could be no occasion for a prosecutor to comment on the failure to testify. Obviously the framers of the constitutions did not contemplate such prosecutorial comments when they authored the constitutional right not to be compelled to testify against oneself. In the late nineteenth century, a move developed to remove the common law disability which prevented an accused from testifying. In 1878, Congress passed an act[2] granting the accused a stat-

[2] Act of Mar. 16, 1878; currently codified as 18 U.S.C. § 3481 (1986).

utory right, upon request, to testify in federal courts. The act also provided that failure to make such request would create no presumptions against the accused. The meaning of the "no presumptions" language was tested in *Wilson v. United States*, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893), where the Court held that a prosecutor's comment on an accused's failure to testify violated the statutory provision and reversed the conviction.[3] In 1895, the Florida Legislature enacted chapter 4400, Laws of Florida[4] which for the first time not only granted an accused in Florida the right to testify[5] but, presumably in light of the *Wilson* decision, specifically provided that *no* prosecutor would be permitted to comment before the court or jury on the failure of the accused to testify.

It is from the 1895 legislative act that the *Rowe* line of cases sprung. In *Jackson v. State*, 45 Fla. 38, 34 So. 243 (1903), this Court reversed a conviction because of a prosecutor's comment on an accused's failure to testify. In so doing, we grounded the reversal on violation of statute, not the Florida Constitution, and noted that no curative instructions had been given to the jury. Further, and even more significantly, although we held that the particular comment in the case at hand was reversible error, we specifically noted that comments on an accused's failure to testify were not per se reversible error:

> There may be some circumstances where reference to the fact may be made in such form as not to constitute reversible error, as in the case of *State v. Mosley*, 31 Kan. 355, 2 Pac. 782, but the remarks made in this case are not of that character.

Jackson, 45 Fla. at 39, 34 So. at 243 (citations omitted). The holding that such comments were not per se reversible was made more explicit in *Steffanos v. State*, 80 Fla. 309, 86 So. 204 (1920), where we held:

> During the argument of counsel the prosecuting attorney commented upon the failure of the accused to testify in his behalf. Exception was taken to the remarks of counsel by the defendant, and the court corrected the prosecuting attorney, and instructed the jury to disregard the statement; but he did so in such words as to render the correction of little value to the defendant. While we do not hold the transaction, as it appears to have occurred, reversible error, we think that, when prosecuting attorneys do violate the plain language of the statute, their remarks should be expunged so far as possible, and removed from consideration by the jury.

80 Fla. at 315, 86 So. at 206. It is thus clear that a prosecutor's comments on an accused's failure to testify was not per se reversible error as of 1920 when *Steffanos* was decided. This changed with the *Rowe* case.

In *Rowe*, the prosecutor made repeated references to an accused's failure to testify including one where the trial court failed to rebuke the prosecutors and which we characterized as

> "an adroit and insinuating attempt, indirectly to accomplish what could not have been accomplished by a direct statement. The statute does not permit such evasions of its manifest purpose."

3. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), acknowledged that *Wilson* was grounded on statute but held that prosecutorial comment on a defendant's failure to testify also violated the fifth amendment.

4. The act was later codified as section 3979, General Statutes (1906); section 6080, Revised General Statutes (1920); section 8383, compiled General Laws (1927); and section 918.09, Florida Statutes (1941). Section 918.09 was repealed by section 180, chapter 70-339, Laws of Florida, following its incorporation in 1967 as Rule of Criminal Procedure 1.250. It is currently contained in Florida Rule of Criminal Procedure 3.250.

5. From 1865 to 1895 an accused had the statutory right to make a statement under oath to the jury. The accused was not a witness and could not be examined on the sworn statement. Ch. 1472, No. 9, § 4, Laws of Florida (1866); ch. 1816, No. 1, Laws of Florida (1870); *Hart v. State*, 38 Fla. 39, 20 So. 805 (1896); *Hawkins v. State*, 29 Fla. 554, 10 So. 822 (1892); *Miller v. State*, 15 Fla. 577 (1876); *Barber v. State*, 13 Fla. 675 (1871).

Rowe, 87 Fla. at 30, 98 So. at 618, quoting from *State v. Moxley,* 102 Mo. 374, 14 S.W. 969 (1890). We rejected the state's argument that comments on failure to testify could be cured by an instruction to the jury because "violation by the prosecuting officer of a statute such as ours cannot be cured by the court instructing the jury to disregard his comment." *Rowe,* 87 Fla. at 29, 98 So. at 617. Accordingly,

> For the violations of the *statute* by the prosecuting officers of the state, as pointed out herein, *and for that only,* the judgment is reversed, and a new trial granted.

87 Fla. at 32, 98 So. at 618 (emphasis supplied).

In a series of cases in the 1950's, this Court again addressed the question of whether a harmless error statute, section 54.23, Florida Statutes (1951),[6] could be applied to a comment on an accused's failure to testify in violation of section 918.09. In *Way v. State,* 67 So.2d 321 (Fla.1953), we concluded that section 54.23 was not applicable to a violation of section 918.09 and reversed the conviction. In *Trafficante v. State,* 92 So.2d 811 (Fla.1957), we relied on *Way* and *Rowe* and held that a prosecutor's comment violated section 918.09. We again addressed the issue of prosecutorial comment on an accused's failure to testify in *Gordon v. State,* 104 So.2d 524 (Fla. 1958). Obviously, however, we were feeling considerable discomfort at our rule of per se reversal and commented at length that we were only following such a rule because section 918.09 required that we do so:

> Here again we have a specific legislative prescription of a right to be accorded to those under prosecution for crime. Whether we as judges deem the rule to be wise and salutary is of no consequence at all and we assume no responsibility for it. The Legislature made the rule and we must follow it, at least until the Legislature changes it.
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> Our responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have as individuals. *Way v. State,* Fla.1953, 67 So.2d 321. Also see *Trafficante v. State,* Fla.1957, 92 So.2d 811. The harmless error statute, Section 54.23, Florida Statutes, F.S.A., does not apply to this type of error.

Id. at 540–41.

It is clear that *Rowe, Way, Trafficante,* and *Gordon* rest on statutory construction, i.e., did the legislature intend that the harmless error statute, section 54.23, be applicable to the statutory prohibition against comment on failure to testify, section 918.09. We concluded that the harmless error statute did not apply for two reasons. First, the language in section 918.09 was mandatory—"nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the accused to testify in his own behalf." Second, section 54.23 was limited to errors relating to "misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure." These were the only two statutes at issue when *Rowe* was decided and, arguendo, *Rowe* was correct in holding that the legislature did not intend that harmless error analysis be applied to prosecutorial comments on failure to testify. *Way, Trafficante,* and *Gordon,* however, are another matter because, after *Rowe* issued, the legislature enacted chapter 19554, section 309, Laws of Florida (1939), codified as section 924.33 (1941 and thereafter).[7] Section 924.-

6. Originally enacted by chapter 6223, § 1, Laws of Florida (1911), currently codified as section 59.041, Fla.Stat. (1985).

7. The statute reads:

924.33 When judgment not to be reversed or modified.—No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

33 differs from section 54.23 in two significant respects. First, it provides that harmless error analysis is applicable to all judgments regardless of the type of error involved. Second, it explicitly provides that there shall be no presumption that errors are reversible unless it can be shown that they are harmful. Thus, *Way, Trafficante,* and *Gordon,* which purport to rely on legislative intent, are directly contrary to legislative intent as expressed in the plain words of section 924.33.[8]

[5, 6] Section 924.33 respects the constitutional right to a fair trial free of harmful error but directs appellate courts *not* to apply a standard of review which requires that trials be free of harmless errors. The authority of the legislature to enact harmless error statutes is unquestioned.[9] Contraposed to this legislative authority, the courts may establish the rule that certain errors *always* violate the right to a fair trial and are, thus, per se reversible. To do so, however, we are obligated to perform a reasoned analysis which shows that this is true, and that, *for constitutional reasons,* we must override the legislative decision. It is clear that the rule of *Way, Trafficante* and *Gordon* is not grounded on the constitution.[10] Although we did not explicitly say so, it is also clear that *Rowe, Way, Trafficante* and *Gordon* were implicitly overruled by *State v. Marshall,* 476 So.2d 150 (Fla.1985), wherein we adopted the harmless error rule for comments on a defendant's failure to testify.

Florida's per se reversal rule on comments on a defendant's silence arose from a separate line of cases. In *Bennett v. State,* 316 So.2d 41 (Fla.1975), relying on *Jones v. State,* 200 So.2d 574 (Fla. 3d DCA 1967), we held that comments on an accused's post-arrest silence are per se reversible. *Accord Donovan v. State,* 417 So.2d 674 (Fla.1982); *Shannon v. State,* 335 So.2d 5 (1976). The holding in these cases was grounded on the fifth amendment to the United States Constitution and our interpretation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As it applies here, *Miranda* stands for the proposition that comment on an accused's post-arrest silence is constitutional error; it does not stand for the proposition that such error is per se reversible. This was made clear in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny but, although we cited *Chapman* in *Bennett,* we overlooked its holding that automatic reversal of a conviction is only appropriate when the constitutional right which is violated vitiates the right to a fair trial. *Chapman* holds that comment on failure to testify is not constitutionally subject to automatic reversal because it does not always vitiate the right to a fair trial and the harmless error analysis should be applied. We followed our interpretation of *Miranda* in *Donovan* and *Shannon.* It was not until we issued *State v. Marshall,* 476 So.2d 150 (Fla.1985), and *State v. Murray,* 443 So.2d 955 (Fla.1984), that we adopted the correct rule from *Chapman* and *Hasting* that constitutional errors, with rare exceptions, are subject to harmless error analysis.

8. There is no reference in *Way, Trafficante,* or *Gordon* to section 924.33. A review of the briefs filed in these cases shows that the state did not rely on, or even recognize the existence of, section 924.33. In *Way,* the state relied on the general proposition that improper comments by the prosecutor are not per se reversible; in *Trafficante,* that there was no comment on failure to testify; and, in *Gordon,* that the issue had not been preserved and there was no comment on failure to testify. In a petition for rehearing on *Way,* which we denied, the state untimely sought rehearing and reargument on the applicability of section 924.33.

9. In this connection, see *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), where the Court recognized that Congress and the fifty states had the authority to enact harmless error statutes or rules, and had done so. Note, also, that, although section 924.33 was enacted prior to *Chapman,* it is consistent with *Chapman.*

10. The prohibition of prosecutorial comment on failure to testify is constitutional, *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). However, there is no constitutional right to per se reversal. *Chapman* and progeny.

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[7, 8] The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman,* 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

In comparing the per se reversible rule and the harmless error rule, and determining their applicability, it is useful first to recognize that both rules are concerned with the due process right to a fair trial. The problem which we face in applying either rule is to develop a principled analysis which will afford the accused a fair trial while at the same time not make a mockery of criminal prosecutions by elevating form over substance.

The dissenters apparently believe that the rule of harmless error cannot cope with comments on post-arrest silence or failure to testify and that only a per se rule will suffice. This view ignores the far-ranging application of the harmless error rule and does not recognize that a per se rule is nothing more than a determination that certain types of errors are always harmful, i.e., prejudicial. Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman,* 386 U.S. at 23, 87 S.Ct. at 827–28. In other words, those errors which are *always* harmful. The test of whether a given *type* of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless. *See* for example, *Delaware v. Van Arsdall,* — U.S. —, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *United States v. Mechanik,* — U.S. —, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986); *United States v. Lane,* — U.S. —, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).

The unique and only function of the rule of per se reversal is to conserve judicial labor by obviating the need to apply harmless error analysis to errors which are always harmful. It is, in short, a rule of judicial convenience. The unique function of the harmless error rule is to conserve judicial labor by holding harmless those errors which, in the context of the case, do not vitiate the right to a fair trial and, thus, do not require a new trial. Correctly applied in their proper spheres, the two rules work hand in glove. Both provide an equal degree of protection for the constitutional right to a fair trial, free of harmful error.

[9] In Florida, we have adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is "fairly susceptible" of being interpreted as a comment on silence will be treated as such. *Kinchen; David v. State,* 369 So.2d 943 (Fla.1979). One authority has said that "[c]omments or arguments which can be construed as relating to the defendant's failure to testify are, obviously, of almost unlimited variety." [11]

11. Annotation, Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as Amounting to Improper Reference

The "fairly susceptible" test treats this variety of arguable comments as comments on silence. We are no longer only dealing with clear-cut violations where the prosecutor directly comments on the accused's silence and hammers the point home as in *Rowe v. State*, 87 Fla. 17, 98 So. 613 (1924). Comments on silence are lumped together in an amorphous mass where no distinction is drawn between the direct or indirect, the advertent from the inadvertent, the emphasized from the casual, the clear from the ambiguous, and, most importantly, the harmful from the harmless. In short, no bright line can be drawn around or within the almost unlimited variety of comments that will place all of the harmful errors on one side and the harmless errors on the other, unless the circumstances of the trial are considered. We must apply harmless error analysis to the "fairly susceptible" comment in order to obtain the requisite discriminatory capacity.

The combination of the fairly susceptible test and the harmless error rule is a happy union. It preserves the accused's constitutional right to a fair trial by requiring the state to show beyond a reasonable doubt that the specific comment(s) did not contribute to the verdict. At the same time, it preserves the public and state interest in finality of verdicts which are free of any harmful error. In view of the heavy burden the harmless error rule places on the state, it further serves as a strong deterrent against prosecutors advertently or inadvertently commenting on an accused's silence. It cannot be rationally argued that commenting on an accused's silence is a viable strategy for obtaining convictions. By contrast, a union of the fairly susceptible test and the rule of per se reversal is pernicious in that the former has little, if any, discriminatory capacity and the latter has none. The union which the dissenters urge substitutes mechanics for judgment in the style of nineteenth century English and American appellate courts where error, no matter how harmless, equaled reversal.[12]

The most perceptive analysis of harmless error principles of which we are aware is that of former Chief Justice Traynor of the California Supreme Court. *See* Roger J. Traynor, *The Riddle of Harmless Error* (1970), and the dissent to *People v. Ross*, 67 Cal.2d 64, 429 P.2d 606, 60 Cal.Rptr. 254 (1967) (Traynor, C.J. dissenting), *rev'd sub nom, Ross v. California*, 391 U.S. 470, 88 S.Ct. 1850, 20 L.Ed.2d 750 (1968). In his dissent, Chief Justice Traynor maintained that comments on Ross's failure to testify were harmful and that the majority misunderstood and misapplied the *Chapman* harmless error test. Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Ross, 60 Cal.Rptr. at 269, 429 P.2d at 621.

[10] It is clear that comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict and that an

to Accused's Failure to Testify, 14 A.L.R.3d 723, 726–27.

12. *See Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), for a brief overview of the legal reform movement of the early twentieth century which introduced the rule of harmless error as a means of substituting judgment for automatic application of rules in order to correct the history of abuses whereby appellate courts "tower[ed] above the trials of criminal cases as impregnable citadels of technicality." *Id.* at 759, 66 S.Ct. at 1245 (citations omitted).

appellate court, or even the trial court, is likely to find that the comment is harmful under *Chapman*. High risk that an error will be harmful is not enough, however, to justify categorizing the error as always harmful (per se). In the case at hand, if the accused had taken the stand and confessed guilt during cross examination, we could say beyond a reasonable doubt that the officer's comment on post-arrest silence did not affect the jury's verdict. Yet the dissenters would have us declare in that instance that the comment[13] is per se reversible error and requires a retrial. It would be possible to set forth an infinite number of realistic hypothetical cases where an analysis of the strength and nature of the permissible evidence of guilt and of the strength and nature of the impermissible comment on silence would show beyond any reasonable doubt that the jury verdict was not affected by the comment on silence. Accordingly, it cannot be said that comment on silence always denies the accused a fair trial and is thus subject to per se reversal. By contrast, if a defendant is denied counsel and takes the stand and confesses, we cannot say beyond a reasonable doubt that the error, denial of counsel, was harmless. Denial of counsel is always harmful, regardless of the strength of the admissible evidence, and can be properly categorized as per se reversible.

The suggestion is made that it is wise public policy to hold that comments on failure to testify and post-arrest silence are per se reversible error. This Court is not the forum for a debate on wise public policy. The responsible branch of government has already established the public policy through section 924.33 that appellate courts will not reverse trial court judgments unless it is determined on the record that harmful error has occurred. This legislative determination of public policy is not constitutionally infirm. Accordingly,

> [o]ur responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have an individuals. *Way v. State,* Fla.1953, 67 So.2d 321. Also see *Trafficante v. State,* Fla.1957, 92 So.2d 811.

Gordon, 104 So.2d at 541.

For the reasons set forth above, we answer the certified question in the affirmative and hold that comments on a defend- [illegible] analysis as set forth herein.[14]

The district court below found that there was sufficient evidence to support the conviction, absent the impermissible comment on post-arrest silence, and concluded that, if the harmless error rule could be applied to the facts of the case, the conviction would be affirmed because the error was harmless beyond any reasonable doubt. The district court's reference to a sufficiency-of-the-evidence test suggests a misunderstanding of the harmless error test. Because we wish to make it clear that the harmless error test is to be rigorously applied, we examine the record ourselves rather than remanding. We conclude that the error was harmful and the conviction should be quashed.

[11] The pertinent evidence at trial was as follows. A police undercover officer and an informant undertook to arrange a controlled purchase of approximately one pound of cocaine from a suspected drug dealer, Rosa. The informant, who was equipped with a body bug, made contact with Rosa and arranged for Rosa to bring the cocaine to the officer's motel room. Two police surveillance units were monitoring and recording the transmissions from the body bug. When Rosa and the informant arrived at the motel room, Rosa told the officer that the cocaine was with another man in a motel room across the street.

13. The comment was "[a]fter that, he advised me he felt like he should speak to his attorney."

14. Our decision that comment on post-arrest silence is not per se reversible error overturns the portion of *Clark v. State,* 363 So.2d 331 (Fla.1978), to the contrary.

Rosa drove alone in the officer's unmarked rental car to get the cocaine. He was observed driving across the street and returning in approximately five minutes with a passenger, DiGuilio, who remained in the car while Rosa went to the officer's motel room. After the cocaine was produced and field tested, the surveillance officers moved in and arrested Rosa and DiGuilio. Initially, for a period of about forty-five to sixty minutes, Rosa and DiGuilio were held in custody in the rental car. The record is not clear, but it appears they could have conversed during this time and, of course, they observed the police activity and, perhaps, overheard some of the police conversation. Rosa and DiGuilio were then moved to a marked police car for transportation to the station and left alone in the car with a hidden recording device. They engaged in a short conversation wherein DiGuilio indicated he knew something of what had happened. The theory of the state at trial was that DiGuilio's remarks proved that he had trafficked in cocaine and conspired with Rosa to traffic in cocaine. The jury returned verdicts of not guilty to trafficking and guilty of conspiring to traffic. The theory of the state on appeal is that the evidence of guilt, absent the impermissible comment, is overwhelming and, thus, the error is harmless.

The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. On this record, it is clear that we cannot declare a belief beyond a reasonable doubt that the police officer's impermissible testimony did not affect the jury verdict and was harmless beyond a reasonable doubt. First, the permissible evidence was not clearly conclusive. Rosa testified he was going to obtain the cocaine from a cohort. The fact that Rosa returned shortly with Diguilio and the cocaine does not show beyond a reasonable doubt that DiGuilio was a cohort who was holding the cocaine. There are entirely plausible explanations consistent with DiGuilio's innocence. For example, DiGuilio could have been present in the motel room and not known of the impending drug deal or of the cocaine. Rosa's statement to the purported drug buyer about a cohort could have been false, a precautionary measure to dissuade strong-arm tactics. Violence, suspicion, and lying between drug dealers is common. The fact that the jury found DiGuilio not guilty of trafficking in cocaine indicates it was not convinced beyond a reasonable doubt that DiGuilio had possessed the cocaine. Second, the context of the recorded conversation between Rosa and DiGuilio is ambiguous. (Because of poor recording quality, it is also very hard to understand.) By the time of the conversation, Rosa and DiGuilio had been in custody together for approximately an hour. Except by inference, DiGuilio's remarks do not directly show that he was a conspirator. Indeed, under the circumstances, it is plausible that DiGuilio had learned of the drug deal after the arrest by observing the events or in an unrecorded conversation with Rosa and that DiGuilio's recorded remarks were based on knowledge obtained after his arrest.

Turning then to the impermissible testimony, it put before the jury the fact that DiGuilio declined to offer any plausible explanation at the time of his arrest for his suspicious presence in the midst of a drug deal. Further, at least indirectly, it also highlighted for the jury the fact that DiGuilio was not testifying at trial and still had offered no plausible explanation. Under those circumstances and on this record, we conclude that the error was not harmless and constituted reversible error. § 924.33, Fla.Stat. (1981).

Cite as 491 So.2d 1139 (Fla. 1986)

[12,13] In his perceptive essay, *The Riddle of Harmless Error*, former Chief Justice Traynor addressed various common errors which, historically, appellate courts fall into when applying harmless error analysis. The worst is to abdicate judicial responsibility by falling into one of the extremes of all too easy affirmance or all too easy reversal. Neither course is acceptable. The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

[14] We wish to emphasize that any comment, direct or indirect, by anyone at trial on the right of the defendant not to testify or to remain silent is constitutional error and should be avoided. We have eschewed the draconian measure of automatically reversing convictions as a means of punishing prosecutorial misbehavior. *State v. Murray*, 443 So.2d 955 (Fla.1984). However, we reiterate what we said in *Murray* at 956:

> When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation. *Arango v. State*, 437 So.2d 1099 (Fla. 1983); *Spenkelink v. Wainwright*, 372 So.2d 927 (Fla.1979) (Alderman, J., concurring specially); *Jackson v. State*, 421 So.2d 15 (Fla. 3d DCA 1982).

See also Bertolotti v. State, 476 So.2d 130 (Fla.1985).

The decision of the district court is approved for the reasons set forth herein and this cause is remanded for further proceedings in light of this opinion.

It is so ordered.

McDONALD, C.J., and BOYD and OVERTON, JJ., concur.

ADKINS, J., concurs in part and dissents in part with an opinion, in which EHRLICH and BARKETT, JJ., concur.

ADKINS, Justice, concurring in part and dissenting in part.

I concur in the decision to reverse the conviction, but strongly dissent to the ill-conceived reasoning which places an inordinate burden on the appellate court and deprives defendants of a constitutional right.

EHRLICH and BARKETT, JJ., concur.

STATE of Florida, Petitioner,

v.

George BURNS, Respondent.

No. 66888.

Supreme Court of Florida.

July 17, 1986.

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance, Third District—Case No. 84-947.