IN THE SUPREME COURT OF FLORIDA

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| RAYMOND WELDON MARSTON, | : | |
| Petitioner, | : | |
| vs. | : | Case No. 2D10-305 |
| STATE OF FLORIDA, | : | |
| Respondent. | : | |
| | : | |

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

# BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KAREN M. KINNEY
Assistant Public Defender
FLORIDA BAR NUMBER O856932

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

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## STATEMENT OF THE CASE AND FACTS

The following facts are taken directly from the Second District Court of Appeal's decision in Marston v. State, 2D10-305, 36 Fla. L. Weekly D2672, 2011 WL 6058276 (Fla. 2d DCA Dec. 7, 2011).

Raymond Marston was convicted of aggravated battery with great bodily harm, kidnapping, three counts of sexual battery using force causing injury, and attempted robbery. At his trial, during jury selection, the prosecutor engaged the venire members in a discussion of Mr. Marston's privilege against self-incrimination. As quoted in the Second District's opinion, the following exchange occurred:

> [PROSECUTOR]:.... You can't hold it against Mr. Marston or his attorneys if they sit there and play dominoes the whole time. Do you understand that?
>
> [VENIRE MEMBER]: Kind of. So you will be talking the whole time to prove that he's guilty?
>
> [PROSECUTOR]: Exactly. Exactly. Because it is the State of Florida's burden and everybody has this right. You are presumed innocent until I prove that you are guilty.
>
> So like I said, Mr. Marston can sit there and not say a word. He can read magazines. He could bring in a laptop and play on Facebook all day long if he wanted to, and you cannot hold that against him. Do you understand?

Does everyone understand that?

....

And I touched upon Mr. Marston doesn't have to say a word. He doesn't have to say a single word this whole trial. You may not even hear [Mr. Marston's] voice at all because I can't put him on the stand.

This comment elicited questions from and discussion with another juror:

[VENIRE MEMBER]: So he doesn't have to be here?

....

[PROSECUTOR]: He has a right to stay completely quiet. It's my job to prove this case.

[VENIRE MEMBER]: But he can talk?

[PROSECUTOR]: He can if he wants to.

[VENIRE MEMBER]: His people, they can talk for him?

[PROSECUTOR]: They can do whatever they feel is appropriate. Like I said, they may want to put him on the stand. Do you have a problem with that?

[VENIRE MEMBER]: No.

....

[PROSECUTOR]: You would hold me to my burden and make sure it is only to this table that you look to for the evidence; do you understand that?

[VENIRE MEMBER]: They can't give any evidence?

[PROSECUTOR]: I'm sure the defense will probably go into that a little more.

[DEFENSE COUNSEL]: Judge, I object. May we

approach?

The trial judge denied the defense request for a curative instruction addressing Mr. Marston's right to remain silent on the basis that the juror was getting confused and getting “the wrong idea,” and the juror would be asking the defense to address Mr. Marston’s right to remain silent. The judge instead directed the prosecutor to make it clear to the juror that the defense has “no obligation.” The prosecutor returned to discussing Mr. Marston's right to remain silent. A venire member continued to express concern, saying: “So he will not explain his position at all as far as—-he would just remain silent?” The prosecutor asked the juror whether she accepted that “Mr. Marston has the absolute right to keep his mouth shut this entire time.” She responded, “No.” The prosecutor answered, “Okay. And the defense will probably get into that a little more with you. Anyone else feel the same way?”

On appeal, Mr. Marston challenged the trial court’s refusal to give a curative instruction when requested by the defense. The Second District affirmed but indicated that the prosecutor's remarks were improper and were “remarkably similar to the improper remarks in Varona v. State, 674 So.2d 823, 824 (Fla. 4th DCA 1996).” The court recognized that even cursory references in voir dire to a defendant's failure to testify is an impermissible constitutional violation. But the court ultimately concluded:

"Under these circumstances, we cannot say that the trial court abused its discretion in denying a curative instruction."

The four circumstances referenced by the court were explained in the opinion as follows. First, the strength of the evidence favorable to the State was stronger relative to the strength of the evidence in Varona v. State, 674 So. 2d 823, 824 (Fla. 4th DCA 1996).

> Here, however, the evidence was stronger. Mr. Marston's DNA matched DNA found on the victim's breast. The victim's description of her assailant matched Mr. Marston, including a protruding Adam's apple, a scabbed patch she had felt on top of his head, long thinning hair, and facial scruff. She identified him from a photopack and said she was seventy-five percent sure he was her attacker.

Second, because Mr. Marston remained silent at his trial, the Second District found that the possibility of coercion to testify was absent. Third, the trial judge had instructed the prosecutor to make it clear to the jurors that the defense had no burden of proof. Last, the jury was instructed before deliberating that the jury must not be influenced in any way by Mr. Marston's decision not to testify.

After the opinion issued, Mr. Marston filed a motion for rehearing and a motion for rehearing en banc, both of which were denied on February 10, 2012.

## SUMMARY OF THE ARGUMENT

This court should grant review to resolve the conflict created by the Second District Court of Appeal's opinion with the Fourth District's opinion in Varona v. State, 674 So. 2d 823 (Fla. 4th DCA 1996), and this Court's opinions in Ventura v. State, 29 So. 3d 1086 (Fla. 2010), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The Second District espoused a rationale for affirming, despite error stemming from a prosecutor's egregious comments on the defendant's right to silence, that does not comport with the harmless error analysis used by the Fourth District in Varona and mandated by this Court in Ventura and DiGuilio.

## ARGUMENT

### ISSUE

THE SECOND DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT'S OPINION IN VARONA AND THIS COURT'S OPINIONS IN VENTURA AND DIGUILIO AS TO APPLICATION OF THE HARMLESS ERROR TEST IN THE WAKE OF A PROSECUTOR'S IMPROPER COMMENTS ON SILENCE.

The Second District in the present case acknowledged that the prosecutor improperly remarked on Mr. Marston's right to remain silent during the jury selection process. And the court acknowledged that the improper remarks were "remarkably similar to the improper remarks in Varona v. State, 674 So. 2d 823, 824 (Fla. 4th DCA 1996)." Marston v. State, 2D10-305, 2011WL6058276 at * 2 (Fla. 2d DCA Dec. 7, 2012).

Instead of reversing for a new trial as the Fourth District Court of Appeal did in Varona after the trial judge overruled the defense objection to the improper remarks, the Second District affirmed. In affirming Mr. Marston's convictions, the Second District expressly and directly conflicted with the Fourth District. To reach the result of an affirmance, the Second District engaged in an analysis that also expressly and directly conflicts with this Court's opinions in Ventura v. State, 29 So. 3d 1086 (Fla. 2010), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The Second District first compared the evidence in this case

with the strength of the evidence in Varona and found the State's evidence against Mr. Marston to be "stronger." The court's cursory statement of the evidence it found compelling alludes to the identification issue that was hotly contested at trial, but falls short of the comprehensive review of the trial evidence that this court required in DiGuilio. The Second District's explanation of the evidence it relied upon to reach its result is revealing because it shows that the identification evidence was, in fact, not "clearly conclusive." DiGuilio, 491 So. 2d at 1138. For instance, that fact that the victim said she was seventy-five percent sure Mr. Marston was her attacker demonstrates that she was twenty-five percent unsure, which can hardly be called a conclusive identification. But the Second District does not address this discrepancy or the other evidence at trial that weighed against the State.

Aside from the incomplete review of the trial evidence put forth in the opinion, even if the Second District found the identification evidence to be overwhelming, the DiGuilio analysis was flawed. This court stated in DiGuilio: "The district court's reference to a sufficiency-of-the-evidence test suggests a misunderstanding of the harmless error test." 491 So. 2d at 1137. And in Ventura, this court reiterated that it has "explicitly rejected the overwhelming evidence test as a proper analysis of harmless error." 29 So. 3d at 1091.

In addition to relying on the improper weight-of-evidence

analysis, the Second District relied on the fact that Mr. Marston remained silent at his trial, and found that the possibility of coercion to testify was absent. This analysis directly conflicts with DiGuilio wherein the court stated that the impermissible testimony "highlighted for the jury the fact that DiGuilio was not testifying at trial and still had offered no plausible explanation." DiGuilio, 491 So. 2d at 1138. The prosecutor's comments here similarly highlighted this for the jury, but the Second District failed to acknowledge it and instead rationalized lack of coercion as a reason for affirmance.

The Second District also relied on the fact that the trial court instructed the prosecutor to make clear to the jury that Mr. Marston had no burden of proof. In contrast, in Varona, the court explained that the prosecutor is not in a position to be so instructing the jury during voir dire:

> On voir dire, it is a defendant's prerogative-not the prosecutor's-to first broach with potential jurors the sensitive area of not taking the witness stand. This preference is reflected in the Florida Standard Jury Instructions in Criminal Cases. Both the preliminary and general instructions indicate that the charge on the right to remain silent is given not automatically, but if the "defendant requests." Fla.Std.Jury Instr. (Crim.) p. 4, 19.

Varona, 674 So. 2d at 825. The Second District is in direct conflict with Varona in suggesting that the trial court's instruction to the prosecutor to continue discussing the

defendant's rights was proper and in relying on that as a factor supportive of the harmless error analysis. The trial judge's deference to the prosecutor in this case is precisely the problem addressed in Varona; thus the fact that the Second District considered this an ameliorative measure cannot be squared with Varona.

The Second District continued to veer off course from a correct harmless error analysis in relying on the fact that the trial judge instructed the jury before deliberating that it must not be influenced by Mr. Marston's decision not to testify. The court seems to be referencing here the standard jury instruction given at the end of the trial in every case. The standard instruction was not the cure for the problem created in Varona when the prosecutor's words in voir dire "spilled far over the line of propriety." See Varona, 674 So. 2d at 825. Thus, the Second District has created conflict by rewriting the harmless error doctrine and finding a cure for improper comments on silence at the beginning of the trial in the form of the standard jury instructions at the end of the trial.

Under the correct harmless error analysis set forth by this Court in Ventura and DiGuilio and properly applied in Varona, the Second District was required to reverse for a new trial. Instead the Second District has relied on an improper analysis to reach an affirmance despite this Court's mandate "that appellate courts rigorously apply the harmless error test upon a close examination

of the record." Varona v. State, 674 So. 2d at 825 (citing DiGuilio, 491 So. 2d at 1137-38).

Should this Court allow the Second District's opinion stand, that court will simply issue a per curiam affirmance in future cases where improper comments on silence occur during trial based on its holding in this case that the standard instruction provides a harmless error cure for such comments. Such result is incompatible with DiGuilio's recognition of the seriousness of the error.

> 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 appellate court, or even the trial court, is likely to find that the comment is harmful under Chapman [v. California, 386 U.S. 18 (1966)].

DiGuilio, 491 So. 2d at 1136-37. The Second District's analysis turns the improper comments into a low risk error. This Court should therefore grant review to address the conflict of decisions.

## CONCLUSION

Petitioner, Raymond Weldon Marston, respectfully requests this Court to accept jurisdiction to review the decision of the Second District Court of Appeal.

APPENDIX

1. Marston v. State, 2D10-305, 36 Fla. L. Weekly D2672, 2011 WL 6058276 (Fla. 2d DCA December 7, 2011).

2. Order denying motion for rehearing and motion for rehearing en banc (Feb. 10, 2012).

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Sonya Roebuck Horbelt, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2012.

## CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

_____

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

KAREN M. KINNEY
Assistant Public Defender
Florida Bar Number 0856932
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

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