**IN THE SUPREME COURT OF FLORIDA**

**JAMES KNOWLES,**

**Petitioner,**

**v.**

**SC04-394**
(Related FSC Case SC01-2778)
**L.T.: 2D99-4646**

**STATE OF FLORIDA,**

**Respondent.**

_____/

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

# BRIEF OF RESPONDENT ON JURISDICTION


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## STATEMENT OF THE CASE AND FACTS

In Knowles v. State, 848 So. 2d 1055, 1059 (Fla. 2003) [Knowles II], this Court previously remanded this case to the Second District because,

> The Second District's use of the incorrect "substantial influence" test leaves us uncertain whether the application of the DiGuilio test would have yielded a different result in the district court. Therefore, we quash the decision below and remand to the district court for reconsideration of whether the error is harmless in light of our reaffirmation in the case of the DiGuilio standard. Cf. Goodwin, 751 So. 2d at 547 (remanding one of two consolidated cases to the district court to reconsider its harmless error determination).
>
> Id. at 1059 (e.s.)

On remand, the Second District Court set forth the following comprehensive summary of facts in Knowles v. State, 864 So. 2d 1262 (Fla. 2d DCA 2004) (Knowles III):

> On the morning of September 19, 1994, James Knowles, carrying thirteen roses and a gun, went to the workplace of his former wife, Tina Knowles. After a brief discussion, which Mr. Knowles characterized as an attempt to revive their relationship, he shot and killed his ex-wife. Ms. Knowles's coworkers heard a noise that sounded like an explosion; one person heard her exclaim, "No, Jimmy, no." After hearing the shot, three of Ms. Knowles's coworkers burst into the victim's office where a struggle for the firearm ensued. Prior to the struggle, Mr. Knowles attempted to take his own life with the firearm, but the gun jammed. At one point during the struggle, he asked to be let go so that he could kill himself. Ultimately, however, the coworkers took control of the gun and subdued Mr. Knowles, who was taken into custody and later indicted for first-degree murder.

The State offered Mr. Knowles a plea to the lesser charge of second-degree murder and two counts of aggravated battery with a firearm. The court accepted his plea and conducted an extensive sentencing hearing. At that proceeding, the defense called Dr. Joel B. Freid, a clinical psychologist, to testify regarding Mr. Knowles's state of mind prior to the homicide. Dr. Freid opined that Mr. Knowles, although not legally insane, was very depressed, suicidal, despondent, and frustrated. Furthermore, Mr. Knowles exhibited a dependent personality and relied upon others for emotional support and direction.

During cross-examination of Dr. Freid at the sentencing proceeding, the State inquired into several limited areas: when a triggering conversation between the victim and the defendant had occurred; whether Dr. Freid had been provided with police reports containing the defendant's statements; and to what extent the defendant's statements might indicate his homicidal tendency. The State also cross-examined Dr. Freid concerning the defendant's assertion that he did not think about the homicide until the day before the incident. At the conclusion of the hearing, the court sentenced Mr. Knowles to thirty years in prison.

Mr. Knowles's initial conviction was vacated after a postconviction relief hearing on the grounds of ineffective assistance of counsel. Mr. Knowles's prior counsel failed to advise him of the amount of gain time that he would receive during his incarceration. Finding that counsel was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the court vacated the conviction and sentence and reinstated Mr. Knowles's plea of not guilty.

At his trial for first-degree murder, the evidence demonstrated that Mr. Knowles and the victim were married for the first time in 1981. They were divorced approximately two years later but continued to live together. During their marriage they had two sons. They remarried in 1991, were divorced again in 1994, and continued to live together until July 6, 1994.

The murder occurred on September 19, 1994, when the events described above occurred. Mr. Knowles testified at trial that his wife had been unfaithful to him during their marriages, but he still loved her. He wanted to forgive her and reunite. Prior to going to his ex-wife's office on September 19, 1994, Mr. Knowles had purchased thirteen roses, one for each year of their relationship, and brought them with him to her office. He asked his wife to take him back, but she refused. She told him about her relationships with other men, some of whom were Mr. Knowles's friends, and she stated that he would never be able to forgive her for her actions. According to Mr. Knowles's trial testimony, Tina Knowles stated that "it wasn't just the one person, there's been others, and some of them are friends of yours, and when you find this out, we're going to go through all this again." Then, according to Mr. Knowles, "somewhere about that point I told her I loved her very much and I shot and killed her."

For two or three days prior to the shooting, Mr. Knowles had made arrangements for the handling of various affairs. He was not sure when this planning stage began--simply that he knew that he needed to "do something else." On cross- examination, Mr. Knowles agreed that if Tina had come back to him, he would not have killed her. He had unilaterally planned a reconciliation but admitted that "if that didn't happen, I knew I was going to die . . . and possibly Tina also." He admitted knowing that he had the gun with him (hidden by the bouquet of roses) when he went to see Tina and that it was his plan for Tina to die first.

His niece, Katherine Shockley, testified that shortly before the murder Mr. Knowles had given her a document designating her custodian of the boys in the event of the death of both of their parents. She stated that Mr. Knowles did not indicate that he intended to kill his wife, but he asked that she distribute certain guns to his boys. He left an undated, handwritten will, a note about payment for completion of work, a note about checks that were owed to him from his employer, and a temporary tag and lease agreement for a pickup truck. These items were

recovered at his home pursuant to a search warrant.

> Also recovered pursuant to the warrant were two audiotapes that were played to the jury in their entirety. In the tapes Mr. Knowles left certain instructions concerning the handling of his affairs after his death. In the first tape, he alluded to the fact that his boys would lose "two of us"--that he was "not going alone." He declared: "This is just something that I have decided that I have to do to be at peace with myself. I cannot be hurt anymore and will not be hurt anymore." The second tape contained the following statement: "I cannot handle this and have not handled it well at all. I just love Tina so much until I can't go on without her."
>
> Finally, Dr. Freid testified, over defense objections, as the State's expert during the guilt phase of the trial. Dr. Freid testified as to Mr. Knowles's state of mind prior to the murder: he was depressed, quite upset, and especially disturbed about learning certain things about his wife's behavior. Therefore, Mr. Knowles developed an elaborate suicide plan. A couple of days later, however, Mr. Knowles changed his plans to include taking his wife's life as well as his own, and he made two audiotapes in which he recorded his intentions. On cross-examination, Dr. Freid reiterated that, in his opinion, Mr. Knowles was emotionally disturbed, very depressed, and struggling with the thought of losing his wife forever by divorce.
>
> Knowles III,
> 864 So. 2d 1263-1265

In accordance with this Court's remand, the Second District Court applied the harmless error standard set out in State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986), which requires, *inter alia*, "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." Knowles III, 864 So. 2d 1262, citing DiGuilio, at 1135.

At trial, the defendant admitted that he took a loaded gun and shot his ex-wife. "Mr. Knowles admitted that he intended to shoot Tina first and that if she had agreed to reconcile, he would not have killed her. Mr. Knowles left behind both audiotapes and written statements concerning his criminal intentions." Id. On remand, the Court was "convinced beyond a reasonable doubt that Dr. Freid's testimony . . .did not affect the jury's decision to convict Mr. Knowles of first-degree murder." Id. at 1267.

## SUMMARY OF THE ARGUMENT

The Second District Court's decision correctly states and applies the law based on the facts given. The decision on remand is not in express and direct express conflict with a decision of another district court of appeal or of this Court on the same question of law, as required by article V, section 3(b)(3).

## ISSUE I

**WHETHER THE SECOND DISTRICT COURT'S HARMLESS ERROR ANALYSIS ON REMAND CONFLICTS WITH THIS COURT'S DECISION IN KNOWLES II and WILLIAMS**

(As restated by Appellee/Respondent)

Basis for Invoking Discretionary Jurisdiction

This Court may review any decision of a district court of appeal that . . . "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." See, Article V, §3(b)(3), Florida Constitution; Rule 9.030(a)(2)(A)(iv), Fla. R. App. Proc.

Under the jurisdiction conferred by Article V, §3(b)(3), "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So. 2d 830 (Fla. 1986), citing Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Petitioner alleges conflict with Knowles II and Williams v. State, 863 So. 2d 1189 (Fla. 2003), cases in which this Court remanded for reconsideration under the harmless error standard announced in DiGuilio. An error is harmless when the reviewing court can conclude beyond a reasonable doubt that the error did not affect the verdict. Francis v. State, 808 So. 2d 110, 129 (Fla. 2001). Under DiGuilio, 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." 491 So. 2d at 1139. On remand, the Second District correctly

applied the harmless error standard announced by this Court and unmistakably concluded that the Court was "convinced beyond a reasonable doubt that Dr. Freid's testimony . . .did not affect the jury's decision to convict Mr. Knowles of first-degree murder." Id. at 1267. The Second District's painstaking harmless error analysis does not conflict with either Knowles II or Williams.

## ISSUE II

### WHETHER THE SECOND DISTRICT COURT'S HARMLESS ERROR ANALYSIS ON REMAND CONFLICTS WITH DiGUILIO, GOODWIN, SMITH, REYES, COOPER, AND COLE

Petitioner next asserts that Knowles III conflicts with Goodwin v. State, 751 So. 2d 537 (Fla. 2000), Smith v. State, 762 So. 2d 969 (Fla. 4th DCA 2000), Cooper v. State, 778 So. 2d 542 (Fla. 3d DCA 2001), Reyes v. State, 783 So. 2d 1129), and Cole v. State, 2004 Fla. App. LEXIS 1797 (Fla. 1st DCA 2004).

In Goodwin, this Court reiterated the applicability of the DiGuilio standard in direct appeals: "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." Id. at 541. The decision below does not expressly and directly conflict with this Court or another district court on the same issue of law. The Second District relied upon the harmless error test derived from DiGuilio; and none of petitioner's cited

cases furnish a basis for a second round of review by this Court. In Smith, a habeas corpus case, appellate counsel was deemed ineffective in failing to argue the correct standard for harmless error under DiGuilio. In Reyes, the trial court erred in admitting unrelated evidence of gang activity. Finding that the testimony "could only have served to lead the jury to base its verdict, not on Reyes's personal guilt, but on a feeling that his conviction would strike a blow against the dangers to the country presented by the existence of gang violence . . ." the court "could not say that the overemphasis of the gang element in the case did not affect the verdict." In Cooper, the trial court erred in admitting irrelevant evidence regarding bullets found in the defendant's possession nine months after a murder; the bullets were in a gun that was *not* the murder weapon. Because the appellate court was "not satisfied beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the verdict," a new trial was required. During closing arguments in Cole, the prosecutor argued, "Are you going to believe the law enforcement officers that took the stand and told you what happened to them or are you going to believe that story he gave you?" Because it was impossible for the appellate court to determine what effect the prosecutor's improper remarks had upon the jury's deliberation process, a new

trial was granted.

## ISSUE III

### WHETHER THE INSTANT CASE CONFLICTS WITH BOWLES, LLANOS AND STRIBBLING REGARDING EXPERT TESTIMONY

Petitioner alleges that Knowles III expressly and directly conflicts with Bowles, Llanos, and Stribbling because "erroneously entered expert testimony . . . *could not possibly*, beyond a reasonable doubt, be deemed to be a harmless error." (Brief of Petitioner at 9). Thus, Knowles resurrects his claim that the erroneous admission of the expert testimony is *per se* harmful.

In Knowles II, this Court expressly "rejected Knowles's assertion that the erroneous admission of an expert witness's testimony bearing on intent is per se harmful error." As this Court explained, "[h]igh risk that an error will be harmful is not enough . . . to justify categorizing the error as always harmful (per se)." Id., citing DiGuilio, 491 So. 2d at 1137. See also State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995) (stating that high probability that an error is harmful does not justify categorizing the error as reversible per se)." Knowles, II. Error, if any, in allowing the State to call a confidential expert may be deemed harmless beyond a reasonable doubt. Lovette v. State, 636 So. 2d 1304 (Fla. 1994).

In Bowles v. State, 381 So. 2d 326 (Fla. 5th DCA 1980),

improper *cumulative* testimony of four police officers (that they would not believe defendant under oath) was not harmless error under the facts of that case. In Stribbling v. State, 778 So. 2d 452 (Fla. 4th DCA 2001), the lead detective in a murder case improperly testified that he did not have a suspect until he received a telephone message in which Stribbling was named as the perpetrator. Because identification was the key factor and the court could not conclude beyond a reasonable doubt that the error did not affect the jury's verdict, a new trial was ordered. In Llanos v. State, 766 So. 2d 1219 (Fla. 4th DCA 2000), the defendant moved to exclude the medical record prepared by the victim's physician in which the doctor stated, "[Patient] has had domestic abuse with a boyfriend ..." and "I read the police report and this has also been documented relative to domestic abuse." Finding that the doctor's reference to the police report gave significant extra weight to the victim's testimony, the error was not harmless. In this case, the Second District correctly applied this Court's harmless error standard of review and no conflict exists.

## CONCLUSION

Based on the foregoing arguments and authorities, the Second District Court's decision on remand does not expressly and directly conflict with this Court or another district court on

the same question of law. Therefore, the State respectfully requests this Honorable Court decline to exercise its discretionary jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard J. D'Amico, Special Assistant Public Defender, P. O. Box 9000-Drawer PD, Bartow, Florida 33831, on this 2nd day of April, 2004.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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**COUNSEL FOR RESPONDENT**