4-4-84

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RANDY EUGENE KINCHEN, Respondent.	)	CASE NO. 64,043

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and was the Defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. Petitioner was the Appellee in the Fourth District Court of Appeal and was the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit.

The following symbols will be used:

"R" Record on Appeal.

"BP" Brief of Petitioner

STATEMENT OF THE CASE

Respondent accepts the case portion of Petitioner's Statement of the Case and Facts with the following additions and/or corrections.

Respondent was arraigned on August 31, 1981 (R 13-16). On September 21, 1981, Respondent filed a written Motion for Continuance (R 1718-1722). This motion was denied on September 24, 1981 (R 18-20). Respondent orally renewed his motion on September 28, 1981 (R 22-68). The judge continued the case until October 5, 1981, due to the unavailability of the prosecution's key witness (R 22-68). Respondent filed a written Motion for Continuance on October 5, 1981 (R 1748-1761).

Respondent filed a Motion to Dismiss the Information on September 3, 1981 (R 1706-1707). He filed a Motion for Statement of Particulars on the same date (R 1708-1709). He filed a Demand for Discovery on the same date (R 1710-1712). The prosecution's initial response to the discovery demand was filed on September 23, 1981 (R 1731-1732). An additional response was filed on October 5, 1981 (R 1736). A third answer was filed on October 9, 1981 (R 1769). The prosecution filed its answer to the Motion for Statement of Particulars on September 23, 1981 (R 1734). It filed an amended answer on October 7, 1981 (R 1768).

Petitioner raised the question of the standard for determining whether a comment is a comment on a defendant's

decision not to testify on rehearing, for the first time. At oral argument, counsel for Petitioner was asked, by Judge Anstead, if the "fairly susceptible" test was the law. Counsel agreed that it was.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts with the following additions and/or corrections.

This case involves an alleged sexual battery, kidnapping, and attempted homicide upon Pamela Lowe on April 9, 1981. The prosecution's case consisted of three areas. The first area consisted of civilian witnesses. The second area consisted of the testimony of Pamela Lowe. The third area consisted of the testimony of arresting and investigating officers.

The first civilian witness called by the prosecution was Anthony Greulich (R 529). He drives a tow truck in Hollywood, Florida (R 530). He said that at 1 a.m. on the date in question he was driving north on Federal Highway in Hollywood when a black woman jumped in his truck and asked him to find a police officer (R 531-532). He then went up Federal Highway and the woman pointed out a Mercury Cougar (R 536-537). He said the car had a Florida license UKW-104 and was yellow or gold (R 536). He stated that he saw three or four people in the car including one person, who appeared to be black (R 538). He tried to follow the car, but lost it (R 539). He admitted that in an earlier statement he had said that there were four people in the car and that the black person was a male (R 544-545).

The next civilian witness called by the prosecution was John Holland, a welder from Dania (R 799-800). He

stated that on April 9, 1981, he was living at 100 North Ocean Boulevard on the Hollywood-Dania border (R 800). At about 1 a.m. he heard a car pull up and heard people shouting (R 803). He lived about thirty feet from the Intercoastal Waterway (R 803-804). The sounds were directly east from his front door (R 803-804). He stated that he saw two white males, along the seawall, throwing bottles (R 804-805). He came out with his shotgun and they ran away (R 805). He said that he had observed the scene for thirty seconds until he went back and got his shotgun (R 808). He testified that the area was not lighted (R 810). He stated that he pulled a woman out of the water who was incoherent (R 817-821). She kept saying, "Don't hurt me." (R 817) Holland testified that he could only see silhouettes but that he thought that the taller, lighter haired person was swinging a chain and the other one was throwing bottles (R 824-285). He stated that he couldn't see any facial features (R 837-838). He admitted that at his deposition he had stated that the person with the lighter hair was the shorter of the two (R 842).

The second area of the prosecution's case consisted of the testimony of Pamela Lowe. She testified that she had been living in Las Vegas since May, 1981 (R 558). In April, 1981, she had been living on Wiley Street in Hollywood, Florida (R 558-559). She had been working as a prostitute for a little over a year at that time (R 559). On the night in question she was working the street as a prostitute

at approximately 12:30 or 1 a.m. on Wiley and Federal Street.

Ms. Lowe testified that at 12:30 or 1 a.m. a car pulled up into a parking lot of a military club (R 559-560). She stated that she was with two other prostitutes (R 560). She walked over to the car and talked to the two people in the car (R 560). The car left and came back (R 560-564). She and another prostitute named Lavette got in the car and discussed performing oral sex for twenty dollars (R 565).

Lowe claimed that a man then said that there were "some niggers" in the car next to them and said that he was getting out to get a gun (R 566). She claimed that she and Lavette got out and ran in different directions (R 566-567). She claimed she ducked behind some orange crates (R 566-567). She claimed the driver of the car then pretended to be a police officer and when she resisted he forced her into the car (R 567-570). She stated that the car pulled away while they struggled (R 570-572). She testified that the passenger of the car forced her to perform oral sex on the driver (R 573-574). She stated that the passenger hit her, took her wig off and was cutting her hair with a knife (R 575-576). The knife came out of the glove box in the car (R 576).

Lowe testified that after a twenty or thirty minute ride they stopped in an area of dirt and sand (R 577-578). She stated that the passenger forced her to commit oral sex on him and then forced her into the water (R 579-580). She claimed that he hit her with a belt and a chain (R 580-581).

She said the other man was in the car and then put a bag over her head before she was thrown in the water (R 585-586). She stated that she doesn't remember who took her out of the water (R 587-588). She stated that the chain was fat and silver (R 607-610).

Pamela Lowe identified James Marino as the man who beat her, forced her to perform oral sex, and who had pretended to be a police officer (R 614-615). She stated that Respondent had not initiated any violence during the evening (R 614-615). She testified the car was a brown Mustang (R 623). She testified that Marino initiated all of the violence (R 643-654). She stated that Respondent was the passive recipient of oral sex (R 671-672). She stated that she never saw a gun that night (R 686). She stated that she was hazy on some aspects of the night and that she had undergone hypnosis to try to improve her memory (R 703-704). She stated that she had been a prostitute for over a year and had worked in Denver, San Francisco, and Fort Lauderdale (R 710).

Ms. Lowe testified that she had picked Marino out of a photographic line-up (R 714-715). She testified that she had never picked Respondent out of a photographic or live line-up (R 716-717). She testified that at her deposition she had been unable to describe the appearance or facial features of the two men (R 718-719). She stated that when she tried to get away only Marino chased her (R 739).

She testified that the only activity she definitely remembers Respondent involved in was the receipt of oral sex (R 744).

The final area of the prosecution's case was the testimony of the arresting and investigating officers in this case. This area began with the testimony of Officer John Miller of the Hollywood Police Department (R 844). He stated that he spoke to a black female named Lavette Arnold at 1:04 a.m. on April 9, 1981, at the corner of Wiley Street and Federal Highway in Hollywood, Florida (R 847). He then looked for a vehicle with the license number UKW-104, but could not find it (R 856-857). The prosecution next called Gerald Primau of the Pembroke Pines Police Department (R 862). He stated that he arrested Marino on April 10, 1981 (R 862). He stated that he went to Marino's house, that Marino sped off and was arrested a few blocks away (R 864-865).

The prosecution then called Detective Robert Foley of the Broward County Sheriff's Department (R 879-880). He stated that he found clothing at the scene that Ms. Lowe identified (R 887,894-895). He also found a brown belt with a silver buckle about 185 feet southwest of the clothing (R 889-890). He stated that Pamela Lowe's hair is consistent with hair found at the scene and hair found in Marino's car (R 895-899). He stated that he removed three latent prints from the belt buckle (R 899-900). The prints were inconsistent with those of Marino (R 943).

The prosecution then called Detective Ellery Richtarcik

of the Broward County Sheriff's Office (R 968-969). He testified that one of the latents off the belt matched the fingerprint of Respondent (R 973-974). He stated that he had no idea when the print was placed (R 986). He stated that the belt was size 34 (R 988). He also testified that he does not know who last touched the belt (R 993). He testified that a person could have hit someone with the belt without leaving a latent print (R 995).

The next prosecution witness was Detective Edel of the Dania Police Department (R 996). He stated that he arrived at 100 North Ocean Drive at 2:30 a.m. on April 9, 1981 (R 997-998). He stated that he removed Pamela Lowe from the ocean (R 999). He found clothing and a wig and a brown belt with a silver buckle thirty-five to forty feet away (R 999-1000). He testified that he interviewed Pamela Lowe and that she was very confused towards the end of the conversation (R 1005-1006). Ms. Lowe identified Marino from a photographic lineup (R 1012). He arrested Marino the next day and found a silver link chain in his car and a knife in the center console (R 1019-1021). He stated that Pamela Lowe had said that one individual was far more aggressive than the other one (R 1028-1029). In his report, he had stated that one of the two men did not want to take part in the beating (R 1029). Detective Edel also stated that he found clothing in suitcases in Marino's trunk (R 1045-1046). Ms. Lowe identified Marino as the aggressive one (R 1052).

Both Respondent and Marino made motions for a judgment of acquittal at the close of the prosecution's case and both were denied (R 1084-1096).

Mr. Marino's case consisted of three witnesses, Brett Knesz, Officer Fred West, and himself. Brett Knesz testified that he had known both Respondent and Marino for eight or nine years (R 1132). He testified that Marino was a close friend of his (R 1132). He stated that he had been convicted of a crime (R 1133). He claimed that Respondent had told him that he had been the aggressor and that he had shaved all the victim's hair off of her entire body and beat her (R 1142-1143,1152-1153). He claimed that Respondent had ruined his boots and owed him money and that this had caused bad feelings between them (R 1150). He admitted that he had said at his deposition that Respondent had told him he had stabbed her in the back (R 1157-1158).

He testified that he had gone to Marino's house and read the victim's statement (R 1160). He had told Respondent's father that he thought there would be separate trials (R 1161). He admitted that he had said Marino was his friend and that he was going to come forward to help him out (R 1163). He spoke to Marino approximately ten times prior to trial (R 1166). He admitted offering to help Marino get a job and offered to move to Houston with him (R 1170).

Mr. Marino then called Officer Fred West of the Dania Police Department (R 1229). He stated that he spoke

to Pamela Lowe at Broward General Hospital on the morning in question (R 1230). He stated that she was hysterical and had trouble relating what happened (R 1244-1245).

Mr. Marino then took the stand in his own behalf (R 1256-1257). He stated that he was working as an iron-worker at the time of this incident (R 1256-1257). He was a friend of Respondent's at the time (R 1258-1259). He stated that on the night in question he left his father's house a little after 9 p.m. and went to Respondent's house and picked him up (R 1263). He stated that they went to the Crown Lounge where he became very drunk (R 1263). They then went to the Banana Boat Lounge where Marino was refused entrance because he was so intoxicated (R 1264). He claimed that Respondent later woke him up in a parking lot and asked him to drive (R 1264). He stated they were in his car (R 1266). He claimed that one black woman got in the car and performed oral sex on Marino (R 1266-1267).

Marino claimed that Respondent soon jumped out and began shouting and then the black woman ran (R 1267). He claimed that Respodent wrestled with the woman and placed her back in the car (R 1267-1268). He said that he drove a few blocks (R 1264-1270). He stated that Respondent then got a knife out of Marino's car and began scaring the woman (R 1269-1270). Marino then drove to John Lloyd Park in Dania (R 1275). He claimed that Respondent took the woman out of the car and she performed oral sex on him (R 1276).

Marino claimed he pulled away briefly and then came back (R 1280-1283). He claimed that Respondent then said, "He's got a shotgun" and they left (R 1283-1284). He stated that on the night in question that he had four or five beers after work and then ten shots of bourbon (R 1304). He stated that the black woman called them names off and on throughout the evening (R 1394). Then Marino rested his case.

Respondent called Arthur Kinchen, his father, as his witness (R 1147). He testified that Brett Knesz approached him in a restaurant and stated that he thought that there would be separate trials and that he would do everything he could for Marino and that when Respondent's trial came up, he would leave (R 1449). Respondent then rested (R 1492).

POINTS INVOLVED

POINT I

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT APPELLANT'S CONVICTION MUST BE REVERSED, AFTER A DIRECT COMMENT CONCERNING RESPONDENT'S DECISION NOT TO TESTIFY.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERENCE.

POINT III

THE TRIAL COURT ERRED IN DENYING RESPONDENT A CONTINUANCE, THUS DENYING HIM THE EFFECTIVE ASSISTANCE OF COUNSEL.

POINT I

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT RESPONDENT'S CONVICTION MUST BE REVERSED, AFTER A DIRECT COMMENT CONCERNING RESPONDENT'S DECISION NOT TO TESTIFY.

This issue involves a direct comment upon Respondent's decision not to testify by his co-defendant's attorney. This occurred in a situation in which the co-defendant's defense was completely antagonistic to his own. Respondent made a timely objection and motion for mistrial (R 1556). These motions were denied (R 1556).

The essence of Petitioner's argument is that this Honorable Court should overrule its long established test for determining whether a comment is a comment on a defendant's decision not to testify. This test has been made very clear by this Honorable Court:

> "Any comment which is fairly susceptible of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error. David v. State, 369 So.2d 943, 944 (Fla. 1979); Trafficante v. State, 92 So.2d 811 (Fla. 1957).

Petitioner urges this Honorable Court to adopt the following test.

> "Whether the manifest intention of the comment was directed to silence or the remark was such that the jury would naturally and necessarily take it to be such a comment."

(BP 6)

The apparent assumption behind this argument is that the sole basis of the prohibition against commenting upon a defendant's decision not to testify is the United States Constitution. Indeed, the only argument for this radical change in Florida law is that the federal courts utilize the standard proposed by Petitioner. This argument completely ignores long standing basis, under Florida law, for prohibiting a comment on a defendant's decision not to testify.

There is a long-standing, independent basis, under Florida law, for prohibiting a comment on a defendant's decision not to testify. This basis flows from the Florida Constitution, the (former) Florida statutes, the caselaw from this Honorable Court, and the Florida Rules of Criminal Procedure. This Florida basis is completely independent of the federal constitutional basis and is far older than the federal constitutional requirement. The federal courts did not hold that the Fifth and Fourteenth Amendments prohibited comment on a defendant's decision not to testify, in state court, until 1965. Griffin v. California, 380 U.S. 609 (1965). The Florida state prohibition is much older than this.

The current Florida Constitution contains a protection of the right to remain silent and the right not to testify.

> "No person shall be...compelled in any criminal matter to be a witness

against himself." Article I, Section 9 Florida Constitution.

A similar provision was contained in the 1885 Constitution in Article I, Section 12. The Florida Constitution has been explicitly relied on in recent years, in order to provide greater protection of the right to remain silent than the federal constitution. Lee v. State, 422 So.2d 928,931 (Fla. 3rd DCA 1982). The right to remain silent and the right not to testify are accorded such significance in our state that they are enshrined in our state constitution.

The prohibition against a comment upon a defendant's failure to testify has also been specifically protected by decisions of this Honorable Court and by our state statutes. This Honorable Court has recognized, at least since 1900, that a comment on a defendant's decision not to testify mandates reversal, if properly preserved. Gray v. State, 42 Fla. 174, 28 So. 53 (1900). Florida has also had a specific state statute prohibiting comment on a defendant's failure to testify, at least since 1895. Chapter 4400, Laws 1895. This section was later codified as Fla.Stat. §918.09.[1] Although this statute has been repealed, it has been carried over into the current Florida Rules of Criminal Procedure.

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[1]Although this section only specifically prohibited comment by a prosecuting attorney, the prohibition equally applies to a co-defendant's attorney. Sublette v. State, 365 So.2d 775 (Fla. 1979).

> "No accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf." Fla.R.Crim.P. 3.250

The rationale for the Florida prohibition against a comment on the defendant's decision not to testify is laid out in this Honorable Court's opinion in Way v. State, 67 So.2d 321 (Fla. 1953).

> "Section 918.09 was designed to protect the defendant in a criminal case from having the jury consider his failure to take the witness stand in his own behalf as even the slightest suggestion of guilt." (Emphasis supplied) 67 So.2d at 323.

It is clear that the Florida rule prohibiting a comment on the decision of a defendant not to testify has several completely independent state law bases; including the Florida Constitution, the (former) Florida statute, the Florida Rules of Criminal Procedure, and the decisions of this Honorable Court. This prohibition is both independent of, and far older than, the federal constitutional right, pursuant to Griffin v. California, supra. Therefore, the underlying assumption behind Petitioner's argument is faulty.

Petitioner is asking this Honorable Court to overrule its long standing precedent. The only reason offered by Petitioner is that the federal courts follow a different test. The longstanding precedent from this Honorable Court should not be cast aside so easily. Petitioner points

out no significant problems with the current standard. It does not point to any criticism of the current standard by either courts or commentators. It has not shown any advantages to be gained by the adoption of its proposed test. It has not come forward with any evidence of the superiority of its proposed test. Such a major change should not be made based on such a dearth of evidence.

There are several important reasons why the present test should be maintained. First, the maintenance of the present test would ensure continuity, stability, and uniformity in our justice system. These are certainly major goals of any legal system. The present test has been consistently followed by this Honorable Court and the Third, Fourth, and Fifth District Courts of Appeal. David v. State, supra; Trafficante v. State, supra; Ramos v. State, 413 So. 2d 1302 (Fla. 3rd DCA 1982); Lee v. State, 422 So.2d 928 (Fla. 3rd DCA 1982); Brown v. State, 427 So.2d 304 (Fla. 3rd DCA 1983); Cunningham v. State, 404 So.2d 759 (Fla. 3rd DCA 1981); Kinchen v. State, 432 So.2d 586 (Fla. 4th DCA 1983); Brazil v. State, 429 So.2d 1339 (Fla. 4th DCA 1983); Childers v. State, 277 So.2d 594 (Fla. 4th DCA 1973); Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980). The maintenance of this consistency and uniformity in our law is an important policy reason to maintain the current test.

The only two Florida cases relied on by Petitioner are anamolies in Florida law. State v. Bolton, 383 So.2d

924 (Fla. 2nd DCA 1980); Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982). They should be expressly disapproved by this Honorable Court. Bolton, supra is the case which first attempted to introduce this erroneous standard into Florida law. However, even the Second District Court of Appeal has not consistently followed Bolton. Although the Second District has never expressly overruled Bolton, it has employed the "fairly susceptible" standard utilized in David, supra in cases subsequent to Bolton. Nelson v. State, 416 So.2d 899 (Fla. 2nd DCA 1982); Dunn v. State, 397 So.2d 748 (Fla. 2nd DCA 1981). Petitioner has cited no cases from the First or Second Districts specifically reaffirming the test proposed by Petitioner. Indeed, the Second District Court of Appeal has apparently receded from the test in Bolton. At the very least, it does not apply it with any consistency. If the Bolton test is manifestly superior to the current standard employed by this Honorable Court, why have its originators (the Second District Court of Appeal) receded from it? Apparently, its merits are not clear even to its authors.

A second reason for maintaining the current test is that it is better designed to meet the underlying policy concerns behind Florida's prohibition against a comment on the defendant's decision not to testify. This Honorable Court has outlined these reasons.

> "Section 918.09, supra, was designed to protect the defendant in a criminal

> case from having the jury consider his failure to take the witness stand in his own behalf as even the slightest suggestion of guilt." (Emphasis Supplied) Way v. State, 67 So.2d 321 (Fla. 1953)

This Honorable Court further developed the reasons behind this prohibition in Trafficante v. State, 92 So.2d 811 (Fla. 1957).

> "In summary, our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction." 92 So.2d at 814.

Both Way and Trafficante were prior to Griffin v. California, supra and thus were based solely on the Florida prohibition. They clearly express the underlying rationale behind this rule. The rule is designed to avoid to "even the slightest suggestion of guilt" from the defendant's failure to testify. This prohibition applies regardless of the motive behind the comment or the possibility of other interpretations.

The test proposed by Petitioner is completely inadequate to meet the concerns expressed by this Court in Way and Trafficante. The proposed test is:

> "Whether the manifest intention of the comment was directed to silence or the remark was such that the jury would naturally and necessarily take it to be such a comment."
>
> (BP 6).

This rule is completely inadequate to meet the concerns expressed in Way and Trafficante. The first prong of the test focuses on the intention of the person commenting on a defendant's decision not to testify. This is directly contradictory to the express statement of this Honorable Court in Trafficante, that the intent behind the comment is irrelevant. The Trafficante premise that intent is irrelevant is far more logical for two reasons. (1) The purpose of the prohibition is not to punish any person for commenting on a defendant's silence. It is to guarantee a criminal defendant a fair trial, free from even the "slightest suggestion of guilt" from his decision not to testify. (2) Judging the intent of the commenter is necessarily a highly speculative and subjective matter.

The second prong of the proposed test is also inadequate to meet the expressed concerns of this Honorable Court. By requiring that the remark "naturally and necessarily" be a comment on the right not to testify, in effect requires that the only interpretation be one commenting on the defendant's failure to testify. Once again, this is directly contradictory to this Honorable Court's express statement in Trafficante that the existence of another interpretation of the statement is irrelevant. It is also clearly insufficient to meet this Honorable Court's concern in Way, supra of avoiding even the "slightest suggestion of guilt" from a comment on the failure to testify. The

proposed test invites a torturous search for any possible meaning other than a comment on the defendant's decision not to testify. This is insufficient protection for the Florida rule. The existing "fairly susceptible" test is much better designed to meet this Honorable Court's expressed concerns and the need for stability in the law.

The procedure followed by Petitioner in raising this issue is also important to consider in evaluating whether to adopt the test proposed by Petitioner. Petitioner never proposed any modification of the existing standard in its brief in the Fourth District Court of Appeal.

During oral argument of this case, Judge Anstead specifically asked counsel for Petitioner, if the "fairly susceptible" test was the law. Counsel for Petitioner agreed that it was. Judge Hersey later asked Counsel for Respondent the same question and he also agreed with this test. The Fourth District Court of Appeal explicitly gave Petitioner an opportunity to challenge this test, or propose a different one, and it specifically agreed with the test employed by this Court. Petitioner argued, for the first time, on re-hearing, that the test employed by the Fourth District Court was improper. It is well settled in Florida that no new ground or position, not taken in the original argument, can be submitted in a petition for rehearing. Jacksonville, T. and K. W. Ry.Co. v. Peninsular, Land, Transportation and Manufacturing Co., 27 Fla. 157, 9 So. 661 (1891). Respondent submits that this argument is waived and thus is not properly

before this Honorable Court. (The Bolton case has been in existence since 1980. Thus, there can be no legitimate claim that it was not available earlier.)

Petitioner's method of raising this issue is also important to consider for reasons other than waiver. If the test proposed by Petitioner is clearly superior to the current test, why was it not argued to the Fourth District Court of Appeal? Instead, Petitioner explicitly agreed with the current test and argued the appeal on that basis. It was only after losing the appeal, that Petitioner completely changed legal theories. Indeed, it appears that the proposed test is almost an afterthought, rather than a clearly superior test requiring this Honorable Court's adoption.

The "fairly susceptible" test employed by this Honorable Court has served Florida well. The underlying assumptions behind Petitioner's proposed change are faulty. Petitioner has advanced no policy reasons for making such a major change in the law. The retention of the present test will assure stability and uniformity in our jurisprudence. It is also better equipped to meet the expressed policy goals of this Honorable Court. Therefore, this Honorable Court should retain the "fairly susceptible" test in determining whether a comment refers to a defendant's decision not to testify.

Assuming arguendo that this Honorable Court adopts Peitioner's proposed test the comment in the present case

would still require reversal as a comment on Respondent's decision not to testify. The comment here was a direct comment on Respondent's decision not to testify. This was a comment by a co-defendant's attorney in a case where their defenses were completely antagonistic. Respondent's co-defendant, James Marino, took the stand and testified that Respondent was the aggressor throughout the evening (R 1256-1394). He also called Brett Knesz to testify that Petitioner had allegedly admitted to him that he was the aggressor, in a conversation that only Knesz and Respondent were parties to (R 1142-1143,1152-1153).

In his closing argument, the co-defendant's attorney stated:

> "Besides all of the physical, tangible proof we have, I did something the State didn't do. I brought up a confession, an admission. Weigh it for what you think it is worth. Did Brett come across to you as a liar? The State is in a position here, should they question his credibility or not. On one hand, they are using him to support the statement of Randy Kinchen's guilt; and, on the other hand, they are saying that he is not credible because now he is my client's best friend. Well, there is such a charge which is perjury, with lying under oath; and you heard Brett testify. You decide if he is credible or not.
>
> Besides all of the physical evidence, then will all of the inconsistencies we have now, the statements from this man's own mouth that were unrefuted, let's say it is the truth. I have no reason to doubt Randy Kinchen's father. Brett did not deny he made that statement, that, "I would do anything I could --" (Emphasis Supplied)(R 1555-1556).

Then, the Respondent's attorney stated:

> "Can I approach the bench? I am obligated to move for a mistrial at this time because Mr. Smith made a comment about that statement being unrefuted and implying my client did not testify. On that basis, I'm moving for a mistrial." (R 1556)

This was clearly a direct comment on Petitioner's decision not to testify. Co-defendant's counsel was stating that Respondent had allegedly confessed and no one had refuted it. Respondent and Knesz were the only parties to the conversation involved. Therefore, only Respondent could refute the statement. A statement that testimony of a defendant's statements in a conversation, was unrefuted, has consistently held to be a comment on the failure to testify, if the defendant and the witness are the only parties to the conversation. Trafficante v. State, 92 So.2d 811 (Fla. 1957). Although Trafficante was decided under the current standard, the same result should be reached under the proposed test. The "manifest intention" of such testimony is to highlight a defendant's decision not to testify. The jury would "naturally and necessarily" take it to be such a comment.

The federal courts have reviewed comments similar to the one here and have found them to be impermissible comments on the defendant's decision not to testify, employing the standard proposed by Petitioner. The federal courts have consistently held:

> "When a prosecutor refers to testimony as uncontradicted, where the defendant has elected not to testify, when he is the only person able to dispute the

> testimony, such reference necessarily focuses the jury's attention on the defendant's failure to testify and constitutes error."
> United States v. Buege, 578 F.2d 187, 188 (7th Cir. 1978); United States v. Handman, 447 F.2d 853,855 (7th Cir. 1971).

The federal courts have consistently applied this principle to situations where a witness testified about the defendant's statements and the defendant was the only other party to the conversation. United States v. Buege, supra; United States v. Flannery, 451 F.2d 880 (1st Cir. 1971); Desmond v. United States, 345 F.2d 225 (1st Cir. 1965). This is exactly the situation here. It is clear that even under the proposed test this must be considered a comment on the failure to testify.

Petitioner calims that this comment was not a comment on Respondent's decision not to testify. It claims that it was:

> "An attempt to explain why Respondent's father's testimony (R 1447-1449) did not refute Mr. Knesz's testimony in his client's behalf (R 1142-1143,1152-1153)."
> (BP 8)

This is clearly illogical. Only Respondent, as a party to the alleged conversation, could refute Knesz's testimony. The clear intent of the co-defendant's attorney was to point this out. Respondent's father's testimony went to Knesz's credibility. He did not refute Knesz's recounting

of Respondent's alleged "confession", as only Respondent could do this if the alleged conversation took place.

Petitioner's reliance on United States v. Jobon-Builes, 706 F.2d 1092 (11th Cir. 1983) and White v. State, 377 So.2d 1149 (Fla. 1979) is misplaced. Neither of these cases involved a conversation in which the defendant and the witness were the only parties.

The comment here was clearly a comment upon Respondent's decision not to testify under the existing test or under the test proposed by Petitioner. Therefore, the decision of the Fourth District Court of Appeal should be affirmed.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE.

A. Introduction

Petitioner only raised one issue in its brief. However, it is well settled that once this Court accepts jurisdiction over a case, it may considerother issues raised in the case. Savoie v. State, 422 So.2d 308 (Fla. 1982). If this Honorable Court decides the first issue adversely to Respondent, it will be necessary to resolve the other issues in the case in order to determine whether Respondent should receive a new trial; all of the issues argued here were raised before the Fourth District Court of Appeal.

B. Argument

This issue involves the denial of Respondent's motion for severance which was made prior to trial and was repeatedly renewed during trial. It is well established that:

> "Severance should be granted liberally whenever potential prejudice is likely to arise in the course of trial." Menendez v. State, 368 So.2d 1278,1280 (fla. 1979); Crum v. State, 398 So.2d 810,811 (Fla. 1981); American Bar Association Standard for Criminal Justice 13-3.1(b)(2d ed. 1980).

This Honorable Court has emphasized that the possibility of prejudice should outweigh any other consideration.

> "The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant consid-

> erations such as expense, efficiency, and convenience." Crum v. State, 398 So.2d 810,811 (Fla. 1981).

Thus, it is clear that whenever the possibility of prejudice arises, severance should be liberally granted. The failure to sever is reversible error if compelling prejudice exists. This situation occurs when

> "The defenses...conflict to the point of being irreconcilable and mutually exclusive." United States v. Crawford, 481 F.2d 489,491 (5th Cir. 1978).

It is also clear that a trial court cannot force a defendant

> "to stand trial before two accusers: the state and his codefendant." Crum v. State, 398 So.2d 810,811-812 (Fla. 1981); Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981).

In the present case, Respondent timely moved for a severance and the defenses of the co-defendants were clearly irreconcilable. Respondent filed a written motion to sever prior to trial (R 1740-1741). The co-defendant, Mr. Marino, also made a motion to sever, prior to trial, which Respondent orally joined in, at the hearing on this motion (R 37-39). Respondent also renewed the motion orally prior to trial (R 80-90,94-95). The trial court denied this motion (R 100). Respondent renewed his motion several times during the trial, beginning with voir dire (R 223-225, 692-695,868,1430-1431). This issue was timely raised and properly preserved.

Respondent's co-defendant, James Rocky Marino, directly accused him of committing this offense and was the

most damaging witness against him. This was the danger raised in Respondent's pre-trial motion to sever and this was what actually occurred (R 1740-1742).

In the prosecution's case, the only witness who identified Respondent was Pamela Lowe. She testified that Marino committed all the violent acts involved, forced her to perform oral sex on both men, beat her, and threw her in the sea (R 614-615). She testifed that Respondent was present during these activities, but she was only certain that he was the passive recipient of oral sex (R 614-615, 673-674,714,743-744). None of the other prosecution witnesses identified Respondent.

The co-defendant's entire defense was to admit that he was present, but to claim that Ms. Lowe was mistaken and that Respondent was the aggressor. He pursued this line of defense throughout his questions, cross-examination, and testimony. Marino took the stand and admitted his presence at the scene but accused Respondent of all the aggressive acts (R 1264-1421). Marino also called Brett Knesz, who claimed that Respondent had admitted to him that he was the aggressor in this incident (R 1140-1215). Marino was the only eyewitness who claimed that Respondent was the aggressor in this offense. Knesz was the only witness who claimed that Respondent had admitted being the aggressor. Thus, it is clear that the most damaging witnesses against Respondent were not those called by the prosecution, but

were those called by his co-defendant.

In the present case, as in Crum, supra, Respondent was severely prejudiced by the failure to sever. This case clearly meets the test laid out in Crawford, supra. Clearly, the defenses were "irreconcilable and mutually exclusive." 581 F.2d at 491. Precisely the evil feared in Crum, supra, and Rowe, supra, occurred here. Respondent had "to stand trial before two accusers, the state and his codefendant." 398 So.2d at 811-812; 404 So.2d 1176.

Thus, the failure to grant Appellant's motion to sever was severely prejudicial. It changed the whole character of the trial and of Respondent's defense (R 1434-1435). Therefore, Respondent's conviction should be reversed for a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING RESPONDENT A CONTINUANCE, THUS DENYING HIM THE EFFECTIVE ASSISTANCE OF COUNSEL.

This issue involved the trial court's denial of Respondent's motion for continuance in order to allow him adequate time to prepare for trial.

A criminal defendant has the right to a fair trial and is entitled to a sufficient time to prepare for trial. E.g. Johnson v. State, 113 Fla. 193,151 So. 383 (1933); Lowe v. State, 95 Fla. 81,116 So. 240 (1928). Thus, although it is generally said that the granting of a continuance is in the discretion of the trial court...

> "Contrariwise, a myopic insistence upon expeditiousness in the face of justifiable request for delay can render the right to defend with counsel an empty formality." Ungar v. Sarafite, 376 U.S. 575,590 (1964).

The securing of testimony beneficial to the accused has long been recognized in Florida as essential to the presentation of a proper defense.

> "[A fair and impartial trial] contemplates...compulsory attendance of witnesses, if need be, and a reasonable time in the light of all the prevailing circumstances to investigate, properly prepare, and present [a] defense. When less than this is given, the spirit and purpose of the law is defeated." Christie v. State, 94 Fla. 469,114 So. 450,451 (1927).

This Honorable Court granted a new trial, holding that it was error for the trial court to deny the motion for continuance.

See also, Ziegler v. State, 95 Fla. 108,116 So. 241 (1928). In Scott v. State, 101 Fla. 250, 134 So. 50 (1931), this Honorable Court, in granting a new trial, recognized that:

> "When the defendant...asks for a reasonable time in which to prepare his defense the time should be granted unless there is a showing to the contrary." 134 So. at 51-52.

More recently, in Valle v. State, 394 So.2d 1004 (Fla.1981) this Honorable Court held that it was reversible error to force a defendant to trial only twenty-four days after arraignment when he had been unable to depose several witnesses.

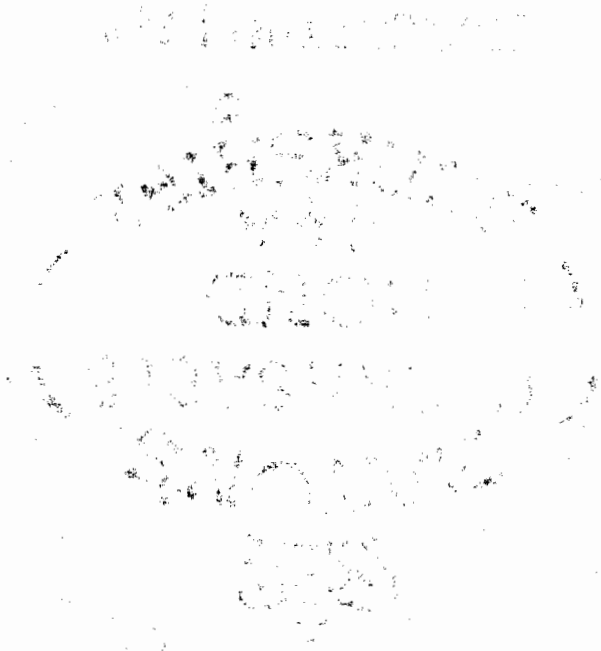
Respondent was arraigned on August 31, 1981, and was charged with kidnapping, sexual battery, and attempted first degree murder (R 13-16). Respondent filed a written motion for continuance on September 21, 1981 (R 1718-1722). This motion was denied on September 24, 1981 (R 18-20). Respondent orally renewed his motion on September 28, 1981; the original trial date (R 22-68). The trial judge initially refused to continue the case and then continued it until October 5, 1981, due to the unavailability of the prosecution's key witness (R 22-68). Respondent filed a written motion for continuance on October 5, 1981 (R 1748-1861). Respondent had taken thirteen depositions during the intervening week (R 1749). Dr. Murray, who had examined the victim, and Brett Knesz, a key adverse witness had failed to appear for depositions (R 1749-1750). On October 2, 1981,

he received the name of eleven witnesses who would allegedly attack the credibility of a defense witness, Vicki English (R 1749). He also received the report of the Sexual Assault Center on October 2 (R 1749-1750). He discovered the names of ten potential witnesses, who he had been unable to speak to during the previous week (R 1750). He orally argued this motion and it was denied (R 69-79).

Respondent was severely prejudiced by his inadequate preparation. He raised the problem, during voir dire, of the late listing of the eleven witnesses who would attack Vicki English's credibility (R 226-227). Respondent failed to make an opening statement because he was unprepared (R 516). He also received a list of four more witnesses from the co-defendant during trial (R 517-518). Respondent was also unable to put Vicki English on the stand because he was unable to depose the eleven witnesses who would allegedly attack her credibility (R 1422-1428). He stated that he had taken two depositions during trial and seventeen others in the seventy-two hours prior to trial (R 1427). Thus, Respondent was clearly prejudiced by the failure to grant a continuance.

In the present case, as in Valle, supra, Respondent was denied the effective assistance of counsel by the trial court's failure to grant a continuance. Respondent was charged with three felonies punishable by life imprisonment and was forced to trial thirty-five days after arraignment,

when he had been unable to depose numerous key witnesses. Several witnesses had been only listed in the last three days before trial. Respondent was seriously prejudiced by the lack of time to prepare. Thus, the trial court erred in denying Respondent a continuance and thereby denied him the effective assistance of counsel.



CONCLUSION

Based upon the foregoing argument, Respondent requests that this Honorable Court dismiss the Petition for Discretionary Review or grant other relief as appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a ture copy of Respondent's Brief on the Merits, Supreme Court Case No. 64,043, has been furnished to the Office of the Assistant Attorney General, JAMES MC LANE, 111 Georgia Avenue, West Palm Beach, Florida, this 20th day of January, 1984, by Courier.

Richard B. Greene
Of Counsel.