IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 65,417
	)	
ALONZA ROWELL,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The respondent accepts the statement of case and statement of the facts recited in the brief of petitioner, with the following additions and clarifications:

The district court of appeal determined that the comment made by the prosecutor in the trial of this cause was "'fairly susceptible' to intrepretation by the jury as a reference to the defendant's exercise of his right to remain silent." Rowell v. State, ___So.2d___, 9 FLW 1177 (Fla. 5th DCA Case No. 83-452, 5/24/84). In its decision, reversing the defendant's conviction without regard to the harmless error doctrine, the district court noted the state's contention that this Court had receded from the per se reversal rule of Bennett v. State, 316 So.2d 41 (Fla. 1975), and its progeny, by its comment in State v. Murray, 443 So.2d 955 (Fla. 1984). However, the district court, although expressing reservations about the

per se rule, correctly noted that neither this Court's decision in Murray, nor the United States Supreme Court's decision in United States v. Hasting, ___U.S.___, 76 L.Ed.2d 96 (1983), dealt with the precise issue here, i.e., a comment on the defendant's silence at the time of his arrest. Rather these cases dealt instead with prosecutor overzealousness and a comment on the failure of a defendant to testify at trial. Rowell v. State, supra. Nonetheless, the district court directed the state's question to this Court for its consideration.

It is true that the district court did make the factual determination that the jury would have reached the same conclusion even in the absence of the improper testimony concerning the respondent's silence at the time of arrest. Rowell, supra. However, the record on appeal shows that there existed only a circumstantial case regarding Counts III and IV. No direct evidence was presented which showed that the defendant was aware of a bag on the other side of the automobile (in the possession of another man) which contained a radio from the previous burglary of another car. (R6, 11, 48-49)

ARGUMENT

POINT I

THE DECISIONS OF STATE V. MURRAY, 443 So.2d 955 (FLA. 1984), AND UNITED STATES V. HASTING, ___U.S.___, 76 L.ED.2d 96 (1983), HAVE NO EFFECT ON THE PER SE REVERSAL RULE OF BENNETT V. STATE, 316 So.2d 41 (FLA. 1975), WHERE A PROSECUTOR HAS ELICITED TESTIMONY OF A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT AT THE TIME OF ARREST.

In Bennett v. State, 316 So.2d 41 (Fla. 1975), this Court, following the lead of the third district in Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), held that a comment at trial or the eliciting of evidence at trial of a defendant's exercise of his right to remain silent at the time of arrest was error of a constitutional magnitude, requiring reversal of the conviction without regard to the harmless error doctrine. This requirement was mandated because of the nature of the exercise of that right.

The Fifth Amendment to the Constitution of the United States provides, in part, that: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." See also, Art. I, § 9, Fla. Const. The privilege against self-incrimination, the defendant's right to silence, "registers an important advance in the development of our liberty -- 'one of the great landmarks in man's struggle to make himself civilized.'" Murphy v. Waterfront Commission of New York, 378 U.S. 52, 55 (1964); Ullman v. United States, 350 U.S.

422, 426 (1956). It has been said that this right reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev, 1961), 317; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Murphy, 378 U.S. at 55.

Most, if not all, of these policies and purposes are defeated when a defendant's silence, designed not to incriminate him, is admitted at his trial with the effect on the jury of his incrimination. In Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966), the United States Supreme Court declared the importance of the right of an accused to remain silent in the face of accusation by holding that evidence of the exercise of this right could not be introduced into the trial of the defendant:

> In accord with our decision today , it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact

> that he stood mute or claimed his privilege in the face of accusation.

In Jones v. State, supra, the court adopted the above-quoted language of Miranda. The court held that any comment upon the defendant's standing mute, or refusing to testify, in the face of an accusation, was reversible error requiring per se a new trial.

The Jones decision was cited with approval by this Court in Bennett v. State, supra. In Bennett, a witness had testified that the defendant had refused to sign a waiver of his Miranda rights and implied that the defendant had refused to make a statement. This Court held that the reference to the defendent's exercise of his right against self-incrimination was reversible error "of constitutional dimension" and without regard to the harmless error doctrine for the reasons discussed in Jones v. State, supra. The defendant's conviction was reversed even though the trial court had instructed the jury to disregard the improper testimony. See also, State v. Strasser, 445 So.2d 322, 323 (Fla. 1984) (on rehearing); State v. Burwick, 442 So.2d 944, 947 (Fla. 1983); Harris v. State, 438 So.2d 787, 794 (Fla. 1983); Shannon v. State, 335 So.2d 5 (Fla. 1976); Chester v. State, 444 So.2d 1051 (Fla. 1st DCA 1984); Ford v. State, 431 So.2d 349 (Fla. 5th DCA 1983).

In the instant case, the prosecutor questioned the arresting officer as to the Miranda rights given to the defendant and as to whether an attempt had been made to take a statement from the defendant. (R7-9) In answer to this direct question by

the prosecutor, the officer indicated that the defendant had exercised his right to remain silent:

> Q. [by prosecutor]: Did there come a time when you ever asked him if he was coerced into making a statement, or did you ever attempt to take a statement from him?
>
> A. [by Officer John Deal]: Ah, I never asked him that. I never . . . I asked him, but he refused to give me any information as far as -- (R9)

Thereupon the defense counsel objected and moved for a mistrial on the basis of an improper comment on the right of the defendant to remain silent. (R9-10) The motion for mistrial was denied. (R10-11)

This testimony established that the defendant had exercised his Fifth Amendment right to remain silent while under police custodial interrogation. Thus, it is clear that this testimony elicited by the prosecution, over the defendant's objection, was improper under Bennett, Jones, and Miranda, supra. Rowell v. State, supra.

The necessity of this holding is clear, yet the state complains that the per se reversal rule in this situation, the law of this State for at least the past nine years (if not longer, Jones v. State, supra), should no longer apply to this constitutional violation. Citing this Court's comment in State v. Murray, 443 So.2d 955, 956 (Fla. 1984), which noted agreement with certain language in the case of United States v. Hasting, ___U.S.___, 76 L.Ed.2d 96, 106 (1983), concerning the application of the harmless error doctrine in particular circumstances, the state argues that the constitutional error here (a direct

reference to the accused's silence at the time of arrest), is no longer considered per se reversible error.

It should first be noted, as did the district court, that neither the Murray decision, nor the Hasting decision involved a reference to the defendant's post-arrest, pre-trial silence, but rather dealt with overzealous prosecutorial comment on defense tactics (Murray) or with a prosecutor's somewhat nebulous argument about certain uncontradicted allegations and evidence (Hasting, 76 L.Ed.2d at 101-102, 110-111). See, DiGuilio v. State, ___So.2d ___, 9 FLW 736, on rehearing, 9 FLW 1326 (Fla. 5th DCA Case No. 82-1235, 6/14/84). Furthermore, the holding in Hasting was nothing new for the Court; it based its decision entirely on the 1967 case of Chapman v. California, 386 U.S. 18 (1967). Therefore, the state's contention that the decisions of Bennett and its progeny, which were all decided long after the Chapman case, have now for some reason lost their import due to this "new" ruling in Hasting is completely misguided. Moreover, the Hasting decision was based entirely on the federal appellate courts' supervisory powers over federal prosecutions and prosecutors who had been routinely ignoring directives from the appellate court.

Chapman and Hasting themselves recognize that there do exist certain constitutional violations at trial which will require reversal of a defendant's conviction without regard to the harmless error doctrine, including violations of a defendant's fifth amendment rights. Chapman v. California, 386 U.S. at 23-24, 42-44; United States v. Hasting, 76 L.Ed.2d at

106. Moreover, as stated in Connecticut v. Johnson, ___U.S.___, 74 L.Ed.2d 823 (1983) (Stevens, J., concurring), Chapman "does not **require** a state appellate court to make a harmless error determination; it merely **permits** the state court to do so in appropriate cases." (emphasis in original) See also, United States v. Hasting, 76 L.Ed.2d at 117 (Brennan and Marshall, JJ., concurring in part, dissenting in part). Therefore, the state's argument that this Court must follow any harmless error decisions of the federal courts (Petitioner's Brief, pp. 11-12) is erroneous.

The respondent submits that a reference at trial in front of the jury that the accused exercised his right to remain silent should continue to be treated as reversible error of substantial constitutional dimensions to warrant reversal without regard to the harmless doctrine, as this Court has held repeatedly. In Breniser v. State, 267 So.2d 23, 24 (Fla. 4th DCA 1972), the court explained why a new trial is necessary when testimony that a defendant remained silent after being taken into custody is elicited:

> There was no reason for the prosecution to introduce evidence of the fact that appellant had claimed his constitutional privilege of remaining silent after he had been taken into police custody. The average juror may well believe that at such moment an accused who felt himself innocent would have no hesitancy in fully discussing the matter with the police, and conversely, an accused who elected to exercise the constitutional privilege "had something to hide." The United States Supreme Court made it clear in its decision in Miranda v. Arizona

> [citation omitted], that the prosecution may not use at trial evidence of the accused claiming the privilege to remain silent.

The Fifth Circuit Court of Appeals, in reaching a similar conclusion in Walker v. United States, 404 F.2d 900 (5th Cir. 1968), stated that it would be naive to fail to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt. The Walker court quoted from Ullman v. United States, 350 U.S. at 426-427, wherein Mr. Justice Frankfurter, speaking for the Court, stated:

> This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.

See also, United States v. Hasting, 76 L.Ed.2d at 110-111 (Stevens, J., concurring); State v. Burwick, supra at 949.

Furthermore, to rule that the harmless error doctrine does apply in this instance would allow prosecutors to act with impunity in eliciting such impermissible comments. Although Chapman permitted a harmless error analysis for comments of the nature involved therein, it did not contemplate fully the possible results of increased prosecutorial disregard for the holding that such comments were improper. Concurring in the decision, Justice Stewart noted that "prosecutors are unlikely to indulge in clear violations of Griffin in the future." Chapman

v. California, 386 U.S. at 45. The dissent went further, reasoning that a harmless error analysis is inappropriate in cases involving intentional prosecutorial misconduct. Id. at 52 n.7, 55 n.9.

The potential for abuse of the Chapman doctrine has been widely recognized. The Chapman Court itself noted that "harmless error rules can work very unfair and mischievous results." Id. at 22. The federal appellate courts have been cognizant of prosecutors' increasingly misplaced reliance on the doctrine following the commision of constitutional error. See, e.g., United States v. Sanders, 547 F.2d 1037, 1942 (8th Cir. 1976); United States v. Rodriguez, 627 F.2d 110, 113 (7th Cir. 1980); United States v. Hammond, 598 F.2d 1008, 1013-1014 (5th Cir. 1979). See also, United States v. Hasting, 76 L.Ed.2d at 117-118 (Brennan and Marshall, JJ., concurring in part, dissenting in part). As the court stated in United States v. Stewart, 576 F.2d 50, 56 (5th Cir. 1978):

> We cannot, as the government urges, allow the Chapman harmless error rule to be a Monday-morning quarterbacking appellate vehicle that justifies ignoring the plainest requirements of established constitutional and procedural principles as though they did not exist.

Commentators have warned that the automatic application of the harmless error rule by the courts could result in deliberate government misconduct in future cases. See, e.g., Mause, "Harmless Constitutional Error: The Implications of Chapman v. California," 53 Minn.L.Rev. 519, 522-554 (1969); Note, "Principles for Application of the Harmless Error Standard," 41

U.Chi.L.Rev. 616,626 (1974); Note, "Harmless Constitutional Error: A Reappraisal," 83 Harv.L.Rev. 814 (1970). In fact, at least one commentator has urged that harmless error rules chould never be applied to cases of intentional constitutional misconduct by the government. Field, "Assessing The Harmlessness of Federal Constitutional Error -- A Process in Need of a Rationale," 125 U.Pa.L.Rev. 15, 29 n.56 (1976).

In this regard, the respondent cannot agree with the attorney general's assessment of the error as an "unintentional slip of the tongue by a state's witness, not specifically elicited by a prosecutor." (Petitioner's Brief, p.10) The witness' answer was specifically elicited by the state by the question, ". . . did you ever attempt to take a statement from him?" (R9) This elicitation of evidence of the defendant's exercise of his constitutional privilege of silence at the time of arrest is error and requires reversal without regard to the harmless error doctrine as held by this Court in Bennett, and the myriad of other cases in this State following that decision. This is true notwithstanding the inapplicable cases of United States v. Hasting, supra; and State v. Murray, supra. The rule of automatic reversal when dealing with the substantial constitutional right to remain silent at the time of arrest is still alive in Florida. See, State v. Strasser, supra (rehearing decided after the decision in Murray); State v. Burwick, supra; Harris v. State, supra; Donovan v. State, 417 So.2d 674 (Fla. 1982); DiGuilio v. State, supra; Chester v. State, supra.

In conclusion, the words of Mr. Justice Drew in Grant v. State, 194 So.2d 612, 615-616 (Fla. 1967), are quite appropriate:

> The State has undoubtedly spent thousands of dollars and hundreds of hours have been devoted by state officials and others in the investigation and prosecution of this appellant. Now, as in an increasing number of cases reaching us in recent years, we must undo all of that which has been done and send this case back for a new trial. To some it might appear to be straining at technicalities to reverse this case in which literally thousands of words were spoken for the mere utterance of 30 words, but this result is required not by the whims of individual feelings of the Justices of the Court but because the law which we, and those others who exercised the State's sovereign power in the trial and prosecution, are sworn to uphold has been patently disregarded. The rules which govern the trial of persons accused of crime in our courts are the result of hundreds of years of experience. With their manifold faults, they have proven to be man's best protection against injustice by man.

POINT II

AS FOUND BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, THE TESTIMONY ELICITED BY THE PROSECUTOR DID CONSTITUTE A COMMENT ON THE RESPONDENT'S RIGHT TO REMAIN SILENT AT THE TIME OF HIS ARREST.

In determining whether an improper comment was made regarding the defendant's exercise of his right to remain silent, the appropriate test, as correctly applied by the district court in the instant case, is whether the comment is "fairly suceptible" to interpretation by the jury as a reference to the defendant's exercise of his right to remain silent. Trafficante v. State, 92 So.2d 811 (Fla. 1957); Bain v. State, ___So.2d___, 8 FLW 2655 (Fla. 4th DCA Case No. 82-1522, 11/2/83). The elicited remark in the instant case clearly was subject to such an interpretation, which would bring it within the constitutional prohibition, regardless of its susceptibility to a different construction. Id.; DiGuilio v. State, supra.

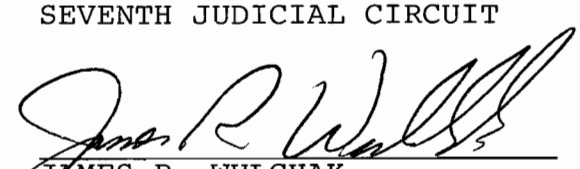
Reversible error occurred here, necessitating a new trial.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the respondent requests that this Honorable Court answer the certified question in the negative, affirm the decision of the District Court of Appeal, Fifth District, and remand the cause for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Mr. Alonza Rowell, S.O. 117245, Cuyahoga Corr. Ctr., 415 W. 3d Street, Cleveland, Ohio 44115 on this 16th day of July, 1984.

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