IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ANGELO JOHN DIGUILIO,

Respondent.

CASE NO. 65,490

PETITIONER'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent and co-defendant were charged jointly in an amended Information, filed in the Volusia County Circuit Court, with one count of trafficking in cocaine, in violation of §§ 893.135(1)(b)(3) and 777.011 Fla. Stat. (1981), and one count of conspiracy to traffic in cocaine, in violation of §§§ 893.135(1)(b)(3), 777.011 & 777.04(3) Fla. Stat. (1981) (R584A-584B). Appellant entered a plea of not guilty and was tried, alone, before a jury on June 7-10, 1982.

During Respondent's trial, the State presented the following evidence to the effect that Respondent was a conspirator in the scheme to traffic cocaine. The State's primary evidence to such effect was two tape-recordings. In one, Respondent's co-defendant, Carl Rosa, the putative seller of the cocaine, informed one of the police agents that one "John" was waiting at a nearby motel room "holding" the cocaine until all negotiations and arrangements were complete (R220, 650, State's Exhibit #8). When Rosa subsequently met with the putative buyers of the cocaine, he stated that his partner did not wish to meet any of them and that he [Rosa] would go and get the cocaine and bring it back (R134, State's Exhibit #8). Rosa was under surveillance by a number of police agents and he was observed driving straight across the street to another motel and returning therefrom, within minutes, with Respondent (R264, 281, 282); a room key and receipt, the latter made out in Rosa's name, and relating to the motel across the street, were introduced into evidence (R184).

When Rosa returned to the room, he had the cocaine in his possession (R136); minutes later, Rosa and Respondent, who had waited outside the room in the car, were arrested. They were later moved to a police vehicle and their conversation therein tape-recorded. Respondent had earlier told the arresting officers that he had been picked up at his home in South Daytona and driven to the scene of the arrest (R331). At this time, Respondent and Rosa began a discussion of their circumstances (R658, State's Exhibit #9). Respondent told Rosa what he had earlier told the police, claiming that no one had a case against him, as all he had done was sit in a car (State's Exhibit #9). Respondent expressed satisfaction that two participants in the scheme had apparently gotten away and he asked Rosa if the "stuff" had been seized or if he [Rosa] had left his fingerprints upon it (R658, State's Exhibit #9).

Also during Respondent's trial, a motion for mistrial was made. During direct-examination, the State asked Deputy Wyatt about his conversation with Respondent at the time of the latter's arrest (R330; App. 1). Wyatt recounted that Appellant had been read his rights, pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and that the following exchange had taken place:

> Q: [by prosecutor]: What rights was he advised of, if you could? Do you have a card you could read from?
>
> A: Agent Grayson has the card.
>
> Q: Do you have one of those with you?
>
> A: I do not. He was advised he had the right to

remain silent. Anything he did say could and would be used against him in a court of law. He was advised he had a right to an attorney before questioning. If he could not afford an attorney, one would be appointed for him. And he did not have any statements.

Q: Did he acknowledge these rights?

A: Yes, sir.

Q: Did he indicate whether or not he would be willing to answer any questions?

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

MR. KEATING: [Respondent's Attorney]: I would like to approach the bench.

THE COURT: Yes, sir.

[Side-bar off record discussion]

THE COURT: Mr. Stark, you may go ahead.

MR. STARK:

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

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

Q: No further questioning?

A: No.

Q: With respect to the surveillance that you and Agent Grayson conducted on that day --

MR. KEATING: Your Honor, before we continue, I'd like to have a motion outside the presence of the jury. (R330-1; App. 1).

Respondent's counsel then made a motion for mistrial on the basis that the prosecutor had asked the witness to comment upon Respondent's right to remain silent (R332; App. 1). The trial judge had the questioning read back and further asked the witness certain clarifying questions of his own (R333-335; App. 1). Such clarifying questioning comprised the following:

> THE COURT: Let me ask the witness to clarify the questions. And maybe I wasn't listening as carefully as I could.
>
> Lieutenant, when you first -- I quess Grayson first advised the Defendant of his rights?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: All right. What was the next thing said after he told him what his rights were?
>
> THE WITNESS: Of course, at that point, he acknowledged his rights. He understood them.
>
> THE COURT: What was the next thing said after he acknowledged he understood them?
>
> THE WITNESS: Nothing was said. But, nothing was asked of him.
>
> THE COURT: When did he begin giving the information to you relating about where he had come from?
>
> THE WITNESS: We were there as containment because of the other officers on the other side of the motel until such times as the other arrest, Mr. Rosa's arrest and we could get someone around. Agent Grayson had another assignment to collect the evidence. And we just stood there in kind of a silence at that time. Of course, we did check Mr. DiGuilio for weapons. He wasn't searched at that time. And, of course, we retrieved identification from him.
>
> THE COURT: When did he next speak?
>
> THE WITNESS: This was approximately, I guess, fifteen or twenty minutes later, when this

conversation took place between Mr. DiGuilio and myself.

THE COURT: And how was the conversation initiated?

THE WITNESS: I asked him.

THE COURT: What did you ask him?

THE WITNESS: I asked him where he lived and he said South Daytona. And I asked him how he got to the location and he said he had come up from South Daytona with a friend. And I asked him if he had come directly from South Daytona and he indicated that he had.

THE COURT: All right. Okay. (R333-335; App 1).

The trial court held that the officer had never stated that Respondent had invoked his right to remain silent before answering the questions and held that Respondent had in fact waived such right and talked. Motion for mistrial was denied (R335-6; App. 1).

The jury acquitted Respondent as to the trafficking charge, but returned a verdict of guilty as to conspiracy (R617). Respondent was adjudicated thereupon and sentenced to a term of ten years incarceration (R622-625). Respondent appealed such judgment and sentence to the Florida Fifth District Court of Appeal and included as one point on appeal the denial of his motion for mistrial in reference to the above testimony. In its decision, DiGuilio v. State, Case No. 82-1235 (Fla. 5th DCA March 29, 1984)[9 FLW 736], the appellate court found all of Respondent's arguments to be without merit, except for that relating to the instant motion for mistrial. The court noted that there was sufficient evidence to support the conviction, "eliminating the impermissible testimony";

the court found, however, that the officer's testimony amounted to an improper comment upon Respondent's right to remain silent. Citing to a number of decisions by other district courts of appeal, as well as to this Court's opinion of Shannon v. State, 335 So.2d 5 (Fla. 1976), the court reversed and remanded for a new trial (See App. 2, copy of original opinion).

Petitioner filed a timely motion for rehearing on April 13, 1984 and urged the appellate court to reconsider its decision in light of this Court's decision of State v. Murray, 443 So.2d 955 (Fla 1984); Petitioner contended that by its citation to United States v. Hastings, ___U.S. _____, 103 S.Ct. 1974 (1983), in such decision, this Court had receded from its prior position that harmless error was inapplicable in instances involving alleged comments upon a defendant's right to remain silent. In its decision upon rehearing, DiGuilio v. State, Case No. 82-1235 (Fla. 5th DCA June 14, 1984) [9 FLW 1326], the district court denied such motion, but certified the below question as one of great public importance, pursuant to Rule 9.030(a)(2)(A)(v) Fla. R. App. P.:

> Has the Florida Supreme Court, by its agreement in State v. Murray, 443 So.2d 955 (Fla. 1984), with the analysis of the supervisory powers of appellate courts as related to the harmless error rule as set forth in United State v. Hasting, ___U.S. ___, 103 S.Ct.1974, 76 L.Ed.2d 96 (1983), receded by implication from the per se rule of reversal explicated in Donovan v. State, 417 So.2d 674 (Fla. 1982), Shannon v. State, 335 So.2d 5 (Fla. 1976); and Bennett v. State, 316 So.2d 41 (Fla. 1975)?

The Fifth District Court of Appeal stated on rehearing that but for its inability to apply harmless error, it would affirm the conviction, because the error complained of was harmless beyond any reasonable doubt; the reversal was predicated upon what the court perceived as the per se rule of Bennett, Shannon and Donovan. (See App. 3, Copy of Opinion on Rehearing).

A timely Notice to Invoke Discretionary Jurisdiction was filed by Petitioner on June 21, 1984 and, on July 11, 1984, the district court stayed issuance of mandate pending this Court's disposition of the cause. A certified question virtually identical to that sub judice is pending before this Court in the case of State v. Rowell, Florida Supreme Court Case No. 65,417.

ARGUMENT

BY ITS AGREEMENT WITH THE ANALYSIS OF THE SUPERVISORY POWERS OF APPELLATE COURTS AS RELATED TO THE HARMLESS ERROR RULE, AS SET FORTH BY THE UNITED STATES SUPREME COURT IN UNITED STATES V. HASTING, U.S. ,103 S.Ct.1974 (1983), THIS COURT, IN STATE V. MURRAY, 443 SO.2d 955 (FLA. 1984), RECEDED BY IMPLICATION FROM THE PER SE RULE OF REVERSAL EXPLICATED IN DONOVAN V. STATE, 417 So.2d 674 (FLA. 1982), SHANNON V. STATE, 335 So.2d 5 (FLA. 1976) AND BENNETT V. STATE, 316 So.2d 41 (FLA. 1975); THIS COURT SHOULD UTILIZE THE INSTANT CASE AS A VEHICLE TO MAKE SUCH RECESSION EXPRESS.

The Fifth District certified the instant question because it recognized the inherent conflict between United States v. Hasting and Donovan v. State et al; one holds that harmless error can be found in situations involving an alleged comment upon a defendant's silence while the other, and its predecessors, holds to the contrary. As long as Hastings exemplified the position of the federal courts and Donovan et al that of the courts of this state, the difference in opinion was worthy of note, but no cause for disturbing precedent. Cf. Lee v. State, 422 So.2d 928 (Fla. 3d DCA 1982), cert. denied, 431 So.2d 989 (Fla. 1983). By this Court's statement in Murray, however, that it agreed with the analysis utilized by the United States Supreme Court in Hasting, the differences in approach between the two court systems would seem to have been mooted. This Court's citation with favor to Hasting, as well as to Chapman v. California, 386 U.S. 18

(1967) and its progeny, is definitely susceptible to the inference that this Court has found the logic of the former preferable to that of Bennett, Shannon and Donovan.

While the instant certified question is one, in effect, seeking guidance from this Court, it is not one asking this Court to choose between two conflicting decisions or propositions of law. Rather it is one asking this Court what it itself has done in a certain decision. Petitioner does believe that this Court has receded by implication from Bennett, Shannon and Donovan. Petitioner does, however, also find it somewhat bordering on the presumptuous to instruct this Court upon what it has meant by its own actions, a subject upon which this Court, obviously, is the only expert. Accordingly, for the sake of argument, Petitioner assumes that the certified question in this case should be answered in the affirmative and utilizes the instant brief as a means to exhort this Court to make such recession explicit. If in fact Murray was not intended for the purpose assumed, Petitioner simply uses this opportunity to urge this Court to adopt the federal position regarding harmless error and comment upon a defendant's silence.

To begin with, it is worth noting, as the district court below did, that there is more than one type of defense silence. One is a failure to testify at trial; another is an arrestee's silence following the reading of Miranda rights. Florida, through statute, rule of criminal procedure, and caselaw has consistently recognized that comment upon the former

silence is reversible error. See e.g. Rowe v. State, 87 Fla. 17, 98 So. 613 (1924); Way v. State, 67 So.2d 321 (Fla. 1953); Trafficante v. State, 92 So.2d 811 (Fla. 1957). Prior to 1975, however, this Court did not regard as impermissible the admission into evidence of a defendant's post-arrest silence. See e.g. Albano v. State, 89 So.2d 342 (Fla. 1956). Similarly, although this Court had held that the State could not comment upon a defendant's silence at a prior court proceeding, see Simmons v. State, 139 Fla. 645,190 So. 756 (1939), this Court expressly disapproved such decision in State v. Hines, 195 So.2d 550 (Fla. 1967). Perhaps most importantly, in State v. Galasso, 217 So.2d 326 (Fla. 1968), this Court held that the admission into evidence for impeachment purposes of a defendant's pre-trial statements, tainted by reason of a failure to give Miranda warnings, did not constitute reversible error. While finding such admission impermissible, this Court expressly applied the harmless error statute, § 924.33 Fla. Stat. (1967), and ordered the conviction affirmed. Interestingly enough, one of the case cited for conflict, and noted in this Court's decision,was Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967).

Seven years later, Jones v. State regained this Court's attention with something of a vengeance. Thus, in Bennett v. State, 316 So.2d 41 (Fla. 1975), it was put to entirely different use when this Court quashed the decision of the lower appellate court, a per curiam affirmance, on the basis of such case's conflict with Jones. Jones had held that the admission into evidence of testimony that the accused,

while in custody remained silent in the face of an accusation of guilt, was per se harmful reversible error which was so fundamental that it could be reached on appeal despite lack of objection. Jones reached this conclusion based solely upon the United States Supreme Court's statement in Miranda that the prosecution may not "use" at trial the fact that a defendant has stood mute or claimed his privilege in the face of accusation; the Third District noted that its decision changed the law in Florida, including that announced by this Court in Albano, supra. In Bennett, this Court basically adopted the reasoning of Jones, and after examining certain testimony at trial, found that reversible error had occurred. This Court's position on the applicability of harmless error was not beyond peradventure, however. While first noting that the error complained of was of constitutional dimension and warranted reversal without consideration of harmless error, this Court then went on to state that "in any event", the error should not be regarded as harmless if there was a reasonable possibility that it might have contributed to the conviction. This Court then cited to certain federal precedents on harmless error, including Chapman v. California, supra, and stated that under no stretch of the imagination could it be said that the evidence against petitioner was overwhelming. In one concurring opinion, Justice England stated that the instant decision overruled Galasso; in another concurring opinion, Justic Overton noted that the error was prejudicial and not harmless.

Any doubt as to the applicability of the harmless error rule was removed when this Court decided Shannon v. State, 335 So.2d 5 (Fla. 1976). In such case, this Court reversed the decision of the lower court, wherein such court had found the prosecutor's argument to constitute harmless error. This Court stated that any comment upon an accused's exercise of his right to remain silent constituted reversible error without regard to the harmless error rule. In Willinsky v. State, 360 So.2d 760 (Fla. 1978), this Court reiterated such holding and extended it to apply to situations involving a defendant's silence at any stage, such as a preliminary hearing, where the right to silence is protected; Galasso was cited, without favor, and, in effect, Simmons v. State was reinstated. Similarly, in Donovan v. State, 417 So.2d 674 (Fla. 1982), this Court acknowledged that any comment upon an accused's exercise of his right to remain silent is reversible error without regard to the harmless error doctrine, although in such case the alleged comments were found not to be objectionable.

Yet, it is also significant that this Court has, in certain respects, found the per se reversal rule not applicable. Thus in Clark v. State, 363 So.2d 331 (Fla. 1978), this Court held that an objection and motion for mistrial were necessary in order to preserve any point on appeal regarding an alleged improper comment upon a defendant's silence. Similarly, in Jackson v. State, 359 So.2d 1190 (Fla. 1978) and Brown v. State, 367 So.2d 616 (Fla. 1979), this Court refused to reverse the convictions at issue where the defense, rather than the State,

had brought to the jury's attention a defense silence. Whereas such result is no doubt partly explainable in this Court's refusal to "reward" invited error, see also Clark, supra, Petitioner contends that it is also a recognition that evidence of a defendant's silence does not per se irretrievably taint a trial to the extent that no fair verdict can be reached. Additionally, it should be noted that in Barfield v. State, 402 So.2d 377 (Fla. 1971), this Court, citing to one of the federal precedents on harmless error, Harrington v. California, 395 U.S. 250 (1969), found the admission into evidence of several statements and a diagram, arguably obtained in violation of Miranda, to be harmless error given the overwhelming evidence of guilt against the defendant. It is unclear what Barfield's relationship is to Bennett, Shannon and Donovan, although its approach to this subject is similar, again, to that which this Court employed recently in Jones v. State, 449 So.2d 253 (Fla. 1984). In such case this Court cited to Hasting, supra, for the proposition that the admission into evidence of the fact that a defendant refused to take a polygraph was harmless error. One can certainly make the analogy between an "ambiguous" failure to take a polygraph and an "ambiguous" silence following Miranda warnings.

The sum total of the above chronology is that the law on this subject seems everchanging; one could say that the life of such law has been experience. Despite the outward appearance of a per se rule, such rule has undergone revision to accomodate other interests, such as the need for contempo-

raneous objection or the need to only penalize the State when it has, in the words of Jackson, attempted to gain a conviction on the basis of a defendant's silence. Petitioner contends that it is time for another evolutionary change in this area, such that any claim of error in regard to an alleged comment upon a defendant's silence be eligible to be reviewed in terms of harmless error.

To Petitioner's knowledge, the appellate issue before this Court in this case is the only issue which is exempt from consideration in reference to harmless error. All other claims of error are evaluated, as this Court held in Palmes v. State, 397 So.2d 648 (Fla. 1981), in conformance with the standard that no judgment will be reversed unless the error complained of is prejudicial to the substantial rights of a defendant; such prejudice will never be assumed. See also Salvatore v. State, 366 So.2d 745 (Fla. 1978). In determining whether or not an error or erroneous ruling has caused harm to the substantial rights of a defendant, an appellate court will consider all relevant circumstances, including any curative instruction or event, as well as the general weight and quality of the evidence; the primary test is whether but for the erroneous ruling, it is likely that the result would have been different. Although even "constitutional error" can be harmless if the evidence of guilt is overwhelming, such finding cannot be made if there is a reasonable possibility that the error may have contributed to the accused's convictions or if it cannot be said to be harmless

beyond a reasonable doubt. See also Drake v. State, 441 So.2d 1079 (Fla. 1983). This Court has applied harmless error in myriad circumstances, including the review of cases in which a sentence of death has been imposed, and has consistently affirmed where there has been no showing that a defendant has been impermissibly prejudiced by any asserted error.

A useful point of comparison is cases involving the erroneous admission into evidence of a defendant's guilt of or involvment in other uncharged criminal activity. Thus in State v. Wadsworth, 210 So.2d 4 (Fla 1968), this Court found no reversible error where, in a vehicular manslaughter prosecution in which it had been alleged that the accused had been intoxicated, the fact that such accused had habitually purchased several miniature bottles of alcohol every week was allowed into evidence; such result was proper due to the strength of the evidence against Wadsworth. Similarly, in Rivers v. State, 226 So.2d 337 (Fla. 1969), an early capital case this Court found a fair verdict possible, despite the fact that a witness had volunteered the fact that the defendant had been arrested on another murder charge. Similar results, although involving less inflammatory collateral crimes, were reached in Johnson v. State, 393 So.2d 1069 (Fla. 1980)(possession of weapon other than the murder weapon), Ferguson v. State, 417 So.2d 639 (Fla. 1982)(prior imprisonment), Smith v. State, 424 So.2d 726 (Fla. 1982)(unrelated theft of a rifle), Waterhouse v. State, 429 So.2d 301 (Fla. 1983)(unrelated possession of marijuana). Obviously in each of these cases it could be argued that the jury was

more likely to convict because they "knew" that the defendant had been guilty of some other crime. This Court just as obviously found such speculation not to be determinative and further found that a reviewing court was competent to review claims of error in such regard. Claims of error regarding the allegedly erroneous admission into evidence of, or "comment upon", a defendant's silence should be treated accordingly.

It must be noted that federal courts already do so. Numerous federal court of appeal are apparently quite comfortable applying harmless error to Miranda-related issues. See e.g. United States v. Sklaroff, 552 F.2d 1156 (5th Cir. 1977), cert denied, 434 U.S. 1009 (1978); Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977), cert. denied, 435 U.S. 929 (1978); Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979); United States v. Whitaker, 592 F.2d 826 (5th Cir.), cert. denied, 444 U.S. 950(1979); United States v. Staller, 616 F.2d 1284 (5th Cir.),cert. denied, 449 U.S. 869 (1980). In Miranda v. Arizona itself the United States Supreme Court mandated no per se reversal rule as a sanction to be applied for any violations thereof and, indeed, in Chapman v. California suggested that similar errors could in fact be considered pursuant to the harmless error rule. Both Chapman and Hasting involve more than clumsy testimony by a prosecution witness; they involve direct prosectorial comment upon a defendant's failure to testify at trial. Surely if the United States Supreme Court, responsible for seeing to it that federal constitutional rights are protected in either

state or federal proceedings, can envision a situation in which such error can be considered harmless, then, with all due respect, this Court can and should do likewise. Cf. Chaney v. State, 267 So.2d 65 (Fla. 1972).

This conclusion is a particularly apt one, when one considers some of the "comments" upon which reversal has been predicated. In Bain v. State, 440 So.2d 454 (Fla. 4th DCA 1983), cited by the appellate court below, the defendant's conviction was reversed because, in testifying as to Bain's post-Miranda interview, the arresting officer stated that at one point the defendant was "unsure" of himself. In Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981), the conviction at issue was reversed, despite admittedly overwhelming evidence of guilt, because the arresting officer had testified that at one point the defendant would not explain something; alternatively it was noted that reversal could equally have been predicated upon the fact that Peterson had stated that he would answer some questions but stop when he did not want to answer anymore. Petitioner respectfully suggests that the per se reversal rule has prevented appellate courts from dispensing justice to all parties, including the State. No societal interest was furthered by the above-described reversals.

Furthermore, no societal interest was furthered by the reversal of the conviction in this case. Petitioner has no desire to run afoul of this Court's dictum in State v. Hegstrom, 401 So.2d 1343, 1344(Fla 1981), to the effect that this Court will not accept a case for review on one basis and

then construe the evidence in such a way as to avoid ruling upon the issues provoking jurisdiction. Nevertheless, Petitioner does continue to question whether or not an impermissible comment was made in this case. As the trial judge below found, inasmuch as Respondent never remained silent following advisement of his Miranda rights, no impermissible comment took place. Compare Donovan; supra. Any illusory impression to the contrary, provided by the testifying officer, i.e. when such officer stated that at one point Respondent "didn't say", was dispelled when the officer then began describing what Respondent had told him (See App. 1). Petitioner does not concur with the court below that whenever a jury is told that a defendant has "refused" to provide some specific bit of information, such jury automatically conjures up an invocation of the Fifth Amendment; Petitioner further challenges the finding that once the jury below heard that Respondent "felt like he should speak to his attorney", such jury "penalized" him for indicating such desire. Given the equivocal nature of the last statement, such that it would not likely be construed a demand for counsel, see Waterhouse, supra, Petitioner is unable to see any harm to Respondent. In any event, Petitioner has presented the above argument, in view of the fact that this Court may, if it wishes, consider any error in the record properly before it on certiorari. Cf. Lawrence v. Florida East Coast Ry. Co., 346 So.2d 1012 (Fla. 1977). Error or not, reversal was not warranted in this case.

The district court noted in its opinion on rehearing that the alleged error committed was harmless beyond any reason-

able doubt. This Court should afford the court below the opportunity to apply harmless error in this case. As the United States Supreme Court observed in Schneble v. Florida, 405 U.S. 427, 432-3 (1972),

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with judge's instructions, stares us in the face. [citation omitted].

We trust juries to disregard every other type of potentially reversible error; we trust reviewing courts to properly assess prejudice in reference to every other claim of error. We do a disservice to both by continuing to hold this one area beyond their purview. During that interval when errors such as that allegedly committed sub judice could safely be considered as candidates for harmless error, this Court observed in Galasso that"[for] an inconclusive and insubstantial colloquy [to] vitiate an otherwise proper trial so as to require reversal [would tend] to make a mockery out of our system of jurisprudence." Id at 330 Those words are still true and bear application today. This Court should answer the certified question in the affirmative and, if it has not already done so, align itself with the federal position in regard to harmless error and comments upon a defendant's silence.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully moves this Honorable Court to answer the instant certified question in the affirmative and to quash the decision of the district court below and reverse and remand with instructions consistent therewith.

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 mail to John W. Tanner, Esquire, 630 N. Olive Avenue, Suite A, Daytona Beach, Florida 32018, this 16 day of July, 1984.

Of Counsel
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