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IN THE SUPREME COURT OF FLORIDA

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CASE NO. 66,888

THE STATE OF FLORIDA,

Petitioner,

vs.

GEORGE BURNS,

Respondent.

* * * * * * * * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * * * * * * * *

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Statement of the Facts recited in the Brief of Petitioner on the Merits with the following additions and clarifications:

Prior to trial, the Defendant made a Motion in Limine. (R. 28). The Motion was treated as a Motion to Suppress Statements by the trial court, as it alleged that on June 8, 1983, a detective, during the administration of the Miranda warnings to the Defendant, heard the Defendant state:

> I ain't making no kind of statement at all. It couldn't be none of me because I went into the Job Corps in Georgia in November of 1981. (R. 28, T. 5-6).

The Motion was denied by the Court. (R. 28).

Defense counsel argued that the statement was irrelevant since the crime was alleged to have occurred in July, 1981, that it was prejudicial and an impermissible comment on the Defendant's exercise of his right to remain silent. (R. 28).

Detective James Bigler, employed by the Metro Dade Police Department Sexual Battery Unit was called by the State to testify. (T. 239).

During Detective Bigler's testimony, there was an overnight recess. (T. 270). The following morning, prior to the resumption of the detective's testimony, the Court

stated it wanted to discuss evidentiary matters. (T. 279). The trial judge noted the defense renewed its Motion in Limine regarding the Defendant's statement to Detective Bigler concerning the Job Corps. (T. 279). The Court ordered the State to elicit the testimony by inquiring as follows:

> Q. And after he was arrested and you were at the Police Headquarters, did he make a statement spontaneously to you?
>
> A: Yes.
>
> Q: What was it?
>
> A: Because I don't want him going through the Miranda Rights because that could constitute a comment on the Defendant's invoking of the Miranda Rights, understand? (T. 280).

In Addition, the trial judge ruled on an interrelated defense objection concerning two Metro Dade Police Officers not involved in the arrest of the Defendant or the investigation of the case at bar. (T. 280-281).

The State intended to call the two Police Officers to show that the Defendant was in Dade County in July, 1981. (T. 280-281). The Court ruled that even though the statement allegedly made by the Defendant was that he was in the Job Corps in November, 1981 that if the jury decided the Defendant meant July, 1981, the State could show that the Defendant made a statement concerning his whereabouts that was later determined to be untrue. (T. 282). The Court held that unless the

Defendant would stipulate he was in Dade County on the date of the incident, the two Officers could testify that they saw the Defendant in Dade County. (T. 284, 328-330). The Defendant had filed a Notice of Alibi which was no longer the defense. (T. 280). Detective Bigler then testified over defense objections concerning the Defendant's statement. (T. 290).

The State next called Detective OTIS CHAMBERS to testify. (T. 330). Detective Chambers testified that he is employed as a Detective for Metro Dade Police Department Sexual Battery Unit. (T. 330). He stated he was involved in the Defendant's arrest. (T. 331).

Chambers testified that he was present when Detective Bigler had the initial conversation with the Defendant; that Bigler advised the Defendant of the charges against him; that Bigler advised the Defendant that the offenses had taken place in summer of 1981; and that the Defendant responded. (T. 332). The defense renewed its objection. (T. 332). The defense renewed its objection. (T. 332). Over the defense objection Chambers was permitted to testify that the Defendant stated:

> I ain't making no kind of statement at all. It couldn't have been none of me, because I went into the Job Corps in Georgia in November 1981. (T. 332).

The State next called Officer RAYMOND HOADLEY followed by Officer EARL FUTCH over defense objections. (T. 33, 35).

Each Officer testified that they knew the Defendant, and saw him in Court. (T. 334, 336). Officer Hoadley stated he "had contact" with the Defendant July 24-25, 1981, in Dade County, Florida. (T. 335). Officer Futch testified that on July 17, 1981, he came into contact with the Defendant in Dade County, Florida. (T. 337).

The District Court of Appeal, Third District, determined that...

> There was an impermissible comment on Defendant's post-arrest silence even though the jury did not actually hear testimony that the Miranda warnings were given. Defendant's statement "I ain't making no statements" in response to being told of the charges against him, was and exercise of his right to remain silent.... So as to remove all doubt he executed a document intelligently refusing to waive that right. Burns v. State, ——So. 2d———, 10 F.L.W. 904 (Fla., 3d DCA, Case no. 84-947, April 9, 1985).

In its decision reversing the Defendant's conviction the Third District Court of Appeal found that it was still bound by the per se reversal rule of Donovan v. State 417 So. 2d 674 (Fla., 1982) and other cases. The Court noted that in Rowell v. State 450 So.2d 1227 (Fla., 5th DCA, 1984) (pending in this Court, case no. 65,417 and Grissom v. State , ——— So. 2d—— , 10 F.L.W. 851 (Fla., 3d DCA, March 26, 1985) (pending in this Court, case no. 66,828) the Fifth and Third District Courts of Appeal found that the Florida Supreme Court

in Murray did not expressly recede from the entrenched rule that any comment on an accused's exercise of his right to remain silent is reversible error not subject to the harmless error doctrine.

The Third District Court of Appeal found that Murray was limited in application to the context of prosecutorial misconduct during closing argument where the Defendant's credibility at trial was attacked, the Defendant having testified at trial. Burns v. State, ——So. 2d——, 10 F.L.W. 904, (Case no. 84-947, April 9, 1985).

The Third District Court of Appeal agreed with Rowell that Murray is not necessarily a retreat from the per se reversible error rule stated in Donovan.

The Third District Court of Appeal reversed the Defendant's conviction for a new trial bur directed the State's Question to this Court for consideration.

ARGUMENT

I.

THE DECISIONS OF STATE V. MURRAY, 443 So. 2d 995 (Fla., 1984) AND UNITED STATES V. HASTING, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), HAVE NO EFFECT ON THE PER SE RULE OF REVERSAL EXPLICATED IN DONOVAN V. STATE, 417 So. 2d 674 (Fla., 1982).

The facts involved in any particular case will determine how the law is to be applied by the Courts. Therefore, to fully understand legal conclusions, it is necessary to set forth the specific facts of the cases under consideration. In the Interest of D.B., 385 So. 2d 83, 87, (Fla., 1980).

The Murray, Hasting and Donovan cases are cases which apply the law to totally different, irreconciable sets of facts. Additionally, these cases all differ from the case at bar. Because of the inconsistencies, there is no reason for the Murray and Hasting cases to control either Donovan or the case at bar.

The Hasting case involved a factual pattern where Hasting did not testify at trial. The error claimed was prosecutorial misconduct by the prosecutor's comment on the defendant's failure to testify at trial. The United States Supreme Court held that the supervisory powers of appellate courts will not be used to reverse convictions where the

errors alleged are harmless. The United States Supreme Court further noted in its decision that the particular remark in the Hasting case was at most an "attenuated" violation of Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). Hasting, 76 L. Ed. 2d at page 102. In the Hasting case the comment by the prosecutor was that the defendant did not challenge any of the crimes charged. Hasting, 76 L. Ed. 2d at page 101-102. The Hasting decision was based primarily upon Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

The case of State v. Murray, 443 So. 2d 995 (Fla., 1984) likewise differs from Hasting, Donovan, and the case at bar. Murray testified at trial. There was no Fifth Amendment nor Article I, Section 9 right to remain silent asserted. Murray, at page 956. There was no Donovan question involved in the Murray case. The assistant state attorney who prosecuted the Murray case at trial stated that Murray is a man who thinks he knows the law and can twist it and lie to his own advantage. Murray, at page 956. This was an improper comment on Murray's testimony at trial after he had taken the stand.

In deciding the case, this Court expressly agreed with the analysis of the Court in the Hasting case that:

> The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Murray at page 956.

The statement made by this Court in Murray does not stand in a vacuum. Murray had nothing factually to do with the Privilege Against Self-Incrimination, and certainly nothing to do with the failure of the defendant to testify and the application of the harmless error rule thereon.

The Donovan case is the only case that has any application to the facts in the case under consideration. Therefore, applying the Donovan decision to the case at bar does not make the ruling inconsistent with Murray or Hasting which factually have nothing to do with the Donovan case.

In Donovan this Court stated:

> Any comment on an accused's exercise of his right to remain silent is reversible error, without regard for the harmless error doctrine. Donovan, at page 675.

The Donovan case was a case in which Donovan had allegedly given a statement to a police officer. The police officer testified at trial that Donovan had been given his warnings per Miranda, and further testified about Donovan's actions and statements. Donovan at page 675. This Court found that Donovan had not exercised his right to remain silent. It is implied that had this Court found that Donovan had exercised his right to remain silent, then this Court would have found reversible error without regard to the harmless error doctrine. This Court decided Donovan long after the Chapman v. California case upon which Hasting was decided. Additionally, it should

be noted that the Donovan case related to postarrest silence, and comment on the defendant's silence after being advised of his Miranda Rights. Donovan did not relate to comment on the defendant's failure to testify at trial.

The case at bar, like Donovan concerned testimony by a police officer that after being told what the charges were, the defendant "spontaneously stated" that he was not going to make any statements, but that he was in the Job Corps in Georgia in November of 1981 (the crime allegedly having been committed in July, 1981). (T. 332). The defendant further executed a document intelligently refusing to waive his right to remain silent. Burns v. State, ——So. 2d——, 10 F.L.W. 904 (Fla., 3d DCA, Case no. 84-947, April 9, 1985). Burns did not testify at trial. In the instant case, there was more than an "attenuated" Griffin violation as in the Hasting case. This comment, as will be discussed in detail in Point II herein, was not only a comment on the defendant's exercise of his right to remain silent as guaranteed to him by the Fifth Amendment and Article I, Section 9 of the Florida Constitution; but in the case at bar, the error was compounded by the Court's instructions to the witnesses on what to testify to and how to testify, and by bringing into Court two other police officers totally unrelated to the case to state that they "had contact" with the defendant in July, 1981 to rebut his statement about November, 1981.

The case of Barry v. State, ——So. 2d——, 10 F.L.W. 934 (Fla., 5th DCA, April 11, 1985) is cited by the State in its Brief as finding that the principles adopted in Murray are inconsistent with Trafficante v. State 92 So. 2d 811 (Fla., 1957) and David v. State 369 So. 2d 943 (Fla., 1979) and so therefore these cases no longer apply. Brief of Petitioner on the Merits, page 11. An opinion of a District Court of Appeal cannot change the law established by the Supreme Court of Florida. Only this Court may change its prior decisions. Gilliam v. Stewart, 291 So. 2d 593 (Fla., 1974). The District Courts of appeal are without power to overrule Supreme Court precedent. Hoffman v. Jones, 280 So. 2d, 431 (Fla., 1973).

To date, this Court has not changed its prior rulings on the right to remain silent as guaranteed by the Fifth Amendment of the United States Constitution, and Article I, Section 9 of the Constitution of the State of Florida. This Court has consistently held that any comment on the accused's failure to testify is per se reversible error without regard to the harmless error rule. Donovan, supra; Bennett v. State, 316 So. 2d 41 (Fla., 1975); Shannon v. State, 335 So. 2d 5 (Fla., 1976); Trafficante, supra; David, supra; and State v. Strasser, 445 So. 2d 322 (Fla., 1983) On Rehearing, 1984.

It should be further noted that the Strasser case which was decided by this Court after the Murray decision

made a finding that "Strasser was charged and convicted of robbery in January of 1981 on evidence which supported a conviction of the completed act." Strasser at p. 322. As a result this Court determined that Strasser was not entitled to a new trial due to the trial court's failure to instruct on the crime of attempt. Strasser at p. 323. However, on Petition for Rehearing, this Court noted that the prosecutor elicited from a State witness evidence that Strasser had exercised his right to remain silent. As a result, this Court remanded the case for a new trial. This Court did not choose at that time to follow Murray or Hasting.

This Court is not bound to follow the United States Supreme Court decision in Hasting. Through the State Constitution the citizens of Florida may provide themselves with "more protection from governmental intrusion than that afforded by the United States Constitution." State v. Sarmiento, 397 So. 2d 643, 645 (Fla., 1981) reh. den. 1981. Sarmiento was later quashed in State v. Ridenour, 453 So. 2d 194 (Fla., 3d DCA, 1984) after Article I, Section 12 of the Florida Constitution was amended by general election in 1982 requiring the rights conferred therein to be construed in conformity with United States Fourth Amendment cases. This provision however, is not a part of Article I, Section 9 of the Florida Constitution. In the Ridenour case Judge Hubbart writing a concurring opinion expressed regret:

> I concur in the opinion and judgment of the Court. I write separately, however, to express my sincere regret at the passage of the recent amendments to Article I, Section 12, of the Florida Constitution, inasmuch as they amount, in effect, to a virtual repeal

> of the entire state constitutional right. By these amendments, Florida no longer has a separately protected constitutional right on search and seizure; it is now inexorably linked to the Fourth Amendment and has no independent existence apart from the Fourth Amendment. . . . Perhaps with the passage of time, we will learn what a mistake that decision was and will act to restore Article I, Section 12 to its rightful place in the Florida Constitution. . . .Until then, I think it is clear. . . .that decisions . . .interpreting this constitutional provision to give our citizens greated rights than that guaranteed by the Fourth Amendment, are, most regretably, relics of the past. Ridenour at p. 194.

Since there has been no constitutional amendment to Article I, Section 9, a State Court is still free to place greater restrictions on the use of post-arrest silence than the United States Supreme Court when interpreting the Fifth Amendment. Lee v. State, 411 So.2d 928, 930 (Fla., 3d DCA, 1982) reh. den. 1982; pet. for rev. den. 431 So. 2d 989 (Fla., 1983). The Lee case relies Willinsky v. State, 360 So. 2d 760 (Fla., 1978) reh. den. 1978.

In Lee the Third District Court of Appeal held that as a matter of state constitutional law, it is impermissible to comment on a defendant's post arrest silence whether induced by Miranda warnings or not. Lee at page 931.

The United States Supreme Court permits state courts to impose higher standards than the federal constitution requires on searches and seizures. Cooper v. California 386 U.S. 58 (1967). It has been noted:

> While upholding under the federal constitution a police search of a car held for use as evidence in a forfeiture proceeding, Justice Black noted that the states were free to adopt a more stringent standard through interpretation of their own bills of rights. Despite this encouragement from the Court it was not until the Burger Court began limiting the federal rights of the State defendant that state

> guarantees that had atrophied during the Warren years were dusted off and reinvigorated to provide higher standards than were being porvided by the Supreme Court.
>
> Before turning to the specific substantive areas in which the states have expanded Burger Court standards, it is important to highlight a procedural matter relevant to this discussion. Because the Supreme Court will not review a decision resting on adequate state grounds (citing Herb v. Pitcairn 324 U.S. 117, 126-127), a state court which bases its ruling on the state constitution may effectively preclude Supreme Court oversight. . . .for example, the Burger Court has refused to review a state court's decision based on state constitutional provisions which satisify basic federal requirements. Ironically, this policy insulates those state court decisions which interpret the state bill of rights as providing greater protection than does the federal Bill of Rights.
>
> Criminal Procedure An Analysis of Constitutional Cases and Concepts, by Charles H. Whitebread, Foundation Press, Inc., New York, 1980, page 593.

This Court is free to interpret the Constitution of Florida's Article I, Section 9, which provides in part, "No person shall. . . be compelled in any criminal matter to be a witness against himself" in accordance with its prior decisions which do not apply the harmless error rule to comments on an accused's silence. This ruling would be consistent with all of the other opinions expressed by this Court including the Murray case which is easily distinguished as not involving a comment on silence.

Further this Court is free to interpret Section 924.33 Florida Statutes (1983) cited by the State in its Brief herein, as being in harmony with the Florida Constitution's prohibition on comment on silence, as this Court has always interpreted

a comment on an accused's right to remain silent as injuriously affecting substantial rights. David, supra. Also, such error has not been deemed by this Court to be harmless as provided by Section 59.041 Florida Statutes (1983) and as alleged by the State in its Brief. There is no reason for this Court to deem such errors harmless now.

If this Court were to abandon its per se rule of reversal, a floodgate of appeals would ensue due to the number of appeals wherein the appellate courts would have to weigh the trial court's assessment of the evidence and determine whether the evidence was overwhelming. This would also create a nightmare for the trial courts ruling on motions for mistrials. How would a trial court determine whether the evidence was overwhelming against a defendant when the State's first witness comments on the defendant's exercise of his right to remain silent? At what point during the trial would the trial judge determine that the evidence is overwhelming and deny the motion for mistrial? After all of the State's witnesses have testified? After the defense puts on witnesses other than the defendant? After a jury verdict? How much evidence is enough evidence so that the trial judge may feel safe in denying a motion for a mistrail? Additionally, a prosecutor might not be as careful to avoid commenting on the defendant's exercise of his right to remain silent where the prosecutor believes that his evidence is overwhelming, which encourages these types of comments.

A prosecutor might comment on the accused's exercise of his right to remain silent as a matter of stragedy in that type of situation. The per se reversal rule acts as a constant reminder that comments on an accused's right to remain silent is dangerous and to remember to avoid such comments wherever possible.

Finally, perhaps the greatest danger in not adhering to the per se rule of reversal followed by this Court for years is the very reason for the rule itself. In Miranda v. Arizona 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) the Court stated:

> . . . 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.

Prior to the Miranda decision this State prohibited any comment to be made either directly or indirectly, upon the failure of an accused to testify, and held such comment to be reversible error. Trafficante v. State 92 So. 2d 811 (Fla., 1957) rehearing denied 1957. In Trafficante this Court was interpreting a statute rather than our Declaration of Rights when it noted:

> When it appears that there has been a violation of Section 918.09, supra, our harmless error statute does not come into play because 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. When such impression has been made on the minds of the jurors it cannot by this Court be said "that the error complained of has (not) resulted in a miscarriage of justice.
>
> Trafficante at page 813.

The reason for the per se rule of reversal is clear. The harm done at trial by any inference that the defendant failed to testify, give a statement or prove his innocence is too grave to be the subject in the State of Florida of the harmless error doctrine.

The Certified Question should be answered in the negative. This Court should not recede from its long history of applying the per se rule of reversal to any comment made concerning the exercise of an accused's right to remain silent.

II.

AS DETERMINED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, THE MOTION TO SUPPRESS STATEMENTS SHOULD HAVE BEEN GRANTED AS THE STATEMENTS WERE AN IMPERMISSIBLE COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT AS SAID COMMENTS WERE "FAIRLY SUSCEPTABLE" TO INTERPRETATION BY THE JURY AS A REFERENCE TO THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

If a comment is "fairly susceptible" to interpretation by the jury as a reference to the Defendant's exercice of his right to remain silent, it is an improper comment on the Defendant's failure to testify. Trafficante v. State, 92 So. 2d 811 (Fla., 1957); Bain v. State ——So. 2d—— , 8 F.L.W. 2655 (Fla. 4th DCA, Case no. 82-1522, 11/2/83); Harris v. State, 438 So. 2d 787 (Fla., 1983); David v. State, 369 So. 2d 943 (Fla., 1979); Roberts v. State, 443 So. 2d 192 (Fla., 3d DCA, 1983) review denied, 450 So. 2d 489 (Fla., 1984); Samonsky v. State, 448 So. 2d 509 (Fla., 3d DCA, 1983) review denied, 449 So. 2d 265 (Fla., 1984); Grissom v. State, ——So. 2d——, 10, F.L.W. 851 (Fla., 3d DCA, March 26, 1985) (pending in this Court, Case no. 66,868); Clark v. State, 363 So. 2d 331 (Fla., 1978).

When the Defendant stated "I ain't making no statements," then proceeded to provide an explanaiton that he was in the Job Corps in Georgia in November, 1981, he had by his first response invoked his right to remain silent. Bennett v. State 316 So. 2d 41 (Fla. 1975).

The Antone case cited by Petitioner is distinguishable from the Case at Bar. In Antone (382 So. 2d 1205 Fla., 1980) the Defendant never stated to the police officer that he was not making any statement, nor did he sign a refusal to waive his right to silence. Further, there was no objection at trial and this Court did not find fundamental error. Antone, 382 So. 2d at page 1213.

In the Case at Bar the Defendant exercised his right to remain silent by stating he was not making any statements and by signing a refusal to answer questions. Further, proper motions and objections were made to preserve the record.

In Peterson v. State 405 So. 2d 997 (Fla. 3d DCA 1981) reh. den. 1981, cited by the Petitioner in its brief, it is noted that the Defendant may at any time cut off an interrogation even once begun. The Defendant in the Case at Bar cut off the interrogation immediately by saying he would not make any statements.

Additionally, the fact that a Miranda situation was involved was in fact capable of inference by the jury when both Bigler and Chambers testified that Bigler advised the Defendant of the charges against him then and after "that information" the Defendant made a statement. (T. 289-290, 331-332). When Chambers testified, he stated he heard the conversation that took place between Bigler and the Defendant.

This testimony sets up in a lay person's mind that the Defendant was advised of the charges and his rights per Miranda particularly when the statement was "I ain't making no statements". Certainly the lay public sees this scenario on television often enough.

The Turner case at 414 So 2d. 1161 (Fla., 3d DCA 1982) held that the statement by the Defendant that "that is all I am gonna tell you right now" could only be construed as a comment on Turner's refusal to further speak (at pg. 1162). Such comment was viewed not, as the State suggested, as an affirmative inculpatory statement.

Further, there is no way a reasonable jury could infer an alibi for crimes alleged to have been committed on July 17-18, 1981 by a statement that in November, 1981 the Defendant was not in the State. This contention by the State is absurd. What kind of alibi is it to be in another place on a day when the alleged crime was not committed?

At the suppression hearing, Detective Bigler testified that he came into contact with the Defendant on June 8, 1983 when the Defendant was under arrest. (T. 10). Detective Bigler also stated he told the Defendant that it was an incident that occurred in the summer of 1981. (T. 11). The crimes charged occurred on July 17-18, 1981. (R. 1-3A). On direct examination at the suppression hearing prior to any intervention by the

Court Detective Bigler testified as follows:

> A. When I introduced myself again I told him the charges, I advised him that before I asked him any quesitons whatsoever about the incident, I wanted to go through his constitutional rights and so that he would be aware of what the quesitons were and again, I told him before I ask him any questions whatsoever I will go through the rights.
>
> As I started to present him the rights form, I asked him preliminary questions.....
>
> I then started to go through the rights form with him and it was at that time he spontaneously stated, "I ain't making no statements. It couldn't be none of me, I went into the Job Corps in Georgia in November of 1981." (T. 11-12).

Detective Bigler further testified on direct examination that he was just beginning the first right "you have the right to remain silent" when the Defendant made the statement. (T. 13).

On cross-examination the Detective was impeached by defense counsel as the following occurred:

> Q. You did in fact get through orally, read aloud to him his constitutional rights, did you not?
>
> A. No.
>
> Q. So you remember taking a deposition?
>
> A. Yes.
>
> Q. In our office on September 6, 1983?
>
> A. I remember giving a depo, several depositions.
>
> Q. Page 57, line 6 through 17, let me ask you if you remember the question and the answer:

> "What happened at the Sexual Battery Office --
> In the presence of --
>
> A. In the presence of Detective Chambers. I presented Burns with an advise of rights form. He told me that he finished the eighth grade but that he was able to read and write English. He told me he was not under the influence of drugs or medication and that he was adequately rested and had 12 hours of sleep, the previous night. I then read aloud to advise him of his constitutional rights before we went through the forms. His response was, "I ain't making no kind of statement at all. It couldn't be none of me, I went into the Job Corps in November of 1981.
>
> So you remember that answer and that question exactly?
>
> A. Yes. (T. 15-16).

Detective Bigler testified on cross-examination that at the point the Defendant made the statement, the Defendant signed the refusal on the constitutional rights form which caused Detective Bigler to cease interviewing the Defendant at that point. (T. 17). Detective Bigler testifeid:

> A. At the conclusion of the statement he made to me I assumed he did not wish to speak any further." (T. 17).

The Trial Court denied the Motion to Suppress. (T. 52). At the trial, prior to Detective Bigler's testimony being resumed on the second day, the trial judge discussed the Defendant's Motion in Limine. (T. 279).

The trial judge noted that the State would be soliciting through the detective, the Defendant's statement. (T. 279).

The judge noted the defense would be renewing its Motion in Limine. (T. 279). The trial judge then ruled as follows concerning the Defendant's statement:

"THE COURT: I'll introduce that. However, I want it done in the following manner: merely say, "and after he was arrested and you were at the police headquarters, did he make a statement spontaneously to you? Answer: -"Because I don't want him going through the Miranda Rights, because that could constitute a comment on the Defendant's invoking of the Miranda Rights. Understand?

MS. DANNELLY: Yes.

THE COURT: And I'll avoid that error. Tell the Officer before he takes the stand, not to refer to the Miranda or the fact that he invoked the rights or anything, otherwise that's a comment on the right to remain silent; and I'm not trying the case twice." (T. 279-280).

The State continued in its direct examination of Detective Bigler as follows:

Q. (By Ms. Dannelly) When you advised the Defendant of the charges that were being placed against him and the date to this incident, did he respond in any way?

A. Yes, he - -

MR. NUNES: Objection.

THE COURT: Objection noted and the Motion noted. Proceed. Overruled.

THE WITNESS: Yes, he did.

Q. (By Ms. Dannelly) advise the members of the jury exactly how it was that George Burns responded to that notice.

A. When I advised him that information he

spontaneously stated, "I'm not making any kind of statement. It couldn't be none of me. I went in the Job Corps in Georgia in November of 1981."

A. Now, are those the exact words that the defendant used when you advised him of the charges and the time frame of the summer of 1981?

A. I have the exact words in my report, if I can double check them.

Q. Certainly.

THE COURT: This report, again, will be made available to Defense Counsel.

THE WITNESS: Quote, "I ain't making no kind of statement at all. It couldn't be none of me, because I went into the Job Corps in Georgia in November, 1981."

Q. (By Ms. Dannelly) And you duly noted that in your Police Report in connection with this case?

A. That's correct. (T. 289-290).

Detective Otis Chambers testified on direct examination by the State that he was present when Detective Bigler had the initial conversation with the Defendant. (T. 331-332). He stated as follows:

Q. Did you hear the conversation that took place?

A. Yes, I did.

Q. Did you hear Detective Bigler -- excuse me -- advise the Defendant of the charges against him?

A. Yes, I did.

Q. Did you hear Detective Bigler advise the

Defendant that the offenses had taken place in the summer of 1981?

A. Yes, I did.

Q. Did the Defendant respond in any way?

MR. FREEDMAN: Renewing that objection for the record your Honor.

THE COURT: Thank you. Overruled. Motion denied.

Q. (By Ms. Dannelly) Did he say anything at all?

A. He made one statement which I will read from my records. The statement was, "I ain't making no kind of statement at all. It couldn't have been none of me, because I went into the Job Corps in Georgia in November of 1981."

Q. Were those exactly the words that George Burns used?

A. Yes they are.

Q. Were they said in your presence?

A. Yes, they were. (T. 332-333).

The trial court erred in denying the Defendant's Motion in Limine (Treated as a Motion to Suppress), and in overruling the Defendant's objections and motions for mistrials when the Defendant's statement was admitted into evidence. There are three major arguments which are all interrelated regarding the erroneous admission of the statement which will be discussed herein.

Aside from the comment on the Defendant's right to silence as guaranteed to him by the Constitutions of the United States and of the State of Florida, there was other misconduct which compounded the Court's initial error. That conduct consisted of the trial judge's departing the impartial Bench and assisting

the State by ruling in a manner to avoid a mistrial which at the same time causing the testimony of witnesses to change by the question asked.

To add more error, the court then permitted the statement that the Defendant was in the Job Corps in November, 1981, to come into evidence when the crimes were alleged to have been committed July 17-18, 1981 and on July 25, 1981.

The facts in the case at bar are similar to the Turner v. State, 414 So. 2d 1161 (Fla. 3d DCA, 1982). In Turner the State elicited testimony from a police officer that after being given the Miranda warnings and making certain statements, Turner stated, "That is all I'm gonna tell you right now." Turner at page 1162.

An even more similar statement was made in Rowell v. State 9 F.L.W. 1177 (Fla. 5th DCA, May 24th, 1984 presently pending in this Court case no. 65,417 where during the trial the State asked an officer whether he attempted to take a statement from the Defendant after his arrest. The officer's answer was, "Ah, I never asked him that. I never..... I asked him, but he refused to give me any information as far as...." The Court found the above testimony to be "fairly susceptible" to interpretation by the jury as a reference to the defendant's exercise of his right to remain silent." Rowell at page 1177.

There is no other possible interpretation the words, "I ain't making no kind of statement at all...." made by a Defendant,

after his arrest, during the course of a custodial interrogation, than the interpretation that the Defendant refused to speak to the police. This is true whether or not the jury actually hears testimony that the Miranda warnings were given.

In the case at bar, the testimony of Detective Bigler at the Suppression Hearing was that he got up to the "you have the right to remain silent" section, when the Defendant made the statement, and then proceeded to sign the refusal form that the Detective had been reading to the Defendant. It is clear from the Defendant's prior record which came up at the sentencing hearing, that the Defendant knew his rights and chose to exercise them.

The trial judge in an effort to avoid a mistrial caused this testimony to be changed, and the facts to be changed, by the detective during his testimony. This was totally improper. At trial, the detective testified that the Defendant responded to being told charges were pending. This was not true. He was responding to being given the Miranda warnings. Rather than rule the statement inadmissible on the facts as presented to him as an impartial trier of fact during the suppression hearing, the trial judge saw fit to change the facts as they were presented to the jury. The result was a denial of Due Process for the Defendant.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States of America as applied to

the State through the Fourteenth Amendment thereof, as well as Article I, Section 9 of the Florida Constitution guarantee a fair and impartial trial to one accused of a crime.

The trial court has a duty to scrupulously guard the rights of an accused insuring that the trail is conducted with the cold neutrality of an impartial judge. See State v. Steel 348 So. 2d 398 (Fla., 3 DCA 1977).

The trial judge's ruling that the State should question the detectives in a certain manner caused the detective's testimony to change. The suggestion that the State should ask, "and after he was arrested and you were at the Police Headquarters, did he make a statement spontaneously to you?" permitted the State to put words in Detective Bigler's mouth which were not the facts. The facts were that the Defendant did not just come out and make a statement. The facts were that this happened in the middle of (or after, depending on which version is taken as true) the Miranda warnings particularly after being given the warning about the right to remain silent. The truth, or the whole statement should have been ruled inadmissible right from the beginning when the Motion in Limine was made. The Defendant signed the refusal and made no further statements thereafter. He did not testify at trial.

To compound this error the second half of the statement also came before the jury, that being the Defendant stated

he was in the Job Corps in November of 1981. Whether the Defendant was in Florida or Georgia or China in November 1981 is irrelevant to whether he was in Dade County, Florida on the date of the offense, to wit: July 17-18, 1981.

The court cited Brown v. State 391 So. 2d 729 (Fla. 3d DCA 1980) for the proposition that evidence may be introduced to show that a Defendant lied about his whereabouts on the day of a crime (Brown at page 730). This is to avoid a false alibi. Brown at page 731-732.

In the case at bar, the alibi defense was withdrawn by the Defendant. (T. 280). Certainly, if the Defendant's defense was an alibi as to July 17 and 18, 1981, the State could counter with persons testifying that the Defendant was in fact in Dade County on the date of the offense as in Brown.

However, in the case at bar, the trail judge ordered the Defendant to either stipulate that he was in Dade County on the date of the offense or two police officers would be permitted to testify that they had contact with the Defendant in July of 1981. (T. 284, 328-330).

This testimony of the police officers (Futch and Hoadley) was highly prejudicial to the Defendant because it showed that the Defendant had been involved with the police on prior occasions. Further, it was unnecessary testimony in that the Defendant's defense was identification, and Ronald

Mobely would not only place the Defendant in Dade County on the night in question, but placed the Defendant at the scene as an active participant.

The court addressed the issue as follows:

> THE COURT: ...Now, issue two, and I'll turn to the Defense. Yesterday, we fought concerning the question of the admissibility of testimony be -- who was the one officer you proffered?
>
> MS. DANNELLY: Hoadley.
>
> THE COURT: Concerning the fact that your client was not in Dade County.
>
> The State's theory is since you filed an alibi, they should be able to offer it.
>
> I sustained the Defense objection. Overnight, I thought about it.
>
> Brown versus State, it would appear to me that evidence is admissible to me for the following reason: Your client, allegedly, through the detective, said the following: "I was in the Job Corps at the time."
>
> The State can offer --
>
> MR. FREEMAN: No, November of 1981. "I was in the Job Corps in Georgia in November of '81."
>
> THE COURT: You can offer testimony, as far as I'm concerned, that in November of '81 he was in Dade County, to show the fact that it was inadmissible and that he was not telling the truth. And that would come in for substantive evidence.
>
> If you want to offer evidence as to November of '81, you can do it.
>
> MS. DANNELLY: Judge, we're in the middle of trial. Obviously, it would be a little late for the State to start looking for witnesses now, in

the middle of trial, to testify as to November of '81.

In exchange for that, I would like to offer the testimony--excuse me for not standing--the testimony of Officer Futch, who would conversely testify that on the day of this incident, he saw George Burns in Dade County.

Now, certainly that should have relevance in light of your ruling about November.

THE COURT: The reason I'm letting you offer testimony as to November '81, because under the case law, if he made a statement that's later shown to be untrue, concerning an alibi or a whereabouts, that is substantive evidence. That's a theory to introduce it.

You also want to offer evidence he was in Dade County on the date of this crime.

MS. DANNELLY: Not only that, Judge, but there is, in the record, in the deposition and in the statement that was supplied by Detective Bigler, a reference to the fact that he advised the Defendant of the charges and that it took place in the summer of '81.

Now, the Defendant knew that. Whether he heard it or whether he understood it or what he was thinking when he said November of '81, is not the issue.

The issue is that he chose--now, that doesn't necessarily mean that he wasn't thinking in his mind, "Hey, November of '81, I was in the Job Corps."

That doesn't mean that he wasn't trying to imply that he had been in the Job Corps since the time this incident happened until November of '81, in Georgia.

THE COURT: When did the incident occur?

MS. DANNELLY: July of '81.

THE COURT: What did he say to Bigler again?

MS. DANNELLY: I would be paraphrasing: Couldn't have been me. I was in the Job Corps in Georgia in November of '81.

Now, he had been on notice that the incident took place in the summer of '81. Detective Bigler testified to that.

Now, if he chooses to offer, in his own statement, a different date, which is part of my case, certainly I should be allowed to introduce evidence as to his presence at the time of the crime in Dade County.

THE COURT: What do you say?

MR. NUNES: All he said was: "I ain't making no kind of statement. I was in the Job Corps in November of 1981."

Where he was in November of 1981 is irrelevant to the date charged in this Information, July 17th and 18th of 1981.

To allow the jurors to speculate as to whether he meant July at that time--he said, "November of 1981."

To allow them to speculate on any meaning behind that, and allow counsel to argue that in closing argument, definitely would be prejudicial to Mr. Burns and--

THE COURT: I agree with the State's contention. I agree under the theory--that would Futch say about how he contracted him that date?

MS. DANNELLY: Interestingly enough, Officer Futch was one of the participating officers in an arrest of Mr. Burns. And by coincidence, on the 17th of July, 1981, for which I have a certified record, he was in Youth Hall.

THE COURT: Unless the Defense will stipulate that he was in Dade County on that date, before the jury, I'll permit you to bring Officer Futch in and say, "Do you know the Defendant?"

Yes, I do."

"Did you see him on the date of this crime?"

"Yes, I did."

MR. NUNES: I'm not going to stipulate that he was in Dade County on that date. And second of all, for Officer Futch to come and testify that the man was in Youth Hall--

THE COURT: He's not going to say that. "Did you see the man on this date?"

"Yes."

And you're going to say--that's all he'll say.

MS. DANNELLY: I'll have him identify him.

THE COURT: "Do you know him? Did you see him on that date?"

"Yes."

Beyond that point, if you cross-examine to the circumstances, that's your venture.

Arrange to have him here after the break.

Note the Defense objection.

I would proffer Brown versus State case, as corroboration of substantive evidence to show that the defendant's statement our of court, number one, was incorrect and therefore substantive evidence.

And number two, because of the issue of identification and the lack of stipulation that he was in Dade County, I think you should be able to introduce evidence that he was in Dade County, to corroborate the ID.

MS. DANNELLY: If I can get ahold of Hoadley, would the Court--

THE COURT: Yes. Under the same circumstances, merely, "I saw him that day, yes. He was in Dade County," and the address. If you want to, even

give the address where he saw him, as long as there is no reverence to criminal justice system.

Make arrangements to have the officers in after the break.

MS. DANNELLY: May I have a moment to contact my secretary and advise Detective Bigler of the Court's ruling?

THE COURT: Yes.

Brown versus State. It's a very short opinion, written by Dan Pearson in about 1980 or '81.

What it holds is that a statement out of court given by an accused, in an attempt to vindicate himself, which is later proved to be wrong, can be in for substantive evidence. (T. 281-286).

I'll try to find the citation for you.

Later the following occurred:

MS. DANNELLY: If we could go ahead and discuss the legal issues pending.

THE COURT: You read Brown?

MR. FREEDMAN: Yes, Judge. Do you have a copy? There are a few cases with Brown.

THE COURT: What's your position?

MR. NUNES: The position is, Your Honor, if in fact, the statement had been, "I ain't making no statement. I was in the Job Corps in July of 1981," that could be recognized as an exculpatory statement at that time.

Therefore, any independent truth, which would tend to show that that particular statement was, in fact, false, would be admissible under Brown.

However, here, the statement that was made is, in fact, "I ain't making no kind of statement. I was in the Job Corps in November of 1981."

The testimony of Officer Hoadley, as well as Officer Futch, I believe his name is, would be such that it ould only come in to show that the individual was in Dade County in July of 1981 and not November.

Therefore, that independent proof does not tend to show the falsity of a statement concerning November of 1981.

I believe that's what Brown stands for.

THE COURT: Couldn't the jury conclude that he was actually meaning July?

MR. NUNES: I don't believe so, Judge. That's leading the jurors, to speculate on that type of statement. And I think that would be improper, under Brown.

THE COURT: Objection overruled. I'm relying on Brown versus State, 391 So. 2d 729, which I think is directly on all fours.

Have you advised the witnesses concerning what I want them to--

MS. DANNELLY: I advised Chambers and Bigler with respect to the statement, however, I haven't seen Officer Futch or Hoadley.

THE COURT: How many are you calling on the issues?

MS. DANNELLY: Those two.

Under the Brown decision, is it in the purview of that decision, when Officer Futch testified as to the circumstances under which he encountered George Burns, that the encounter took place in North Dade?

THE COURT: Say that Again.

MS. DANNELLY: When he testified that he came into contact with George Burns on the 17th day of July, 1981, can he testify that the contact

took place in North Dade County?

THE COURT: Yes. No problem....
(T. 328-329).

Both Officer Hoadley and Futch testified that they are Police Officers (T. 334, 335). Each officer testified that they knew the Defendant, and saw him in Court. (T. 334, 336). Officer Hoadley stated he "had contact" with the Defendant July 24-25, 1981 in Dade County, Florida. (T. 335). Officer Futch testified that on July 17, 1981, he came into contact with the Defendant in Dade County, Florida. (T. 337).

Any reasonable person upon hearing two police officers testifying in a case in which they were not involved, would surely draw the inference that the Defendant had been arrested in the past, at the very least. Otherwise, why would he have "had contact" with these officers on July 17, and on July 24-25. 1981? What other possible conclusion may be drawn from that testimony?

It is well recognized in Florida that any admission into evidence of an accused's prior arrests is so prejudicial that it automatically requires reversal of the conviction. Dixon v. State 426 So. 2d 1258, 1259 (Fla, 2nd DCA 1983) reh. den. 1983.

Where an accused has not placed his character in issue such an attack deprives the Defendant of a fair trial and requires a reversal. Wilt v. State 410 So. 2d 924, 295 (Fla., 3 DCA, 1982).

This Court has noted, the concept of "guilt by association" and has addressed the issue of a jury's perception of a Defendant. In Fulton v. State 335 So. 2d 280, 285 (Fla., 1976) this court ordered a new trial where the State had inquired as to a defense witnesses prior arrests. The defense witness testified that the victim had a reputation for violence which went to the heart of the Defendant's defense of self defense to second degree murder. It was brought out by the State that the witness was also a defendant charged with second degree murder. The Court addressed the issue of what it termed a "spill over" effect. Fulton at page 285.

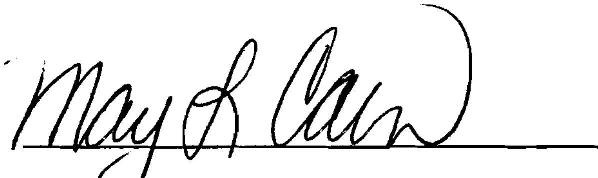
In the case at bar, the Defendant's character was not in issue. The only possible conclusion to draw from the testimony of the police officers was that the Defendant is a person of shady character who had been arrested at least twice before. This alone amounts to a denial of Due Process entitling the Defendant to a new trial. Coupled with the comment on the Defendant's invocation of his constitutional rights, and changing of testimony of the lead detective as to the facts surrounding the statement discussed herein, the entire trial was tainted. Therefore, the judgment and sentence should be reversed and the case remanded for 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, Third District, and remand the cause for a new trial.

Respectfully submitted,

BENNETT H. BRUMMER
PUBLIC DEFENDER
ELEVENTH 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, Attn: Julie S. Thornton, Esquire, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128 and Mr. George Burns, #093565 (F-271), Marion Correctional Institution, P.O. Box 158, Lowell, Florida 32663, this 28th day of May, 1985.

MAY L. CAIN
SPECIAL ASSISTANT PUBLIC DEFENDER