IN THE SUPREME COURT OF FLORIDA

STEVEN MITCHELL BARRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,031

MARSHALL CHRISTOPHER LONG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,091
(Consolidated)

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PETITIONERS' INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner Barry appealed to the District Court of Appeal, Fifth District, following his conviction for manslaughter and a revocation of probation. On appeal, he contended that the prosecutor improperly commented on his failure to testify at trial, and that his motion for mistrial was improperly denied. Barry v. State, 10 FLW 934 (Fla. 5th DCA, April 11, 1985).

Although Barry did not testify at trial, he had given the police three separate statements, all containing

inconsistencies. In his opening statement and closing argument, defense counsel argued, based on the latter two statements, that the defendant had killed the victim in self-defense. In response, the state, during its closing argument, argued as follows:

> On his first statement, you'll notice that the first statement, this is the first taped statement. The first statement absolutely denied everything. He didn't do anything. He just went home and went to sleep and we have the first taped statement, the second taped statement. And they are inconsistent, in and of themselves. If he told the truth in the first statement, then he lied in the second statement. And he also lied in the very, very first statement. So, he didn't tell the truth. He still hasn't told the truth.

(R800) Defense counsel immediately moved for a mistrial on the grounds that the prosecutor had commented on the defendant's failure to testify. (R800-801) The trial court denied the motion, ruling that the statement was not a comment on the failure to testify, but was a comment on the inconsistencies and conflicts within the statements themselves. (R833-834)

The appellate court agreed with the trial court and affirmed Barry's conviction and probation revocation, ruling that even if the comment were susceptible of being construed as a comment on the defendant's failure to testify, it appeared that this Court, in State v. Murray, 443 So.2d 955 (Fla. 1984), had approved the application of the harmless error rule to comments

on the defendant's failure to testify at trial. The court found that there existed overwhelming evidence of guilt. Barry, supra.

Petitioner Long appealed from an order placing him on probation for burglary. The issue in the appeal was also the denial of a motion for mistrial following a prosecutor's comment on the defendant's failure to testify. The prosecutor told the jury in final argument " . . . [defense counsel] asks you to allow his client to walk out of here a free man with no record and never having had to admit that he committed a crime." (R145) This comment, the district court ruled, was about the defendant's failure to confess and to testify at trial. Long v. State, 10 FLW 1039 (Fla. 5th DCA, April 25, 1985). Later in the argument the prosecutor continued, "I haven't heard any evidence that he [the defendant] thought this car belonged to one of his friends." (R151) Long's motion for mistrial was denied, and the appellate court affirmed even though it found the comments of the prosecutor improper. In doing so, the court ruled that "the evidence was sufficient, in our opinion, to overcome the error so we affirm the conviction." Long v. State, supra.

In both Barry and Long, supra, the fifth district court certified the following question as one of great public importance:

> 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 States v. Hasting, 461 U.S.

> 499, 103 S.Ct. 1973, 76 L.Ed.2d 96 (1983), receded by implication from the per se rule of reversal of David v. State, 369 So.2d 943 (Fla. 1979) and Trafficante v. State, 92 So.2d 811 (Fla. 1957), where the prosecutor comments on defendant's failure to testify at trial?

Id.

Notice to Invoke Discretionary Review was timely filed in both cases. Pursuant to a motion by counsel for both petitioners, the cases were consolidated. This brief follows.

SUMMARY OF ARGUMENT

Where a prosecutor's comment is susceptible of being interpreted by a jury as a comment on the defendant's failure to testify. The appellate courts must reverse the defendant's conviction without resort to the harmless error doctrine. The cases of State v. Murray, 443 So.2d 955 (Fla. 1984), and United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1973 L.Ed.2d 96 (1983), do not mandate a change of this well-established and well-reasoned rule. Policy reasons, including the protection of this important constitutional right, the deterrence of deliberate prosecutorial disregard for the law on such comments, and the undue and improper burden on appellate courts to reconsider the weight of the evidence, necessitate maintaining the current per se reversal rule in this context. The certified question should be answered in the negative and the petitioner's convictions vacated and a new trial ordered.

ARGUMENT

THE DECISIONS OF STATE V. MURRAY, 443 So.2d 955 (FLA. 1984), AND UNITED STATES V. HASTING, 461 U.S. 499 (1983), HAVE NO EFFECT ON THE PER SE REVERSAL RULE OF DAVID V. STATE, 369 So.2d 943 (FLA. 1979), AND TRAFFICANTE V. STATE, 92 So.2d 811 (FLA. 1957), WHERE A PROSECUTOR HAS COMMENTED ON A DEFENDANT'S FAILURE TO TESTIFY AT TRIAL.

In David v. State, 369 So.2d 943 (Fla. 1979), and Trafficante v. State, 92 So.2d 811 (Fla. 1957), this Court, citing Griffin v. California, 380 U.S. 609 (1965), and Chapman v. California, 386 U.S. 18 (1967), held that a prosecutor's comment on a defendant's failure to testify at trial 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.; Fla. R. Crim. P. 3.250. 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).

The Florida legislature declared the importance of the right of the accused to remain silent at trial by adopting Section 918.09, Florida Statutes, which provided in part:

> . . . nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf . . . .

Rule 3.250, Florida Rules of Criminal Procedure, now provides substantially the same prohibition.

In Trafficante v. State, this Court quoted with approval cases from the past four decades which recognized the paramount importance of the constitutional right to silence at trial and prohibited using this silence against the defendant at trial to improperly prejudice the jury. Way v. State, 67 So.2d 321 (Fla. 1953); Simmons v. State, 139 Fla. 645, 190 So. 756 (1939) The Court noted that these cases have repeatedly rejected a harmless error approach in order to preserve the exercise of this right. Trafficante, supra at 813-814.

Since Trafficante, Florida courts have continued to recognize the prominence of this right and have been strict in controlling comments on the defendant's exercise of his right. See, e.g., Harris v. State, 438 So.2d 787 (Fla. 1983); David v. State, supra; Brock v. State, 446 So.2d 1170 (Fla. 5th DCA 1984); Brown v. State, 427 So.2d 304 (Fla. 3d DCA 1983). This is true of indirect comments or comments by innuendo as well as direct comments on the defendant's failure to testify. See, e.g., Miley v. State, 186 So.2d 299 (Fla. 2d DCA 1966); Trafficante, supra.

The proper test to apply is whether the comment is "fairly susceptible of being interpreted by the jury as referring to a criminal defendant's failure to testify." David v. State, supra; Trafficante v. State, supra; Layton v. State, 435 So.2d 883 (Fla. 3d DCA 1983). The fact that the comment is susceptible to a different construction does not affect the prohibition. Childers v. State, 277 So.2d 594 (Fla. 4th DCA 1973).

In the two cases sub judice, the comments were "fairly susceptible" of being interpreted by the jurors as a comment on the defendants' failure to testify at trial. Merely because the comment in Barry is susceptible to a different construction as given it by the lower courts, does not affect the prohibition. The arguments of counsel for the state in the two cases concerning the defendants not yet telling the truth and there being no evidence heard from the defendant were thus clearly improper under Trafficante, supra, and its progeny. Pursuant to these cases the defendants' convictions should be reversed without regard to the harmless error doctrine.

The necessity of this holding is clear, yet the Fifth District in the two opinions under review affirmed the defendants' convictions, suggesting that the per se reversal rule, the law of this State for at least the past 46 years, 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, 461 U.S.499 (1983), concerning the

application of the harmless error doctrine in particular circumstances, the court contends that the constitutional error here (a direct reference to the accused's silence at trial), is no longer considered per se reversible error.

It should first be noted that neither the Murray decision, nor the Hasting decision, involved a direct reference to the defendant's silence at trial, but rather dealt with overzealous prosecutorial comment on defense tactics (Murray) or with a "legitimate comment by the prosecutor on the weaknesses in the defense case" (Hasting, 76 L.Ed.2d at 101-102, 110-111). 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 court's contention that the decisions of Trafficante and its progeny, many of which were 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, this Court need not follow any harmless error decisions of the federal courts.

The petitioners submit that a reference at trial in front of the jury that the accused exercised his right to remain silent at trial 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. Such comments may well remind the jurors of the silence of the defendant and reinforce in their minds the notion that an innocent defendant would take the stand to deny his guilt. They may believe that an accused who elected to exercise the constitutional privilege "had something to hide."

The Fifth Circuit Court of Appeals, in reaching this 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, 442 So.2d 944, 949 (Fla. 1983).

Furthermore, to rule that the harmless error doctrine does apply in this instance would allow prosecutors to act with impunity in making such impermissible comments. Although Chapman permitted a harmless error analysis for comments of the nature involved therein, it did not comtemplate 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 commission 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 should 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).

The appellate court in the instant cases stated that in its opinion the evidence was sufficient to overcome the error. As stated by Justice Stevens in his concurring opinion in Hastings, 76 L.Ed.2d at 111, an appellate court should not find harmless error merely because it believes that the other evidence is overwhelming. As the United States Supreme Court wrote in Kotteakos v. United States, 328 U.S. 750, 763-764 (1946):

> it is not the appellate court's function to determine guilt or innocence . . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . . the question is not were [the jury] right in their judgment, regardless of the error or its effect upon the jury. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Justice Stevens went on to note that the appellate courts are much too busy to be spending countless hours pouring over trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. Id. Justice Stevens concluded that, although he was persuaded of the high probability of the defendants' guilt, he could not possibly state with anything approaching certainty that the jurors who had spent hours deliberating the fate of the defendants would not have entertained a reasonable doubt concerning the guilty verdicts if the error were purged from the record.

The per se reversal rule therefore has the distinct advantages of being a deterrent for over-zealous prosecutors and of being easier for courts to administer. (Indeed, if trial courts were promised automatic reversal in this situation, fewer cases would reach the appellate courts since mistrials would be granted routinely.) These advantages and the per se reversal rule in this limited situation would thus protect the Fifth Amendment from erosion.

This comment on the defendant's exercise of his constitutional privilege of silence at trial is error and requires reversal without regard to the harmless error doctrine as held by this Court in Trafficante, David, and the myriad of other cases in this State following those decisions. 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 trial is still alive in Florida and needs to remain so. See, Harris v. State, supra; David v. State, supra; Brock v. State, supra; Brown v. State, supra; Trafficante, 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.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court answer the certified question in the negative, vacate the decisions of the District Court of Appeal, Fifth District, vacate the petitioners' judgments and sentences, and remand the cases to the trial court for new trials.

Respectfully submitted,

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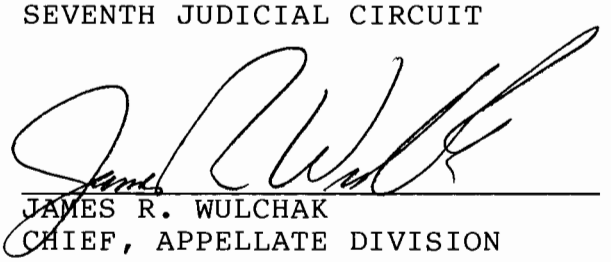

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CERTIFICATE OF SERVICE

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, Florida 32014, on this 20th day of June, 1985.

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