IN THE SUPREME COURT OF FLORIDA

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RANDY EUGENE KINCHEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,780

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Randy Eugene Kinchen, was the Defendant in the Circuit Court of Seventeenth Judicial Circuit, In and For Broward County, Florida; Appellant in the original appeal to the Fourth District Court of Appeal, and on the remand to that court; and was the Respondent in the previous discretionary review (based on a different certified question) before this Honorable Court.

Respondent, State of Florida, was the prosecution in the trial court; Appellee in front of the Fourth District Court of Appeal; and was Petitioner on the previous certified question.

In the brief, the parties will be referred to as they appear before this Honorable Court and/or by name.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Petitioner, Randy Eugene Kinchen, was charged, along with a Co-defendant, by a refiled information with kidnapping, sexual battery, and attempted first degree murder on August 25, 1981 (R1703-1704). Petitioner was tried by a jury from October 5, 1981 to October 16, 1981 (R69-1646).

The Fourth District Court of Appeal reversed Mr. Kinchen's conviction; finding that the Co-defendant's attorney had commented on the Defendant's failure to testify. Respondent then suggested, for the first time, that the Florida standard for determining what is a comment on silence, should be changed.

The Fourth District Court of Appeal acknowledged conflict with Gains v. State, 417 So.2d 719 (Fla.1st DCA 1982) and State v. Bolton, 383 So.2d 924 (Fla. 2nd DCA 1980).

This Honorable Court accepted jurisdiction of this case. The initial opinion of this Court reaffirms the traditional Florida standard for determining whether a comment is a comment on silence. The opinion also reaffirms that the comment in the present case is a comment on silence. This Court remanded the case to the Fourth District Court of Appeal to determine whether Respondent can sustain its burden of proof to prove that the comment on silence in this case was harmless beyond a reasonable doubt.

The Fourth District Courtof Appeal affirmed the conviction but certified the following question:

> IS IT NECESSARY, IN EVALUATING AN ASSERTION OF HARMLESS ERROR IN A CRIMINAL APPEAL, THAT EACH APPELLATE JUDGE INDEPENDENTLY READ THE COMPLETE TRIAL RECORD?

Kinchen v. State, ____ So.2d ____, 12 FLW 1453, 1454 (Fla. 4th DCA, June 10, 1987). The same question was certified in Ciccareli v. State, ____ So.2d ____, 12 FLW 1429 (Fla. 4th DCA, June 10, 1987).

STATEMENT OF THE FACTS

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

The first civilian witness called by the prosecution was Anthony Greulich (R529). He drives a tow truck in Hollywood, Florida (R530). He said that at 1 a.m. on the date in question he was driving north on Federal Highway in Hollywood when a Black woman jumped in his truck and asked him to find a police officer (R531-532). He then went up Federal Highway and the woman pointed out a Mercury Cougar (R536-537). He said the car had a Florida license UKW-104 and was yellow or gold (R536). He stated that he saw three or four people in the car including one Black person (R538). He couldn't tell if the Black person was male or female (R538). He tried to follow the car, but lost it (R539). He admitted that in an earlier statement he had said that there were four people in the car and that the Black person was a male (R544-545).

The next civilian witness called by the prosecution was John Holland, a welder from Dania (R799-800). He stated that on April 9, 1981, he was living at 100 North Ocean Boulevard on the Hollywood-Dania border (R800). At about 1 a.m. he heard a car pull up and heard people shouting (R803). He lived about thirty feet from the Intercoastal Waterway (R803-804). The sounds were directly east from his front door (R803-804). He stated that he

saw two white males, along the seawall, throwing bottles (R804-805). He came out with his shotgun and they ran away (R805). He said that he had observed the scene for thirty seconds until he went back and got his shotgun(R808). He testified that the area was not lighted (R810). He stated that he pulled a woman out of the water who was incoherent (R817-821). She kept saying, "Don't hurt me." (R817) Holland testified that he could only see silhouettes but that he thought that the taller, lighter haired person was swinging a chain and the other one was throwing bottles (R824-825). He stated that he couldn't see any facial features (R837-838). He admitted that at his deposition he had stated that the person with lighter hair was the shorter of the two (R842).

The second area of the prosecution's case consisted of the testimony of P[redacted] L[redacted]. She testified that she had been living in Las Vegas since May, 1981 (R558). In April, 1981, she had been living on Wiley Street in Hollywood, Florida (R558-559). She had been working as a prostitute for a little over a year at that time (R559). On the night in question she was working the street as a prostitute at approximately 12:30 or 1 a.m. on Wiley and Federal Street.

Ms. L[redacted] testified that at 12:30 or 1 a.m. a car pulled up into a parking lot of a military club (R559-560). She stated that she was with two other prostitutes (R560). She walked over to the car and talked to the two people in the car (R560). The car left and came back (R560-564). She and another prostitute named L[redacted] got in the car and agreed to each perform oral sex for twenty dollars (R565).

L████ claimed that a man then said that there were "some niggers" in the car next to them and said that he was getting out to get a gun (R566). She claimed that she and L██████ got out and ran in different directions (R566-567). She claimed she ducked behind some orange crates (R566-567). She claimed the driver of the car then pretended to be a police officer and when she resisted he forced her into the car (R567-570). She stated that the car pulled away while they struggled (R570-572). She testified that the passenger of the car forced her to perform oral sex on the driver (R573-574). She stated that the passenger hit her, took her wig off and was cutting her hair with a knife (R575-576). The knife came out of a glove box in the car (R576).

L████ testified that after a twenty or thirty minute ride they stopped in an area of dirt and sand (R577-578). She stated that the passenger forced her to commit oral sex on him and then forced her into the water (R579-580). She claimed that he hit her with a belt and a chain (R580-581). She said the other man was in the car and then put a bag over her head before she was thrown in the water (R585-586). She stated that she doesn't remember who took her out of the water (R587-588). She stated that the chain was fat and silver (R607-610).

P██████ L████ identified James Marino as the man who beat her, forced her to perform oral sex, and who had pretended to be a police officer (R614-615). She stated that Petitioner had been passive during the evening (R614-615). She testified the car was a brown Mustang (R623). She testified that Marino committed all of the violence (R643-654). She stated that Petitioner was the passive recipient of oral sex (R671-672). She stated that she

never saw a gun that night (R686). She stated that she was hazy on some aspects of the night and that she had undergone hypnosis to try to improve her memory (R703-704). She stated that she had been a prostitute for over a year and had worked in Denver, San Francisco, and Fort Lauderdale (R710).

Ms. L[redacted] testified that she had picked Marino out of a photographic line-up (R714-715). She testified that she had never picked Petitioner out of a photographic or live line-up (R716-717). She testified that at her deposition she had been unable to describe the appearance or facial features of the two men (R718-719). She stated that when she tried to get away only Marino chased her (R739). She testified that the only activity she definitely remembers Petitioner involved in was the receipt of oral sex (R744).

The final area of the prosecution's case was the testimony of the arresting and investigating officers in this case. This area began with the testimony of Officer John Miller from the Hollywood Police Department (R844). He stated that he spoke to a Black female named L[redacted] A[redacted] at 1:04 a.m. on April 9, 1981, at the corner of Wiley Street and Federal Highway in Hollywood, Florida (R847). He then looked for a vehicle with the license number UKW-104, but could not find it (R856-857). The prosecution next called Gerald Primau of the Pembroke Pines Police Department (R862). He stated that he arrested Marino on April 10, 1981 (R862). He stated that he went to Marino's house, that Marino sped off and was arrested a few blocks away (R864-865).

The prosecution then called Detective Robert Foley of the Broward County Sheriff's Department (R879-880). He stated that he found clothing at the scene that Ms. L[redacted] identified (R887, 894-895). He also found a brown belt, with a silver buckle, about 185 feet southwest of the clothing (R889-890). He stated that P[redacted] L[redacted]'s hair is consistent with hair found at the scene and hair found in Marino's car (R895-899). He stated that he removed three latent prints from the belt buckle (R899-900). The prints were inconsistent with those of Marino (R943).

The prosecution then called Detective Ellery Richtarcik of the Broward County Sheriff's Office (R968-969). He testified that one of the latents off the belt matched the fingerprint of Petitioner (R973-974). He stated that he had no idea when the print was placed (R986). He stated that the belt was size 34 (R988). He also testified that he does not know who last touched the belt (R993). He testified a person could have hit someone with the belt without leaving a latent print (R995).

The next prosecution witness was Detective Edel of the Dania Police Department (R996). He stated that he arrived at 100 North Ocean Drive at 2:30 a.m. on April 9, 1981 (R997-998). He stated that he removed P[redacted] L[redacted] from the ocean (R999). He found clothing and a wig and a brown belt with a silver buckle thirty-five to forty feet away (R999-1000). He testified that he interviewed P[redacted] L[redacted] and that she was very confused towards the end of the conversation (R1005-1006). Ms. L[redacted] identified Marino from a photographic line-up (R1012). He arrested Marino the next day and found a silver link chain in his car and a knife in the center console (R1019-1021). He stated that P[redacted] L[redacted]

had said that one individual was far more aggressive than the other one, who wanted no part of the situation (R1028-1029). Detective Edel also stated that he found clothing in suitcases in Marino's trunk (R1045-1046). Ms. L[redacted] identified Marino as the aggressive one (R1052). Both Petitioner and Marino made motions for a judgment of acquittal at the close of the prosecution's case and both were denied (R1084-1096).

Mr. Marino's case consisted of three witnesses, Brett Knesz, Officer Fred West, and himself. Brett Knesz testified that he had known both Petitioner and Marino for eight or nine years (R1132). He testified that Marino was a close friend of his (R1132). He stated that he had been convicted of a crime (R1133). He claimed that Petitioner had told him that he had been the aggressor and that he had shaved all the victim's hair off of her entire body and beat her (R1142-1143, 1152-1153). He claimed that Petitioner had ruined his boots and owed him money and that this had caused bad feelings between them (R1150). He admitted that he had said at his deposition that Petitioner had told him he had stabbed her in the back (R1157-1158).

He testified that he had gone to Marino's house and read the victim's statement (R1160). He had told Petitioner's father that he thought there would be separate trials (R1161). He admitted that he had said Marino was his friend and that he was going to come forward to help him out (R1163). He spoke to Marino approximately ten times prior to trial (R1166). He admitted offering to help Marino get a job and offered to move to Houston with him (R1170).

Mr. Marino then called Officer Fred West of the Dania Police Department (R1229). He stated that he spoke to P[redacted] L[redacted] at Broward General Hospital on the morning in question (R1230). He stated that she was hysterical and had trouble relating what happened (R1244-1245).

Mr. Marino then took the stand in his own behalf (R1256-1257). He stated that he was working as an iron worker at the time of this incident (R1256-1257). He was a friend of Petitioner at the time (R1258-1259). He stated that on the night in question he left his father's house a little after 9 p.m. and went to Petitioner's house and picked him up (R1263). He stated that they went to the Crown Lounge where he became very drunk (R1263). They then went to the Banana Boat Lounge where Marino was refused entrance because he was so intoxicated (R1264). He claimed that Petitioner later woke him up in a parking lot and asked him to drive (R1264). He stated they were in his car (R1266). He claimed that one Black woman got in the car and performed oral sex on him (R1266-1267).

Marino claimed that Petitioner soon jumped out and began shouting and then the Black woman ran (R1267). He claimed that Petitioner wrestled with the woman and placed her back in the car (R1267-1268). He said that he drove a few blocks (R1264-1270). He stated that Petitioner then got a knife out of Marino's car and began scaring the woman (R1269-1270). Marino then drove to John Lloyd Park in Dania (R1275). He claimed that Petitioner took the woman out of the car and she performed oral sex on him (R1276). Marino claimed he pulled away briefly and then came back (R1280-1283). He claimed Petitioner then said, "He's got a

shotgun" and they left (R1283-1284). He stated that on the night in question that he had four or five beers after work and then ten shots of bourbon (R1304). He claimed that when Petitioner had suggested getting a prostitute he said "Sure" (R1318). He stated that the Black woman called then names off and on throughout the evening (R1394). Then Marino rested his case.

Petitioner called Arthur Kinchen, his father, as his witness (R1447). He testified that Brett Knesz approached him in a restaurant and stated that he thought that there would be separate trials and that he would do everything he could for Marino and that when Petitioner's trial came up, he would leave (R1449). Petitioner then rested (R1492). Petitioner and Marino both renewed their motions for judgment of acquittal which the judge denied (R1486-1489). Petitioner was convicted of the offenses charged and was sentenced to 30 years in prison and to two consecutive sentences of ten years probation (R1641-1642, 1674-1675).

SUMMARY OF ARGUMENT

Petitioner's first point raises the issue of whether Florida should return to its traditional rule that a comment on silence is reversible error,without regardless to the harmless error test. This was the law in Florida for many years. Gordon v. State, 104 So. 2d 524 (Fla. 1958); Trafficante v.State, 92 So. 2d 811 (Fla. 1957); Way v. State, 67 So.2d 32 (Fla. 1953); Rowe v. State, 87 Fla. 17, 98 So. 613 (1924). In August, 1985 this Honorable Court overruled more than fifty years of unbroken precedent in a narrow four (4) to three (3) decision. State v. Marshall, 476 So.2d 150 (Fla. 1985). This experiment in a harmless error test has been a failure and should be ended. Other states have followed such experiments; found them unworkable, and returned to a per se rule. Westmark v. State, 693 P.2d 220 (Wyo. 1984). The traditional law of Florida should be restored.

The second issue concerns the certified question itself. Assuming arguendo that this Honorable Court decides to maintain a harmless error analysis; thorough review of the entire record is essential. In Holland v. State, 503 So.2d 1250 (Fla. 1987), this Court stated:

> "It's the duty of the panel of appellate judges to read the record in its entirety and review the issues with careful scrutiny in order to apply the (harmless error) test".

Id. at 1253 (italicized material added)

The United States Supreme Court and other state courts have also emphasized the need to review the entire records in detail, to determine whether an error is harmless beyond a reasonable

doubt. United States v. Hasting, 461 U.S. 499 (1983); State v. Zimmerman, 479 L.E. 2d 862 (Ohio 1985). Thus, the certified question must be answered in the affirmative.

The third issue concerns whether the acknowledged comment on silence by the Co-defendant's counsel, is harmless, beyond a reasonable doubt. This Honorable Court and the Fourth District have both determined that the Co-defendant's counsel commented upon Petitioner's failure to testify. The only issue is whether the issue is harmless beyond a reasonable doubt.

Appellant would initially point out that Respondent has never initially argued that the error in this case was harmless; either in this Honorable Court, or in the Fourth District Court of Appeal. This Court raised this possibility, sua sponte, in the prior certified question. Thus, Respondent has waived the defense of harmless error.

Assuming arguendo, that the question of harmless error is properly before this Honorable Court; the error in the present case is clearly not harmless beyond a reasonable doubt. The harm from this comment is clear from only a brief review of the testimony in this case. Petitioner's entire defense to these charges was that his Co-defendant, James Marino,was the aggressor in this incident. Petitioner's defense was that although he was present; he had little, if any, participation in this incident. Petitioner's defense was completely confirmed by the prosecution's primary witness, P[redacted] L[redacted] the alleged victim in this case (R558-744).

P█ L█ identified James Marino as the man who beat her, forced here to perform oral sex, and who had pretended to be a police officer (R614-615). She stated that Petitioner had not initiated any violence during the evening (R614-615). She testified that Marino initiated all of the violence (R643-654). She stated that Petitioner was the passive recipient of oral sex (R671-672).

The only direct contradiction of Petitioner's defense case came from the Co-defendant, James Marino, and one of his witnesses, Brett Knesz. Marino testified that he was present and that Petitioner was the aggressor in this incident (R1256-1396). Marino's testimony was directly contrary to that of the victim, P█ L█ P█ L█ had no connection with either Marino or the Petitioner. Thus, she had no reason to lie concerning the issue of who was the aggressor in this case. Marino had an obvious reason to lie. He was facing charges of three very serious felonies (attempted first degree murder; sexual battery with a knife; and kidnapping). Thus, it is clear that absent corroboration of Marino there was no reason for the jury to believe Marino and disbelieve the victim, P█ L█

The only witness who substantially corroborated Marino was Brett Knesz. He testified that Marino was a close friend of his (R1132). He stated that he had been convicted of a crime (1133). He claimed that Petitioner had told him that he had been the aggressor and that he had shaved all the victim's hair off of her entire body and beat her (R1142-1143, 1152-1153).

He testified that he had gone to Marino's house and read the victim's statement (R1160). He had told Petitioner's father that he thought there would be separate trials (R1161). He admitted that he had said Marino was his friend and that he was going to come forward to help him out (R1163). He spoke to Marino approximately ten times prior to trial (R1166). He admitted offering to help Marino get a job and offered to move to Houston with him (R1170). Thus, Brett Knesz's credibility was crucial. His testimony was the only testimony corroborating Marino on the key issue in the case. If Knesz was to be believed; then Petitioner had admitted to being the aggressor in the incident.

Marino's attorney knew that this testimony <u>the most crucial testimony available</u> in order to attempt to show that Petitioner, and not Marino, was the aggressor. This is why he commented on Petitioner's failure to testify. (R1555-1556). Co-defendant's counsel stated that Petitioner had allegedly confessed and no one had refuted it. Petitioner and Knesz wee the only parties to the conversation involved. Therefore, only Petitioner could refute the statement (R1555-1556).

This comment was severely and directly prejudicial <u>on the primary issue in the case</u>; i.e. whether Petitioner or Marino was the aggressor in this case. It directly and explicitly pointed out that Petitioner had not taken the stand to refute Knesz's testimony that he had allegedly admitted being the aggressor. Only Petitioner could refute this, as only he and Knesz were parties to this conversation.

It cannot be determined, beyond a reasonable doubt, that this comment was harmless. If the jury, had believed that Petitioner was not the aggressor, it may well have found him not guilty of one or more counts, or only guilty of a lesser included offense, on one or more counts. Therefore, it is immediately apparent that the harmless error standard of DiGuilio, supra cannot be met.

Petitioner's fourth point raises the issue of whether the trial court erred in denying Petitioner's motion for severance. The failure to sever Petitioner and his Co-defendant was severely prejudicial to Petitioner. The testimony of the Co-defendant provided the most damaging evidence against Petitioner (R1256-1394). His testimony was virtually the only evidence that Petitioner was the aggressor during the incident;indirect contradiction to the victim, P[redacted] L[redacted] testimony. The Co-defendant provided virtually the only evidence that would support the verdict of attempted first-degree murder, under either a felony-murder or premeditated murder theory. See Amlotte v. State, 456 So.2d 448 (Fla. 1984). Thus, the failure to sever was highly prejudicial and constitutes reversible error. Crum v. State, 398 So.2d 810, 811 (Fla. 1981); Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981); United States v. Crawford, 581 F.2d 489, 491 (5th Cir. 1978).

The fifth issue concerns the trial court's refusal to grant him a continuance to allow him adequate time to prepare. Defense counsel had been unable to depose numerous prosecution witnesses and had deposed seventeen (17) prosecution witnesses during the seventy-two (72) hours prior to trial (R1422-1427, 1748-1761).

This denied Petitioner the effective assistance of counsel. Valle v. State, 394 So.2d 1004 (Fla. 1981); Westbrook v. State, 439 So.2d 1039 (Fla. 4th DCA 1983).

The sixth issue concerns the hypnosis of the key prosecution witness, P[redacted] L[redacted]. This requires reversal under Bundy v. State, 471 So.2d 9 (Fla. 1985)

ARGUMENT

POINT I

THIS COURT SHOULD RETURN TO ITS WELL-SETTLED POSITION THAT COMMENT IN A DEFENDANT'S RIGHT TO REMAIN SILENT REQUIRES REVERSAL UPON TIMELY OBJECTION THERETO

This Court has repeatedly held that a comment on silence renders a conviction reversible as a matter of law. Cf. Bennett, 316 So.2d 41 (Fla. 1975), Shannon v. State, 335 So.2d 5 (Fla. 1979), Clark v. State, 363 So.2d 331 (Fla. 1978), and the cases cited therein. In Marshall, supra, this Honorable Court overruled more than sixty (60) years of long-standing precedent and set up harmless error that on a comment on silence; in a narrow four (4) to three (3) decision. This experiment, in the harmless error test, which we have been enduring, for the last two years, has been a complete failure, and must be abandoned.

Many states have a per se reversible rule concerning a comment on silence. Ex Parte Tucker, 454 So.2d 552 (Ala. 1984); State v. Marcello, 375 So.2d 94 (La. 1979); West v. State, 485 So.2d 68 (Miss. 1985); State v. Lara, 539 P.2d 623 (N.M.App. 1975); State v. Turner,433 A.2d 397 (Me. 1981) (If a direct comment); State v. Nelson, 719 S.W. 2d 13 (Mo.App. 1986); State v. Bennett, 304 S.E. 2d 35 (W.Va. 1983); Westmark v. State, 693 P.2d 220 (Wyo. 1984). The number is growing, with Missouri and Wyoming, being recent additions. Florida should return to its long standing tradition and join these other states.

The experience of Wyoming as described by the Wyoming Supreme Court in Westmark, supra exemplifies the need to return to a per se reversible rule. Wyoming had a per se reversible

rule and then changed to harmless error test in 1982. Richter v. State, 642 P.2d 1269 (Wyo. 1982). After a two year experiment in the harmless error test; the Wyoming Supreme Court found the experiment to be a complete failure and returned to the per se rule. Westmark, supra. The analysis of the Wyoming Supreme Court is very applicable to Florida.

> Since we overruled **Clenin v. State**, Wyo., 573 P.2d 844 (1978) in **Richter v. State**, Wyo., 642 P.2d 1269 (1982), where we held that violations were not necessarily prejudicial and, under some fact situations, constitute harmless error, our attention has been called to far too many instances where prosecutors seem to be playing "Russian roulette" with this impermissible practice. The game seems to be that prosecutors will take the chance and ask about or comment upon silence even though they know that these interrogations are impermissible as being in violation of the defendant's Fifth Amendment rights to the federal constitution and his Art. 1,§11, Wyoming constitutional rights-on the theory that the Supreme Court in all probability will hold the error to be harmless.
>
> No more.
>
> We herewith return to the rule of **Clenin v. State**, supra, and will hold that any comment upon the accused's exercise of his or her right to remain silent is prejudicial error which will entitle the accused to a reversal of the conviction.
>
> We will reverse Westmark's conviction and remand for a new trial.
>
> 693 P.2d at 221-222

The Wyoming Supreme Court went on to further describe the reasons for the per se rule:

> This court has long been concerned about the problem at hand in this appeal--philosophically, factually and from the pure legal point of view. In **Jerskey v. State**, Wyo., 546 P.2d 173, 175 (1976) we said:

"The theory of the privilege against self-incrimination is a good, high-principled concept aimed at the preservation of the very most basic of the individual's rights in a democratic society and one which should be readily embraced by all of us."

We remembered that **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R. 3d; 974 (1966) **referred to Escobedo v. Illinois**, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). The **Miranda** Court said:

"***That case was but an explication of basic rights that are enshrined in our Constitution--that 'No person *** shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall *** have the Assistance of Counsel'--rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, there were secured 'for ages to come, and *** designed to approach immortality as nearly as human institutions can approach it,' **Cohens v. Commonwealth of Virginia**, 6 Wheat. 264, 387, 5 L.Ed. 257 (1821)." 384 U.S. at 442-443 [86 S.Ct. at 1611].

In **Jerskey**, we pondered the evil which is described when courts ignore or do not assign the intended importance to such rights as those embodied in the Fifth Amendment to the United States Constitution and Art. 1, § 11 of the Wyoming Constitution when we said:

"It is because of these ancient tendencies by which men in possession of the powers of government seek, with the weaponry of government, to impose their will upon those whom they govern (or 'serve') that the protections embodied in the Federal Fifth Amendment and the Wyoming Constitution, Article 1, Section 11, were needed.

"The evil is so often spawned in the name of the law and the pursuit of the public order as expressed by officials who are engaged in doing what is 'good,' 'right,' 'fair,' 'in the public interest,' or who are so often 'just doing their duty.' However, when public officials adopt their own ideas about morality as standards for adjudicating the righteousness of others--absent the guidelines furnished by the

> common and statutory law pool of experience contributed to by all civilized people--the 'good,' the 'right,' and the 'fair' become the **expedient.** The standard for the successful society is then judged according to the end result with precious little attention being paid to the manner by which it is achieved and to how many heads may have fallen into the basket in the process. Government becomes ultra powerful and the citizen is relegated to the least rather than the most important unit of the social order. The fragile cobwebs of human rights become misty visions which tend to blend with the ghosts of some public official's private opinion of what is 'good,' 'fair,' 'right,' and 'just' until the become imperceptible and--at last--are no rights at all." 546 P.2d at 177.
>
> In Wyoming we have said that, unless there is a clear, unmistakable, knowledgeable waiver of the defendant's constitutional right to remain silent, silence may not be used against him in trial--and to do so is error. **Jerskey v. State,** supra.
>
> Prior to **Jerskey,** this court said in **Gabrielson v. State,** Wyo., 510 P.2d 534, 538 (1973) (decided before **Doyle**):
>
> "No constitutional right of an accused person is more sacred than his right not to make a statement or testify against himself, and it was highly improper for any comment or question to be made or asked pertaining thereto."
>
> Justice Guthrie, concurring in **Gabrielson,** was particularly concerned with trial comments upon the defendant's exercise of his right to remain silent and said:
>
> "*** The chilling effect of such a procedure on the exercise of such a right needs no demonstration. A constitutional guaranty indeed becomes barren and valueless if by the assertion thereof it can be utilized to his detriment." 510 P.2d at 539-540.
>
> 693 P.2d at 222-224

Florida has the same sacred constitutional right. Article I, Section 2 <u>Fla.Const.</u>, Florida has also experienced numerous abuses of the prohibition against penalizing a citizen for

exercising his sacred constitutional right. Ferry v. State, ___ So.2d ___, 12 FLW 215 (Fla.May 8, 1987); Brannin v. State, 496 So.2d 124 (Fla. 1986); Long v. State, 494 So.2d 213 (Fla. 1986); Betolotti v. State, 476 So.2d 130 (Fla. 1985); Barry v. State, 494 So.2d 213 (Fla. 1986); Rosso v.State, ___ So.2d ___, 12 FLW 1024 (Fla. 3rd DCA April 14, 1987); Smith v. State, ___ So.2d ___, 12 FLW 130 (Fla. 4th DCA December 24, 1986). These are just a few of the cases where this error continues.

The question remains as to why prosecutors continue to repeatedly make such an obvious and basic violation of the one of the most sacred and ancient of rights under the Florida and United States Constitutions. The only logical answer is because an assertion of a citizen's right to remain silent is so damning, in the jury's eyes, that it constitutes the final nail in the coffin; eliminating the citizen's chances for acquittal. Hardly a voir dire goes by, after all, where a juror does not candidly state that he expects an innocent person to give his story to the police, or that he will wait to decide the case until he hears the defendant's side of the story. See, Waddell v. State, 458 So.2d 1140 (Fla. 5th DCA 1984). The right to remain silent is portrayed on television and movies as a screen behind which the guilty hide. It is precisely these subconscious, but no less devastating, visceral responses which the prohibition against comment on the exercise of the right to remain silent is designed to circumvent. And it is precisely because these responses are so insidious that mandatory reversal is the only appropriate prophylactic, both to remove temptation from the path of the prosecution, insofar as the Court is able to, and to ensure that

an accused's conviction is not impermissibly tainted. Florida has a per se rule of reversal in other areas. State v. Hall, ___ So.2d ___, 12 FLW 363 (Fla. July 17, 1987); Perri v. State, 426 So.2d 1021 (Fla. 3rd DCA 1983). Florida has had a two year experiment with the harmless error test. It has been a miserable failure. It should be ended after two years; just as the Wyoming Supreme Court ended its failed experiment after two years. This Court should return to its time honored per se rule of reversal.

POINT II

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE AND THE RULE OF HOLLAND V. STATE, 503 So.2d 1250 (Fla. 1987) SHOULD BE MAINTAINED

This issue involves a certified question from which, in effect, urges this Honorable Court to overrule its decision in Holland, supra. The procedure which by the Fourth District Court of Appeal proposed in Kinchen, supra and described more fully in Ciccarelli v. State, ___ So.2d ___, 12 FLW 1429 (Fla. 4th DCA June 10, 1987) is not only contrary to Holland, supra, but is contrary to the role of a judge as conceived by virtually every court in the nation.

The Fourth District Court of Appeal has proposed the following form of review:

> In determining that the error involved herein was harmless we have relied extensively upon the review of the evidence set out in the parties'briefs and our own internal review process by which the court's legal staff directly examines the trial court record to be certain that the court is presented with an accurate description of the evidence. Each judge on the panel has not independently read the record in its entirety. While we are confident that this review has been both complete and accurate, we are concerned as to whether our review is in accord with the holding in **Holland v. State**, 12 FLW 94 (Fla. Feb. 5, 1987), which appears to hold that it is the duty of each appellate judge to read the entire trial court record before determining whether trial error may be harmless.
>
> Our primary concern is that we comply with the supreme court's directions in resolving a harmless error claim by the state. At the same time, however, we must acknowledge some concern for the sheer amount of judicial time that will be required if, indeed, each judge must read the entire record before harmless error may be found. While the record is not especially

> lengthy in the present case, we must note that a claim of harmless error is raised in the vast majority of criminal appeals and our ability to manage an already staggering caseload will certainly be affected by a requirement that each judge read the entire record.
>
> Ciccarelli, supra at 1429.

This form of review is completely inadequate; especially when dealing with such an important right as the right to remain silent.

The procedure described in Ciccarelli, supra is constitutionally deficient under the decisions of the United States Supreme Court. United States v. Hasting, 461 U.S. 499 (1983).

> Since **Chapman**, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, **e.g., Brown, supra,** 411 U.S., at 230-232, 93 S.Ct., at 1569-1570; **Harrington v. California,** 395 U.S. 250, 89 S.Ct. 1726, 23 L.1Ed.2d 284 (1969); **Milton v. Wainwright,** 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972).
>
> 461 U.S. at 510.

Thus, the United States Supreme Court has specifically held that is the duty of the court; not the court's legal staff, to consider the entire trial record as a whole.

Other federal and state courts have reached the same result. United States v. Muscarella, 585 F.2d 242, 250 (7th Cir. 1978); State v. Phillips, 298 N.W. 239, 242 (Wis.App. 1980); State v. Zimmerman, 479 N.E.2d 862 (Ohio 1985). Any rational attempt at deciding whether an error is harmless, beyond a reasonable doubt, can only be made after a complete review, of the entire record, by the judges themselves.

The system proposed in Ciccarelli also transfers some of the most basic functions of being a judge to judicial aides. This proposal undermines the very foundations of our system of appellate review.

Appellate judges, in Florida, constitute a small, select group of the most highly qualified and experienced legal scholars in our state. They all have years of experience as members, in good standing, of the Florida Bar. They all have spotless ethical reputations and outstanding reputations as practicing attorneys and legal scholars. Many have previously been trial judges. Most appellate judges are initially placed on the bench by the Governor of Florida, after being nominated by a Judicial Nominating Commission; which is composed of prominent members of the Florida Bar and other prominent citizens. The nomination and selection process involves a very detailed screening process of the backgrounds and qualifications of the candidates. Appellate judges are then subjected to periodic review by the voters; through the merit retention process.

The contrast between an appellate judge and a judicial aide is a stark one. Judicial aides are generally persons who have just graduated from law school. Many are not members of the Florida Bar. Many have never handled a trial or an appeal at any level. None have been through the rigorous selection process of the Judicial Nominating Commission and the Governor. They are not subjected to review, by the citizens of Florida, through the merit retention process.

A thorough and complete review, of the entire record, is one of the most basic and essential functions of being an appellate judge. The experience and qualifications of an appellate judge are required to ensure full, fair and accurate appellate review. A summary, by an aide, is no substitute for the full flavor of a case one receives from a complete reading of the entire record. Both the Florida and Federal Constitutions require this. Holland, supra; Hastings, supra. The litigants on both sides are entitled to it. It must always be remembered that an appeal ultimately involves the life or liberty of a fellow citizen. Each citizen is entitled to the full review process described by Holland.

The Ciccarelli procedure not only denied full appellate review to litigants; it would substantially erode public confidence in our judicial system. The people of Florida have a right to expect the judges that they vote on; through the merit selection process, to perform such a basic function of judicial review. The public has no idea who the judicial aides are, has no way of monitoring their performance;and has no method of approving or disapproving of their work.[1]

The people of Florida are entitled to complete, accurate, and thorough appellate review as outlined in Holland, supra. Thus, this Honorable Court must answer the certified question in the affirmative.

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[1] The danger of the sort of "hands-off, delegation of responsibility method" of Ciccarelli is exemplified in the scandal-ridden Iran-Contra arms deals. Here, as there, the responsible official must have first-hand knowledge of the situation.

POINT III

THE DIRECT COMMENT ON A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

This issue involves a direct comment on Petitioner's right to remain silent by the Co-defendant's attorney. The Co-defendant's attorney stated:

> "Besides all of the physical, tangible proof we have, I did something the State didn't do. I brought up a confession, an admission. Weigh it for what you think it is worth. Did Brett come across to you as a liar? The State is in a position here, should they question his credibility or not. On one hand, they are using him to support the statement of Randy Kinchen's guilt; and, on the other hand, they are saying that he is not credible because now he is my client's best friend. Well,there is such a charge which is perjury, with lying under oath; and you heard Brett testify. You decide if he is credible or not.
>
> Besides all of the physical evidence, then with all of the inconsistencies we have now, the statements from this man's own mouth that were unrefuted, let's say it is the truth. I have no reason to doubt Randy Kinchen's father. Brett did not deny he made that statement, that, "I would do anything I could --" (R1555-1556).

Then, Petitioner's counsel stated:

> "Can I approach the bench? I am obligated to move for a mistrial at this time because Mr. Smith made a comment about that statement being unrefuted and implying my client did not testify. On that basis, I'm moving for a mistrial." (R1556)

The statement that Brett Knesz's testimony as to an alleged confession was "unrefuted" has been previously determined to be a comment on Petitioner's failure to testify by this Honorable Court and by the Fourth District Court of Appeal.

Respondent has never raised the question of harmless error during this entire case. Thus, this issue is waived and should not be reached by this Honorable Court. Respondent never raised the issue in the original appeal; in the District Court of Appeal; either in its answer brief, at oral argument, or in its motion for rehearing. Respondent's failure to raise this issue should bar consideration of this issue by this Honorable Court. Respondent was the losing party in the Fourth District Court of Appeal. Respondent then sought discretionary review in the Florida Supreme Court. As the aggrieved party, in the Florida Supreme Court, Respondent had the responsibility of properly raising all grounds in the lower court. This Court has a long tradition of refusing to entertain any issue or argument, not properly raised in the lower court. Stein v. Brown Properties, 104 So.2d 495, 500 (Fla. 1958).

Respondent never raised this issue before this Court, on the previous certified question, by way of brief, motion for supplemental brief, or at oral argument. It is well settled that appellate courts only review issues which are properly presented to them. Foley v. State, 50 So.2d 179, 182 (Fla. 1951). Petitioner recognizes that the Florida Supreme Court's opinion, explicitly holding that a comment on silence may be harmless error, had not been rendered at the time of briefing and oral argument. However, the United States Supreme Court had held that a comment on a defendant's failure to testify could be harmless error as early as 1967. Chapman v. California, 386 U.S. 18 (1967). Thus, it is clear that Respondent had the "tools to construct" an argument on this issue as early as 1967. See Engle

v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Indeed, other members of the West Palm Beach Bureau of the Attorney General's Office were arguing that a comment on silence could be harmless error, while this case was pending. Marshall v. State, No. 83-709, 10 FLW 88 (Fla. 4th DCA Dec. 28, 1984) reversed sub.nom. State v. Marshall, 471 So.2d 150 (Fla. 1985). Thus, there is absolutely no reason for Respondent not having raised this issue in either the Fourth District Court of Appeal, or before the Florida Supreme Court. Thus, the defense has been waived.

Assuming arguendo, that the question of harmless error is even available to Respondent, it is clear that the error in the present case is not harmless beyond a reasonable doubt. This Court has set a very high standard for the prosecution to meet in order to show that a comment on silence is harmless beyond a reasonable doubt. In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). This Court outlined the high burden the prosecution must meet; in order to prove that a comment on silence is harmless, beyond a reasonable doubt.

> The most perceptive analysis of harmless error principles of which we are aware is that of former Chief Justice Traynor of the California Supreme Court. See Roger J. Traynor, The Riddle of Harmless Error (1970), and the dissent to People v. Ross, 67 Cal.2d 64, 429 P.2d 606, 60 Cal.Rptr. 254 (1967) (Traynor, C.J., dissenting), rev'd sub nom, Ross v. California, 391 U.S. 470 (1968). In his dissent, Chief Justice Traynor maintained that comments on Ross's failure to testify were harmful and that the majority misunderstood and misapplied the Chapman harmless error test. Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the possible evidence, excludes the impermissible evidence,

> and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:
>
> > Overwhelming evidence of guilt does not negate the fact that an error constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.
>
> Ross, 429 P.2d at 621.
>
> It is clear that comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict and that an appellate court, or even the trial court, is likely to find that the comment is harmful under Chapman.
>
> 491 So.2d at 1136-1137

This Court went on to identify various errors in applying this analysis.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

> We wish to emphasize that any comment, direct or indirect, by anyone at trial on the right of the defendant not to testify or to remain silent is constitutional error and should be avoided.
>
> Id. at 1137.

Thus, this Court has made clear that this is a very high burden and that even in cases where the evidence against the defendant is overwhelming the error may be harmful.

This Court's actual analysis of the actual error in DiGuilio, supra, is also instructive.

> The harmless error tests, as set forth in Chapman and progeny, places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See Chapman, 386 U.S. at 24. Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. On this record, it is clear that we cannot declare a belief beyond a reasonable doubt that the police officer's impermissible testimony did not affect the jury verdict and was harmless beyond a reasonable doubt. First, the permissible evidence was not clearly conclusive. Rosa testified he was going to obtain the cocaine from a cohort. The fact that Rosa returned shortly with DiGuilio and the cocaine does not show beyond a reasonable doubt that DiGuilio was a cohort who was holding the cocaine. There are entirely plausible explanations consistent with DiGuilio's innocence. For example, DiGuilio could have been present in the motel room and not known of the impending drug deal or of the cocaine. Rosa's statement to the purported drug buyer about a cohort could have been false, precautionary measure to dissuade strong-arm tactics. Violence, suspicion, and lying between drug dealers is common. The fact that the jury found DiGuilio not guilty of trafficking in cocaine indicates it was not convinced beyond a reasonable doubt that DiGuilio had possessed the cocaine.

> Second, the context of the recorded conversation between Rosa and DiGuilio is ambiguous. (Because of poor recording quality, it is also very hard to understand.) By the time of the conversation, Rosa and DiGuilio had been in custody together for approximately an hour. Except by inference, DiGuilio's remarks do not directly show that he was a conspirator. Indeed, under the circumstances, it is plausible that DiGuilio had learned of the drug deal after the arrest by observing the events or in an unrecorded conversation with Rosa and that DiGuilio's remarks were based on knowledge obtained after his arrest.
>
> Turning then to the impermissible testimony, it put before the jury the fact that DiGuilio declined to offer any plausible explanation at the time of his arrest for his suspicious presence in the midst of a drug deal. Further, at least indirectly, it also highlighted for the jury the fact that DiGuilio was not testifying at trial and still had offered no plausible explanation. Under those circumstances and on this record, we conclude that the error was not harmless and constituted reversible error. § 923.33, Fla. Stat. (1981).
>
> Id. at 1137-1138.

Thus, it is clear both from the general principles laid out in DiGuilio and the specific application, in that case, that it is a very difficult burden for the Respondent to meet in order to show that the error was harmless. See also State v. Burns, Case No. 66,888, (Fla. July 17, 1986).

The harm from this comment is clear from a review of the testimony in this case. Respondent's entire defense to these charges was that his co-defendant, James Marino, was the aggressor in this incident. Petitioner's defense was that although he was present; he had little, if any, participation in this incident.

Petitioner's defense was completely confirmed by the prosecution's primary witness, P[redacted] L[redacted] the alleged victim in this case. P[redacted] L[redacted] testified that she had been living in Las Vegas since May, 1981 (R558). In April, 1981, she had been living on Wiley Street in Hollywood, Florida (R558-559). She had been working as a prostitute for a little over a year at that time (R559). On the night in question she was working the street as a prostitute at approximately 12:30 a.m. or 1 a.m. on Wiley and Federal Street.

Ms. L[redacted] testified that at 12:30 or 1 a.m. a car pulled up into a parking lot of a military club (R559-560). She stated that she was with two other prostitutes (R560). She walked over to the car and talked to the two people in the car (R560). The car left and came back (R560-564). She and another prostitute named L[redacted] got in the car and discussed performing oral sex for twenty dollars (R565).

L[redacted] claimed that a man then said that there were "some niggers" in the car next to them and said that he was getting out to get a gun (R566). She claimed that she and L[redacted] got out and ran in different directions (R566-567). She claimed she ducked behind some orange crates (R566-567). She claimed the driver of the car then pretended to be a police officer and when she resisted he forced her into the car (R567-570). She stated that the car pulled away while they struggled (R570-572). She testified that the passenger of the car forced her to perform oral sex on the driver (R573-574). She stated that the passenger

hit her, took her wig off, and was cutting her hair with a knife (R575-576). The knife came out of the glove box in the car (R576).

L[redacted] testified that after a twenty or thirty minute ride they stopped in an area of dirt and sand (R577-578). She stated that the passenger forced her to commit oral sex on him and then forced her into the water (R579-580). She claimed that he hit her with a belt and a chain (R580-581). She said the other man was in the car and then put a bag over her head before she was thrown in the water (R585-586). She stated that she doesn't remember who took her out of the water (R587-588). She stated that the chain was fat and silver (R607-610).

P[redacted] L[redacted] identified James Marino as the man who beat her, forced her to perform oral sex, and who had pretended to be a police officer (R614-515). She stated that Petitioner had not initiated any violence during the evening (R614-615). She testified the car was a brown Mustang (R623). She testified that Marino initiated all of the violence (R643-654). She stated that Petitioner was the passive recipient of oral sex (R671-672). She stated that she never saw a gun that night (R686). She stated that she was hazy on some aspects of the night and that she had undergone hypnosis to try to improve her memory (R703-704). She stated that she had been a prostitute for over a year and had worked in Denver, San Francisco, and Fort Lauderdale (R710).

Ms. L[redacted] testified that she had picked Marino out of a photographic lineup (R714-715). She testified that she had never picked Respondent out of a photographic or live line-up (R716-

717). She testified that at her deposition she had been unable to describe the appearance or facial features of the two men (R718-719). She stated that when she tried to get away only Marino chased her (R739). She testified that the only activity she definitely remembers that Petitioner was involved in; was the receipt of oral sex (R744).

The only direct contradiction of Petitioner's defense case came from the co-defendant, James Marino, and one of his witnesses, Brett Knesz. Marino testified that he was present and that Respondent was the aggressor in this incident (R1256-1396). Marino's testimony was directly contrary to that of the victim, P[redacted] L[redacted]. P[redacted] L[redacted] had no connection with either Marino or the Petitioner. Thus, she had no reason to lie concerning the issue of who was the aggressor in this case. Marino had an obvious reason to lie. He was facing charges of three very serious felonies (attempted first degree murder; sexual battery with a knife; and kidnapping). Marino could be found not guilty of some or all of these charges, if he could convince the jury that he was not the aggressor. It is also very possible that he could be convicted of a lesser included offense on one or more of the charges or that he would receive a less severe sentence if convicted. Thus, it is clear that absent corroboration of Marino there was no reason for the jury to believe Marino and disbelieve the victim, P[redacted] L[redacted]

The only witness who substantially corroborated Marino was Brett Knesz. Knesz was called as a witness by Marino. Brett Knesz testified that he had known both Petitioner and Marino for eight or nine years (R1132). He testified that Marino was a

close friend of his (R1132). He stated that he had been convicted of a crime (R1133). He claimed that Petitioner had told him that he had been the aggressor and that he had shaved all the victim's hair off of her entire body and beat her (R1142-1143, 1152-1153). He claimed that Petitioner had ruined his boots and owed him money and that this had caused bad feelings between them (R1150). He admitted that he had said at his deposition that Petitioner had told him he had stabbed her in the back, although he did not testify to this at trial (R1157-1158).

He testified that he had gone to Marino's house and read the victim's statement (R1160). He had told Petitioner's father that he thought there would be separate trials (R1161). He admitted that he had said Marino was his friend and that he was going to come forward to help him out (R1163). He spoke to Marino approximately ten times prior to trial (R1166). He admitted offering to help Marino get a job and offered to move to Houston with him (R1170). Thus, Brett Knesz's credibility was crucial. His testimony was the only testimony corroborating Marino on the key issue in the case. If Knesz was to be believed; then Petitioner had admitted to being the aggressor in the incident.

Marino's attorney knew that this testimony was <u>the most crucial testimony available</u> in order to attempt to show that Petitioner, and not Marino, was the aggressor.

In his closing argument, Marino's attorney stated:

> "Besides all of the physical, tangible proof we have, I did something the State didn't do. I brought up a confession, an admission. Weigh it for what you think it is worth. Did Brett come across to you as a liar? The State is in a position here, should they question his credibility or not. On one hand, they are using him to support the statement of Randy

> Kinchen's guilt; and, on the other hand, they are saying that he is not credible because now he is my client's best friend. Well, there is such a charge which is perjury, with lying under oath; and you heard Brett testify. You decide if he is credible or not.
>
> Besides all of the physical evidence, then with all of the inconsistencies we have now, the statements from this man's own mouth that were unrefuted, let's say it is the truth. I have no reason to doubt Randy Kinchen's father. Brett did not deny he made that statement, that, "I would do anything I could"
>
> (emphasis supplied) (R1555-1556)

Then, the Petitioner's attorney stated:

> "Can I approach the bench? I am obligated to move for a mistrial at this time because Mr. Smith made a comment about that statement being unrefuted and implying my client did not testify. On that basis, I'm moving for a mistrial."
>
> (R1556)

This was clearly a direct comment on Petitioner's decision not to testify. The Co-defendant's counsel was stating that Petitioner had allegedly confessed and no one had refuted it. Respondent and Knesz were the only parties to the conversation involved. Therefore, only Petitioner could refute the statement. A statement that testimony of a defendant's statements in a conversation, was unrefuted, has consistently held to be a comment on the failure to testify, if the defendant and the witness are the only parties to the conversation. Trafficante v. State, 92 So.2d 811 (Fla. 1957).

This comment was severely and directly prejudicial on the sole issue in the case; i.e. whether Petitioner or Marino was the aggressor in this case. It directly and explicitly pointed out

that Petitioner had not taken the stand to refuse Knesz's testimony that he had allegedly admitted being the aggressor. Only Petitioner could refute this, as only he and Knesz were parties to this conversation.

It cannot be determined, beyond a reasonable doubt, that this comment was harmless. If the jury, had believed that Petitioner was not the aggressor, it may well have found him not guilty of one or more counts, or only guilty of a lesser included offense, on one or more counts. If the jury had believed the victim, Ms. L[redacted] rather than Marino and Knesz, the jury would have had to acquit Petitioner of the attempted first-degree murder count, under either premeditated murder or felony murder theory. See Amlotte v. State, 456 So.2d 448 (Fla. 1984). The jury may well have acquitted Petitioner (or convicted him of a lesser included offense) on one of the other counts; believing either that his participation was coerced, or that it was legally insufficient to justify a conviction. Therefore, it is apparent that the harmless error standard of Chapman, supra and DiGuilio, supra.

POINT IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR SEVERANCE

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

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

The Florida Supreme Court has emphasized that the possibility of prejudice should outweigh any other consideration.

> "The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency, and convenience." Crum v. State, 398 So.2d 810, 811 (Fla. 1981).

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

> "The defenses...conflict to the point of being irreconcilable and mutually exclusive." United States v. Crawford, 581 F.2d 489, 491 (5th Cir. 1978).

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

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

In the present case, Petitioner timely moved for a severance and the defenses of the co-defendants were clearly irreconcilable. Petitioner field a written motion to sever prior to

trial (R1740-1741). The Co-defendant, Mr. Marino,also made a motion to sever prior to trial which Petitioner orally joined in at the hearing on this motion (R37-39). Petitioner also renewed the motion orally prior to trial (R80-90, 94-95). The trial court denied this motion (R100). Petitioner renewed his motion several times during the trial, beginning with voir dire (R223-225, 692-695, 868, 1430-1431). This issue was timely raised and properly preserved.

Petitioner's Co-defendant, James Rocky Marino, directly accused him of committing this offense and was the most damaging witness against him. This was the danger raised in Petitioner's pre-trial motion to sever and this was what actually occurred (R1740-1742).

In the prosecution's case, the only witness who identified Petitioner was P████ L███. She testified that Marino committed all the violent acts involved, forced her to perform oral sex on both men, beat her, and threw her in the sea (R614-615). She testified that Petitioner was present during these activities, but she was only certain that he was the passive recipient of oral sex (R614-615, 673-674, 714, 743-744). None of the other prosecution witnesses identified Petitioner.

The Co-defendant's entire defense was to admit that he was present, but to claim that Ms. L███ was mistaken and that Petitioner was the aggressor. He pursued this line of defense throughout his questions, cross-examination, and testimony. Marino took the stand and admitted his presence at the scene but accused Petitioner of all the aggressive acts. (R1264-1421). Marino also called Brett Knesz, who claimed that Petitioner had

admitted to him that he was the aggressor in this incident (R1140-1215). Marino was the only eyewitness who claimed that Petitioner was the aggressor in this offense. Knesz was the only witness who claimed that Petitioner had admitted being the aggressor. Thus, it is clear that the most damaging witnesses against Petitioner were not those called by the prosecution, but were those called by his Co-defendant.

In the present case, as in Crum, supra, Petitioner was severely prejudiced by the failure to sever. This case clearly meets the test laid out in Crawford, supra. Clearly, the defenses were "irreconcilable and mutually exclusive." 5821 F.2d at 491. Precisely the evil feared in Crum, supra, and Rowe, supra, occurred here. Petitioner had "to stand trial before two accusers, the state and his co-defendant." 398 So.2d at 811-812; 404 So.2d 1176.

Thus, the failure to grant Petitioner's motion to sever was severely prejudicial. It changed the whole character of the trial and of Petitioner's defense (R1434-1435). Therefore, Petitioner's conviction should be reversed for a new trial.

POINT V

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

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

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

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

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

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

This Court granted a new trial, holding that it was error for the trial court to deny the motion for continuance. See also, Ziegler v. State, 95 Fla. 108, 116 So. 241 (1928). In Scott v. State, 101 Fla. 250, 134 So. 50 (1931), the Court, in granting a new trial, recognized that:

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

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

Petitioner was arraigned on August 31, 1981, and was charged with kidnapping, sexual battery, and attempted first degree murder (R13-16). Petitioner filed a written motion for continuance on September 21, 1981 (R1718-1722). This motion was denied on September 24, 1981 (R18-20). Petitioner orally renewed his motion on September 28, 1981; the original trial date (R22-68). The trial judge initially refused to continue the case and then continued it until October 5, 1981, due to the unavailability of the prosecution's key witness (R22-68). Petitioner filed a written motion for continuance on October 5, 1981 (R1748-1861). Petitioner had taken thirteen depositions during the intervening week (R1749). Dr. Murray, who had examined the victim, and Brett Knesz, a key adverse witness had failed to appear for depositions (R1749-1750). On October 2, 1981, he received the name of eleven witnesses who would allegedly attack the credibility of a defense witness, Vicki English (R1749). He also received the report of the Sexual Assault Center on October 2 (R1749-1750). He discovered the names of ten potential witnesses, who he had been unable to speak to during the previous week (R1750). He orally argued this motion and it was denied (R69-79).

Petitioner was severely prejudiced by his inadequate preparation. He raised the problem during voir dire of the late listing of the eleven witnesses who would attack Vicki English's credibility (R226-227). Petitioner failed to make an opening statement because he was unprepared (R516). He also received a list of four more witnesses from the co-defendant during trial (R517-518). Petitioner was also unable to put Vicki English on the stand because he was unable to depose the eleven witnesses who would allegedly attack her credibility (R1422-1428). He stated that he had taken two depositions during trial and seventeen others in the seventy-two hours prior to trial (R1427). Thus, Petitioner was clearly prejudiced by the failure to grant a continuance.

In the present case, as in Valle, supra, Petitioner was denied the effective assistance of counsel by the trial court's failure to grant a continuance. Petitioner was charged with three felonies, punishable by life imprisonment and was forced to trial thirty-five days after arraignment, when he had been unable to depose numerous key witnesses. Several witnesses had been only listed in the last three days before trial. Petitioner was seriously prejudiced by the lack of time to prepare. Thus, the trial court erred in denying Petitioner a continuance and thereby denied him the effective assistance of counsel.

POINT VI

THE PETITIONER'S CONVICTION SHOULD BE REVERSED FOR A NEW TRIAL DUE TO THE HYPNOTIZING OF THE KEY PROSECUTION WITNESS, PRIOR TO TRIAL

In the prosecution's case,the only witness who identified Petitioner was P L She testified that Marino committed all the violent acts involved, forced her to perform oral sex on both men, beat her, and threw her in the sea (R614-615). She testified that Petitioner was present during these activities, but she was only certain that he was the passive recipient of oral sex (R614-615, 673-674, 714, 743-744). None of the other prosecution witnesses identified Petitioner.

Ms. L had been previously hypnotized' as her memory was so hazy (R703-704). This Honorable Court has previously held that a conviction must be reversed, for a new trial, if a witness'memory is affected by hypnosis; and there is a reasonably possibility that the improper evidence might have contributed to conviction. <u>Bundy v. State</u>, 471 So.2d 9, 12-19 (Fla. 1985). Here, P L was virtually the only witness on the issue of identification.

Therefore, Petitioner's conviction should be reversed for a new trial.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse the judgement and sentence of the trial court and remand this case for a new trial. Petitioner makes this request upon the previously described errors, individually and cumulatively. These errors denied him a fair trial and due process of law under the Florida and Federal Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Lee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 26 th day of August, 1987.

Richard B. Greene

Of Counsel