SUPREME COURT OF FLORIDA

JOHN ALLRED,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,532

BRIEF OF PETITIONER ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the Respondent, and the Respondent was the Petitioner in the Fourth District Court of Appeal; Petitioner was the Defendant and the Respondent was the prosecution in the Criminal Division of the Circuit Court, Appellate Division, of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

In this Brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as Mr. Allred, and the Respondent as the State.

The following symbols will be used throughout this Brief:

"R" Record on Appeal.

"A" Appendix, followed by the appropriate page number.

All emphasis in this Brief is supplied by the Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Mr. John Allred was stopped by Officer Kelly for a driving infraction and suspicion of driving under the influence (DUI). Approximately five (5) minutes later two (2) additional police officers appeared on the scene. Mr. Allred, who was not free to go, was requested to perform the alphabet test from "C" to "W."[1] He was not advised of his constitutional rights per Miranda. Mr. Allred incorrectly recited the alphabet. (R. 9).

After being arrested for DUI and transported to the police station for additional testing, Mr. Allred was requested to count from "1,001 to 1,030" as part of the one-legged stand test. Mr. Allred counted 1,001 to 1,021 correctly, but from that point on counted 22 to 30 without the prefix 1,000 before each number. (R. 49).

Mr. Allred filed a written amended supplemental Motion to Suppress the results of the alphabet test done at the roadside and the counting portion done at the police station. (R. 40-41). On November 2, 1990, the trial court entered an Order granting Mr. Allred's Motion. (A.p. 10-16). Thereafter, the State appealed to the Circuit Court Appellate Division which affirmed the trial court based upon the reasoning and analysis set forth in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990). (A.p. 7-9).

The State then appealed the Circuit Court's Opinion to the Fourth District Court of Appeal. The Fourth District reversed the

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[1]The State has always conceded the county court's finding that this roadside testing was conducted in a custodial setting.

Circuit Court, on the authority of State v. DiAndrea, 602 So.2d 1322 (Fla. 4th DCA 1992) (A.p. 2-6), decided the same day holding that recitation of the alphabet test is not testimonial in nature so as to implicate the Fifth Amendment. State v. Allred, 602 So.2d 1326 (Fla. 4th DCA 1992), (A.p. 1).

On August 27, 1992, the Fourth District certified to this Court the following question of great public importance:

> IS A POLICE OFFICER'S REQUEST OF AN INDIVIDUAL ARRESTED FOR DRIVING UNDER THE INFLUENCE TO RECITE THE ALPHABET FROM "C" TO "W" A TESTIMONIAL RESPONSE WITHIN THE PRIVILEGE AND PROTECTIONS OF THE FIFTH AMENDMENT. (A.p. 1).

Mr. Allred timely filed his Notice of Appeal. On October 5, 1992, this Court postponed its decision on jurisdiction, and directed that Mr. Allred's Initial Brief was to be filed by October 30, 1992.[2]

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[2]DiAndrea v. State, Florida Supreme Court Case No. 80,475 is also presently pending before this Court involving the same certified question.

Furthermore, in the instant case, the county and circuit courts specifically held that the compelled "counting test" was like the alphabet test and constituted a testimonial communication protected by the Fifth Amendment. The Fourth District did not specifically address the counting test, nor was it included within the certified question. The Petitioner does not request this Court to exercise its discretionary authority to review the "counting" issue. See, Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982).

SUMMARY OF THE ARGUMENT

In Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990), a majority of the United States Supreme Court held that questioning a DUI arrestee as to the date of his sixth birthday called for a testimonial response implicating the Fifth Amendment. In reaching this conclusion the Court noted that the critical question for Fifth Amendment purposes is whether the compelled utterance results in an incriminating inference derived from a testimonial act as opposed to simply physical evidence. Thus, the majority reasoned that because everyone is presumed to know their birth date, an incriminating inference of impaired mental faculties could therefore arise not just from the fact the defendant slurred his response, but from his inability to correctly state the date of his sixth birthday.

The analysis and reasoning of the majority opinion in Pennsylvania v. Muniz, supra, should be applied in requesting a DUI arrestee to recite the alphabet from "C" to "W." Just as everyone is presumed to know his birth date, everyone is presumed to know the English alphabet. Thus, when Mr. Allred failed to correctly recite the alphabet, the State will draw upon his incorrect response to have the jury conclude that his mental faculties were impaired. Because the State will not rely simply upon Mr. Allred's physical delivery of the alphabet, but rather the "content" of his answer, the Fifth Amendment is implicated.

ARGUMENT

A POLICE OFFICER'S REQUEST OF AN INDIVIDUAL ARRESTED FOR DRIVING UNDER THE INFLUENCE TO RECITE THE ALPHABET FROM "C" TO "W" CONSTITUTES A TESTIMONIAL RESPONSE WITHIN THE PRIVILEGE AND PROTECTIONS OF THE FIFTH AMENDMENT

The Fourth District certified a question of great public importance asking this Honorable Court to decide whether a police officer's request of an individual arrested for DUI to recite a portion of the alphabet constitutes a "testimonial response so as to implicate the Fifth Amendment." Below, a two (2) judge majority relied upon State v. DiAndrea, 602 So.2d 1322 (Fla. 4th DCA 1992) and concluded therein that reciting the alphabet is no different than compelling a DUI arrestee to walk a straight line or do other physical sobriety tests which historically have not been protected by the Fifth Amendment. DiAndrea, supra at 1323 (A.p. 3). The Petitioner submits that the majority failed to recognize the distinction between sobriety testing that indicates impairment purely as the result of physical performance and testing that may reveal impairment by testing thought processes through the spoken word. Furthermore, as correctly pointed out by Judge Anstead in his dissenting opinion in DiAndrea,[3] the majority failed to properly follow and apply the reasoning and analysis of the United States Supreme Court's majority opinion in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990), which requires the certified

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[3]Judge Anstead dissented in State v. Allred, 602 So.2d 1326 (Fla. 4th DCA 1992), adhering to his dissent in State v. DiAndrea, supra.

question be answered in the affirmative.

The Self-Incrimination Clause of the Fifth Amendment reads in pertinent part: "no person...shall be compelled in any criminal case to be a witness against himself." The United States Supreme Court has explained that the privilege "protects a person only against being incriminated by his own compelled testimonial communications." Doe v. United States, ___U.S.___, 108 S.Ct. 2341, 2345-46 (1988). In Doe, the Court held that in order to be testimonial, "an accused's communication must itself explicitly or implicitly relate a factual assertion, disclose information," or "express the contents of an individual's mind." Id., at 2346-2348 and f.n. 8.

Recently, the Supreme Court in Pennsylvania v. Muniz, supra, addressed the extent of the Fifth Amendment's protections in the context of a DUI case. In Muniz, the Court held that an arrested DUI driver's Fifth Amendment right against self-incrimination was violated when the trial court admitted in evidence his response to police questions without having received Miranda warnings that he did not know the date of his sixth birthday. Muniz, supra, 110 S.Ct. at 2642. In reaching this conclusion, the Supreme Court first acknowledged that the Fifth Amendment does not protect an accused from being compelled to reveal the physical properties of his voice. Muniz, supra, 110 S.Ct. at 2645. However, the fact that Muniz slurred his response did not automatically dispense with any further Fifth Amendment inquiry. Instead, the majority held that the correct question is "whether the incriminating inference

of mental confusion is drawn from a testimonial act or from physical evidence." Muniz, supra, 110 S.Ct. at 2646.

Thus, the Muniz Court held that because the trier of fact might reasonably have expected a sober person to know his birth date, the incriminating inference of impaired mental faculties[4] that the State would indeed argue stemmed not simply from Muniz's slurred delivery but from his incorrect answer as to his sixth birthday. In using the "content" or "testimonial aspect" of Muniz's response, the Supreme Court held that the Fifth Amendment privilege against self-incrimination applied[5].

In the instant case, Mr. Allred while in custody, and without being warned of his constitutional rights per Miranda, was requested to recite the alphabet from the letter "C" to the letter "W." He responded incorrectly. (R. 9).

While admittedly the majority in Muniz expressly left undecided the issue sub judice involving a compelled alphabet recitation, Muniz, supra, 110 S.Ct. at 2651, f.n. 17, the County Court (A.p. 10-16), Circuit Court (A.p. 7-9), and Judge Anstead, in his dissenting opinion in DiAndrea, supra, all correctly

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[4]An essential element which the State must prove in a DUI prosecution beyond a reasonable doubt is that the defendant drove a vehicle while his mental faculties were impaired by the use of alcohol or drugs. See, F.S., §316.193 (1992).

[5]The Muniz majority also dismissed the Commonwealth's claim that because it had no investigatory interest in the actual date of Muniz's sixth birthday, the Fifth Amendment did not apply. "[The Commonwealth may not have cared about the correct answer, but it cared about Muniz's answer. The incriminating inference stems from the then existing contents of Muniz's mind as evidenced by his assertion of his knowledge at that time.]" Muniz, supra, 110 S.Ct. at 2649, f.n. 13.

concluded that the reasoning and analysis of the majority's opinion in Muniz applies to the instant case and compels the finding that Mr. Allred's Fifth Amendment privilege was violated. Judge Anstead stated:

> The Muniz analysis must also be applied to a request to recite the alphabet. Here, as in the Muniz's birth date question, there was an additional twist, in that the detainee was asked just not to recite the alphabet from A to C but rather from C to W. This is similar to the twist on the birthday question asking for the date of a detainee's sixth birthday rather than his date of birth...in both cases, however, it is the ability to respond with a correct answer that is used to gauge the condition of the detainee's mental faculties. Just as everyone is presumed to know his birth date, everyone is presumed to know the English alphabet. Here, the State seeks to have a jury draw an inference that the detainee was impaired because he recited the alphabet from "C" to "Z" instead of from "C" to "W" as requested. This is the same testimonial aspect of the response that the United States Supreme Court held was implicated in Muniz. In other words, it is the incorrect testimonial response that is sought to be used against the detainee. There is no doubt, as was the case in Muniz, that it is the content of the response that is crucial, and not just the manner in which the response is delivered. State v. DiAndrea, supra, at 1324; (A.p. 4-5).

As the Muniz majority stated, the correct question is "whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence." Muniz, supra, 110 S.Ct. at 2646. Clearly, sub judice, the State, if permitted, would argue to the trier of fact that everyone knows the alphabet. Hence, Mr. Allred's failure to properly recite the alphabet can only be explained as evidence that his mental faculties were

impaired by the use of alcohol. By utilizing the "content" of Mr. Allred's response as opposed to strictly his "delivery," the Fifth Amendment is implicated.

Also, it should be noted that the instant case does not involve recitation of the traditional alphabet from "A" to "Z" but rather from "C" to "W." First, this constituted an added twist which Judge Anstead in DiAndrea properly noted is comparable to the Muniz birthday question. Secondly, devising the alphabet test in this fashion further demonstrates that the State was not simply seeking to obtain the physical properties of Mr. Allred's voice. If indeed they were simply interested in obtaining the physical properties of his voice, i.e., slurred speech, then they could have handed Mr. Allred a card with the alphabet test listed, and simply asked him to read it. This process would have been a voice exemplar, and admittedly would not constitute a testimonial communication protected by the Fifth Amendment. See, United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973). However, this process was not used.

The distinction between an exemplar and a testimonial communication protected by the Fifth Amendment was addressed in United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984). In Campbell, a Governmental agent dictated to the defendant the words he wished written down for an alleged handwriting exemplar. The defendant asked to see what it was he was being asked to write down, rather than by doing it by the dictation process. The agent refused his request. Later at trial, the Government was permitted

to introduce the fact that the defendant had refused to give a handwriting exemplar. On appeal, the First Circuit Court of Appeal held that the dictation procedure violated the defendant's Fifth Amendment privilege. The Court acknowledged that normally handwriting exemplars were not protected against self-incrimination. However, the Court noted that the dictation procedure was different in that it required "an intellectual process:"

> When he writes a dictated word, the writer is saying how I spell it, - a testimonial message in addition to the physical display. If a defendant misspelled a common word, and the documents sought to be attributed to him misspelled it in the same way, could it be thought that the Government would not quite properly argue that there was a message. [Thus, requiring an intellectual process, however subtle, is a clear violation of the Fifth Amendment]. (citation omitted). Id., at 1021.

Likewise, requiring Mr. Allred to recite the alphabet from "C" to "W" required an intellectual process, however subtle, and it constituted a violation of his Fifth Amendment privilege.

The analysis and arguments of the majority in DiAndrea, supra are misplaced and without merit. The argument that a compelled recitation of the alphabet is undeserving of Fifth Amendment protection because it is unlike asking a DUI arrestee how much he drank implies that the Fifth Amendment protections are predicated on some sort of sliding scale of how weighty the incriminating response may be. The United States Supreme Court has clearly held that the Fifth Amendment protects communications "whatever form they may take." Schmerber v. California, 384 U.S. 577, 86 S.Ct.

1826, 1832 (1966). Additionally, the State is required to produce evidence by the independent labor of its officers not by the simple expedient of forcing it from the accused's own lips. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981).

The majority's argument that requiring recitation of the alphabet is no different than requiring a DUI defendant to walk a straight line fails to recognize that the constitution distinguishes between sobriety testing that indicates impairment solely as the result of physical performance and testing that may reveal impairment by thought processes through the spoken word. For example, compelling a blood sample in order to determine the physical makeup of the blood and drawing the inference of impairment does not offend the Fifth Amendment because it does not entail a testimonial act. However, if the police asked a defendant directly "whether his blood contained a high concentration of alcohol, his affirmative answer would be testimonial even though it would be used to draw the very same inference concerning his physiology" that the blood test does. Muniz, supra, 110 S.Ct. at 2646. Thus, the majority's argument that there is no difference in the recitation of the alphabet from walking the line for Fifth Amendment purposes is without merit. The Fifth Amendment protects the accused from incriminating himself through the spoken word. Muniz, supra, 110 S.Ct. at 2646.

The majority in DiAndrea aligned itself with Contino v. State, 599 So.2d 728 (Fla. 2d DCA 1992), wherein the Second District concluded that compelling a DUI arrestee to recite the alphabet

from A to Z is not testimonial because "[the only significance of the recitation is the manner in which it was done]." The Fourth District's reliance on Contino is misplaced.

In Contino, the traditional "A to Z" alphabet was used, which the Second District itself noted was not as "content oriented" as the sixth birthday question in Muniz. Id. However, as correctly noted by Judge Anstead in his dissent in DiAndrea the instant case involved an "added twist" wherein law enforcement used the "C" to "W" alphabet, rendering it as content oriented as the Muniz birthday question.

To conclude as the Contino Court did that the only significance of the recitation is the "manner" in which it was done fails to employ the proper constitutional analysis and to recognize the obvious incriminating use by the State of the incorrect recitation. Simply because there are "non-testimonial" components to an arrestee's communication, i.e., slurred speech that does not negate application of the Fifth Amendment. Instead, as held by the majority in Muniz the correct analysis is whatever the incriminating inference of mental confusion is drawn from a testimonial act or physical act. Muniz, supra, 110 S.Ct. at 2646. The greatest and most effective use by the State will be pointing out the incorrect recitation of the alphabet, i.e., the content of Mr. Allred's answer as opposed to his delivery.

It is well established law that the states are free to impose greater restrictions on police activity and grant greater personal constitutional protections than those established and deemed

necessary under the Federal Constitution by the United States Supreme Court. However, states may not provide less protections. See, e.g., Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215 (1975). As this Court held in Traylor v. State, ___So.2d ___, 17 FLW S42, 43 (Fla. 1992), "the Federal Constitution thus represents the floor for basic freedoms; State Constitution, the ceiling."

In rejecting the majority opinion in Pennsylvania v. Muniz, and siding with the Muniz dissent the DiAndrea majority has in effect extended less constitutional protection to Mr. Allred which as noted above is contrary to the established law.

Apart from giving less constitutional protection, Judge Anstead's dissenting opinion in DiAndrea, supra, and the discussion above demonstrates that the certified question should be answered in the affirmative. The Fourth District's majority decision should be reversed.

CONCLUSION

Based upon the arguments and authorities cited herein this Honorable Court is respectfully requested to reverse the majority decision below as well as in DiAndrea v. State, supra, and adopt the well reasoned dissenting opinion of Judge Anstead's holding that based upon Pennsylvania v. Muniz, supra, compelled recitation of the alphabet from "C to W" violated Mr. Allred's Fifth Amendment privilege against self-incrimination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished by hand to Robert Jaegers, Esquire, Office of the State Attorney, 300 North Dixie Highway, Room 105, West Palm Beach, Florida 33401, and by mail to Joan Fowler, Esquire, Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, on this day 28 of October, 1992.

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