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SUPREME COURT OF FLORIDA

JOHN ALLRED,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. ~~80,582~~ 80,532

REPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the STATE OF FLORIDA, was the prosecuting authority, and Petitioner, JOHN ALLRED, was the defendant in the Criminal Division of the County Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, the Honorable Peter D. Blanc, County Judge, presiding.

An appeal, by the State, was taken to the Appellate Division of the Fifteenth Judicial Circuit Court, which affirmed. Certiorari was granted by the Fourth District Court of Appeal, upon the State's petition, quashing the opinion of the Circuit Court.

In the brief the parties will be referred to as they appear before this Honorable Court, with the Petitioner also referred to as Mr. Allred, and the State as the Respondent.

The symbol "R" represents the Record on Appeal.

All emphasis is supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as contained in the Brief of Petitioner on the Merits.

SUMMARY OF THE ARGUMENT

The certified question:

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

must be answered "no" because the mere recitation of the alphabet, or a portion of it, or a series of numbers, can not, itself, explicitly or simplicity, relate a factual assertion or disclose information. Absent an attempt to assert facts or disclose information, an individual cannot find himself or herself placed in the historic cruel trilemma of self-accusation, perjury or contempt which defines testimonial responses according to the United States Supreme Court, and the other courts which have also reached this conclusion.

ARGUMENT

MERE RECITATION OF THE ALPHABET, OR A SPECIFIED PORTION OF IT, OR A SERIES OF NUMBER CANNOT CONSTITUTE TESTIMONIAL COMMUNICATION BECAUSE IT CAN NOT, ITSELF, EXPLICITLY OR IMPLICITLY, RELATE A FACTUAL ASSERTION OR DISCLOSE INFORMATION.

The definition of "testimonial communication" has been clearly established by the United States Supreme Court, which held that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Muniz, 110 S.Ct. at 2646, quoting Doe v. United States, 487 U.S. 201, at 210 (1988). The Muniz opinion's discussion of "testimonial communication" teaches that the privilege against compulsory self-incrimination was aimed at the process of the ecclesiastical courts and the Star Chamber to guard against attempts to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt. The Court recognized that a "private inner sanctum of individual feeling and thought" is protected by the Fifth Amendment. However, the Court also recognized there is not a "testimonial" verbal statement, either oral or written, when information is not conveyed nor facts asserted. Id. Cf. Doe v. United States, 487 U.S., at 213.

The Supreme Court set forth the following definitional test in Muniz:

> Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, (footnote omitted) the suspect confronts the "trilemma" of truth, falsity or silence and hence the response (whether based on truth or falsity) contains a testimonial component.

This definition does not provide support for the trial court's order of suppression. The trial court stated, "this Court feels a distinction must be made for those tests which require the defendant to convey ability or inability by what is said." This effectively would create a new "Rule of Law" which would say that it is permitted to introduce evidence of "how" something is said, but "not what is said." Nothing in the Muniz opinion supports the distinction the trial and circuit courts felt existed, and which petitioner now asks this Court to create. The Second District Court of Appeal, in Contino v. State, 599 So.2d 728 (Fla. 2d DCA 1992), noted alphabet recitations are not as "content oriented" as the Muniz sixth birthday question, which did elicit, minimally, some information, to wit: the date of the sixth birthday. Respondent submits a mere recitation of letters, or numbers, in a set order, conveys no information.

A number of other appellate courts throughout the United States have also held that counting or reciting the alphabet is not testimonial. Chadwick v. State, 766 S.W. 2d 819, 821 (Tex. App. 1988); People v. Bugbee, 559 N.E. 2d 554 (Ill. 2d DCA 1990). (citing numerous cases)

Respondent submits that the Petitioner's opinion ignores that portion of Pennsylvania v. Muniz which discusses the historic "cruel trilemma of self-accusation, perjury or contempt . . . that defined the operation of the Star Chamber", which is the foundation of the need for the Fifth Amendment right. 110 S.Ct., at 2647. The language is Muniz would not impose the sanction of suppression for failure to "Mirandize" a suspect

unless the suspect were placed in the "historic trilemma." Id., 2647-48.

The trial court's order, quoted at length in the Circuit Court's opinion of November 27, 1991, finds nothing improper with a request to perform physically in order to test a defendant's physical processes. In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held such tests were permissible. Respondent submits that a recitation of the alphabet, or a specified portion of the alphabet, or the counting of a requested series of numbers, reveals no thoughts or beliefs of a defendant, and is no more testimonial in nature than is the finger to nose test. See Edward v. Bray, 688 F.2d 91 (10th Cir. 1982). The distinction drawn between physical performance testing and thought process performance testing overlooks the biological fact that the subject's brain controls not only thought processes but also physical processes. Therefore it is not logical to permit introduction of results of physical tests but not permit introduction of evidence of alphabet recitation or counting. Schmerber permits physical testing of the brain's functions and this Court should follow the test set forth by the United States Supreme Court in Muniz to determine whether the words spoken by the respondent were testimonial or merely aurally sensible brain tests. See Muniz, at 2645-46, and n.7. (Note: The Muniz opinion did not decide whether Muniz's counting (or not) itself was "testimonial within the meaning of the privilege." Id. at 2651, n.17.) See also Contino, Chadwick and Bugbee, supra.

In the absence of any testimonial responses, the evidence obtained from the videotaped physical sobriety tests should be admitted in its entirety.

Respondent also notes that the trial court's order confuses the distinct elements of how a person speaks (slurring, whispering, etc.), with the content of the person's speech by suggesting that "what" a person speaks may indicate impairment. Respondent submits that "how" a person speaks would include the person's ability to properly formulate a sentence, properly include all of the words of the sentence, and, or, place sentences, or words in proper order. This position is supported by Chadwick, Supra, and by the U. S. Supreme Court's discussion in Muniz, at 2646, although the Supreme Court found that it did not need to reach a decision as to "whether a suspect's impaired mental faculties can fairly be characterized as an aspect of his physiology." "What" a person says may more likely be "testimonial", e.g. see Doe, Supra, at 213, but, by its nature, the alphabet, alone, cannot be testimonial because it is a preordered list, incapable of communicating thoughts or ideas by itself without being modified. It is not a communication which, in and of itself, explicitly or implicitly, relates a factual assertion or discloses information. See Stange v. Worden, 756 F.Supp. 509 (U.S.D.C. Kan. 1991). Therefore, according to Muniz, at 2646 and 2647, it is not testimonial. Such numbers and letters are merely neatly stacked tools on the brain's workbench.

In contrast, in Muniz, the offensive question required the defendant to provide the date of his sixth birthday. This

required the defendant to pick out a group of letters from the alphabet, arrange them into a word, place the word together with some numbers and provide an answer which was immediately subject to review for self-incrimination (incorrectness), contempt (for failure to provide any answer), or perjury (for an intentionally false answer). Id., at 2649.

Counting or reciting the alphabet cannot invoke this trilemma. If a defendant doesn't know the alphabet, he is told by the officer that he need not try to recite it. Even if he says he does, but does it incorrectly, he is not subject to all three horns of the "trilemma" of truth, falsity or silence because one cannot provide a false answer, only an incorrect one. See Muniz, 496 U.S. at ____, 110 L.Ed.2d at 555, 110 S.Ct. at 2653, Rehnquist, C.J., concurring, "[T]he potential for giving a bad guess does not subject the suspect to the truth falsity-silence predicament that renders a response testimonial and therefore within the scope of the Fifth Amendment privilege." The same result applies to counting. There can be no trilemma because there can be no false answer. The historic cruel trilemma require an accused to confront truth, falsity or silence, not mistakes. Therefore the Muniz opinion, which clearly establishes this principle of law, cannot be relied upon as support for the petitioner's requested suppression of admissible evidence of petitioner's impairment by alcohol.

Respondent directs this Court to a footnote in State v. Steiger, 590 A.2d 408 (Conn. 1991), at 417 n.15, which could, upon cursory examination, be interpreted as supporting the

petitioner's position. However, respondent submits that case is distinguishable because it concerns a psychiatric examination, similar to that discussed in Muniz, at 2649 n.13, in which a defendant is requested to assert knowledge, as opposed to his ability to merely use the tools necessary to reveal that knowledge. It is the use of one's faculties, and not the revelation of knowledge, which frames the issue presented in the instant case. As quoted in Steiger, Muniz holds that the Fifth Amendment only protects against securing from an accused a communication involving both consciousness of the facts and the operations of the mind in expressing them. Muniz, 2645-7. There is no suggestion that there is any Fifth Amendment protection afforded to the basic operations of the brain which may be necessary to express thoughts and beliefs of facts when no thoughts or beliefs of facts are communicated. See also, Edwards v. Bray, 688 F.2d 91 (10th Cir. 1982).

Communication of the date of the sixth birthday would communicate a belief, i.e. that the accused believed or knew that a certain date was the date of the accused's sixth birthday. Recitation of a series of numbers or letters in a pattern specified by another, such as a police officer, communicates no thought or belief.

CONCLUSION

The STATE OF FLORIDA, requests this Court to deny the petition for a Writ of Certiorari, and affirm the District Court's holding that the recitation of the alphabet, in any specified pattern, is not testimonial and should not be suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Douglas N. Duncan, Esq., Wagner, Nugent, Johnson & Roth, P.A., P. O. Box 3466, West Palm Beach, FL 33402, this 10 day of November, 1992.

Joan Fowler

Of Counsel