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SUPREME COURT OF FLORIDA

JOHN ALLRED,

Petitioner,

CASE NO. 80,532

vs.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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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.

"IB" Petitioner's Initial Brief, followed by the appropriate page number.

"AB" Respondent's Answer Brief, 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

Petitioner will rely upon his Statement of the Case and Facts as set forth in his Initial Brief.

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 State contends that the Petitioner was not confronted with the "historic trilemma" of self accusation, perjury or contempt when he was compelled by law enforcement to recite the alphabet from "C" to "W." The State has overlooked that in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 2647-48 (1990), the Supreme Court held that whenever an accused is subjected to "custodial interrogation" he faces the "modern day analog of the historic trilemma." In so holding, the Supreme Court acknowledged that during custodial interrogation the suspect is not confronted with the identical choices of self accusation, perjury or contempt faced by a witness in court, but that the choices are sufficiently similar so that the Fifth Amendment applies to police custodial questioning. Muniz, supra, 110 S.Ct. at 2648, f.n. 10.

The Petitioner was in police custody when he was requested to recite the alphabet. He was not told he could refuse to answer or as incorrectly suggested by the State that if he didn't know the alphabet he need not respond. Consequently, the "inherently compelling pressures" of this custodial interrogation compelled the Petitioner, like the defendant in Muniz, to respond where he would not otherwise have done so freely. Muniz, 110 S.Ct. at 2648-49. At that point, the remaining choices available to the Petitioner

were to incriminate himself by saying he didn't know the alphabet as requested, or incriminate himself as he did by responding incorrectly. It should be noted that the State's argument that an incorrect guess is not protected by the Fifth Amendment was rejected by the Muniz majority; the majority held that an "incorrect guess" to the sixth birthday question would be "incriminating as well as untruthful." Muniz, supra, 110 S.Ct. at 2649. Likewise, the Petitioner's incorrect recitation is incriminating as the State will use the "content" of his response to argue that his normal faculties were impaired.

The State also argues that recitation of the alphabet cannot under any circumstances constitute a testimonial communication because the alphabet is a "pre-ordered list of letters" and its recitation conveys no information. (A.B., p. 5). In making this argument, the State has construed too narrowly the definition of what constitutes a testimonial communication.

In Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 1689-90 (1980), the Supreme Court held that Miranda warnings are required whenever a person in custody is subjected to either express questioning or to words or actions by police reasonably likely to elicit an incriminating response from the suspect. The Court noted that "incriminating" refers to any response that the prosecution may seek to introduce at trial.

> No distinction can be drawn between statements which are direct confessions and statements which amount to admissions apart or all of an offense. The privilege against self incrimination protects the individual from being compelled to incriminate himself in any

> manner; it does not distinguish degrees of incrimination. Innis, supra, 100 S.Ct. at 1690, f.n. 5, quoting Miranda v. Arizona, 384 U.S. at 476-77, 86 S.Ct. at 1629 (1966).

Contrary to these United States Supreme Court holdings, the Fourth District below in State v. DiAndrea, 602 So.2d 1322, 1323 (Fla. 4th DCA 1992), and highlighted by the State in their Answer Brief, incorrectly suggest that there is a distinction between asking a DUI suspect "how much he drank," from compelling him to recite the alphabet "C" to "W." Both elicit incriminating responses, and as noted above, the Fifth Amendment does not distinguish degrees of incrimination.

In addition, the State overlooks the fact that it is not required that the police have a per se "investigatory interest" in a given response before the Fifth Amendment applies. As noted by the majority in Muniz, the fact that the police did not have an investigatory interest in the actual date of Mr. Muniz's sixth birthday did not take the response outside the protection of the Fifth Amendment. The Court stated:

> [A critical point is that the Commonwealth had an investigatory interest in Muniz's assertion of belief that was communicated by his answer to the question...they may not have cared about the correct answer...but it cared about the answer for 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.

Likewise, undoubtedly the State sub judice did not care about the Petitioner's correct recitation of the alphabet for some independent investigatory interest. However, it obviously cared

about his answer for its incriminating use. As held in Doe v. United States, 480 U.S. 201, 210, 108 S.Ct. 2341, 2347 (1988), a testimonial communication includes a suspect asserting his knowledge, beliefs and/or revealing the contents of his mind. When the Petitioner recited the alphabet, he, in essence, asserted his knowledge, his beliefs and the contents of his mind as they existed at that time. It is exactly this type of extortion of information and the attempt to force a suspect to disclose the contents of his own mind that the Supreme Court in Doe v. United States held implicates the self incrimination clause. "The privilege spares the individual from having to reveal, directly or indirectly his knowledge of the facts relating him to the offense, or having to share his thoughts and belief with the Government."[1] Doe, supra, at 108 S.Ct. at 2349.

Lastly, the State argues that because the subject's brain controls not only thought processes but also physical processes, it is not logical to permit introduction of the results of physical sobriety tests, but not evidence of alphabet recitation. (A.B., p. 6).

This same argument was raised by the Government in Muniz, and rejected by a majority of the United States Supreme Court:

> The Commonwealth and the United States as amicus curiae argue that [Muniz's answer that he did not know the proper date of his sixth

[1]The privilege, of course, applies to "answers that in themselves would support conviction as well as any information sought which would furnish a link in the chain of evidence needed to prosecute." St. George v. State, 564 So.2d 152, 155 (Fla. 5th DCA 1990).

> birthday and the resulting incriminating inference from this answer] does not trigger the protections of the Fifth Amendment privilege because the inference concerns "the physiological functioning of Muniz's brain..."
>
> But this characterization addresses the wrong question; that the "fact" to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence. Muniz, supra, 110 S.Ct. at 2645-2646.

Thus, as presented in the Petitioner's Initial Brief, there is a distinction to be drawn between physical tests and testimonial acts. As the Supreme Court noted in Muniz, compelling a blood sample in order to determine the physical make up of the blood and thereafter draw an inference of impairment does not offend the Fifth Amendment. But, if the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative verbal answer would be testimonial and violative of the Fifth Amendment even though it would be used to draw the same inference concerning his physiology.

The United States Supreme Court in Fisher v. United States, 425 U.S. 391, 410, 96 S.Ct. 1569, 1580 (1976), held that in deciding the difficult question of whether a particular communication involves the Fifth Amendment the question may not be answered categorically, but rather the facts and circumstances of the particular case must be analyzed.

The particular fact of the instant case is that the Petitioner was not requested to recite the traditional American alphabet from

A to Z, but instead from "C" to "W." This fact alone distinguishes the instant case from the out of state decisions cited by the State. (A.B., p. 5). Additionally, as Judge Anstead's dissent correctly noted in State v. DiAndrea, supra at 1324, the "C" to "W" is as much an added twist as the sixth birthday question used in Muniz so that both are communications protected by the Fifth Amendment.

Two Cases Consolidated:

Applications for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Fourth District - Case Nos. 92-0323 & 92-0324

(Palm Beach County)

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