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IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RONNIE HOGGINS,

Respondent.

CASE NO. 90,121

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case.

STATEMENT OF THE FACTS

Respondent will rely on the statement of the facts from his Initial Brief because Petitioner's statement does not accurately reflect the quality (or lack thereof) of the evidence against Respondent. For example, Petitioner states that the robber was described as wearing a green t-shirt and blue slippers, and that a green t-shirt and blue slippers were found in the apartment. Petitioner's Brief at p.5 Petitioner omits the fact that an eyewitness testified that there was nothing on the robber's green t-shirt (R 512), yet the green t-shirt found in the apartment (and admitted into evidence) has an indian chief on it (R 522-523). Moreover, Officer Cleveland testified that the blue slippers were found "on or about the premises" of apartment 205 (R 473). Officer Cleveland also testified that he found the green t-shirt in an upstairs bedroom (R 475), yet he wrote in his police report that he found the green t-shirt downstairs under a pile of sheets (R 483). Officer Cleveland said that this was a "mistake on [his] part" (R 483-484). Rather than clarifying, piece by piece, Petitioner's Statement of the Facts, Respondent will rely on the following statement of facts taken from his Initial Brief in the district court.

Officer Jeff Poole of the Pompano Beach Police Department testified that on September 10, 1993, he and Officer Michael Way were working off-duty as security for the Holiday Lake Apartments (R 261). At about 10:30 p.m., Ronnie Hoggins approached the

two officers in their patrol car and said that his bike was stolen from his porch at apartment 205 (R 262). Hoggins described the bike and the officers tried to find it (R 262-263).

Officer Poole testified that at 12:30 a.m. he saw Hoggins riding a bicycle with a cash register drawer and cigar box atop the handles bars (R 264). Officer Poole turned around and put on his lights and siren (R 264). Hoggins ran into the curb, fell off the bike, and dropped the cash drawer and cigar box (R 264). Poole testified that Hoggins picked up the cash drawer and cigar box and ran away (R 264). Officer Way pursued on foot while Poole drove to the other side of the apartments to set up a perimeter (R 266). Meanwhile, Officer Poole learned that the Freeze Food Market a block away had been robbed (R 265).

At 1: 15 a.m., Officer Poole went to apartment 205 and spoke to Kimberly Jones, who gave her consent to search the apartment (R 269,295). Ms. Jones told Poole that she and her children were the only people in the apartment (R 295). Poole found Hoggins in bed upstairs, but he did not look like he had been sleeping' (R 271).

Officer Poole brought Hoggins downstairs and sat him down in a chair (R 272). The victim of the robbery, Mr. Abuzniad, was brought inside the apartment and he identified Hoggins (R 272). Hoggins was then under arrest (R 272-273). Officer Poole testified that Hoggins said he didn't want to go to jail and began resisting (R 273). Mr. Abuzniad was yelling "I want to kill you" and was trying to get to Hoggins (R 273-274). Officers needed

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1 Poole testified that he touched Hoggins's heart and that it was going a "million miles a minute" (R 27 1).

to restrain Mr. Abuzniad because Hoggins was handcuffed (R 273).

A search of the apartment revealed the cash drawer and cigar box in the attic (R 274). Officer Poole testified that there was a trail of lottery tickets and food stamps leading to apartment 205 (R 278).

On cross-examination, Officer Poole testified that when Hoggins approached him regarding the stolen bike, Hoggins was wearing a t-shirt and shorts, but he didn't remember the color of either (R 289). Nor did Poole remember the color of the shirt or pants Hoggins was wearing when he saw him riding the bike with the cash drawer (R 293).

Officer Michael Way testified that he and Poole took the stolen bike report from Hoggins (R 303). Later that evening they saw a black male on a bicycle with a cash drawer and cigar box (R 306). Way saw the black male crash his bike into the curb, pick up the cash drawer and cigar box, and run (R 307). Officer Way chased him on foot (R 307). Officer Way was asked whether Hoggins was this black male, but Way testified that all he could see was the back of his head, and that he eventually lost him (R 308). Later, Officer Way saw Hoggins in apartment 205 and identifed him as the person he had taken the stolen bike report from earlier (R 307-308).

Jihad Abuzniad testified that on September 10, 1993, he and his friend Najeh Salameh were working at his family's Freeze Food Market when he was robbed at gun point by Hoggins (R 3 19). Mr. Abuzniad said Hoggins had been in the store earlier wearing a gray t-shirt (R 322). Abuzniad said that Hoggins came in the store again, pointed a gun at him and

Salameh, and demanded the money (R 322). Hoggins was wearing jean shorts, a green t-shirt, and he was using another t-shirt to cover his face (R 322). According to Abuzniad, Hoggins was holding one gun and had another gun tucked in his shorts (R 322). Hoggins told Abuzniad to open the register, but Abuzniad was so nervous he had trouble doing so (R 323). Abuzniad testified that Hoggins said, "You got two seconds to give me the money or you're dead, both of you are dead" (R 324). Abuzniad gave Hoggins the register drawer containing cash and food stamps (R 324). Hoggins took the cigar box containing lotto tickets, and left the store (R 324). Abuzniad went outside to see where he was going (R 325). Hoggins took the t-shirt off his head allowing Abuzniad to see his face (R 325). Abuzniad testified that Hoggins fired two shots at him, one of which put a hole in his van (R 325).

A few minutes later the police arrived, and they took Abuzniad to look at two suspects, neither of whom he could identify (R 334). Abuzniad was then taken to apartment 205, where he identified Hoggins as the robber (R 335). Abuzniad also identified the cash drawer and cigar box found in apartment 205 (R 336).

On cross-examination,Abuzniad testified that the robber had a tattoo on his arm like a wine glass or "liquor sign" (R 362). When asked whether a lot of people in the neighborhood have tattoos, Abuzniad testified that Hoggins was a regular customer and thus he "know[s] his arm" (R 363). Abuzniad said that he saw the trail of his property leading to apartment 205 and that when he saw Hoggins therein he tried to attack him (R 362).

Crime scene technician Lori Haberland testified that she processed the cash drawer

and cigar box for fingerprints (R 439). Latent print examiner Robert Holbrook identified a fingerprint from the cash drawer and a fingerprint from the cigar box as Hoggins's (R 464-465).

Officer David Cleveland testified that he was the officer who responded to the Freeze Food Market (R 468). Officer Cleveland testified that Abuzniad told him that he was robbed by a black male wearing a green t-shirt, jeans, and blue slippers (R 469). Later, Abuzniad was taken to apartment 205 where he attacked Hoggins, and then identified him as the culprit (R 472). Officer Cleveland also testified that blue slippers were found "on or about the premises" of apartment 205 and that he collected these and placed them into evidence (R 473). Officer Cleveland also testified that he found a green t-shirt in an upstairs bedroom in apartment 205 and placed that into evidence as well (R 475). In his police report, however, Officer Cleveland wrote that he found the green t-shirt downstairs under a pile of sheets (R 483). Officer Cleveland said that this was a "mistake on [his] part" (R 483-484).

Najeh Salameh testified that he was working at the store when the robber entered, pointed the gun at his head, and told him to lay down on the floor (R 503). The robber told Abuzniad to open the register, but Abuzniad was nervous and was pushing the wrong button (R 504). Abuzniad finally opened the register and began putting the money in a bag (R 504). The robber told Aduzniad to give him the drawer because he knows he pushed the button for the police (R 504). The robber took the cash drawer and the cigar box and left (R 504).

Mr. Salameh testified that Abuzniad went outside while he called the police (R 506).

Two shots were fired at Abuzniad, and one of them was very close (R 507). Mr. Salameh testified that he saw the robber ride a bike towards the Holiday Lake Apartments as a police car drove by (R 509).

Mr. Salameh testified that the robber was a black male who had a tattoo on his arm, but he was unable to see the robber's face (R 505). On cross-examination, Mr. Salameh testified that the robber was wearing a green t-shirt, but that he didn't see anything on the t-shirt (R 5 12).

After Mr. Salameh testified, the state rested (R 5 14).

Kimberly Jones testified that she lives at apartment 205 and that she is the mother of Hoggins's son (R 520). Hoggins was visiting his son on the night in question (R 520). Hoggins rode his sister's bike to the apartment, and the bike was stolen off the porch (R 520).

Ms. Jones testified that the green t-shirt found in the apartment was hers and that it has an indian chief on it (Ms. Jones testified that she is a cheerleader for the "Pompano Chiefs" little league team) (R 523). Ms. Jones said that this shirt was in the laundry downstairs and that she never saw Hoggins take it (R 523-524). Ms. Jones testified that Hoggins has a tattoo of a bull on his shoulder (R 529).

Hoggins testified on September 10, 1993, he lived at 300 N.W. 19th Court, Pompano Beach, about 10 to 15 minutes from the Holiday Lake Apartments (R 536). On the night in question, he rode his sister's bike to the apartments to visit his son (R 539). About ten minutes later, the bike was gone, and he notified police (R 539).

Hoggins testified that he and Ms. Jones looked for the bike for awhile and then went back to the apartment (R 541). Later that evening, while Ms. Jones was watching t.v., Hoggins sat on the step in front of the apartment (R 541). Hoggins testified that he saw someone running through the apartment complex (R 542). This person stopped in the playground and appeared to be hiding something (R 542). The person then fled (R 542). Hoggins investigated and found the cash drawer and cigar box (R 542). Hoggins took them and ran back to the apartment where he hid them in the attic (R 542). Hoggins took his clothes off and laid down (R 543). Hoggins denied going to the market that night and denied robbing it (R 544).

After Hoggins's direct testimony, the prosecutor asked for a side bar (R 544). The jury was excused (R 544). The prosecutor, citing case law (presumably Rodriguez v. State, 6 19 So. 2d 103 1 (Fla. 3d DCA 1993)), stated that he intended to ask Hoggins whether he made any statements on the night in question (he did not) (R 544-557). During the discussion which followed, Hoggins was asked when he was read his Miranda warnings (R 546). Hoggins said he was advised of his rights when he was placed in the police car (R 546). Hoggins testified that the police handcuffed him in the bedroom and brought him downstairs (R 547-548).

Over defense objection, the trial court stated that he would allow the prosecutor to question Hoggins about his silence (R 556). The trial court added that he thought the "Fourth [District Court of Appeal] would have a lot of fun with this one" (R 556).

Over renewed defense objection, the prosecutor asked Hoggins whether he told anyone his version on the night in question (R 566-567, 571). Hoggins said that he did not (R 567,571).

After Mr. Hoggins testified, the defense rested (R 590).

Over defense objection, the prosecutor was allowed in closing to argue Hoggins's silence:

> MR. MILLIAN: Now, when Mr. Hoggins gives his story -- When you remember the story that he gave the other day, remember one thing, that the police arrived at that apartment to conduct a search. It was then that they found him hiding in the upstairs bedroom in the apartment of his girlfriend. Remember, he doesn't tell them that story at that time.
>
> Now, when they bring him downstairs and have him confronted face to face with the victim, who is so outraged, who is also being shown the third suspect, this victim is so outraged, saying "You tried to kill me," and that victim when confronted with him tries to go after this man, he never mentioned his story.
>
> MR. McCUE: I'm going to make my objection to that portion of the closing argument based on previous stated grounds,
>
> THE COURT: Overruled.
>
> MR. MILLIAN: Mr. Hoggins did not give them that story. Ronnie Hoggins, never did at that point say anything like, "Man, I didn't try to shoot you. I didn't rob your store. I just found that money and stuff and picked it all up and ran into the apartment."
>
> Ladies and gentlemen of the jury, I want you to keep that in mind when you evaluate his story or his testimony that he gave on the witness stand.

(R 6 15-6 16). The prosecutor also argued Hoggins's silence in the rebuttal portion of his argument:

[W]hen Mr. Hoggins was confronted by the victim, why didn't he say I'm not your man. I did nothing wrong. I found the money and I didn't try to kill you.

(R 644). The prosecutor also argued Mr. Hoggins's post-Miranda silence:

Now, when the victim has identified him by saying, you are the guy that just tried to kill me then he wants to fight the defendant and he has to be calmed down by the police officers. Not once does this Defendant give the police the [ac]count that he came up with when he took this witness stand today. He gave this statement under oath, but never anytime previous to today did he ever say this story to the police about how he came across this money and stuff.

Is that the action of a man who is innocent or is that the action of a man that committed a robbery, and when trying to get away with it he committed attempted murder[?]

(R 649-650).

Having been advised of his constitutional right he never mentioned one time this story he has said here today.

(R 649-65 1).

SUMMARY OF THE ARGUMENT

Evidence of a defendant's pre-Miranda silence should be held inadmissible. The right to remain silent exists whether or not the Miranda warning has been or is ever given, and the right to remain silent would not truly exist if one may be penalized for its exercise by allowing the state to comment on silence at trial. Furthermore, holding pre-Miranda silence inadmissible does not harm the truth finding process of a trial because such evidence is insolubly ambiguous. Whether an innocent or guilty person feels the need to speak or remain silent at the time of arrest depends on a vast array of confusing factors including unique personal characteristics of the accused.

ARGUMENT

POINT ON APPEAL

DOES FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, PREVENT THE IMPEACHMENT OF A TESTIFYING DEFENDANT WITH THE DISCLOSURE OF A DEFENDANT'S PRE-*MIRANDA* SILENCE WHILE IN CUSTODY?

At trial, Mr. Hoggins denied robbing the Freeze Food Market (R 544). He testified that he saw someone hide the cash drawer and cigar box in the playground, and that he retrieved these items and took them into the apartment (R 542). The prosecutor persuaded the trial court to allow him to ask Hoggins whether he offered his exculpatory story on the night in question (R 544-557). Hoggins had to admit in front of the jury that he did not (R 567,571). Thereafter, the prosecutor was allowed to argue Hoggins's silence to the jury:

> MR. MILLIAN: Now, when Mr. Hoggins gives his story -- When you remember the story that he gave the other day, remember one thing, that the police arrived at that apartment to conduct a search. It was then that they found him hiding in the upstairs bedroom in the apartment of his girlfriend. Remember, he doesn't tell them that story at that time.
>
> Now, when they bring him downstairs and have him confronted face to face with the victim, who is so outraged, who is also being shown the third suspect, this victim is so outraged, saying "You tried to kill me," and that victim when confronted with him tries to go after this man, he never mentioned his story,
>
> MR. McCUE: I'm going to make my objection to that portion of the closing argument based on previous stated grounds.
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> THE COURT: Overruled.
>
> MR. MILLIAN: Mr. Hoggins did not give them that story. Ronnie

> Hoggins, never did at that point say anything like, "Man, I didn't try to shoot you. I didn't rob your store. I just found that money and stuff and picked it all up and ran into the apartment."
>
> Ladies and gentlemen of the jury, I want you to keep that in mind when you evaluate his story or his testimony that he gave on the witness stand.

(R 615-616).

> [W]hen Mr. Hoggins was confronted by the victim, why didn't he say I'm not your man. I did nothing wrong. I found the money and I didn't try to kill you.

(R 644). The prosecutor also argued Hoggins's post-Miranda silence

> Now, when the victim has identified him by saying, you are the guy that just tried to kill me then he wants to fight the defendant and he has to be calmed down by the police officers. Not once does this Defendant give the police the [ac]count that he came up with when he took this witness stand today. He gave this statement under oath, but never anytime previous to today did he ever say this story to the police about how he came across this money and stuff.
>
> Is that the action of a man who is innocent or is that the action of a man that committed a robbery, and when trying to get away with it he committed attempted murder[?]

(R 649-650).

> Having been advised of his constitutional right he never mentioned one time this story he has said here today.

(R 649-65 1).

Mr. Hoggins's appealed the judgment and sentence to the Fourth District Court of Appeal. In a comprehensive and scholarly opinion, Judge Warner, writing for the Court, reversed the judgment and sentence, and certified the following question to be of great public importance:

> DOES FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, PREVENT THE IMPEACHMENT OF A TESTIFYING DEFENDANT WITH THE DISCLOSURE OF A DEFENDANT'S PRE-*MIRANDA* SILENCE WHILE IN CUSTODY?

Hoggins v. State, 689 So. 2d 383 (Fla. 4th DCA 1997). This question should be answered in the affirmative.

The *Doyle-Jenkins- Weir* Trilogy

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the court held that it was fundamentally unfair and a deprivation of due process to allow an arrested person's silence to be used to impeach his explanation of his allegedly criminal conduct offered at his trial where he had remained silent after receiving Miranda warnings. While the Court's ruling was based on its application of the Due Process Clause of the Fourteenth Amendment, the following passage from Justice Powell's majority opinion demonstrates that the Court also questioned the probative value of a defendant's post-arrest silence:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id., 426 U.S. at 617-18, 96 S.Ct. at 2244-45, 49 L.Ed.2d at 97-98 (citation and footnote

omitted).

Four years later in Jenkins v. Anderson, 447 U.S. 23 1, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the Court was asked to expand Doyle to prohibit the use for impeachment of a defendant's silence prior to arrest. The Court refused, explaining that because "[t]he failure to speak occurred before the petitioner was taken into custody and given Miranda warnings ... the fundamental unfairness present in Doyle is not present in this case." Id., 426 U.S. at 240, 100 S.Ct. at 2130, 65 L.Ed.2d at 96. Still later, in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court was faced with the same question that is presented in this case: whether to allow a prosecutor to impeach a defendant with his pre-Miranda, post-custodial, silence. In a per curiam, summary opinion, the Court limited the Doyle holding to those cases where the defendant's silence followed Miranda warnings and held that the use of a defendant's post-arrest, pre-Miranda warning, silence does not offend due process if offered "[i]n the absence of the sort of affirmative assurances embodied in the Miranda warnings." Id., 455 U.S. at 607. However, in both Jenkins and Weir, the Supreme Court stressed that each state should decide this issue for itself under its own rules of evidence. Jenkins, 447 U.S. at 239; Weir, 455 U.S. at 607. How has Florida responded to this directive?

B. Florida Law

Petitioner asserts that "[t]his Court and other district courts of Florida have traditionally construed the right to remain silent under the Florida Constitution consistent

with that of the United States [C]onstitution" and that "Historically, Florida Courts have allowed impeachment by silence such as in this case...." Petitioner's Brief at pp. 10-11. Neither of these statements is true. Florida has traditionally been stricter in protecting the right to remain silent than the federal courts. For example, Florida has "a very liberal rule" for determining whether a comment constitutes a comment on silence; any comment which is "fairly susceptible" of being interpreted as a comment on silence will be treated as such, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The federal courts, on the other hand, look to whether the prosecutor's manifest intent was to comment on the defendant's silence, or whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. See e.g., Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987); United States v. Groz, 76 F.3d. 1318, 1326 (5th Cir. 1996). In addition, Florida continued to have a per se reversible error rule for comments on silence long after Chapman v. California, 86 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), held that such comments were subject to a harmless error analysis. See DiGuilio, supra.

The privilege against self-incrimination has been an integral thread in the fabric of Florida law since our beginings as a state. In the Florida Constitution of 183 8, article I, § 10, provided that ". . .the accused. ..shall not be compelled to give evidence against himself." The same basic right was retained in subsequent constitutions. Fla. Const. of 1861, art. I, § 10; Fla. Const. of 1865, art. I, § 8; Fla. Const. of 1868, art. I § 8; Fla. Const. of 1885, art. I, § 12. In its second session, the Florida Legislature codified the right to silence as well. A Manual

or Digest of the Statute Law of the State of Florida, 4th Div., Title II, Chap. II, § 2(1) (1847). In 1895, the legislature broadened this right by precluding the prosecution from commenting on the failure of the accused to testify. Ch. 4400, Laws of Fla. (1895)(later codified as section 918.09, Fla. Stat., repealed, ch. 70-339, Laws of Fla). See Gray v. State, 42 Fla. 174, 28 So. 53 (1900). The same prohibition now appears in Fla. R. Crim. P. 3.250.

The right to remain silent and to due process of law is now contained in Article I, § 9, Fla. Const.:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Judge Warner correctly began her analysis of this issue consonant with the primacy principle explainedin Traylorv. State, 596 So. 2d 957 (Fla. 1992). Hoggins v. State, 689 So. 2d 383,385 (Fla. 4th DCA 1997). See also Allred v. State, 622 So. 2d 983,986 (Fla. 1993); Peoples v. State, 612 So. 2d 555,556 (Fla. 1993). Judge Warner observed that with respect to impeachment by disclosure of silence, this Court said in Willinskv v. State, 360 So. 2d 760,762 (Fla. 1978):

> Impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process. It should not be material at what stage the accused was silent so long as the right to silence is protected at that stage. The language in Doyle v. Ohio,426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) and United States v. Hale, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975), although set in the context of silence at arrest, reflects a general policy.

Prior to this Court's decision in Willinsky, the Fourth District Court of Appeal confronted this issue in Webb v. State, 347 So. 2d 1054 (Fla. 4th DCA 1977), cert. denied 354 So.2d 986 (Fla. 1977). With uncanny prescience, Judge Downey condemned the use of pre-Miranda silence:

> [W]e note that, while Miranda warnings make it even more offensive to use a person's silence upon arrest against him, the absence of such warnings does not add to nor detract from an individual's Fifth Amendment right to remain silent. If one has a right upon arrest not to speak for fear of self-incrimination, then the mere fact that the police call his attention to that right does not elevate it to any higher level. If it were otherwise, an ignorant defendant who was advised of his right to remain silent would be protected against use of his silence to impeach him at trial; but an educated, sophisticated defendant familiar with his right to remain silent who was not apprised of that right by the police would be subject to impeachment for the exercise of a known constitutionally protected right.

Webb, 347 So. 2d. at 1056.

The Third District Court of Appeal was the first Florida court to confront the issue of the impeachment use of pre-Miranda silence after the decision in Fletcher v. Weir was issued. In Lee v. State, 422 So, 2d 928 (Fla. 3d DCA 1982) , rev. denied, 43 1 So. 2d 989 (Fla. 1983), the Third District applied Webb and Willinsky and held that, as a matter of state constitutional law, it is impermissible to comment on a defendant's post-arrest silence whether or not that silence is induced by Miranda warnings.

The Third District still follows Lee. See e.g., Hicks v. State, 590 So. 2d 498 (Fla. 3d DCA 199 1). Contrary to Petitioner's assertion, Rodriguez v. State, 6 19 So. 2d 103 1 (Fla. 3d

DCA 1991), rev. denied, 629 So. 2d 135 (Fla. 1993), does not hold that it is permissible to impeach a defendant with his pre-Miranda silence. In Rodriguez, the defendant did speak to the police about the offense (he told them he "shot his wife and was turning himself in," yet at trial he testified the shooting was accidental). Therefore, Rodriguez falls into that category of case which allows a prosecutor to impeach a defendant who does talk about the offense (or offers an explanation of it), but does not "tell all." See Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) (per curiam) (distinguishing between the defendant who does not speak at all, as in Doyle, and the defendant who speaks but does not "tell all"); Montoya-Navia v. State, 22 Fla. L. Weekly D943, 944-45 (Fla. 3d DCA April 16, 1997) (defendant who does talk to the police about the offense can be impeached at trial by referring to his failure to state other matters) .

Unfortunately, the loose language in Rodriguez led the Fifth District Court of Appeal astray in Parker v. State, 641 So. 2d 483 (Fla. 5th DCA 1994).[2] In Parker, the prosecutor was allowed to elicit and comment on a defendant's pre-Miranda "demeanor" (i.e., defendant's lack of surprise upon trooper's discovery of cocaine in car he was driving). Parker was

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2 Without acknowledging its previous case law, e.g., Lee and Hicks, and with a curious citation to Brecht v. Abrahamson 113 S.Ct. 1710 (1993) (which addressed the issue of pre-Miranda silence only tangentially), the Third District in Rodriguez gratuitously stated that "Impeaching a defendant's credibility with pre-Miranda silence is proper because a police officer has yet to assure the defendant that such silence cannot be used against him." Rodriguez, 619 So. 2d at 1032. However, the Third District got back on track at the end of the decision: "When Rodriguez's trial statement differed from his spontaneous statements to the officer, the State's inquiry into the appellant's pre-Miranda silence was proper in order to impeach the inconsistent testimony." Id. at 1032-34.

erroneously decided because as a matter of state constitutional law it is impermissible to comment on a defendant's pre-Miranda silence. Lee; Webb; Hoggins, a trooper's testimony as to a defendant's demeanor indicating lack of surprise is considered testimony on a defendant's silence.' See United States v. Elkins, 774 F.2d 530, 535 -38 (1st Cir. 1985)("Doyle cannot be avoided simply by treating testimony as to a defendant's non-responsiveness after receiving Miranda warnings as 'demeanor' evidence. Doyle has been strictly applied so that any description of a defendant's silence following arrest and Miranda warning, whether made in the prosecutor's case in chief, on cross-examination, or in closing arguments, constitutes a violation of the Due Process Clause"); United States v. Rivera, 944 F.2d 1563, 1568-70 (1 lth Cir. 1991)("[I]f the government's position was accepted, we might force future defendants into the unenviable predicament of expressing their innocence non-verbally through flailing arms, shaking heads, furtive glances or the like, lest the government draw negative inferences from a defendant's passive silence").

C. State v. Sam: State v. Owen. et al.

Relying on State v. Sapp, 690 So. 2d 58 1 (Fla. 1997), and a laundry list of other cases, Petitioner goes to great lengths to demonstrate that this Court has adopted the federal limitations on Miranda. Petitioner's Brief at pp. 11-17. Petitioner then tries to equate a comment on silence with a Miranda violation. See Petitioner's Brief, at p. 16 ("The State maintains that Respondent could not prematurely invoke his Miranda rights....[T]he State argues that since Miranda did not apply where there was no interrogation, the Respondent's

silence cannot be construed as an excercise of his right to be silent."). The two cannot be equated, however. The Supreme Court has described the Miranda warnings as "prophylactic rules," which "are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination is protected."' New York v. Ouarles, 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). This distinction was noted in People v. Convers, 49 N.Y.2d 174, 182-83, 400 N.E.2d 342,424 N.Y.S. 2d 402, vacated, 449 U.S. 809 (1980), where the New York Court of Appeals responded to a state attempt to apply the rationale of Harris v. New York 401 U.S. 222, 9 1 S.Ct. 643, 28 L.Ed.2d 1 (197 1) (allowing the impeachment use of statements taken in violation of Miranda) to allow impeachment by silence:

> First, an inconsistent statement is much more probative than is silence. Moreover, a defendant's decision to remain silent at the time of arrest is in and of itself an assertion of a basic constitutional privilege. Thus, to allow that silence to be used against a defendant is to place a burden upon the direct exercise of a fundamental right. The Miranda warnings, on the other hand, constitute a prophylactic device designed to prevent constitutional violations and to protect the rights of an accused. In the absence of any actual coercion, a statement made by a defendant who has not been informed of his rights is not inherently suspect, nor does the use of such a statement against a defendant penalize that defendant for the exercise of a constitutionallyprotected right. Since the use for impeachment purposes of a statement made in the absence of Miranda warnings does not penalize an accused for the assertion of a constitutional right, whereas the use of a defendant's silence even for impeachment purposes only would burden the exercise of the defendant's privilege against self incrimination, it is appropriate to allow the use of such statements for impeachment

purposes while precluding similar use of a defendant's silence. Conyers, 400 N.E. 2d at 342. Consistent with this Court's opinions in Traylor, Sapp and State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997), that freely given, voluntary confessions are an unqualified good, and therefore, this Court will determine their admissibility consistent with Supreme Court decisions. However, commenting on a person's constitutional right to remain silent is not an unqualified good. It is a burden on that basic constitutional right,[3] and, as we shall see, of little or no probative value.

D. Evidentiary Basis

Judge Warner also analyzed this issue on an evidentiary basis, noting that Webb was also based on the determination that the silence of the defendant was not actually inconsistent with the defendant's trial testimony. Judge Warner noted that there are many reasons why a person may not speak when taken into custody by police:

> First, the situation is full of intimidation, which may render anyone mute. The person may be in such fear or confusion that even an innocent person may not know what to say. Or, the person may know about his rights and his silence is an assertion of them, even without receipt of Miranda warnings.

Hoggins, 689 So. 2d at 383. In People v. De George, 73 N.Y. 2d 614, 617, 541 N.E. 2d 11,

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[3] As the Wyoming Supreme Court stated in Jerskev v. State, 546 P.2d 173, 175 (Wyo. 1976): "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."

12, 543 N.Y.S.2d 11 (1989), the Court of Appeals of New York listed other reasons why silence is ambiguous:

> Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's "awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial", a belief that efforts at exoneration would be futile under the circumstancesorbecause of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because "they are simply fearful of coming into contact with those whom they regard as antagonists." In most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence.

Of course, Petitioner argues that a defendant can explain to the jury why he or she remained silent. Petitioner's Brief at p. 25. The Supreme Court directly addressed this in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975):

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

Hale, 422 U.S. at 180 (emphasis added). See also, DeGeorge, supra, ("Moreover, despite its lack of probative value the evidence undoubtedly affects a witness' credibility. Jurors, who may not be sensitive to the wide variety of alternative explanations for a defendant's pretrial

silence, may assign much more weight to it than is warranted and thus the evidence may create a substantial risk of prejudice.")

Judge Warner correctly analyzed this case on an evidentiary basis when she wrote:

> In the instant case, the appellant was taken from his bed, handcuffed, and led downstairs to face one of the victims of the robbery. The testimony reveals that it was a very tense and explosive situation, with the victim yelling and threatening the appellant. In this chaotic atmosphere, his silence as to his explanation of the events of the evening is not inconsistent with the subsequent explanation he gave. On an evidentiary basis, we also hold, consistent with Webb, that the exculpatory statement was not inconsistent with appellant's prior silence. Therefore, such silence was inadmissible as impeachment.

Hoggins, 689 So. 2d at 387. In addition, if Mr. Hoggins's version of events is true then he has at least taken something that does not belong to him (i.e., committed theft), and it would be natural for him to not want to incriminate himself as to this lesser offense.

Petitioner argues that Mr. Hoggins did not assert his right to remain silent because he said that he did not know he had that right. Petitioner's Brief at pp. 17, 26. However, whether the state should honor a defendant's constitutional right to remain silent does not depend on the defendant's knowledge of that right. A defendant can assert a constitutional right without knowing where it comes from or even that he or she has it. For example, if a defendant asks for a lawyer during police questioning, the questioning must cease whether the defendant knows he has the right to counsel or not.

Furthermore, if the issue of whether to admit pre-Miranda silence hinged on a

defendant's motivation for that silence, then, in each case, the defendant would be required to testify and offer an explanation for remaining silent. One commentator noted that this inquiry would itself violate due process principles:

> Even if the defendant was silent for reasons other than reliance on the privilege against self-incrimination, the due process analysis would still mandate exclusion of the silence at trial because determining accurately whether pre-trial silence of a defendant was motivated by the privilege, by fear, or by an intent to fabricate an exculpatory story later is impossible. The defendant can, of course, testify as to the reason for his prior silence. Justice Stevens proposed such an approach in his dissenting opinion in Doyle. But the majority in Doyle rejected this, stating that "the unfairness [that violates due process principles] occurs when the prosecution , in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the excercise of that right [to remain silent]." Similarly, under the proposed theory, requiring the defendant who did not receive warnings to explain his pre-trial silence would violate due process principles. As the Court found in Doyle the "unfairness occurs" when the defendant is asked to testify about the reason for silence that may be the excercise of the privilege against self-incrimination.

Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials,* 29 Wm. & Mary L. Rev. 285, 335-336 (1988) (footnotes omitted).

E. Other States

Petitioner cites a number of out of state cases; however, many of these cases do not actually address the issue involved, and those that do have been roundly criticised by other courts and commentators. See e.g., Jarrett v. State, 453 S.E. 3d 461 (Ga. 1995) ("The rule promulgated in Mallory [409 S.E. 2d 839 (Ga. 1991)] is consistent with the extensive

criticism leveled by several commentators at any rule which allows a comment upon a criminal defendant's silence."); Wills v. State, 82 Md.App. 669,573 A.2d 80 (1990) ("Most of the state courts that have adopted Fletcher and allow the admission of this evidence...do so with little or no discussion of the merits of their position").

Weeding out Petitioner's cited cases yields the following, First, Petitioner asserts that California has aligned itself with Fletcher v. Weir. Petitioner's Brief at 21. However, Petitioner has overlooked the fact that California does so only because of a state constitutional amendment which ties California courts to federal law regarding admission of evidence in criminal cases. See Peonle v. Delgado, 13 Cal. Rptr 2d 703,705 (4th Dist. 1992). Prior to that amendment, California excluded pre-Miranda silence for all the good policy reasons outlined by Judge Warner. See People v. Fondron, 57 Cal. App. 3d 390,204 Cal. Rptr. 457 (1984). Likewise, Illinois case law is not persuasive because, unlike Florida, which is a "primacy" state, see Traylor, Illinois adopted Fletcher v. Weir because it is is a "lock-step"state. For better or worse, Illinois construes its state constitutional rights in lock-step with Supreme Court decisions. See Peonle v. Givens, 482 N.E. 2d 211, 221 (Ill. 4th Dist. 1992) ("Unlike the majority ofjurisdictions which have rejected Fletcher, Illinois has consistently followed the Supreme Court of the United States in situations concerning the application of a more restrictive view of an individual's constitutional rights than previously enjoyed. Our supreme court has stated it 'will follow the decisions of the United States Supreme Court on identical State and Federal constitutional problems.' In fact, the court has

overruled its previous decisions in order to conform to decisions of the United States Supreme Court." Citations omitted.)

Petitioner should not find too much comfort in State v. Finley, 915 P.2d 208, 218 (Mont. 1996). Although the Montana Supreme Court held that comments on pre-Miranda silence were not error, it also curiously stated that its decision should not be read as "condoning" them either. Id.

Petitioner cites State v. Hunt, 323 S.E. 490, 492 (N.C. App. 1984), but on closer inspection North Carolina law favors Mr. Hoggins on this issue. Hunt contains a well-reasoned dissent by Judge Whicard (impeachingwith pre-Miranda silence violates the state's privilege against self incrimination because "[t]o hold otherwise allows the State to convert exercise of the privilege against self-incriminationn to a sword that pierces the credibility of a defendant who also exercises the right to present a defense at trial through his or her own testimony.") State v. Hunt (dissent), 72 N.C. App. at 80, 323 S.E. 2d at 502. s taken to the North Carolina Supreme Court where the six justices who took part in the case tied; therefore, under North Carolina law, the lower court opinion upon which Petitioner relies has no precedentialvalue. See State v. Hunt, 3 13 N.C. 593, 330 S.E.2d 205 (1985). What is interesting, however, is the fact that while Hunt was pending in the North Carolina Supreme Court, the Court of Appeals again had occasion to address this issue. See State v. Abbitt, 73 N.C. App. 679,327 S.E. 2d 590 (1985). This time, the Court of Appeals decided that Judge Whichard's dissenting opinion in Hunt was the better reasoned position, but that

the doctrine of stare decisis required it to follow Hunt (then pending in the Supreme Court) and affirm. See State v. Abbitt, 327 S.E. 2d at 593 (1985). In other words, if the Court of Appeals of North Carolina gets another opportunity to address this issue, it will no doubt rule that pre-Miranda silence is inadmissible (stare decisis no longer being an impediment to adopting the better reasoned approach of the dissenting opinion in Hunt).

In a footnote, Petitioner states that "Connecticut also views its constitution as not providing broader rights in the context of post-arrest silence. State v. Leecan, 504 A. 2d 480, 486 (Corm. 1986)." Petitioner's Brief at p. 22 n.6. It should be stressed, however, that the Connecticut Supreme Court held in Leecan that impeachment as to custodial pre-Miranda silence is inadmissible based on their rules of evidence.[4]

Petitioner's cited cases of State v. Ramirez, 871 P.2d 237 (Ariz. 1994), and Bradley v. State, 494 So. 2d 750 (Ala. Cr. App. 1985), are not persuasive because in each case the defendant did speak to police; therefore, Ramirez and Bradley fall into the same category of case as the Third District's decision in Rodriguez (see the discussion, supra). In State v. Henry, 863 P.2d 86 1 (Ariz. 1993), the defendant also spoke to the police, and, when evidence of his silence was admitted, it was limited to pre-custodial silence. Likewise, People v.

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[4] Leecan is an example of tail wagging the dog jurisprudence. Out, constitutional errors of any kind are deemed fundamental and need not be preserved for appellate review by objection. In Leecan, the Court foresaw defense attorneys holding back on these errors in order to get a new trial. Therefore, the court chose not to find a constitutional basis for the error, but settled instead on the evidentiary basis (with the same rationales).

Schollaert, 486 N.W. 2d 312, 316 (Mich. App. 1992), and State v. Martinez, 651 A.2d 1189 (RI 1994) are not persuasive because each case addressed pre-custodial silence. State v. Brown 517 A.2d 831 (N.H. 1986), involved a different issue than the one in the instant case; Brown concerned a defendant's silence towards a third person (the victim), and not the police.

The only opinion that has ruled pre-Miranda silence admissible in a more than a perfunctory way is State v. Sorenson, 143 Wisc. 2d 226,421 N.W. 2d 77 (1988). But the reasoning of that decision is extremely suspect. The court offered two rationales. The first, that "[a] contrary position would allow defendants, who have not been induced by government action to remain silent, to wrongfully manipulate the rules of evidence, and cripple the state's ability to address all the evidence presented by the defendant at trial," Sorenson, 421 N.W. 2d at 90, ignores all the reasons why silence is probative of little or nothing. The second rationale, that "once a defendant elects to take the stand, any comment by the prosecution regarding defendant's pre-Miranda silence may be explored and explained by defendant's own counsel on redirect," id., ignores the Supreme Court's opinion in Hale that "permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." Hale, 422 U.S. at 180.

Although no consensus has emerged, at least ten states follow Florida's lead and prohibit the impeachment use of pre-Miranda silence: Connecticut, Delaware, Georgia,

Maryland, Nevada, New Jersey, Pennsylvania, Texas, Washington, and Wyoming. See State v. Leecan, 198 Conn. 517,504 A.2d 480 (Corm. 1986); Bowe v. State, 514 A.2d 408 (Del. 1986); Mallory v. State, 261 Ga. 625, 409 S.E.2d 839 (Ga. 1991); Wills v. State, 82 Md. App. 669,573 A.2d 80 (Md. Ct. Spec. App. 1990); Coleman v. State, 111 Nev. 657,895 P.2d 653 (Nev. 1995); State v. Deatore, 170 N.J. 100,358 A.2d 163 (N.J. 1976); Commonwealth v. Turner, 499 Pa. 579,454 A.2d 537 (Pa. 1982), holding limited in part by Commonwealth v. Bolus, 680 A.2d 839 (Pa. 1996); Sanchez v. State, 707 S.W.2d 575 (Tex. Crim. App. 1986); State v. Davis, 38 Wash, App. 600,686 P.2d 1143 (Wash. Ct. App. 1984); Clenin v. State, 573 P.2d 844 (Wyo. 1978), reaffirmed by Tortolito v. State, 901 P.2d 387 (Wyo. 1995).

F. Harmless Error Analysis

The error in this case can not be deemed harmless. Comments on silence are "high risk errors," based on the substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict. State v. DiGuilio, 49 1 So. 2d 1129,1136-1137 (Fla. 1986). In the instant case, the prosecutor told the jury to keep Mr. Hoggins's silence "in mind when you evaluate his story or his testimony that he gave on the witness stand" (R 616). The prosecutor's repeated emphasis of Mr. Hoggins's silence in closing argument precludes the finding of harmless error; it cannot be said that the impeachment as to Hoggins's silence and the comments thereon did not affect the jury's verdict. In addition, Judge Warner correctly included the prosecutor's two comments on Hoggins's post-m

silence in her harmless error analysis. See Whitton v. State, 649 So. 2d 861, 864-865 (Fla. 1995) (harmless error analysis must inlude objected to and unobjected to comments on silence because harmless error test requires an examination of the entire record). Accordingly, the Fourth District Court of Appeal correctly reversed for new trial. That decision should be approved.

CONCLUSION

This Court should answer the certified question in the affirmative and approve the lower court decision.

Respectfully submitted,

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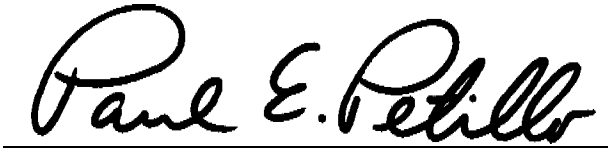
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to , Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 19th day of May, 1997.



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