CASE NO. 90, 121

STATE OF FLORIDA

Petitioner,

vs.

RONNIE HOGGINS,

Respondent.

**********X**********

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Ronnie Hoggins, was the defendant, and Petitioner, the State of Florida, was the prosecution, in the trial on criminal charges filed in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant, and Petitioner was the appellee, in the appeal filed with the District Court of Appeal, Fourth District. 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 "the State."

The following symbols will be used in this brief:

A = Appendix

R = Record on Appeal

T = Transcript

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

STATEMENT OF THE CASE

Respondent was charged in an amended information with attempted first degree murder with a firearm, armed robbery, aggravated assault, and resisting an officer without violence (R. 743-744). He was found and adjudicated guilty as charged (R. 746-749, 757-758). The trial court sentenced Respondent on the murder and robbery to life imprisonment as an habitual violent felony offender, to ten years imprisonment as an habitual violent felony offender on the assault, and with time served on the resisting an officer charge (R. 728, 759-768).

Respondent appealed to the Fourth District Court of Appeal. The court reversed the case, the majority determining that the use of Appellant's in custody pre-*Miranda*[1] silence for impeachment purposes violated his right against self-incrimination under Article 1, Section 9 of the Florida Constitution (A. 1-5).[2] It certified the following question as one of great public importance:

> DOES FLORIDA CONSTITUTION, ARTICLE 1, SECTION 9, PREVENT THE IMPEACHMENT OF A TESTIFYING DEFENDANT WITH THE DISCLOSURE OF A DEFENDANT'S PRE-MIRANDA SILENCE WHILE IN CUSTODY?

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] Judge Polen dissented on this point.

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. The Fourth District granted Petitioner's motion to stay the mandate during the pendency of this Court's review.

STATEMENT OF FACTS

Officer Jeff Poole of the Pompano Beach Police Department testified that on September 10, 1993, he observed Respondent riding a bicycle with a cash register drawer and a cigar box atop the handle bars (T. 264, 304-305). Respondent was traveling in the direction of the Holiday Lake Apartments (T. 267). Officer Poole said that he and Officer May had spoken with Respondent earlier that evening when Respondent had reported to the officers that his bicycle had been stolen from Apartment 205 of the Holiday Lake Apartments (T. 262, 303).

Officer Poole stated that when he saw Respondent riding the bike, he put on his lights and siren (T. 264). Respondent ran into a curb, dropped the drawer and box, got off the bike, picked up the drawer and box, and ran (T. 264). Officer Poole then learned that there had just been an armed robbery at the nearby Freeze Food Market (T. 265-266).

The officers went to Apartment 205 of the Holiday Lake Apartments when they saw Respondent flee into the complex (T. 267). There was a trail of food stamps and lottery tickets in the parking lot near where the bicycle was left and on the stairwell leading up to the apartment (T. 278, 280-284, 387-388). After obtaining consent from Kimberly Jones, the resident of the apartment, to

conduct a search (T. 269-270), the officers located Respondent in an upstairs bedroom (T. 270).

Officer Poole brought Respondent downstairs, where he sat down in a chair (T. 272). Other officers brought over one of the victims, Jihad Abuznaid, who identified Respondent as the perpetrator of the armed robbery (T. 272). The officers proceeded to arrest Respondent, but Respondent "started resisting the arrest," saying that he did not want to go to jail (T. 273). The officers subdued both Respondent and the victim, who was yelling at Respondent (T. 273). Officer Poole said that the victim seemed quite upset from the time he got to the apartment (T. 273).

Jihad Abuznaid testified that he recognized Respondent as the person who robbed him when he saw his face (T. 335). Respondent had removed the shirt that he used to cover his face during the robbery when he went outside (T. 325). He testified that about five minutes had passed between the time of the robbery and the identification (T. 345).

Mr. Abuznaid identified the cash register drawer and cigar box, both containing money, food stamps, and lottery tickets, which were found in the entrance of the attic to the apartment (T. 336-337, 368). He also identified the green shirt that Respondent had used as a mask (T. 344-345,352). He said that he told the police

about a wine glass shaped tattoo on Respondent's arm (T. 362-363). Mr. Abuznaid explained that he knew Respondent's arm because Respondent was a regular customer, and came into the store two or three times a day for years (T. 363).

Robert Holbrook, the fingerprint examiner, identified a fingerprint from the cash drawer and a fingerprint from the cigar box as Respondent's (T. 464-465).

Officer David Cleveland testified that he found a green t-shirt in the upstairs bedroom of the apartment (T. 475). He said that he also found a pair of blue slippers in the apartment (T. 473). He stated that the victim had described the perpetrator as wearing a green t-shirt, blue jeans, and blue slippers (T. 469). Officer Cleveland indicated that the victim was enraged at Respondent upon seeing him at the apartment (T. 472).

Najeh Salameh, who **was** working in the store at the time of the robbery, testified that he saw the robber ride a bike towards the Holiday Lake Apartments as the police drove by (T. 509). He described the robber as a black male with a tattoo on his arm and wearing **a** green t-shirt (T. 505, 512).

Kimberly Jones testified for the defense. She said that Respondent rode his sister's bike to the apartment and that it was stolen off the porch (T. 539). She said that the green t-shirt in

the apartment belonged to her (T. 523-524). She stated that Respondent has a tattoo of a bull on his shoulder (T. 529).

Respondent then testified that on the night in question, he saw someone run through the complex and that the person appeared to be hiding something in the playground (T. 542). He claimed that after the person fled, he went to investigate and found the cash drawer and cigar box (T. 542). He said that he hid the items in the attic, took off his clothes, and laid down (T. 544).

Prior to cross-examining Respondent, the prosecutor informed the trial court that he intended to impeach Respondent with his silence at the apartment (T. 544-545). Defense counsel contended that the prosecutor was trying to use Respondent's constitutional right to remain silent to impeach him and said that was in violation of the Fifth Amendment (T. 544).

The trial court conducted an inquiry of Respondent. Respondent said that he did not know he had the right to remain silent (T. 546). He said that he was not advised of his rights until he was placed in the patrol car (T. 546). He said that they brought him downstairs in handcuffs (T. 546). He first stated that the officers asked him if he knew anything about a robbery at the Freeze Food Market, but then said that they did not ask him anything about a robbery or shooting at the market (T. 547). He

said that they did not ask him about the cigar box and cash register (T. 547-548). When the trial court asked Respondent why he thought the officers were arresting him, he said, "I felt this guy apparently did something big for all those guys to come in like that." (T. 548).

After the inquiry, defense counsel again asserted that there would be a violation of Respondent's Fifth Amendment right to remain silent (T. 549, 551, 553, 554). Without pointing to any evidentiary rule, defense counsel asked since when silence was evidence of guilt in contending that Respondent merely exercised his right to be silent (T. 555) .

On cross-examination, the prosecutor asked whether Respondent ever told the police his story when they came to the bedroom or when the victim identified him downstairs (T. 566, 571) . The prosecutor clarified on recross that when the police came to his bedroom and when he was taken downstairs, he had not been read his rights (T. 570).

In closing argument, the prosecutor asked the jury to remember when it evaluated Respondent's testimony that he did not tell the police his story when they came into the bedroom or when he was confronted with the victim downstairs (T. 615-616) On rebuttal, the prosecutor made the same argument without objection (T. 644,

649). He then argued without contemporaneous objection:

> 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 account 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.

(T. 649-650).

The prosecutor later argued without objection that having been advised of his rights, Respondent never mentioned the story he gave in his testimony (T. 651).

After arguments, defense counsel argued amongst other things that the prosecutor's argument on silence in the face of an accusation was improper because an "admission of guilt" was not included in the evidence code (T. 659).

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. Florida courts have traditionally construed the right to remain silent under the Florida constitution consistent with that of the United States constitution. In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the United States Supreme Court held that the federal constitution does not prohibit impeachment of a defendant by his silence even after arrest, if no Miranda warnings have been given. Florida courts have allowed impeachment by silence such as in this case, as have many courts of other states. These courts recognize the evidentiary value of pre-*Miranda* silence in testing the credibility of a defendant's testimony.

Furthermore, both the United State Supreme Court and this Court have given the fact of custody significance only in the context of coercive interrogation.

ARGUMENT

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?

The Fourth District recognized that in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the United States Supreme Court held that the federal constitution does not prohibit impeachment of a defendant by his silence even after arrest, if no Miranda warnings have been given (A. 2). However, it decided that use of custodial pre-Miranda silence as such violates the due process protections contained in the Florida Constitution (A. 4) .[3] The State respectfully submits that the Fourth District's decision is in error.

This 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 constitution. In addition, these courts have given the fact of custody significance only in the context of coercive interrogation.

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[3] Defense counsel never claimed a separate state constitutional right at trial, but spoke in terms of the Fifth Amendment (T. 549, 551, 553, 554). Hence, the Fourth District's review in terms of the Florida constitution was not actually preserved for appeal. See New Mexico v. Montoya, 861 P. 2d 978, 982 (N.M. 1993); State v. Byrne, 542 A. 2d 667, 671 (Vt. 1988).

Historically, Florida courts have allowed impeachment by silence such as in this case, as have many courts of other states.

FEDERALISM

The majority below noted that the state constitution may place more rigorous restraints on governmental intrusion than the federal constitution imposes, citing to Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992)(A. 3). While this principle is not disputed, the State points out that in Traylor, this Court did not ultimately hold that it was finding Article I, Section 9 of the Florida Constitution more expansive than the federal constitution. In fact, as noted by the Fourth District in State v. Owen, 654 So. 2d 200, 202 (Fla. 4th DCA 1995), rev. gendins, Case No. 85781, this Court actually relied heavily on federal law when it made its pronouncements in Traylor. Regardless, this Court in Traylor analyzed the voluntariness of a confession, as opposed to the applicability of *Miranda* or the invocation of the right to silence.

Recently, this Court declined to construe Article I, Section 9 as affording a defendant greater protection than the federal constitution with regard to anticipatorily invoking Miranda rights. See Sapp v. State, 22 Fla. L. Weekly S115, 116 (Fla. Mar. 13, 1997). In the past, this Court has similarly adopted federal limitations on *Miranda*. See, e.g., Washington v. State, 653 So. 2d

362 (Fla. 1995)(based on Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed. 2d 908 (1966), taking of blood samples does not violate Article I, Section 9); Christmas v. State, 632 So. 2d 1368, 1370-1371 (Fla. 1994)(based on Illinois v. Perkins, 496 U.S. 292, 110 S. ct. 2394, 110 L. Ed. 2d 243 (1990), *Miranda* warnings are not required in custodial situations when defendant initiates conversation with police); Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993)(based on Colorado v. Connely, 479 U.S. 157, 107 S.Ct. 515, 93 L. Ed. 2d 473 (1986), police allaying fears of defendant about safety of family is not psychological coercion); Arbelaez v. State, 626 So. 2d 169, 175 (Fla. 1993) (based on Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), Miranda does not apply outside the context of the inherently coercive custodial interrogation for which it was designed); Allerd v. State, 622 So. 2d 984, 987 n. 10 (Fla. 1993) (based on Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed.2d 528 (1990), routine booking questions do not violate the constitutional protection against self-incrimination); Henry v. State, 613 So. 2d 429 (Fla. 1992) (based on Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L. Ed. 2d 222 (1985), inadmissibility of statements made without the benefit of *Miranda* warnings does not preclude admission of subsequent statements that are made pursuant

to such warnings); Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1992)(based on Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L. Ed. 2d 1 (1971), defendant's otherwise inadmissible statements are admissible during cross-examination of a defendant for impeachment purposes); Gore v. State, 599 So. 2d 978, 981 n. 2 (Fla. 1992) (based on North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L. Ed. 2d 286 (1979), refusal to sign a written waiver is not dispositive to a finding of a valid waiver); Thompson v. State, 595 So. 2d 16, 17 (Fla. 1992) (based on California v. Prysock, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981), no requirement of a 'tailsmanic incantation' of ***Miranda*** warnings); Henry v. State, 574 So. 2d 66, 69-70 (Fla. 1991) (based on Michigan v. Moselv, 423 U.S. 96, 96 S.Ct. 321, 46 L. Ed. 2d 313 (1975), suspect's assertion of his right to remain silent does not create any per se bar to subsequent interrogation); Brown v. State, 565 so. 2d 304, 306 (Fla. 1990) (based on Duckworth v. Eagan, 492 U.S. 195, 106 L.Ed. 2d 166, 109 S. Ct. 2875 (1989), right to cut off questioning is implicit in ***Miranda*** warnings so that there is no requirement that such a statement be specifically communicated); Herring v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988) (based on Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L. Ed. 2d 954 (1987), valid ***Miranda*** warnings do not require that suspect be aware

of all possible subjects of questioning); Caso v. State, 524 So. 2d 422 (Fla. 1988)(based on Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L. Ed. 2d 182 (1974), exclusionary rule not applicable to testimony of a witness whose identity was discovered through the unwarned statement of defendant).

CUSTODY

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the court held that a person in custody must be informed that he has the right to remain silent in order "to be subjected to interrogation." The court explained, "such a warning is an absolute prerequisite in overcoming the inherent pressures of the **interrogation** atmosphere." 384 U.S at 444.(emphasis supplied). The court defined "custodial interrogation" as questioning initiated by law enforcement officers after a person has been taken into custody. Id. at 468-469. See Allred v. State, 622 So. 2d 984, 987 (Fla. 1993) (interrogation takes place for section 9 purposes when person is subjected to express questions or words or actions by state agent that can reasonably be deemed as designed to lead to incriminating response).

Hence, the need for **Miranda** warnings does not come into play "outside the context of the inherently coercive custodial interrogations for which it was designed." Arbelaez v. State, 626

So. 2d 169, ***175*** (Fla. 1993). In Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the court stressed this point:

> It is clear therefore that the special procedural safeguards outlined in ***Miranda*** are not required where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation" as conceptualized in the ***Miranda*** opinion, **must** reflect a measure of compulsion above and beyond that inherent in custody itself.

See also Illinois v. Perkins, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990)(premise of ***Miranda*** is that compulsion results from interaction of custody and official interrogation). Not surprisingly, then, this Court just recognized in Sapp v. State, 22 Fla. L. Weekly S115, 116 (Fla. Mar. 13, 1997) that absent either custody or interrogation, ***Miranda*** is not implicated.

The Fourth District's reliance on custody in its analysis, therefore, was not founded, for there was no interrogation in the instant case. Although Respondent initially stated that the officers asked him if he knew anything about a robbery at the Freeze Food Market, he then said that the officers did not ask him anything about a robbery or shooting at the market (T. 547). He said that they did not ask him about the cigar box and cash

register (T. 547-548). When the trial court asked Respondent why he thought the officers were arresting him, he said, "I felt this guy apparently did something big for all those guys to come in like that," apparently referring to his claim that another put the cash drawer and cigar box in the playground (T. 548) .

The State maintains that Respondent could not prematurely invoke his **Miranda** rights.[4] In Sapp, this Court held that the defendant, who had filed with the clerk of court **a claim** of rights form, could not be said to have invoked his rights before custodial interrogation was imminent. In this case, it is arguable whether interrogation was imminent, for as the Fourth District noted, there was a scene at the apartment from which the police sought to remove Respondent (T. 273). Therefore, there **was** no reason to believe that the police were about to take the time to interrogate Respondent at the apartment.

Notwithstanding the exact holding of Sapp, the State argues that since ***Miranda*** did not apply where there was no interrogation, then Respondent's silence cannot be construed as an exercise of his right to be silent. In a **case** factually similar to the instant

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[4] In reality, Respondent's silence could not be deemed an invocation of his rights since Respondent said that he did not know he had the right to remain silent (T. 546).

one, the court in People v. Schollaert, 486 N.W.2d 312, 316 (Mich. App. 1992) decided that the defendant's silence was not constitutionally protected because he had not been interrogated.

FLORIDA CASE HISTORY ON A DEFENDANT'S SILENCE

The court in Arbosast v. State, 340 So. 2d 1179, 1180 (Fla. 3d DCA 1977) contended that before Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 99 (1975), the **law** in Florida **was** that where there was an inconsistency between silence and testimony, the prosecution could comment as to the defendant's failure to deny or explain incriminating facts to the police. Post-Doyle, this court in Spivey v. State, 529 So. 2d 1088, 1092 (Fla. 1988) explained why post-arrest silence cannot be used to impeach a defendant, quoting directly from Doyle, 426 U.S. at 617-618:

> Silence **in the wake of these [Miranda] 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.** (citation omitted). 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.

(emphasis supplied).

This Court's consideration in Spivey was expressly limited to post-arrest, post-Miranda silence. 529 So. 2d at 1090, 1092, 1093, 1094, 1095. In citing to the earlier decision of State v. Burwick, 442 SO. 2d 944, 948 (Fla. 1983), this Court indicated that its belief that post-Miranda silence was not probative was based on assurances made in the *Miranda* warnings. Id. at 1093. In Burwick, this Court emphasized that the *Miranda* warnings assure an accused that he will not be penalized if he chooses to remain silent. 442 so. 2d at 948.

The court in Rodriguez v. State, 619 So. 2d 1031, 1032 (Fla. 3d DCA 1993) held permissible the inquiry made into the defendant's pre-Miranda silence. As in this case, the silence occurred upon the police responding to the residence where the defendant was located. The court reasoned, "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. (citation omitted)." 619 So. 2d at 1032. See also Lebowitz v. State, 343 so. 2d 666, 667 (Fla. 3d DCA 1977). Citing to Rodriguez, the court in parker v. State, 641 So. 2d 483, 485 (Fla. 5th DCA 1994) upheld the impeachment of the defendant with his pre-

Miranda silence.[5]

In its opinion, the majority below cited Willinskv v. State, 360 So. 2d 760 (Fla. 1978) for the proposition that it is not material at what stage an accused is silent as long as silence is protected at that stage (A. 3). Willinskv, however, does not support the majority's position, for, as argued above, silence was not protected at the stage in which Respondent was in custody but was not subjected to interrogation. Indeed, the stage at issue in Willinsky was a post-arrest preliminary hearing. Notably, this Court relied on two federal cases in support of its decision in Willinskv, 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). 360 So. 2d at 762.

The Fourth District next pointed to its earlier decision in Webb v. State, 347 so. 2d 1054 (Fla. 4th DCA 1977) . The facts in Webb are unlike those in this case. Webb had been arrested, and it was not certain, **as** it is here, that he had not been read his rights. Regardless, Webb testified that his silence was because he does not talk to police when he might go to jail but that his lawyer does the talking. 347 So. 2d at 1055. Finally, the court

[5] Like here, the silence in Parker referred to the defendant's prearrest silence while he was in custody.

predicated its holding on the due process clause of the Fourteenth Amendment, and not on the Florida Constitution. Id. at 1056.

Weiss v. State, 341 So. 2d 528 (Fla. 3d DCA 1977), cited by the Fourth District, is also inapposite. The defendant in Weiss was a police officer who had been advised by his attorney not to talk. The Third District determined, therefore, that the defendant's silence had no probative value. 341 So. 2d at 530. It also held that the Fifth Amendment applied. Id. Of course, since Weiss, the United States Supreme Court clarified, in Fletcher v. Weir, 455 U.S. 603, the scope of the Fifth Amendment. And, subsequently, the Third District in Rodriguez v. State, 619 So. 2d 1031 (Fla. 3d DCA 1993) suggested that no constitutional rights are violated by reference to custodial pre-Miranda silence in impeaching a defendant.

Finally, the Fourth District looked to Lee v. State, 422 So. 2d 928 (Fla. 3d DCA 1982) for support. Lee, like Weiss, is an opinion rendered prior to the Third District's later decision in Rodriguez, supra. In addition, the court cited to cases in which the harmless error rule was deemed not to apply to show that the right to remain silent is afforded greater protection in Florida than required by the United States Supreme Court. 422 So. 2d at 930. However, in the later case of Clark v. State, 363 So. 2d

331334 (Fla. 1978), this Court concluded that the application of the contemporaneous objection rule to cases involving improper comments on the right to remain silent would promote the administration of justice in Florida, in light of the fact that the federal constitution and holdings of the United States Supreme Court did not mandate an absolute rule requiring reversal. Then in State v. Disuilio, 491 So. 2d 1129 (Fla. 1986), this Court held that comments on post-Miranda silence were subject to harmless error analysis under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (Fla. 1967).

CASE LAW OF OTHER STATES ON A DEFENDANT'S SILENCE

Many states other than just those cited in the majority's opinion have held their state law to be consistent with the United State's Supreme Court decision in Fletcher v. Weir, 455 U.S. 603. The states aligning their constitutional law with the construction of the federal constitution include California, Illinois, Michigan, Missouri, Montana, New Hampshire, North Carolina, Ohio, and Wisconsin. See, e.g., People v. Delgado, 13 Cal. Rptr. 2d 703, 705 (4th Dist. 1992); People v. Givens, 482 N.E. 2d 211, 221 (Ill. 4 Dist. 1985); People v. Alexander, 469 N.W. 2d 10, 13 (Mich. App. 1991); State v. Antwine, 743 S.W.2d 51, 69 (Mo. banc 1987); State v. Finley, 915 P. 2d 208, 218 (Mont. 1996); State v. Brown, 517 A.

2d 831, 836 (N.H. 1986); State v. Hunt, 323 S.E. 2d 490, 492 (N.C. App. 1984) ; State v. Sabbah, 468 N.E. 2d 718 (Ohio 1982); State v.Sorenson, 421 N.W. 2d 77, 90 (Wisc. 1988).[6]

Other states have generally followed federal precedent without expressly interpreting their constitutions. For instance, in West Virginia, the court in State ex rel. Boso v. Hedrick, 391 S.E. 2d 614, 619 (W. Va. 1990) rejected the defendant's claim of ineffective assistance of counsel based on the failure to object to use of post-arrest silence because no *Miranda* warnings had been given to the defendant. In State v. Lofquest, 388 N.W. 2d 115, 117 (Neb. 1986), the Nebraska court remanded the case to the trial court for a hearing as to whether the defendant had been apprised of his Miranda rights prior to the silence as a requisite to considering whether the defendant's due process rights had been violated.

The court declined to find error in the Arizona case of State v. Ramirez, 871 P. 2d 237, 246 (Ariz. 1994) where the prosecutor's comments referred to the defendant's demeanor prior to being informed of his rights. In Alabama, the court in Bradley v. State,

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[6] 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 (Conn. 1986) .

494 So. 2d 750, 767 (Ala. Cr. App. 1985) rejected the defendant's claims concerning the use of his silence at the time of arrest, upon indictment, or **any** time thereafter, because the defendant had not been told of his *Miranda* rights. And, in Guy v. State, 778 P. 2d 470, 474 (Okl. Cr. 19891, the Oklahoma court held that the impeachment by way of the defendant's post-arrest but *pre-Miranda* silence was proper and **was** not violative of due process.

Some states have ruled that use of post arrest, pre-Miranda silence is consistent with their evidentiary rules. The court in State v. Ospina, 611 N.E. 2d 989, 993-994 (Ohio App. 10 Dist. 1992) held that the use of such silence **was** not unduly prejudical and did not violate rules of evidence. The Arizona court in State v. Henry, 863 P. 2d 861, 872 (Ariz. 1993) found no error under state evidentiary law in the use of pre-Miranda silence to impeach the defendant.

The court in State v. Martinez, 651 A. 2d 1189, 1194 (R.I. 1994) stated that the defendant's *pre-Miranda* silence was admissible as an adoptive admission under the Rhode Island rules of evidence. Similarly, the court in Salster v. State, 487 So. 2d 1020, 1021 (Ala. Cr. App. 1986) referred to the defendant's pre-*Miranda* silence as 'nonverbal acts." Finally, in Antwine, 743 S.W. 2d at 69, the Missouri court reasoned:

> Because appellant's testimony raised a natural and reasonable expectation that he would have made an exculpatory statement at the time of his arrest, we believe the State's questions regarding appellant's silence at the time of his arrest as to the events of the day were probative of an inconsistency in his testimony at trial.

EVIDENTIARY VALUE

The State contends that Respondent's silence in this case was probative to question Respondent's testimony on the stand because an innocent person would have told the police that he had just found the cash drawer and cigar box. See generally Privett v. State, 417 so. 2d 805, 806 (Fla. 5th DCA 1982) (to be an admission under section 90.803(18)(b), Florida Statutes, the person would have to be expected to protest if statement were untrue). Indeed, Respondent said that he thought the police were in the apartment because of what the guy did (T. 548), i.e. the person who took the cash drawer and cigar box to the playground.

Under such circumstances, one would expect that Respondent would have immediately suggested that there was a mix-up. But certainly, at the time the victim, who was visibly upset, identified Respondent as the perpetrator, one would expect that Respondent would have protested that he was not responsible (T. 273, 472).

The State stresses that the probative value in this case must be measured in terms of the silence's impeachment value, and not in terms of any substantive value in showing consciousness of guilt. The State points out, however, the decision in Fenelon v. State, 594 So. 2d 292, 294 (Fla. 1992), in which this Court stated that evidence of flight is relevant to the issue of a defendant's guilt, despite other possible inferences that might be drawn from such evidence. This Court recognized, "Such evidence like any other evidence offered at trial, is weighed and measured by its degree of relevance to the issues in the case." 594 So. 2d at 294.

The State urges that silence in this case was made relevant to the credibility of Respondent's testimony by Respondent's decision to take the stand and give a story of innocence that was not offered to the police prior to the time of formal arrest and ***Miranda*** warnings. As the court noted in State v. Sorenson, 421 N.W. 2d 77, 90 (Wisc. 1988), any comment by the prosecution on cross-examination can be explored by the defense on redirect, so that the defendant would be shielded from any other possible inferences that could be drawn from his silence.

In this case, if Respondent really had just found the stolen items as he claimed, he would not have been so confused as to "not know what to say" (A. 5), but he would have readily protested.

Moreover, Respondent said that he did not know he had the right to be silent (T. 546), so he could not have been asserting such a right by his silence (A. 5).[7]

Nor can it be said that Respondent would have been so intimidated that he could not speak (A. 5). Respondent never suggested at trial that he could not speak, but only conceded that he did not tell the police his story. There was no interrogation to apply immediate pressure to Respondent (547-548). Respondent was at least familiar with the victim, whom he frequently saw in the store (T. 363), and with two officers, to whom he had reported his bike stolen that day (T. 262, 303). Significantly, Respondent was able to resist arrest and to yell that he did not want to go to jail (T. 273).

POLICY

In Harris v. New York, 401 U.S. 222, 226, 91 S.Ct. 643, 28 L. Ed.2d 1 (1971), the court stated, "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." In this state, the prosecution is

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[7] The State points out that had Respondent known of his right to remain silent and had wished to exercise it, he could have simply said that he was invoking his rights.

permitted to challenge on cross-examination representations made by the defendant. See generally McCrae v. State, 395 So. 2d 1145, 1152 (Fla. 1981). The State submits that allowing a defendant to take the stand and give testimony that an innocent person would have initially provided in the face of accusation, but that the defendant did not, is tantamount to allowing the defendant to take the stand and commit perjury.

The court in Sorenson, 421 N.W. 2d at 90 apparently agreed with the State:

> A contrary position [to Eletcher] 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.

Likewise, the court in State v. Hunt, 323 S.E. 2d 490, 492 (N.C. App. 1984) stated: "we are concerned with the long-standing and fundamental right of the State to impeach a defendant who waives his right not to testify with prior declarations or conduct that is inconsistent with his sworn testimony at trial."

The majority below was concerned that allowing impeachment by use of pre-*Miranda* silence might result in the police postponing unnecessarily the giving of warnings (A. 4). The State fails to

see how the police could induce a defendant who wants to talk to be silent absent apprising him of his right to be silent. Indeed, in Fletcher v. Weir, 455 U.S. at 606, the court explained that absent ***Miranda*** warnings, there is no government action inducing a defendant to remain silent.

Furthermore, the majority's concern presupposes that officers can predict that a defendant will go to trial, take the stand in his defense, and invent a story. It also ignores that road patrol officers often do not initiate discussion with defendants because interviewing might be the exclusive task of investigative detectives within their agency.

In this case, the police did not wait an unnecessarily long time to *Mirandize* Respondent. Respondent was arrested upon the victim identifying him and Respondent's putting up a struggle (T. 273).[8] Respondent was then taken to the patrol car where he **was** read his rights (T. 546). The police had an interest in getting

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[8] The Fourth District suggested that the police should have read Respondent his rights in the bedroom (A. 4). However, the police were still in the process of an investigation at that time, for they neither had the stolen property or an identification by the victim. "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause. . . ." Hoffa v. United Stats, 385 U.S. 293, 309, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

Respondent out of the apartment and away from others before taking the time to inform Respondent of his rights. Clearly, in the midst of the turmoil, the police had no intention of questioning Respondent inside the apartment.

HARMLESSNESS

In Spivey v. State, 529 So. 2d 1088, 1094 (Fla. 1988), this Court applied the harmless error rule to comments made on the defendant's post-*Miranda* silence. If this Court should for some reason disagree with the foregoing analysis, then the harmless error rule should also be applied in this case. The jury's verdict could not have been affected by the cross-examination of Respondent and the prosecutor's arguments thereon. The evidence of Respondent's guilt was overwhelming.

One victim positively identified Respondent as the perpetrator, while the other victim said that the robber, whose description Respondent met, rode off on a bicycle. Two officers identified Respondent as the person they saw riding a bike in the vicinity of the store, within minutes of the robbery, with a cash drawer and cigar box. A trail of lottery tickets, food stamps, etc. was left both at the location of the bike and at the steps of the apartment where Respondent was found. The cash drawer and cigar box were found in the apartment with Respondent's

fingerprints on them.

With regard to the majority's reference to two comments made by the prosecutor that touched upon Respondent's post-*Miranda* silence (A. 5), the State stresses that defense counsel never objected to the comments and never informed the trial court that the prosecutor had referenced post-Miranda silence (T. 649-650, 651, 659). In Clark v. State, **363 So.** 2d 331, 334 (Fla. 1978), this Court declined to find fundamental error with regard to comments on the defendant's post-Miranda silence, but instead held that any claim of error had been waived by the defendant's failure to object.

The State maintains that one of the comments referred to by the majority did not directly implicate Respondent's post-Miranda silence. Rather, its context suggested that the prosecutor **was** continuing to point to pre-arrest 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 account 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.

(T. 649-650).(emphasis supplied).

Thus, only one later comment expressly referred to post-Miranda silence (T. 651).

This comment standing alone cannot be said to have rendered Respondent's trial unfair. See Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353, 374 (1993) (harmlessness found where comments comprised less than two pages of large transcript). And, if this Court agrees with the State's reasoning herein, any error was dissipated by the permissible comments and by the substantial evidence against Respondent. Brecht, 123 L.Ed.2d at 373-374.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State of Florida respectfully submits that the certified question should be answered in the NEGATIVE, and the decision of the district court should be QUASHED and the conviction and sentence be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: PAUL PETILLO, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 11th day of April, 1997.

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TN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 90, 121

STATE OF FLORIDA

Petitioner,

vs.

RONNIE HOGGINS,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

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APPENDIX TO PETITION ~~BRIEF~~ ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

RONNIE HOGGINS,

Appellant,

v.

STATE OF FLORIDA,

Appellcc.

CASE NO. 95-1154

Opinion filed February 26, 1997

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Richard D. Eade, Judge; L.T. Case No. 93-15937 CF10A.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General: West Palm Beach, for appellec.

WARNER, J.

The issue involved in this appeal is whether a prosecutor may elicit and comment on a defendant's custodial pre-*Miranda*[1] silence as impeachment when the defendant testifies in his defense.[2] We hold that the prosecutor may not and reverse.

This case arises from the armed robbery of a convenience storc. The state's evidence showed that in the late cvcning of September 10, 1993, appellant reported to the police that his bike had been stolen. Later that cvcning appellant robbed a store where the two victims were working. During the course of the robbery, appellant pointed a gun at both victims and threatened to kill them if they didn't give him the money. He left with the cash register drawer and a cigar box containing lotto tickets. On his way out, he fired two shots at one of the victims. Around 12:30 a.m., the police observed appellant riding a bike with a cash register drawer and a cigar box. When the police put on their lights and sirens, appellant crashed his bike, picked up the drawer and box, and ran into an apartment complex. He was pursued by the police. They began a search of the area and followed a trail of lotto tickets and food stamps which led to an apartment rented by the mother of appellant's child. Consent was given to search the apartment; the police found appellant in an upstairs bedroom; they also found the cash drawer and cigar box. Appellant was handcuffed and brought downstairs, where the police had brought one of the victims to identify appellant. Appellant was then arrested but was not read his *Miranda* rights until he was placed in the patrol car.

In his own defense, appellant testified that he was visiting his child at the apartment. He stated that his bike was stolen off the porch, which he had reported to the police that night. Later, while he was sitting on the front step, he observed someone running through the complex who appeared to hide something in the playground area. The person fled, and appellant investigated. He found the cash drawer and cigar box and took them back to the apartment where he hid them in the attic. He then laid down in an upstairs bedroom. He denied going to the store and robbing it.

On cross-examination, the prosecutor was allowed to ask appellant why he had never told the police his story when they came to the apartment on the night of the robbery. Objection to this impeachment was overruled based on *Rodriguez v.* ***Stare, 6*** 19 So. 2d 103 1 (Fla. 3d DCA 1993). *Rodriguez* held that

[1] *Miranda v. Arizona*, *384* U.S. 436, 86 S. Ct. 1602 (1966).

[2] In this case, we arc called upon to decide only whether such impeachment is permissible as to a defendant's *pre-Miranda* silence when the defendant is in a custodial situation. We therefore do not reach the issue of impeachment as to a defendant's *pre-Miranda* silence when a defendant is not in a custodial situation.

impeachment of a defendant's credibility with defendant's pre-*Miranda* silence is proper, relying on *Brecht v. Abrahamson, 507* U.S. 619, 113 S. Ct. *17 10* (1993), and *Jenkins v. Anderson, 447* U.S. 231, 100 S. Ct. 2124 (1980). In closing argument the prosecutor also commented extensively on appellant's failure to give his explanation at the scene. The jury convicted appellant and he then filed this appeal.

The Supreme Court addressed the use of silence as impeachment after the giving of *Miranda warnings in Doyle v. Ohio, 426* U.S. *6* 10, 96 S. Ct. 2240 (1976). There; it held that the impeachment use of a defendant's silence after *Miranda* warnings have been given violates due process, as it is fundamentally unfair to implicitly assure the defendant that his silence will not be used against him and then to use his silence to impeach his subsequent explanation. This was followed by *Jenkins*, where the Supreme Court held that the use of a defendant's pre-arrest silence to impeach the defendant's credibility when the defendant testifies does not violate the Constitution. Subsequently, in *Fletcher v. Weir, 455* U.S. 603, 102 S. Ct. 1309 (1982), the Court held that the Constitution does not prohibit the use for impeachment purposes of a defendant's silence even after arrest if no *Miranda* warnings have been given. The Court later noted that such silence "does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *Brecht, 507* U.S. at 628.

In *Jenkins* and *Weir,* while determining that impeachment with the defendant's pre-*Miranda* silence violated no federal constitutional standard, the Court left open the possibility that states could formulate their own evidentiary rules defining when silence is viewed as more probative than prejudicial. *Jenkins. 447* U.S. at 240-41; *Weir, 455* U.S. at 607, Many states have used their own evidentiary analysis to condemn the use of pre-*Miranda* silence as impeachment.[3] Other states have relied upon their state constitutional provisions to do so.[4] Some, however, have followed the Supreme Court and approved the use of impeachment as to pre-*Miranda* silence.[5] *The Jenkins/Weir* cases have received considerable criticism from commentators as well.[6] To determine whether comment on pre-*Miranda* silence is permissible impeachment, we look to both the Florida Constitution and our evidentiary rules.

State Constitutional Basis

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[3] Some states make an evidentiary determination on a case-by-case basis. *E.g., Silvernail v. State,* 777 P.2d 1169 (Alaska Ct. hpp. 1989); *State* v. *Antwine*, 743 S.W.2d 51 (Mo. 1987); *People v. DeGeorge, 54* 1 N.E.2d 11 (N.Y. 1989). Others have ruled that impeachment as to custodial pre-*Miranda* silence is inadmissible based on their rules of evidence. *E.g., State v. Leecan, 504* A.2d 480 (Corm. 1986); *Mallory v. State, 409* S.E.2d 839 (Ga. 1991); *Wills* v. *State,* 573 A.2d 80 (Md. Ct. Spec. App. 1990). In addition, there are states that have precluded impeachment as to pre-*Miranda* silence on both evidentiary and constitutional grounds. *E.g., Coleman v. State, 89.5* P.2d 653 (Nev. 1995); *Commonwealth v. Turner,* 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).

[4] *E.g., State* v. *Davis,* 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); see also Coleman, 895* P.2d at 653 (relying on both evidentiary and constitutional grounds); *Sanchez,* 707 S.W.2d at 575 (same).

[5] *E.g., People v. Delgudo,* 13 Cal. Rptr. 2d 703 (Cal. Ct. App. 1992); *State v. Finley,* 91'5 P.2d 208 (Mont. 1996); *State v. Sorenson,* 421 N.W.2d 77 (Wis. 1988).

[6] See Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials,* 29 Wm. & Mary L. Rev. 285, 323-35, 333-35 (1988); Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Low of Confessions*, 136 U. Pa. L. Rev. 729, 820 (1988). *But* see David E. Melson, *Comment, Fourteenth Amendment Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings, 73* J. Crim. L. & Criminology 1572 (1983).

Article 1, section 9 of the Florida Constitution provides:

> No person shall bc 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.

In Traylor v. State, 596 So. 2d 957,961 (Fla. 1992), the court recognized that under our federalist system of government, state constitutions may place more rigorous restraints on governmental conduct than what the federal Constitution imposes; however, states cannot place more restrictions on fundamental rights than the federal Constitution permits. Thus, the court held that Florida courts:

> are bound under federalist principles to give primacy to our stale Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

Id. at 962-43 (footnote omitted).

We analyze appellant's claim under our state due process provision, With respect to impeachment by disclosure of silence, the supreme court said in *Willinsky* 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. 6 10, 96 S.Ct. 2240, 49 L.Ed.2d 9 1 (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 genera! policy.

While the *Willinsky* court dealt with silence at a preliminary hearing, in *Webb v. State, 347 So.* 2d 1054 (Fla. 4th DCA 1977), we applied the same type of analysis to a situation factually similar to the instant case. Webb testified on his own behalf to an alibi and on cross-examination the prosecutor was allowed to ask why Webb had not told the police about the alibi on his arrest. Because the record did not reveal whether *Miranda* rights had been read, the state argued that the prosecutor was free to comment on *pre-Miranda* silence. To that contention, our court stated:

> [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 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.

Id. at 1056. The court also cited to *Weiss v. State,* 341 So. 2d 528 (Fla. 3d DCA 1977), in which the prosecutor commented on the appellant's failure to come forward to explain himselfprior *to his arrest* when hc knew he was under investigation. *Weiss* held that this too was a violation of the Fifth Amendment privilege. The analysis of *Webb* is consistent with tie due process concerns of *Willinsky.*[7] Furthermore, *in Lee v. State, 422 So.* 2d 928 (Fla. 3d DCA 1982), decided after *Weir* and *Jenkins,* the court applied *Webb* and *Willinsky* and determined that the right to remain silent is entitled to more protection under our state constitution than is permitted under the federal Constitution.

By prohibiting impeachment of a testifying

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[7] This use of due process theory was extensively reviewed in Professor Snyder's article. See ***supra note 6.*** Professor Snyder advocates the same considerations as this court noted in *Webb.*

defendant with custodial silence, all defendants arc treatcd the same regardless of when *Miranda* warnings are administered. In this case, for instance, the officers did not administer the warnings to the appellant until after handcuffing him, formally placing him under arrest, and placing him in the police car for transport. If they had read him his rights when they placed him in custody in the bedroom, then none of his subsequent silence would be admissible under *Doyle*.[8] There must be concern that a rule allowing impeachment as to pre-*Miranda* silence but not as to post-*Miranda* silence may result in the police postponing unnecessarily the giving of the warnings, so that silence can be cffcctivcly used as impeachment if the defendant testifies.

Because we first look to our state constitution, we follow *Webb* and hold that the use of custodial pre-*Miranda* silence violates the due process protections contained in the Florida Constitution. While *Rodriguez* was decided on federal Fifth Amendment grounds, its citation to Jenkins and *Brecht*, without consideration of the state constitutional grounds, leaves our districts with different rules regarding the protection of constitutional rights. Even if our decision here does not directly conflict with *Rodriguez*,[9] we think that this is a question of great public importance whose interpretation should be uniform throughout the state. We therefore certify the following question:

> 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?

Evidentiary Basis

The Supreme Court also left open the possibility that state evidentiary rules may preclude the admission of a defendant's silence as impeachment. Indeed, the decision in *Webb was* also based on thc determination that the silence of the defendant was not actually inconsistent with the defendant's trial testimony. *Webb, 347 So.* 2d at 1056. In *Weiss,* the court held that, in addition to the constitutional violation, the prejudicial effect of the evidence of silence for impeachment purposes outweighed its probative value. *Weiss,* 341 So. 2d at 530.

The United States Supreme Court used an evidentiary approach in holding that a trial court erred in allowing the prosecutor to cross-examine the defendant regarding a prior invocation of his Fifth Amendment rights. *Grunewald v. United States, 353* U.S. 391, 77 S. Ct. 963 (1957). It noted that where the evidentiary matter had such serious constitutional overtones, the dangers of the impermissible use of such evidence outweighed any probative value it might have. *Grunewald, 353* U.S. at *423-24; see also United States v. Hale, 422* U.S. 171, 95 S. Ct. 2133 (1975) (apre-Doyle case applying evidentiary analysis to post-*Miranda* silence; noting that government must establish threshold inconsistency between silence and later

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[8] WC notc that the Supreme Court in *Doyle* anticipated *the giving* of *Miranda* warnings immediately upon arrest:

> The warnings mandated by *[Miranda]* require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may he 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 reauired to advise the person arrested.

Doyle, 426 U.S. at 6 17 (emphases supplied; footnotes and citations omitted).

[9] The facts of Rodriguez also differ in that it appears that Rodriguez's silence may have occurred prior to custody, However, statements in *Rodriguez* could be read to permit impeachment as to all pre-*Miranda* silence

defendant with custodial silence, all defendants are treated the same regardless of when *Miranda* warnings are administered. In this case, for instance, the officers did not administer the warnings to the appellant until after handcuffing him, formally placing him under arrest, and placing him in the police car for transport. If they had read him his rights when they placed him in custody in the bedroom, then none of his subsequent silence would be admissible under *Doyle*.[8] There must be concern that a rule allowing impeachment as to pre-*Miranda* silence but not as to *post-Miranda* silence may result in the police postponing unnecessarily the giving of the warnings, so that silence can be effectively used as impeachment if the defendant testifies.

Because we first look to our state constitution, we follow *Webb* and hold that the use of custodial pre-*Miranda* silence violates the due process protections contained in the Florida Constitution. While *Rodriguez* was decided on federal Fifth Amendment grounds, its citation *to Jenkins* and *Brecht*, without consideration of the state constitutional grounds, leaves our districts with different rules regarding the protection of constitutional rights. Even if our decision here does not directly conflict with *Rodriguez*, we think that this is a question of great public importance whose interpretation should be uniform throughout the state. We therefore certify the following question:

> 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?

Evidentiary Basis

The Supreme Court also left open the possibility that state evidentiary rules may preclude the admission of a defendant's silence as impeachment. Indeed, the decision in *Webb was* also based on the determination that the silence of the defendant was not actually inconsistent with the defendant's trial testimony. *Webb, 347 So.* 2d at 1056. In *Weiss,* the court held that, in addition to the constitutional violation, the prejudicial effect of the evidence of silence for impeachment purposes outweighed its probative value. *Weiss,* 341 So. 2d at 530.

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[8] We note that the Supreme Court in *Doyle* anticipated the giving of *Miranda* warnings immediately upon arrest:

> The warnings mandated by [Miranda] require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. 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 reauired to advise the person arrested.

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[9] The facts of *Rodriguez* also differ in that it appears that Rodriguez's silence may have occurred prior to custody. However, statements *in Rodriguez* could hc read to permit impeachment as to all pre-*Miranda* silence.

exculpatory testimony at trial).

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 bc 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.

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, WC also hold, consistent with *Webb*, that the exculpatory statement was not inconsistent with appellant's prior silence. Therefore, such silence was inadmissible as impeachment.

The prosecutor also made two comments on appellant's post-*Miranda* silence. In rebuttal closing argument, the prosecutor argued:

> He gave this statement under oath, but never anytime previous to todav did he ever sav this story to the police about how he came across this monev and stuff,

The prosecutor then argued:

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

Both of these comments were as to appellant's post-*Miranda* silence and were therefore impermissible. *See Doyle, 426* U.S. at 6 17- 19; *accord Spivey v. State, 529 So.* 2d 1088, 1092 (Fla. 1988); *State v. Burwick*, 422 So. 2d 944,948 (Fla. 1983).

The errors in admitting impeachment as to pre-*Miranda* and post-*Miranda* silence and comment thereon are subject to a harmless error analysis. *State v. DiGuilio, 49* 1 So. 2d 1129 (Fla. 1986). The prosecutor spent a lot of time in cross-examination of appellant on his pre-*Miranda* silence while in custody and then emphasized it in closing argument. The evidence against the appellant was strong with the victim's identification of appellant. But the victim testified that the robber used a t-shirt to cover his face during the robbery, and he also testified that the robber had a wine glass or liquor sign as a tattoo, when appellant had a tattoo of a bull. The mother of appellant's child corroborated parts of appellant's version of events. As the supreme court noted in *DiGuilio*, "[i]t is clear that comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict ." *Id.* at 1136-37. Under these circumstances, we cannot conclude beyond a reasonable doubt that the impeachment as to the appellant's silence and the comments thereon did not affect the jury's verdict. See *id.* at 1138-39.

The case is reversed and remanded for a new trial.

GLICKSTEIN, J., concurs.
POLEN, J., dissents with opinion.

POLEN, J., dissenting.

I would affirm appellant's conviction, as I believe Rodriguez v. State, 619 So. 2d 103 1 (Fla. 3d DCA), rev. denied, 629 So. 2d 135 (Fla. 1993), should be followed to allow impeachment based on pre-Miranda silence with the certified question as being of great public importance.

Were the majority inclined to affirm the conviction, I believe we would agree that appellant's Habitual Violent Felony Offender Sentence for a life felony would require reversal in any event. Lamont v. State, 610 So. 2d 435 (Fla. 1992); Newberry v. State, 616 So, 2d 1093 (Fla. 4th DCA 1993). Because the majority reverses for a new trial, it was unnecessary for them to reach the sentencing issue.