IN THE SUPREME COURT OF FLORIDA

MARK ANTHONY POOLE, :

Appellant, :

vs. : Case No. SC05-1770

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR REPEATEDLY COMMENTED DURING CLOSING ARGUMENT ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL AND HIS SILENCE AFTER HIS ARREST.

"In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right." Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, 542 U.S. 177, 193 (2004) (citing Carter v. Kentucky, 450 U.S. 288, 299-300 (1981)). This Court applied this principle in Rodriguez v. State, 753 So.2d 29, 37 (Fla. 2000).

Following his arrest, Manuel Rodriguez admitted that he was present at the time of the crimes, armed burglary and three murders, he helped Luis Rodriguez gain entry to the victims' apartment, and he acted as a lookout. Manuel Rodriguez exercised his right to decline to testify at trial. During closing argument, the prosecutor made two remarks similar to the prosecutor's remarks in the present case [XXI T2835; XXII T2840-2841] that this Court held to be improper comments on Rodriguez's right to silence: (1) "[S]omebody obviously was in that apartment with Luis Rodriquez. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who

that second person could have been." (2) In response to defense counsel's voir dire question asking if prospective jurors were willing to listen to both sides of the story, the prosecutor argued, "And there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant. There were no two sides." Rodriguez, 753 So.2d at 37.

In Rodriguez, as in the present case, Answer Brief, pp. 34-35, the State argued that the prosecutor's comments were invited responses. This Court rejected that argument. This Court recognized but distinguished cases that involved invited responses, cautioning that "this exception should also be narrowly interpreted." Id., at 39. In Dufour v. State, 495 So.2d 154, 160 (Fla. 1986), the prosecutor's comment to the jury that "[y]ou haven't . . . heard any evidence that [the defendant] had any legal papers in the cell with him" was held to be proper rebuttal to defense counsel's statement in closing that an adverse witness could have had access to and based his testimony upon the defendant's legal papers. In Barwick v. State, 660 So.2d 685, 694 (Fla. 1995), defense counsel suggested in closing that an impropriety had occurred when the defendant made a taped confession. This Court held that the prosecutor's response was invited when he asked, "what fact, what testimony, what anything have you heard as a result of him going down to that police station would create a reasonable doubt in your mind?"

Because the invited response cases, Dufour and Barwick, must

be narrowly interpreted under Rodriguez, the prosecutor's repeated remarks concerning Mark Poole's silence in the present case cannot be excused as invited. Defense counsel's remark in closing that Poole acknowledged committing the burglary, sexual battery, and robbery, [XXI T2795] was simply a rhetorical device intended to convey to the jury that defense counsel, in his capacity as the legal representative of Poole, was conceding that the State had sufficiently proved Poole's guilt of those offenses. Counsel presumably did this so he could focus his argument on the deficiencies in the State's evidence concerning Poole's guilt of the murder and attempted murder. Defense counsel's statement did not waive Poole's constitutional right not to be penalized for his silence after his arrest and at trial. There is no record of Poole ever knowingly and voluntarily waiving his right to remain silent. The absence of any evidence of any incriminating post-arrest statements suggests that he exercised his right to remain silent following his arrest. The fact that he did not testify at trial establishes that he exercised his right to remain silent at trial.

Appellee's claim that there was no evidence to show that there was anyone else at the scene of the crime other than Poole, Answer Brief, p. 35, is not true. The State's principal witness at trial, Loretta White, told the 911 operator, "There was one in the bedroom and I think there was one in the living room." [XIX T2430-2431] Paramedic Lee Paxton testified that White told her that two black people broke into her trailer. [XIX T2297, 2307]

Appellee claims that because White had suffered a concussion, she was confused, and her 911 call did not establish there was another assailant. Answer Brief, p. 35 n.3. This argument is inconsistent with the State's reliance upon White's trial testimony to establish what happened at the time of the crime. Answer Brief, pp. 2-6. If the concussion caused White to be so confused that her statements on the morning after the offense cannot be relied upon, what basis is there for relying upon her memory of the events when she testified at trial three and a half years later? Questions regarding the credibility of witnesses and the weight of the evidence are for the jury to decide. Fitzpatrick v. State, 900 So.2d 495, 508 (Fla. 2005).

Since the State had in fact presented evidence that there were two black men in White's trailer, the prosecutor was not entitled to respond to defense counsel's argument by asserting that there was no evidence to show that there was anyone else at the scene other than Poole, and appellee's reliance on Caballero v. State, 851 So. 2d 655 (Fla. 2003), Answer Brief, p. 35, is misplaced.

Appellee also argues that only one of the prosecutor's comments on Mr. Poole's post-arrest silence and failure to testify at trial was preserved by a contemporaneous objection and that any argument on the prior comments was waived by failure to object. Answer Brief, pp. 29-33. This raises the question of what constitutes a contemporaneous objection.

Webster's New Universal Unabridged Dictionary (2d ed. 1979)

defines "contemporaneous" as "existing or happening in the same period of time." All but the first of the prosecutor's comments on silence argued in appellant's Initial Brief, pp. 30-33, occurred on two consecutive pages of transcript, [XXII T2840-2841] and the final comment was immediately followed by defense counsel's objection and motion for mistrial. [XXII T2841-2842] The objection and motion for mistrial happened in the same period of time as the prosecutor's comments reported on transcript pages 2840 and 2841 and were contemporaneous as to those comments.

The prosecutor's first comment on Poole's silence occurred six transcript pages prior to the objection and motion for mistrial. [XXI T2835] After the court denied defense counsel's motion for mistrial, the prosecutor continued his rebuttal argument for another seven transcript pages. [XXII T2842-2849]

This case is not like Nixon v. State, 572 So.2d 1336, 1340-1341 (Fla. 1990), cert. denied, 502 U.S. 854 (1991), Answer Brief, pp. 31-32,, in which defense counsel made no objection during the course of the prosecutor's closing argument to remarks made at the beginning and waited until the conclusion of the argument to move for a mistrial. In Nixon, this Court explained that a "contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings." Id., at 1341. In the present case, defense counsel's objection and motion for mistrial were sufficiently timely to place the judge on notice that an error had been

committed and provided the opportunity to correct the error.

Moreover, the only way to effectively correct the error was to grant the motion for mistrial. The trial court could not erase the prosecutor's improper comments on Poole's silence from the minds of the jurors either by admonishing the prosecutor for improper argument or by instructing the jury to disregard the comments. An admonishment of the prosecutor or a so-called curative instruction would have had the opposite effect by placing further emphasis on the prosecutor's improper remarks.

Should this Court find that the objection was not sufficiently contemporaneous to preserve the prosecutor's first comment on Poole's silence, and even if this Court were to find that only the last comment on silence was properly preserved, this Court must still consider all of the comments on silence in conducting its harmless error analysis. In State v. Hoggins, 718 So.2d 761 (Fla. 1998), the prosecutor commented on both Hoggins' pre-Miranda silence at the time of arrest and Hoggins' post-Miranda silence in arguing to the jury that Hoggins never told the police the exculpatory explanation of his conduct that he gave at trial. Defense counsel objected to the comments on pre-Miranda silence but failed to object to the comments on post-Miranda silence. This Court explained that it was required to consider both the comments to which counsel objected and the comments to which counsel failed to object:

> Error involving comment on silence must be evaluated under a harmless error analysis. See State v. Diguilio, 491 So.2d 1129, 1130 (Fla. 1986). Although defense counsel did

> not make a contemporaneous objection to the prosecution's comment on Hoggins' post-Miranda silence, Whitton v. State, 649 So.2d 861, 865 (Fla. 1994), requires us to examine the entire record, regardless of offered objections, when performing a harmless error analysis. Accordingly, in conducting a harmless error analysis we consider the prosecutor's comments and argument on Hoggins' post-Miranda silence as well as comment and argument on Hoggins' pre-Miranda silence at the time of arrest.
>
> When the evidence against the defendant is not clearly conclusive, comment on postarrest silence is not harmless. See DiGuilio, 491 So.2d at 1138. The test is not one of weight of the evidence or the overwhelming nature of the evidence offered to show guilt. Rather, the test is whether a reasonable possibility exists that the error affected the verdict. See, e.g., Whitton, 649 So.2d at 865.

Hoggins, 718 So.2d at 772. This Court found it could not reasonably say that the comments on silence did not affect the jury verdict and reversed for a new trial. Id.

Appellee mistakenly relies upon Fitzpatrick v. State, 900 So. 2d at 517, Answer Brief, p. 37, to argue that the comments on Poole's silence were harmless because the State's evidence of guilt was overwhelming. In Fitzpatrick, at 516-517, this Court applied the harmless error test of State v. DiGuilio, 491 So.2d 1129, 1137-1139 (Fla. 1986). This Court quoted DiGuilio, at 1139,

> The test is not a sufficiency-of-the-evidence . . . or even an overwhelming evidence test. . . . The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. . . . If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Fitzpatrick, at 517. This Court found that there was no reasonable possibility that a witness's single comment that Fitzpatrick stated that he thought he needed an attorney affected the jury verdict in light of DNA evidence, eyewitness testimony that the victim was last seen alive with Fitzpatrick, and the fact that the improper remark was neither repeated nor emphasized. Id. While this Court did observe that the evidence of Fitzpatrick's guilt was overwhelming, id., that observation cannot have been the basis for the finding of harmless error after quoting the DiGuilio passage stating that overwhelming evidence was not the test for harmless error.

The present case is very different from Fitzpatrick because the prosecutor repeatedly emphasized his comments on Poole's silence both after his arrest and at trial. Because of the prosecutor's repeated emphasis on Poole's silence, his violation of Poole's constitutional right to silence cannot be found harmless.

Appellee relies upon State v. Murray, 443 So.2d 955, 956 (Fla. 1984), and Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), for the proposition that prosecutorial misconduct should be the "subject of bar disciplinary action, not reversal and mistrial." Answer Brief, p. 36 n.4. This Court exercises the ultimate authority in disciplining members of the bar for misconduct. Counsel for appellant is not aware of any case since the decision in Murray in which this Court has punished a prosecutor for misconduct which resulted in a finding of harmless

error on appeal. Counsel is aware of only a very few cases where this Court has actually punished a prosecutor in a bar disciplinary action for misconduct that resulted in reversal on appeal. See, e.g., The Florida Bar v. Schaub, 618 So.2d 202 (Fla. 1993). More importantly, the opinions in Murray and Bertolotti fail to take into account that the reversal of a criminal defendant's conviction or death sentence because of prosecutorial misconduct does not in fact punish the public. The constitutional rights to silence in the face of accusation and to a fair trial are far more valuable to each and every citizen of Florida than the costs associated with ordering a new trial. Those rights belong to the public at large and must be protected by this Court or they will cease to exist.

ISSUE II

THE PROSECUTOR VIOLATED APPELLANT'S RIGHT TO A FAIR PENALTY PHASE TRIAL BY CROSS-EXAMINING DEFENSE WITNESSES ABOUT UNPROVEN PRIOR ARRESTS, THE UNPROVEN CONTENT OF A TATTOO, AND LACK OF REMORSE.

Appellee argues that the prosecutor was entitled to cross-examine Mark Poole's brother, Joe Poole, Jr., about Mark's prior arrests because the defense presented Joe's testimony about Mark's good character and because it was relevant to Joe's credibility. Answer Brief, pp. 41-42. This argument completely ignores this Court's ruling in Geralds v. State, 601 So.2d 1157, 1162 (Fla. 1992), quoted more fully in the Initial Brief, p. 44,

> The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment. This rule is of particular force and effect during the penalty phase of a capital murder trial[.]

Rather than address this Court's decision in Geralds, Appellee seeks to confuse the issue by relying on a decision by this Court in 1950, twenty-two years before the initial enactment of Florida's death penalty statute, section 921.141, Florida Statutes (1972), Cornelius v. State, 49 So.2d 332 (Fla. 1950). Answer Brief, p. 42. At the time Cornelius was decided, there was no equivalent of the present trifurcated procedure for determining the appropriate sentence in a capital case. The jury's discretion to recommend mercy or withhold such a recommendation was totally unguided, contributing to the United States Supreme Court decision

that all state capital sentencing procedures were unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972).

Appellee's argument that the prosecutor's improper question about Poole's prior arrests was harmless because Joe Poole, Jr., never answered the question, Answer Brief, p.46, is misleading because Joe did answer the actual question asked by the prosecutor:

> Q. If you're that close to your brother, do you know if this was the first time he ever got arrested when he got arrested for this crime?
> A. No.
> Q. You don't know?
> A. No, it's not his first time getting arrested.
> Q. He got arrested in Georgia, South Carolina, Texas.
> MS. JESTER: Objection.

[XXIII T3185-3186] Thus, the witness answered the question asked, and the prosecutor began gratuitously and improperly testifying about Mark Poole's inadmissible record of prior arrests. Defense counsel explained her objection to the court:

> MS. JESTER: Your Honor, I would object on improper impeachment of this witness. We've never put in that he hasn't gotten in trouble before. In fact, we were asking about drug use and drinking.

[XXIII T3186]

Defense counsel was correct in arguing that the information about Poole's history of arrests was improper impeachment under Geralds, 601 So.2d at 1162. Nonetheless, the prosecutor argued, incorrectly, that his impeachment was "entirely appropriate." [XXIII T3186] Defense counsel further explained her objection:

> MS. JESTER: Your Honor, again, I believe it's improper. The rules for the penalty phase are different than in the evidentiary portion of the trial. . . . But in the penalty phase it's specific as to what aggravators the state can use and the defense is allowed to put in specific character.
>
> We're not asking for lack of prior history record. We haven't brought up the prior history . . . .
>
> MR. FISHER [co-counsel]: What is even more is that when in our motion in limine specifically states we do not intend to pursue during the jury portion of trial, those significant history mitigators.

[XXIII T3187]

Defense counsel had moved in limine to exclude evidence of Poole's prior criminal history, waiving the mitigating circumstance of no significant history of prior criminal activity. [V R933-934; XXII T 2939] The prosecutor agreed that the motion should be granted, and the trial court granted the motion. [XXII T 2939] Given the prosecutor's agreement to granting the motion in limine, his conduct in violating the ruling and arguing that it was appropriate for him to do so was plainly dishonest. The court erroneously and inexplicably overruled the defense objection to the prosecutor's violation of the ruling on the motion in limine on the grounds that credibility is always an issue and the defense opened the door to the prosecutor's question. [XXIII T3187-3188] The penalty phase trial in a capital case is one of the most significant proceedings in which any attorney can participate. The prosecutor's dishonesty in deliberately violating the court's

ruling on the defense motion in limine which he encouraged the court to grant must not be tolerated.

Appellee falsely asserts that defense counsel addressed the court concerning the prosecutor's questions about Poole's remorse after the penalty phase reconvened the day following the questions. Answer Brief, p. 51. The penalty phase of the trial began on May 2, 2005. [XXII T2905] Hattie Poole, Mark Poole's mother, was the first defense witness to testify that day. [XXII T2986-2988] During cross-examination, the prosecutor asked Mrs. Poole whether Mark Poole ever apologized for the murder or the rape. [XXIII T3028] Mrs. Poole's testimony was followed by that of Carolyn Moody, Mark Poole's older sister. [XXIII T3030-3031] The prosecutor cross-examined Mrs. Moody about whether Poole ever expressed remorse for the murder. [XXIII T3071-3074] Mrs. Moody's testimony was followed by that of Arry Moody, Mark Poole's nephew. [XXIII T3079-3081] The prosecutor cross-examined Mr. Moody about whether Poole expressed any remorse for the murder and rape. [XXIII T3091] Following Mr. Moody's testimony, the trial court took a 20 minute afternoon recess. [XXIII T3099-3101] The trial resumed on the same day, May 2, 2005. [XXIII T3105] The court asked if the defense was ready to proceed. Defense counsel Jester answered yes, but defense counsel Fisher answered no. [XXIII T3106] Defense counsel Fisher then objected to the questions about remorse:

> We have an issue that we need to take up. Mr. Aguero has been asking questions about remorse. We are not going to be raising remorse as a mitigator, and it isn't

> proper for him to be asking questions at this point, given that we are not asking for remorse as a mitigator.

[XXIII T3106] Defense counsel further explained that the defense was not going to put on any evidence of remorse and that he was asking the prosecutor not to ask any further questions about remorse and not to make any argument about remorse in closing. [XXIII T3106] The defense presented the testimony of three more witnesses, Dmarcus Moody [XXIII T3109], Arry Day Moody [XXIII T3121], and Clarence Bryant [XXIII T3140], before the court recessed for the evening. [XXIII T3145-3146]

Appellee incorrectly asserts that the "prosecutor was clearly under the impression that the defense either had or would be arguing remorse or rehabilitation during the penalty phase." Answer Brief, p. 52 n.7. The prosecutor actually argued that defense counsel failed to object at the time he asked the questions and that he had no way to know whether the defense was going to raise remorse with a subsequent witness. [XXIII T3106-3107] Furthermore, the prosecutor stated:

> I know I can't argue it. But I think I was free in anticipation of what might be coming in the rest of the penalty phase to ask those witnesses that question. I think the case law's clear, the state can't argue that unless the defense brings it up and says now he's remorseful, and then the state goes into well, maybe he's remorseful now that he's sitting here in the trial, but he wasn't remorseful before. And the door gets opened in that fashion.

[XXIII T3107] Thus, the prosecutor admitted that he knew his questions were improper because the defense had not presented any

evidence of Poole being remorseful for the crimes, but he thought he could get away with it because defense counsel failed to immediately object. While defense counsel was remiss for not immediately objecting to the improper questions, that does not excuse the prosecutor's deliberate misconduct.

Appellee incorrectly asserts that defense counsel raised the issue of the improper questions about remorse "not by an objection, but simply in the form of a concern or discussion." Answer Brief, p. 53. While defense counsel did not use the word objection, he did say he was raising an issue about the prosecutor's improper questions about remorse, as quoted above. In doing so, he was calling the trial court's attention to a possible error while there was still time for the court to take corrective action, so his "concern or discussion" fulfilled the purpose of a contemporaneous objection. See Nixon v. State, 572 So.2d 1336, 1340-1341 (Fla. 1990), cert. denied, 502 U.S. 854 (1991).

If this Court concludes that defense counsel's objection to the improper questions about remorse was untimely, it would still be appropriate to consider the prosecutor's misconduct in asking about lack of remorse while conducting harmless error analysis of other prosecutorial misconduct preserved by contemporaneous objections. State v. Hoggins, 718 So.2d 761, 772 (Fla. 1998).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Scott A. Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this 6th day of September, 2007.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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September 6, 2007

PLEASE REPLY TO

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Honorable Thomas D. Hall, Clerk
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RE: Mark Anthony Poole vs. State of Florida
Appeal No. SC05-1770

Dear Mr. Hall:

Enclosed for filing in the above-styled cause are the original and seven (7) copies of the Reply Brief of the Appellant. This brief has been saved as SC05-1770.brr. This brief has been sent via e-mail.

Sincerely,

Tami Locke

TAMI L. LOCKE
Legal Secretary

/tll

Enclosures: noted above

xc: Scott A. Browne, Attorney General's Office