IN THE SUPREME COURT OF FLORIDA

Case No.: SC15-348

STATE OF FLORIDA,

Petitioner,

v.

DONNA HORWITZ,

Respondent.

On Discretionary Review from the Fourth District Court of Appeal, State of Florida

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ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA, shall be referred to as "Petitioner" or "State." Respondent, DONNA HORWITZ, shall be referred to as "Respondent" or "Ms. Horwitz." References to the Record on Appeal and State's Initial Brief on Merits are abbreviated as follows:

(R.__) = Record on Appeal, followed by the appropriate volume and page numbers;

(IB.pg #) = Petitioner's Initial Brief on Merits.

STATEMENT OF THE CASE

Respondent was indicted for first degree murder in the shooting death of her husband, Lanny Horwitz (R1/11). Radley Horwitz, the couple's adult son, was a witness for the State. The State did not pursue the death penalty (R8/611).

Respondent moved *in limine* to exclude testimony that Respondent invoked her right to silence (R1/42-43). The State moved *in limine* to, *inter alia*, permit evidence that Respondent remained silent before being arrested or advised of her rights (R1/122-24). The trial court permitted the State to refer to Respondent's silence during its case-in-chief (R18/2100-02, 2103) and to comment extensively on that silence in its closing argument (R20/2364, 2374, 2375 2376-77, 2378, 2469), over Respondent's continuing objections (R5/185, 18/2101, 20/2365, 2374). On the other hand, Respondent was not permitted to question her hearing aid witness that Respondent did not answer his questions about firing weapons on the advice of counsel (R18/2155-57). And the trial court instructed the jury that it should consider any statements made by Respondent "with caution" (R20/2344).

At the end of the State's case and again at the close of all the evidence at Respondent's trial, the trial court denied Respondent's motion for judgment of acquittal made on the grounds that the circumstantial evidence was insufficient to support her conviction (R1/134-40, 19/2165-73, 2257, 2261-63).

The jury thereafter returned its verdict finding Respondent guilty of first degree murder with a firearm as charged and that her discharge of the firearm caused great bodily injury or death (R1/173). The same day, January 17, 2013, Respondent was adjudged guilty of first degree murder with a firearm (R1/175-76) and sentenced to serve life in prison with credit for 470 days time served (R1/171). The trial court also imposed a 25-year mandatory term pursuant to the 10-20-life statute (R1/142).[1] Respondent's motion for new trial (R1/179-80) was denied on January 22, 2013 (R1/178). Notice of appeal from the judgment of conviction and sentence was timely filed on January 25, 2013 (R1/185).

On appeal, Respondent raised four issues, including that the trial court committed error in permitting the State to introduce testimony that Respondent had remained silent when questioned by police at the scene of the shooting prior to her arrest where Respondent had not testified at trial. Respondent also argued that the prosecutor's reliance upon her pre-arrest silence in closing argument was erroneous for the same reason.

On February 18, 2015, the Fourth District Court of Appeal ("Fourth DCA") issued a written opinion in which it agreed with Respondent and held that the trial

[1] However, since Appellant must, by statute serve her life sentence without any eligibility for parole, Section 775.082(1), Fla. Stat., the additional imposition of a twenty-five year term before parole eligibility under 10-20-life would appear to be superfluous. *See Clowers v. State*, 31 So.3d 962, 966 (Fla. 1st DCA 2010).

court erred in admitting evidence of Respondent's pre-arrest, pre-*Miranda* silence. *Horwitz v. State*, 40 Fla. L. Weekly D474 (Fla. 4th DCA, Feb. 18, 2015). The Fourth DCA reversed Respondent's conviction and remanded for a new trial. *Horwitz*, at 6. The Fourth DCA also certified the following question to this Court as a question of great public importance:

> WHETHER, UNDER FLORIDA LAW, THE STATE IS PRECLUDED FROM INTRODUCING EVIDENCE OF A DEFENDANT'S PRE-ARREST, PRE-MIRANDA SILENCE WHERE THE DEFENDANT DOES NOT TESTIFY AT TRIAL?

Horwitz, at 7.

STATEMENT OF THE FACTS

Lanny Horwitz, 66, was discovered lying naked in the master bathroom of his home in Admiral's Cove on the morning of September 30, 2011. The shower was running and the glass shower doors had been shattered. There was blood and glass through the entire room on the walls and the floor (R15/1522, 1523, 16/54-55, 1661, 18/2058). The death was initially thought to be a suicide, but further investigation revealed that Horwitz had been shot nine times (R12/1132), including one contact wound to the mouth (R12/1109) and one shot to the heart which would alone have been fatal (R12/1116). Respondent defended on the theory that someone else, possibly Radley Horwitz or someone associated with him, was responsible for the killing (R11/947, 953).

Respondent, 65, had twice divorced Lanny Horwitz (R13/1192-93, 18/2090). Radley continued to live with Lanny, and, with Lanny's help, began a firearms business in 2004 that ended when Radley was convicted for a federal firearms charge (R13/1196, 1198). Radley blamed his father for the arrest (R14/1363). All three family members were very familiar with guns and enjoyed target shooting (R13/1201).

After his release from federal custody, Radley went to live with his father at the Admirals Cove home (R13/1202). But Radley could not find a job (R14/1348) other than assisting his father in an investment scheme that never really took off

(R13/1204-05, 14/1354), despite going back to 2001 (R14/1353). Also involved in that scheme was a neighbor, Francine Tice (R13/1206), with whom Lanny became close after her divorce (R13/1220).

According to Mary Jane Garbo, the mother of Radley's daughter, Radley and his father had a tumultuous relationship (R19/2242). Radley felt restricted because he had to live at home, and Lanny Horwitz at one point quit buying his groceries and helping Radley pay child support (R19/2243-44). Radley noted that the picture on his father's desk was of Lanny's three dogs, not of his son, Radley, or his granddaughter (Radley's daughter) (R14/1369). Ms. Garbo agreed, on the other hand, that Respondent was a loving grandmother and helped her often with the child, as well as serving as the caretaker for her own elderly mother (R19/2246-47).

Radley had purchased a book called "Hitman" at a gunshow, which he recognized as a collector's item and sold about a month later at a profit (R14/1414-15). He believed he also had an electronic copy of the book, as he recalled reading it online (R14/1415). Radley knew that he was a beneficiary of his father's life insurance policy (R13/1225).

Respondent maintained a home in New Haven in nearby Abacoa, where she lived with her mother (R13/1212, 1215). When Lanny and Radley returned from a stay at Lanny's home in North Carolina from January to March, 2011 (R13/1215),

Respondent returned to live with him and their son, at Lanny's home in Admiral's Cove, a gated community which required security card or authorization from a homeowner to enter (R11/967-70). The Horwitz home was adjacent to the six to eight foot high community perimeter wall (R11/974, 993-94). Respondent's mother lived in the guesthouse (R13/1222-23), having provided Horwitz with a $200,000 fourth mortgage on the Admiral's Cove home (R13/1226, 18/2120).

But Lanny Horwitz continued to spend a lot of time with Tice, leading to friction with Respondent (R13/1224). Respondent and her mother planned to move back into the house in Abacoa (R13/1253). Radley, too, resented Lanny's relationship with Tice, whose bills Lanny paid, so that although she had the real estate listing to sell the Admiral's Cove house (the North Carolina house, too, was for sale R13/1216), Tice had no incentive to close a sale (R13/1226, 1253).

Radley testified that on September 29, 2011, Lanny Horwitz was planning to travel to North Carolina the next day with Ms. Tice (R13/1259-60). Respondent discovered the plan when she saw Lanny's luggage in the laundry room (R13/1262). The next morning, Radley was awakened by gunshots (R13/1272). He took out his ear plug and heard more shots (R13/1273). When he heard a couple of clicks, he left his room (R13/1274). He said he saw Respondent running in and out of the master bedroom, screaming Lanny's name (R13/1225). The house alarm went off (R13/1276). Radley said he saw Lanny in the bathroom (R13/1281), but

left when he heard him make a gurgling sound (R13/1281). According to Radley, Respondent told him that "He was so horrible" (R13/1282).

It was about 7:00 a.m. when the security guard at the community gate, Christopher Fisher, received an alarm from the residence (R11/970-71). Fisher dispatched Luis Garcia to the home (R11/972). Radley answered the door and said he did not know what was happening, but "my mom is screaming" (R11/1005-06). Respondent was inside, and she said, "I think he's dead" (R11/1008). According to Garcia, Respondent said that "he would do this" (R11/1015). There was a gun in Lanny's right hand (R11/1017), which Garcia moved away from the body (R11/1017) when he unsuccessfully tried to resuscitate Lanny (R11/1016-17). A fire rescue paramedic, Brian Dittmer, declared Lanny Horwitz dead shortly thereafter (R12/1173).

David Cockrum, the captain of security, also went to the home, where he saw Radley on the phone outside (R11/1043). Cockrum did not see any women, including Respondent (R11/1045).

Kristi Coleman ("Officer Coleman") of the Jupiter Police Department arrived in response to a call about a suicide (R11/1053). Officer Coleman approached Radley and Respondent, who were sitting in a vehicle outside the home (R11/1052). Respondent was barefoot and wearing black pajama pants and a pink top (R17/1937-38, 18/2050). When Officer Coleman asked Respondent if she

needed anything, Respondent indicated that she could not hear (R11/1056).[2] Coleman asked Respondent if she had been in the room when the gun was fired, but received no response (R11/1057, 1058).

Coleman said that Respondent appeared to be in shock (R11/1057). Radley, on the other hand, was quite calm (R18/2067). When Radley called his daughter's mother so that she could arrange for the child to be picked up from school, she described him as "nonchalant" (R19/2236).

Officer Coleman said she noticed a drop of blood on Respondent's bare left foot (R11/1060). She first referred to this observation just before her deposition almost a year later (R11/1067-68, 15/1482). She did not see any other blood at the vehicle (R11/1064). Radley told police a week after the shooting that he noticed three drops of blood on Respondent's foot, which she wiped off with a napkin he gave her (R13/1290, 14/1385, 1387). No napkin with blood on it was ever recovered by the police (R16/1620-21, 1673). Radley had not initially mentioned this (R18/2054). Radley was tested for gun residue (R13/1291, 15/1505), but the test was negative (R15/1506).

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2 A hearing aid specialist testified as a defense witness that Respondent suffered a 48 percent hearing loss in each ear (R18/2146, 2158). The court provided Respondent with a hearing device which she used throughout the trial of this cause (R5/87, 90-91). Even with this assistance, she sometimes complained that she was unable to hear the proceedings (R6/319, 10/805).

In addition to the gun found outside the bathroom, police also found a holstered gun on top of a dresser in the master bedroom (R12/1164, 15/1520, 17/1933). Both were Smith & Wesson .38 special revolvers; the one outside the bathroom was an Airweight and the one on the dresser was an Airlight (R17/1795-96). DNA from the handle of the Airlight came from two people whose identity was inconclusive, although the three Admiral's Cove security guards could be excluded (R16/1725). The major source of DNA found on the handle of the Airweight was Lanny Horwitz; Radley and the three security guards were excluded as the DNA second source, but Respondent could not be excluded (R16/1730, 1732), although it was likely that 1 of every 15 Caucasians, 1 out of every 43 African-Americans, and 1 out of every 450 Hispanics would exhibit similar results (R16/1734). Respondent, Radley and the three security guards were excluded as the source of DNA recovered from the trigger of the Airweight, while Lanny Horwitz could not be excluded (R16/1736), with a probability that 1 out of 2.1. billion Caucasians, 1 out of 7.1 billion African-Americans, and 1 out of 1.2 billion Hispanics would exhibit the same results as Lanny Horwitz (R16/1737). Bullet fragments fired from both guns were found in the bathroom (R17/1807-08, 1822-23, 1824).

All of the sinks in the house, including Radley's, except for one tested positive for blood, but the presence of bleach or cleaners would have yielded the

same result (R16/1609, 1643). Although the police searched the Abacoa house (R16/1696, 18/2024), they never found the pajamas Respondent had been wearing (R16/1699, 1700, 18/2025, 2117).

A blood spatter expert testified that he did not recognize anything that he could comfortably say was gunshot spatter (R17/1881). Thus, it was "possible" that the shooter had not been marked with blood (R17/1913). On the other hand, Lanny Horwitz's feet were cut by the shattered glass (R17/1903). And the shot to his mouth was certainly fired from within the bathroom (R18/2060), as were two additional shots which struck the tile floor (R18/2072).

A bloody finger smudge was found on the gate to the home (R14/1393, 15/1503). One of the two DNA sources on that smudge was Lanny Horwitz. Respondent, Radley, and the three Admiral's Cove security officers were excluded as the second DNA source (R15/1504, 16/1721).

A suitcase labeled with Respondent's name was recovered from the closet containing female effects in the master bedroom of the Admiral's Cove home (R18/2004). Inside the suitcase was a ziploc bag with five live .38 caliber bullets stamped "Federal," like the majority of the projectiles from the two guns (R18/2005). The remaining projectiles were stamped "Plus P".

A day planner was also recovered from the same closet (R16/1604, 1690, 18/2023). Radley identified the handwriting in the journal as Respondent's

(R13/1300, 1302). In her March entries, Respondent expressed excitement and happiness at the prospect of moving back in with Lanny Horwitz (R15/1560-61, 18/2045-46). By the end of July, she was writing more about Lanny and Tice, noting, for example, that "Mr. Meany came home today" and that he "lied about being at Fran's" (R15/1563, 18/2047). The last entry, on September 5, was: "Lan went to Fran's 5:20. Another long day of lies, of being Mr. Meany. I stayed home all day. Very tired" (R18/2047).

Detective Frank testified that no promises had been made to Radley in exchange for his statement (R18/2029, 2109). However, a large quantity of ammunition and twenty-six guns were found in the Admiral's Cove house, including AK-15's and assault rifles, even though Radley as a convicted felon was prohibited from having any guns or ammunition (R18/2056).[3]

3 A gun safe was located in Lanny Horwitz's closet, but a key to that safe was found in Radley's room (R18/2069-70).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal correctly reversed Respondent's conviction and held that the State is precluded from introducing evidence of a defendant's pre-arrest, pre-*Miranda* silence where the defendant does not testify at trial. Although admission of such evidence is not prohibited under the United States Constitution, this Court has recognized that the Florida Constitution provides individual criminal defendants greater protections against self-incrimination. The Florida Constitution should be construed to preclude use of a defendant's pre-arrest, pre-*Miranda* silence where the defendant does not testify at trial.

Additionally, the Fourth DCA's conclusion was required by Florida evidence law because Respondent did not testify at trial. The fact that Respondent did not testify at trial results in Respondent's silence being devoid of any probative value. At the same time, the capacity for unfair prejudice to Respondent from use of her pre-arrest silence, especially under the factual circumstances of the instant case, was too great to allow admission of the silence as evidence of guilt.

STANDARD OF REVIEW

The Fourth DCA correctly stated in this case that "[a] trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard of review, but the court's discretion is limited by the rules of evidence and the applicable case law." *Horwitz*, at 4 (*citing Lopez v. State, 97* So. 3d 301, 304 (Fla. 4th DCA 2012); *McCray v. State*, 919 So. 2d 647, 649 (Fla. 1st DCA 2006)). This Court's consideration of the certified question raises questions of constitutional and evidentiary law that this Court decides *de novo*. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1259 (Fla. 2006).

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY REVERSED RESPONDENT'S CONVICTION AND HELD THAT THE STATE IS PRECLUDED FROM INTRODUCING EVIDENCE OF A DEFENDANT'S PRE-ARREST, PRE-*MIRANDA* SILENCE WHERE THE DEFENDANT DOES NOT TESTIFY AT TRIAL

A. The certified question is one of Florida law for which this Court is the final arbiter.

The State first discusses the use of evidence of pre-arrest, pre-*Miranda* silence under the United States Constitution. (IB.10). The State's discussion is ultimately inapposite because the issue of whether the admission of Respondent's pre-arrest, pre-*Miranda* silence violated the United States Constitution is not before this Court. Instead, the certified question now before this Court is one of Florida law for which this Court is the final arbiter.

The State discusses *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980). *Jenkins* is distinguishable from the case at bar because the defendant in Jenkins testified at trial. The specific issue before the United States Supreme Court in *Jenkins* was whether the use of pre-arrest, pre-*Miranda* silence for purposes of impeachment violated the United States Constitution. *Jenkins*, 447 U.S. at 235. In *Jenkins*, the Court addressed whether the prosecution could impeach the defendant with his pre-arrest, pre-*Miranda* silence in failing to inform police of his alleged crime at the time the crime occurred. The defendant testified

at trial and claimed that the crime was committed in self-defense. *Jenkins*, 447 U.S. at 235. The Court concluded that "the use of prearrest silence to impeach a defendant's credibility does not violate the [United States] Constitution."*Id.* at 240.

The State also discusses *Salinas v. Texas*, 133 S. Ct. 2174, 186 L.Ed. 2d 376 (2013). In *Salinas*, the United States Supreme Court addressed whether the Fifth Amendment of the United States Constitution prohibited the introduction of evidence of pre-arrest, pre-*Miranda* silence as evidence of guilt against a defendant who *does not* testify at trial. 133 S.Ct. at 1278. Salinas voluntarily answered some pre-arrest, pre-*Miranda* questions from police regarding a murder, but Salinas fell silent when asked whether the shell casings at the scene would match Salinas' shotgun. *Id*. A plurality of the Court ruled that where the defendant does not expressly invoke his Fifth Amendment right at the time of the pre-arrest, pre-*Miranda* questioning, the introduction of evidence against of the defendant's silence does not violate the Fifth Amendment even where the defendant does not testify at trial. *Id*. at 2178-84.

Respondent generally agrees with the State's description of the United States Supreme Court's decisions in *Jenkins* and *Salinas*. However, the Fourth DCA accurately identified that this case involves a question of a defendant's rights *under Florida law*. *Horwitz*, at 5. The Florida Constitution provides more protection to defendants in this context than the United States Constitution.

"Because state courts have the power to interpret their state constitutions as more protective of individual rights than the federal constitution, states may rely on their own constitutions to prohibit the use of pre-*Miranda* silence." *State v. Hoggins*, 718 So. 2d 761, 767 (Fla. 1998). In other words, "the federal Constitution sets the floor, not the ceiling" of the extent of a Florida defendant's right not to be compelled to be a witness against himself or herself in any criminal matter. *Rigterink v. State*, 2 So. 3d 221, 241 (Fla. 2009). The Fourth DCA correctly recognized in its opinion in this case that "it is well-established that Florida courts are free to interpret the right against self-incrimination afforded under the Florida Constitution as affording greater protection than that afforded under the United States Constitution." *Horwitz*, at 5 (*citing Rigterink v. State*, 66 So. 3d 866, 888 (Fla. 2011)).

The State's description of the admissibility of pre-arrest, pre-*Miranda* silence under the United States Constitution is of limited usefulness in the case at bar. *Salinas v. Texas* is not controlling upon this Court in this context. *See Lee v. State*, 422 So. 2d 928, 930-31 (Fla. 3d DCA 1982)(rejecting State's argument that federal constitutional law was dispositive of whether prosecutor's comments on defendant's post-arrest, pre-*Miranda* silence were prohibited as a matter of Florida state constitutional law). Instead, this Court is the "ultimate arbiter of the meaning and extent of the safeguards provided under Florida's Constitution." *Rigterink*, 2

So. 3d at 241 (*quoting Busby v. State*, 894 So. 2d 88, 102 (Fla. 2004)). This Court makes the final decision whether Florida law prohibits the introduction of a defendant's pre-arrest pre-*Miranda* silence as evidence of guilt where the defendant does not testify at trial.

B. The Florida Constitution provides defendants greater protections against self-incrimination than the U.S. Constitution and should preclude evidence of a defendant's pre-arrest, pre-*Miranda* silence where the defendant does not testify at trial.

This Court has already decided that Article I, section 9 of the Florida Constitution provides Florida defendants more protection against self-incrimination than is afforded by the federal Constitution. This Court recognized in *State v*. *Hoggins*, 718 So.2d 761 (Fla. 1998) that under Florida law, inconsistency between a defendant's silence and an exculpatory statement made by a defendant at trial is a prerequisite to admissibility of the silence. This Court's reasoning extends to a defendant's *prearrest* pre-*Miranda* silence, which should be inadmissible where the defendant does not testify at trial just as it is inadmissible to impeach a defendant who does testify at trial.

This *Court* made clear in *Hoggins* that evidence of prearrest silence is admissible to impeach a defendant's trial testimony. In *Hoggins*, this Court held that in Florida the use of a defendant's postarrest pre-*Miranda* silence could not be

used to impeach a defendant's testimony, even though such impeachment is permitted under the United States Constitution. *Hoggins*, 718 So.2d at 772. Upon review of Florida's case law and evidentiary rules, this Court concluded that Florida's constitution had consistently been interpreted to provide greater protection to the right to remain silent and precluded the use of a defendant's postarrest silence, even for impeachment purposes. *Id*. at 769.

This Court in *Hoggins* distinguished situations where the State seeks introduction of evidence that the defendant was silent before his arrest and before any *Miranda* warnings were given. This Court recognized that "Florida courts have found, consistent with the United States Supreme Court in *Jenkins*, that prearrest, pre-*Miranda* silence can be used *to impeach* a defendant." *Id*. at 770 (emphasis added). However, this Court took pains to warn that the evidence is admissible only "if the silence was inconsistent with the defendant's testimony at trial." *Id*. at 770 n. 11.

The inconsistency requirement is strictly construed. *See Webb v*. *State*, 347 So.2d 1054 (Fla. 4th DCA 1977)(finding inadmissible silence that is not inconsistent with a defendant's exculpatory statement at trial); *see also United States v*. *Hale*, 422 U.S.171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975)(where government fails to establish threshold inconsistency between silence and

exculpatory statement at trial, silence lacks any probative value and must be excluded). Therefore, this Court mandated in *Hoggins*:

> In Florida, a defendant takes the stand in a criminal case subject to impeachment by prior inconsistent statements to the extent that the probative value of the prior inconsistent statements is not outweighed by the risk of unfair prejudice to the defendant. See §§ 90.403, 608, Fla. Stat. (1997). The same rule applies to impeachment by prior silence, which is not precluded by the federal or state constitution. See Parker, 641 So.2d at 485; Rodriguez, 619 So.2d at 1032-33. *Thus, inconsistency is a threshold question when dealing with silence that may be used to impeach*. If a defendant's silence is not inconsistent with his or her exculpatory statement at trial then the statement lacks probative value and is inadmissible.

718 So.2d at 770-71 (emphasis added); *See also Reaser v State*, 356 So.2d 891, 892 (Fla. 3d DCA 1978).

This Court's statement in *Hoggins* that pre-arrest silence must be inconsistent with a defendant's trial testimony in order to be admissible was made as part of the Court's constitutional analysis. The Fourth DCA's conclusion that Florida law prohibits the use of pre-arrest silence as substantive evidence of guilt where a defendant does not testify at trial was therefore entirely consistent with this Court's reasoning. For this Court to embrace the position advocated by the State would require this Court to reverse its prior reasoning and scale back the rights Florida law currently provides Florida defendants.

The particular facts of the instant case provide a good example of why the rationale adopted by the United States Supreme Court in *Salinas* is impractical and

leaves open the possibility for abuse by prosecutors. Respondent and Radley were sitting in their vehicle outside their home following the shooting death of her husband, Lanny. (R11/1052). Respondent indicated in response to questions from Officer Coleman that Respondent could not hear. (R11/1056). Contrary to the State's suggestion that none of the three questions Officer Coleman asked were incriminating in nature, the third question asked of Respondent as to whether she was in the room when the gun went off clearly had substantial potential for incrimination.

The State's position, consistent with *Salinas*, would have required Respondent, at an extremely emotional and difficult time when the record contains evidence she could not even hear the questions asked of her, to affirmatively invoke her constitutional right against self-incrimination in response to Officer Coleman's questions. Failure to do so results in having the State use her silence as substantive evidence of guilt even though Respondent did not testify at trial. The capacity for prosecutors to abuse such pre-arrest silence in using it as substantive evidence of guilt is too great, and should not be permitted. What if Officer Coleman had asked Respondent, "Did you shoot him?" or the more accusatory, "You shot him, didn't you?" Despite the evidence that Respondent could not hear the questions, the State's position would allow it to use Respondent's silence as substantive evidence of guilt. The use of such silence against a defendant is

inconsistent with the protections defendants enjoy under the Florida Constitution as interpreted by this Court.

C. Florida's Evidentiary Rules Prohibit Use of Pre-Arrest, Pre-*Miranda* Silence as Evidence of Guilt Where a Defendant Does Not Testify at Trial

In *Hoggins*, this Court summarized the state of the law in this context:

> Accordingly, under the federal constitution, a state may offer impeachment evidence of a defendant's silence occurring either before or after arrest, so long as the silence did not follow Miranda warnings. See Fletcher, 455 U.S. at 606, 102 S.Ct. 1309, 71 L.Ed.2d 490; Jenkins, 447 U.S. at 240, 100 S.Ct. 2124, 65 L.Ed.2d 86. *The states, however, are free to find, pursuant to their own rules of evidence, that pre-Miranda silence occurring either before or after arrest, or in both situations, is not admissible.*

Hoggins, 718 So. 2d at 766 (Emphasis added).

This Court concluded that both testimony and comments in closing argument regarding Hoggins' post-arrest, pre-*Miranda* silence were prohibited from being used against Hoggins. This Court reached its conclusion based not only upon the Florida Constitution, but also upon Florida's evidentiary rules. *Id*. at 772.

The Fourth DCA's reversal in the case at bar is consistent with this Court's holding in *Hoggins* that Florida's rules of evidence preclude the use of silence when that silence is not inconsistent with a defendant's trial testimony. *Id*. at 770. In *Hoggins*, this Court held that, even putting the constitutional issue aside, Florida's rules of evidence precluded use of Hoggins' silence "because Hoggins'

silence was not inconsistent with his trial testimony." *Id*. This Court's holding in *Hoggins* applies even more clearly where the defendant does not testify at trial and there is no "inconsistency" the State may attempt to establish between a defendant's prior silence and trial testimony.

The absence of any probative value, combined with the large potential for prejudice, resulted in this Court's holding in *Hoggins* that a defendant's post-arrest, pre-*Miranda* silence is inadmissible even for impeachment. The same considerations apply with greater force to the use of pre-arrest, pre-*Miranda* silence where the defendant does not testify at trial. This Court recognized in *Hoggins* that "[i]f a defendant's silence is not inconsistent with his or her exculpatory statement at trial then the statement lacks probative value and is inadmissible." *Id*. at 771. Where the defendant does not testify, the lack of any inconsistency robs the pre-arrest, pre-*Miranda* silence of probative value.

In addition, the unfair prejudice from the use of a defendant's pre-arrest silence is great. In *Hoggins*, this Court quoted with approval the following explanation of the unfair prejudice to a defendant from admission of post-arrest silence:

> 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 the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

Id. at 772 (*quoting Hale*, 422 U.S. at 180, 95 S.Ct. 2133, 45 L.Ed.2d 99).

Again, the same consideration applies with even greater force where the defendant does not testify at trial and the unfair prejudice to a defendant is weighed against the absence of the silence's probative value. The State is simply incorrect in its assertion (IB.19) that Respondent's silence in this case had probative value that outweighed the unfair prejudice.

The State argues that there are situations where a defendant's silence can be admissible, even as substantive evidence. (IB.18). *Hoggins* refutes any assertion that this Court left the door open for the use of silence for impeachment, let alone as substantive evidence of guilt, where there is no inconsistency between the silence and defendant's trial testimony. Furthermore, "[s]ilence is generally deemed ambiguous," and "is 'considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question.'" *Id*. at 771 (*quoting Hale*, 422 U.S. at 176-179, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975)). As already described above, the facts regarding the questioning in the instant case dispel any suggestion that Respondent could be fairly said to have adopted Officer Coleman's questions as her own statement. §90.803(18)(b), Fla. Stat.

Here, Respondent's prearrest silence was inadmissible where she did not testify at trial. In complete contravention of the principles explained by this Court

in *Hoggins*, the State in this case maintained that it could introduce evidence of Respondent's prearrest silence even though she never testified. The State relied on *Rodriguez v*. *State*, 619 So.2d 1031 (Fla. 3d DCA 1993), in which the Third DCA observed that "the use of prearrest silence to impeach a defendant's credibility does not violate the Constitution." *Id*. at 1032 (quoting *Jenkins*, 447 U.S.at 240).

Contrary to the State's position, *Rodriguez* does not provide a *carte blanche* to the admission of any evidence of a defendant's prearrest silence *as proof of his or her consciousness of guilt*. *See* R20/2375. Importantly, in *Rodriguez*, the defendant *testified at trial* and asserted that the shooting for which he was being prosecuted was accidental. Thus, "when Rodriguez first claimed the shooting was accidental at trial, it was proper for the State to impeach his testimony by inquiring whether Rodriguez had previously told the officer that the shooting was accidental." *Rodriguez*, 619 So.2d at 1032.

It is the defendant's decision to testify which permits his impeachment with his prior silence. "[I]impeachment follows the defendant's own decision to cast aside the cloak of silence and advances the truth-finding function of the criminal trial." *Id*. (*quoting Jenkins*, 447 U.S at 238, 100 S.Ct. 2124)). The Third DCA in *Rodriguez* therefore applied the same threshold inquiry that this Court later deemed essential in *Hoggins*, namely whether the defendant testifies at trial in a manner

inconsistent with his previous silence. Obviously, the defendant must testify in order to even reach the inconsistency question.

In the instant case, the trial court permitted the prosecutor, over Respondent's objections, to introduce testimony that Respondent remained silent at the scene of the shooting, and then to repeatedly comment in her closing argument on Respondent's failure to immediately assert the trial defense. Respondent's silence was unavailable for impeachment because Respondent did not testify at trial, and the trial court committed reversible error in allowing the State to argue that the jury could consider the silence as evidence of Respondent's consciousness of guilt.

The prosecutor's repeated reliance on the prearrest silence evidence renders the error in admitting it prejudicial and reversible. The State's reliance on Respondent's prearrest silence was not merely an incidental part of its case against her. It became the feature of the trial. The prosecutor began her probing of this subject during the testimony of Officer Kristi Coleman, one of the first officers at the scene, after Respondent's objections to the testimony were already denied (R1/42-43, 105-09, 5/137-39, 185, 10/1055):

> Q. And when you first make any contact with [Respondent] or make any statement, what do you tell her – what do you ask her?
>
> A. I asked her if she needed anything.

A. She didn't answer me.

Q. And did she actually – did you ask again?

A. Yes. I asked her if she wanted a bottle of water.

Q. And what was her response?

A. She put her fingers in her ears and went like this.

Q. And just for the record, you're mouthing. She opened her mouth –

A. Yes.

Q. – on more than one occasion?

A. (nods head.)

Q. And did she make any statements?

A. No.

At that point, I asked her if she was in the room when the gun had gone off. And then I called for fire rescue because she didn't answer me.

(R10/1056-57).

Officer Coleman told the prosecutor that Respondent appeared to be in shock (R10/1057), so the prosecutor asked her to repeat her previous testimony about Respondent's failure to respond to questioning (R10/1057-58). Even so, Officer Coleman was apparently not overwhelmed with suspicion at Respondent's

lack of response, since she still believed after talking to her that the shooting was a suicide (R10/1058).

The prosecutor later renewed her exploration of the topic of Respondent's silence during her redirect examination of the lead detective, Detective Frank:

> Q. Mr. Tesh was asking you about when you were on the scene. You asked Radley more than once, did your mom say what happened? Do you remember that?
>
> A. Yes, I do.
>
> Q. And, in fact, he was never able to relate to you anything Donna said, was he?
>
> A. No.
>
> Q. And, in fact, as the lead detective, any statements at all about – from, Donna to Luis Garcia that a fourth or fifth person had been in the house?
>
> A. No.
>
> Q. Any statement by Donna to Radley that a fourth or fifth person was in the house?
>
> A. No.
>
> Q. Any statement by Donna to anyone, anyone –

(R18/2100).

Respondent objected, to which the trial court responded:

> Yeah. I did a lot of research up here about this and – on my own, while the case was going on about – there is a difference between pre-arrest, pre-Miranda, silence.

> And there's a different category of post-arrest, pre-Miranda. And then, obviously, post-arrest, post-Miranda.

(R18/2101-02). The court further observed:

> And there's also a nuance about case in chief versus cross of the defendant. Because they're split. There's a split among the states.
>
> A fairly – it's fairly complex. But I believe I'm making the correct ruling, as I made previously, so – but, you've preserved it. And that is an important issue.
> I'm going to overrule your objection.

(R18/2102).

In fact, whatever the conflict, if any, between states on this issue, there is no such conflict in Florida, as explained above. Nevertheless, the trial court's ruling gave the prosecutor license to continue in this vein:

> Q. So, Detective Frank, Donna Horwitz never told Luis Garcia about anyone else being in the house, did she?
>
> A. No. She did not.
>
> Q. She never told Kristi Coleman about anyone else being in the house?
>
> A. No.
>
> Q. Or Officer Mayernik?
>
> A. No.

Q. Or David Cockrum?[4]

A. No.

Q. And Donna Horwitz never said anything about what took place in the house, to any of those people, did she?

A. No, she did not.

(R18/2103).

Armed with this ammunition, the prosecutor commenced her closing argument by telling the jury:

When the police officers first get there; these are armed, uniformed people there to help her. And she says nothing.

(R20/2364).

The trial court overruled Respondent's objection to this argument (R20/2365), allowing the prosecutor to continue:

You know from all the officers, they thought this was a suicide call. They're over there trying to console Donna. And she says nothing to them.

(R20/2374). Respondent again objected, and was again overruled (R20/2374).

At this point, the prosecutor explained to the jury the effect of Respondent's silence:

The Defendant, at that time, has no right to silent [sic].

[4] It would have been hard for Respondent to have told Cockrum anything, since he testified that he never saw her at the scene (R11/1045).

> You can take that as an evidence of consciousness of guilt, when she does not speak to Luis Garcia or Kristi Coleman or to Radley. There is no right to remain silent at that time. You can take that as evidence of consciousness of guilt.
>
> . . . . And you heard from David Cockrum; he's also with Admirals. He went in with Garcia to that same area of the victim. He also went through the gate and out through the gate. Donna said nothing to Cockrum. . . .
>
> Mayernik, when he goes in; Donna said nothing to him. . . .
>
> EMT Bryan Dittmer comes in, pronounces him dead. And Donna says nothing to Bryan Dittmer. . . .
>
> Chris Fisher arrives a few minutes after Garcia. . . . And Donna said nothing to him. . . .
>
> So far she had said nothing to any of these initial officers or EMT.
>
> Kristi Coleman, you heard from. . . . .
> She said her first words to Donna are, are you okay?
>
> And Donna did like that, (indicating). And prompted Kristi to say, were you – were you in the room when the gun went off? And Donna did not answer.

(R20/2375-78).

Finally, in her final closing argument, the prosecutor compared Radley's behavior in *not* remaining silent:

> Radley brought a lawyer, which is everyone's right, to a statement where he answered each and every question that Jupiter Police Department asked him.

(R20/2560);

> There was nothing that he neglected to offer to Jupiter Police Department. He told them everything he knew. He participated in every way.
>
> He, at the scene, gave a statement. He submitted to gunshot residue tests. He did everything throughout the process to be cooperative. That's not lawyering up.

(R20/2460-61). The prosecutor then exhorted the jury to consider:

> . . . Officer Coleman is concerned. And she says, were you in the room when he was shot, when the gun went off?
>
> Nothing. That's what she says, absolutely nothing.
>
> And you can consider that. The fact that when someone asks her if she's in the room when she shot – when they think it's suicide, she's [sic] says nothing.

(R20/2469).

The standard for assessing such comments is whether they are "fairly susceptible" of being interpreted by the jury as a comment on the defendant's failure to testify. *State v*. *Kinchen*, 490 So.2d 21, 22 (Fla. 1985). The evidence and argument in the present case manifestly meet this test.

Nevertheless, claims of error in the overruling of an objection to a comment on the defendant's exercise of his right to remain silent are reviewed for harmless error. *Poole v*. *State*, 997 So.2d 382, 391 n. 3 (Fla. 2008); *State v*. *Marshall*, 476 So.2d 150, 153 (Fla. 1985). This Court has emphasized that "the harmless error

analysis is not an 'overwhelming-evidence test.'" *Ventura v. State*, 29 So.3d 1086, 1089 (Fla. 2010) (emphasis in original). Instead, "[t]he question is whether there is a reasonable possibility that the error affected the verdict." *State v. DiGuilio*, 491So.2d 1129, 1135 (Fla. 1986). "The burden to show the error was harmless must remain on the State. 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." *Ventura*, 29 So.3d at 1089-90.

In the present case, the Fourth DCA correctly concluded that it could not say the State's use of evidence of Respondent's pre-arrest, pre-*Miranda* silence was harmless. The pervasive emphasis by the prosecution on Respondent's silence throughout the trial and the prosecutor's closing argument cannot fail to have had a profound impact on the jury's deliberations in this case where the State's proof was entirely circumstantial. *See Reyes v. State*, 976 So.2d 1169, 1171 (Fla. 1st DCA 2008) (improper admission of evidence was not harmless error where the prosecutor referred to it during both opening statement and closing argument); *Valley v. State*, 860 So.2d 464, 468 (Fla. 4th DCA 2003) (improper admission of hearsay evidence might have been harmless if the State had not used the evidence "to bolster its case during closing argument"). Because the State cannot satisfy its burden of establishing that the error was not harmful, the Fourth DCA correctly reversed Respondent's conviction and remanded for a new trial.

CONCLUSION

Florida law currently provides defendants more rights against self-incrimination than are guaranteed under the federal Constitution. The approach advocated by the State, allowing the admission of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt, yields an unfair result under the circumstances of Respondent's case. Furthermore, the State's approach would generally open the door to the unfair use of silence against defendants who do not testify at trial. This Court should hold, consistent with its reasoning in *Hoggins*, that the Florida Constitution prohibits the admission of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt against a defendant who does not testify at trial.

Additionally, this Court's well-reasoned holding in *Hoggins* that Florida evidentiary rules prohibit the admission of silence that is not inconsistent with trial testimony applies to the case at bar. Respondent did not testify at trial, and under *Hoggins*, her silence was devoid of probative value. The case at bar illustrates well the danger of allowing the State to focus a jury's attention upon a defendant's pre-arrest, pre-*Miranda* silence where the defendant does not testify at trial. Respondent respectfully urges this Court to adhere to its prior precedent.

WHEREFORE Respondent, DONNA HORWITZ, respectfully requests that this Court answer the certified question in the affirmative, and approve the decision of the Fourth District Court of Appeal remanding to the trial court for new trial.

Respectfully submitted,

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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I CERTIFY that (1) this brief has been prepared in Times New Roman font, 14 point, and double-spaced, and (2) on this 25th day of June, 2015, a true and correct copy hereof has been e-filed and furnished to the following attorney via e-mail, pursuant to Fla. R. Jud. Admin. Rule 2.516(b)(1), to the following e-mail addresses:

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