IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ALVIN TYRONE THORNTON, Respondent.	)	CASE NO. 64,899

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Petitioner was the Prosecution and Appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts, but adds the following:

Around 11:30 a.m. on January 31, 1982, Officer Gary Ciani arrested respondent at the 600 block of Northwest 9th Avenue in Ft. Lauderdale. T179,186,5-6. After eliciting the fact that Ciani read respondent his constitutional rights, the prosecutor continued his examination of Ciani at trial as follows:

> Q. Did Mr. Thornton, the first time you read him his rights, give you an indication that he did not understand what you were saying?
>
> A. No, sir. He replied, "Yes," that he understood, and he did not answer any questions at the initial time of arrest. T187-188.

Respondent unsuccessfully objected and moved for a mistrial. T-188-190.

After arresting respondent, Ciani took him to the police station. He told respondent that Ciani had witnesses, including respondent's girlfriend, who said that respondent had committed the murder. T-20,22. He also told respondent that he would feel better if he confessed. T-22. At 1:00 p.m. Ciani had respondent sign a waiver of rights form and then took an exculpatory statement from him. T-24.

Respondent did not testify at trial, but did testify on his motion to suppress that he asked for an attorney at the police station. T-28. He was told, "they don't come out on Sundays," T-28, and agreed to talk only after being so advised. T-29.

Ciani also testified on the motion to suppress. He testified that respondent requested an attorney at 3:00 p.m., at which time Ciani attempted to put appellant in touch with assistant state attorneys John Jolly and Mary McCleary. T-25.

ARGUMENT

THE COURT OF APPEAL CORRECTLY REVERSED APPELLANT'S CONVICTION AND SENTENCE.

A. Petitioner has asserted in its brief, that, under Donovan v. State, 417 So.2d 674 (Fla. 1982), Ciani's testimony, that respondent refused to answer any questions, did not constitute a comment on silence since appellant made a statement to the police an hour and a half later. In Donovan, the defendant initially denied any involvement in a murder, then remained silent when read his rights, then confessed, all within a period of ten minutes. This Court wrote that, since Donovan denied any involvement in the murder, he did not exercise his right to remain silent. Accordingly, this Court reasoned, testimony that Donovan remained silent when read his rights did not constitute a comment on silence since Donovan did not exercise his right to remain silent.

In Donovan, this Court reaffirmed the principle of Bennett v. State, 316 So.2d 41 (Fla. 1975) that any comment on the defendant's silence makes a conviction reversible as a matter of law. In Donovan, this Court also approved of Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1980). In Roban, there was testimony that Roban refused to answer questions when arrested, but subsequently made a statement to the police.

The facts of this case are indistinguishable from those in Roban. As in Roban, appellant refused to answer questions when arrested, but subsequently made a statement to the police. Since this Court approved of Roban in Donovan, petitioner is correct in

asserting that Donovan controls this case, but incorrect in asserting that Ciani's testimony was not a comment on silence under Donovan.

B. In its brief, petitioner has urged that this Court abandon the principle of stare decisis and overrule its decisions in David v. State, 369 So.2d 943 (Fla. 1979) and Trafficante v. State, 92 So.2d 811 (Fla. 1957).

The rule of stare decisis effectuates uniformity, certainty, and stability in the law. It is designed to keep the scale of justice steady, and embraces a conservative doctrine directed towards achieving the greatest stability in the law. 13 Florida Jurisprudence 2d, Courts and Judges, §136.

Petitioner's only argument for abandonment of David and Trafficante is that two federal courts and a federal court do not agree with the principles espoused in those cases.[1] It would be terrible indeed if this Court's decisions ensuring the rights of its citizens were so sickly and weak as to fall before contrary rulings by inferior or foreign courts.

In any event, petitioner has not shown how the abandonment of David and Trafficante would require a different result in the case at bar. Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982), which petitioner cites with favor, provides that there is a violation of the right to remain silent when a prosecutor makes a

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[1] Petitioner asserts in its brief that the federal court's rulings are especially puissant because the right to remain silent is "a federal constitutional right." Initial Brief on Merits, page 10. Petitioner's position notwithstanding, our constitution also protects the right to remain silent. Article 1, Section 9, Florida Constitution (1968). It is hard to see why the chief legal officer of the state espouses the diminution of the the protections of our state constitution.

remark which the jury would naturally and necessarily take to be a comment on the silence of the accused. How could a jury conclude that Ciani's testimony,, that respondent refused to answer questions, was anything but a comment on silence?

C. This Court has repeatedly held that a comment on silence renders a conviction reversible as a matter of law. Cf. Bennett, supra, Donovan, supra, Clark v. State, 363 So.2d 331 (Fla. 1978), and the cases cited therein.

Somehow, petitioner neglected to mention the foregoing authorities when asserting to this Court that the doctrine of harmless error applies to cases involving comments on silence.

Petitioner has rested its position upon the following sentence taken out of context from State v. Murray, 443 So.2d 955 (Fla. 1984): "We agree with the recent analysis of the Court in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983)." Murray did not involve a comment on silence. It did not purport to overrule Bennett.[2]

In Hasting, the Supreme Court ruled that Hasting's conviction was not reversible as a matter of law where the prosecutor pointed out to the jury that Hasting did not challenge various parts of the government's case. The Court concluded that the prosecutor's remark was harmless beyond a reasonable doubt. Thus Hasting is entirely consistent with the prior rulings of this Court: in White v. State, 377 So.2d 1149 (Fla. 1979), this Court

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2 Bennett's progeny are so numerous, and its principle is so well settled, that to overturn it would be rather like uprooting a vast old banyan tree with many roots, leaving a devastation in its place. Petitioner has asserted no particular reason why this should be done.

held that the conviction was not reversible as a matter of law where the prosecutor pointed out that there was no testimony contradicting the state's main witness.

From the foregoing it is hard to see how the single sentence which petitioner has plucked from Murray mandates the departure from the settled authority of Bennett. In Rowell v. State, ___So.2d___ (Fla. 5th DCA - May 24, 1984), Case No. 83-452 [9 FLW 1177], the court rejected the very argument which petitioner now advances before this Court, writing:

> Murray did not concern a prosecutorial comment on a defendant's exercise of his right to remain silent. Therefore, its expressed approval of the analysis by the Supreme Court in Hasting is not necessarily a retreat from the per se rule of Bennett and Donovan. Despite our agreement with the logic of Hasting and our reservations in regard to the justice of a per se rule, we are bound at this point in time to adhere to Bennett and Donovan. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This conclusion is buttressed by the fact that in the recent case of State v. Strasser, No. 62,665 (Fla. Feb. 9, 1984) [9 FLW 60], released a month after the opinion issued in Murray, the Florida Supreme Court relied on its prior decision in State v. Burwick, 442 So.2d 944 (Fla. 1983), which was issued a month before Murray. In Burwick, it was held to be reversible error to admit evidence at trial that a defendant had intelligently exercised his constitutional right to silence after Miranda warnings in the state's effort to rebut his insanity defense. The Florida Supreme Court recognized the per se rule in Burwick, stating: "There is no dispute that it is reversible error for the prosecution to attempt to impeach a defendant's alibi testimony by asking on cross-examination why he remained silent at the time of his arrest." 442 So.2d at 947. Two United States Supreme Court cases are cited in Burwick: 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). Doyle is irrelevant in regard to the applicability of the harmless error rule; it expressly notes that issue was not raised. Hale did not approve a per se rule

> but confined its holding to the circumstances of that particular case and an express finding of prejudice. Neither Burwick nor Strasser refers to Hasting. 9 FLW at 1178.

In any event, petitioner has failed to show that Ciani's testimony was harmless beyond a reasonable doubt. As Judge Hurley pointed out in his original dissenting opinion below, respondent was prejudiced by Ciani's testimony:

> The officer's comment in the case before us spotlighted the defendant's exercise of his Fifth Amendment privileged. It effectively told the jury that the defendant did not instantaneously deny his guilt, but that he required an appreciable length of time to come up with "his side of the story." As I understand it, this is precisely what the law forbids. Moreover, reference to the arrest period was wholly unnecessary because the record reflects that the officer again advised the defendant of his Miranda rights prior to taking the 1:50 p.m. statement. Thus, I cannot escape the conclusion that the comment mandates reversal.
> Appendix to Initial Brief on Jurisdiction, pages 2-3.

CONCLUSION

Based upon the foregoing argument and authorities cited therein, Respondent respectfully requests this Honorable Court to discharge review of this case.

Respectfully submitted,

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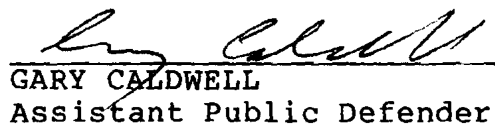
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MARLYN J. ALTMAN, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, FL 33401, this 2 day of July, 1984.



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