

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

AUG 13 1984

CLERK, SUPREME COURT

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Chief Deputy Clerk

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 ANGELO JOHN DIGUILIO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 65,490

PETITIONER'S REPLY BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

In his Brief on the Merits, Respondent states that he accepts the Statement of the Case and Facts, as set out in Petitioner's Brief on Merits, except that "proof of guilt was based entirely upon circumstantial evidence and the inadmissible testimony was clearly prejudicial, tipping the balance against Respondent." (Brief of Respondent at 1). This argumentative addendum is a statement neither of the case nor of the facts; rather, it is a statement of opinion, unsupported by the record or the decision to be reviewed. Petitioner does not accept it, urges this Court to likewise reject it, and stands by the version of the case and facts recited in its Initial Brief on Merits.

Because Respondent has added a Point II in his argument section, Petitioner briefly states the case and facts pertinent to such issue. Petitioner and a co-defendant, Carl Rosa, were jointly charged with the offenses at issue and motions to sever were denied (R584-A, 602,605). When the case was called for trial on June 7, 1982, both defendants were present and attorneys for both participated in voir dire (R3-76). A jury was chosen by the close of proceedings that day and, when court reconvened on June 8, 1982, Judge Smith informed the jury that Carl Rosa would no longer be involved in the case, as that morning he had "elected to change his plea." (R85-6). The judge stated that Rosa's case was then set for sentencing (R86). The record indicates that no objection or motion for mistrial was interposed at this time and, Respondent's post-

trial motion for new trial contained no issue relating to this statement (R86, 620-1)(See Appendix).

Respondent raised the issue in his Initial and Reply Briefs in his appeal to the Fifth District Court of Appeal. In its opinion, DiGuilio v. State, 451 So.2d 487, 489 (Fla. 5th DCA 1984), the court expressly discussed two issues and stated that it found no merit in any of the others (See Appendix). The question which the district court certified to this Court does not involve this issue in any way, and Respondent did not file a Notice to Invoke Discretionary Jurisdiction, so as to assume the stance of a cross-petitioner for this Court.

POINT I

ARGUMENT

BY ITS AGREEMENT WITH THE ANALYSIS OF THE SUPERVISORY POWERS OF APPELLATE COURTS AS RELATED TO THE HARMLESS ERROR RULE, AS SET FORTH BY THE UNITED STATES SUPREME COURT IN UNITED STATES V. HASTING, U.S. \_\_\_\_\_, 103 S.Ct. 1974(1983), THIS COURT, IN STATE V. MURRAY, 443 So.2d 955 (FLA. 1984), RECEDED BY IMPLICATION FROM THE PER SE RULE OF REVERSAL EXPLICATED IN DONOVAN V. STATE, 417 So.2d 674 (FLA. 1982), SHANNON V. STATE, 335 So.2d 5 (FLA. 1976) AND BENNETT V. STATE, 316 So.2d 41 (FLA. 1975); THIS COURT SHOULD UTILIZE THE INSTANT CASE AS A VEHICLE TO MAKE SUCH RECESSION EXPRESS.

In his Brief on the Merits, Respondent has chosen to restate the question certified by the Fifth District Court of Appeal, so as to add an element of intentional misconduct on the part of the prosecutor; Respondent's point on certiorari reads:

WAS THIS COURT'S DECISION IN STATE V. MURRAY, 443 So.2d 955 (FLA. 1984), INTENDED TO GIVE THE APPELLATE COURTS THE OPPORTUNITY TO APPLY THE "HARMLESS ERROR DOCTRINE" TO CASES WHERE A PROSECUTOR DELIBERATELY ELICITS IMPROPER COMMENT FROM A WITNESS CONCERNING A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT IN THE FACE OF ACCUSATION AND ALLOW QUESTIONS AND ANSWERS INTENDED TO INFORM THE JURY THAT A DEFENDANT REFUSED TO ANSWER QUESTIONS? (emphasis supplied)(Brief of Respondent at 2)

Inasmuch as this is not the question the district court certified, Petitioner sees no reason for this Court to address it. In any event, Respondent has failed to reveal the source of his know-

ledge as to the prosecutor's motivation sub judice, and his hypothesis as to intentional misconduct has no support in the record or opinion below.

Respondent's argument does, however, rather paradoxically, highlight the applicability of Murray to the situation before this Court or other similar situations. This Court stated in Murray that where there is overzealousness or misconduct on the part of either the defense counsel or prosecutor, it is proper for the trial or appellate court to exercise its supervisory powers by registering disapproval or referring the matter to the Florida Bar for disciplinary investigation. This Court noted that however egregious such behavior was, it could not serve as a basis for reversal of a conviction, unless in and of itself such conduct was so prejudicial as to vitiate the entire trial. This Court emphasized that a determination as to whether or not any member of the bar merited discipline was an entirely different matter from a determination as to whether or not the conviction at issue should be reversed. Murray stands for the proposition that appellate courts must consider harmless error in relation to any claim of error.

Although Murray concerned prosecutorial argument unrelated to a defendant's silence, this Court, in underscoring the need for consideration of harmless error, cited to United States v. Hastings, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1974 (1983), in which the United States Supreme Court reversed the decision of the federal appellate court below which had failed to apply harm-

less error in regard to a claim of error involving an alleged prosecutorial comment upon a defendant's silence. It is Petitioner's contention that by citing to Hasting, this Court has receded from its earlier decisions such as Bennett v. State, 316 So.2d 41 (Fla. 1975) and Shannon v. State, 335 So.2d 5 (Fla. 1976), which held to the direct contrary.

Respondent has not offered very much in dispute of such contention. Instead, he has confined himself to a policy-related argument, urging this Court not to encourage prosecutors to violate a defendant's right to remain silent; Respondent views "harmless error" as a shield behind which maleficent officers of the court may hide. Murray belies such scenario. If a prosecutor commits an act of misconduct, he can be disciplined for it; if such act of misconduct does not taint the entire trial, the conviction can still be affirmed, despite whatever fate befalls the erring assistant state attorney. The harmless error analysis on appeal, thus, bears similarity to a trial court's inquiry pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971); whereas one fact to be determined is the intentional nature of any failure to timely disclose, the touchstone of Richardson is the presence or absence of prejudice to the other party. Cf. State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA 1984).

Murray's clear and correct recognition of the supervisory powers of appellate courts and the role harmless error should play should have no exception related to the nature of any prosecutorial comment. The district court below would

have found the error complained of harmless, if such were within its powers. This Court should answer the certified question in the affirmative and quash the order of reversal below.

POINT II

ARGUMENT

RESPONDENT HAS NOT DEMONSTRATED  
FUNDAMENTAL ERROR, COGNIZABLE ON  
CERTIORARI, IN REFERENCE TO THE  
FACT THAT THE JURY LEARNED THAT  
CO-DEFENDANT ROSA HAD CHANGED  
HIS PLEA (RESTATED).

In its Brief on Merits, Petitioner cited to Lawrence v. Florida East Coast Ry Co., 346 So.2d 1012 (Fla. 1977), as authority for the proposition that this Court in resolving the instant certified question, could determine whether or not the comment at issue was in fact a comment upon Respondent's silence; Petitioner felt then, and continues to feel, that the two inquiries are interrelated. In his Brief on the Merits, however, Respondent has cited to Lawrence as authority for his resurrection of an unsuccessful appellate point, bearing no relationship to the certified question. Petitioner contends that Respondent should have filed his own Notice to Invoke Discretionary Jurisdiction, if he wished to raise this issue. Petitioner maintains that there is no necessity for this Court to address the issue.

On the basis of such claim's lack of merit, there is additionally no necessity that the issue be reached. Respondent has framed his point as follows:

IS IT STILL REVERSIBLE ERROR PER SE  
FOR THE TRIAL JUDGE TO ANNOUNCE TO THE  
JURY THAT A CO-DEFENDANT, FROM WHICH A  
DEFENDANT HAD SOUGHT A SEVERANCE, HAD  
PLED GUILTY TO THE CHARGE AFTER THE  
SELECTION OF THE JURY WAS CONDUCTED?

The quick answer to this uncertified question is, "No, and it never has been reversible error per se."

Respondent bases his claim of error upon two precedents, Moore v. State, 186 So.2d 56 (Fla. 3d DCA 1966) and Thomas v. State, 202 So.2d 883 (Fla. 3d DCA 1967); in each case, the appellate court reversed, finding denial of defense motions for mistrial, made in reference to statements by either the judge or prosecutor in reference to a co-defendant's fate, error. As has been noted, no motion for mistrial was made sub judice, nor did Respondent raise the issue in his post-trial motion for new trial. Two courts have expressly found that statements by trial judges on the issue at hand are not fundamental error. See Grisette v. State, 152 So.2d 498 (Fla. 1st DCA 1963); Vitiello v. State, 167 So.2d 629 (Fla. 3d DCA 1964). It is worth noting that Judge Smith, unlike the court personnel in Thomas or Moore, did not inform the jury that Rosa had pled guilty as charged. Although he did mention sentencing, for all the jury knew, Rosa could have pled nolo contendere, thus still disclaiming responsibility, in reference to a lesser offense. Further, as the court in Grisette noted, there is no reason to presume prejudice, where the jury learns of the fate of a defendant's accomplice. In Grisette, the court noted that a jury, upon hearing such announcement, would be equally likely to conclude that the guilty parties had already accepted responsibility and been punished and that those left must be innocent.

Respondent has urged this Court to address this point because of the age of the authorities involved. It is worth noting that in Ferguson v. State, 417 So.2d 639 (Fla. 1982), this Court discussed all four of the above-cited cases. While

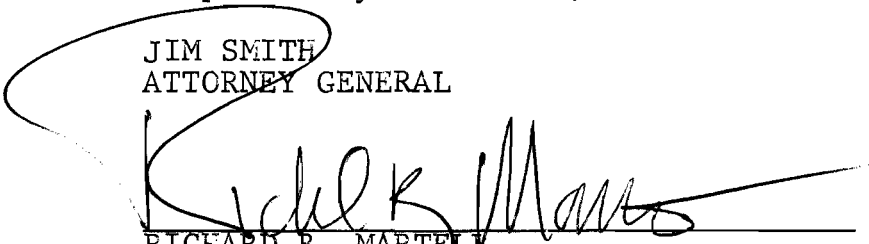
simply noting Thomas and Moore, this Court cited with favor Vitiello and Grisette, inter alia, for the proposition that the fact that a jury hears of an accomplice's guilt does not necessarily constitute reversible error. Thus, the Fifth District's resolution of this issue is in accord with relevant precedent. Respondent has continuously failed to demonstrate prejudice in reference to the judge's comment, to which he interposed no objection. Respondent's failure to preserve this point for either appellate or certiorari review renders unnecessary any further consideration.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully moves this Honorable Court to answer the instant certified question in the affirmative and to quash the decision of the district court below and reverse and remand with instructions consistent therewith.

Respectfully submitted,

JIM SMITH  
ATTORNEY GENERAL

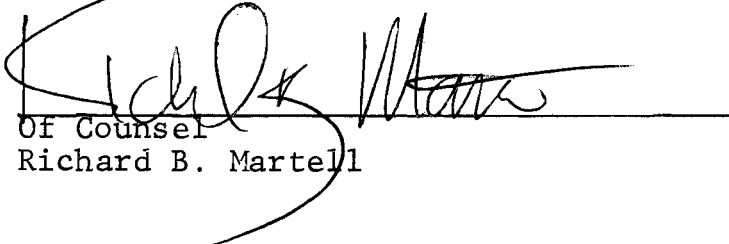


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to John W. Tanner, Esquire, 630 N. Olive Avenue, Suite A, Daytona Beach, Florida, 32018, this 10 day of August, 1984.



Of Counsel  
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