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PRELIMINARY STATEMENT

The Petitioner, Respondent in the District Court of Appeals, Appellant in the Broward County Circuit Court, and the Defendant in the Broward County Court, shall, in this Brief, be referred to as the Petitioner.

The Respondent, State of Florida, shall be referred to as the State.

The Record that has been presented to the various Courts is contained in three (3) volumes, and reference to these shall be by the letter "R" and the letter "T" for Transcript (R.T.), followed by the page number where this matter may be found.

STATEMENT OF THE CASE

The Petitioner was convicted in the County Court of Broward County, Florida, on 14 July 1983. She timely appealed to the Circuit Court of Broward County, in its appellate capacity, which Court reversed the Petitioner's conviction and remanded the matter for a new trial. This occurred on 8 May 1985.

Thereafter, the State of Florida sought a Writ of Certiorari in the Fourth District Court of Appeals and that Court, on 22 January 1986, filed its opinion quashing the "Circuit Court's order reversing respondent's DUI conviction" and remanded the matter for further appropriate proceedings [State v. Macias, 481 So.2d 979 (Fla. 4 DCA 1986)]. Petition for Rehearing, Motion to Certify Conflict was denied, and certiorari was sought and obviously granted.

STATEMENT OF THE FACTS

The opinion of the Fourth District Court of Appeals sets forth the basic facts of the matter and the same are not really in dispute other than an interpretation of the import of the procedure regarding the Petitioner performing certain tests. Hence, the Petitioner will set forth very succinctly the basic facts of the case, quoting, in essence, from the Appellate Court decision. Elaboration on the facts, as necessary, shall be accomplished in the body of the Brief to avoid redundancy.

FACTS

The Petitioner was arrested by Davie Florida policeman Howard Fox for Driving Under the Influence [hereinafter, sometimes for brevity, referred to a DUI], and was so charged by the State's Attorney's Office. Trial commenced in April of 1983, and the policeman testified as to the occurrences leading to the stop, and his observations of the Petitioner such as the odor of alcohol, bloodshot eyes, slurred speech, and the like. As a result of his observations, this policeman, who testified he had no training whatsoever as to alcohol and did not himself drink (R.T. pp. 60, 61, 66, 67), concluded the Petitioner was impaired. He then read the Petitioner her "rights", had her perform what are commonly known as "roadside sobriety tests", and then placed her under arrest and transported her to the Davie police station, where after the requisite requirements were fulfilled, the Petitioner was given a breath test and a reading of .19 was obtained.

The Court, during trial, compelled the Petitioner upon the request of the prosecutor to speak, and, under the direction of the policeman, to perform the "roadside sobriety tests", this, before the jury (R.T. pp. 13-15, 23-29).

The Petitioner offered her defenses through cross-examination, both as to roadside tests and the breathalyzer (R.T. pp. 50-67, 135-154), but did not testify.

The jury found Petitioner guilty.

POINT ON REVIEW

WHETHER THE COMPELLING OF A
DEFENDANT IN A CRIMINAL TRIAL
FOR DRIVING UNDER THE INFLU-
ENCE TO PERFORM CERTAIN TESTS
BEFORE A JURY, VIOLATES CON-
STITUTIONAL PROTECTIONS.

SUMMARY OF ARGUMENT

The Petitioner will urge the Court to find, consistent with existing law as perceived by Petitioner, that the compelling of a Defendant in a criminal trial [and in particular as relates to the instant situation, a Driving While Intoxicated trial] to perform certain tests in open Court, which that Defendant was compelled earlier to perform at an arrest scene, for, in essence, comparison purposes, constitutes a violation of the privilege against self-incrimination.

The Appellate Court upheld the procedure as being non-violative of the self-incrimination clause as envisioned by either the State or Federal Constitutions, or the decisions rendered by the Courts upon this issue.

In so doing, the Petitioner will argue the Court has allowed a procedure that in fact sub silencio allows the State to employ the Defendant as its main witness against that Defendant.

As an attachment or appendix, the Petitioner will illustrate the danger of this procedure by attaching the occurrences in another case arising out of the same trial Court, wherein the Fourth District Court of Appeals has granted certiorari.

ARGUMENT

COMPELLING A DEFENDANT IN A
CRIMINAL JURY TRIAL FOR DRIVING
UNDER THE INFLUENCE TO PERFORM
CERTAIN DEMONSTRATIVE TESTS BE-
FORE THAT JURY VIOLATES CONSTI-
TUTIONAL PROTECTIONS AND GUAR-
ANTEES.

The trial of KENDRA MACIAS began as what may unfor-
tunately be euphemistically labeled a run of the mill drunk
driving trial, with the usual attempts to create a reasonable
doubt through cross-examination of the witnesses and attack-
ing the reliability of the breathalyzer.

However, as noted above, a unique element was added,
the Petitioner became an auditioner in her trial. Early on
during the direct examination of the arresting policeman, the
Court, at the request of the prosecutor, compelled the Peti-
tioner to recite "my name is Kendra Macias Bobich" in terms
"of showing what her present voice characteristics are" (R.
T. p. 13). Over objection, the Petitioner complied, and the
policeman was then allowed to opine as to the differences
between her voice in court at trial and on the night in
question (R.T. pp. 14-15).

The policeman then described the roadside tests
that were "given" the Petitioner, and the purpose thereof
(R.T. pp. 18-19).

The prosecutor then requested that the Court order
the Petitioner to perform those tests before the jury. The

Court overruled the objection, "understanding this is simply for the purposes of showing what her present normal faculties are, ***." (R.T. p. 20).

The policeman then described the tests and the Petitioner's purported failure to perform those tests on the night of her arrest (R.T. pp. 21, 22).

The Petitioner was then compelled to leave her seat and under the direction of the witness/policeman, performed the roadside tests before the jury (R.T. pp. 26-29). The policeman described the tests and the manner in which they were to be performed.

Then, in final argument, the prosecutor, alluding to the "roadside" tests the Petitioner performed in Court, informed the jury that although she may have been a little nervous, "she performed her tests very well. She shook a little but she didn't fail. She passed ***." Objection by defense counsel was overruled (R.T. p. 182), and the prosecutor made another brief mention of that evidence.

As an aside and to illustrate the pitfalls of the trial Court, and ipso facto the Fourth District's ruling, the Petitioner is enclosing a copy of the excerpts of the record in Faiks v. State, 4 DCA Case Number 4-86-0717, now presently pending certiorari in the Fourth District. Mr. Faiks is an attorney who was represented by the undersigned before the same trial judge and prosecutor as the Petitioner at bar. While the Petitioner is of course not

suggesting that matter is before this Court for review, the Petitioner submits the same is highly illustrative of the constitutional dilemma involved. This is annexed hereto as A. 1.

The Appeals Court decision, tracing the history of the Fifth Amendment protections vis a vis what was compelled of the Petitioner, cited to the various decisions thereon, including Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966), the leading case, and held that the matters compelled were non-communicative.

The Petitioner would begin by quoting from Schmerber, supra:

"The distinction which has emerged ... is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical' evidence does not violate it... . Some tests seemingly directed to obtain 'physical evidence' may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine guilt or innocence on the basis of physiological responses whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege is as broad as the mischief against which it

seeks to guard." Id at 1832,
emphasis supplied.

This important principle was recognized by the Florida Appellate Courts in Machin v. State, 213 So.2d 499 (Fla. 3 DCA 1968), cert denied 221 So.2d 747 (Fla. 1968), and Wells v. State, 468 So.2d 1087 (Fla. 3 DCA 1985).

In Machin, *supra*, the issue of the perpetrator's ability to run [the perpetrator allegedly had a limp] was an issue, and the Defendant Machin wished to run before the jury. The trial Court ruled, "it would allow the jury to observe the Defendant run but if he did so he would then be available to the state for proper cross-examination". The Appeals Court held that "under the specific circumstances set forth above, we conclude that this ruling was correct inasmuch as this would have been a form of testimony presented by the Defendant to the jury", citations of the Court omitted.

Wells, *supra*, involved an apparent relevancy of tatoos. The Court succinctly ruled:

"Defendant Wells, seeking reversal, cites as error the trial court's ruling that if he displayed tatoos on his arms to the jury as evidence, he would be subject to cross-examination." The Court affirmed on the authority of Machin, supra.

The Fifth District Court of Appeals, in Thomas v. State, 439 So.2d 245 (Fla. 5 DCA 1983), sort of waltzed with the issue, but, it is submitted, did not finish the dance.

In Thomas, supra, the Defendant "moved for the Court to allow Thomas to display his upper body to the jury without subjecting himself to cross-examination". This was apparently felt relevant by the Defendant, but the trial Court denied the Motion.

The Court noted:

"The argument is that a physical exhibition, had it been required by the state, would not be considered testimonial and, therefore, would not violate the privilege against self-incrimination."
[citations omitted].

"Therefore, argues the appellant, the converse of that proposition is available to defendant at trial: he may present non-testimonial 'physical' evidence without losing his right against self-incrimination."

The Court rejected the argument on two grounds, the first being a failure to proffer.

The Court, apparently in disagreement with the Third District, agreed "that a physical display such as that suggested here would not be testimonial", but still upheld the ruling, and noted, rather cogently and appropos to the case at bar:

"Would it be proper to receive such evidence, absent any possible cross-examination, and leave to the jury's unformed speculation any and all questions concerning the

consistency of the defendant's physical appearance between the time of trial and the time of the crime, the purpose of the demonstration, and the possible explanations for any conflicts between testimony and appearance."

This, Petitioner submits, is the exact basis for the Third District's reasoning, and illustrates the fallacy of the Fourth District's disagreement with the Third, to wit: did Machin have an injury causing a limp the night of the robbery, or did Wells obtain tatoos after his arrest? Hence, these displays are a form of testimony going to crucial issues in the matter.

The Fourth District, with all due respect to that Court, misses the mark as to the issues involved when it held instantly, or restated, that "a full sobriety test has been held not to be a communication" *** [citations omitted] *** "If the performance of these tests at the scene is not a communication, the same is ipso facto true of performance of identical tests in court." [Macias, supra]. The Court was citing, inter alia, to State v. Edwards, 463 So.2d 551 (Fla. 5 DCA 1985), which Court noted that the observations regarding these tests were not protected as they were, in fact, not compelled by the Statute involved. Indeed, no defendant is compelled to perform roadside sobriety tests. However, in the instant situation, what one need remember is that the Court compelled performance of these tests. And, addressing the major issue as juxtaposed to the above authorities, the

same were indeed compelled testimonial offerings used against the Defendant.

There can be no question but that the Petitioner was compelled to speak for more than mere identification or to measure the physical properties of her voice for identifiable characteristics [United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973)]. Indeed, the policeman was asked to opine the difference between the voice quality itself in Court and on the night in question so as to show that the slurred speech indicated the impaired faculties the prosecutor needed to prove. Put another way, in open Court, the Petitioner was compelled to speak, so that the prosecutor could use her words, with the aid of the police, to prove her faculties in fact differed on the night in question. Thus, the Petitioner was compelled to aid the State in proving what the Petitioner's normal faculties were and provide the basis for the conclusions of impairment.

More egregious, however, were the compelled "road-side tests". The Petitioner has already described the manner employed by the Court for their demonstration and no further elaboration is necessary. To answer the ultimate question as to were these demonstrations communicative acts, one need only look to the already quoted final argument of the prosecutor that the Defendant [Petitioner] passed the tests in Court. The Petitioner was the star witness against herself.

Having submitted that error was committed, in the context of the opinion of the Fourth District, that even if such were error, the harmless error rule would apply, Petitioner would address, briefly, that issue. The Appellate Court relied upon this Court's decision in State v. Marshall, 476 So.2d 150 (Fla. 1985), which held that reference to a Defendant's failure to testify could be subject to the harmless error rule if the State shows the comment was harmless beyond a reasonable doubt. This decision, of course, is in accord with certain decisions of the United States Supreme Court [See: ie, Rose v. Clark, U.S. Supreme Court Case Number: 84-19741, decided 2 July 1986, 39 Cr.L 3277], and the evolving of the harmless error rule in various decisions of this Court.

However, even in the recent Rose case, supra, the United States Supreme Court, but seven days next than the date the undersigned is writing these words, stated:

*"Despite the strong interests that support the harmless error doctrine, the court in Chapman [Chapman v. California, 386 U.S. 18 (1967)] recognizes that some constitutional errors require reversal without regard to the evidence in the particular case *** citations omitted ***. This limitation recognizes that some errors necessarily render a trial fundamentally unfair."*

If these other constitutional errors exist, the Rose Court, quoting from Chapman, noted that error is harmless:

*"if beyond a reasonable doubt
it 'did not contribute to the
verdict obtained'."*
Emphasis by the Court.

The issue, in this instance, is fairness.

In a concurring opinion, Justice Stevens traced a bit of the harmless error rule and its applicability, and noted that "Racial discrimination in the selection of a petit jury may require a new trial without any inquiry into the actual impact of the forbidden practice, citing to the Court's recent opinion in Batson v. Kentucky, 476 U.S. _____, 39 Cr.L 4069 (1986), which is a decision of similar import to this Court's decision two years earlier in State v. Neil, 457 So.2d 481 (Fla. 1984). The compelling of a Defendant to be a witness against himself [as opposed to an oblique comment on the failure to testify] ought meet this criteria, without regard to harmless error.

Continuing, however, the error was not harmless. While the Fourth District states that "there does not appear to be any indication in the case law that it is necessary for the State to demonstrate that a Defendant possesses normal faculties in order to obtain a D.U.I. conviction", citing to cases that from the undersigned's reading do not even mention the same, the Petitioner would argue contrary thereto.

The Appellate Court recites that normal faculties are presumed and that the Defendant has the burden of prov-

ing otherwise, citing to a 1970 case [Parkin v. State, 238 So.2d 817 (Fla. 1970)] which, the Petitioner submits, runs contrary to a later pronouncement by the United States Supreme Court upon such burden shifting presumption [See: Sandstrom v. Montana, 442 U.S. 510 (1979)]. Moreover, the Standard Jury Instructions in Misdemeanor Cases, effective 16 April 1981, requires that the State prove that the Defendant was affected by alcohol to the extent his normal faculties were impaired before there can be a conviction. Indeed, normal faculties are defined and read to the jury during the Court's charge. Hence, the State must prove, beyond a reasonable doubt, that the Defendant's normal faculties were impaired by alcohol. In this case, the trial Court allowed the State to employ the Petitioner as its main witness to prove what her normal faculties were by a demonstration in the quiet, daylight confines of the courtroom, which, besides that which has been addressed above, effectively precluded cross-examination of the arresting policeman regarding what the Petitioner's normal faculties may have been and thereby, ipso facto, lessening the State's burden of proof. Harmless error should never apply to this situation.

CONCLUSION

For this and for all of the foregoing, this Court ought quash the decision of the Fourth District Court of Appeals, and reinstate the decision of the Circuit Court of Broward County authored in its Appellate capacity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief Upon the Merits has been furnished by mail to Michael W. Baker, Esquire, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401, this 15 July 1986.

BY: 

FRED HADDAD