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Florida Reverses Its Per Se Reversal Rule on Improper Prosecutorial Comment on a Defendant's Right to Remain Silent

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FLORIDA REVERSES ITS PER SE REVERSAL RULE ON IMPROPER PROSECUTORIAL COMMENT ON A DEFENDANT'S RIGHTS TO REMAIN SILENT

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I. INTRODUCTION

A police officer took the stand in a Florida court and was asked by the prosecutor whether the defendant made any post-*Miranda* warning statements.[1] The officer responded, "I asked him, but he refused to give me any information."[2] Until very recently, depending on whether the trial was in federal or state court, the effect of such a comment would have been radically different. In state court, the comment probably would have resulted in an immediate mistrial, and, had it not, would have required reversal on appeal regardless of the strength of the evidence against the defendant. Such a result was mandated by the longstanding Florida rule that comment by the state on a defendant's exercise of his right to remain silent was per se reversible error. In federal court, such a comment was seen as curable under the harmless error rule. After years of deliberation and vacillation, the Florida Supreme Court recently adopted the federal approach in the case of *State v. DiGuilio*.[3]

The former Florida rule had been under increasing attack. By

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1. Miranda v. Arizona, 384 U.S. 436 (1966).

2. This scenario is taken from Rowell v. State, 450 So. 2d 1226 (Fla. 5th DCA 1984), *quashed*, 476 So. 2d 149 (Fla. 1985), and is apparently a common occurence. *See, e.g.*, White v. State, 377 So. 2d 1149 (Fla. 1979), *cert. denied*, 449 U.S. 845 (1980); Chance v. State, 363 So. 2d 331 (Fla. 1978); Trafficante v. State, 92 So. 2d 811 (Fla. 1957); Simmons v. State, 190 So. 756 (Fla. 1939); Rowe v. State, 98 So. 613 (Fla. 1924); Jackson v. State, 34 So. 243 (Fla. 1903); *see generally* Cain, *Sensational Prosecutions and Reversals*, 7 NOTRE DAME LAW. 1 (1932); DeFoor, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L.J. 443 (1983); Padovano, *Prejudicial Comments of the Prosecutor During Closing Argument*, 51 FLA. B.J. 159 (March 1977); Vess, *Walking a Tightrope: A Survey of the Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22 (1973); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946 (1954) [hereinafter cited as *Forensic Misconduct*]; Note, *Adverse Comments by a Florida Prosecutor Upon a Defendant's Failure to Testify*, 15 U. MIAMI L. REV. 293 (1961); Note, *Prosecutor Forensic Misconduct—"Harmless Error?"* 6 UTAH L. REV. 108 (1958).

3. 10 Fla. L.W. 430 (Fla. August 29, 1985), *petition for reh'g filed*, No. 65,490 (Fla. Sept. 13, 1985).

1984, two district courts of appeal had certified questions to the supreme court asking, in substance, whether Florida should abandon its per se rule in such cases. The Fifth District Court of Appeal addressed the issue as follows:

> The state poses the question: Why should a mere, unintentional slip of the tongue by a State's witness . . . doom an otherwise proper and lawful conviction to certain reversal despite ironclad testimony and physical and circumstantial evidence which provide unequivocal and uncontroverted proof of the accused's guilt? Indeed, this is a difficult question to answer from the standpoint of reason and logic. Perhaps it can only be answered by the acrid and familiar comment on the law by Mr. Bumble in *Oliver Twist*. Or perhaps more fairly by the observation that bad precedents often derive from noble motives. In any event, the state's question would be more appropriately directed to the Florida Supreme Court than to us.[4]

II. DEVELOPMENT OF EARLY FLORIDA LAW

The evolution of Florida law on improper prosecutorial comment can only be described as curious. From its inception, Florida's Constitution has contained a prohibition against compelling a witness to testify against himself.[5] Florida courts further adhered to the mirror-image of this protection[6]—the defendant was generally considered incompetent to testify on his own behalf.[7] Beginning in 1864 with the State of Maine, there was a nationwide erosion of the common law rule that a criminal defendant was incompetent to testify in his own behalf.[8] By 1865, whether a criminal defendant

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4. *Rowell*, 450 So. 2d at 1228.

5. FLA. CONST. of 1838, art. I, § 10. The same basic provision was retained in subsequent constitutions. FLA. CONST. of 1861, art. I, § 10; FLA. CONST. of 1865, art. I, § 10; FLA. CONST. of 1868, art. I, § 8; FLA. CONST. of 1885, art. I, § 12. The provision in the 1968 revision to the constitution of 1885 provides that "[n]o person shall be . . . compelled in any criminal matter to be a witness against himself." FLA. CONST. art. I, § 9.

6. Miller v. State, 15 Fla. 577, 583 (1875). It is clear that a defendant had the right to address the jury as counsel in his own cause, but unclear whether he could do so as co-counsel with his lawyer. *See generally* DeFoor, Lewis & Mitchell, *The Right to Dual Representation*, 18 HOUS. L. REV. 519 (1981); DeFoor & Mitchell, *Hybrid Representation: An Analysis of a Criminal Defendant's Right to Participate as Co-Counsel at Trial*, 10 STETSON L. REV. 191 (1981).

7. *See generally* J. WIGMORE, EVIDENCE § 579 (Chadbourn Rev. 1979).

8. For an excellent discussion of the history of this erosion, see Ferguson v. Georgia, 365 U.S. 570 (1961). In *Ferguson*, the Court concluded that Georgia's adherence to the incompetency doctrine was unconstitutional, finding a right in the United States Constitution for

could testify in his own behalf in Florida was a matter of judicial discretion,[9] and, in 1870, defendants were given a statutory right to make a sworn statement to the jury.[10] This right was broadened by the legislature in 1895 to make criminal defendants subject to all the rules applicable to other witnesses.[11] The statute further provided protection to defendants by precluding the prosecution from commenting upon a defendant's silence if he chose not to take the stand.[12] This protection, earlier afforded by statute, is now extended by the nearly identical provisions of Rule 3.250 of the *Florida Rules of Criminal Procedure*.[13]

Once the defendant became a permissible witness and the prosecution was precluded from commenting on the defendant's silence, three new issues arose. First, what constitutes an impermissible comment upon a defendant's right to remain silent? Second, assuming an impermissible comment is made, is contemporaneous objection required in order to preserve the point for appeal? Finally, and most fundamentally, what is the appropriate remedy when an impermissible prosecutorial comment on the defendant's right to remain silent is made? Is reversal always mandated, or is there room for application of the harmless error rule?

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the defendant to testify. The Georgia statute was repealed, although, curiously, Georgia retained in its statutes a right for a criminal defendant to make an unsworn statement to the jury in lieu of testimony. GA. CODE ANN. §§ 38-415, 27-405 (1974).

9. *Miller*, 15 Fla. at 583.

10. *See* Law of June 1, 1870, ch. 1816, 1870 Fla. Laws 13; Hancock v. State, 85 So. 142, 143-44 (Fla. 1920) (Browne, C.J., dissenting).

11. Law of May 30, 1895, ch. 4400, § 1, 1895 Fla. Laws 162 provided:

> Accused May Make Himself a Witness: In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the accused to testify in his own behalf.

See also Hart v. State, 20 So. 805 (Fla. 1896) (noting that prior to this law the accused could make statements under oath relating to matters of his defense and at the same time not become a witness or subject to the rules governing witnesses).

12. Law of May 30, 1895, ch. 4400, 1895 Fla. Laws 162 eventually came to be codified at FLA. STAT. § 918.091 (1958). *See* Ratiner, *Adverse Comments by a Florida Prosecutor upon a Defendant's Failure to Testify*, 15 U. MIAMI L. REV. 293, 295 n.12 (1961).

13. FLA. R. CRIM. P. 3.250 provides:

> Accused as Witness. In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

III. NATURE OF COMMENT

Analysis of the law concerning improper prosecutorial comment has been hampered by the failure of appellate courts to define precisely what constitutes an impermissible comment on a defendant's silence. The impropriety of a comment is not affected by how inadvertent or indirect[14] the comment might be, or by a prosecutor's denial of any "intent" to comment on a defendant's right.[15] If the comment is fairly susceptible of an interpretation that brings it within the rule requiring per se reversal, it is so construed, regardless of its susceptibility of a differing construction.[16] Indeed, the types of prosecutorial comment which courts have found to merit reversal have ranged from the egregious[17] to the subtle.[18] The same rule applies to a comment by a prosecutor about the failure of a co-defendant to testify.[19] It does not, however, extend to such a comment by a co-defendant's counsel.[20]

Not all comments relating to a defendant's post-*Miranda* silence are cause for reversal. Much confusion has resulted from a prosecutor's characterization of his case as "uncontroverted" or "unexplained" in cases where the defendant did not testify. Prosecutors began using this double entendre soon after they were prohibited from directly commenting on a defendant's silence.[21] For a long

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14. Flaherty v. State, 183 So. 2d 607 (Fla. 4th DCA 1966). *But see* Helton v. State, 424 So. 2d 137 (Fla. 1st DCA 1982).

15. Trafficante v. State, 92 So. 2d 811 (Fla. 1957); Milton v. State, 127 So. 2d 460 (Fla. 2d DCA 1961).

16. Harris v. State, 438 So. 2d 787 (Fla. 1983); Rowe v. State, 98 So. 613, 618 (Fla. 1924); Jackson v. State, 34 So. 243 (Fla. 1903). The rule may be stated as follows: If the prosecutor's comment is "fairly susceptible of being interpreted by the jury as a statement to the effect that an 'innocent man would attempt to explain the circumstances but the defendant offered no such explanation . . .' then the comment thus interpreted or construed violated the prohibition of the rule." David v. State, 369 So. 2d 943, 944 (Fla. 1979) (quoting David v. State, 348 So. 2d 420, 421 (Fla. 4th DCA 1973) (Mager, J., dissenting)).

17. *See David*, 369 So. 2d at 944. The defense attorney apparently had hypothesized a defense predicated upon a business failure. The prosecutor argued the permissible line: "Where is the evidence," *see infra* notes 64-74 and accompanying text, but went on to pose the impermissible rhetorical question, "If he had a business failure, why didn't he say anything . . .?" *David*, 369 So. 2d at 944 (emphasis omitted). The conviction was reversed.

18. *See* Hall v. State, 364 So. 2d 866, 867 (Fla. 1st DCA 1978) (where the prosecutor referred to the defense counsel's attempt to shift the focus of the case from the defendant, whom he characterized as sitting there "quietly").

19. Clouser v. State, 152 So. 2d 200, 201 (Fla. 2d DCA 1963); Harper v. State, 151 So. 2d 881, 883 (Fla. 2d DCA 1963).

20. Jenkins v. State, 317 So. 2d 114, 115 (Fla. 3d DCA 1975); Smith v. State, 238 So. 2d 120, 121 (Fla. 3d DCA 1970). *But see* Cruz v. State, 328 So. 2d 24 (Fla. 3d DCA 1976). *See generally* Annot., 1 A.L.R. 3d 989 (1965).

21. Gray v. State, 28 So. 53 (Fla. 1900).

while such comments were allowed on the theory that they were comments on the evidence, not a defendant's silence.[22] The trend then began to run the other way, culminating in a holding by the Second District that "when the defendant elects not to testify, it is error to refer to the State's evidence as being unexplained or uncontradicted, or undenied . . . ."[23]

The Florida Supreme Court later allowed such comment in two cases where the defense counsel advanced theories of coerced confession[24] and insanity without the defendant's testimony.[25] Then, in the case of *White v. State*,[26] the Third District held that such comments were permissible as comments on the evidence when the testimony of several witnesses had been heard.[27] This approach was approved by the Florida Supreme Court, which cited the earlier line of cases allowing such comment.[28] Subsequently, the Fifth District, in *Smith v. State*,[29] stated: "Indeed, if a prosecutor could not make fair comment on the fact that the state's evidence of guilt was uncontroverted, what would be left for him to argue in a case where the defendant declined to testify?"[30]

In the Fourth District, the treatment given this type of comment

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22. *Id.*; *see also* Clinton v. State, 47 So. 389 (1908).

23. Singleton v. State, 183 So. 2d 245, 252 (Fla. 2d DCA 1966) (citing Way v. State, 67 So. 2d 321 (Fla. 1953); Trafficante v. State, 92 So. 2d 811 (Fla. 1957)), *overruled in part*, Craft v. State, 300 So. 2d 307 (Fla. 2d DCA 1974).

24. State v. Mathis, 278 So. 2d 280, 281 (Fla. 1973) ("Now did you hear one thing about him getting beaten up or somebody was pounding on his head, forcing him into this?").

25. State v. Jones, 204 So. 2d 515, 516 (Fla. 1967) ("Now where is the evidence that he says he didn't know what he was doing?").

26. 348 So. 2d 368 (Fla. 3d DCA 1977).

27. *Id.* at 369 ("You haven't heard one word of testimony to contradict what she [state's witness] has said, other than the lawyer's argument.").

28. In White v. State, 377 So. 2d 1149 (Fla. 1979), *cert. denied*, 449 U.S. 845 (1980), there was only one witness to the crimes, other than the defendant. In referring to the testimony of the eye witness in closing argument, the prosecutor said, "You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument." . . . Defendant objected to this statement and moved for a mistrial. The motion for mistrial was denied and this ruling was affirmed by the district court of appeal. It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. . . . It is thus firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury.

377 So. 2d at 1150 (citing State v. Mathis, 278 So.2d 280 (Fla. 1973); State v. Jones, 204 So. 2d at 516-517; Clinton v. State, 47 So. 389 (Fla. 1908); Gray v. State, 28 So. 53 (1900); Mabery v. State, 303 So. 2d 369 (Fla. 3d DCA 1974); Woodside v. State, 206 So. 2d 426 (Fla. 3d DCA 1968)).

29. 378 So. 2d 313 (Fla. 5th DCA), *aff'd*, 394 So. 2d 407 (Fla. 1980).

30. *Id.* at 314.

may well have depended on which panel heard the case. In *Marshall v. State*,[31] the court found a similar comment impermissible.[32] Judge Glickstein, concurring in *Crawford v. State*,[33] attributed the *Marshall* result to the workings of the district court "which by its mode of operation is balkanized into diverse panels of three or majorities thereof."[34] He criticized the *Marshall* decision as factually indistinguishable from the supreme court's decision in *White*[35] and a previous decision of the same district in *Lampkin v. State*.[36]

In light of the positions taken by the courts in *White*,[37] *Budman*,[38] and *Smith*[39] on the one hand, and in *Marshall* and the older cases of *Singleton*[40] and *Trafficante*[41] on the other, there remains confusion as to the parameters of acceptable prosecutorial comment on "unrefuted evidence" and the like.[42] May such a comment be advanced at all times, or only where it may be seen as a

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31. 473 So. 2d 688 (Fla. 4th DCA), *quashed*, 476 So.2d 150 (Fla. 1985).

32. "[T]he only person you heard from in this courtroom with regard to the events of [the day in question] was . . . [the victim]." *Id.*

33. 473 So. 2d 700 (Fla. 4th DCA 1985).

34. *Id.* at 702 (Glickstein, J., concurring specially).

35. White v. State, 377 So. 2d 1149 (Fla. 1979).

36. 445 So. 2d 673 (Fla. 4th DCA 1984). Judge Glickstein stated in *Crawford*, 473 So. 2d at 702:

> Although the *[Lampkin]* opinion does not recite the prosecutor's comments, the briefs reflect that the prosecutor said: "There's only been one version of facts given from that chair right there and B.R. Johnson (policeman) made that version and said the gun was in the middle of the seat." The defendant was the only person other than the policeman who could have testified as to the location of the gun.
>
> The Supreme Court should be aware of these two cases in its consideration of *Marshall* and of the instant case. I fail to see how *Marshall* differs from *White* or *Lampkin*, but it represents the opinion of this court . . . .

37. White v. State, 348 So. 2d 368 (Fla. 3d DCA 1977), *approved in pertinent part*, 377 So. 2d 1149 (Fla. 1979).

38. Budman v. State, 362 So. 2d 1022 (Fla. 3d DCA 1978), *aff'd*, 394 So. 2d 407 (Fla. 1980).

39. Smith v. State, 378 So. 2d 313 (Fla. 5th DCA 1980).

40. Singleton v. State, 183 So. 2d 245 (Fla. 2d DCA 1966), *overruled in part*, Craft v. State, 300 So. 2d 307 (Fla. 2d DCA 1974).

41. Trafficante v. State, 92 So. 2d 811 (Fla. 1957).

42. The Florida Supreme Court has expressly permitted prosecutorial reference to "unrefuted" evidence. State v. Sheperd, 10 Fla. L.W. 609 (Fla. Nov. 25, 1985). The court stated:

> In order to clarify exactly when a comment is "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify, we hold that a prosecutorial comment in reference to the *defense* generally as opposed to the *defendant* individually cannot be "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify.

Id. at 610 (emphasis in original).

comment on the evidence rather than on the defendant's silence? The language of the Fifth District in *Smith*[43] and *Elam v. State*[44] and the supreme court's decision in *White* suggest the former, while the original Third District opinion in the *White* case suggests the latter.[45]

There are several directions in which the Florida courts may go in clarifying this point of law.[46] Some jurisdictions allow such comments if they appear to refer to a witness other than the defendant.[47] Florida courts already allow comment that the defendant did not provide a witness that he reasonably could have been expected to provide.[48] Courts in other jurisdictions would seem to allow this line of argument[49] even when the defendant would be the only witness who could reasonably be expected to refute the evidence.[50] Aside from the need of the Fourth District to internally reconcile its views, the supreme court needs to elucidate whether it intended to overrule *Singleton* and *Trafficante* and to clarify the exact parameters of improper prosecutorial comment.

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43. Smith v. State, 378 So. 2d 313 (Fla. 5th DCA 1980).

44. 389 So. 2d 221 (Fla. 5th DCA 1980).

45. 348 So. 2d at 369. The court said:

> In referring to the testimony of the eyewitness, the prosecuting attorney said, "You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument." If the evidence presented a situation where the only person who could have contradicted the witness's testimony was the defendant himself, then this comment might be interpreted as the defendant suggests. We hold that in this case, where the testimony of several witnesses was heard and there was nothing in the testimony to show that the defendant was not present at the scene of the crime, that the statement by the state's attorney was a fair comment upon the evidence.

46. *See generally* Annot., 14 A.L.R.3d 723 (1967).

47. *See, e.g.*, Desmond v. United States, 345 F.2d 225 (5th Cir. 1965). Cases like this fall under the rubric announced in United States v. Bubar, 567 F.2d 192 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977): "A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury naturally and necessarily would interpret the summation as a comment on the failure of the accused to testify." *Id.* at 199 (quoting United States *ex rel.* Leak v. Fallette, 418 F.2d 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970)); *see also* United States v. Riola, 694 F.2d 670 (11th Cir.), *cert. denied*, 460 U.S. 1073 (1983); State v. Bolton, 383 So. 2d 924 (Fla. 2d DCA 1980).

48. Buckrem v. State, 355 So. 2d 111 (Fla. 1978). The witness must be competent and available. This is especially true if a witness is a spouse. Jenkins v. State, 317 So. 2d 90 (Fla. 1st DCA 1975).

49. For other forms the argument can take, see United States v. Giuliano, 383 F.2d 30 (3d Cir. 1967) ("unrefuted"); Ruiz v. United States, 365 F.2d 103 (10th Cir. 1966) ("uncontroverted"); State v. Hampton, 430 S.W.2d 160 (Mo. 1968) ("undenied").

50. *See, e.g.*, People v. Stambeary, 261 N.E.2d 765 (Ill. 1970).

IV. CONTEMPORANEOUS OBJECTION

The second issue to be addressed in an analysis of improper prosecutorial comment is whether contemporaneous objection to the comment is required. As with the issue of what constitutes an impermissible comment, the courts have vacillated on this point. However, on the issue of contemporaneous objection, the courts now take a uniform view.

When the issue was addressed in *Simmons v. State*[51] in 1939, the lack of a contemporaneous objection was held not to bar raising the issue on appeal. It was not until 1978 that Justice Alderman, writing in a special concurrence to *Willinsky*, called the *Simmons* conclusion on contemporaneous objection into question.[52] In the same year, in *Clark v. State*,[53] Justice Alderman, this time writing for the majority, directly addressed the point and stated that improper comment on a defendant's right to remain silent was not fundamental error. Thus, failure to object contemporaneously waived the point on appeal:[54]

> "Fundamental error," which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. An improper comment on defendant's exercise of his right to remain silent is constitutional error, but it is not fundamental error.[55]

Justice Adkins, who had authored *Willinsky*, dissented, decrying what he saw as a retreat from the principles embodied in *Simmons*.[56] The *Clark* holding persists, even though the courts have held other, arguably less serious, instances of improper prosecutorial comment fundamental and deemed them proper for appellate review despite the absence of objection.[57]

V. THE APPROPRIATE SANCTION

A. History of the Florida Law

The third and final issue relevant to this inquiry is: What sanc-

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51. 190 So. 756 (Fla. 1939).
52. 360 So. 2d at 763 (Alderman, J., concurring).
53. 363 So. 2d 331 (Fla. 1978).
54. *Id.* at 334.
55. *Id.* at 333 (citing in comparison Doyle v. Ohio, 426 U.S. 610 (1976); Chapman v. California, 386 U.S. 18 (1967)).
56. *Clark*, 363 So. 2d at 335-36 (Adkins, J., dissenting).
57. *See, e.g.*, Peterson v. State, 376 So. 2d 1230, 1234 (Fla. 4th DCA 1979).

tions have accompanied violations of the prohibition against prosecutorial comment upon a defendant's right to remain silent, and, by extension, what sanction *should* accompany such a violation? The Florida Supreme Court has reversed its position on the issue of sanction no fewer than six times. The initial Florida view, indicated in dicta, was that, although unlikely, there "might" be cases where such comment would not be reversible error.[58] In 1939, the supreme court in *Simmons v. State*[59] adopted the then minority view[60] that such comment was incurable and not subject to the harmless error rule.[61] In *Simmons*, the defendant took the stand on his own behalf and the prosecutor sought to impeach him on the basis of his failure to testify at a preliminary hearing, without objection from the defense.[62] The *Simmons* automatic reversal rule guided Florida decisions on the issue until the 1967 case of *State v. Hines*.[63] In *Hines* and subsequent cases, the court deviated from the *Simmons* rule, partly in response to intervening federal decisions. Prior to completing our examination of the history and development of Florida law on sanctions, it is necessary to examine two significant federal developments and their impact on the state law's development.

B. Development of the Federal Case Law

1. Fifth Amendment Applied to States

In 1893, the United States Supreme Court first addressed the issue of improper prosecutorial comment in *Wilson v. United States*,[64] holding, like early Florida courts, that it was reversible error to comment on the defendant's exercise of his fifth amendment right to silence.[65] After declining in *Adamson v. California*[66]

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58. Jackson v. State, 34 So. 243 (Fla. 1903).
59. 190 So. 756 (Fla. 1939).
60. *See* Ratiner, *supra* note 12, at 298; Note, *Forensic Misconduct*, *supra* note 2, at 960 n.68.
61. Simmons v. State, 190 So. 756, 757 (Fla. 1939).
62. *Id.*
63. State v. Hines, 195 So. 2d 550 (Fla. 1967).
64. 149 U.S. 60 (1893).
65. The prosecutorial comment made during closing argument in *Wilson* was:

> I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime.

Id. at 66. When the defense objected and the court suggested that counsel should not be commenting on that subject, the prosecutor added: "I did not mean to refer to it in that

to hold the self-incrimination clause of the fifth amendment applicable to the states,[67] the Supreme Court reversed itself in *Malloy v. Hogan*[68] and incorporated the fifth amendment through the fourteenth amendment.[69]

The next step was taken in *Griffin v. California*,[70] in which the Court applied the reversible error rule articulated in *Wilson* to the states through the fourteenth amendment. The trial court in *Griffin* followed a provision of the California Constitution[71] and instructed the jury that the defendant had a constitutional right not to testify. However, the court ruled that if the facts were within the defendant's knowledge, the jury could consider the defendant's

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light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." *Id.* at 67. The Court equated this rejoinder with:

> You gentlemen of the jury know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it.

Id. at 67.

66. 332 U.S. 46 (1947).

67. In *Adamson*, the Court upheld a conviction under the same section of the California Constitution permitting comment by court and counsel on a defendant's silence which the Court later found objectionable in Griffin v. California, 380 U.S. 609 (1965). In declining to incorporate the fifth amendment through the fourteenth, the Court touted the constitutional doctrine of federalism and the preservation of "the balance between national and state power." 332 U.S. at 53. In referring to that section of the California Constitution that permitted comment upon the defendant's silence, the Court opined: "However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence." *Id.* at 56.

In a concurring opinion, Justice Frankfurter agreed with the majority on this point:

> Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process."

Id. at 60 (Frankfurter, J., concurring).

68. 378 U.S. 1 (1964).

69. *Malloy* did not involve a prosecutor's comment; it involved a man's attempt to claim the protection of the fifth amendment's privilege against self-incrimination in a state court proceeding. The state court found that the questions were not incriminating. The court "adjudged him in contempt, and committed him to prison until he was willing to answer the questions." *Id.* at 3.

70. 380 U.S. 609 (1965).

71. CAL. CONST. art I, § 13 provides in part that "in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

failure to explain evidence that he reasonably could be expected to deny.[72] The prosecutor in *Griffin* had commented on the defendant's failure to take the stand and deny the crime or explain facts within his knowledge.[73] In reversing Griffin's conviction, the Supreme Court held that in both federal and state trials the fifth amendment forbids "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[74]

2. *Harmless Error Rule*

The second significant federal development was the application of the harmless error rule to a constitutional violation. The defendant in *Chapman v. California*[75] was convicted before the Court decided *Griffin*. Like *Griffin*, *Chapman* was a California case involving state constitutionally-permitted comment by the court and the prosecutor on the defendant's right to silence.[76] Having the benefit of *Griffin*, the California Supreme Court nevertheless affirmed Chapman's conviction by applying the harmless error provision of the state constitution.[77] After determining that federal rather than state law controlled,[78] the United States Supreme Court reversed. The Court, however, declined to hold all federal constitutional errors harmful,[79] noting that all fifty states had harmless error rules which "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[80]

In fashioning a "harmless constitutional error rule,"[81] the Court

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72. 380 U.S. at 610.
73. *Id.* at 610-11.
74. *Id.* at 615.
75. 386 U.S. 18 (1967).
76. *Id.* at 19, 26-42.
77. *Id.* at 20.
78.

> The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. . . . Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.

Id. at 21.
79. *Id.* at 22.
80. *Id.*
81. *Id.*

looked to the standard annunciated in *Fahy v. Connecticut*[82] and held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[83]

C. *Florida Law After Incorporation of the Fifth Amendment*

In 1967, contemporaneous with the emergence of the federal harmless error rule, the Florida Supreme Court in *State v. Hines*[84] directly and expressly receded from *Simmons v. State*,[85] holding that where a defendant took the stand, his failure to testify in a prior hearing properly could be the subject of prosecutorial comment.[86] In the 1968 case of *State v. Galasso*,[87] the court applied the statutory harmless error rule[88] to such a comment and the reversal of the *Simmons* doctrine was complete. Ten years later, in *Willinsky v. State*,[89] the court again changed direction when it repudiated *Galasso* and expressly reinstated the rule of *Simmons*.[90]

1. Murray v. State

The murky and shifting law of improper prosecutorial comment has been further confused by recent opinions of the Florida Supreme Court. Reacting to what one district court described as a "veritable torrent"[91] of cases involving prosecutorial improprieties, the district courts reversed an astonishing number of cases in 1982[92] and 1983.[93] While this phenomenon has been discussed in

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82. 375 U.S. 85 (1963). The precise test articulated by the Court was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86-87, *quoted in Chapman*, 386 U.S. at 23.

83. 386 U.S. at 24.

84. 195 So. 2d 550 (Fla. 1967).

85. 190 So. 756 (Fla. 1939).

86. *Id* at 551. Justice Thornal dissented and adhered to the *Simmons* rule. *Id.* at 551 (Thornal, J., dissenting).

87. 217 So. 2d 326 (Fla. 1968).

88. FLA. STAT. § 924.33 (1985) provides:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appealed papers, that error was committed that injuriously affected the substantial right of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

89. 360 So. 2d 760 (Fla. 1978).

90. *Id.* at 763.

91. Jackson v. State, 421 So. 2d 15, 16 (Fla. 3d DCA 1982).

92. The year 1982 yielded at least nine reversals predicated upon improper prosecutorial comment on the defendant's silence during closing argument, Simpson v. State, 418 So. 2d 984 (Fla. 1982); Cooper v. State, 413 So. 2d 1244 (Fla. 1st DCA 1982); Wheeler v. State, 425 So. 2d 109 (Fla. 1st DCA 1982); Collins v. State, 423 So. 2d 516 (Fla. 3d DCA 1982); Gomez

greater depth previously, suffice it to say that there was great concern that the district courts had overreacted to the problem.[94] Prosecutors were being restricted beyond the requirements of Florida law, and the district courts were using reversal as the sanction.[95] During this surge of cases, one district court took the un-

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v. State, 415 So. 2d 822 (Fla. 3d DCA 1982); Ramos v. State, 413 So. 2d 1302 (Fla. 3d DCA 1982); McMillian v. State, 409 So. 2d 197 (Fla. 3d DCA 1982) (reversed for improper questioning by the prosecutor); Chapman v. State, 417 So. 2d 1028 (Fla. 3d DCA 1982); Coleman v. State, 420 So. 2d 354 (Fla. 5th DCA 1982); as well as several close calls: Thomas v. State, 419 So. 2d 634 (Fla. 1982); Breedlove v. State, 413 So. 2d 1 (Fla. 1982); Williams v. State, 425 So. 2d 591 (Fla. 3d DCA 1982); Westley v. State, 416 So. 2d 18 (Fla. 1st DCA 1982); Nelson v. State, 416 So. 2d 899 (Fla. 2d DCA 1982); Kindell v. State, 413 So. 2d 1283 (Fla. 3d DCA 1982).

93. The year 1983 had 22 reversals, Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) (sentence vacated and remanded to trial court); Huff v. State, 437 So. 2d 1087 (Fla. 1983); Perdomo v. State, 439 So. 2d 314 (Fla. 3d DCA 1983); Robinson v. State, 438 So. 2d 8 (Fla. 5th DCA 1983); Bayshore v. State, 437 So. 2d 198 (Fla. 3d DCA 1983); Shepherd v. State, 436 So. 2d 232 (Fla. 3d DCA 1983); Salazar-Rodriguez v. State, 436 So. 2d 269 (Fla. 3d DCA 1983); Green v. State, 436 So. 2d 434 (Fla. 3d DCA 1983); Bullard v. State, 436 So. 2d 962 (Fla. 3d DCA 1983); Layton v. State, 435 So. 2d 883 (Fla. 3d DCA 1983); Kinchen v. State, 432 So. 2d 586 (Fla. 4th DCA 1983); Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA 1983); Dixon v. State, 430 So. 2d 949 (Fla. 3d DCA 1983); Michaels v. State, 429 So. 2d 338 (Fla. 2d DCA 1983), *modified*, 454 So. 2d 831 (Fla. 1984); Brazil v. State, 429 So. 2d 1339 (Fla. 4th DCA 1983); Edwards v. State, 428 So. 2d 357 (Fla. 3d DCA 1983); Lipman v. State, 428 So. 2d 733 (Fla. 1st DCA 1983); Fernandez v. State, 427 So. 2d 265 (Fla. 2d DCA 1983); Brown v. State, 427 So. 2d 304 (Fla. 3d DCA 1983); Green v. State, 427 So. 2d 1036 (Fla. 3d DCA 1983); Murray v. State, 425 So. 2d 157 (Fla. 4th DCA 1983); Rahmings v. State, 425 So. 2d 1217 (Fla. 2d DCA 1983); ten close calls, Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983); Mason v. State, 438 So. 2d 374 (Fla. 1983); Harris v. State, 438 So. 2d 787 (Fla. 1983); Harich v. State, 437 So. 2d 1082 (Fla. 1983); O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983); Friddle v. State, 438 So. 2d 940 (Fla. 1st DCA 1983); Miller v. State, 438 So. 2d 1043 (Fla. 1st DCA 1983); Broomfield v. State, 436 So. 2d 435 (Fla. 4th DCA 1983); McGee v. State, 435 So. 2d 854 (Fla. 1st DCA 1983); Carr v. State, 430 So. 2d 978 (Fla. 3d DCA 1983); and several other cases involving improper questioning, Bain v. State, 440 So. 2d 454 (Fla. 4th DCA 1983); Fussell v. State, 436 So. 2d 434 (Fla. 3d DCA 1983); Perez v. State, 434 So. 2d 347 (Fla. 3d DCA 1983); Dixon v. State, 426 So. 2d 1258 (Fla. 2d DCA 1983).

94. *See* DeFoor, *supra* note 2, at 444-47.

95. One of the authors had occasion, at the height of the controversy, to participate in a panel discussion on the subject of prosecutorial argument, convictions, and reversals at the annual meeting of the Florida Prosecuting Attorney's Association held in Fort Pierce, Florida in September 1983. Panelists included Jerry M. Blair, State Attorney for the Third Circuit; J. Allison DeFoor II, Monroe County Judge; Harry Lee Anstead, Judge, Fourth District Court of Appeal; Allen R. Schwartz, Chief Judge, Third District Court of Appeal; and Clifford B. Sheppard, Jr., President-Elect, Florida Conference of Circuit Court Judges. The panel discussion followed a one hour analysis from the prosecutor's point of view offered by Ray Marky, Associate Attorney General. Mr. Marky conceded that some prosecutorial abuses had occurred, but engaged in analysis of cases in which he felt district courts had exceeded the requirements of the law in reversing for such argument. Mr. Marky decried the fact that he felt no similar restrictions were being placed on defense counsel and generally asserted the point of view noted in the text. His concerns were supported in the case law. In Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA), *petition for review denied*, 441 So. 2d 633

precedented step of threatening to report an offending prosecutor

(Fla. 1983), the prosecutor's summation included the following statement which was not objected to contemporaneously by defense counsel: "There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill." *Id.* at 1031. This statement was held reversible error, despite the clear holding to the contrary of the Florida Supreme Court in Paramore v. State, 229 So. 2d 855 (Fla. 1969):

> The reading of passages from the Bible is not ground for reversal. Counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the case. . . . This is a matter within the discretion of the trial judge . . . .

Id. at 860-61.

The court in *Meade* attempted to distinguish its holding by claiming that *Paramore*'s facts were not clear and that some killing is justified under Florida law. As to the first point, Ray Marky, who handled *Paramore* on appeal, claimed in his speech that the prosecutor in *Paramore* not only cited the same commandment, but in fact read it verbatim from the Bible upon which the witnesses had been sworn. As to the latter, the question comes to mind why this should not have been a point which defense counsel might have made, if desired, in argument. Ironically, a modern translation of the commandment "Thou shalt not kill" translates the prohibition as "Thou shalt do no murder." BOOK OF COMMON PRAYER 317-18 (Seabury Press 1979).

In Green v. State, 427 So. 2d 1036 (Fla. 3d DCA), *petition for review denied*, 438 So. 2d 834 (Fla. 1983), a defense expert witness referred to the defendant as a "Dragon Lady." *Id.* at 1038. The prosecutor revisited this theme in his summation. The district court reacted strongly, characterizing the remarks as a sign of incompetence. *Id.*

It is difficult to understand the *Green* court's holding in light of rules concerning the proper scope of argument. The supreme court has stated that, as long as argument is predicated upon evidence in the case, Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1962), *cert. denied*, 372 U.S. 904 (1963), "[w]ide latitude is permitted in arguing to a jury." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982), *cert. denied*, 459 U.S. 882 (1982). The prosecutor is free to make logical inferences to support his theory of the case. *Id.* at 8. The supreme court has held that these inferences can properly include the "fanciful play of imagina[tion]." Gaston v. State, 184 So. 150, 151-52 (Fla. 1938).

In an earlier case, the Georgia Supreme Court stated poetically: "His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wing to his imagination." Mitchum v. State, 11 Ga. 615, 631 (Ga. 1852), *quoted in* Washington v. State, 98 So. 605, 609 (Fla. 1932).

Generally speaking, the Florida Supreme Court has been slow to reverse for over-characterization, or mere rhetoric. *See, e.g., Breedlove*, 413 So. 2d 1, 7 (Fla. 1982); Schneider v. State, 152 So. 2d 731, 735 (Fla. 1963).

Finally, in the case of Murray v. State, 425 So. 2d 157 (Fla. 4th DCA 1983), *quashed and remanded*, 443 So. 2d 955 (Fla. 1984), the district court found the following statement sufficient predicate for reversal, curiously on the theory that it constituted an injection of personal opinion:

> I suggest to you, ladies and gentlemen, that here is a man who thinks he knows the law; thinks he can twist and bend the law to his own advantage and lie to you in court so that he is acquitted and not sent to prison as a result or otherwise adjudicated in any fashion.

425 So. 2d at 158. It is difficult to understand how the remark may be seen as anything other than a permissible comment upon the credibility of a defendant who took the stand. It is even more difficult to fathom how a remark prefaced with "I suggest to you" is an injection of personal opinion, as opposed to a mere prefatory phrase. *See* Edwards v. State, 288

to the Bar for discipline,[96] and, in a subsequent case, carrying out the threat.[97]

The high watermark of this trend of reversals was reached in *State v. Murray*.[98] In *Murray*, the Florida Supreme Court reversed a holding of the Fourth District that a prosecutor's attack on the defendant's credibility constituted reversible error.[99] The supreme court quashed the district court's decision and ordered the trial court's judgment reinstated. The court characterized the comments in question as "excessively pungent,"[100] but focused upon the "overwhelming" evidence of the defendant's guilt[101] and noted that the prosecutor had been admonished upon objection.[102] The court further stated that "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless."[103]

2. United States v. Hasting

The court in *Murray* expressly stated that it agreed with the analysis of the United States Supreme Court in *United States v. Hasting*,[104] which involved a prosecutor's comment on the defendants' silence during summation.[105] In reversing the convictions,[106]

So. 2d 540 (Fla. 2d DCA 1974) (prosecutor's prefatory comment "I think" held not an expression of personal opinion sufficient to constitute prejudicial error). Federal courts generally allow reasonable inferences to be drawn from the evidence. *See, e.g.*, United States v. Braithwaite, 709 F.2d 1450, 1456 (11th Cir. 1983).

96. Jackson v. State, 421 So. 2d 15, 17 (Fla. 3d DCA 1982). The *Jackson* court noted that other sanctions, such as stern judicial admonitions, repeated reversals, the threat of discipline by superiors or, ideally, self-adherence to prosecutors' sworn oaths both of office and to the *Code of Professional Responsibility*, had all failed. *Id.* at 16. The court served notice that it was prepared to go to the extraordinary measure of analyzing each instance of abuse and referring instances of abuse to the Florida Bar or seeking discipline directly in circuit court. *Id.* at 17.

97. Molina v. State, 447 So. 2d 253 (Fla. 3d DCA 1983), *petition for review denied*, 447 So. 2d 888 (Fla. 1984). In *Molina*, the district court found that the prosecutor almost exactly replicated the error which had earlier predicated a reversal of the same case. "It quite clearly appears from this record that the prosecutor deliberately set about to circumvent our [holding] in *Molina v. State*, 406 So. 2d 57 (Fla. 3d DCA 1981) . . . ." 447 So. 2d at 255 (Pearson, J., concurring).

98. 443 So. 2d 955 (Fla. 1984).

99. 425 So. 2d 157, 158 (Fla. 4th DCA 1983), *quashed and remanded*, 443 So. 2d 955 (Fla. 1984).

100. 443 So. 2d at 957.

101. *Id.* at 956.

102. *Id.* at 957.

103. *Id.* at 956.

104. 461 U.S. 499 (1983).

105. *Id.* at 502. During summation, the prosecutor responded to an objection by stating:

the Seventh Circuit in *Hastings* refused to apply the harmless error rule because it "would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights."[107] The Supreme Court assumed that, in reversing the trial court, the court of appeals "was exercising its supervisory powers to discipline . . . prosecutors"[108] and saw the question presented it as "whether . . . in a purported exercise of supervisory powers, a reviewing court may ignore the harmless-error analysis of *Chapman*."[109] The Court answered this question in the negative[110] and reversed the court of appeals. The Court stressed that a federal court's supervisory powers "are not to be exercised in a vacuum. Rather, reversals of convictions under the court's supervisory power must be approached 'with some caution,' and with a view toward balancing the interests involved."[111] The Court went on to stress the factors it considered relevant and which were not fully addressed by the court of appeals:

> [The court of appeals] did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.[112]

The Court also suggested that better remedies than reversal exist to deter improper prosecutorial comment,[113] such as ordering the

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"The defendants at no time ever challenged any of the rapes, whether or not that occurred, any of the sodomies." *Id.*

In a concurring opinion, Justice Stevens found the prosecutor's remarks free from error, and that "[i]t is therefore unnecessary for this Court to consider the scope of the supervisory power of the federal appellate courts . . . ." *Id.* at 512-13 (Stevens, J. concurring).

Chief Justice Burger, the author of the majority opinion in *Hasting*, made a curious comment on Justice Stevens' point: "Justice Stevens may well be correct that the prosecutor's argument was permissible comment. The question on which review was granted assumed that there was error and the question to be resolved was whether harmless-error analysis should have applied." *Id.* at 506 n.4.

106. United States v. Hastings, 660 F.2d 301 (7th Cir. 1980), *rev'd sub nom.* United States v. Hasting, 461 U.S. 499 (1983).

107. *Id.* at 303.

108. 461 U.S. at 505.

109. *Id.*

110. *Id.*

111. *Id.* at 506-07 (citations omitted).

112. *Id.* at 507.

113. *Id.* at 506 n.5. Here, for example, the court could have dealt with the offending argument by directing the district court to order the prosecutor to show cause why he should not be disciplined, *see, e.g.*, SOUTHERN DISTRICT OF ILLINOIS RULE 33, or by asking the

prosecutor to show cause why he should not be disciplined, or referring the matter to the Justice Department's Office of Professional Responsibility for investigation.[114]

As to the nature of the error[115] that resulted from the prosecutor's comment on the defendants' silence, the Court noted that "the harmless-error rule governs even constitutional violations under some circumstances . . . ."[116] Therefore, since the Court in *Chapman* had "affirmatively rejected a per se rule . . ., it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations . . . ."[117] Because the court of appeals in *Hasting* failed to apply the harmless error rule,[118] the Supreme Court reversed.[119]

Consequently, in the federal system,[120] before a court may reverse a conviction for a prosecutor's remarks on a defendant's right to remain silent, the reviewing court must first review the whole record to determine whether the error was harmless. If the reviewing court is convinced that the error was harmless beyond a rea-

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Department of Justice to initiate a disciplinary proceeding against him. During the year 1980, the Department of Justice, Office of Professional Responsibility, investigated 28 complaints of unethical conduct and that one Assistant United States Attorney resigned in the face of an investigation of allegedly improper arguments made to a grand jury. Brief for Petitioner at 21 n.16, United States v. Hasting, 461 U.S. 499 (1983). The court also could have publicly chastised the prosecutor by identifying him in its opinion. *See* United States v. Modica, 663 F.2d 1173, 1183-84 (2d Cir. 1981).

114. *Hasting*, 461 U.S. at 506 n.5.

115. As previously noted, there was some debate as to whether any error did in fact exist. *Id.* at 502, 506, 512.

116. *Id.* at 508.

117. *Id.* at 508-09.

118. *Id.*

119. Based on an examination of the whole record which it had before it, the Court applied the harmless error rule and determined "beyond a reasonable doubt that the error relied upon was harmless." *Id.* at 512. Justices Blackmun, Brennan, and Marshall would have vacated the judgment and remanded the case to the court of appeals for application of the harmless error test. *Id.* at 512 (Blackmun, J., concurring); *id.* at 520, 523 (Brennan and Marshall, JJ., dissenting in part).

120. As one would expect, the court of appeals in each of the circuits applies the harmless-error rule to comments on defendants' silence. *See, e.g.* United States v. Cox, 752 F.2d 741 (1st Cir. 1985); United States v. Singer, 732 F.2d 631 (8th Cir. 1984); United States v. Barton, 731 F.2d 669 (10th Cir. 1984); United States v. Blanton, 730 F.2d 1425 (11th Cir. 1984); United States V. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1847 (1985); United States v. Shaw, 701 F.2d 367 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984); United States v. Rodriguez, 627 F.2d 110 (7th Cir. 1980); United States v. Parker, 549 F. 2d 1217 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977); Berryman v. Colbert, 538 F.2d 1247 (6th Cir. 1976); United States v. Tillman, 470 F.2d 142 (3d Cir.), *cert. denied*, 410 U.S. 968 (1972); Leake v. Cox, 432 F.2d 982 (4th Cir. 1970); United States v. Nasta, 398 F.2d 283 (2d Cir. 1968).

sonable doubt, the conviction should stand.

Having examined the United States Supreme Court's decision in *Hasting*, the Florida Supreme Court in *Murray* articulated a standard of review requiring application of the harmless error rule before a decision is reversed. The court noted that the district court in *Murray* had focused solely upon the prosecutor's statements and not on the evidence.[121] In this regard, the supreme court reaffirmed longstanding principles of law in this area and reversed a trend at the district court level which had gone too far.

The court indicated that reversal will be reserved for only the most egregious cases[122] and inferred that, short of the harmful error standard, appellate courts still have a duty to disapprove improper comments as a function of their supervisory powers.[123] The court followed the suggestion in *Hasting* and specifically approved disciplinary action against offending prosecutors, "in appropriate cases," as a remedy for prosecutorial misconduct.[124] What shall constitute such an appropriate case remains undefined.

VI. Call for Clarification

The *Murray* court's reliance, in dicta, on *Hasting*, generated considerable confusion because *Hasting* involved an impermissible comment upon the defendant's silence.[125] The United States Supreme Court approved the application of the harmless error standard before reversal of such cases.[126] The obvious question which arose was whether the Florida Supreme Court had, by implication, receded from a per se reversal rule on improper prosecutorial comment on a defendant's exercise of his right to remain silent.

This was precisely the issue confronting the Fifth District in *Rowell v. State*.[127] In *Rowell*, the prosecutor's witness made the comment reproduced at the beginning of this article[128] and the state, citing both *Hasting* and *Murray*, argued that before reversal can be ordered, the court must apply the harmless error doctrine. The *Rowell* court noted that *Murray* did not deal directly with a comment upon a defendant's silence; thus, the reliance upon *Hast-*

121. 443 So. 2d at 956.
122. *Id.*
123. *Id.*
124. *Id.*
125. 461 U.S. at 507-09.
126. *Id.*
127. 450 So. 2d 1226 (Fla. 5th DCA 1984).
128. *See supra* note 2 and accompanying text.

ing in the *Murray* decision constituted dicta.[129] The court went on to note that subsequent to *Murray*, the Florida Supreme Court in *State v. Strasser*[130] had relied upon pre-*Murray* law in reaffirming the per se rule of reversal for improper comment upon a defendant's right to remain silent.[131] The *Rowell* court indicated its preference for the *Hasting* rule and made the reference to the "acrid and familiar comment on the law by Mr. Bumble in *Oliver Twist*" to explain these seemingly contrary results.[132] The Fifth District then certified the following question as one of great public importance:

> Has the Florida Supreme Court, by its agreement in *State v. Murray* . . . with the analysis of the supervisory powers of appellate courts as related to the harmless error rule as set forth in *United States v. Hasting* . . . receded by implication from the per se rule of reversal explicated in *Donovan v. State* . . .?[133]

Similar questions were subsequently certified on five separate occasions by three district courts of appeal.[134]

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129. *Rowell*, 450 So. 2d at 1228.

130. 445 So. 2d 322 (Fla. 1984).

131. *Rowell*, 450 So. 2d at 1228. The *Rowell* court held:

> 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*. . . . This conclusion is buttressed by the fact that in the recent case of *State v. Strasser*, 445 So. 2d 322 (Fla. 1984), 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 (1976), and *United States v. Hale*, 422 U.S. 171 (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*.

Id.

132. *Rowell*, 450 So. 2d at 1228.

133. *Id.* (citations omitted).

134. Grissom v. State, 469 So. 2d 151 (Fla. 3d DCA 1985); Burns v. State, 466 So. 2d 1207 (Fla. 3d DCA 1985); Marshall v. State, 473 So. 2d 688 (Fla. 4th DCA 1985); Crawford v. State, 473 So. 2d 700 (Fla. 4th DCA 1985); Knox v. State, 471 So. 2d 59 (Fla. 4th DCA 1985); Barry v. State, 467 So. 2d 434 (Fla. 5th DCA 1985).

VII. Florida Supreme Court Rejects Per Se Reversal Rule

With the stage thus set, the Florida Supreme Court had to decide whether it would recede from the per se reversal rule. The court at first skirted the issue, then faced it squarely.

A. Bertolotti v. State

In *Bertolotti*,[135] the supreme court reviewed improper argument in the penalty phase of a murder trial.[136] The court expressed concern over the continuing trend of misconduct in this area[137] and that the harmless error doctrine might encourage prosecutors to believe that such actions could be taken without repercussion.[138] The court again stressed that sanctions should be directed at the offending prosecutor and not at the citizenry: "[I]t is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction."[139] The court also stressed the role of the trial court in acting swiftly to curb and correct such abuse.[140]

B. The Question Resolved: State v. DiGuilio[141]

The very next week, despite the mild misgivings expressed in *Bertolotti* that the harmless error rule might have a tendency to encourage misconduct, the Florida Supreme Court in *State v. DiGuilio*[142] fully and squarely rejected the per se reversal rule for comments directed to a defendant's silence. In so doing, the court added yet another chapter to Florida's long history of judicial vac-

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135. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985).

136. The court found present in the prosecutor's closing argument both the forbidden "Golden Rule" argument and an improper attempt to inflame the jury. *Id.* at 133.

137. "[W]e are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint." *Id.*

138. "Nor may we encourage them to believe that so long as their misconduct can be characterized as "harmless error," it will be without repercussion." *Id.*

139. *Id.* at 133-34.

140. *Id.* at 134.

> Moreover, we commend to trial judges the vigilant exercise of their responsibility to insure a fair trial. Where, as here, prosecutorial misconduct is properly raised on objection, the judge should sustain the objection, give any curative instruction that may be proper and admonish the prosecutor and call to his attention his professional duty and standards of behavior. *Id.*

141. 10 Fla. L.W. 430 (Fla. August 30, 1985), *petition for reh'g filed*, No. 65, 490 (Fla. Sept. 13, 1985).

142. *Id.*

illation on this point.

The court in *DiGuilio* described the history of Florida's per se rule in cases involving prosecutorial comment on a defendant's fifth amendment right as "long and consistent,"[143] although that was hardly the case.[144] Justice McDonald, writing for the court, placed great reliance upon the rationale of the federal position expressed in *Chapman*[145] and *Hasting*[146] and further noted the existence of Florida's statutory harmless error provisions.[147]

The court then suggested that Florida's per se reversal rule was based upon an incorrect belief that federal standards dictated this result: "We did not apply [the harmless error rule] to comments on silence previously because we believed, under *Miranda*, that the federal constitution required automatic reversal."[148]

This analysis ignores the longer history of the rule,[149] including its early adoption on independent state grounds, although doubtless the seemingly impregnable status of the *Miranda* rule led to the per se rule's longevity. The *DiGuilio* court, after noting that all fifty states and the federal courts had some variation of the harmless error rule,[150] which "promotes the administration of justice,"[151] noted that "[i]t makes no sense to burden our legal system with a new trial when the result will be the same."[152]

Although reiterating the fact that such comment constitutes error,[153] the court articulated the standard for appellate reversal as whether "[a]bsent the comment on silence, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"[154] The court then concluded that the federal standard was

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143. 10 Fla. L.W. at 431.

144. *See supra* text accompanying notes 58-63, 84-90. The court incorrectly traced its origin to the 1967 case of Jones v. State, 200 So. 2d 574 (Fla. 3d DCA 1967).

145. 10 Fla. L.W. at 432; *see* Chapman v. California, 386 U.S. 18 (1967).

146. United States v. Hasting, 461 U.S. 499 (1983).

147. "Florida has had a harmless error statute for some time now in both civil and criminal proceedings. §§ 49.041, 924.33 FLA. STAT. (1983)." *DiGuilio*, 10 Fla. L.W. at 431.

148. 10 Fla. L.W. at 431.

149. The historical background of the independence of the states to interpret their analogous constitutional provisions was recognized in the case of Florida v. Kinchen, 10 Fla. L.W. 446, 447 (Fla. Aug. 30, 1985) (Ehrlich, J., dissenting).

150. *DiGuilio*, 10 Fla. L.W. at 432.

151. *Id.* (citing *Chapman*, 386 U.S. at 22; *Hasting*, 461 U.S. at 508). The court stated that "[a]ll of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 10 Fla. L.W. at 432.

152. 10 Fla. L.W. at 432.

153. *Id.*

154. *Id.*

"more reasonable" than the former Florida rule.[155] The rejection of the per se rule was underscored the very next day in two opinions reaching the same conclusion.[156]

VIII. CONCLUSION

Although its analysis of the legal history is flawed, the Florida Supreme Court in *State v. DiGuilio* has resolved ambiguity in the application of the harmless error rule to improper prosecutorial comment on a defendant's right to remain silent. All improper prosecutorial comments, whether made in the federal or Florida courts, are now subject to the same harmless error test and a "beyond a reasonable doubt" standard.[157] The adoption of the harmless error rule is a desirable result both in terms of reconciling the federal and state standards and, more importantly, in reducing the number of occasions when society, victims, and witnesses are subjected to the abuse inherent in a retrial.

The Florida courts have concluded that contemporaneous objection is required to preserve the issue of improper prosecutorial comment for appeal. The preliminary issue of what constitutes an impermissible comment has been mooted for the most part by the adoption of the harmless error standard. Only the determination of the propriety of the subtle remark about a defendant's silence will cause courts difficulty. Clearly prejudicial remarks are normally deemed impermissible. Because subtle comments are far less likely to rise above the level of harmless error, it usually will be unnecessary for courts to reach the more difficult issue of impermissibility.

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155. *Id.* In keeping with the concerns he had previously expressed in this area, Justice Adkins dissented. *Id.* (Adkins, J., dissenting).

156. State v. Marshall, 476 So. 2d 150 (Fla. 1985); State v. Kinchen, 10 Fla. L.W. 446 (Fla. August 30, 1985), *petition for reh'g filed*, No. 64, 043 (Fla. Sept. 16, 1985).

157. We now adopt the harmless error rule. Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged. Such a comment, however, should be evaluated according to the harmless error rule, with the state having the burden of showing the comment to have been harmless beyond a reasonable doubt. Only if the state fails to carry this burden should an appellate court reverse an otherwise valid conviction.

Marshall, 476 So.2d at 153.