IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO.: [redacted]

[redacted],

Defendant.
_____/

MOTION FOR NEW TRIAL

COMES NOW, the Defendant, [redacted], by and through undersigned counsel, pursuant to Florida Rules of Criminal Procedure 3.5805, 3.590, and 3.600 and hereby respectfully moves this Honorable Court for an order granting the Defendant a new trial, on the following grounds:

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

1. No person shall be . . . compelled in any criminal matter to be a witness against oneself. Art. I, § 9, Fla. Const.

2. No prosecuting attorney shall be permitted before the jury or court to comment on the failure of the accused to testify in his or her own behalf. Fla. R. Crim. P. 3.250.

3. When a verdict has been rendered against the defendant . . . the court on motion of the defendant . . . may grant a new trial. Fla. R. Crim. P. 3.580

4. The court shall grant a new trial if . . . the prosecuting attorney was guilty of misconduct…or the court erred in the decision of any matter of law arising during the course of the trial, providing substantial rights of the defendant were prejudiced thereby. Fla. R. Crim. P. 3.600(b)(5) & (b)(6).

FACTS AND ARGUMENT

1. The Defendant was convicted on April 17, 2009 of Aggravated Assault on a Law Enforcement Officer, a first degree felony. Sentencing is pending, and a Pre-Sentence Investigation has been ordered.

2. Following the jury's verdict, the Defendant was remanded to the custody of the Walton County Sheriff's Department.

3. Pursuant to the aforesaid Rules, this Motion is timely filed within ten days of the rendition of the jury's verdict.

4. Pursuant to the aforesaid Rules, the Defendant is requesting this Court order a new trial based on the following statement of prosecutorial misconduct and error of law that occurred during the course of the Defendant's trial:

a. The Trial Court erred in denying Defendant's Motion for a Mistrial during the State's Rebuttal Argument, when the Assistant State Attorney [redacted] made mention of the Defendant's failure to testify.

b. Florida's Constitution provides a defendant with the right to decline to testify against himself in a criminal proceeding. Art. I, § 9, Fla. Const. Moreover, Florida Rule of Criminal Procedure

3.250 prohibits a prosecuting attorney from commenting before the jury or the court on the defendant's failure to testify. Therefore "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." Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000) (quoting State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985)) (emphasis added).

c. "Comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial." Kiner v. State, 824 So. 2d 271 (Fla. 4th 2002). A prosecutor's violation of the Defendant's exercise of his right to remain silent is judged by the ***harmless error*** test. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The "harmless error" test requires the state to show beyond a reasonable doubt that the specific comments made by the prosecutor did not contribute to the verdict. Id. at 1136. If the state cannot prove that there is no reasonable possibility

that the comments contributed to the defendant's conviction then a new trial must be granted. Id.

d. On many occasions Florida courts have found reversible error when confronted with comments from the prosecutor about the defendant's failure to testify. See e.g. Wilson v. State, 988 So. 2d 43 (Fla. 3rd 2008); Miller v. State, 847 So. 2d 1093 (Fla. 4th DCA 2003); Smith v. State, 843 So. 2d 1010 (Fla. 1st DCA 2003); Rigsby v. State, 639 So. 2d 132 (Fla. 2nd DCA 1994).

e. In Wilson the court reversed the defendant's conviction and remanded the case for a new trial because it found that during closing arguments, the prosecution impermissibly commented on the defendant's right to remain silent. Id. at 43. The prosecution stated:

> Members of the Jury, this isn't a murder case. It is an attempted purchase of cocaine. A stubborn fact. A crime. A crime, nonetheless.
>
> The defendant has had the opportunity to be able to have a jury trial and he has that right.

He had the right to remain silent
–

Id. at 44. Defense counsel objected to the prosecutor's statement and moved for a mistrial. Id. The trial court sustained the objection but denied defense counsel's motion for a mistrial. The appellate court found this denial to be in error. Id. at 43.

f. In Miller, the court reversed the defendant's conviction and remanded the case for a new trial because it found that the prosecution impermissibly commented on the defendant's right to remain silent. Id. at 1094. The prosecution stated that the judge "instructed you that the defendant has the right to remain silent. And he does. He did not take the stand in this case. But there were two witnesses." Id. at 1095. Defense counsel immediately moved for a mistrial, but the court denied the motion. Id. The appellate court found this denial to be in error. Id. at 1094.

g. In Smith, the Court reversed the conviction and remanded the case for a new trial

because it found that the prosecution impermissibly commented on the defendant's right to remain silent. Id. at 1010-11. The prosecution stated:

> A reasonable doubt can come from the evidence, a conflict in the evidence and a lack of evidence. From that testimony from that witness stand there is no reasonable doubt that was put forward to you today from that witness stand that he didn't commit the crime. *Nobody testified he wasn't the guy*.

Id. at 1011. Defense counsel immediately moved for a mistrial, but the motion was denied by the trial judge. Id. The appellate court found this denial to be in error.

h. In Rigsby the court reversed the conviction and remanded the case for a new trial because it found that the prosecution impermissibly commented on the defendant's failure to testify. Id. at 133. The prosecutor stated:

> Now, we heard Miss Corces' (appellant's counsel's) version as she stepped up to the podium about what happened that night, but we didn't hear that from the stand. . . In her version of the facts, Miss Corces stated they were

> arguing and while they were arguing that Vincent (the appellant) put the baby in water. Frankly, ladies and gentleman, you didn't hear from the stand from anyone who could testify as to exactly how it happened.

Id. Defense counsel objected to those statements and moved for a mistrial, but the motion was denied. Id. The appellate court found this denial to be in error.

i. The cases for which the court found the comments concerning the defendant's failure to testify to be improper but harmless error were cases where the evidence overwhelmingly supported a guilty verdict. See e.g. Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003) (finding that because the Defendant's voluntary confession of the crime was substantiated by fingerprint and DNA evidence, the guilty verdict was supported by the evidence and the prosecutor's comments constituted error harmless beyond a reasonable doubt); Boutwell v. State, 530 So. 2d 1092 (Fla. 1st DCA 1988) (finding that the evidence presented at trial as to Defendant's guilt was "very strong," and therefore

prosecutorial comments about the Defendant's failure to testify constituted harmless error).

j. In the case at bar, the statements made by Assistant State Attorney [redacted] concerning [redacted] failure to testify were very similar to and in fact more directly stated than the comments made in Wilson, Miller, Smith and Rigsby where the respective courts found the prosecutor's comments to be "fairly susceptible of being interpreted as referring to, a defendant's failure to testify." During his Rebuttal Argument, Assistant State Attorney [redacted] stated:

> Well, let's look at it from the perspective that the two deputies that had a perfect opportunity to see what was going on. In fact, on [redacted] property, they were the only ones who were sober there. [redacted] was drunk. We didn't hear from him. We didn't have to hear from him. He had the right not to testify. But the testimony of the officers was that they had a clear view. Yes, it was roughly seventy yards, but they saw the firearm come right at them.

(Tr. Excerpt Rebuttal Argument 1-9). The Assistant State Attorney's comments meet the requirements of the "fairly susceptible" test because he directly stated in reference to [redacted], "We didn't hear from him." This directly and overtly references [redacted] exercise of his right not to testify.

k. Moreover, the statements made by the Assistant State Attorney rise above the level of harmless error because the State will not be able to prove that there is no reasonable possibility that Assistant State Attorney [redacted] comments about [redacted] failure to testify contributed to [redacted] conviction. Unlike the cases where the court found that harmless error resulted from the prosecutor's comments, the evidence of [redacted] guilt is not overwhelmingly supported by the evidence.

WHEREFORE, for all the foregoing reasons, the Defendant respectfully prays that this Court will enter an order vacating the judgment against Defendant and

ordering a new trial pursuant to Florida Rules of Criminal Procedure Rule 3.5805, 3.590, and 3.600.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion has been mailed and hand-delivered to the following: Office of State Attorney, 524 US Highway 90 E, Defuniak Springs, Florida 32433, on this___day of April, 2009.

Respectfully Submitted,