IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD TRAYLOR,	:	
Petitioner	:	
v.	:	CASE NO. 70,051
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON JURISDICTION

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I PRELIMINARY STATEMENT

Petitioner, JOHN EDWARD TRAYLOR, was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court, and will be referred to as the state. A copy of the opinion of the District Court, Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986), is attached to this brief as appendix "A". Traylor's motion for rehearing is appendix "B", and the District Court's order denying rehearing, dated January 19, 1987, is appendix "C".

II STATEMENT OF THE CASE AND FACTS

The facts of this case are set forth in the opinion of the District Court, Traylor v. State, supra, at 1298-99 [Appendix A].

III SUMMARY OF ARGUMENT

In concluding that the introduction into evidence of Traylor's unconstitutionally obtained confessions to both the charged Florida murder and the collateral Alabama murder was "harmless error", the District Court applied the wrong standard of review. Instead of focusing on the potential impact upon the jury of the constitutional error in allowing the state to present Traylor's detailed confessions to the two murders, the District Court based its conclusion on the sufficiency, or (possibly) what it perceived as the overwhelming nature of, the remaining evidence. Thus, the opinion below expressly and directly conflicts with the decisions of this Court in State v. DiGuilio, 491 So.2d 1129 (Fla.1986); Long v. State, 494 So.2d 213 (Fla.1986); and Barry v. State, 494 So.2d 213 (Fla.1986). Under the circumstances of this case, if the proper standard of review had been applied, the error could not have been deemed "harmless". Felder v. McCotter, 765 F.2d 1245, 1250-51 (5th Cir. 1985); see Chapman v. California, 386 U.S. 18 (1967).

IV ARGUMENT

ISSUE

THE OPINION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN STATE V. DiGUILIO, 491 So.2d 213 (FLA.1986); LONG V. STATE, 494 So.2d 213 (Fla.1986); and BARRY V. STATE, 494 So.2d 213 (Fla.1986).

In its opinion issued November 14, 1986, the First District Court of Appeal agreed with petitioner's contention that his confessions, both to the charged Florida murder and to the Alabama murder which was used as "Williams-rule" evidence, were obtained in violation of his Sixth Amendment right to counsel. However, the Court concluded that those constitutitional violations amounted to "harmless error":

> The ultimate issue remains, however, as to whether this constitutional error was harmful. Such error may be harmless in the face of other overwhelming evidence of guilt. Kirkland v. State, 10 FLW 2642 (Fla. 1st DCA 1985). Here, aside from the confessions, there was evidence of Traylor's death threats prior to the murder as well as physical evidence placing him atthe scene of the crime. There were also the letters he sent to his judges acknowledging his guilt in both murders. Aside from this evidence, which we find sufficient to support the second-degree murder conviction, it is indicative of harmless error that despite the confessions the jury did not find Traylor guilty of premeditated murder as sought by the State. Therefore, although the confessions should have been suppressed, we find that under these circumstances the error was harmless and the conviction should not be reversed.

Traylor v. State, 498 So.2d 1297, 1301 (Fla. 1st DCA 1986).

In reaching this conclusion, the District Court failed to apply the standard set forth in Chapman v. California, 386 U.S. 18 (1967), which must be met before constitutional error may be declared "harmless". In applying the wrong standard of law, the District Court's decision expressly and directly conflicts with the decisions of this Court in State v. DiGuilio, 491 So.2d 1129 (Fla.1986); Long v. State, 494 So.2d 213 (Fla.1986); and Barry v. State, 494 So.2d 213 (Fla.1986).

In Chapman, the United States Supreme Court rejected the defendant's contention that all federal constitutional errors, regardless of the facts and circumstances, were reversible per se. Instead, the Court said, "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, supra, 386 U.S. at 22. However, the Court made it clear that the burden is on the state to demonstrate that the error could not have contributed to the verdict obtained. Chapman v. California, supra, 386 U.S. at 24. The Chapman Court, citing Fahy v. Connecticut, 375 U.S. 85 (1963), also "emphasize[d] an intention not to treat as harmless those constitutional

errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless." Chapman v. California, supra, 386 U.S. at 24.

In DiGuilio, this Court extensively discussed the Chapman principle, in the context of prosecutorial comment on a defendant's silence:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Stae v. DiGuilio, supra, at 1133.

* * *

> The most perceptive analysis of harmless error principles of which we are aware is that of former Chief Justice Traynor of the California Supreme Court. See Roger J. Traynor, The Riddle of Harmless Error (1970), and the dissent to People v. Ross, 67 Cal.2d 64, 429 P.2d 606, 60 Cal.Rptr. 254 (1967) (Traynor, C.J. dissenting), rev'd sub nom, Ross v. California, 391 U.S. 470, 88 S.Ct. 1850, 20 L.Ed.2d 750 (1968). In his dissent, Chief Justice Traynor maintained that comments on Ross's failure to testify were harmful and that the majority misunderstood and misapplied the Chapman harmless error test. Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court subtitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:
>
> > Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation, and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

State v. DiGuilio, supra, at 1136.

This Court went on to hold, contrary to the conclusion which had been reached by the Fifth District Court of Appeal, that the error in DiGuilio was not "harmless" under the circumstances of that case:

> The district court below found that there was sufficient evidence to support the conviction, absent the impermissible comment on post-arrest silence, and concluded that, if the harmless error rule could be applied to the facts of the case, the conviction would be affirmed because the error was harmless beyond any reasonable doubt. The district court's reference to a sufficiency-of-the-evidence test suggests a misunderstanding of the harmless error test. Because we wish to make it clear that the harmless error test is to be rigorously applied, we examine the record ourselves rather than remanding. We conclude that the error was harmful and the conviction should be quashed.

State v. DiGuilio, supra, at 1137.

The DiGuilio opinion concludes wtih the following synopsis:

> In his perceptive essay . . . former Chief Justice Traynor addressed various common errors which, historically, appellate courts fall into when applying harmless error analysis. The worst is to abdicate judicial responsibility by falling into one of the extremes of all too easy affirmance or all too easy reversal. Neither course is acceptable. The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error upon the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

State v. DiGuilio, supra, at 1139.

The theory of the defense in this case was that the killing of Tina Nagy occurred while petitioner was in the heat of passion, and that the jury should convict him of manslaughter, but not first or second degree murder. Petitioner's oral and written confessions to the Nagy murder were used by the prosecution not only to show identity, but also to rebut the defense's contention that the crime was committed in the heat of passion. The introduction, as "Williams-rule" evidence, of petitioner's oral confession to the Beason murder was justified by the state on the same basis, i.e., to "raise an inference" that the charged murder of Tina Nagy was not committed in the heat of passion, but was fully intentional. In his closing arguments, both initially and on rebuttal, the prosecutor argued at length that the inconsistencies and omissions in petitioner's August 22, 1980 statements to Detective Warren demonstrated that the killing of Tina Nagy was not manslaughter.

The evidence which should have been suppressed included three detailed confessions, two oral and one written, to two separate murders. While it is true that other incriminating statements were admitted into evidence, none of these even approached the challenged statements in degree of detail, or in their being emphasized by the state. See Felder v. McCotter, 765 F.2d 1245, 1250-51 (5th Cir. 1985). None of the remaining statements reveal anything at all about the circumstances of the killings, or about petitioner's state of mind at the time they occurred. Most importantly, none of the remaining statements were inconsistent with petitioner's defense that the killing of Ms. Nagy occurred in the heat of passion.

The state has clearly failed to meet its burden under Chapman and DiGuilio of demonstrating that the unconstitutionally obtained and erroneously admitted confessions did not contribute to the jury's decision to convict petitioner of second degree murder rather than manslaughter, and to reject his partial defense that

the crime was committed in the heat of passion. The fact that the jury "split the difference" between the first degree murder verdict urged by the state and the manslaughter verdict urged by the defense may mean that the error was not as harmful as it could have been; but it certainly does not mean that the error was "harmless", particularly under the rigorous standard set forth in DiGuilio.

In Felder v. McCotter, supra, at 1250-51, the court, in granting the writ of habeas corpus, rejected the "harmless error" argument advanced by the state:

> The thesis that two confessions do no more harm than one is ingenious, but one we have never adopted. Ms. Cobb's oral recall of Felder's statement was far less impressive than the detailed account spelled out in his written confession, which is deliberate, lengthy, and precise. Chapman v. California and a host of other cases teach that, for constitutional error to be ignored, it must be harmless beyond a reasonable doubt. A mere comparison of Ms. Cobb's testimony with the written statement introduced at trial demonstrates the weight that a jury might put on the later written and signed statement. Harm is demonstrable. The state cannot show that admission of Felder's confession to the police officer was harmless beyond a reasonable doubt.

In the present case, the confessions obtained in violation of petitioner's Sixth Amendment rights were the only confessions which contained any detail, which shed any light on the circumstances of the offense, which went directly to the key issue of intent, and which were used extensively by the prosecutor to refute petitioner's theory of the case. In Kirkland v. State, 478 So.2d 1092, 1094 (Fla. 1st DCA 1985), cited in the DCA's opinion in the instant case, in sharp contrast, the inadmissible statements and the admissible statements were described as "almost identical." Thus, even assuming arguendo that Kirkland was correctly decided under the rigorous standards set forth in Chapman and Diguilio,[1/] that

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[1/] Kirkland cites to the original DiGuilio opinion as issued on August 29, 1985. The final opinion in DiGuilio, on rehearing granted (upon which petitioner is relying for conflict jurisdiction) was issued on July 17, 1986. Thus, the District Court in Kirkland did not have the benefit of the views expressed in the latter opinion.

case does not support the conclusion that constitutional error can be dismissed as "harmless" under the far different circumstances presented here. In the instant case, the unconstitutionally obtained confessions to the charged homicide and to another murder played a substantial part in the state's presentation of its case, and perhaps even a larger part in the prosecutor's argument to the jury. Unlike Kirkland v. State, the content of these confessions was not duplicated or even approached by admissible statements. It is a virtual certainty that the confessions played a major role in the jury's deliberations as well. The prosecutor asked them to pay close attention to the alleged inconsistencies and incriminating details in the confessions, and, moreover, the jury had no reason to believe that they were not supposed to consider the confessions. As Chapman and DiGuilio make clear, the main inquiry in constitutional "harmless error" analysis is not on the sufficiency or strength of the untainted evidence of guilt, nor is it on whether the appellate court believes the jury would have likely reached the same verdict anyway. Rather, the main focus is on the effect of the constitutional error itself. If the error was trivial, or hypertechnical, or resulted in the admission of evidence which was cumulative or non-prejudicial, then, in the context of a particular trial, it may well have been "harmless" even if it involved a constitutional right. See Chapman v. California, supra, 386 U.S. at 22 ("We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . ."). Conversely, however, Chapman recognizes that constitutional errors that "affect substantial rights" of a party may not be treated as harmless. "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of a harmless" Chapman v. California, supra, 386 U.S. at 23-24. It is hard to imagine any type of evidence which

is more relevant, or more adversely influential, than a full confession, unless perhaps it is (as here) two full confessions.

Petitioner is entitled to a fair trial and, as a result of constitutional error, he didn't get one. The confessions unconstitutionally obtained by Detective Warren, with the help of Alabama detectives Grubbs and Gay were a dominant feature--maybe the dominant feature--of petitioner's trial. If the state believes it can persuade another jury to convict petitioner of second degree murder without recourse to those confessions, it should be given an opportunity to try. But petitioner's present conviction, based upon a jury verdict so heavily infected with constitutional error, must not be allowed to stand. Chapman v. California, supra; State v. DiGuilio, supra. This Court should accept jurisdiction based on conflict with DiGuilio, Long, and Barry. Moreover, since under the circumstances of this case, it is clear that no finding of "harmless error" which would comport with the Chapman-DiGuilio standard can be made, petitioner requests that this Court accept the case for review and reverse for a new trial, rather than merely remanding for reconsideration in light of DiGuilio.[2/]

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Court accept jurisdiction of this case.

Respectfully submitted,

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[2/]Petitioner's motion for rehearing in the District Court [Appendix B], which was denied without opinion [Appendix C], is based almost entirely on the District Court's failure to apply the DiGuilio standard.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General Norma J. Mungenast, The Capitol, Tallahassee, FL, 32301, this 20 day of February, 1987.

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