

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
<u>ISSUE: (RESTATED) THIS COURT SHOULD NOT</u> <u>ACCEPT JURISDICTION TO REVIEW THE DECISION</u> <u>IN TRAYLOR V. STATE, 498 SO.2D 1297 (FLA. 1ST</u> <u>DCA 1986) SINCE PETITIONER HAS NOT SHOWN AN</u> <u>EXPRESS AND DIRECT CONFLICT WITH STATE V.</u> <u>DIGUILIO, 491 SO. 2D 1129 (FLA. 1986); LONG</u> <u>V. STATE, 494 SO. 2D 213 (FLA. 1986); AND</u> <u>BARRY V. STATE, 494 SO. 2D 213 (FLA. 1986)</u> <u>ON THE SAME QUESTION OF LAW.</u>	4-8
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Barry v. State,</u> 494 So.2d 213 (Fla. 1986)	i,4,5,6,7
<u>Long v. State,</u> 494 So.2d 213 (Fla. 1986)	i,4,5,6,7
<u>Nielsen v. City of Sarasota,</u> 117 So.2d 731 (Fla. 1960)	7
<u>Reaves v. State,</u> 485 So.2d 829 (Fla. 1986)	7
<u>State v. DiGuilio,</u> 491 So.2d 1129 (Fla. 1986)	i,4,5,6,7
<u>Traylor v. State,</u> 498 So.2d 1297 (Fla. 1st DCA 1986)	i,1,4,5,6,7
 <u>OTHER</u>	
§ 924.33, Florida Statutes	4

IN THE
SUPREME COURT OF FLORIDA

JOHN EDWARD TRAYLOR,

Petitioner,

v.

CASE NO. 70,051

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Respondent, hereinafter referred to as the State accepts Petitioner's Preliminary Statement and will use the designations set out therein. A copy of the opinion of the First District Court of Appeal, Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986) is attached to this brief as appendix A.

STATEMENT OF THE CASE AND FACTS

The State refers this Court to the First District's opinion for a recitation of the facts. (Appendix A)

SUMMARY OF ARGUMENT

The State contends that this Court should not accept jurisdiction as Petitioner has failed to demonstrate that the First District's opinion, on its face, is in express and direct conflict on the same question of law with any decision from this Court. The First District applied the proper harmless error analysis and resolved the issue in the State's favor. Petitioner's brief reflects only a difference of opinion with the First District's result; it does not show an improper application of the law and thus an express and direct conflict with this Court's decisions. Accordingly, jurisdiction should be denied.

ISSUE

(RESTATED) THIS COURT SHOULD NOT ACCEPT JURISDICTION TO REVIEW THE DECISION IN TRAYLOR V. STATE, 498 SO.2D 1297 (FLA. 1ST DCA 1986) SINCE PETITIONER HAS NOT SHOWN AN EXPRESS AND DIRECT CONFLICT WITH 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) ON THE SAME QUESTION OF LAW.

Petitioner urges this Court to invoke jurisdiction on the grounds that the First District Court of Appeal's decision in Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986) expressly and directly conflicts with the following decisions from this Court on the same question of law: 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). Petitioner alleges that the First District applied the wrong standard of review in concluding that the admission of Petitioner's confessions constituted harmless error. For the following reasons, the State submits conflict jurisdiction has not been established.

In DiGuilio, supra, this Court accepted review of the Fifth District's certified question to determine whether the harmless error doctrine or the per se rule of reversal applied to comments on a defendant's remaining silent. Recognizing the language in Section 924.33 of the Florida Statutes (that no judgment shall be reversed unless the appellate court concludes the error injuriously affected the substantial rights of the Appellant and that there shall be no presumption that errors are reversible unless it can be shown that they are harmful), this Court held that comments on a defendant's silence

were subject to the harmless error analysis. Petitioner sets out on pages four and five of his jurisdictional brief those portions of the DiGuilio opinion in which this Court emphasized that the overwhelming evidence of the Appellant's guilt is only one factor the appellate court must consider in the harmless error analysis. The focus, however, is on whether there is a reasonable probability that the error influenced the jury's verdict. DiGuilio, supra at 1135, 1138.

In Long v. State and Barry v. State, 494 So.2d 213 (Fla. 1986), this Court, relying on DiGuilio, concluded that the Fifth District had erred in both cases by relying solely on a sufficiency of the evidence test to determine the comments on the defendants' remaining silent were harmless errors. This Court remanded those cases back to the Fifth District for consideration in light of DiGuilio. It must be emphasized that jurisdiction was not invoked in Barry and Long due to an express and direct conflict with DiGuilio; rather this Court accepted review because the Fifth District had certified virtually the identical question it had in DiGuilio, i.e., whether the harmless error or reversible per se rule applied to comments on defendant's remaining silent.

Despite Petitioner's contentions to the contrary, the State submits the proper harmless error standard was applied in the case sub judice and further contends that no express and direct conflict on the same question of law appears within the four corners of the Traylor decision. The appellate court noted in its opinion the following overwhelming evidence of Petitioner's guilt which the court found

sufficient to support the second-degree murder conviction: Petitioner's death threats to the victim prior to murder, physical evidence placing him at the scene of the crime, (his hair on her body and his bloody palmprint found on the wall near the body) and inculpatory letters sent to his Florida and Alabama judges confessing to the crimes and requesting the death penalty. Traylor, supra at 1301. The court did not stop with that analysis, as apparently the Fifth District did in Barry and Long, rather it followed the DiGuilio standard and focused on the possible impact the confessions had on the jury's verdict:

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.

Id. (Emphasis added). The confessions in question are not described or included within the four corners of the majority opinion, but the opinion does correctly reveal that the State introduced the confessions to show evidence of premeditation. The simple fact that the jury did not return a conviction of first degree murder demonstrated to the First District that the jury did not rely on the confessions in reaching their verdict. Stated in DiGuilio terms, the court concluded there was no reasonable probability that the confessions affected the verdict. On this basis the State submits Petitioner is simply incorrect in suggesting the wrong standard of review was applied. Rather, a review of pages six through nine of Petitioner's brief indicates his dispute is actually with the result reached by the appellate court that the error was indeed harmless. In this portion of his brief Petitioner

reargues facts and inferences which are not on the four corners of the opinion and are not relevant to this Court's decision to accept or reject jurisdiction. See Reaves v. State, 485 So.2d 829 (Fla. 1986). Furthermore, a difference of opinion with the district court's ultimate result does not demonstrate an express and direct conflict on the same question of law and therefore cannot be a basis for this Court to accept jurisdiction. This Court's comments in Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960) supports this contention:

We do not here suggest that if we had been charged with the responsibility of the Court of Appeal in the instant case we would have arrived at the same conclusion which they reached. In fact, it is altogether possible that we might have arrived at an entirely different conclusion as to the ultimate effect of the ... evidence....Such a difference of view, however is not the measure of our appellate jurisdiction to review decisions of Courts of Appeal because of alleged conflicts with prior decisions of this Court on the same point of law.

Id. at 734.

It is apparent from the four corners of the Traylor opinion that while the First District reviewed the overwhelming evidence of guilt, it also focused on the potential impact the error had on the jury and concluded the confessions did not affect the jury's verdict of second-degree murder. Inasmuch as this is what DiGuilio requires in applying the harmless error standard, the State submits no express and direct conflict exists with DiGuilio; Barry, or Long. Accordingly, the State respectfully requests this Court to reject Petitioner's invitation to participate in a harmless error analysis that has been

properly conducted below but which has been resolved against him. Since no proper basis for jurisdiction exists, this Court should decline review.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Honorable Court to deny jurisdiction of this appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Norma J. Mungenast
NORMA J. MUNGENAST
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Steven L. Bolotin, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida 32302, on this the 12th day of March, 1987.

Norma J. Mungenast
NORMA J. MUNGENAST
ASSISTANT ATTORNEY GENERAL

OF COUNSEL