OA 11-3-87 AMG

IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD TRAYLOR,

Petitioner,

v. CASE NO. 70,051

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, JOHN EDWARD TRAYLOR, was the defendant in the trial court, appellant in the District Court of Appeal, and will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecutor in the trial court and the appellee in the District Court of Appeal, and will be referred to as the state.

The record proper (volumes I-III) in the District Court of Appeal will be referred to by use of the symbol "R" followed by the appropriate page number. The transcripts of pre-trial and trial proceedings prepared for the District Court of Appeal (volumes IV-XVII) shall be referred to by the symbol "T" followed by the appropriate page number. All emphasis is added unless indicated otherwise.

II STATEMENT OF THE CASE AND FACTS

The facts are reflected accurately in the District Court of Appeal's opinion in this case. However, the facts will be presented as petitioner presented them to the District Court of Appeal:

On June 7, 1980, the body of Tina Nagy was found in her apartment in Jacksonville, Florida (T-1136,1150-1152). She had been stabbed 22 times in the chest, and there was a ligature mark on her neck (T-1262,1270-1273). [The medical examiner testified at trial the stab wounds were the cause of death (T-1272-1273,1276-1277)].

Among the items of evidence which were discovered in the apartment was a palm print impression on the wall, and what appeared to be dried blood (T-1158; 1207). Subsequently, a crime lab technician cut out a piece of sheetrock containing the palm print, and turned it over to the Florida Department of Law Enforcement (T-1207-1209).

On June 11, 1980, petitioner, John E. Traylor, also known as Jason William Riley, was charged by information with the second degree murder of Ms. Nagy and a capias was issued for his arrest (R-162-165). Petitioner and Ms. Nagy had been involved for about a year in an intense and turbulent love affair (T-1883-1889; 1905-1908; see T-1854-1856). Ms. Nagy was married, but her relationship with petitioner was apparently common knowledge, even to her estranged husband, Julius (T-1560,1585,1605-1606,1614).

On August 5, 1980, the body of Debra Beason was found at her residence in Birmingham, Alabama (T-1738-1740). There appeared

to be a stab wound in her chest, and an electrical cord was stretched from around her neck through a cabinet handle, and tied to the refrigerator handle (T-1739).

Birmingham police learned that an individual known as Jason Riley had been seen with Ms. Beason on the night before her body was discovered, at a bar called the Blazer Grill (T-606). Riley was also seen leaving Ms. Beason's apartment the next morning (T-607).

The police contacted Riley's wife, Ginger, in order to ascertain his whereabouts (T-569,584). Ms. Riley told the police that she had met her husband when they were both patients on the psychiatric ward of the "UAB" Hospital (T-199-200,257,584). She told them that he was staying at the Siesta Motel in the adjacent town of Irondale (T-569,585). The detectives followed her to the motel (T-585).

There, Ms. Riley went to the room and got her husband to come out, whereupon the detectives arrested him and placed him in the patrol car (T-569,586-587).

[Subsequently, the Birmingham police ran Riley's prints through the "NCIC", and learned that he was John Traylor, and that he was wanted in Jacksonville, Florida, in connection with the Tina Nagy case (T-178,210,265-266)].

Petitioner had his first appearance in the Jefferson County, Alabama District Court on August 18, 1980; he was adjudged indigent and, upon his request for court-appointed counsel, Attorney Orson "Pete" Johnson was appointed to represent him (R-156-157).

Johnson, who was informed by letter of his appointment on the following day, contacted Detective George Grubbs of the Birmingham Police Department on August 20, 1980, informed him that he was representing petitioner, and instructed and requested that the detectives not talk to Traylor anymore unless he (Johnson) were present (T-286-287; see R-198).

Johnson had tried to get in touch with Sergeant James Gay, but Gay was not in the homicide office when the call was made (T-287). Consequently, Johnson spoke with Grubbs, who was the lead detective in the Beason case, and who was the only officer he could get in touch with in the homicide office (T-287, 239-240). He asked Grubbs to relay the message to Gay (T-303). Johnson came away from the conversation with the understanding that the detectives would not talk to petitioner anymore without informing him about it (T-287). Johnson also advised petitioner not to talk to the police (T-287-288).

On August 21, 1980, Detective John Warren of the Jacksonville Sheriff's Office received a phone call from Sergeant Gay, who told him that they had petitioner in custody in Birmingham; they had run his prints through the NCIC and obtained a "hit" that he was wanted in Jacksonville (T-178,210,265-266).

The next morning, August 22, 1980, Warren flew to Birmingham, where he was met at the airport by Detectives Grubbs and Gay (T-178). Warren was <u>not</u> made aware that petitioner was represented by an attorney (T-180). The detectives went to the prosecutor's office, and petitioner was brought down from the

jail to be interviewed (T-179-181).

Petitioner was brought from his jail cell to the interview room at the request of the Jacksonville detective (Warren) and at the direction of the Alabama detectives (Grubbs and Gay) (T-200-201; 208,267-268). Petitioner did not request or initiate the interview (T-208).

During the initial portion of the interrogation, Warren and Gay were in the room with petitioner, while Grubbs stood outside (T-181,1743). Warren advised petitioner of his Miranda rights, and asked him to sign the form if he understood them (T-182-184). Petitioner did so (T-184). Detective Warren told petitioner that he was there in connection with Tina Nagy:

> As I stated earlier, I told him who I was, why I was there, had to do with Tina Nagy. He denied that at first, knowing Tina Nagy. I said, you know, you were boyfriend, girlfriend, I asked him when was the last time he saw her. Finally, he told me he saw her in May of 1980. I told him, I said, look I can put you in the room, you were there. Tina is dead, you killed her. I said, there's two sides to every story and I want to know your side. He got very quiet. Approximately five minutes he hung his head down, nothing was said for that period of time. Finally I asked him, I said, John, did you kill Tina. He nodded his head yes and I asked him why, and then he started telling me about the incident and why he did it.

(T-187).

Petitioner told Detective Warren that he and Tina had had an argument the night before; the next morning he woke her up and they argued some more (T-248). Tina slapped him, called him

a punk, and told him he should never have come out of prison (T-248, 1654). There was a struggle, in which Tina scratched petitioner's face and knocked his glasses off, and he punched her in the mouth (T-165). She ran into the kitchen and came back with a steak knife (T-1655). She told petitioner either that she could kill him and call the police because he was in her apartment, or that she would kill him for assaulting her in her apartment (T-248,1655). Petitioner grabbed her by the throat and pulled her to the floor, and she dropped the knife (T-248,1655).

Petitioner picked up the knife and began stabbing her (T-248, 1655). He then took her car keys and jewelry, and left the state (T-1655). Detective Warren asked petitioner about strangulation; petitioner denied strangling the victim, other than choking her to the floor (T-1656).

Detective Warren then asked petitioner about the Alabama murder:

> I asked him about the Beason case, which is the Birmingham, Alabama case. Again, he wanted to deny that. I told him the cases are very similar. I said, you were in the scene in that case. Birmingham can put you in the scene, at which time he admitted to us that, yes, he did kill Tiny Nagy and Debra Beason.

(T-188).

Petitioner had met Debra Beason at a Birmingham bar (T-1674-1676). They went back to Ms. Beason's residence (T-1675). Petitioner and Ms. Beason were making love on the living room floor, and Ms. Beason began making "sexual pleasure sounds" which reminded petitioner of Tina (T-1666,1719). He looked up and saw

a butcher knife on the coffee table; he grabbed it and stabbed Ms. Beason once in the chest and once in the back (T-1666,1719).

Petitioner denied that he strangled Ms. Beason, and denied any knowledge of an electrical cord (T-1667,1719).

Detective Warren then wanted to tape record petitioner's statements, but petitioner said he would prefer to write them out (T-188-189). Petitioner wrote out a confession to the Nagy murder (T-189-191,1657-1661). He then asked for and received permission to call his wife; the conversation lasted nearly an hour (T-191-192,251-252).

Petitioner told her essentially what he had just told Detective Warren (T-252). Then petitioner began to give a written statement concerning the Alabama homicide (T-194). Detective Grubbs was in the room with petitioner, and Warren and Gay were standing outside (T-194,253,293).

Johnson went into the interview room, and spoke angrily with Grubbs (T-294). He said he was going to see "Bugger Red" (Chief Meyers) about it, because he had told Grubbs not to talk to his client (T-294,304). Grubbs then left the room, and Johnson remained inside with petitioner for several minutes (T-195-196,254,294). Johnson took the sheet of paper on which petitioner had been writing (T-255,303).

When Johnson came back out of the room, he told the detectives he didn't want them talking to his client anymore and to take him back upstairs (T-196,254).

Detective Warren was aware at the time he interviewed petitioner on August 22, 1980, that there was an information

in Jacksonville, Duval County, Florida, charging petitioner with the second degree murder of Tina Nagy, and that there was a capias for his arrest on that charge (T-209-210).

Warren testified (at the hearing on petitioner's motion to suppress the August 22, 1980, statements) that he did not serve a warrant on petitioner nor did he advise petitioner that he was under arrest for the Nagy murder (T-216). [At a subsequent hearing, on petitioner's second motion to suppress,[1] Warren testified on proffer that he did advise petitioner on August 22, 1980, that he was under arrest for the death of Tina Nagy (T-644)].

In any event, there was a hold on petitioner from Jacksonville through the NCIC, as a result of information and capias from Duval County (T-209,209,214,222). Consequently, petitioner was not free to leave the jail (and would not have been free to leave the jail even if the Alabama case had not existed) at the time he was interrogated by Detective Warren.

On March 11, 1983, pursuant to the Interstate Agreement On Detainers and based on the Duval County information charging petitioner with second degree murder, petitioner was delivered from Alabama into the temporary custody of the State of Florida (R-80).

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[1] Petitioner's second motion to suppress was not primarily directed to the August 22, 1980, statements. However (as a result of information obtained from the state on discovery after the initial motion to suppress was denied), appellant sought to relitigate the factual question of when Detective Warren informed appellant he was under arrest (T-240-42, 558-64). The state objected to relitigating this question (T-559). The trial court permitted the defense to proffer Warren's testimony that he first advised petitioner that he was under arrest in the Nagy case on August 22, 1980 (T-563-64; 641-45).

On March 17, 1983, the state sought and obtained an indictment charging petitioner with first degree murder in the death of Ms. Nagy (R-1-2).

The state filed a notice of intent to introduce "similar fact" or "Williams Rule" evidence at trial; specifically, evidence concerning the murder of Debra Beason in Birmingham, Alabama (R-94).

On August 5, 1983, the defense sought to suppress the oral and written confessions, in both the Florida and Alabama cases, said confessions made by petitioner on August 22, 1980 (R-158-160,179-187).

While a number of grounds were asserted in the motion, the defense placed its main emphasis on the violation of petitioner's Sixth Amendment rights (see R-179-186; T-332-348).

After a hearing on August 11, 1983, the trial court denied the motion to suppress (T-173-384; R-197-204).

In its findings of fact, the trial court specifically found that the Birmingham attorney, Pete Johnson, called Detective Grubbs and instructed him that he did not want the police to talk with his client, and that this request was not communicated by Grubbs to any other law enforcement officer of either Alabama or Florida (R-198).[2]

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[2]Since the prosecutor, in the hearing on the motion to suppress, attempted to attack Johnson's credibility on this point, it is important to note that the trial court, as trier of fact, chose to believe the witness' testimony.

The trial court recognized that petitioner's Sixth Amendment argument presented a serious question requiring close scrutiny (R-201; T-383-384). However, the trial court concluded that petitioner's confessions made to Detective Warren on August 22, 1980, did not take place during a critical stage of the Florida prosecution (R-201).

The court based its conclusion on the fact that (according to Warren's testimony in the first suppression hearing) petitioner was not under arrest on the Florida charge, and on the state's argument that the information charging appellant with second degree murder and the capias issuing therefrom:

> ...were filed not for the purpose of instituting a then-and-there prosecution of the defendant but was absolutely necessary for the entry of the defendant's capias into the national computers for his detention whenever found caused by his own flight from the State of Florida.

(R-201).

In the alternative, the trial court concluded that petitioner had waived his right to counsel before confessing to both the Florida and Alabama murders (R-201). The court found as a fact that petitioner was brought from the jail to the District Attorney's Office at the request of Detective Gay, to be interviewed by (Florida) Detective Warren (R-198). The court further found that petitioner "...raised no objection and did not refuse to go." (R-198).

The trial court based its finding of a waiver on the "totality of the circumstances", and re-emphasized the facts

that petitioner never personally invoked his right to counsel on either charge, and that he "disregarded" his Alabama lawyer's advice not to talk to the police (R-202).

The court also noted petitioner's awareness of his right to counsel, and his knowledge regarding the status of the Alabama and Florida cases (R-202). The trial court did not find that petitioner had in any way initiated the interrogation.

On December 2, 1983, petitioner was found incompetent to stand trial, and committed to the state hospital in Chattahoochee (R-283-289). On August 16, 1984, he was adjudged competent and was returned to Jacksonville to stand trial (R-314).

The case proceeded to trial before a jury on February 25-March 1, 1985. Over the defense's renewed objections (T-1651-54; 1658,1715,1718,1725), petitioner's oral confession of August 22, 1980, both the Nagy (Florida) and Beason (Alabama) murders, and his written confession of that date to the Nagy murder, were admitted into evidence (T-1646-1679,1709-1735).

Over defense objection (T-1791,1808-1810,677-699; R-339,342, 402-404), the state was permitted to introduce letters written by petitioner to Judge Soud in Jacksonville and to Judge Charles Nice in Birmingham, in which petitioner stated his desire to change his pleas to guilty, and asked for the death penalty (R-446, 451-452; T-1835-1837,1851-1852). [The letter to Judge Soud was written from Chattahoochee, and was apparently mailed in violation of a notice issued by the state hospital restricting petitioner's communication (R-342,402-404; T-677-691,1852-1853)].

"Williams Rule" evidence concerning the Alabama murder, largely consisting of petitioner's statements, was presented to the jury (T-1665-1668,1718-1727,1737-1745,1753-1755,1835, 1851), over defense objection (R-140-151; T-1340-1386,1663-1664).

The state also introduced the testimony of a FDLE fingerprint analyst, who stated his opinion that petitioner's palm print matched the palm print which was found on the wall of Ms. Nagy's apartment (T-1509-1510,1524). The comparison was done through photographs, because the piece of sheetrock which contained the palm print was lost by the state (T-1505,1525; R-248-249; T-446,1426-1427).

FDLE Serologist Stephen Platt testified that there was blood staining present on the piece of wall board which contained the palm print (T-1431-1433). Platt found human blood staining on various items of evidence (including a blanket, a sheet, a rug, a doll, and several articles of clothing), but was unable to determine a blood type (T-1436-1456). He also found human blood staining on the blade of the knife which was found in the victim's hand (T-1448,1155). Platt did not find any blood staining on a length of electrical cord which was found in the room (T-1449-1450, 1158).

FDLE Microanalyst Linda Hensley testified that several hairs found on Ms. Nagy's person matched petitioner's head hair or pubic hair, and could have come from the same source (T-1547-1548). Other hairs found on Ms. Nagy's person did not match petitioner's hair (T-1550-1553).

The defense did not contend that petitioner was not the person responsible for Ms. Nagy's death; the defense position was that petitioner's act was committed in the heat of passion, and that the jury should convict him of manslaughter (T-2041-44,2047).

The state, on the other hand, contended that the killing of Ms. Nagy was premeditated, and that the jury should convict petitioner of first degree murder (T-1994,2025,2071-2073). To this end, the state presented testimony regarding a phone conversation between petitioner and Beth Linderman (the manager of the store where Tina Nagy worked) in which petitioner said that if Tina didn't leave town in 24 hours, she'd be dead (T-1580,1589,1623).

Testimony of both state and defense witnesses indicated that petitioner was in extreme emotional turmoil over Tina's breaking up with him (T-1557,1562,1565,1615-1617,1854-1856,1869-1870,1979).

The manager of the apartment complex where Ms. Nagy's body was found, and the police officer who responded to the scene, testified that the screen to the bedroom window was bent and partially out (T-1135,1138,1143-1144). The prosecutor theorized that petitioner had gained entrance to the apartment in this manner (T-1998,2013-2014,2063-2064).

However, Ms. Nagy knew that petitioner was in her apartment before she returned home (T-1567,1570-71). Ms. Nagy's friend, Beverly Marsland, who had been waiting for Ms. Nagy at Smuggler's Lounge, called her apartment to find out where she was; petitioner answered, identified himself, and said that Tina wasn't home (T-1566-1567).

When Tina arrived at Smuggler's, Ms. Marsland told her that petitioner had answered the phone in her apartment; Tina seemed to be surprised (T-1567,570-571). Tina left Smuggler's between midnight and 12:30 a.m. (T-1571-1572).

When her body was found the following day, she was wearing a sheer negligee (T-1152,1198-1199,2035-2036). There was evidence of recent sexual intercourse (T-1273-1274).

In his closing argument, in an attempt to rebut petitioner's "heat of passion" defense, the prosecutor emphasized a number of asserted discrepancies between petitioner's confessions made to Detective Warren on August 22, 1980, and the physical and circumstantial evidence as testified to by the state's witnesses (T-2015-19). The prosecutor had this to say about the way the confessions were obtained:

> And, of course, you heard the testimony from Detective Warren who went to Alabama once he found that they had John Traylor in custody and it's interesting because there sits Jason Riley in an Alabama jail, a Jason Riley. When all of a sudden in walks a Jacksonville homicide detective, a homicide in Jacksonville, Florida, and he says to him, are you John Traylor? He says no. Denies that. He says, did you kill Tina Nagy. He says no, I didn't do that. Then Detective Warren says, I know you're John Traylor, I know you killed Tina Nagy. Now, there's two sides to every story, so why don't you tell me about it? The defendant thought. You recall Detective Warren's testimony, he put his head down and he thought, and I submit to you Detective Warren, an experienced, experienced homicide detective, he outsmarted the defendant because he allowed him, he told him there's two sides to every story, as if one side could be

disputed and your side could be be believed, but, in fact, the other side of that story, two sides to the story, the other side of it is the undisputed and uncontroverted physical evidence at the crime scene that showed there was a premeditated murder. The undisputed side of the story are the witnesses who heard the threats that the defendant made to the victim prior to her death. That's the undisputed side. But he gave the defendant a chance to explain it. So, what did the defendant do? He gave a written statement and oral statements that he presented -- that he wrote out that would exculpate himself. He presented a statement that would be most favorable to his explanation of how the crime went. But, see, it just doesn't fit with the physical evidence and with what the witnesses said about the prior threats. It just doesn't fit.

(T-2015-16).

The prosecutor then argued:

He, the defendant, said he stabbed her, that he stabbed the victim. Well, he doesn't say that, in fact, he stabbed her 22 times. He, in fact, denied in his oral statement, he denied strangling her, when in fact, the physical evidence, the expert pathologist, Dr. Lipkovic, testified that she was, in fact, strangled with an electric cord. He doesn't -- the defendant doesn't say anything about those neck wounds with the knife, the chest wounds with the knife. He just says he stabbed her. Well, that's not true and the physical evidence shows that. We know that. And then, of course, you heard Detective Moneyhun discuss and it was admitted to you that the evidence brought to you merely showed the motive, intent and plan of the defendant, that the defendant, after being advised of his rights, admitted to Gay and Grubbs and Warren, that, in fact, he had killed Debra Jo Beason under -- and the similarities of those murders are very significant to you because Debra Jo Beason, and you heard the testimony from the detectives,

> Debra Jo Beason was stabbed, Debra Jo Beason had been strangled with the electrical cord tied around her neck. Debra Jo Beason was found nude in an upstairs apartment. Very same, similar circumstances as the murder of Tina Nagy and yet the defendant wants you to believe, as he tells you in his written statement, that the murder of Tina Nagy was just something that came over his ordinary judgment.

(T-2018-19).

The prosecutor next made reference to Detective Warren's testimony that while he was escorting petitioner to the bathroom on August 22, 1980, after petitioner had written out his confession to the Nagy and after the phone conversation with his wife, petitioner told Warren that he had better make sure petitioner was convicted and sent to prison for life or else he would kill again (T-1162-1163). [This testimony was admitted over the defense's renewed objection (T-1662-1663)].

The prosecutor argued:

> And then, of course, as further evidence of the defendant's intent you heard Detective Warren testify the defendant said to him, you better convict me because I'll kill again. Does that suggest to you a person who merely committed a manslaughter because his judgment was overcome, his normal judgment was overcome? Use your common sense.

(T-2019-20).

In his closing argument on rebuttal, the prosecutor continued with the same theme:

> Now, let's look just for a second at some of these circumstances in terms of how they relate to this voluntary statement the defendant gave to Detective Warren. It's significant and it goes to show, again, this

defendant's thinking and his conduct because the only way, ladies and gentlemen, that you can ever determine premeditation or a person's state of mind is to look at the acts, the actions, the conduct of what a person does and the things he says after something happens and you can infer back to a specific circumstance, a specific act, what a person planned or what he wanted to do and, as already covered by Mr. Rosner earlier, the circumstances surrounding Detective Warren's initial confrontation with this defendant of his true identity some sort of response, get a story as if the other side was not the truth in terms of the facts. We look at the 22 stab wounds that the defendant didn't mention in his written statement, didn't mention it in his oral statement to Detective Warren. The neck wounds. Read the statement. Did he indicate that he also cut at Tiny Nagy in the neck area in his statement? No. Did he tell Detective Warren that? No.

How about the slash mark? Look for the slash mark. Where is that in that statement of the testimony, yet we know that's a fact, it happened?

How about the way Ms. Nagy was found, partially nude, the nightgown up to her thighs. Did he tell Detective Warren about that?

More importantly, the bloody palm print. Did he indicate at any point in his written or oral statement to Detective Warren how that bloody palm print found itself on Ms. Nagy's bedroom wall.

Strangulation. He denied it. He denied it orally and didn't put it in his written account of how it happened, yet we know about that aspect. The State of Florida would submit that all the circumstances would indicate that there are some other lies and statements concerning provocation, justification for taking of Tina's life.

He didn't mention anything about the false information, about where he was going. He didn't talk about the jewelry. He did not

> mention about the close proximity of the wounds. He sure didn't mention the electric cord. Didn't mention anything about any electric cord.

(T-2064-66).

The jury returned a verdict finding petitioner guilty of second degree murder with a deadly weapon (R-498; T-2112).

On March 15, 1985, after denying petitioner's motion for new trial (R-499-502; T-2122), the trial court adjudicated petitioner guilty of that offense, sentenced him to 150 years imprisonment, and retained jurisdiction over parole for the first one-third of his sentence (R-503-509; T-2146).

Petitioner appealed his conviction to the Florida First District Court of Appeal. The First District Court of Appeal found that both the Alabama and Florida confessions were improperly admitted into evidence. However, the First District Court of Appeal found that the admission of these confessions, while constitutional error, was "harmless". Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986).

On June 11, 1987, by written order, this Court accepted jurisdiction to review the First District Court of Appeal's opinion in this case.

III SUMMARY OF ARGUMENT

In concluding that the introduction into evidence of Traylor's unconstitutionally obtained confessions to both the charged Florida murder and collateral Alabama murder was "harmless error", the First District Court of Appeal applied the wrong standard of review or misapplied the proper 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 confession 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.

Under the circumstances of this case, if the proper standard of review had been applied correctly, the error could not have been deemed "harmless".

IV ARGUMENT

ISSUE PRESENTED

THE FIRST DISTRICT COURT OF APPEAL IN ITS OPINION IN THIS CASE MISCONSTRUED OR IMPROPERLY APPLIED THE HARMLESS ERROR TEST AS SET FORTH IN STATE V. DIGUILIO, 491 So.2d 1129 (FLA. 1986) (ON REHEARING).

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. In light of Michigan v. Jackson, 475 U.S.__, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), Wyrick v. Fields, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982) and other cases cited therein, it is difficult to see how the First District Court of Appeal could have ruled otherwise. Petitioner does not believe that that conclusion is judicially negotiable in this proceeding.

However, the First District Court of Appeal concluded that these constitutional 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, 478 So.2d 1092 (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 at the 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 or misapplied the standard set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), which must be met before constitutional error may be declared "harmless". In applying the wrong standard of law or misapplying the harmless error test, the District Court's decision ignored the precepts explained in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) [on rehearing] and the District Court fell into the same traps that caught the courts in 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.

Id. at 386 U.S. 22.

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. Id. at 386 U.S. 24. The Chapman court also made it clear that constitutional errors were not to be treated as harmless if these errors affected the substantial rights of a party. For instance, an error in admitting relevant evidence "which possibly influenced the jury adversely" cannot be treated as harmless.

In DiGuilio, this Court on two separate occasions confronted "the riddle of harmless error" (to borrow the title of former chief justice Traynor's perceptive essay). This Court's original opinion in DiGuilio [State v. DiGuilio, 10 FLW 430 (Fla. Aug. 29, 1985)] did not contain the in-depth analysis that the opinion on rehearing contained. The original opinion did quote Chapman [10 FLW 431] and did cite to United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

On rehearing, 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.

Id. 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, [citations omitted]. In his dissent, Chief Justice Traynor maintained that comments on Ross' 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 substitutes 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 comments 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.

Id. at 1137.

The DiGuilio opinion concludes with the following comments:

> 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 fuidance 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.

Id. at 1139.

In this case, the confessions made by petitioner to Detective Warren on August 22, 1980, were strongly emphasized by the state at trial. [See T-1121-1122 (opening argument); T-1646-1669 (testimony of Detective Warren); T-1709-1721 (testimony of Detective Gay); T-2015-2020; 2064-2068 (closing argument)].

Detective Warren related to the jury, in detail, petitioner's oral confession to the murder of Tina Nagy (T-1654-1656), and read to the jury petitioner's written confession to the Nagy murder (T-1659-1661). Warren also testified to the jury, again in some detail, petitioner's oral confession to the murder of Debra Beason (T-1666-1667).

The state then called Detective Gay from Birmingham, who repeated the gist of petitioner's oral confessions to both the Nagy murder and the Beason murder (T-1715-1716,1719).

In addition to confessing to the murders, petitioner's statements included admissions that he placed the murder weapon (a knife) in Ms. Nagy's hand, that he stole her car and jewelry, and that he disposed of the stolen property during his flight from the state (T-1655-1656,1660-1661,1716).

In the confessions, petitioner denied strangling Ms. Nagy, other than choking her to the floor, denied strangling Ms. Beason at all, and (in the Alabama case) denied any knowledge of an

electrical cord (T-1656,1667,1719).

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 (see T-2042-2047). The jury was instructed on manslaughter (T-2077-2078; R-487).

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 Alabama 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 intentional (T-1364-1365,1381). In his closing arguments, both initially and on rebuttal, the prosecutor argued at length that the inconsistencies and omissions in appellant's August 22, 1980, statements to Detective Warren demonstrated that the killing of Tina Nagy was not manslaughter (T-2015-2020,2064-2068).

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, 1250-1251 (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 "compromised" 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 1250-1251, the court, in granting the writ of habeas corpus, rejected the harmless error argument advanced by the state:

> The thesis that two confesions 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. Calfornia 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 this 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 partial defense that the killing of Ms. Nagy occurred in the heat of passion.

In Kirkland v. State, 478 So.2d 1092, 1094 (Fla. 1st DCA 1985), cited in the District Court's opinion in this 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 (more about this later), Kirkland does not support the conclusion that the constitutional error can be dismissed as "harmless" under the far different circumstances of this case.

Here, the state made extensive use, in its presentation of evidence and in its argument to the jury, of detailed, in-custody confessions to the murders of two women in two different states; these unconstitutionally obtained confessions went directly to the main disputed issue in the trial: intent. The prosecutor came

right out and told the jury (repeatedly) that the details of the confessions were inconsistent with the physical facts and demonstrated the falsity of the defense's position that the crime was manslaughter (T-2015-2020,2064-2068).

In light of this analysis, how can the state now claim that it has shown beyond a reasonable doubt that these confessions, relied on so heavily by the prosecutor, could not have contributed to the jury's decision to reject a manslaughter verdict? The prosecutor obviously believed that the confessions would strengthen his case with the jury; otherwise he would not have argued aggressively and successfully, in the face of petitioner's constitutionally based motion to suppress, that these statements should be admitted into evidence (R-188-196; T-359-373). See Gunn v. State, 78 Fla. 599, 604-605 (1919).

The police did not interrogate petitioner in custody, in the absence of his attorney, in order to do him a favor; the prosecutor did not insist on the introduction of these statements before the jury because he considered them to be exculpatory. To the contrary, he believed that he could use them to convince the jury that the charged killing was premeditated, and that it was not done in the heat of passion, and he succeeded in the latter endeavor.

As Chapman and DiGuilio make clear, the main inquiry in constitutional "harmless error" analysis is not on the sufficiency or the 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. Conversely, however, Chapman recognizes that constitutional errors that "affect substantial rights" of a party may not be treated as 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, one written, two oral.

A final point about the Kirkland v. State opinion upon which the First District Court of Appeal relied. Kirkland cites to the original DiGuilio opinion as issued on August 29, 1985. The final opinion in DiGuilio, on rehearing granted was issued on July 17, 1986. Thus, the District Court in Kirkland did not have the benefit of the rigorous harmless error analysis expressed in the July 17, 1986, DiGuilio opinion.

Moreover, the Kirkland court fell into one of the common errors cited by former Chief Justice Traynor: It concluded that the error in Kirkland was harmless because there was "overwhelming

evidence of guilt." Kirkland at 1094-1095.

This is the same type of error that this Court complained about in Long v. State and Berry v. State, 494 So.2d 213, 214 (Fla. 1986):

> In both cases below the district court applied an incorrect standard. In Long, the court stated 'The evidence in this case was sufficient in our opinion, to overcome the error so we affirm the conviction.' 469 So.2d at 1. In Berry, the court stated: The evidence of guilt here is overwhelming, so if the comment was erroneous, it was harmless. 467 So.2d at 437 [footnote omitted].

Likewise, the First District Court of Appeal in this case committed the same error: ["Such error may be harmless in the face of other overwhelming evidence of guilt." and "Aside from this evidence, which we find sufficient to support the second degree murder conviction, it is indicative of harmless error...." Traylor v. State, 498 So.2d at 1301.]

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 (perhaps 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 these confessions, it should be given an opportunity to try. But petitioner's present conviction, based upon a jury verdict so heavily and thoroughly infected with constitutional error, must not be allowed to stand. Chapman v.

California; State v. Diguilio, supra.

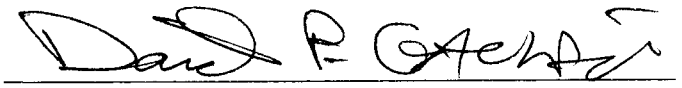
In light of the District Court's Appeal's inability to properly apply the harmless error rule, petitioner requests that this Court reverse for a new trial, rather than merely remanding for reconsideration in light of DiGuilio.

V CONCLUSION

Based on the foregoing arguments and authorities, petitioner respectfully requests that this Court reverse his conviction for second degree murder and remand this case to the trial court for a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, John E. Traylor, this 29th day of July, 1987.

David P. Gauldin

DAVID P. GAULDIN