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IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD TRAYLOR,

Petitioner,

v. Case No. 70,051

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, State of Florida, shall utilize the same abbreviations cited by Petitoner. All emphasis is added unless otherwise noted.

The lower court opinion of Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986) (Nimmons, J. concurring), is the subject of this proceeding.

STATEMENT OF THE CASE AND FACTS

The State of Florida, Respondent, adds the following information to Petitioner's statement to sufficiently present the facts in a light most favorable to the prevailing party:

On August 6, 1980, Birmingham Detective Gay arrested Jason Riley (one of Traylor's alias names) for the August 5, 1980 murder of Debra Beason in Birmingham, Alabama. (T 258). Gay interviewed Riley on August 6th, August 8th, sometime between August 8th and August 20th, and on August 20th, when Detective Gay discovered that Riley was John Edward Traylor. There was an outstanding warrant from Jacksonville, Florida for Traylor's arrest for the murder of Tina Nagy. (T 259-260). On each of these occassions, Gay informed Petitioner of his constitutional rights. During these interviews, Petitioner never asked to speak to an attorney and never requested that the discussions stop. (T 254-255). From these various conversations with Petitioner, Gay was aware that Petitioner had met his wife at a psychiatric ward in a Birmingham hospital. However, Gay had never conferred with Petitioner's psychiatrist or reviewed his psychological history. (T 256-257). On August 21, 1980, Gay called Detective Warren in Jacksonville informing him of Petitioner's custody in Birmingham. (T 178). Warren, aware of Florida's outstanding information and capias (T 209) and aware that Petitioner had already made statements to the Birmingham police concerning Beason's murder

charge (T 218), flew to Birmingham on August 22, 1980 to continue his investigation of Nagy's death. (T 217, 267). In the course of his investigation, Warren became aware from Alabam detectives that Beason's death had some siimilarities with Nagy's death. (T 179, 219).

Gay and Detective Grubbs (Birmingham police) picked up Warren from the airport, discussed each other's cases and arranged for an interview with appellant in the district attorney's office (T 179). At 9:20 a.m. on August 22nd, Warren and Gay proceeded to interview Petitioner. (T 180, 243, 268). Grubbs remained outside the office. (T 181). Warren was in control of the interview initially and Gay was there "out of protocol." Gay did not discuss Beason's death, although eventually the similarity of the MO's of Beason's and Nagy's deaths was noted on by Warren. (T 272).

The interview began with Warren giving appellant a constitutional rights advisement form. (See recitation of rights form at T 184-185). Petitioner read out loud the document in its entirety without any trouble. Warren then read it back to Petitioner, and according to Gay, Petitioner had no trouble following Warren. Warren then asked appellant if he understood his constitutional rights, to which appellant answered affirmatively. (T 184, 232, 244-245). Petitioner then signed the form as an indication that he understood his rights. (T 184).

This procedure took approximately five to ten minutes. (T 187).

Warren next informed Petitioner that he was there to investigate Nagy's death. Initially, Petitioner denied being John Traylor, or knowing Nagy. (T 182, 187). Warren told Petitioner he knew he and Nagy had been "boyfriend, girlfriend," and then he asked when he had last seen her. Petitioner replied that it was in May of 1980. Warren then told Petitioner Nagy was dead, he could place Petitioner in the room, and that Petitioner had killed her. Warren then said "there's two sides to every story and I want to know your side." After Petitioner hung his head and remained silent for about five minutes, Warren asked him, "John, did you kill Tina." Petitioner nodded yes, and he proceeded to make an oral statement concerning Nagy's death. (T 187, 248, 1654-1656, 1715-1716). Particularly relevant is Petitioner's noted suspicion that Nagy and Petitioner's brother were starting to become very good friends and possibly were to start dating each other. (T 1656).

Warren then asked Petitioner if he killed Beason, which Petitioner denied. After informing Petitioner that the cases were very similar and Birmingham could place him at the scene, Petitioner admitted he killed both Nagy and Beason. (T 187, 249, 1665-1667, 1718).

After both statements, Gay, Warren and Petitioner took a twenty to thirty minute break at which time Petitioner was

brought a coke. (T 188, 1656, 1669). The interview resumed shortly after 11:00 a.m. Warren requested permission to tape the conversation and appellant replied that he'd rather not use a tape recorder but would write out statements. (T 189). During the next forty-five to fifty minutes, Petitioner, without any assistance from Gay or Warren (T 193, 250), wrote out the following statement:

> On August 15th, 1980, approximately 11:30 p.m., Tina Nagy called for me at Linda Elder's house. I returned the call, at which time Tina said that I [should] come over and spend the night. Upon arriving at her apartment, I noticed that Tina was not home. She told me on the phone that the door would be unlocked so I went in and waited for her. After five or ten minutes, I walked out and sat on the steps. Soon afterwards she came home and we went inside. Tina began cursing at me for no apparent reason, calling me names and making derogatory statements about my family. We smoked some pot and then went to bed. When the alarm clock went off the next morning, I had to wake Tina up. She got up and began cursing at me again, saying that I'm a no good punk and that I should never have come out of prison. She slapped me in the face, knocking my glasses off and scratching my face. I call her an asshole and said that she had only been using me all along and then I hit her in the mouth. She ran into the kitchen from the bedroom, saying that she was going to call the police. She came back with a knife in her hand and said that she could kill me for hitting her because I was in her -- underlined twice -- apartment. I then grabbed her by the throat [sic] and told her to go ahead. She dropped the knife and I

> pushed her to the floor, at which time I picked up the knife and stabbed her in the chest. I took her rings, her bag of pot and a bottle of valium and went to her car, got in it and left. After filling it up with gas I left and went west toward Georgia. I dropped the car about 50 miles east of Birmingham and hitchhiked from there. And that's the end of it and there's a big line through it from there on with his signature on it.

(T 1659-1661).

At the completion of his statement admitting to killing Nagy, Petitioner asked if he could call his wife. According to Warren's testimony at the suppression hearing, neither Petitioner's wife nor her mental problems were mentioned until Petitioner made the statement that he needed to tell her where he was and what he had done. (T 230). Gay overheard Petitioner telling his wife in the one-hour conversation that followed that he was John Traylor, and that he had killed Nagy and Beason. (T 192, 251-252). At approximately 1:00 p.m. Petitioner was brought his lunch (T 192). Prior to resuming the interview, Warren accompanied Petitioner to the bathroom at which time Petitioner advised Warren that "he was glad all this was over, that he had been caught. . .its a good thing that you all caught me. . . [they] better make sure [I] stay in prison for the rest of [my] life [and] that [I do] not get out because if [I do] get out, [I] will kill again." (T 1662-1663). [This statement does not appear to have been elicited at the suppression hearing.] At 1:15 p.m.

Petitioner returned to the office and agreed to give Detective Grubbs a written statement of the Alabama case while Gay and Warren waited outside the office. At this point, Pete Johnson walked up, asked where his client was, interrupted appellant and Grubbs, and told all the detectives not to talk to his client anymore and to take him back u stairs. (T 194-196, 254). This was the first time either Gay or Warren were aware that Petitioner had an attorney. (T 194, 213, 254).

According to testimony from Johnson, he was appointed on August 18, 1980 to represent Petitioner only on the Beason case. Johnson received notification of this appointment on August 19, 1980. On August 20, 1980, Johnson called the Birmingham detectives and told Grubbs to relay a message to Gay not to talk to his client anymore without him being present. (T 286, 303). On that same day Johnson instructed appellant not to talk to the police. (T 287-288, 319). On the morning of August 22, 1980 Johnson received for the first time information from the public defender's office in Jacksonville that Petitioner was involved with Nagy's murder. (T 323-325).

Both Gay and Warren testified that neither prior to nor during the August 22, 1980 conversation was Petitioner ever promised anything, coerced, beaten or threatened, or under the influence of drugs or alcohol. (T 185-187, 246-247). During the interview Petitioner did not appear to be affected psycho-

logically, depressed, upset, lethargic, or under mental strain or duress; rather, Petitioner was cool, calm, and collected, rather quiet, soft spoken and coherent. (T 185, 246). Petitioner appeared to understand the questions concerning his rights, he answered questions in a very articulate and complete manner, without wandering. He appeared to be very intelligent, and he was more than willing to talk to Warren and Gay. (T 186, 201-202, 220, 246, 276). Petitioner never requested an attorney or invoked his right to remain silent. (T 186, 277).

After hearing the above testimony and arguments (T 330-375), and after reviewing memoranda, (R 179-195), Judge Soud denied the motion to suppress. (R 197-204). Judge Soud's order concluded that Petitioner was fully advised of his constitutional rights pursuant to Miranda, that he executed a waiver of those rights, that he fully understood his rights, intelligently waived each one, and freely and voluntarily spoke to Warren. He also noted that for Fifth Amendment purposes Petitioner never personally invoked his right to have counsel present nor did he ever indicate that he wished not to speak with Warren. He also ruled that the presence of counsel was waived for the reasons more fully set forth in the resolution of appellant's Sixth Amendment claim. (T 199-200). Judge Soud initially held that the Sixth Amendment right to counsel had not yet attached. (R 201). Even if the interview was a critical stage of the prosecution, the court found that from a totality of the circumstances, appellant

waived his right to counsel with regard to the confession to the Florida murder and with regard to the oral statements pertaining to the Alabama murder. (T 201-202). Judge Soud held that the Sixth Amendment right to counsel could be waived if the record showed an intentional relinquishment of a known right or privilege and that the total circumstances reflected that relinquishment:

> From all the circumstances garnered herein, it seems clear that the Defendant had a state of mind in which he knew the nature of criminal prosecutions, knew the impact the confessions would have on that prosecution, knew the necessity and right of having counsel present, knew the significance of following legal advice from counsel, knew and understood the adversary nature of criminal proceedings, and in spite of all that, freely and openly talked about his criminal involvements not only to the Alabama and Florida detectives but to the Birmingham newspapers as well.

(R 203-204).

At trial, in addition to offering the August 22, 1980 oral and written statements, the State elicited the following evidence: Apparently on May 15, 1980 Nagy walked out on Petitioner. (T 1856). On the afternoon of June 5, 1980 Petitioner called the store that employed Nagy and told another co-manager "This is a friend of Tina's, please tell her if she doesn't leave town within twenty-four hours, she'll be dead." (T 1579-1580, 1583). Petitioner sounded mad on the phone and his

voice was shaking. He never called back or apologized and the co-manager never told Nagy of the threat. (T 1581, 1584). Petitioner made the phone call from Carolyn Joyce's home. Both Carolyn and her ex-husband heard the threat, the latter recalling the comment to be: "this town is not big enough for the two of us and if she doesn't get out of town within forty-eight hours, I'm going to kill her." This witness also stated that Petitioner seemed agitated. (T 1587-1590, 1623-1624).

At approximately 5:00 p.m. on June 5th, Petitioner told Patricia Hamilton that Nagy did not want to see him anymore and that Petitioner was upset. (T 1557, 1560). On June 6th, Petitioner told Nagy's friend, Beverly Marshland, that he was very much in love with Nagy, that she did not love him, and that he did not know what to do. (T 1563). Beverly and Nagy were to meet at a bar that night around 10:00 p.m. after Nagy got off work. At 10:15 p.m. Beverly called Nagy's apartment. Petitioner answered, identified himself, and said that Nagy was not there. Nagy arrived at the bar about five minutes later and acted surprised when Beverly told her Petitioner had answered her phone. Nagy's husband, who had recently moved to Atlanta, also tried to call her apartment around 10:30 p.m. that night, but did not get an answer. (T 1563-1571, 1592). When Nagy did not show up for work at 9:00 a.m. the next morning, her co-manager called the police and asked them to go by her house. (T 1582).

At 10:50 a.m. on June 7th, 1980, the police, using a pass key, entered Nagy's apartment and found her lying on her back on the floor beside the bed, covered in blood on her upper torso, and wearing a pink night gown that had large amounts of holes on the right breast area. She was partially covered with a blue blanket that was hanging down off the bed. Full rigor mortis had set in and her body was cold. In Nagy's left hand was a serrated-edge steak knife. (T 1134, 1136-1137, 1151-1152, 1155, 1323). Hair collected from Nagy's right hand microscopically proved to be the same as hairs in the head-hair standard from Petitioner. (T 1547). The room was found to be in complete disarray. (T 1155, 1207). A woman's bobby pin was lodged in the venetian blind, which was crinkled where someone's head may have struck it. The screen to the windown was bent and was partially out. The glass window was down and probably shut after the screen had been knocked loose. (T 1155-1156). The manager of the apartments testified that on June 6th the window screen had not been bent or damaged. (T 1547). The screen covering the glass sliding door had been cut so that the lock and latch could be reached. (T 1151).

Petitioner's palmprint, in the form of dried blood, was found five feet up the wall straight off the end of the bed. (T 1158, 1207, 1510). There were also numerous smudges on the wall which appeared to be blood. (T 1207). Blood was found on the blue blanket, the knife, a white bra, a slip, a T-shirt found in

the clothes hamper, two pillow cases and the fitted sheet that was on the bed, a doll that was found close to the door of the bedroom, two blue rugs-one in the bedroom and one in the bathroom, tissue from the waste basket in the bathroom, and the bathroom sink. (T 1203, 1324-1331, 1436-1454).

The Chief Medical Examiner, Dr. Lipkovic, performed an autopsy on Nagy. Some of Tina's wounds were bruises, predominantly found on the right side of the neck, which were consistent with a person grabbing her neck and applying pressure (T 1260, 1278). Also on her neck was a well-defined, straight line like depression or furrow that came from a ligature that was both pressing and rubbing against the neck. (T 1262). These marks were consistent with the type of electrical cord found at the foot of the bed on the floor. (T 1264).

According to Lipkovic, the ligature mark or stangulation could have caused unconsciousness in the victim and had to have occurred within the same period of time as the other wounds. (T 1275-1276). Based on the fact that no cyanosis in Nagy's face was observed, if the ligature had suppressed the blood supply, it had to have been removed before death. (T 1286-1287). Finally, towards the midline of the neck were two shallow nicks, most probably done by the tip of the knife and then several criss-crossing scrape abrasions that most probably were caused by the blade of the knife as it was drawn across the neck in different

directions. (T 1262).

Nagy also had abrasions and carpet-burn type injuries on the back of her body, shoulder blades, the back of the elbows and on the knees. There was an intense linear bruise on the right lower leg that was probably caused by contact with the bottom rail of the bed frame. (T 1260). Nagy's left hand had several cut wounds which are commonly described by forensic pathologists as defense wounds. (T 1261, 1276). Also present were bruises in the left upper chest and the right mid-thigh area. (T 1261). A split on the underside of her lip was present and could have been caused by a knuckle hitting her. (T 1266, 1288).

The fatal wounds were six of twenty-two stab wounds on Nagy's right breast, which penetrated a considerable distance into lung tissue. One of those actually cut the pericardial sack. Very few of the remaining sixteen stab wounds were nicks. (T 1270-1272). According to Lipkovic, the twenty-two wounds concentrated in the right chest area meant that Tina was partially immobilized. Either Nagy was incapacitated from defending herself and not moving during at least a good part of these stab wounds or she might have even been unconscious. (T 1276).

In the course of the autopsy, Lipkovic found intact spermatozoa present in Nagy's vaginal orifice, which indicated a very short interval between death and intercourse, probably not

more than a couple hours or so. (T 1273-1274, 1308). In addition, hair collected from Nagy's right leg was determined to be microscopically the same as hairs in the pubic hair standard from appellant. (T 1548).

Other evidence offered at trial consisted of two letters written by Petitioner to Judge Nice, in Birmingham, Alabama, dated December 10, 1980 and to Judge Soud in Jacksonville, Florida, dated January 11, 1984. (R 446, 452, T 1835-1837, 1851-1852). In the letter to Judge Nice, Petitioner admitted that he killed Beason and Nagy. He stated he had been a mentally deranged person for most of his life, he was unsure if his sickness could be cured, and the only punishment sufficient for what he did was death. Petitioner then expressed his desire to plead guilty to the Alabama charge and go to Florida "and get it all over with down there." (T 1851-1852). Petitioner's letter to Judge Soud stated his competent and certain decision to be put to death as swiftly as possible, his sincere desire to change his plea from not guilty to guilty, and his hope that the only sentence Judge Soud would impose would be death by electrocution. (T 1835-1887). Both letters were admitted despite Petitioner's objections.

On February 26, 1985, after the trial had begun, Judge Southwood held a hearing on the admissibility of Williams Rule evidence, regarding the Beason killing. (T 1341-1385). The State

pointed out to the court the following factual similarities between the two cases:

> . . .Debra Jo Beason died as a result of being stangled and stabbed in Birmingham, Alabama. She was found with an electric cord around her throat tied to a kitchen cabinet and also refrigerator door. She had been stabbed with a butcher knife, that her body was found almost totally nude in a spread eagle position on the floor of her apartment, that she also sustained knife wounds to the neck, that she, in fact, was a white female in the 20's, similar to age to Ms. Nagy, that the defendant had sex with Ms. Beason, as well as having sex here with Ms. Nagy . . . somewhat immediately prior to the commission of the [crime] . . . . That the defendant denied strangulation in that murder. He denied strangulation in this murder. . . . that both victims were found on the floor of the apartment. That jewelry was taken from both victims, jewelry was taken from Ms. Nagy and also jewelry was taken from Ms. Beason as well . . . the defendant, in giving a confession to the Alabama murder to Detective Warren indicated that Ms. Beason made the same type of sounds as he was having intercourse with her as Ms. Nagy had and it triggered the murder in Alabama . . . .That . . . the admission[s] by this defendant to both the Jacksonville murder and the Alabama murder were intertwined, namely that he talked about both of them jointly to both Detective Warren and Gay, Detective Gay being of the Birmingham Police Department, Detective Warren being of the Jacksonville Sheriff's Office, that he confessed to his wife in their presence, indicating, number one, I'm not really Jason William Riley, my name is John Traylor and I've killed both Debbie Beason here in Alabama and Tina Nagy in Jacksonville. Additionally . . .

> both murders occurred in the summer of 1980, the Jacksonville one being on or about June 6th or 7th, 1980, the Birmingham, Alabama one being approximately August 5th of 1980, that the time of day both murders occurred, in the early morning hours, approximately 6 a.m., as the defendant said in the statement to Detective Warren pertaining to the Jacksonville one and between 6 and 7:00 in the morning in Alabama, that the defendant knocked the victim to the floor prior to both murders. Ms. Beason was knocked to he floor by the defendant, as well as Ms. Nagy was. Both victims lived in upstairs appartments and . . . the lower torso was naked with respect to when both bodies were found and I think I indicated likewise, the legs were spread apart. All these are points of similarity, Your Honor, with repect to both crimes that occurred.

(T 1351-1353). These facts concerning Beason's murder were subsequently elicited from testimony from Warren, Gay and Grubbs (T 1665-1667, 1676, 1718-1734, 1737-1755). Although the State argued several reasons why this evidence was admissible, the judge admitted evidence of the Birmingham murder only to prove Petitioner's motive, intent or plan. (T 1341-1385). A limiting instruction to that effect was given throughout the rest of the trial each time details of Beason's murder were discussed (T 1665, 1717, 1736, 1752, 1850-1851) and again at the conclusion of the case. (T 2078).

The jury found Petitioner guilty of the second-degree murder of Tina Nagy. (R 498; T 2112).

SUMMARY OF ARGUMENT

The trial court properly ruled Petitioner waived his Sixth Amendment right to counsel before telling a Florida detective that Petitioner killed Tina Nagy and Debra Beason. The District Court erred in holding the August 22, 1980 statements inadmissible where the totality of the circumstances overwhelmingly demonstrate Petitioner's intelligent relinquishment or abandonment of the known right to counsel.

This Court should affirm the trial court's ruling and hold that no error occurred in admitting the statements. If the trial court erred, such error was harmless as the statements were potentially exculpatory, and Petitioner never denied killing Tina Nagy. The United States Supreme Court has held that the harmless error doctrine requires the reviewing court to determine whether absent the error the record demonstrates the factfinder would have found the defendant guilty beyond a reasonable doubt. This Court adheres to the United States Supreme Court's delineation of harmless error analysis. The record here demonstrates the factfinder would have found Petitioner guilty of second-degree murder without considering the Petitioner's statements.

ARGUMENT

ISSUE I

PETITIONER WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL BEFORE ADMITTING TO KILLING TINA NAGY AND DEBRA BEASON, AND THE DISTRICT COURT INCORRECTLY FOUND CONSTITUTIONAL ERROR IN THE TRIAL COURT'S ADMISSION OF PETITIONER'S STATEMENTS

The State respectfully asserts the District Court of Appeal erred in reversing the trial court's ruling that Petitioner waived his Sixth Amendment right to counsel. Therefore, this Court need not determine whether the admission of Petitioner's statement at trial that he killed Tina Nagy and Debra Beason constituted harmless error, as no error occurred. This Court has the authority to reverse the District Court's erroneous holding although that holding was not the subject of the jurisdictional briefs. Savoir v. State, 422 So.2d 308, 312 (Fla. 1982). Contrary to Appellant's "belief", this issue is "judicially negotiable." See Petitioners' Brief, page 20. This Court should reverse the District Court's holding and affirm the trial court's ruling that Petitioner, who had been advised by his Alabama attorney not to speak to police, knowingly waived his Sixth Amendment right to counsel.

The trial court found as fact that Detectives Warren advised Petitioner of his constitutional rights and Petitioner waived those rights, including the right to counsel. (R 197-202) Judge

Soud noted that Petitioner had not been arrested or arraigned on the Florida charges. (R 200) Furthermore, Judge Soud correctly recognized that Petitioner had the right to waive the assistance of counsel. See Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Witt v. State, 342 So.2d 497 (Fla. 1977). The trial court recognized however that Petitioner's Sixth Amendment claim that his confession was not preceded by a valid waiver of the assistance of counsel required "closer scrutiny." (R 201).

Assuming Florida had commenced prosecution, Judge Soud ruled that Petitioner had waived his Sixth Amendment right to counsel, based on the following:

> (1) Petitioner had been provided counsel on the Alabama charges; and
>
> (2) At the interview Petitioner knew of the Florida detainer on the Nagy murder and that Detective Warren was investigating the murder; and
>
> (3) Detective Warren was not aware Petitioner had counsel on the Alabama murder charge; and
>
> (4) Petitioner knew he had a right to have his Alabama attorney present at the interview with Detective Warren; and
>
> (5) Petitioner knew he had a right to a lawyer of his own choosing or by appointment 'regarding the Florida murder'; and
>
> (6) Petitioner had been informed by his Alabama attorney not to talk to police, and Petitioner 'utterly disregarded that legal advice' and did not invoke his right to counsel; and

(7) Petitioner had access to a telephone during the Nagy murder interview; and

(8) Petitioner further indicated this waiver of the right to counsel by confessing both the Nagy and the Beason murder to the media.

(R 202). Judge Soud properly ruled that Petitioner had the right to waive the assistance of counsel by intentional relinquishment of the right. See United States v. Brown, 569 F.2d 236 (5th Cir. 1978). The trial court concluded that Petitioner "knew the nature of criminal prosecutions, knew the impact of confess ions. . ., knew the necessity and right of having counsel present, knew the significance of following legal advice from counsel, . . . and freely and openly talked about his criminal involvements. . ." (R 203-4). The totality of circumstances demonstrate Petitioner waived his Sixth Amendment right to counsel. Id. The District Court erred in reversing this ruling in Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986), and this Court should hold that the trial court properly found Petitioner waived his right to counsel.

The Eleventh Circuit Court of Appeals has adopted a specific test for determining whether a person waived the Sixth Amendment right to counsel. Tinsley v. Purvis 731 F.2d 791 (11th Cir. 1984); Hance v. Zant, 696 F.2d 940, 947 (11th Cir. 1983), cert.denied 463 U.S. 1210 (1984). When police provide Miranda warnings and a defendant disclaims any desire to have the

presence of counsel during questioning, valid waiver occurs. See Love v. Young, 781 F.2d 1307, 1314 (7th Cir. 1986), cert.denied, 106 S.Ct. 2923 (1986), (Recognizing test in Eleventh Circuit); Murphy v. Holland, 776 F.2d 470, 481 (4th Cir. 1985), vacated for reconsideration of Michigan v. Jackson, 90 L.Ed.2d 334 (1986). (Recognizing that in Eleventh Circuit, defendant waives Sixth Amendment right to counsel if waived after given Miranda warning.) The test for determining waiver in Florida under the Federal Constitution is whether police provide Miranda warnings, or otherwise advise defendant of right to counsel, and defendant declines the presence of counsel.

Here, Detective Warren did provide Miranda warnings to Petitioner, and Petitioner validly waived his right to counsel under the Sixth Amendment. Furthermore, under Michigan v. Jackson, 475 U.S. 625, 89 L.Ed.2d 631, 106 S.Ct. 1406 (1986), once a criminal has consulted with his attorney, he may waive his right to counsel. The defendants had requested counsel in Jackson "but were not afforded opportunity to consult with counsel before police initiated further investigation." 89 L.Ed.2d at 636. Petitioner's prior arraignment on the Alabama charge, provided him with knowledge of the criminal justice system. The appointment of counsel on that charge, (murder of Debra Beason) obviously "educated" Petitioner, who also received Miranda warnings. Petitioner could therefore intelligently waive his right to counsel on the Florida murder charge of Tina Nagy.

These facts clearly demonstrate Petitioner's waiver meets the criteria in Tinsley, supra, of a valid waiver of a Sixth Amendment right.

The facts of this case are extremely similar to the facts of Love v. Young, 781 F.2d 1307, 1314-1318. The defendant Love had been before the trial court, and received appointed counsel. Two days later, a detective visited Love in jail to question him. Like Petitioner, Love attempted to give exculpatory information, after Detective Lombardo advised Love of his right to counsel. The detective testified at a suppression hearing that Love understood his rights and never indicated he desired counsel present.

Love's exculpatory statement eventually contributed inadvertently to his conviction. The lower court ruled the statement had been obtained in violation of Love's Sixth Amendmetn right to counsel, but that the error was harmless. The Seventh Circuit found no Sixth Amendment violation and did not reach the harmless error analysis.

Love had never invoked his right to counsel and the Seventh Circuit found he had waived the right. In Love and the instant case, the failure to invoke counsel renders the Michigan v. Jackson, 475 U.S. 625, 89 L.Ed.2d 621, case off point, 106 S.Ct. 1404 (1986); 498 So.2d at 1300. The Seventh Circuit held the "totality of the circumstances" demonstrated Love's waiver. In

otherwords, Love intentionally "relinquished or abandoned a known right." 781 F.2d at 1316.

Here the facts more clearly demonstrate Petitioner waived his Sixth Amendment right to counsel. See Deaton v. State, 480 So.2d 1279, 1282 (Fla. 1986). The Court in Love noted the defendant's experience with the criminal justice system. Petitioner also had similar experience. Significantly, Petitioner had been specifically warned by his Alabama counsel not to speak to Alabama police. Unlike the defendant Love, Petitioner had received specific knowledge and understanding of his right to have counsel present, from his lawyer and from Detective Warren. The conduct of Petitioner in stating he did not want a lawyer present and in participating in the interview inescapablely leads to the conclusion that Petitioner waived his Sixth Amendment right to counsel. 781 F.2d at 1318. Like Love, Petitioner wanted to extricate himself from an accusation. Unlike Love, Petitioner admitted to the killing but presented a "manslaughter" version of the event.

The District Court's ruling that Petitioner did not waive his Sixth Amendment right to counsel cannot square with the overwhelming evidence demonstrating waiver. The States notes the lack of a signed form is only minimally relevant. See North Carolina v. Butler, 441 U.S. 369 (1979). The District Court stated that the trial court "inferred" valid waiver from

Petitioner's "failure to affirmatively invoke the right to counsel before talking to" Detective Warren regarding the Nagy murder. The Court apparently found Petitioner did not have to invoke counsel as "adversary proceedings" had commenced. Therefore, the Court found no valid waiver of a Sixth Amendment right to counsel and Petitioner's oral and written statements that he killed Tina Nagy during an altercation were erroneously admitted. 498 So.2d 1300-01.

Aside from the District Court's improper disregard for the trial court's extensive factual findings demonstrating Petitioner's valid waiver, the lower court also erroneously interpreted the constitutional test for valid waiver of the right to counsel. See Tinsley v. Purvis, 731 F.2d 791 (11th Cir. 1984). Petitioner clearly waived that right. The District failed to properly defer to the trial court's ruling finding Petitioner had waived his right to counsel. See Shapiro v. State, 390 So.2d 344 (Fla. 1980). This Court should reinstate the trial court's ruling.

In Michigan v. Jackson, 89 L.Ed.2d 631, supra, the Court held that police may not initiate interrogation where an accused "has been formally charged with a crime and . . .has requested appointment of counsel." 89 L.Ed.2d at 636. Once the defendant has consulted with an attorney, the defendant may reject the attorney's advice, and police may initiate communication. The

decision in Michigan v. Jackson only bars police initiated contact before the defendant has an opportunity to consult. See Traylor, 498 So.2d at 1301-02:

> I do not agree with the implication from the language of the majority opinion that there is an absolute bar to the waiver of the Sixth Amendment right to counsel where adversary proceedings have begun. I do not believe such a proposition is supported by Michigan v. Jackson, [citation omitted].
>
> A defendant may waive his right to counsel under either the Fifth or Sixth Amendments at any time if there is "an intentional relinquishment or abandonment" of those rights. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (construing waiver of Sixth Amendment right to counsel); Edwards v. Arizona, 451 U.S 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (construing waiver of Fifth Amendment right to counsel during custodial interrogation) The question in any case is whether there has in fact been a waiver.

Judge Nimmons concurring opinion correctly construed constitutional case law not to bar waiver. However, the concurring opinion incorrectly found Petitioner had not waived the Sixth Amendment right to counsel in admitting to killing Tina Nagy and Debra Beason. 498 So.2d at 1302.

The Petitioner's specific refusal to demand the presence of counsel at the interview with Detective Warren, after Petitioner had consulted with counsel, is relevant in determining whether

the totality of the circumstances demonstrate Petitioner validly waived his Sixth Amendment right to counsel. See Johnson v. Zerbst, 304 U.S. 458 (1938); Love v. Young, supra. As the trial court recognized, Petitioner had received legal advice not to talk to police in the Alabama charge, the Florida detective advised Petitioner on his right to counsel, and Petitioner specifically stated he did not want an attorney. (R 232).

Detective Warren was not required to convince Petitioner that he needed an attorney. Delap v. State, 440 So.2d 688 (Fla. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983); Palmes v. State, 397 So.2d 648 (Fla. 1981); State v. Craig, 237 So.2d 737 (Fla. 1970). Neither was Warren required to ask Petitioner if he already had an attorney, and even if Warren knew of Johnson's appointment, he was not required to ask Petitioner if he wanted Johnson present. Tinsley v. Purvis, 731 F.2d 791 (11th Cir. 1984); United States v. Brown, 569 F.2d 236 (5th Cir. 1978). Since Warren was there seeking information about the Florida murder, he would have given incorrect legal advice to suggest that Petitioner had the right to specifically have his Alabama attorney present. Brown, supra, at 239 (Hill, J., concurring); United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973); [Fifth Circuit cases decided before October 1, 1981 are binding on the Eleventh Circuit. Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981).] Petitioner's previous appointment of counsel on the Alabama murder of Debra Beason, his previous warnings from that

counsel not to speak to police, and his fresh instruction from Detective Warren that Petitioner had a right to counsel, demonstrates conclusively that Petitioner knowingly and intelligently waived his right to counsel.

Petitioner intentionally relinquished a known right. See Brewer v. Williams, 430 U.S. 387, 404 (1977). (Marshall, J. concurring): The opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel. 430 U.S. at 405. In Brewer the defendant's "consistent reliance upon the advice of counsel in dealing with the authorities" refuted suggestion of waiver. Here, Petitioner had appointed counsel on another charge and rejected that counsel's advice. Furthermore, in Brewer the police promised the defendant's attorney that no interrogation would occur in the long car ride back to Des Moines.

The differences between the facts of Brewer and the instant case actually help illuminate why Petitioner did waive his Sixth Amendment right to counsel. Unlike defendant Williams, Petitioner had not been arraigned on the Florida charge. Unlike defendant Williams, Petitioner had access to a telephone to call a lawyer at any time during the interview, and most importantly, unlike defendant Williams, Petitioner specifically declined any legal assistance after being advised by another lawyer on another

murder charge.

In fact, despite the isolation of defendant Williams, and his repeated reliance on the assistance of counsel, the Court in Brewer clearly held Williams could have waived his Sixth Amendment rights. The Court's decision in that case, by the slimmest margin, did not find waiver. Obviously the Court would find waiver here as Petitioner's previous experience with counsel and Detective Warren's advisement of Miranda rights unequivocally demonstrates Petitioner intentionally relinquished a known right. In Brewer the crucial distinction was William's "consistent reliance" upon counsel. Id. at 404. Here, just the opposite is true: Petitioner immediately rejected his counsel's advise when given the first opportunity to confess.

In Johnson v. Zerbst, 304 U.S. 456 (1938) the Court held that "intelligent" waiver of a Sixth Amendment right to counsel depends on "the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." 304 U.S. at 464. All three considerations demonstrate Petitioner waived his right to counsel. His background included another murder charge, (for which he was convicted), providing Petitioner with experience in the criminal justice system, including receiving legal advice not to speak with Alabama police. His conduct of rejecting that advice and willingly admitting to killing Tina Nagy, after again being

advised of his right to counsel, constituted the intentional relinquishment of a known right or privilege.

Petitioner signed the constitutional rights form stating that he understood he had the right to counsel. (R 184) He told Detective Warren he did not want a lawyer. (R 232) Petitioner's later statements to the media, his comments to Detective Warren that Petitioner "was glad all this was over, that he had been caught. . . it's a good thing that you all [police] caught me. . [they] better make sure [I] stay in prison. . .because if [I do] get out, [I] will kill again," (T 1662-63), all demonstrate Petitioner's willingness to freely discuss the murder and his relief in doing so.

The facts surrounding Petitioner's waiver are extremely close to the facts demonstrating a Fifth Amendment "right to have counsel present during a custodial interrogation" in Wyrick v. Fields, 459 U.S. 42 (1982). In Wyrick the defendant Fields had invoked his right to counsel but initiated contact with police. Id. at 46. Here Petitioner specifically declined to have a lawyer so the Wyrick reasoning on waiver is applicable. The Court in Wyrick reiterated that the "totality of the circumstances" must be examined in determining waiver. The Court found Field's waived his right to have counsel present where he declined to have a lawyer present at a polygraph interrogation.

The Eleventh Circuit has recognized that the United States

Supreme Court applies the same standard for determining waiver to for both Fifth and Sixth Amendment rights. Tinsley v. Purvis, 731 F.2d 791, 794 (11th Cir. 1984). The standard is delineated in Johson v. Zerbst, supra. See, United States v. Brown, 569 F.2d 236, supra. The waiver must be a knowing and intelligent relinquishment of a known right.

This Court has held that an accused who has already had counsel, may waive the right to counsel, under Florida law. Waterhouse v. State, 429 So.2d 301 (Fla. 1983). See Ferguson v. State, 417 So.2d 63 (Fla. 1982). The right to counsel during questioning can be waived after formal charges Witt v. State, 342 So.2d 497 (Fla. 1977). Police are not required to convince a defendant he needs an attorney.

In Witt, supra, the defendant, fully advised of his rights, requested counsel following his arrest. The defendant made his first appearance with counsel the following day. The next day he indicated a desire to confess while conversing with a detective in his cell. The defendant was taken out of his cell up to the sheriff's office where he made an oral and written confession. Prior to this confession the defendant was fully advised of his constitutional rights, specifically rejected an offer to consult counsel, and signed a written waiver thereof. On appeal of his confession the defendant asserted that his confession should have been suppressed for failure of the State to provide proper

representation. The Court held that under the facts of the case the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.

A recent Fifth District Court of Appeal case is particularly applicable. In Lofton v. State, 471 So.2d 665 (Fla. 5th DCA 1985),pet. for rev.den. 480 So.2d 1294 (Fla. 1985), the defendant, while being held in jail on burglary charges, was interviewed by an investigator concerning his involvement in an unrelated sexual battery charge. During this interview appellant admitted engaging in sexual intercourse with the victim, but maintained it was consensual. At trial, Lofton sought to suppress this statement on the grounds that the statement was taken without contacting the attorney representing him in the unrelated burglary charge, particularly since the officer knew of the public defender's representation of Lofton in the other case. The State maintained that Lofton was fully aware of his right to counsel, signed a waiver of rights form and volunteered to speak with the investigator. The confession was admitted at trial and Lofton appealed arguing that because he was represented by counsel on another charge he had indicated his desire to speak only through counsel and thus his rights were violated when his attorney was contacted. The court held:

> Here, it is clear that defendant was not represented by counsel in the sexual battery case. In fact, he had not yet been charged in that case. He was informed of his right to counsel

> and of his right not to speak to the investigator, and he waived those rights. Appellant does not contend that his statement was otherwise involuntary, and we hold that it was not made involuntary merely because the public defender representing defendant in a completely unrelated criminal matter was not notified prior to the questioning.

Lofton, supra at 666.

Based on the numerous federal and Florida cases cited above, the State asserts Petitioner's confession was properly admitted as no sixth amendment violation occurred. Petitioner was adequately informed of his rights, was intelligent enough to understand his rights, signed his name to the rights form to indicate he understood his rights, specifically stated he did not want an attorney, was not coerced in any fashion whatsoever, and was more than willing to talk to Warren and Gay. Petitioner was instructed by his Alabama attorney not to talk to the police and Petitioner decided to ignore that advice. Just as Petitioner had the right to terminate the interview, he also had the perogative to then and there answer questions, and thats exactly what he chose to do.

Judge Nimmons concurring opinion below stated that the absence of a written statement by Petitioner which waived Sixth Amendment rights was significant. 498 So.2d at 1302. However, the Constitution does not require that a waiver of rights be in

writing. See Connecticute v. Barrett, 479 U.S. ____, 93 L.Ed. 920 (1987); North Carolina v. Butler, 441 U.S. 369 (1979); Love v. Young, 781 F.2d 1307, 1318, fn. 9. Under this logic, a defendant's verbal assertion of rights could likewise be ignored. Other factors cited by Judge Nimmons demonstrate Petitioner's valid waiver: Detective Warren explained to Petitioner his constitutional rights and Petitioner gave a statement fifteen minutes into the interview. Compare, Maine v. Moulton, 474 U.S. ____, 88 L.Ed.2d 481, 106 S.Ct. ____ (1986); and Anderson v. State, 420 So.2d 574 (Fla. 1982), where police isolated the defendant for three days in an automobile.

Petitioner has no valid claim that Warren used coercive techniques, allegedly reflected by Petitioner's abandonment of his total innocence of Nagy's killing. See Cave v. State, 476 So 2d 180 (Fla. 1985). In Cave this Court rejected the argument that one who initially professes innocence may not continue to be interviewed by police.

In Monroe v. State, 369 So.2d 962 (Fla. 3rd DCA), cert.denied, 376 So.2d 74 (Fla. 1979), the Court recognized that the State must demonstrate a valid waiver of the right to counsel by a preponderance of the evidence. Johnson v. State, 294 So.2d 69 (Fla. 1974). The presence of counsel is not essential to the validity or effectiveness of that waiver. 369 So.2d at 964. The facts of Monroe are on point here. Petitioner waived his Sixth

Amendment right to counsel.

None of Detective's straight forward questioning of Petitioner constituted coercion. See Roman v. State, 475 So.2d 1228 (Fla. 1985), at 1232. Detective Warren merely told Petitioner that Warren believed Petitioner killed Tina and "wanted to hear his side of the story." The trial court rejected Petitioner's claim that his statements were not fully and voluntarily provided to Warren. This conclusion is presumed correct. Shapiro v. State, 390 So.2d 344 (Fla. 1980). Furthermore, the record demonstrates Detective Warren ensured Petitioner understood his right to request the presence of an attorney, and the trial court conducted an extensive hearing on the issue. See Moran v. Burbine, 475 U.S. 412, 89 L.Ed.2d 410, 106 S.Ct. 1135 (1986); Michigan v. Mosely, 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975).

In Miranda v. Arizona, 384 U.S. 436 (1966) the Court recognized that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement would constitute a waiver." 384 U.S. at 475. The State must show "that an accused was offered counsel but intelligently and understandingly rejected the offer". Id. Here the State showed Petitioner declined the offer of counsel, already had counsel, and gave a statement within 15 minutes. The trial court properly found the State had met its

burden of showing Petitioner waived his right to counsel. The District Court erred in reversing this ruling.

This Court should reverse the District Court's holding that the State violated Petitioner's Sixth Amendment rights in allowing Petitioner to decline to have an attorney present, after being twice advised of his Constitutional rights, before admitting he killed Tina Nagy and Debra Beason. The United States Supreme Court has held that:

> An express written or oral statement of waiver. . .is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. As was unequivocally said in Miranda, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

North Carolina v. Butler, 441 U.S. 369, 373 (1979). Petitioner of course did not merely remain silent but told Detective Warren that Petitioner did not want a lawyer. Petitioner had just recently spoken with his attorney on another charge and had received specific legal advice not to speak with police. In Butler the Court quoted Johnson v. Zerbst, supra, and stated that a defendant may waive the fundamental right to counsel depending

on the "particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." 441 U.S. 374-75. (Justice Blackman, the fifth vote, concurred disclaiming any relevance between the Miranda waiver standard and a Sixth Amendment waiver.) Here, the facts demonstrate that Petitioner's waived his Sixth Amendment right to counsel. His recent background with the criminal justice system, his experience with his appointed counsel and his conduct in stating he did not want a lawyer present, (R 232), all show unequivocally that he waived his right to counsel. The State of Florida may not force a defendant to accept an attorney. Faretta v. California, 422 U.S. 806 (1975). Petitioner wanted to tell Detective Warren what Petitioner had done to Tina Nagy and Debra Beason and the trial court properly admitted the statement. Connecticut v. Barrett, 479 U.S. ____, 93 L.Ed.2d 920, 928 (1987). This Court should affirm the trial court's ruling holding Petitioner waived his Sixth Amendment right to counsel and no error occurred in admitting the statement.

As earlier noted, the concurring opinion correctly recognized that Petitioner could also waive his Sixth Amendment right to counsel on the Debra Beason murder charge. Petitioner did waive that right. In fact, considering Petitioner has been specifically advised by his lawyer not to discuss the Beason murder with police, this Court has a firm record upon which to affirm the trial court's finding of waiver. (R 199-205). Thus,

although Petitioner had obviously invoked his right to counsel on the Beason charge, he could also waive the right to counsel. Conneticut v. Barrett, 479 U.S. ___, 93 L.Ed.2d 920, 928, 107 S.Ct. ____ (1987); Tinsley v. Parvis, 731 F.2d 791 (11th Cir. 1984); Love v. Young, 781 F.2d 1307, 1308-1314, supra, Traylor, 498 So.2d 1301-02. This Court should affirm the trial court's ruling on waiver, and hold the District Court unnecessarily applied the harmless error analysis.

ARGUMENT

ISSUE II

PETITIONER'S EXCULPATORY STATEMENTS THAT HE KILLED TINA NAGY, AND HIS ADMISSION HE KILLED DEBRA BEASON, DID NOT AFFECT THE JURY VERDICT OF SECOND-DEGREE MURDER OF TINA NAGY, AND THE TRIAL COURT'S ADMISSION OF THOSE STATEMENTS WAS HARMLESS ERROR AS DEFINED BY THE UNITED STATES SUPREME COURT AND THIS COURT.

The District Court should have determined all of Petitioner's statements admissible at trial, as did the trial court. See Tinsley v. Purvis, 731 F.2d 791 (11th Cir. 1984); Love v. Young, 781 F.2d 1307 (7th Cir. 1986), cert. denied, 106 S.Ct. 2923 (1986). Should this Court hold differently, the State respectfully asserts the record requires this Court to affirm the conviction of second-degree murder. In Rogers v. State, 12 F.L.W. 368, 372 (Fla. July 17, 1987), this Court held that a reviewing court must find an error harmless if there is not a "reasonable likelihood the error affected the trial's outcome. The error in the instant case was harmless beyond a reasonable doubt because Petitioner's statements "confessed" only to manslaughter, and the statements could not reasonably had affected the jury verdict of second-degree murder.

The State submits that Petitioner admitted to killing Tina Nagy and Debra Beason in part to relieve his conscience and to attempt to minimize the consequences. Human beings are complex;

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here in the admission of Petitioner's statement.

The District Court however found Petitioner's statements were obtained in violation of his Sixth Amendment right to counsel 498 So.2d at 1300. If this Court agrees, it must analyze the record to determine whether the constitutional error "was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. ____, 89 L.Ed.2d 674, 684, 106 S.Ct. ____ (1986). The test of a reasonable doubt is not whether the Petitioner can speculate or fantasize that there is a mere possibility the error affected the verdict:

> The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt of innocence. [citations ommitted], and promotes public respect for the criminal [justice] process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

89 L.Ed.2d 684-5. In Van Arsdall the Court held a violation of the defendant's Sixth Amendment right to cross-examination was harmless.

The Court's references to the inestimable importance of promoting public respect for the criminal trial process deserves consideration. See Traynor, The Riddle of Harmless Error 50 (1970), where Mr. Traynor warned that reversal for error regardless of its effect on the judgment "encourages litigants to

abuse the judicial process and bestirs the public to ridicule it."

Soon after deciding Van Arsdall the Supreme Court reaffirmed the vitality of the harmless error doctrine in Rose v. Clark, 478 U.S. ____, 92 L.Ed 460, 106 S.Ct. ____. In Rose the trial court erroneously instructed the jury on the definition of the required mental state for second-degree murder and violated the defendant's due process rights. The Court of Appeals held it could not apply the harmless error analysis as the defense at trial was expressly based on the lack of malice. The Supreme Court reversed, recognizing that it could easily apply the harmless error analysis:

> Where a reviewing Court can find that the record developed establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "The Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall [Citation ommitted]

92 L.Ed.2d at 460. The record here demonstrates Petitioner's guilt beyond a reasonable doubt and this Court should affirm the judgment.

The Court in Rose stated unequivocally that when the State provides a defendant a trial before an impartial jury and the assistance of counsel, the reviewing Court must determine whether the constitutional error affected the fact-finding process. The

error is harmless if it "did not contribute to the verdict obtained." (Emphasis in original) Rose at 470, quoting Chapman v. California, 386 U.S. 18, 24 (1967).

Under Rose v. Clark, the alleged violation of Petitioner's Sixth Amendment right to counsel is subject to the harmless error analysis. 92 L.Ed.2d at 460. Milton v. Wainwright, 407 U.S.s 371 (1972). As in Milton, the record sub judice demonstrates Petitioner's guilt of second-degree murder beyond a reasonable doubt. The jury heard extensive testimony that Petitioner had threatened to kill Tina Nagy after she left him on June 5, 1980. Petitioner told Tina's co-worker that Petitioner would kill Tina if "she doesn't leave town in 24 hours." (T 1579-80). Carolyn Joyce heard Petitioner make this threat. (T 1587-90, 1623-26).

Police found evidence that Petitioner broke into Tina's apartment, indicated by a cut and damaged screen. (T 1155-56) Petitioner's bloody palmprint was found five feet up the wall straight off the end of the bed. Police found blood on a blanket, the murder weapon, a white-bra, a slip, a T-shirt, pillow cases, a doll, two rugs, and on tissue. (T 1203;1324-31; 1436-54). Dr. Lipkovic found bruises on her neck consistent with someone grabbing her neck and applying pressure. (T 1260, 1278) He found a well-defined, "straight line like" depression or furrow on her neck that came from a ligature pressed against her

neck, consistent with the type of electrical cord found by the bed. (T 1262-64). The ligature mark could have caused Tina to lose consciousness and occurred within the same time as the other wounds. (T 1275-76). The ligature was removed before causing death. (T 1286-7).

Petitioner "criss-crossed" the serrated knife across Tina's neck. Tina was likely dragged across the carpet resulting in carpet burn injuries. Most significantly, Tina suffered cut wounds commonly described by forensic pathologists as defensive wounds. There were bruises on Tina's right leg consistent with contact with the bottom rail of the bed. (T 1260-66; 1676) Her lip was cut and could have been caused by a knuckle hitting her. (T 1266, 1288).

Furthermore, Petitioner wrote letters to the Alabama and Florida trial judges where he admitted killing Debra Beason and Tina Nagy. He wrote Judge Soud that the death penalty should be imposed. (T 1835-87). The jury also heard other evidence of Petitioner's murder of Debra Beason beside the August 22nd, 1980 statements. The jury considered testimony from detectives Gay and Grubbs concerning details of Beason's murder. The jury heard details of the Beason murder apart from Petitioner's statement. (T 1721-26; 1731-34; 1739-42; 1751-55).

As the opening statements by both parties indicated, the State's theory at trial was that Petitioner murdered Nagy after

consciously deciding to do so. (T 1115-1133). In an effort to show this premeditation, the State elicited testimony indicating Petitioner had threatened to kill Nagy. Additionally, the State introduced detailed evidence of the number, nature, and depth of injuries to Nagy's body, and the killing of Debra Beason, and evidence indicating that Ms. Nagy tried to defend herself, and evidence demonstrating that she appeared to be beaten (her lip busted), jerked into the window screen, stabbed, and strangled. The State focused on the disarrayed room and blood found in various places to further demonstrate premeditation. Finally, the State attempted to capitalize on omissions in Petitioner's August 22, 1980 confessions and his denial of stangulation to insinuate that Petitioner confessed only to lessen his degree of culpability. Petitioner's defense, on the other hand, was that he killed Nagy in the heat of passion and thereby committed only manslaughter.

The jury obviously rejected the State's first-degree murder charge against Appellant. The evidence without the August 22, 1980 statements however demonstrated beyond a reasonable doubt that Appellant (1) knew his brutal actions were reasonably certain to kill Ms. Nagy; (2) committed those acts with ill will, hatred, spite, or an evil intent; (e.g. Petitioner's threats, his murder of Beason, and his theft of Ms. Nagy's car and jewelry.) and (3) Petitioner's acts demonstrated an indifference to human life. Most importantly, the State asserts that Petitioner's

"confessions" exculpated Petitioner of murder and presented a story of manslaughter, just as Petitioner argued at trial. (T 2041-44, 2047). Petitioner has not suggested that he would have claimed he was not involved in the Tina Nagy killing, absent the August 22, 1980 statements.

Petitioner did not admit to strangling Tina in his August 22nd, 1980 statement. He denied strangling Tina or Debra Beason. (T 1656; 1719; 1659-69; 193; 250) In his statement he claimed that Tina "came back with a knife in her hand and said that she could kill me for hitting her because I was in her apartment. . ." (R 1659-61). Petitioner's "confession" was in part an attempt to evade criminal responsibility for brutally killing a young woman. In light of the jury's refusal to find Petitioner guilty of premeditated murder, the affect of the statement was harmless. See also Gilvin v. State, 418 So.2d 996 (Fla. 1982); Thompson v. State, 328 So.2d 1 (Fla. 1976); and Ferrey v. State, 457 So.2d 1122 (Fla. 3d DCA 1984).

The record demonstrates beyond a reasonable doubt that the allegedly erroneous admission of Petitioner's statements could not have constributed to his second-degree murder conviction. See Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985). Had Petitioner claimed he never knew Tina Nagy, or he wasn't in her apartment that night, he might have a legitimate argument the error was harmful. The State however didn't need Petitioner's

statement to prove he was there and that he'd threatened Tina just before the murder.

In Chapman v. California, supra, the Court recognized the harmless-error doctrine must avoid affirming the admission of "highly important and persuasive evidence...though legally forbidden, ... into a trial in which the question of guilt or innocence is a close one." 386 U.S. at 22-23. Here the question of Petitioner's guilt of second-degree murder is not close. The victim's numerous stab wounds, bruises, and other evidence of strangulation, along with Petitioner's trial admission that he killed Ms. Nagy demonstrate the harmlessness of the admission of the August 22, 1980 statements.

In United States v. Hastings, 461 U.S. 499, 509 (1983) the Supreme Court clearly delineated the harmless-error doctrine as applied to alleged federal constitutional errors:

> Since Chapman, the Court has consistently made clear it is the duty of the reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional errors.

The Court in Hastings noted that the doctrine recognizes the "prompt administration of justice and the interests of the victims. . ." Id. Here, two victims are dead, killed by Petitioner seven years ago. The District Court properly found the error harmless, although not employing identical language expressed by this Court in State v. Diguillio, 491 So.2d 1129

(Fla. 1986). Furthermore, contrary to Petitioner's argument, the District Court did examine the affect the alleged error had on the jury, as mandated by Diguillio: "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." 498 So.2d 1301. This Court should affirm the District Court's ruling, as consistent with State v. Diguillio.

However, this Court should clarify its language in Diguillio which can be read to require a reviewing court to reverse even where the "the evidence of [defendant's] guilt was overwhelming if not conclusive." See Lee v. State, 12 F.L.W. 1498 (Fla. 1st DCA June 26, 1987). The Court's recognition in Lee that this Court's language in Diguillio imposes a greater burden on the State than that delineated in Sections 59.04 and 924.33, Florida Statutes (1985), reveals the need for clarification.

The basic premise of the harmless error doctrine is that the reviewing court must determine whether the evidence of guilt, absent the erroneously admitted evidence demonstrates, the criminal defendant's culpability beyond a reasonably doubt. It is impossible for a reviewing court to literally determine whether an alleged trial error "did not affect the jury deliberations and influence its verdict...." Lee, 12 F.L.W. at 1500. All a reviewing court may examine is the record before it.

In the case sub judice the evidence supporting Petitioner's conviction of second-degree murder absent the challenged exculpatory "confession" is unequivocal. It is not manslaughter to choke and stab a young woman twenty-two times, drag her around the room, punch her in the face, cut her throat, and slash her hands as she tries to defend herself. (T 1260-88). This Court should affirm the District Court's holding that any error in admitting Petitioner's statements of August 22, 1980 were harmless. See Hansbrough v. State, 12 F.L.W. 305 (Fla. June 26, 1987). To hold otherwise would violate the principles of the harmless error doctrine as defined by the United States Supreme Court and applied to federal constitutional issues.

The United States Supreme Court has held that a reviewing court will not assume prejudice. The only yardstick by which to measure the potential effect of error is the record itself. In Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2852 (1984), the Court recognized the "question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. Although Strickland involved a defendant's burden. The reasoning delineated by the Court is applicable. Here, the State must show the factfinder would not have had a reasonable doubt repecting guilt, absent the error committed at trial. See Greer v. Miller, 789 F.2d 438 (7th Cir. 1987), rev'd, ____ U.S. ____, 55 U.S.L.W. 5126 (June 10, 1987). In

Greer the Supreme Court recognized the Chapman test to be whether the "properly admitted evidence at trial 'was sufficient to prove defendant's guilt beyond a reasonable doubt. . .'" Id. at S1101. In Schneble, supra, the Supreme Court stated that "judicious application of the harmless error rule does not require that we indulge assumptions of irrational jury behavior. . . ." 405 U.S. at 431-32. The State urges the Court to affirm the District Court's holding, and clearly recognize that the harmless error test is whether the factfinder would have found the defendant guilty beyond a reasonable doubt, absent the error.

CONCLUSION

This Court should reserve the District Court's ruling that the trial court erroneously admitted Petitioner's statements, as Petitioner waived his Sixth Amendment right to counsel. This Court should affirm the District Court's holding affirming Petitioner's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished by U.S. Mail to David P. Gauldin, Attorney for Petitioner, P.O. Box 142, Tallahassee, Florida 32302 this 18th day of August, 1987.

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