IN THE SUPREME COURT OF FLORIDA

NO. 71,192

GARY ELDON ALVORD,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida; ROBERT MARTINEZ, Governor, State of Florida

Respondent.

INITIAL SUPPLEMENTAL BRIEF IN SUPPORT OF AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Wm. J. Sheppard
Elizabeth L. White
James C. Lohman
Cyra O'Daniel
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661

Attorneys for Petitioner
Gary Eldon Alvord

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

NO. 71,192

GARY ELDON ALVORD,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida;
ROBERT MARTINEZ, Governor, State of Florida

Respondent.

INITIAL SUPPLEMENTAL BRIEF IN SUPPORT OF AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

PRELIMINARY STATEMENT

Petitioner, Gary Eldon Alvord, Jr. will be referred to herein as "Petitioner" and "Mr. Alvord." The Respondent, State of Florida, will be referred to as "The State" and "Respondent."

STATEMENT OF THE FACTS

The day after Mr. Alvord's arrest for first degree murder in Lansing, Michigan, he was interrogated by Lansing Detective Donald Dufour. Detective Dufour orally gave petitioner some of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), but failed to inform Mr. Alvord of his right to have counsel appointed if he was indigent. At the time, Mr. Alvord was in fact indigent and unable to obtain counsel to advise him prior to and during his interrogation. For this reason, Mr. Alvord did not knowingly, understandingly or intelligently waive his constitutional privilege against self-incrimination or his right to counsel. Nonetheless, the following statement was allowed into evidence at his trial:

Q And what did he say to you?

A His reply was, "I am a rapist, not a God-damn thief."

Q And what did you say to that?

A I asked him what he meant by that.

Q And what did he say?

A He said, "I am wanted for three murders in Florida."

Q And did you respond to that?

A Yes, sir, I did.

Q And what did you say?

A I said, "I thought it was two."

Q And what did he say, if anything?

A He said, "Maybe they forgot one."

[Trial transcript pp. 940-941] See, Alvord v. State, 322 So.2d 533, 536-537 (Fla. 1975). This highly damaging statement was argued to the jury during the State's closing argument as direct evidence of Mr. Alvord's guilt. It was additionally argued in the penalty phase.

Introduction of this statement violated defendant's constitutional rights in that the statement was obtained in violation of the requirements of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Gary Eldon Alvord, was charged by indictment in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, with three counts of first degree murder on August 1, 1973. The indictment charged that Gary Eldon Alvord murdered Georgia Tulley, Ann Herrmann and Lynn Herrmann on June 17, 1973. This cause proceeded to trial on the indictment and on April 4, 1974, the jury returned a verdict finding Petitioner guilty. Following the penalty phase of the trial, the jury returned a recommendation to the trial court that it impose the death penalty upon Petitioner]. On April 9, 1974, the trial judge imposed the death penalty upon the Petitioner and filed an order setting out his findings of fact in support of the imposition of the death sentence.

Petitioner filed a timely notice of direct appeal to the Florida Supreme Court and Petitioner's conviction and sentence were affirmed by the Florida Supreme Court. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923 (1976).

On October 6, 1978, Petitioner filed a motion for post-conviction relief in the trial court pursuant to Fla.R.Crim.P. 3.850, and on October 24, 1978, a first supplement to the motion for post-conviction relief was filed. This motion was denied by the trial court.

The denial of the motion for post-conviction relief was affirmed by the Florida Supreme Court on April 9, 1981. Alvord v. State, 396 So.2d 184 (1981).

A death warrant was signed by the Honorable Bob Graham, Governor of the State of Florida, and Petitioner was scheduled to be executed on May 6, 1981.

On April 21, 1981, Petitioner filed a Petition for Writ of habeas corpus pursuant to 28 U.S.C. Section 2254 and an Application for a Stay of Execution in the United States District Court for the Middle District of Florida, Tampa Division.

An evidentiary hearing was held in this cause on May 13 and 14, 1982. On March 23, 1983, the district court entered an order setting aside Petitioner's death sentence based on the trial court's consideration of a non-statutory aggravating factor; denying habeas corpus relief on Petitioner's claims challenging the constitutionality of his conviction, and directing the State of Florida to conduct a new sentencing hearing of Petitioner in a timely fashion. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983).

Respondent filed a motion to alter or amend judgment on April 4, 1983, which was denied by the district court on May 5, 1983. Timely notices of appeal were filed by Petitioner on May 12, 1983 and by Respondent on May 16, 1983 [R.714, 719]. The Eleventh Circuit Court of Appeals affirmed the district court's denial of a new trial but, on the basis of Wainwright v. Goode,

464 U.S. 78 (1983), reversed the district court's opinion requiring a new sentencing hearing. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). Petitioner was found incompetent to be executed in November, 1984.

On September 25, 1987, counsel for Petitioner filed a Petition for Extraordinary Relief, for Writ of Habeas Corpus and Request for Stay of Mental Examination, together with a Request for Oral Argument. The State served its response thereto on the same date, and on September 28, 1987, the petition was denied. Thereafter, on October 2, 1987, counsel for Petitioner served a Motion for Rehearing and Motion for Clarification.

On January 26, 1988, this Court directed to State to respond to the "Hitchcock issue," which the State did on February 25, 1988.

Oral argument was scheduled on the petition for August 29, 1988. Prior to oral argument, on July 8, 1988, counsel for petitioner served an Amendment to Petition for Writ of Habeas Corpus and Request for Oral Argument asserting that, under the recently decided case of Caso v. State, 524 So.2d 422 (Fla. 1988), asserting Mr. Alvord was entitled to a new trial, due to the error at trial in admitting a statement made by Mr. Alvord without the benefit of proper Miranda v. Arizona, 384 U.S. 436 (1967) warnings. No response to this Amendment was filed by the State.

During oral argument, counsel for Mr. Alvord briefly informed this Court of the Caso claim. The State likewise indicated it would submit a brief on the issue if directed by this Court. Thereafter, by written order this Court instructed counsel to file supplemental brief on the Caso claim. This brief is submitted in compliance with the Court's order.

SUMMARY OF ARGUMENT

I.

THE COURT IS OBLIGED TO DECIDE THE MIRANDA/CASO ISSUE TO CORRECT THE PREVIOUS MISAPPLICATION OF CONSTITUTIONAL LAW.

In this Court's previous Alvord v. State, 322 So.2d 533 (Fla. 1975), decision, it misapplied the Miranda requirements and failed to order suppression of Mr. Alvord's unwarned statements. In recognition of this Court's express reversal of the Alvord decision in Caso v. State, 524 So.2d 422 (Fla. 1988), reversal and remand for new trial is required. The Caso decision identified Alvord as an abberant misapplication of Supreme Court precedent, demanding corrective measures, so that retroactive change of law principles need not be reached.

II.

PETITIONER'S UNWARNED STATEMENTS WERE INADMISSIBLE.

The trial court erred in admitting Petitioner's statements made in absence of an advisement of his right to court-appointed counsel. This Miranda violation requires reversal of the conviction.

III.

THE ERROR COMPLAINED OF IS NOT HARMLESS.

The error in admission of Petitioner's unwarned statements was not harmless, according to current tests for harmless error promulgated by this court. The State cannot show that the wrongfully admitted statements had no reasonable possibility of influence on the jury, the test prescribed in State v. Lee, _____ So.2d _____, 13 FLW 532 (Fla. September 1, 1988).

ARGUMENT

I.

THIS COURT IS OBLIGED TO DECIDE THE MIRANDA/CASO ISSUE TO CORRECT THIS COURT'S PREVIOUS MISAPPLICATION OF CONSTITUTIONAL LAW.

In Caso v. State, 524 So.2d 422 (Fla. 1988), this Court expressly overruled its prior holding in the instant case, Alvord v. State, 322 So.2d 533 (Fla. 1975), and held that unwarned statements, such as the one given to Detective Defour by Petitioner, are inadmissible in the State's case-in-chief.

The legal precedent for this Court's decision regarding suppression of the defendant's confession lies in the language of Miranda v. Arizona, 384 U.S. 436 (1966). See Caso at 423. The issue does not turn on this Court's conflicting decisions in Alvord and Caso, and therefore does not address a change in law, but instead looks to correct this Court's misreading of underlying United States Supreme Court precedent. Since this precedent was in full effect at the time of this Court's previous decision in Alvord, it contained the applicable rule which remains unchanged. A decision on the merits in the instant case would bring Florida law into conformity with prevailing United States Supreme Court precedent for the last twenty years. Thus, the instant case presents no issue of retroactivity, as would be triggered by a change in the law, nor does it present the difficulty of creating a flood of litigants claiming rights under

the holding.

Even if the Caso decision were viewed as a change in the law, the change of law principles under Florida law would not preclude retroactive application in the instant case. In Witt v. State, 387 So.2d 922 (Fla. 1980), the test for possible retroactive application of changes in law was outlined by this Court. The Court identified the main purpose for the rule relating to post-conviction relief as providing review in the event of major changes in law if unfairness is "so fundamental in either process or substance that the doctrine of finality must be set aside." 387 So.2d at 922.

This Court held that a change in law which is a "fundamental" change, "casting serious doubt on [the] veracity and integrity of the original trial proceeding," must be applied retroactively. In doing so, this Court noted the inherent unfairness of non-uniformity of decisions in certain instances:

> Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Id. at 925 (emphasis added).

The instant case satisfies all of the Witt requirements.

Indeed, in Caso when the District Court of Appeal certified its decision as one of great public importance, it expressly stated, that the Alvord case should be re-examined in light of existing Supreme Court decisions which had reaffirmed the Miranda decision. Upon acceptance of certification, this Court in Caso expressly overruled its previous decision in Alvord, thereby making it a fundamental question of substance. Further, a decision in accord are with Caso would cast serious doubt on the integrity of Mr. Alvord's original trial proceeding, since his unwarned statement was so central to the State's case. The fundamental unfairness of the decision is enhanced by the fact that this is a capital case, and that the admittedly incorrect decision in Alvord will lead to the most severe and irrevocable penalty under law, the execution of Mr. Alvord.

Moreover, particularly in the context of capital cases, this Court has extended retroactive effect to changes of law. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987). In Thompson, this Court reversed and remanded on the basis of the trial court's limitation of the mitigating factors in sentencing. Id. The Court relied on the United States Supreme Court decision in Hitchcock v. Dugger, _____ U.S. _____, 95 L.Ed.2d 347 (April 22, 1987), finding error in the unconstitutional limitation on jurors' consideration of non-statutory mitigating evidence. Id. Moreover, this Court specifically relied on Witt to defeat the State's claim of procedural default. Id. at 175. This Court

held that Hitchcock represented a sufficient change in the law that "potentially affects a class of petitioners, including [petitioner], to defeat the claim of a procedural default." Id.

The instant case presents not only an allegation of a Hitchcock violation, but also the Miranda issue, and both are properly treated as reversible errors requiring further proceedings under Witt and Thompson v. Dugger. Both issues present fundamental constitutional errors that demand present compliance. For this reason, the Caso decision should be applied to the facts of this case.

In another Supreme Court case, State v. Rickard, 420 So.2d 303 (Fla. 1982), this Court adopted United States Supreme Court's reasoning to give retroactive effect to another landmark evolution in criminal law, Payton v. New York, 445 U.S. 573 (1980). This Court relied on United States v. Johnson, 457 U.S. 537 (1982) as authority for the retroactive application. Johnson decided that Payton was a change of law on the basis that it represented a "clear break with the past." The Court discussed the balancing test for determining whether a "new" constitutional rule should be retrospectively or prospectively applied: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities as the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." But inquiry into this type of analysis in the instant case is unnecessary, since

the "new" standards have been in existence for twenty-two years since the Miranda decision, and had been the rule of law for seven years prior to Mr. Alvord's trial in 1973. Therefore, examining this issue in terms of retroactivity is an exercise in futility; the law had been settled prior to the 1975 Alvord decision.

Thus, the sticky issues of retroactivity and change of law are irrelevant here. This Court's decision was the result of misapplication of existing law, not of a change in law. Even assuming that the Caso decision is a change in the law, however, the balancing test as set forth by this Court in Rickard weighs in favor of giving Caso retroactive effect. Accordingly, this Court should proceed to the merits of petitioner's claim.

II.

PETITIONER'S UNWARNED STATEMENTS WERE INADMISSIBLE.

The burden is squarely upon the State to show that petitioner was fully and properly advised of his rights under the Constitution of the United States before a confession can be admitted. Miranda v. Arizona, 384 U.S. 436, 479; Van Horn v. State, 334 So.2d (Fla. 3d DCA 1976). This "heavy burden," (Miranda, 384 U.S. at 475) is imposed to afford an accused every reasonable presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1937). Over twenty years ago the Miranda case listed the rights of which a detained suspect must be specifically apprised before interrogation may begin, including the advisement that "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 444. The opinion provides a strict bar against use of unwarned statements: "[U]nless and until such warnings are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation may be used against him." (emphasis added) Id.

This stricture is absolute on its face; the Court has provided a right and the necessary penalty for its deprivation. If the accused is not informed regarding his rights during interrogation, the interrogation may not be received in evidence.

The Court equated ignorance of a right with its denial:

> Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent - the person most often subjected to interrogation-the knowledge that he too has the right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only with effective and express explanation to the indigent can there be assurance that he was truly in a position to exercise it. (emphasis added)

Id. at 473 (footnotes deleted). Thus, if an individual is not informed of his right to appointed counsel, he is presumed to be ignorant of that right:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Id. at 475, quoting Carnley v. Cochran, 396 U.S. 506, 516 (1962). No amount of circumstantial evidence that the person may have been aware of this right will stand in its stead. Id. at 471-472. The mere existence of such a right, if not specifically given to an individual facing interrogation, is, as the opinion states, "hollow," or illusory.

In the instant case, the record indicates that Mr. Alvord was not advised that he had the right to a court-appointed lawyer

if he could not afford one. Alvord v. State, 322 So.2d 533, 537 (Fla. 1975). Trial testimony indicated that the defendant was advised by Detective Donald Dufour of the Lansing Police Department that:

> [h]e didn't have to talk to me, that anything he said will be used in court against him. I advised him that he had to, he had a right to have an attorney. He had a right to have an attorney present before he answered any questions or made any statement.

Id. at 536-537.

This testimony shows that the petitioner was not advised of and therefore, was effectively denied his right to court-appointed counsel. Yet the interrogation continued and the statements were received into evidence. Id. Under Miranda, this constitutional violation mandates suppression of the statements, and requires reversal of the conviction.

The United States Supreme Court has never upheld as constitutional the admission of a defendant's in-custody confession during the government's case-in-chief "in the absence of full warning or a showing of effective waiver" (original emphasis). United States v. Stewart, 576 F.2d 50, 54 (5th Cir. 1978). See, e.g., Oregon v. Elstad, 470 U.S. 298 (1985) (that part of confession that was unwarned inadmissible); Michigan v. Tucker, 417 U.S. 433 (1974) (defendant's unwarned statement properly excluded by trial court); Orozco v. Texas, 394 U.S. 324 (1969) (conviction reversed on ground that accused not warned).

The sanction for prosecutorial failure to comply with constitutional standards has been complete exclusion of the defendant's statement, and indeed exclusion and reversal has remained the primary remedy in Florida and federal courts for Miranda violations. See, e.g., Fendley v. United States, 384 F.2d 923 (5th Cir. 1967) (defendant not informed of right to have court-appointed counsel present during interrogation; conviction overturned); Cook v. United States, 392 F.2d 219 (5th Cir. 1968) (incompleted warning given; reversed); Montoya v. United States, 392 F.2d 731 (5th Cir. 1968) (failure to advise of the right to have counsel provided; remanded for new trial); Chambers v. United States, 391 F.2d 455 (5th Cir. 1968) (failure to advise of right to presence of retained or appointed attorney during interrogation; reversed); Lathers v. United States, 396 F.2d 524 (5th Cir. 1968) (failure to advise of right to have attorney present; reversed); Atwell v. United States, 398 F.2d 507 (5th Cir. 1968) (failure to advise of right to counsel before and during interrogation; remanded for retrial); Agius v. United States, 413 F.2d 915 (5th Cir. 1969) (failure to give complete Miranda warnings); Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969) (failure to advise of right to presence of retained or appointed counsel during interrogation; reversed); Sanchez v. Beto, 467 F.2d 513 (5th Cir. 1972), (failure to inform of right to have attorney during interrogation; conviction overturned); United States v. Stewart, 576 F.2d 50 (5th Cir. 1978) (failure to

advise of right to appointment of counsel; remanded); Woods v. State, 211 So.2d 248 (Fla. 3rd DCA 1968) (prosecution did not prove accused was advised of his right to appointed counsel; conviction reversed); Abram v. State, 216 So.2d 498 (Fla. 1st DCA 1968) (confession in murder case suppressed and conviction overturned where accused not advised of right to appointed counsel; remanded); James v. State, 223 So.2d 52 (Fla. 4th DCA 1969) (failure to advise of right to appointed counsel; reversed); Ard v. State, 233 So.2d 430 (Fla. 4th DCA 1970); (confession suppressed); Shriner v. State, 386 So.2d 525 (Fla. 1980) (statements illegally derived may be suppressed); Caso v. State, 524 So.2d 422 (Fla. 1988) (conviction overturned).

These cases make it clear that where appellate courts find violations of a defendant's Miranda warnings, the courts have consistently overturned the conviction and remanded for new trial. This underscores the central importance of Miranda warnings at the core of the rights of an accused. Due to the right's import, the violation in the instant case demands the recognized remedy, a new trial.

This remedy has been automatically accorded by Florida appellate courts for improper admissions of confessions, despite other overwhelming evidence of guilt. In Ard v. State, supra, the court remanded a murder case for retrial, finding "[n]otwithstanding the fact that there is substantial evidence of the defendant's guilt in the record, even without the

inadmissible confession, such admission constitutes fundamental error and requires reversal." 233 So.2d at 440. (emphasis added).

In Abram v. State, supra, the court reversed a murder conviction on the ground that the defendant's confession had not been preceded by a complete advisement of his right to have an appointed attorney. 216 So.2d at 498. The court reversed and remanded despite "overwhelming eyewitness testimony establishing defendant's guilt of the crime charged." Id. at 500. The court classified the confession as "merely cumulative," that it "added little if anything to the evidence already adduced concerning defendant's guilt." Id. The court nonetheless found it necessary to reverse the judgment in order to "assure compliance with the technical requirements of the law." Id.

The instant case must consequently be overturned regardless of the effect of the petitioner's statements on the total weight of evidence. The harmless error analysis need not be reached. Such a holding would affirm this Court's continuing adherence to the Miranda doctrine, and would assure integrity of the criminal trial process.

In Caso, supra, this Court reversed and remanded on an issue identical to the instant case, and expressly reversed its previous holding in the instant case. The Caso appellant contended that this court's decision in Alvord represented a "marked departure from established state and federal precedent."

524 So.2d at 424. The opinion acknowledged misplaced reliance on Alvord's primary authority, Michigan v. Tucker, stating that the case "provides no support for admitting the confession itself." Id. at 525. This Court concluded the Caso opinion by holding that the failure to advise a person in custody of the right to appointed counsel, if indigent, renders the custodial statements inadmissible in the prosecutor's case-in-chief. Id.

The instant case, having been expressly overturned by Caso, rightfully requires the same relief: a new trial. Only a trial would correct the glaring constitutional errors in the case, and insure a just resolution of petitioner's claim. A new trial is thus required not only by legal precedent, but by fundamental fairness as well.

III.

THE ERROR COMPLAINED OF IS NOT HARMLESS.

As previously noted, in Caso v. State, this Court overruled the opinion rendered on Petitioner's direct appeal and held that statements made without proper Miranda warnings are inadmissible. Caso, 524 So.2d at 425. In doing so, this Court reversed and remanded for new trial, but not before touching upon a harmless error analysis. Id.

The harmless error doctrine is factually inapplicable and inappropriate in the instant case. In Kight v. State, 512 So.2d 926 (Fla. 1987), the case cited for harmless error analysis by Caso, this Court found no Miranda violation, since the unwarned statement in Kight was the second of such statements made to police and was not the product of custodial interrogation, but instead was a spontaneous incriminating assertion. Id. at 926. This Court stated:

> We stress that these statements are admissible only because Kight's initial unwarned statement and subsequent warned statements were voluntarily made and not the result of actual coercion. We, therefore, concluded that although it was error to admit Kight's original statement to Officer Weeks, this error was harmless because the unwarned statement was merely cumulative to the subsequent properly admitted statements.

Id. (citations omitted). In the instant case, however, no such mix of warned and unwarned statements was presented, nor were the petitioner's statements cumulative or repetitious. Indeed, the

statement admitted against Mr. Alvord was the only such statement made by him. This statement was clearly material to the State's case because it established that Mr. Alvord knew three women had been murdered and implied knowledge of the rape of one of them. The impact of the statement in the instant case cannot be analyzed as a redundant or severable part of a statement. The impact and damage to Mr. Alvord's case can only be assessed as a whole. Therefore, the harmless error status accorded the defendant's statement in Kight is not analogous to the statement in the instant case.

A recent decision of this Court analyzing harmless error has required the State to show "beyond a reasonable doubt that there is no reasonable possibility that the erroneous admission" influenced the jury. State v. Lee, _____ So.2d _____, 13 FLW 532 (Fla. September 1, 1988). This Court has refused to allow a conviction to stand merely on the basis of its assessment of the sufficiency of the evidence. Id. at FLW 533. Instead, the Court focused its analysis on the effect of the challenged evidence on the jury. Id. This Court further found that the State had failed to establish there was no reasonable possibility that the error affected the jury verdict. Id., citing, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Thus, the test is whether the evidence's wrongful admission created a reasonable possibility of affecting the jury's decision, which the State must prove beyond a reasonable doubt.

Matire v. State, _____ So.2d _____, 13 FLW 2001 (Fla. 4th DCA August 31, 1988), citing DiGuilio. The State is foreclosed from such a showing on the instant facts. The record cannot support a contention that the petitioner's improperly admitted statements did not in fact inflame and propel the jury toward a guilty verdict and then to a recommendation of death.

In DiGuilio this Court outlined a two-part test for finding harmless error. The first part of the inquiry is to examine the permissible evidence, on which the jury could have legitimately relied, to determine whether it was clearly conclusive. 491 So.2d at 1138. Then, the court is to "conduct an even closer examination of the impermissible evidence to determine whether it might have possibly influenced the jury." Id.

The "possible influence" presented by the petitioner's unwarned statements was great. Confessions are generally quite persuasive, especially petitioner's statement which: 1) led the jury to believe petitioner had the mental capacity to form the intent to commit premeditated murder; and 2) established that petitioner had some knowledge of the crime itself. Thus, the instant case is an inappropriate candidate for the application of the harmless error doctrine.

Nor is the error in the instant case comparable to other cases where the harmless error doctrine has been applied in this state. In Abram v. State, 216 So.2d 498 (Fla. 1st DCA 1968), the court held, that the admission of an unwarned statement, when the

accused has made an identical, admissible statement, is cumulative evidence, making its erroneous admission into evidence harmless error. Abram involved a defendant's call to a policeman and admission that he shot the victim. 216 So.2d at 499. This admission was duplicated in a later, warned confession made by the defendant during interrogation. Id. at 500. The court held this was not a basis for reversal, finding the confession "merely cumulative." Id.

Again, the harmless error finding bears no relation to the facts of the instant case. Petitioner did not make multiple statements to the police, and the record is uncontradicted that the petitioner's entire interrogation was conducted in the absence of advisement that a court-appointed lawyer could be obtained. Further, the impact of the petitioner's statements on the jury was substantial. The statements tended to show that petitioner was aware of the crimes he had committed; they were used by the prosecutor as the focal point of his closing argument, and their influence on the jury cannot be underestimated. Indeed, in the original Alvord opinion, this Court noted the significance of Mr. Alvord's incriminatory statement when it noted,

> Defendant's statement that he was a rapist, not a thief, was relevant in view of evidence showing that the underwear of one of the victims was found in a room separate from her body, and her pubic area was exposed. Also, there was evidence of male sperm in her vagina, ...

322 So.2d at 538.

The inquiry into harmless error requires this Court to examine the trial record not to determine whether there was other overwhelming evidence of guilt, but to find whether "it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, _____ So.2d _____, 13 FLW 536, 537 (Fla. September 9, 1988) (emphasis added). This inquiry may include complete examination of the trial record. Id. at 536. The inquiry of harmlessness "entails an evaluation of the impact of the erroneously admitted evidence in light of the defenses asserted." Id. at 536-37. Such an examination in the instant case would reveal that the petitioner's trial was devoid of protections of his interests against introduction of unwarned statements.

The same conclusion is reached by applying United States Supreme Court harmless error decisions to the facts of the instant case. The major tenets of harmless error analysis were outlined by the Supreme Court in Chapman v. California, 386 U.S. 18 (1967). Findings of harmless errors, the Court explained, "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Id. at 22. This result-oriented test forms the crux of the analysis. The Court added, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. at 23. The outcome-determinative factor is counter-balanced by an intention

"not to treat as harmless those constitutional errors that affect substantial rights of a party." Id.

The instant case presents strong reasons against application of harmless error on both the outcome-determinative and substantial right grounds. The Miranda rights have been consistently recognized as forming substantial rights as envisioned by Chapman, since they lie at the core of protections afforded to accused persons, and they trigger fundamental constitutional rights embodied in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Additionally, harmless error should not be assigned to the instant case because of the damning nature of the statements and their prejudicial persuasive effect on the jury.

The most recent Supreme Court formulation of the harmless error doctrine was decided in May of this year in Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284 (May 31, 1988). The Court held that the prosecution carries the burden of proving beyond a reasonable doubt that a constitutional error did not contribute to the verdict. Id. at 100 L.Ed.2d 293, citing Chapman. The Court cautioned however that some constitutional violations, "by their very nature cast so much doubt on the fairness of the trial process, that as a matter of law, they can never be considered harmless," citing the example of a Fifth Amendment violation where an attorney has a conflict of interest. Satterwhite, 100 L.Ed.2d at 293. The Court reasoned that the scope of such a

violation could not be discerned from the record, and accordingly any inquiry into its effect on the outcome of the case would be purely speculative. Id at 294.

Similarly, in the instant case, it cannot be guessed what effect suppression of the statements would have had. The State cannot rely on the sufficiency of the other evidence in the case, for the Supreme Court stated this is not the proper inquiry:

> The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'

Id. at 295, citing Chapman.

The error in admitting this evidence to support a death sentence was compounded by the trial court's erroneous exclusion of the Hitchcock mitigation factors regarding the petitioner's mental capacity. The jury heard the petitioner's statements, but were unable to evaluate them in terms of their voluntariness, rationality, or truthfulness. Instead, the jury may have drawn unfounded inferences from the statements that petitioner was not mentally ill. Thus, not only did the trial court permit the juror to consider inadmissible evidence during its sentencing deliberations, it also restricted the jury's ability to consider non-statutory mitigating circumstances which might have persuaded the jury to recommend life instead of death. The combination of

these two errors weighs heavily against a finding of harmless error.

No one can guess what effect the combined constitutional errors in this case had on the decision-making process of the jurors. It is certain, however, that Mr. Alvord's statement was a significant piece of evidence against him. A new trial untainted by this evidence is required.

CONCLUSION

Under the reasoning of decisions of the United States Supreme Court and of this Court, the statements made by petitioner to Detective Defour were inadmissible because Mr. Alvord was not properly advised of his right to counsel. Admission of this statement severely prejudiced Mr. Alvord's defense in that it established petitioner's knowledge of the crimes charged. For these reasons, Mr. Alvord's convictions should be reversed and a new trial ordered.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By _____
Wm. J. Sheppard

By _____
Elizabeth L. White
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Ann Quince, Esquire, Assistant Attorney General, 15705 Warbler Place, Tampa, Florida 33624, by mail, this 21st day of September, 1988.

Elizabeth L. White
ATTORNEY