IN THE SUPREME COURT OF

THE STATE OF FLORIDA

DAVID GOODWIN,

Petitioner,

vs. CASE NO.

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the circuit court, and Respondent was the appellee and the prosecution respectively. In the brief, the parties will be referred to by name.

The following symbols will be used:

"R"	Record on appeal
"T"	Transcript of proceedings in the lower tribunal, followed by appropriate volume and page numbers

STATEMENT OF THE CASE

Appellant, David Goodwin, was informed against for delivery of cocaine (Count I) and tampering with evidence, a ten dollar bill (Count II) (R 202-203). Mr. Goodwin was tried by a jury (R 213-215, 217-218). At the conclusion of the evidence, the trial court granted Mr. Goodwin's motion for judgment of acquittal on Count II but permitted Count I to go to the jury (T 139-140, 143-145), which returned a verdict finding Mr. Goodwin guilty of that charge (R 216).

Mr. Goodwin was adjudged guilty in accordance with the jury's verdict (R 219). Following the denial of his motion for new trial (R 221-222, T 192), Mr. Goodwin was sentenced, on May 30, 1997, to serve fifteen years in prison as a habitual offender (R 225-227), the State having previously noticed its intent to seek the imposition of an enhanced sentence (R 204-205). Mr. Goodwin was given credit for time served. This sentence was in excess of the sentencing guidelines recommendation of only 45.6 months in prison (R 228-229).

On his appeal to the Fourth District Court of Appeal, Appellant's conviction was affirmed, based on the appellate court's holding that, under the new harmless error test set out in Section 924.051(7), Florida Statutes (1995), the error claimed on appeal was harmless. Upon denial of rehearing on June 24, 1998, the District Court

of Appeal certified the following question to this Court as presenting an issue of great public importance:

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN *DIGUILIO v. STATE*, 491 So. 2d 1129 (*Fla. 1986*)?

Petitioner noticed his intent to invoke the discretionary jurisdiction of this Court on July 9, 1998. This Court subsequently entered an order setting a briefing schedule.

This initial brief on the merits follows.

STATEMENT OF THE FACTS

On April 11, 1996,[1] Deputy Tircu Taranu was driving an unmarked vehicle at around 8:00 p.m. (T 92-93) when he saw a man he identified as Mr. Goodwin standing in the middle of the road (T 94). According to Taranu, the two men made eye contact, and the man raised his hand (T 94). When Taranu stopped the car, the man asked him if he wanted rock or weed (T 94). Taranu told him he wanted a "dime," which, according to Taranu, meant that he wanted crack cocaine rock (T 94). Taranu gave the man a marked ten dollar bill and received three small pieces of crack cocaine in exchange (T 94, 134). The entire transaction took no more than about thirty seconds (T 112).

Taranu broadcast a description to his backup officers of a black male in a checkered shirt and burgundy shorts (T 99). Based on that description, Mr. Goodwin was taken into custody about five minutes later (T 114) as he stood keeping himself warm (T 118) about two blocks away (T 108) at a barrel which had a fire burning in it (T 102). According to Deputy Gandarillas, one of the officers who arrested Mr. Goodwin, Mr. Goodwin dropped some currency he was holding in his hand into the

[1]According to the trial transcript, Deputy Taranu testified that the incident occurred on August 11, 1996 (T 92), but Deputy Gandarillas identified the date as April 11, 1996 (T 115), as alleged in the information (R 202) and in the police report (R 201).

burning trash can as the police drove up (T 119, 127). Taranu identified Mr. Goodwin at the scene as the person who had previously sold him the cocaine (T 101).

Mr. Goodwin moved for a mistrial (T 116) during the testimony of Deputy Gandarillas when the officer testified that during the operation in which he and Taranu were involved, one officer (Taranu) "goes out into the areas that are known for street level drug sales and he tries to make buys from street level dealers" (T 115). The motion was denied (T 149-150), but the trial court instructed the jury to disregard the statement by the witness (T 116).

The marked ten dollar bill Taranu said he gave to Mr. Goodwin was never recovered, although Mr. Goodwin did have other currency in his possession (T 122), nor were any drugs found when Mr. Goodwin was searched (T 126).

SUMMARY OF THE ARGUMENT

1. Reference to the scene of the crime as a "drug area" and to the investigation as one designed to root out "street level drug dealers" was prejudicial in the instant case, and the trial court erred in denying Petitioner's motion for mistrial made in response to these improper characterizations.

2. The harmless error test set forth in Section 924.051(3), Florida Statutes (1995) unconstitutionally thwarts an appellant's legitimate appellate rights by shifting the burden of proving harmful error from the beneficiary of the error to the victim of the error. It also violates the separation of powers by attempting to establish procedures for appellate review. Establishing the appropriate standard for appellate review is inherent in this Court's rule-making authority. Nor does the statute define the burden of proving harmful error with sufficient specificity. Finally, the issue in the present case raises a violation of Mr. Goodwin's constitutional right to a fair trial, so that the harmless error test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) and State v. DiGuilio, apply.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN DEPUTY GANDARILLAS TESTIFIED THAT APPELLANT WAS APPREHENDED IN A POLICE OPERATION DIRECTED AT STREET LEVEL DRUG DEALERS.

During his direct testimony in the instant case, Deputy Gandarillas told the jury that during operations of the Street Crimes Unit like the one which resulted in Mr. Goodwin's arrest, one officer "goes out into the areas that are known for street level drug sales and he tries to make buys from the street level dealers" (T 115). When Mr. Goodwin immediately objected and moved for mistrial in response to this testimony, the trial court initially took the matter under advisement, instructing the jury that it should disregard "the last comment from the deputy, please" (T 116). When Mr. Goodwin renewed his motion at the conclusion of the case, however, the trial court denied it (T 149-150). This was error.

Generally, the characterization in a criminal trial of the neighborhood where the crime was committed by an epithet such as "drug supermarket" is not relevant to the State's case. Davis v. State, 562 So. 2d 443 (Fla. 2d DCA 1990). A trial is unfair where an officer testifies that the place where the illegal act occurs is a known

narcotics area: the defendant has the right to be tried on the evidence, not on the characteristics or conduct of certain classes of criminals in general. Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991); Cabral v. State, 550 So. 2d 46 (Fla. 3d DCA 1989). This Court has long recognized the prejudice inherent from the admission of such irrelevant evidence. Black v. State, 545 So. 2d 498 (Fla. 4th DCA 1989) [defendant arrested at "crack" or "base" house where "no normal people lived"]; Beneby v. State, 354 So. 2d 98 (Fla. 4th DCA), cert. denied, 359 So. 2d 1220 (Fla. 1978) [area known to be inhabited by drug users]. In the present case, Deputy Gandarillas' description of the area where the transaction at issue below took place as a "drug area" and assertion that the focus of the investigation was to apprehend "street level drug dealers" likewise cannot fail to have suggested to the jury that Mr. Goodwin, as a denizen of such an area,[2] must have been one of those "street level dealers" the State was seeking to catch. The instant case is thus to be distinguished from those like Gillion v. State, 573 So. 2d 810 (Fla. 1991), where the police, rather than impugning the area's reputation, merely testified as to their personal observations of drug transactions which occurred in their presence. The Supreme Court held in Gillion that in such a case, admission of the police testimony of their own personal

[2]Mr. Goodwin was apprehended only two blocks away from the place where the alleged drug sale occurred (T 108).

observations was not improper, distinguishing Beneby v. State, 354 So. 2d 98, where testimony concerning the reputation or character of the area was at issue.

The instant clearly falls within the proscription of Beneby and not the exclusion from that proscription defined in Gillion. Deputy Gandarillas' reference to "street level drug sales" did not describe any personal observations of his own, but was a direct statement concerning the reputation of the neighborhood where Mr. Goodwin lived. As such, it was improper and prejudicial.

The evidence in the present case was hardly overwhelming. Only one witness, Deputy Taranu, identified Mr. Goodwin as the person who sold crack cocaine, and Taranu's identification was based solely on his thirty-second contact with the perpetrator at the time of the illegal transaction (T 112). No drugs or other suspicious articles were found on Mr. Goodwin's person when he was arrested just a few minutes later (T 126), nor was the marked ten dollar bill given to the seller by Taranu ever recovered, although Mr. Goodwin had other money in his possession (T 122).[3] Consequently, when the jury heard the prejudicial testimony in the instant case concerning the "street level drug dealers" the police were trying to catch and the "areas that are known for street level drug sales," which included the place where the

[3]The State theorized, but could not prove (T 143-145) that Mr. Goodwin burned this bill.

instant offense occurred, Mr. Goodwin's motion for mistrial should have been granted, since the deputy's testimony may well have improperly influenced the jury in returning its verdict against Mr. Goodwin. As a result, Mr. Goodwin's constitutional right to a fair trial was denied, and his conviction must now be reversed, and this cause remanded for a new trial.

POINT II

THE HARMFUL ERROR TEST DEFINED IN SECTION 924.051(7), FLORIDA STATUTES (1995) IS UNCONSTITUTIONAL AND SHOULD NOT, IN ANY EVENT, BE APPLIED IN THE PRESENT CASE.

In its decision in the instant case, the Fourth District Court of Appeal affirmed Mr. Goodwin's conviction, holding that, while a reference to the neighborhood where Mr. Goodwin was arrested as one "known for street level buys" where the officer "tries to make buys from street level drug dealers" was error, Mr. Goodwin did not meet his burden under Section 924.051(7), Florida Statutes (1995) to establish that the error was "prejudicial." The Court's conclusion that Florida's harmless error test, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) does not apply to the instant case must be corrected.

In State v. DiGuilio, this Court rejected the application of a reversible error per se rule when faced with an erroneously admitted comment on the defendant's right to remain silent. Instead, this Court adopted the harmless error test from Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), which it noted was consistent with Section 924.33,[4] Florida Statutes. 491 So. 2d at 1134, n. 9.

[4]"No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."

Recognizing that "the authority of the legislature to enact harmless error statutes is unquestioned," 491 So. 2d 1134, this Court nevertheless explained that Section 924.33, Florida Statutes, passed constitutional muster since it "respects the *constitutional* right to a trial free of harmful error but directs appellate courts *not* to apply a standard of review which requires that trials be free of harmless errors." *Id.* (emphasis added in part, original in part). Chapman, and thus DiGuilio, placed the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict on the beneficiary of the error. 491 So. 2d at 1135. This Court observed that the defendant's *constitutional right to a fair trial* was preserved by this procedure, despite DiGuilio 's rejection of an automatic reversal rule, because the burden of showing harmlessness was placed on the beneficiary of the error:

> The combination of the fairly susceptible test and the harmless error rule is a happy union. It preserves the *accused's constitutional right to a fair trial* by requiring the state to show beyond a reasonable doubt that the specific comment(s) did not contribute to the verdict.

491 Sol. 2d at 1136 (emphasis added). This Court also explained that placing the burden on the beneficiary of the error deters a party from purposely committing strategic error:

> *In view of the heavy burden the harmless error rule places on the state*, it further serves as a strong deterrent against

> prosecutors *advertently* or inadvertently commenting on the accused's silence. It cannot be rationally argued that commenting on an accused's silence is a viable strategy for obtaining convictions.

491 So. 2d at 1136 (emphasis added.) This Court made it unequivocally clear that the burden *must* remain with the beneficiary of the error:

> The burden to show the error was harmless *must* remain on the state.

491 So. 2d at 1139 (emphasis added).

Recently, this Court has held that the legislature may not place conditions on the constitutional right to appeal which "thwart the litigants' legitimate appellate rights." In re Amendments to the Florida Rules of Procedure, 685 So. 2d 773, 774 (Fla. 1996). An appellant's legitimate appellate right to a fair appeal and a fair trial is thwarted by the shifting of the burden of proving the prejudicial or nonprejudicial nature of the error from the beneficiary of the error to the victim of the error.

Thus, while the legislature has the power to discourage courts from reversing a conviction in the absence of prejudice to the defendant, its scheme must nevertheless satisfy constitutional concerns for the defendant's *right to a fair trial*. Section 924.054(7), by shifting the burden of proving prejudice to the victim of the error thwarts legitimate appellate rights, ignores constitutional safeguards, and

cannot be countenanced by the courts.

This conclusion is buttressed by the fact that since July 1, 1996, every appellate court in Florida -- including this Court -- has reversed at least one case under the harmless error standard (including the placement of the burden on the State to show harmless error) as set out in DiGuilio. *E.g.*, Johnson v. State, 682 So. 2d 215 (Fla. 5th DCA 1996); Chadwick v. State, 680 So. 2d 567 (Fla. 1st DCA 1996); Livingston v. State, 682 So. 2d 591 (Fla. 2d DCA 1996); Smith v. State, 681 So. 2d 894 (Fla. 4th DCA Oct. 23, 1996), Jean-Mary v. State, 678 So. 2d 928 (Fla. 2d DCA 1996); Green v. State, 688 So. 2d 301 (Fla. 1996).

In addition, Mr. Goodwin urges that, to the extent that the statute establishes procedures for the courts to conduct their review on appeal and creates standards of review for the appellate courts, the statute unconstitutionally violates the separation of powers. Art. I, section 3, Florida Constitution. Article V, section 2(a) of the Florida Constitution confers on the Supreme Court alone the power to adopt rules for the practice and [procedure in all courts. State v. Ford, 626 So. 2d 1138, 1345 (Fla. 1993) ["All courts in Florida possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to the existing laws and constitutional provisions"). Establishing

the appropriate standard of review on appeal is inherent in this Court's rule-making authority. State v. DiGuilio, 491 So. 2d 1129; Ciccarelli v. State, 531 So. 2d 129, 131 (Fla. 1988) (Grimes, J., specially concurring). According use of Section 924.051(7) to establish or modify the procedure for conducting appellate review is unconstitutional. Markert v. Johnson, 367 So. 2d 1003 (Fla. 1978).

Finally, while the statute places a burden on the victim of the error, it does not delineate what the burden is. To the extent that the statute is vague in defining the burden, the statute must be construed in favor of the defendant. Nell v. State, 277 So. 2d 1 (Fla. 1973) [if there is any doubt as to a statute, the doubt must be resolved in favor of the citizen). State v. DiGuilio requires that unless there is no reasonable doubt that the error did not influence the jury, the error cannot be considered harmless. Thus, if a burden is placed on the defendant as the victim of the error, consistent with DiGuilio, the burden would be that if the defendant raises a reasonable doubt that the error may have influenced the jury, the error cannot be deemed harmless. This is also consistent with Heuss v. State, 687 So. 2d 823 (Fla. 1996), which explained that the party's initial burden is merely one of presenting a prima facie case, and the ultimate burden was on the reviewing court to "conclude beyond a reasonable doubt ... that the verdict could not have been affected by the

error."

Furthermore, even assuming that section 924.051(7) is valid with respect to issues involving a technical violation of some State procedural rule, a state may not apply its own harmless error procedure to resolve an issue involving a federal question. Chapman v. California, 186 U.S. 18, 87 S.Ct. 824, 827; White v. State, 356 So. 2d 56 (Fla. 4th DCA 1978). Where there is a violation of a right rooted in the Bill of Rights, the state's harmless error procedure gives way to the harmless error test in Chapman. Indeed, this Court has adopted the Chapman harmless error procedure in deciding issues involving the Florida Constitution and state law errors as well. *E.g.*, Traylor v. State, 596 So. 2d 957, 973 (Fla. 1992); State v. Schopp, 636 So. 2d 1016 (Fla. 1995). The issue in the present case, far from involving some merely procedural error, raises an issue involving the admission of irrelevant and prejudicial testimony which implicates Mr., Goodwin's *constitutional* right to a fair trial. Indeed, the admission of evidence, like that at bench, which tends to show a defendant's bad character or propensity to commit crime has been held presumptively harmful because of the danger that the jury will take it as evidence of guilt of the crime charged. Straight v. State, 397 So. 2d 903 (Fla. 1981). Consequently, the District Court's summary conclusion that the error herein raised "is not a

constitutional error to which *State v. DiGuilio* [citation omitted] is required to be applied" is unconvincing.

Since the Fourth District Court of Appeal appeared to concede that under the standard enunciated in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), reversal would be required in the instant case, Mr. Goodwin's judgement of conviction should be reversed and this cause remanded for a new trial.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Goodwin requests that this Court quash the decision of the Fourth District Court of Appeal, apply the harmless error test enunciated in DiGuilio v. State, and reverse the judgment and sentence below, with directions that Mr. Goodwin be afforded a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of AUGUST, 1998.

_____
Of Counsel

AUTHORITIES CITED

FLORIDA CONSTITUTION

FLORIDA STATUTES