SUPREME COURT OF THE STATE OF FLORIDA

JAMES KNOWLES,

CASE NO: SC01-2778
Petitioner,

vs.L.T. CASE NO: 2D99-4646

STATE OF FLORIDA,

Respondent.
_____/

# PETITIONER'S AMENDED INITIAL BRIEF
# APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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## CITATION OF AUTHORITIES





## INTRODUCTION

The Petitioner shall be referred to as Petitioner or Appellant. The State shall be referred to as State or Appellee. References to the Record shall be designated as (R-). References to the trial transcript shall be designated as (T-).

## STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of first degree murder of his wife. He was sentenced to life in prison without parole (R-225-228). Originally accused of two counts of aggravated assault with a weapon, at the commencement of the trial, the State dismissed the aggravated assault charges and proceeded with first degree murder only (T-7).

Prior to trial, Petitioner had previously entered a plea to murder in the second degree and two counts of aggravated battery with a firearm (R-89-96). He was sentenced to thirty (30) years in state prison. The sentencing hearing is recorded in its entirety at R-117-206. At that hearing, Petitioner called Dr. Joel Fried, a psychologist, as his expert witness for the purpose of sentencing. Dr. Fried had been hired by the defense to determine Petitioner's sanity.

That initial conviction was vacated after a post conviction relief hearing (R-211-213) upon the grounds of ineffective assistance of counsel. Prior counsel had failed to accurately advise Petitioner of the amount of gain time that he would

receive during his incarceration thus requiring a new trial. The matter then proceeded to trial.

Petitioner and the victim were married the first time in 1981. They were divorced after two and one-half years but continued to live together. During the marriage they had to children, both boys. They remarried in 1991 and were divorced again in 1994. Irrespective of the divorces, they continued to live together until July 6, 1994 (T-341, 342). After the physical separation, Petitioner became increasingly more depressed over the fact that his marriage had failed.

On September 19, 1994, Petitioner entered the wife's place of business ostensibly to discuss a reconciliation. After a discussion, Petitioner shot her with one shot from a revolver. She died at the scene. Four other employees were at the business at the time of the shooting but none of them actually witnessed the incident. The four men at the scene heard the victim say "no, Jimmy, no" then they heard an explosion (T-101-103). All of the men proceeded to the victim's office where a struggle for the firearm ensued. Prior to the struggle, Petitioner had attempted to take his own life with the firearm but the gun jammed. At one point during the struggle, he asked to be let go so that he could kill himself (T-104, 1-15-17). Ultimately, the men subdued the Petitioner and took control of the gun. Petitioner was arrested at the scene. The victim died of the single gunshot wound.

Since no witnesses were present immediately prior to the shooting, the only record evidence of the encounter between Petitioner and his wife is found in the testimony of the Petitioner commencing at T-341. Petitioner testified that his wife had been unfaithful to him during their marriages but he still loved her. He wanted to forgive her and reunite. Prior to appearing at the wife's office on September 19, Petitioner had purchased thirteen roses, one for each year of their relationship, and brought them with him to the office. He asked his wife to take him back but she refused. She stated that while he had been able to forgive her for her prior actions, she had been involved with more than one man, that some of the men were Petitioner's friends (T-349, 1-12 through T-350, 1-6) and he would never be able to forgive her for her actions. He testified at T-349, 1-25, that she said "it was just sex...." and at T-350, 1-2:

> "...no, I don't think you will this time, James, because it wasn't just the one person, there's been others, and some of them are friends of yours, and when you find this out, we're going to go through all this again."

Thereafter, Petitioner testified as follows at page 359 line 7:

> "And somewhere about that point I told her I loved her very much and I shot and killed her."

For two or three days prior to the shooting, Petitioner had made certain arrangements for the handling of his affairs. Petitioner's niece, Katherine Shockley, testified that Petitioner had given her a document designating her as

custodian of the boys in the event of the death of both of their parents. Ms. Shockley stated that Petitioner did not give any indication of the fact that he intended to kill his wife (T-172, 1-23 through T-175). Petitioner also left an undated handwritten will which was read into evidence at T-269, a note about payment for completion of work by Aluminum Building Systems, a note about checks that were owned to him from his employer, and a temporary tag and lease agreement for a pickup truck (T-270, 271). These items were recovered at Petitioner's home pursuant to a search warrant (R-77).

Law enforcement agencies also recovered audiotapes at Petitioner's home when executing the search warrant. Those tapes were played to the jury in their entirety at T-272 - 277. In the tapes, Petitioner appeared to be intent upon committing suicide. He also left certain instructions as to the manner of handling of his affairs after his death. In the first tape, Petitioner alludes to the fact that the boys would lose "two of us" and "I'm not going alone." Finally, he stated on the tape at T-275, l. 1-4 as follows:

> "This is just something that I have decided that I have to do to be at peace with myself. I cannot be hurt anymore and will not be hurt anymore."

Another tape read to the jury at T-276 - 277, contained the following statement:

> "I cannot handle this and have not handled it well at all. I just love Tina so much until I can't go on without her. I know it's hell to feel that way, Bob, and I know that if I were talking to you direct right now that things might be different in some way, but it could never, never stop the hurt I feel in my heart."

Dr. Fried, the defense's original expert at the first sentencing, was called over defense objection as the state's expert during the guilt phase of the trial. The objection is argued at T-306-312. Finding that the Petitioner waived his confidentiality by calling the doctor as a witness at the sentencing, the Court allowed the doctor to testify at trial as to the mental condition of the Petitioner. T-312. Dr. Fried testified that he was originally hired to evaluate Petitioner's sanity (T-317, 1-15-19).

At T-321 through T-327, Dr. Fried testified as to the state of mind of the petitioner prior to the murder especially relating statements that the Petitioner intended to kill his wife. At T-322, Dr. Fried specifically referred to Mr. Knowles making "plans" to take his wife's life. These statements bear directly upon premeditation. During the direct examination of Dr. Fried, the following testimony is recorded commencing at (T-326, l. 11):

Q. "So when he went to his wife's place of business on Monday, the morning hours of Monday, September 19th, he clearly knew that was the wrong act?"

A. "I believe that is true, yes."

And again at (T-326, l. 24) the following testimony is recorded:

Q. "And not to be repetitious, regarding his ability to form specific intent, he did have that ability, Doctor, didn't he?"

A. "In my opinion, he did, yes."

Dr. Fried further diagnosed Petitioner's depression stating that Petitioner was "very depressed" (T-324, 1-3). Petitioner was crying a lot, he was very distressed and disturbed (T-324, 1-14-15) and psychological tests administered indicated "he was anxious and very, very severely depressed." (T-324, 1-22-23). Finally, Dr. Fried testified that Petitioner probably would not have killed his wife is she had agreed to reconcile the marriage (T-338, 1-3-8).

In closing argument, the State relied upon the psychologists testimony, at one point, characterizing the testimony of the psychologist as "significantly important." (T-400, 1. 20-21). Finally, the prosecutor called Petitioner's preparations an "elaborate plan," stating emphatically "that's premeditation." (T-401 l. 18-20 )

At trial Knowles argued for a lesser charge of murder of manslaughter based on heat of passion. Petitioner was convicted as charged of murder in the first degree and sentenced to life in prison without possibility of parole.

Petitioner's appeal on the merits to the Second District Court of Appeal was affirmed by a 2 to 1 decision, *Knowles v. State*, 800 So. 2d 259 (Fla. 2nd DCA 2001). While the Second District's opinion determined that the use of the testimony of Dr. Fried was erroneous both by violating the privilege against self-incrimination and attorney-client privilege, the court further found that this testimony constituted harmless error. In dissent, Judge Blue found the error harmful stating:

> "Where, as in this case, the primary issue is the defendant's premeditation, I can think of nothing more harmful than the presentation of evidence of premeditation from the defendant's psychologist."

After Petitioner's Motion for Rehearing, Certification and En banc review was denied, Petitioner's timely Request to Invoke the Discretionary Jurisdiction of the court was granted.

## SUMMARY OF THE ARGUMENT

Erroneously allowing a psychiatrist, who had been selected by the defense to determine sanity, to testify to the requisite premeditation for first degree murder, cannot possibility be a harmless error. Harmless error cannot be determined by

weighing other evidence detrimental to the defendant that was adduced at the trial. Such error is especially not harmless if the error involved a constitutional violation. In this case the District Court found the error to violate the Appellant's constitutional privilege against self incrimination and attorney-client privilege. The violation of such rights cannot be harmless. Even if the evidence is overwhelming, as a matter of law, if the error itself is harmful, then, a harmless error analysis may not be used to deny a new trial. Prior case law as reinforced by *Goodwin v. State* requires the error to be harmless beyond a reasonable doubt. The fact that one learned appellate judge found the error to be harmful should meet the reasonable doubt standard.

Erroneous admission of expert testimony or testimony of witnesses with heightened credibility, as a matter of law, cannot be the subject of a harmless error analysis. Irrespective of the fact that the court determined the testimony of the psychologist to be improperly admitted, the court found the admission of that evidence to be harmless error. Since the witness was an expert in mental health with heightened credibility and he testified to criminal intent, the testimony of that witness cannot possibly constitute harmless error.

## ARGUMENT

POINT I - THE DISTRICT COURT ERRED WHEN IT FOUND HARMLESS ERROR BASED UPON SUBSTANTIAL ADDITIONAL EVIDENCE OF GUILT WHEN THE ANALYSIS ONLY REQUIRES THE ERROR ITSELF TO BE HARMLESS BEYOND A REASONABLE DOUBT.

The standard of review in analyzing whether an error is harmless is whether the error is harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), *Chiccarelli v. State*, 531 So. 2d 129 (Fla. 1988), *Goodwin v. State*, 751 So. 2d 537 (Fla. 2000).

The case of *Goodwin v. State*, 751 So. 2d 537 (Fla 2000), and the subsequent recent cases of *Smith v. State*, 762 So. 2d 969 Fla. 4th DCA 2000), *Reyes v. State*, 783 So. 2d 1129 (Fla. 3rd DCA 2001) and *Cooper v. State*, 778 So. 2d 542 (Fla. 3rd DCA 2001) decided by the District Courts of Appeal, all stand for the proposition that significant, substantial, and even overwhelming, additional record evidence is not sufficient to justify a finding of harmless error. Rather, harmless error must be determined by whether the evidence that has been erroneously admitted could have had substantial influence upon a jury verdict. That error, to be harmless, must be determined to be harmless beyond a reasonable doubt, *Goodwin* at P. 544, 545, *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986) at P. 1138.

In *Goodwin*, at page 542, the court stated as follows:

> "Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Thus, when conducting a harmless error analysis, the court must not focus upon the other evidence on the record but must focus on whether the evidence erroneously admitted could have possibly effected the verdict. The decision of the District Court in *Knowles* relies upon the additional evidence of guilt rather than the harmful nature of the improperly admitted testimony, *Knowles* at P. 264, 265. As the dissent states at P. 267:

> "Where, as in this case, the primary issue is the defendant's premeditation, I can think of nothing more harmful than the presentation of evidence of premeditation from the defendant's psychologist."

Thus, one learned appellate judge believed that this error was not harmless beyond a reasonable doubt.

While the Court has elected not to distinguish constitutional errors and non-constitutional errors, as error affecting a constitutional right can rarely be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed. 2d 302 (1991), sets forth fifteen constitutional errors which are expressly not harmless as a matter of law. In addition, the court in *Goodwin* at page 542 stated that developing a

"laundry list" of such constitutional errors would not guarantee the integrity of the criminal process and mandates a case by case analysis. In the instant case, the District Court found that use of the testimony of Dr. Fried violated Mr. Knowles' absolute constitutional privilege against self incrimination under both the State and Federal Constitutions. *Knowles* at P. 263, 264. In fact, the Court stated at P. 264 that the testimony of the psychologist had a "profound impact upon Mr. Knowles' constitutional rights." Thus, based upon *Fulminante* and *Goodwin*, the violations to which Mr. Knowles was subjected are of a constitutional nature and therefore cannot possibly constitute harmless error. See *State v. Guess*, 613 So.2d 406 (Fla. 1992).

Since *Goodwin*, which was only decided in the year 2000, numerous harmless error cases have been decided by the District Court's of Appeal. In *Smith v. State*, *supra* the court found harmful error in admitting hearsay evidence that improperly bolstered the credibility of one of the two principal antagonistic witnesses. Citing *Chapman*, *DiGuilio*, and *Goodwin*, the court stated at page 972 as follows:

> "But under *Chapman-DiGuilio-Goodwin*, any finding that erroneously admitted evidence is harmless because it cumulates other evidence is itself an incomplete analysis of the prejudice component. It fails to confront that the proper evidence might have nevertheless effected the jury."

*Reyes v. State*, *supra* concerned whether the admission of improper testimony concerning gang activity constituted harmless error. The court said that it could not conscientiously so conclude. Such an error appears to be more minimal than the constitutional error which has occurred in the instant case. In *Cooper v. State*, *supra* the trial court erred in admitting ammunition which had been found nine months after the homicide. Concluding that the error was not harmless the court quoted from *DiGuilio* at page 1139 as follows:

> "The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error effected the verdict."

*Ousley v. State*, 763 So.2d 1256 (Fla. 3rd DCA 2000) involved a reversal because of improper impeachment. Citing *Goodwin* and *DiGuilio*, the court said at P. 1257:

> "Harmlessness is not established, as the state seems to argue, when there is otherwise sufficient, even persuasive, evidence in the record to support the convictions. Nor, as it seems to suggest, is the pertinent test satisfied by our being pretty sure either that the defendant actually was guilty, or that the jury was not influenced by the error we have identified."

The test is whether the court is satisfied beyond a reasonable doubt that the erroneous evidence did not contribute to the verdict.

These recent cases since *Goodwin* involve issues that are less than constitutional in magnitude. The Petitioner Knowles was the victim of a constitutional error which cannot be considered harmless.

Examining the standard of review, the admission of the testimony of the psychologist cannot possibly be classified as harmless beyond a reasonable doubt. Only the Appellant and his wife were present at the time that the shooting occurred. Thus, no other witnesses were present to testify as to the requisite intent for murder in the first degree. That intent was supplied by the psychologist, a person who is possessed with superior skills, and, in the eyes of the jury, would be a highly credible, knowledgeable witness. The jury could have relied on his testimony alone in determining criminal intent. Under the criteria set forth in *Goodwin* and *DiGuilio*, that possibility makes the error harmful.

## POINT II - THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT FOUND HARMLESS ERROR IRRESPECTIVE OF THE FACT THAT ERRONEOUSLY ADMITTED EXPERT TESTIMONY FROM A PSYCHOLOGIST OFFERED EXPERT PROOF OF CRIMINAL INTENT

While the dissent in this case recognized the powerful nature of the testimony of the psychologist regarding the issue of intent, the majority found the error to be harmless. This testimony was especially damaging to the Petitioner because this expert psychologist testified to the major issue in the case, intent. By stating that Petitioner had a "plan," this witness, a highly educated psychologist, made the State's case.

*Bowles v. State*, 381 So. 2d 326 (Fla. 5th DCA 1980), involved the testimony of four police officers who testified to events and occurrences which were later

determined to be inadmissible. Finding that the police officer's testimony carried more weight than that of the average citizen, the court determined that the error could not be harmless. At page 328, the court stated:

> "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law, and the prosecutor in his closing argument asked the jury to do just that."

Thus, the court determined that the error was further compounded by using the testimony of the police officers in closing argument. In the instant case, in closing argument, the prosecutor specifically referred to the psychologist's testimony and at one point stated that it was "significantly important." The prosecutor further stated that the psychologist called Mr. Knowles preparations an "elaborate plan." Thus, it is obvious that the State relied heavily upon the psychologist's testimony which could have contributed to the guilty verdict.

In a similar case, *Stribbing v. State*, 778 So. 2d 452 (Fla. 4th DCA 2001), the court rejected harmless error because the evidence of police officers "was likely accorded a high degree of credibility by the jury." While both of the cited cases involve police officers, the basis for the decisions is the heightened credibility afforded to such officers. Use of a psychologist, a highly educated and trained mental health therapist, on an issue involving petitioner's mental state, no doubt carries such a heightened credibility.

*Llanos v. State*, 766 So. 2d 1219 (Fla. 4th DCA 2000), involves the admission of a hearsay notation in a medical report prepared by a doctor. The statement was found to be inadmissable hearsay because it was not reasonably pertinent to diagnosis or treatment. Rejecting harmless error, the Fourth District stated at page 1219, "Here, the doctors reference to the police report gave significant extra weight to the victim's testimony." Thus, in *Llanos*, the District Court rejected harmless error where the source of the improperly admitted testimony is from a similar expert with heightened credibility.

The erroneously entered expert psychological testimony, as a matter of law, must be characterized as harmful error.

## CONCLUSION

The Order affirming the trial court by the Second District Court of Appeal should be reversed upon the issue of harmless error and a new trial ordered.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this ___ day of July, 2002, to the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, FL, 33607.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of this brief is times New Roman, 14 point, in compliance with Florida Rule of Appellate Procedure 9.210 (a)(2).

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