IN THE SUPREME COURT OF FLORIDA

JAMES KNOWLES,

Petitioner,

v. **FSC Case No. SC01-2778**
2d DCA Case 2D99-4646

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In Knowles v. State, 800 So. 2d 259 (Fla. 2d DCA 2001), the Second District set forth the following facts surrounding the appellant/petitioner's initial plea, post-conviction relief proceedings, and subsequent jury trial:

The Initial Plea

> On September 19, 1994, Mr. Knowles went to the workplace of his former wife, Tina Knowles, where he shot and killed her. A grand jury indicted him on one count of first-degree murder and two counts of aggravated assault with a firearm based on the September 19 events. Later, Mr. Knowles, pursuant to a plea offer to the lesser charge of second-degree murder and two counts of aggravated battery with a firearm, entered a plea that was accepted by the court. At the sentencing proceeding, the defense called Dr. Joel B. Freid, a clinical psychologist, to testify regarding Mr. Knowles's state of mind prior to the homicide. Dr. Freid opined that Mr. Knowles, although not legally insane, was very depressed, suicidal, despondent, and frustrated. Further, Mr. Knowles exhibited a dependent personality and relied upon others for emotional support and direction.
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> During cross-examination at that sentencing hearing, the State inquired into several limited areas: when a "triggering conversation" between the victim and the defendant occurred; whether the witness had been provided with police reports containing statements made by the defendant (he had); and how those statements might indicate the defendant's homicidal tendency. The State also cross-examined the expert regarding the defendant's statement that he did not think about homicide until the day before the event and inquired into Dr. Freid's opinion that the defendant had an emotionally dependent personality.
>
> Later, knowing that a successful relief application would subject him to trial on first-degree murder charges, Mr. Knowles established in a

postconviction proceeding, that his counsel failed to advise him properly prior to entering his plea. Finding that the motion was valid and that both prongs of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), had been met, the court vacated the conviction and sentence and reinstated his plea of not guilty. Mr. Knowles then went to jury trial on the original charges including first-degree murder.

The Trial

In order to prove the charges against Mr. Knowles, the State introduced evidence regarding the victim's relationship with Mr. Knowles, the events leading to September 19, 1994, and the events of that fateful day.

The victim and Mr. Knowles first married each other in 1981, divorced two and a half years later, remarried in 1991, and divorced again in 1994. However, they continued to reside together until July 6, 1994. They had two children.

In an effort to reconcile, Mr. Knowles went to Tina Knowles's place of business bearing roses. The attempt to revive their relationship failed. Shortly thereafter, a shot that sounded like an explosion rang out. One witness believed he heard Tina saying just before the shot, "No, Jimmy, no." Immediately, Brian Carson and Kurt Smith ran to Tina's office and began wrestling with Mr. Knowles for possession of the firearm. Later, Robert Christian joined the fray and was successful in removing the firearm from Mr. Knowles's possession. Either during or shortly after the altercation, Mr. Knowles stated he wanted to kill himself. Apparently, this was not immediately possible because the weapon had "stovepiped"; that is, a casing had blocked the slide and jammed the gun. The victim had been shot once and died at the scene.

Just days before the murder Mr. Knowles had given his niece a written document that designated the custodian of the children in the event of both parents' deaths. He also left other documents including a handwritten will.

Two audiotapes made by Mr. Knowles before the homicide were admitted into evidence and published to the jury. In a tape left for his niece, Mr. Knowles made a number of statements including:

> I just can't handle it anymore.
>
> I don't want you to cry over me.
>
> They're [the children] gonna lose the two of us. I'm not going by myself.
>
> Let them understand that I really did not mean to cheat them out of a father and mother.
>
> Don't try to explain my actions to nobody. There is no explanation for my actions. This is just something that I have decided that I have to do to be at peace with myself.

During the trial the State advised the court of its intention to call Dr. Freid to testify in its case-in-chief on the issue of premeditation. The defense objected, contending that Dr. Freid's testimony should be barred because it flowed directly from a defective plea which, furthermore, had been judicially vacated. In response to the State's argument that the defendant had voluntarily waived any privilege regarding Dr. Freid's testimony by presenting it at the prior sentencing, the defense reiterated that the expert testimony came from a tainted process and that Mr. Knowles was entitled to be returned to his position prior to his change of plea, with all privileges remaining intact. The trial court, however, found that the there had been a voluntary waiver of the privilege in accord with section 90.507, Florida Statutes (1993), and permitted the State to call Dr. Freid and inquire into matters the defendant had mentioned to him.

Dr. Freid testified that he had been initially retained to evaluate whether Mr. Knowles met the requirements of legal insanity. To that end, he reviewed documents that had been provided,

> administered a battery of psychological tests, and, importantly, interviewed Mr. Knowles. Dr. Freid's testimony established a number of points: first, that Mr. Knowles had made plans to kill both his ex-wife and himself prior to the actual shooting; second, that Mr. Knowles pulled out a gun and shot his ex-wife after she had commented on the roses he had just presented to her, and that he had then immediately tried to kill himself but could not because the gun jammed; and third, that Mr. Knowles was legally sane at the time of the offense and knew his conduct was wrong.
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> Knowles v. State, 800 So. 2d 259.

In addition to the foregoing summary set forth by the Second District Court, the Respondent/Appellee, State of Florida, also directs this Court's attention to the following:

On Saturday night before the murder, Knowles saw his ex-wife, Tina, and her brother, Daniel Sobecki, when they stopped for a drink at J.R's. The next day, Knowles told Sobecki that he'd been standing behind a door or in the bushes and if Tina had "walked out with another man," Knowles "would have just killed all of us." (V.3/T149). During that same conversation on Sunday afternoon, Knowles also asked Sobecki to make sure that the boys were taken care of "if anything" ever happened to Knowles and Tina. (V.3/T149).

Knowles' audiotapes repeatedly confirmed his murder/suicide plan. Among other things, Knowles acknowledged, on tape, that their sons were "gonna lose [the] two of us [because] I'm not going by myself," (V.3/T273), and he expressed ostensible regret

for “cheating” his boys “out of a mother and a father.” (V.3/T276). Knowles also prepared various handwritten documents which outlined details regarding his property and his children. The documents and audiotapes verified that Knowles intended that his two boys would be left without either parent; they would lose both a “mother and a father.” (V.3/T269; 273; 274; 275; 276; 278).

On Monday morning, James Knowles shot and killed his ex-wife, Tina. The bullet went right through Tina’s heart. (V.3/T300).

Preservation of Issue:

Before the clinical psychologist, Dr. Freid, was called to testify, the parties and the trial court addressed the defendant’s waiver of confidentiality by virtue of his voluntary disclosure during the prior sentencing hearing and the fact that the scope of the defendant’s post-conviction attack was limited solely to trial counsel’s erroneous “gain time” advice. (V.4/T311). When the prosecutor announced that he would have Dr. Freid available for rebuttal (V.4/T311), defense counsel stated:

> MR. ANDERSON [Defense counsel]: Well, and, you know, as I told Mr. Harb [prosecutor], I don’t make these decisions instantaneously, unless I’m forced to, and I decided to make this objection just in the last

few minutes, but obviously I've been thinking about it. I don't have any objection to the doctor's testimony, provided that none of this factual information is brought into it. You know, in other words, I don't know how you'd do that.

THE COURT: He wouldn't be calling the doctor for anything other than the question of, Doctor, when did he form the intent to kill, and Mr. Castillo covered it fairly well in front of Judge Roberts, and that was no earlier than Sunday and--no later than Sunday and no earlier than Saturday.

MR. ANDERSON: Well, I wanted to have my cake and eat it too.

THE COURT: That's the only reason he called Dr. Freid.

MR. ANDERSON: That's fine. What Mr. Harb suggests is fine.

THE COURT: Well, you try--both of you try your own case, but I am finding that in accord with Section 90.507 there has been a voluntary waiver of the [sic] either psychotherapist privilege or attorney/client privilege and rights against self-incrimination. Dr. Freid can be called to testify and he can be called to testify regarding what the defendant told him was in his mind.

MR. HARB [Prosecutor]: Okay. I'll be calling Dr. Freid, Your Honor.

THE COURT: Bring them in.

(V.4/T312).

Defense counsel raised no objection at this point, and the trial court subsequently reiterated that the reason the defendant was granted a new trial "had absolutely nothing to do with calling Dr. Freid as a witness" or with Dr. Freid's

testimony. (V.4/T340). Instead, the incompetency [of counsel] claim dealt solely "with a question of how much gain time the defendant would get at the Department of Corrections." (V.4/T340).

At trial, Dr. Freid related Mr. Knowles' own summary of activities on the days just before the shooting. (V.4/T319-320). According to Dr. Freid, at that point in time, Mr. Knowles was depressed, quite upset, and, on Sunday, Knowles learned some things about his wife that were very disturbing to him. Therefore, Knowles developed an elaborate plan for ending his own life. (V.4/T320-321; 325). However, either late Sunday or early Monday, Knowles changed his plans to include taking his wife's life as well as his own and Knowles made two audiotapes in which he recorded his intentions. (V.4/T322). Dr. Freid also related Knowles' description and specific sequence of activities on the morning of the fatal shooting -– Knowles took the gun, went to the florist, had coffee with a friend, returned to the florist to pick up the arrangement of roses, went to Tina's place of business and asked her to come back to him. When Tina said no, Knowles pulled out the gun, shot her, and then tried to shoot himself. (V.4/T323). His plan was to kill himself and kill her. (V.4/T323). According to Dr. Freid, Mr. Knowles struggled with the conflict over his dependence on his wife and

the need to be more assertive; Knowles was devastated by the prospect of losing his wife. (V.4/T325).

On cross-examination by defense counsel, Dr. Freid reiterated that, in his opinion, Knowles was "emotionally disturbed," very depressed, and had difficulty coping with the thought of losing his wife from divorce. (V.4/T331-332). Dr. Freid further explained, "I think what was settled in his mind was that if she rejected him, that he was going to carry out what he said that he was going to carry out in those tapes that he had already made." (V.4/T334). On redirect examination, Dr. Freid agreed that if Tina had agreed to reconcile, that "[i]t's very possible that [Knowles] may not have done what he did." (V.4/T338).

James Knowles testified on his own behalf at trial. (V.4/T341-365). On direct examination, Knowles also described, in detail, his activities and conversations with Tina during the week-end preceding Tina's murder and on the day of her death. (V.4/T348; 349-350). Tina admitted that she'd had a date on Saturday and she told Knowles that "it doesn't matter who it was, it was just sex." (V.4/T348). Knowles didn't "know where this planning stage started, other than it made me know I needed to do something else," and he went to see Tina on September 19th because he was "trying to put my home back together." (V.4/T348-

349) Knowles expected to be successful, but Tina turned him down. (V.4/T349). According to Mr. Knowles, on the day of Tina's death,

> I walked in with a bouquet of roses, sat them down on her desk, and we talked. She told me I shouldn't have bought the roses, I knew I couldn't afford it. . . . I asked her to come back to me, come back and make a home for our children. Tina was loved by our children and by me.
>
> She said, after what I did Saturday night and other things that I've done, I just don't believe you will ever forgive me. And I said – I said to Tina that it was – it was just sex and I had forgiven her for that before and I would get over it again. And she said, 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.
>
> <u>And somewhere about that point I told her I love her very much and I shot and killed her</u>.
>
> (V.4/T349-350).

On cross-examination, Knowles agreed that if Tina had "come back" to him, that he would *not* have killed her. (V.4/T350; 363-364). According to Knowles, he'd planned a reconciliation with Tina, but he'd also decided that "if that didn't happen, I knew I was going to die," . . . and "possibly Tina also." (V.4/T351). Knowles knew that he had the gun on him when he went to see Tina (V.4/T361) Knowles admitted that he shot Tina first, and his plan was for Tina to die first. (V.4/T351).

Significantly, during the initial defense closing argument,

the petitioner's trial counsel relied, in part, on Dr. Freid's testimony to support their defense. In fact, defense counsel stated, "Dr. Freid's testimony, I thought, was important." (V.4/T385). In particular, defense counsel emphasized that the defense was "heat of passion" and, according to defense counsel, Dr. Freid's "expert opinion" actually supported their theory of defense. (See, V.4/T385-386). During rebuttal closing argument, defense counsel again relied on Dr. Freid to support the defense theory that, on the day of the shooting, Knowles likely would have "grasped at straws" and seized every opportunity to believe that he would be successful at a reconciliation. (V.4/T410-411). According to defense counsel, "[T]hat's what the expert said. I suggest we believe him, and believe that he believed, right until the last minute, that he would succeed." (V.4/T411).

On direct appeal, the petitioner/appellant contended, *inter alia*, that the trial court erred in allowing the State to call Dr. Freid during its case-in-chief. Three separate opinions were issued in this case. Judge Casanueva authored the opinion of the Court which concluded that "the testimony of Dr. Freid followed an involuntarily entered plea and was the direct consequence of the plea," . . . thus, "there has been no voluntary waiver of Mr. Knowles's privilege." Knowles, 800 So.

2d at 263. However, any error in allowing the State to call Dr. Freid during its case-in-chief was harmless beyond a reasonable doubt. Id., 800 So. 2d at 264.

Specially concurring, Judge Green agreed that Knowles' conviction should be affirmed and concluded that the defense waived the issue because trial counsel did not object to Dr. Freid's testimony at trial. "The transcript supports the conclusion that while defense counsel vacillated with respect to whether he should object, his final exchange with the state attorney indicates a clear waiver." See, Green, J., concurring, 800 So. 2d at 265. Moreover, as Judge Green further explained,

> When Dr. Freid testified at the sentencing hearing, the information became available to anyone in the world with an interest to review it. H.J.M. v. B.R.C., 603 So.2d 1331, 1334 (Fla. 1st DCA 1992) (holding that "[o]nce this privilege has been waived, it cannot be reinvoked"); Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982) (holding that "[i]t is black letter law that once the privilege is waived, and the horse [is] out of the barn, it cannot be reinvoked").
>
> See, Green, J., concurring, 800 So. 2d at 266

Lastly, Judge Blue dissented and disagreed that the admission of Dr. Freid's testimony was harmless error.

SUMMARY OF THE ARGUMENT

Supplemental Issue:

The petitioner, James Knowles, voluntarily waived any confidential communications with Dr. Freid by having the clinical psychologist testify on his behalf at his original sentencing hearing. Because the petitioner previously waived any confidential privilege, the trial court did not err in allowing the State to call Dr. Freid as its witness during the subsequent trial. Moreover, error, if any, was harmless. The petitioner's actions were inconsistent with a killing that occurred on the spur of the moment. Despite his feelings for his ex-wife, the multiple written and audiotaped statements by the petitioner and his own trial testimony revealed that, while he hoped for a reconciliation, he simultaneously planned a murder/suicide and succeeded, in part.

Issue II:

As this Court explained in Goodwin, in evaluating harmless error, the reviewing court must be satisfied beyond a reasonable doubt "after evaluation of the impact of the error in light of the overall strength of the case and the defenses asserted, that the verdict could not have been affected by the error." 751 So. 2d at 545 (quoting Heuss v. State, 687 So. 2d 823, 824 (Fla. 1996)). The Second District Court made that evaluation on

direct appeal and, based on the court's comprehensive review, concluded that the error was harmless beyond a reasonable doubt.

Issue III:

Except for certain federal constitutional errors identified by the United States Supreme Court as 'structural,' no error is categorically immune to a harmless error analysis. In this case, error, if any, in allowing the State to call the defendant's former expert was properly deemed harmless beyond a reasonable doubt.

SUPPLEMENTAL ISSUE

WHETHER THE PETITIONER, WHO WAIVED HIS CONFIDENTIAL PRIVILEGE BY INTRODUCING THE TESTIMONY OF THE CLINICAL PSYCHOLOGIST AT HIS ORIGINAL SENTENCING HEARING, WAS ENTITLED TO "REINVOKE" THAT CONFIDENTIAL PRIVILEGE AFTER HIS MOTION FOR POST-CONVICTION RELIEF WAS GRANTED ON THE BASIS OF TRIAL COUNSEL'S ERRONEOUS "GAIN-TIME" ADVICE.

In this case, appellant/petitioner currently challenges only the harmless error analysis which was conducted by the Second District Court in Knowles v. State, 800 So. 2d 259 (Fla. 2d DCA 2001). At the outset, however, the State reasserts, and does not waive, its arguments that the trial court properly allowed the State to call Dr. Fried at trial because petitioner voluntarily revealed his communications with Dr. Fried during the prior sentencing proceedings.[1]

Preservation of Issue

In Goodwin v. State, 751 So. 2d 537, 644 (Fla. 1999), this Court interpreted section 924.051(7) "as a reaffirmation of the

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[1]As this Court explained in Hall v. State, 752 So. 2d 575, 582 (Fla. 2000), once this Court has conflict jurisdiction, it has jurisdiction to decide all issues necessary to a full and final resolution." Id. at 582, citing Jacobson v. State, 476 So. 2d 1282, 1284 (Fla. 1985); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982).

important principle that the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection" . . . "[O]nly when the defendant satisfies the burden of demonstrating the existence of preserved error does the appellate court engage in a DiGuilio harmless error analysis. If the error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is "fundamental." Id. at 544, citations omitted.

As Judge Green's concurring opinion below states, "The transcript supports the conclusion that while defense counsel vacillated with respect to whether he should object, his final exchange with the state attorney indicates a clear waiver." See, Green, J., concurring, 800 So. 2d at 265. Thus, the State submits that the petitioner's "violation of privilege" claim was not preserved for appeal. Furthermore, in the alternative, the defendant's "violation of privilege" claim does not constitute "fundamental" error, which is defined as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996).

Petitioner's Waiver of Confidentiality

Assuming, *arguendo*, that the petitioner's "waiver of

confidentiality" claim either was preserved for direct appeal or may be reviewed under the category of "fundamental" error, the trial court was correct in finding a waiver of any existing privilege.

Where the defendant calls a confidential expert to testify, the defendant's privilege is waived. Sagar v. State, 727 So. 2d 1118, 1119 (Fla. 5th DCA 1999). In this case, the privilege, which initially attached to Dr. Freid's testimony, was waived by the petitioner at his prior sentencing hearing. Thus, the trial court correctly determined that the doctor could testify as a state witness because the identical subject matter had been voluntarily disclosed by the petitioner during the original sentencing proceeding. (V.1/R166-178); see §90.507, Fla. Stat. (1999).

Petitioner, when initially charged with first degree murder, pled to second degree murder and proceeded to sentencing. Having already had Dr. Freid appointed to evaluate him, the petitioner elected to have the doctor testify on his behalf at the sentencing hearing. This affirmative action waived the psychotherapist-patient privilege and the attorney-client privilege. Later, petitioner filed a 3.850 motion asserting that his counsel was ineffective for failing to correctly advise

him regarding gain time. (R104-112). No other issue was presented for the post-conviction trial court's consideration, and the Rule 3.850 motion was granted solely on the "erroneous gain time" complaint specified in his motion. (R211-213). After petitioner withdrew his plea, he was tried on the original first degree murder charge. During the trial, the State called Dr. Freid as its witness.

Petitioner relied below on Lovette v. State, 636 So. 2d 1304 (Fla. 1994) and H.A.W v. State, 652 So. 2d 948 (Fla. 5th DCA 1995). However, unlike those cases, in the instant case, *the State called Dr. Freid as a witness only after the privilege had been waived by Petitioner.* Thus, no rights of petitioner were abridged by the State's action because it was petitioner who voluntarily disclosed his communications with Dr. Freid during the earlier sentencing hearing.

Furthermore, Petitioner cannot now assert that his successful 3.850 motion applied to anything that transpired during the plea negotiations or sentencing. The motion for relief was limited to the erroneous "gain time" issue, as was the evidentiary hearing. No amendments to the motion were filed by Petitioner. (R211-213). Having waived the privilege regarding Dr. Freid in the initial sentencing proceeding, it was also waived for the trial. See, Perriman Corporation v. United

States, 665 F.2d 1214 (D.C.Cir. 1981). Moreover, Petitioner cannot assert that, even if his disclosure was voluntary, it was not knowing because he is not required to give *knowing* consent. See Bolin v. State, 650 So. 2d 21 (Fla. 1995). Significantly, as Judge Green's concurring opinion recognized,

> When Dr. Freid testified at the sentencing hearing, the information became available to anyone in the world with an interest to review it. H.J.M. v. B.R.C., 603 So.2d 1331, 1334 (Fla. 1st DCA 1992) (holding that "[o]nce this privilege has been waived, it cannot be reinvoked"); Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982) (holding that "[i]t is black letter law that once the privilege is waived, and the horse [is] out of the barn, it cannot be reinvoked").

See, Green, J., concurring, 800 So. 2d at 266

Since the petitioner voluntarily disclosed his formerly "privileged" communications with Dr. Freid during one proceeding, the trial court properly permitted the State to call Dr. Freid as its witness during a subsequent proceeding. Although an accused's privilege against self-incrimination prohibits a psychiatrist from testifying directly as to the facts obtained from the defendant about the crime, if the defense opens the door to collateral issues, admissions or guilt, the State's redirect examination properly may inquire within the scope opened by the defense. See, State v. Parkin, 238 So. 2d 817, 820 (Fla. 1970), certiorari denied, 401 U.S.

974, 91 S.Ct. 1189, 28 L.Ed.2d 322.

It is undisputed that the psychotherapist-patient privilege and attorney-client privilege can be waived. McKinlay v. McKinlay,, 648 So.2d 806 (Fla. 1st DCA 1995); Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991). The State submits that once the confidential privilege was waived, it cannot be reinvoked. See, H.J.M. v. B.R.C., 603 So. 2d 1331, 1334 (Fla. 1st DCA 1992); Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982).

Here, as in U.S. v. Tyler, 281 F.3d 84 (3rd Cir. 2002), the defendant forfeited any benefits of "confidentiality" when he voluntarily chose to provide information which he thought would benefit him at his original sentencing. In Tyler, the defendant was tried in state court, and he was acquitted of murder, but convicted of intimidating a witness. The state trial judge ordered a pre-sentence investigation; and, responding to the invitation of the probation office in connection with the PSI, Tyler voluntarily submitted a handwritten letter to the state trial judge, hoping to reduce his impending sentence. At the conclusion of his letter, Tyler acknowledged that he had driven his brother to the murder scene but he denied any intent on his part to kill the victim.

After Tyler's release from state prison, federal authorities

launched a separate investigation and Tyler was charged with violating the federal witness tampering statute by murdering a potential federal witness. Before Tyler's federal trial, the state probation office released Tyler's handwritten letter and the government gave notice it would introduce the letter during its case-in-chief. Tyler moved to suppress the letter on Fourth, Fifth, and Sixth Amendment grounds. The trial court denied Tyler's motion and allowed the prosecution to introduce Tyler's letter.

On appeal, the Third Circuit found that "Tyler could not reasonably expect a cloak of confidentiality. He knew the letter would be considered by the state court judge in sentencing, an open proceeding. Nothing prevented the sentencing judge from referring to the letter's contents from the bench. Furthermore, Tyler desired its consideration. He had no reasonable expectation that the letter would not become public." 281 F.3d at 94. In also rejecting Tyler's Fifth Amendment claim, the court explained,

> The District Court found that Tyler knew of his Fifth Amendment rights before voluntarily writing his state sentencing judge. The Fifth Amendment right against self-incrimination must be claimed when self-incrimination is threatened. Ordinarily, it cannot be reserved for future constitutional battles. Minnesota v. Murphy, 465 U.S. 420, 427-28, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (observing an individual may lose the benefit of the privilege even absent a knowing waiver). As the Supreme Court noted in

> Murphy, "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself." Id. at 429, 104 S.Ct. 1136. Tyler voluntarily chose to provide information he believed would benefit him at sentencing. Therefore, assuming a Fifth Amendment privilege existed, Tyler waived and forfeited its benefits.
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> Tyler, 281 F.3d at 95; 98

In a related situation, once an attorney-client communication is disclosed publicly, the privilege no longer attaches and cannot be reasserted later. See, United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987). In Suarez, the trial court held an evidentiary hearing to determine whether the defendant's original guilty plea should be withdrawn. At that hearing, Suarez expressly waived his attorney-client privilege to permit counsel's testimony. The trial court set aside Suarez' guilty plea and, subsequently, Suarez was tried before a jury. At trial, the government called Suarez' former attorney to testify during the government's case in chief. Defense counsel objected on the ground that the waiver of attorney-client privilege was only for a limited purpose at the evidentiary hearing. However, the trial judge ruled that the attorney-client privilege had been waived as to all matters addressed at the prior hearing, and allowed the attorney to testify. On appeal, Suarez' argued, *inter alia*, that the

admission of his former attorney's testimony violated the attorney-client privilege. In rejecting the defendant's claim, the Eleventh Circuit explained,

> We begin by noting that the privilege is not a favored evidentiary concept in the law since it serves to obscure the truth, and it should be construed as narrowly as is consistent with its purpose. Teachers Insurance & Annuity Ass'n of America v. Shamrock Broadcasting Co., 521 F.Supp. 638, 641 (S.D.N.Y.1981). The purpose of the attorney-client privilege is to promote freedom of consultation between client and lawyer by eliminating the fear of subsequent compelled legal disclosure of confidential communications. International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177 (M.D.Fla.1973), aff'd, 550 F.2d 287 (5th Cir.1977). However, at the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege. See United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir.1975); In re Weiss, 596 F.2d 1185 (4th Cir.1979); Teachers Insurance, 521 F.Supp. at 641; United States v. Aronoff, 466 F.Supp. 855, 862 (S.D.N.Y.1979); United States v. Mierzwicki, 500 F.Supp. 1331, 1334 (D.Md.1980). For that reason, it has long been held that once waived, the attorney-client privilege cannot be reasserted. See, e.g., United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir.1971),cert. denied, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972); Drimmer v. Appleton, 628 F.Supp. 1249 (S.D.N.Y.1986); United States v. Krasnov, 143 F.Supp. 184, 190-91 (E.D.Penn.1956), aff'd, 355 U.S. 5, 78 S.Ct. 38, 2 L.Ed.2d 22 (1957); Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4 D.C.A.1982); 8 Wigmore, Evidence § 2328 at 638 (McNaughton rev. 1961) ("A waiver at one stage of a trial should be final for all further stages ..."). Once Feldman testified at the hearing to withdraw the guilty plea, the attorney-client privilege could not bar his testimony on the same subject at trial. Feldman's testimony at trial was well within the scope of his testimony at the plea withdrawal, which was already in

> the public domain pursuant to the waiver of the privilege. Thus, we agree with the district court that Feldman's trial testimony was not a violation of Suarez attorney-client privilege.

See also, Pawlyk v. Wood, 248 F.3d 815 (9th Cir. 2001) (State's use of testimony of former defense-retained psychiatrist in rebuttal to defendant's insanity defense did not violate due process or defendant's right to counsel).

In this case, the defendant testified at trial and the State submits that the prosecutor permissibly could have called the clinical psychologist in rebuttal. Rebuttal testimony is permitted to refute a defense theory or to impeach a defense witness. See, Charles W. Ehrhardt, Florida Evidence S 612.5 (1999). The concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted." Ramirez v. State, 739 So. 2d 568, 579 (Fla. 1999). Here, the defendant testified at trial and, therefore, the prosecutor permissibly also could have offered the clinical psychologist's testimony in rebuttal to challenge the defendant's selective portrayal of the shooting.

Once the defendant introduced the testimony of the clinical psychologist, he waived the privilege. The fact that formerly privileged communications may now be used to contradict his trial testimony cannot be deemed an injustice. *Cf,* U.S. v.

Dunnigan, 507 U.S. 87 (1993) (permissible to enhance defendant's sentence for the willful presentation of false testimony at her trial despite claim that it would chill a defendant's exercise of her constitutional right to testify in her own defense); Ohio Adult Parol Authority v. Woodard, 523 U.S. 272 (1998) (rejecting claim that interview procedure of clemency proceedings presented defendant with a "Hobson's choice" between asserting his Fifth Amendment rights and participating in clemency, even though clemency proceedings are not confidential and what defendant says or does not say may be used against him in postconviction proceedings; Ohio permissibly does not allow a defendant to say one thing in clemency and another in habeas). The evidentiary privilege is just that - a *privilege* - and not a constitutional right. See, Federal Grand Jury Proceedings, In re Cohen, 975 F.2d 1488 (11th Cir. 1992) (defendant's argument under Simmons v. United States, 390 U.S. 377 (1968), that a grand jury could not question defendants' attorneys about testimony they gave at a motion to suppress hearing because defendants would be forced to give up one constitutional right to assert another, rejected for two reasons: first, that attorney client privilege is a common law privilege, not a constitutional right; and, second, although never overruled, Simmons has been narrowed and its reasoning questioned; Simmons has never been extended to

situations involving the exclusion of prior testimony when competing right, whether constitutional or statutory, are at issue).

In Jaffee v. Redmond, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), the U. S. Supreme Court held that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under the federal rules of evidence. However, like other testimonial privileges, "the patient may of course waive the protection." Jaffee, 518 U.S. at 15 n. 14, 116 S.Ct. 1923. Once "privileged" information has been disclosed by the person who holds the privilege, the claim of privilege has been waived. See, In re Zuniga, 714 F.2d at 640.. The privilege is deemed waived when the person who has the privilege consents to disclosure of any significant part of the matter or communication. See, Saenz v. Alexander,584 So. 2d 1061 (Fla. 1st DCA 1991). In this case, once the defendant called the psychologist to reveal the formerly confidential communications, his decision to disclose became final. The State submits that he may not reattach the privilege now. See also, Sikes v. State, 313 So. 2d 436 (Fla. 2d DCA 1975) (Confessions defendant made to prison employees while her first

appeal was pending were admissible at her second trial); Long v. State, 610 So. 2d 1276, 1278 (Fla. 1992), reversed on other grounds, Long v. State,689 So. 2d 1055 (Fla. 1997) (At Long's second trial, the State introduced Long's videotaped interview by CBS News which took place after Long's initial trial and conviction.)

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN APPLYING THE HARMLESS ERROR ANALYSIS DERIVED FROM THIS COURT'S PRECEDENT IN DIGUILIO AND GOODWIN

(As restated by Appellee/Respondent)

The State reasserts, and does not waive, its preceding argument that the trial court did not err in finding a waiver of any privilege by the defendant and allowing the State to call the clinical psychologist at trial. Furthermore, the Second District Court correctly upheld the petitioner's conviction and sentence.

Petitioner argues that the Second District Court failed to properly apply the harmless error analysis set forth by this Court in State v. DiGuilio, 491 So. 2d 1129, 1137-1138 (Fla. 1986) and Goodwin v. State, 751 So. 2d 537 (Fla. 2000), and addressed in Smith v. State, 762 So. 2d 969 (Fla. 4th DCA 2000), Reyes v. State, 783 So. 2d 1129 (Fla. 3d DCA 2001), Cooper v. State, 778 So. 2d 542 (Fla. 3d DCA 2001), and Ousley v. State,

763 So.2d 1256 (Fla. 3d DCA 2000).

In DiGuilio, this Court held that improper comments on a defendant's invocation of his right to remain silent are subject to a harmless error analysis and need not require reversal if the court is convinced, beyond a reasonable doubt, that the error did not contribute to the verdict. In Goodwin, this Court subsequently determined that the harmless error test addressed in DiGuilio also applied to cases not involving constitutional error.

Significantly, in DiGuilio, this Court specifically recognized that the application of the [harmless error] test requires "not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." Id. at 1138; See also, Jones v. State, 748 So. 2d 1012, 1135 (Fla. 1999) (Considering the properly admitted evidence and the fact that the error was not repeated or emphasized, this Court was convinced "beyond a reasonable doubt that the that the error complained of did not contribute to the verdict.") Consequently, the petitioner's underlying premise -– that the appellate court "*must not*" also rely on the permissible evidence

introduced at trial, is incorrect.

The petitioner did not, and credibly could not, deny taking the loaded gun and killing his unarmed ex-wife by firing a bullet through her heart. Although Knowles suggested that his actions supported "only" a lesser degree of homicide, Knowles admitted, at trial, that if Tina had agreed to "come back" to him, that he would *not* have shot and killed her. (V.4/T350; 363-364). Although Knowles admittedly hoped for a reconciliation with Tina, he'd also decided that "if that didn't happen, I knew I was going to die," . . . and "possibly Tina also." (V.4/T351). Knowles knew that he had the gun on him when he went to see Tina (V.4/T361) Knowles admitted that he shot Tina first, and that his plan was for Tina to die first. (V.4/T351). In reviewing the instant case, the Second District Court correctly applied the harmless error analysis and precedent set forth by this Court. As the Second District Court explained,

> As the beneficiary of the error, the State carries the burden to prove beyond a reasonable doubt that the error is harmless; that is, that it did not contribute to the verdict or that there is no reasonable possibility that the error affected the conviction. This determination must be grounded on the court's examination of the entire record. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).
>
> Recently, our supreme court expounded upon the DiGuilio harmless error analysis in Goodwin v. State, 751 So. 2d 537 (Fla. 2000). There the court categorized errors into at least two types. The first consists of "constitutional errors" such as those

> described in Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), and the second consists of errors so serious that they are "presumptively harmful." Goodwin, 751 So.2d at 542. In this case the violation of the privilege against self-incrimination has a profound impact upon Mr. Knowles's constitutional right. Similarly, the violation of his attorney-client privilege is "presumptively harmful." Each directly affects an accused's basic due process right to a fair trial.
>
> Goodwin mandates that the analysis must focus on how the error affects the trier of fact. Id. at 541. It would be inappropriate to uphold the jury verdict of guilty in this case by concluding that the permissible evidence alone would support the verdict. Instead, the conceptual framework for reviewing the record in its entirety is provided by the answer to the following question: "Do I, the judge, think that the error substantially influenced the jury's decision?" Id. at 545 (quoting O'Neal v. McAninch, 513 U.S. 432, 437, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)).
>
> Id.

Applying the harmless error standard announced by this Court in DiGuilio and Goodwin to the facts of this case, Judge Casanueva's opinion also concluded that,

> A review of the record has convinced this court that **the error did not substantially influence the jury's verdict** and, therefore, upon the unique facts of this case, the error is harmless beyond a reasonable doubt.
>
> As to the matters improperly placed before the jury through the use of Dr. Freid's testimony, the record contains equally compelling evidence from other sources-notably through Mr. Knowles's own voice.
>
> Finally, Dr. Freid testified that Mr. Knowles was legally sane at the time of the offense and knew the wrongful nature of his conduct. Mr. Knowles's defense was not insanity but rather that he possessed a level

> of intent lower than premeditation. The defense, implicitly if not explicitly, conceded the wrongful nature of his conduct by seeking a conviction for a lesser crime. Further, the law presumes Mr. Knowles to be sane, so Dr. Freid's testimony on this point did nothing more than confirm a legal presumption that had not been challenged or placed in issue for the jury to resolve.
>
> Another important consideration is that Mr. Knowles testified on his own behalf, and the record contains no indication that he did so because of the trial court's error. A careful examination of his direct testimony reveals nothing indicating that at the time of the murder he was depressed or suffering from any form of emotional disturbance. Thus, the evidence supporting the defense theory that Mr. Knowles lacked premeditation or acted on any other level of intent came from Dr. Freid's testimony on cross-examination that Mr. Knowles was "emotionally disturbed," "depressed," and in fact "very depressed." Thus, Mr. Knowles received the benefit of Dr. Freid's testimony to underscore his lack of culpability without having to call him to the witness stand and thereby forfeiting his ability to give the first and last closing arguments.

Here, the Second District Court in Knowles relied upon the harmless error test derived from Goodwin/DiGuilio; and neither Smith, Reyes, Cooper, nor Ousley furnish a basis for concluding otherwise. In Smith, a habeas corpus case, appellate counsel was deemed ineffective in failing to argue the correct standard for harmless error under DiGuilio. In Ousley, it was error to allow the prosecution to impeach the defendant, on trial for first degree murder and kidnapping, with damaging details of his prior convictions, and the appellate court was not "satisfied beyond a reasonable doubt that it did not contribute to the

verdict." In Reyes, the trial court erred in admitting unrelated evidence of gang activity. Finding that the testimony "could only have served to lead the jury to base its verdict, not on Reyes's personal guilt, but on a feeling that his conviction would strike a blow against the dangers to the country presented by the existence of gang violence . . ." the court "could not say that the overemphasis of the gang element in the case did not affect the verdict." Finally, in Cooper, the trial court erred in permitting the state to introduce irrelevant evidence regarding bullets found in the defendant's possession nine months after a murder; the bullets were in a gun that was *not* the murder weapon. Because the court was "not satisfied beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the verdict," a new trial was required.

In the instant case, there was substantial, independent permissible evidence of the petitioner's premeditation, most notably from the petitioner's own letters, audiotapes, and statements. The testimony of the clinical psychologist, even if arguably deemed error, could not have had substantial influence upon the jury's verdict. Despite his feelings for his ex-wife, the written statements and audiotapes by petitioner and his own testimony revealed that, while he hoped for a reconciliation, he

planned a murder/suicide. (Vol.3/T272-277, 350-351). This plan was further corroborated by the witnesses testifying to petitioner's actions the day of the murder. Petitioner's focused and deliberate actions were inconsistent with a killing that occurred on the spur of the moment. See Spencer v. State, 645 So. 2d 377 (Fla. 1994). The tapes prepared by petitioner verified his careful, advance consideration of the murder/suicide plan, and so do his actions the day of the murder. Although repeatedly asserting that he wanted to reconcile with his ex-wife, petitioner not only purchased flowers to "win her back," but he took along his loaded gun to kill her if the answer was "no." Following the murder, petitioner attempted to shoot himself, but the gun was wrestled away by the victim's co-employees. The victim's death was not the result of "just" a "spur of the moment" act, but her killing was the culmination of a deliberate course of action which was ultimately discharged, as planned, by the petitioner.

ISSUE III

WHETHER THE SECOND DISTRICT COURT ERRED, AS A MATTER OF LAW, IN CONDUCTING A HARMLESS ERROR ANALYSIS AND FINDING THAT THE ADMISSION OF THE PSYCHOLOGIST'S TESTIMONY WAS HARMLESS

(As restated by Appellee/Respondent)

Petitioner waived any claim of confidential privilege and, therefore, it was not error to allow the State to call the clinical psychologist at trial. In the alternative, the Second District did not err in its application of the harmless error analysis below. An error is harmless when the reviewing court can conclude beyond a reasonable doubt that the error did not affect the verdict. Francis v. State, 808 So. 2d 110, 129 (Fla. 2001), citing State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986); see also, Kearse v. State, 662 So. 2d 677, 684-85 (Fla. 1995) (finding erroneous admission of hearsay testimony harmless beyond a reasonable doubt where same information admitted through other witnesses).

This Court previously has recognized that error, if any, in allowing the State to call a confidential expert may be deemed harmless beyond a reasonable doubt. See, Lovette v. State, 636 So. 2d 1304 (Fla. 1994). However, according to the petitioner, under the appellate courts' decisions in Bowles, Llanos, and Stribbling, the Second District Court erred, as a matter of law, in finding harmless error. Essentially, petitioner seems to

suggest that erroneous expert psychological testimony can never be deemed harmless. For the following reasons, this claim is meritless.

In Bowles v. State, 381 So. 2d 326 (Fla. 5th DCA 1980), improper *cumulative* testimony of four police officers (that they would not believe defendant under oath) was not harmless error under the facts of that case. In Stribbling v. State, 778 So. 2d 452 (Fla. 4th DCA 2001), the lead detective in a murder case improperly testified that he did not have a suspect until he received a telephone message in which Stribbling was named as the perpetrator. Because identification was the key factor and the court could not conclude beyond a reasonable doubt that the error did not affect the jury's verdict, a new trial was ordered.

In Llanos v. State, 766 So. 2d 1219 (Fla. 4th DCA 2000), the defendant was charged with armed kidnapping and aggravated battery. At trial, Llanos moved to exclude the medical record prepared by the victim's physician in which the doctor stated, "[Patient] has had domestic abuse with a boyfriend ..." and "I read the police report and this has also been documented relative to domestic abuse." Finding that the doctor's reference to the police report gave significant extra weight to the victim's testimony, the error was not harmless.

In the instant case, the Second District Court applied Goodwin/DiGuilio, reviewed the entire record, and found that "the error did not substantially influence the jury's verdict." There was no Constitutional violation in this case, nor was there any prohibition against conducting a harmless error analysis. Errors regarding the admission of evidence which are subject to harmless error analysis include the admission of evidence in violation of a defendant's Fourth, Fifth, or Sixth Amendment rights, including the admission of involuntary confessions. See, Arizona v. Fulminante, 499 U.S. 279, 308, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Notably, except for those certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error is categorically immune from a harmless error analysis. Here, the defendant admittedly took a loaded gun, shot his ex-wife through the heart, and admitted that he intended to shot her "first." On cross-examination, Knowles agreed that if Tina had "come back" to him, that he would *not* have killed her. (V.4/T350; 363-364). According to Knowles, he'd planned a reconciliation with Tina, but he'd also decided that "if that didn't happen, I knew I was going to die," . . . and "possibly Tina also." (V.4/T351). Knowles knew that he had the gun on him when he went to see Tina (V.4/T361) Knowles admitted that he shot Tina first, and his

plan was for Tina to die first. (V.4/T351). Knowles left behind both audiotapes and written statements confirming his criminal intentions. The testimony of the clinical psychologist which, according to defense counsel's closing argument, supported their theory of defense (V.4/T385-386), even if deemed error, was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, the State requests this Court approve the trial court's ruling, or, in the alternative, approve the harmless error analysis by the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard J. D'Amico, Special Assistant Public Defender, P. O. Box 9000-Drawer PD, Bartow, Florida 33831, on this 6th day of September, 2002.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT