

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-139

NATHANIEL WILLIAMS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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**BRIEF OF PETITIONER ON THE MERITS**

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL OF  
FLORIDA, THIRD DISTRICT

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**BRIEF OF PETITIONER ON THE MERITS**

**INTRODUCTION**

The Petitioner, Nathaniel Williams, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State, was the respondent in the trial court and Appellee below. The parties will be referred to as they stood before the trial court or as they stand before this Court.

## **STATEMENT OF THE CASE AND FACTS**

The State of Florida filed an information charging Williams with second degree murder. (R. 4-7). On November 27, 1987, Daniel Rhodes was shot and killed over what appeared to be a dispute over narcotics and money. (T. 265). Approximately fourteen years after the shooting, Williams was arrested and charged with second degree murder. The State's case consisted of the testimony of two eyewitnesses to the shooting who were able to make out-of-court identifications of Williams but unable to make in-court identifications and an alleged admission made by Williams to a convicted felon who decided to come forward fourteen years after the alleged statement in hopes that a federal judge would mitigate a ten-year sentence.

On November 27, 1987, Detective Tubenero, the lead detective in this case, went to the scene and discovered the body of Daniel Rhodes in a red car. (T. 166). The medical examiner concluded that Rhodes had suffered two gunshot wounds, one to the wrist and one to the chest. He also concluded that the gunshot wound to the chest was the cause of death. (T. 346). During his investigation Detective Tubenero spoke to John Kenzie and Roger Hunt who were the two eyewitnesses to the shooting. After these two witnesses identified Williams as the shooter, Detective Tubenero obtained a warrant for Williams' arrest. (T. 177).



## **B. Trial**

John Kenzie testified that on November 27, 1987, he was sitting in his house when he saw two guys run by the house. (T. 251). According to Kenzie the two individuals were arguing over money and one of the individuals yelled out, “it was no good.” (T. 252). Kenzie then testified that an individual whom he subsequently identified as Williams in a photo lineup, pulled out a gun and fired one shot into the victim’s chest. (T. 255). Kenzie was unable to identify Williams in court as the individual who fired the shot fourteen years ago.

The state attempted to corroborate Kenzie’s out-of- court identification with the testimony of Roger Hunt. In an attempt to bolster Hunt’s character and credibility, the state decided to introduce the fact that Hunt was a pastor at the time of his testimony. (T. 197). The state also introduced evidence that Hunt was an ex-security officer. (T. 198). Finally, the state established that at the time of the incident Hunt was a police explorer. (T. 199). Hunt told the jury that police explorers were part of the Boy Scouts and that the program was sponsored by the police to keep “kids” from getting in trouble. (T. 199).

On cross-examination defense counsel attempted to elicit from Hunt that he was thrown out of the explorers since he was arrested for an aggravated assault. (T. 219). The state argued that since Hunt received a withhold of adjudication defense

counsel could not elicit information about this conviction. Defense countered with the argument that since the state chose to introduce evidence of victim's good character they opened the door and the jury had the right to know that Hunt was thrown out of the police explorers. The trial court sustained the state's objection and denied defense counsel the right to fully cross examine Hunt concerning his membership in the police explorers. (T. 219-222).

Hunt testified at trial that while he was in his car driving, he saw Williams and a second man arguing in the street and that during the argument he saw Williams shoot the second man. (T. 209-210). Hunt, similar to Kenzie, was able to make an out of court identification the day after the incident but was unable to make an in court identification. (T. 216-7).

During Hunt's direct examination the state indicated that they wanted to introduce a photograph of the victim so that the witness could testify that the victim did not have a gun on the day of the incident. Defense counsel objected to the introduction of the photograph since the photograph, which showed the victim in a military uniform with the American flag in the background, did not depict the way the victim looked on the day of the incident. (See Exhibit A). Defense counsel further argued that the only reason the state wanted to introduce the photograph was to inflame the passion of the jury since the trial in this case was conducted

thirty days after the September 11 bombing of the World Trade Center. (T. 207).

Despite the fact that the state conceded that the picture did not look like the way the victim looked on the day of the crime, the state insisted that they needed to introduce the photograph so that the witness could say that the victim did not have a gun on the day of the shooting.<sup>1</sup> The state made this argument even though they knew that there was no issue in the case concerning whether the victim had a gun. Over the objection of defense counsel the trial judge allowed the state to introduce the prejudicial photograph of the victim dressed in a military uniform with the American flag waving in the background.

The only other witness introduced by the state that offered evidence which pointed to defendant was Martin Anderson, who at the time he was testifying was serving a federal prison sentence for distributing cocaine. (T. 307). Anderson testified that in return for his testimony he was hoping that he would receive some type of mitigation of his ten-year prison sentence. (T. 312-4). According to Anderson he saw defendant fourteen years prior to trial at his brother's house and he remembered that defendant told him that he had just shot someone seven times

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<sup>1</sup>Recognizing the effect the picture would have on the jury the state refused defense counsel's suggestion that the state show the victim the autopsy pictures. Without even showing the picture to the witness the state claimed that they needed to show the jury the picture of the victim in his military uniform. (T. 207-8).

the day before. (T. 307). Anderson claimed that when defendant moved to Atlanta he went into business with Anderson. He decided after he was arrested and convicted for distributing narcotics it was in his best interest to come forward and reveal the alleged statement made by defendant fourteen years earlier. (T. 314).

After deliberations the jury convicted defendant of second degree murder. (R. 17). The trial judge sentenced Williams to seventeen years in state prison. On direct appeal Williams argued that the trial judge improperly limited his cross-examination of Hunt since once the state introduced evidence that the witness was a police explorer, the defense had the right to establish that Hunt was expelled from that organization due to the fact that he had committed an aggravated assault. Williams also argued that the trial judge erred in allowing the state to introduce a prejudicial picture of the victim in a military uniform since identity was not an issue in the case and the victim looked nothing like the way he looked in the picture at the time of the crime.

The Third District ruled that Williams was denied his right to fully cross examine Hunt, since the court wrongfully prohibited Williams from eliciting on cross that the victim had been expelled from the police explorers. The court refused to grant Williams a new trial since “. . . **given all the other evidence as to Williams guilt we’re unable to conclude that the error necessarily deprived**

**defendant a fair trial . . .”** The court also ruled that since the picture of the victim was necessary to establish identity it was not error to allow the state to introduce a photograph of the victim in a military uniform even though the picture did not depict the way the victim looked at the time of the crime.

After the filing of jurisdictional briefs this Court entered an order accepting jurisdiction in this case.

## **SUMMARY OF ARGUMENT**

Nathaniel Williams was convicted of second degree murder. The State's case consisted of the testimony of two eyewitnesses to the shooting who were unable to make in court identifications of Williams but were able to make out of court identifications and an alleged admission made by Williams to a convicted felon who decided to come forward fourteen years after the alleged statement in hopes that a federal judge would mitigate a ten-year sentence.

Recognizing the potential weaknesses in their case the state decided to take advantage of the fact that the trial in this case was conducted one month after the tragedy of September 11, 2001 by introducing evidence that one of their eye witnesses was a police explorer at the time he witnessed the crime despite the fact that state knew that the witness had been thrown out of the police explorers for committing the crime of aggravated assault. The state further tried to bolster their case and exploit the tragedy of September 11, 2001 by introducing a photograph of the victim wherein, he was dressed in a military uniform with the American flag in the background despite the fact that the state conceded that the victim looked nothing like the way he looked in the picture at the time of the crime.

On direct appeal defense counsel argued that since the state decided it was necessary to bolster the character of their eyewitness with evidence that he was a

police explorer at a minimum, defense counsel had the right to establish during cross examination that the witness had been expelled from the police explorers. The Third District Court of Appeal agreed that it was error to limit defendant's right to cross examine the witness, however, the court refused to grant defendant a new trial since “. . . **given all the other evidence as to Williams guilt we're unable to conclude that the error necessarily deprived defendant a fair trial . . .**” The Third District's use of an improper harmless error standard resulted in the court wrongfully concluding that the error in this case was harmless since it was impossible for the state to establish beyond a reasonable doubt that the error did not contribute to the jury verdict.

The Third District Court of Appeal also incorrectly ruled that even though the trial in this case was conducted one month after the tragedy of September 11, 2001, it was not an abuse of discretion to allow the state to introduce a photograph of the victim dressed in a full military uniform, which the state conceded was not the way the victim looked at the time of the crime, despite the fact that the photograph had no relevance at trial since there was no issue as to the victim's identity raised at trial.

The trial court's decision to prohibit defense counsel's right to cross examine the state's witness concerning his expulsion from the police explorers

coupled with the court's decision to allow the state to introduce a highly prejudicial irrelevant photograph of the victim in a military uniform, denied defendant a fair trial and reversal is therefore required.

## **ARGUMENT**

### **I.**

**THE THIRD DISTRICT COURT OF APPEAL  
ERRED IN CONCLUDING THAT THE  
IMPROPER LIMITATION OF CROSS  
EXAMINATION WAS HARMLESS ERROR  
SINCE AFTER REVIEWING THE  
ADMISSIBLE EVIDENCE IN THE CASE THE  
COURT WAS NOT NECESSARILY  
CONVINCED THAT THE ERROR DEPRIVED  
DEFENDANT A FAIR TRIAL.**

John Kenzie, one of the state witnesses who was unable to make an in-court identification, testified at trial that he saw the shooting and that a day after the shooting he identified Williams as the person who had fired the shot. (T.256). The state recognizing the importance of corroborating this testimony also introduced the testimony of Roger Hunt who also claimed that he identified Williams fourteen years earlier as the shooter but was unable to identify defendant in court as the shooter. (T. 216).

In attempt to bolster Hunt's character and therefore credibility, which the



state hoped would convince the jury that they should believe the testimony of both Hunt and Kenzie, the state at the very beginning of Hunt's testimony elicited that Hunt was a pastor, and ex security guard and when he was younger he was a member of the police explorers, which was an organization that was designed to keep teenagers out of trouble. (T.197-9). The state decided to introduce evidence that Hunt was a member of the police explorers only after they had successfully convinced the trial judge prior to trial that defense counsel did not have the right to elicit on cross examination that Hunt was thrown out of the police explorers for committing an aggravated assault for which he plead no contest and received a withhold of adjudication. (T. 7-8).

Recognizing that the jury may be more apt to believe a police explorer than a young juvenile who was in trouble with the law, the state decided that it was necessary to let the jury know that a police explorer was a juvenile who worked with the police and that the purpose of the program is to keep juveniles out of trouble. This is evidenced by the following questions which were asked Hunt prior to him being asked about any of the relevant details in this case:

PROSECUTOR: Were you also with the police explorer at that time?

WITNESS: Yes, ma'am.

PROSECUTOR: Can you tell the jury what that means being with the

police explorers?

**WITNESS: A police explorer is part of the boy scouts. It's a – similar to the Boy Scouts, but its kind of the program that the police department sponsors for kids to stay out of trouble and to come.**

**PROSECUTOR: You worked with police officers and that kind of thing?**

WITNESS: Yes.

PROSECUTOR: Did you have any responsibility as a police explorer, like a job or is it a group of kids where a lot of explorers got together and went to different outings and that type of things?

WITNESS: Yes, ma'am.

PROSECUTOR: It was the second one that I said?

WITNESS: Yes. (T. 199).

It was only after the state had felt they had sufficiently bolstered Hunt's character by establishing that he was a police explorer who was working with the police in a program so that he would not get in any trouble that the state decided to question the witness concerning the facts in this case.

Prior to cross-examination of Hunt, defense counsel argued that the trial judge should revisit his ruling concerning whether defense counsel could elicit the fact that the witness had been expelled from the police explorers for committing an aggravated assault since the state opened the door to this testimony when they

decided to bolster the character of their witness by introducing irrelevant misleading testimony that the witness was a police explorer. The court rejected defense counsel's argument that the state had opened the door to this testimony when they attempted to bolster the witness' character by introducing evidence that he was a police explorer. (T. 219-222).

The Third District Court of Appeal concluded that once the state decided to bolster the character of the witness with the irrelevant testimony that he was a member of the police explorers, Williams had the right on cross-examination to elicit information that Hunt had been thrown out of the police explorers. The Third District further ruled that Williams did not have the right to elicit the fact that the witness was thrown out of the police explorers due to an aggravated assault conviction since he received a withhold of adjudication.<sup>2</sup> Despite the improper

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It is Williams' position that the state opened the door to this normally inadmissible evidence since once they decided to establish Hunt was a police explorer, defendant had the right to show why Hunt was thrown out of the explorers so that the jury would be in a better position to judge Hunt's true character. See *Rodriguez v. State*, 753 So.2d 29, 42 (Fla.2000) (holding that where defendant sought to establish that witness disliked him and was biased against him, the State was allowed to ask questions which would shed light on the reasons for the possible bias or dislike, which included question relating to the witness's knowledge that the defendant had engaged in random acts of violence and blackmail); *Ramirez v. State*, 739 So.2d 568, 579 (Fla. 1999)(The notion of "opening the door" is premised on "considerations of fairness and the truth-seeking function of a trial.")

However, it is not necessary for this court to resolve this issue since the Third

limitation of Williams Sixth Amendment right to cross-examine a crucial witness, the court refused to grant Williams a new trial because the court concluded “...given all the other evidence as to Williams guilt were unable to conclude that the error necessarily deprived defendant a fair trial..”

In *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), this Court established the harmless error test to be applied by Florida’s appellate courts to determine whether the error alleged on appeal requires a new trial. In *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999), this Court once gain recognized that *State v. DiGuilio*, *supra*, properly states the harmless error test in this state. Specifically, the *DiGuilio* Court defined the harmless error test as follows:

**The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.**

The court went on to detail how an appellate court should apply this test when the court stated:

. . . Application of the test requires an examination of the

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District’s conclusion that the trial judge erred in not allowing defense counsel to establish that Hunt had been thrown out of the explorers by itself required the granting of a new trial in this case.

entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and **in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict . . .**

In holding that the harmless error test requires that the appellate court focus on the effect the error may have had on the jury rather than the sufficiency of the evidence this Court stated:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, *or* even an overwhelming evidence test. **Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. 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 affected the verdict. The burden to show the error was harmless remains on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.**

In both *Diguilio* and *Goodwin* this Court relied upon Chief Justice Traynor's analysis of the harmless error doctrine when it concluded that the appellate court must focus on how the error effected the verdict rather than the sufficiency of the evidence when determining harmless error. In *Goodwin*, this Court cited the following from Chief Justice Traynor's essay *The Riddle of*

*Harmless Error:*

The test is not a sufficiency of the evidence , a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test...**the focus is on the effect of the error on the trier of fact.**

In *DiGuilio*, this Court cited the following from Chief Justice Traynor's dissent in *People v. Ross*, 429 P.2d 606 (Cal. 1968):

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 the error without considering other reasons untainted by error that would have supported the same result.

In concluding that the error was harmless in this case the Third District Court of Appeal ignored the holdings in both *DiGuilio* and *Goodwin* in several ways. A review of the opinion reveals that the Third District Court of Appeal never looked at the error in this case and how the error may have effected the jury verdict. Instead after concluding that the trial court erred in denying defendant the right to cross-examine Hunt concerning his expulsion from the police explorers the court concluded that the error was harmless because: “. . . **given all the other evidence as to Williams guilt** we're unable to conclude that the error necessarily

deprived defendant a fair trial...”. Therefore, it is clear that when the court conducted its harmless error analysis the court failed to look at how the error may have effected the jury verdict and only looked to see if there was sufficient admissible evidence to justify the conviction.

Not only did the district court erred by not evaluating the effect the error had on the jury, but the court also erred in failing to require the state to establish beyond a reasonable doubt that the error did not contribute to the jury verdict. Therefore, by requiring the defendant to establish that the error deprived him a fair trial rather than requiring the state to prove beyond a reasonable doubt that the error did not contribute to the jury verdict, the court applied a harmless error test which was specifically rejected by this Court in both *DiGuilio* and more recently in *Goodwin*.

When this Court reviews how the trial judge’s error in limiting defendant’s right to fully cross examine a crucial state witness may have effected the jury verdict, it will be impossible for the court to conclude beyond a reasonable doubt that the error did not contribute to the jury verdict. The state’s case consisted of two eyewitnesses who were unable to make an in-court identification of Williams and a convicted felon who was hoping his testimony would help him get his federal prison sentence mitigated. Based upon the inherent weakness in their case the state felt it was important to have the jury believe that Roger Hunt, one of their crucial

eyewitnesses, was a witness with extremely good character. The state attempted to establish this fact by introducing evidence that at the time Hunt was testifying he was a pastor and before being a pastor he was a security guard. (T. 197-8). In an attempt to even further boost Hunt's character the state went on to introduce evidence that at the time of the incident Hunt was a police explorer, which was a program designed to keep juveniles out of trouble. (T. 199). By introducing all of this good character evidence the state was trying to accomplish two goals. First, the state wanted the jury to believe that Hunt was a person of such good character that it would be hard for the jury not to accept his testimony which was crucial corroborating testimony of the other eyewitness. Furthermore, by introducing evidence that Hunt was working with the police as a police explorer the state was hoping to gain sympathy for their case since at the time the case was tried, which was thirty days after the bombing of the world trade center, public support for the police was at its highest.<sup>3</sup>

Once the state decided to put Hunt's character at issue and exploit the fact

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<sup>3</sup> The fact that the state was looking to exploit the World Trade Center bombing is supported by the fact that the state also was looking to gain sympathy for the victim by introducing a photograph of the victim fully dressed in military uniform with an American flag in the background despite the fact that everybody at trial recognized that the victim looked nothing like the picture at the time of the crime. The admissibility of this photograph is discussed in point two of this brief.



that he was a member of the police explorers, it was crucial that the defense be allowed to inform the jury that Hunt was thrown out of the police explorers. If the state did not want the jury to know that Hunt had been thrown out of the police explorer's all they had to do was not introduce evidence on direct examination that Hunt was ever in the police explorers since, this evidence had no relevance at trial other than to establish that Hunt was a witness with allegedly good character.

The improper limitation of cross-examination had to have a tremendous effect on the jury's deliberations in this case. In evaluating Hunt's testimony, the jury was left with the impression that Hunt was a witness who had impeccable character. The jury was told that Hunt was a pastor, a security guard and when he was younger a police explorer. What was concealed from the jury was that Hunt's character was not as impeccable as the state wanted them to believe since he had been thrown out of the police explorer's due to an arrest for an aggravated assault. If the jury had known this fact they may have viewed Hunt's testimony in a different light. Since the state decided to make character of the witness an issue in this case, it is impossible for the state to establish beyond a reasonable doubt that the improper limitation of defendant's Sixth Amendment right to cross-examine a crucial witness did not effect the jury's verdict. A new trial is therefore warranted.

## II.

**THE THIRD DISTRICT COURT OF APPEAL  
ERRED IN AFFIRMING TRIAL JUDGE'S RULING  
WHICH ALLOWED THE STATE TO INTRODUCE  
A PHOTOGRAPH OF THE VICTIM WHEREIN HE  
IS DRESSED IN A MILITARY UNIFORM WITH  
THE AMERICAN FLAG IN THE BACKGROUND  
SINCE THIS PICTURE HAD NO RELEVANCE AND  
WAS ONLY INTRODUCED TO INVOKE THE  
PASSION OF THE JURY.**

The State of Florida, over defense objection, was allowed to introduce a photograph of the victim wherein he was dressed in a military uniform with the American flag in the background. (T. 207). The trial judge abused his discretion and erred in allowing the introduction of this photograph since the photograph had no relevance to any issue at the trial and in the alternative, whatever minor relevance the photograph had was outweighed by the potential that the photograph may have inflamed the passion of the jury and therefore denied defendant a fair trial.

The majority opinion in the lower court concluded that there was no error in allowing the state to introduce the prejudicial photograph since it was necessary to establish identity. The facts in this case establish that identity was not an issue in the case and that the only reason why the state wanted to introduce this photograph was to take advantage of the patriotic fervor that existed after September 11 and establish that the victim was a member of the military.

In this case the parties stipulated to the fact that the victim alleged in the information was in fact the person who was killed. The state claimed, however, that the photograph of the victim, which looked nothing like the way the victim looked on the day of the crime, was relevant because the state wanted the witness to identify the person who did not have a gun during the altercation. (T. 206-7). The state's alleged reason for introducing the photograph was illusory since nobody ever claimed that the victim had a gun in this case.

This was not a self defense case. The only issue the jury had to resolve was whether defendant was the person who shot the victim. Therefore, all the state had to prove in this case was whether defendant was the person who had the gun on the day of the homicide. The state was able to establish this fact through the questioning of their two eyewitnesses who both testified that defendant was the person who shot the gun. (T. 208-9, 254).<sup>4</sup>

If the state's real purpose of showing the picture to the witness was to establish that the victim did not have a gun that day, clearly, the state could have used another picture to establish this illusory goal. At trial, defense counsel agreed

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<sup>4</sup>In his concurring opinion Judge Ramirez concluded that if defense counsel had stipulated that the victim did not have a gun, the introduction of the photograph would have been error. However, since there never was a claim that the victim had a gun in the case nobody requested a stipulation to this undisputed fact.

to allow the witness to look at the autopsy picture so that he could testify that the victim did not possess the gun. Without even showing the picture to the witness the state claimed that the witness could not identify the victim from the autopsy picture and insisted that the jury see the picture of the witness in his military clothing. (T. 207). The fact that the state was not satisfied in letting the jury see highly prejudicial autopsy photographs illustrates that the state knew how prejudicial the picture of the victim in his military uniform was in this case.

As a general rule, the admissibility of photographic evidence is within the broad discretion of the trial judge. *Garmise v. State*, 311 So.2d 747 (Fla. 3d DCA 1975), *cert. denied*, 429 U.S. 998, 97 S.Ct. 524, 50 L.Ed.2d 608 (1976). An appellate court should not disturb the trial judge's decision unless it is clearly abusive or patently in error. *Garmise*, 311 So.2d at 747; *Reed v. State*, 224 So.2d 364 (Fla. 4th DCA 1969). The admission of gruesome or **unduly sympathetic** photographs may be improper when they are irrelevant or other photographs are adequate to support the State's contentions. *See, e.g., Thompson v. State*, 619 So.2d 261 (Fla. 1998) (autopsy photographs were improperly introduced when they were not essential given that other photographs introduced were more than adequate to support the claim that the murder was heinous, atrocious, or cruel), *cert. denied*, 510 U.S. 966, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993); *Czubak v.*

*State*, 570 So.2d 925 (Fla.1990) (gruesome photographs improperly introduced when not relevant to any issue).

This Court has continuously cautioned that trial judges should carefully scrutinize photographs for prejudicial effect, especially when less graphic photographs are available to illustrate the same point. *Marshall v. State*, 604 So.2d 799 (Fla.1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). This Court has long followed the rule that photographs are admissible if they are **relevant** and not so shocking in nature as to defeat the value of their relevance. See *Bush v. State*, 461 So.2d 936, 939-40 (Fla.1984), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); *Williams v. State*, 228 So.2d 377, 378 (Fla.1969).

The facts taken in the light most favorable to the state established that the victim and the defendant were involved in some type of street transaction prior to the shooting. Recognizing that the jury may not have been sympathetic to this type of victim, the state decided to introduce a photograph of the victim wherein he is wearing a military uniform. Under normal circumstances the improper use of this photograph probably would not have risen to the level of harmful error, however, in this case it must be pointed out that the trial in this case took place one month after the September 11<sup>th</sup> bombing of the World Trade Center. The state obviously

recognized that patriotism was at an all time high at the time of the trial and, therefore, a picture which portrayed the victim as a member of the military with the American flag in the background would result in the jury being extremely sympathetic to the victim.

If at the time of the homicide the victim was wearing a military uniform, or for that matter looked anything like the way he looked in the picture, the state would have had the right to introduce the photograph assuming that they could establish some relevance. However, since the victim was not wearing a uniform at the time of the homicide and the picture did not accurately reflect how the victim looked at the time of the homicide, it was error to allow the state to introduce this highly emotional picture which was only introduced to inflame the passions of the jury especially since the picture had no relevance to any issue that was being decided by the jury.<sup>5</sup>

The improper introduction of this photograph clearly could have effected the

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<sup>5</sup>In its opinion the Third District Court of Appeal wrongfully suggests that since Williams was a fugitive for thirteen years, it was his fault that the trial in this case was conducted after the tragedy of September 11 and, therefore, he did not have the right to complain about the state's tactic of attempting to exploit the tragedy by introducing an irrelevant photograph of the victim. Obviously, Williams did not plan on having his trial after the September 11 tragedy so that the state would not be able to introduce an irrelevant photograph that was intended to prejudice the jury. Therefore, this case is nothing "like the proverbial person who kills his parents and then complains about his orphan status."

jury's verdict in this case. Since the state can not establish beyond a reasonable doubt that the improper bolstering of the victim's character through the use of an irrelevant photograph, coupled with the improper limitation of cross examination of a crucial state witness which allowed the state to improperly bolster that witnesses character did not contribute to the jury verdict, a new trial is warranted.

### **CONCLUSION**

Based upon the foregoing, this Honorable Court is respectfully requested to quash the decision of the lower court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Appellate Division, 110 SE 6th Street, Ft. Lauderdale, Florida 33301, on this \_\_\_\_ day of May, 2003.

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ROBERT KALTER  
Assistant Public Defender

**CERTIFICATE OF FONT**

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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ROBERT KALTER  
Assistant Public Defender

# **EXHIBIT A**