

IN THE SUPREME COURT OF FLORIDA

CASE NO.

LOWER COURT CASE NO. 3D02-11

NATHANIEL WILLIAMS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

Petitioner, Nathaniel Williams, seeks discretionary review of a decision of the Third District Court of Appeal that directly conflicts with decisions from this court. The symbol “A” refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The victim, Daniel Rhodes, was shot and killed on November 27, 1987. Two eyewitnesses identified Williams as the shooter, and a warrant for his arrest was issued. Williams was arrested in Atlanta, Georgia. He was charged with second degree murder with a deadly weapon. At trial, both eyewitnesses, Roger Hunt and John Kenzie, verified their out-of-court identifications of Williams as the individual who shot and killed Rhodes. Neither witness could make an in-court identification of Williams during the trial. Additionally, the State presented testimony from Martin Anderson, an acquaintance of Williams who was serving a ten-year prison sentence , that shortly after the murder, Williams confessed to Anderson that he killed someone.

The State filed a motion *in limine* prior to trial to preclude defense counsel from cross-examining Roger Hunt about his arrest for aggravated assault. Hunt's arrest, which occurred some time after the 1987 shooting of Daniel Rhodes, resulted in a withhold of adjudication, and the State argued that defense counsel should be precluded from questioning Hunt about whether he had ever been convicted of a felony. The trial court granted the State's motion but ruled that defense counsel could reargue this issue if it became relevant.

During Hunt's testimony, the State attempted to bolster the credibility of one of their eyewitnesses by establishing that Hunt had been a member of the police explorer program at the time of the shooting, that he was an ex-security officer, and that at the time of the trial, he was a pastor. Upon cross-examination, defense counsel attempted to question Hunt regarding his expulsion from the police explorers due to his arrest for aggravated assault. The State objected, arguing that because Hunt's arrest resulted in a withhold of adjudication, defense counsel was not permitted to elicit information about it. Defense counsel argued that since the state tried to bolster the witnesses' character by establishing that he was a police explorer they opened the door to evidence that the witness had been thrown out of the police explorers. Over the objection of counsel the trial judge refused to allow defense counsel the right to show that the witness had been expelled from the police explorers.

The Third District Court of Appeal concluded that since the witness received a withhold of adjudication the trial judge correctly concluded that defense counsel could not establish that the witness had been thrown out of the police explorers due to the aggravated assault conviction. The court did find however, "that the trial court abused its discretion in not permitting the defense to elicit the fact that Hunt had been expelled from the police explorers. This evidence could and should have

been elicited without divulging the reason for the expulsion.”

Despite the fact that the state was allowed to bolster the victim’s character with evidence that he was a priest, ex-security guard, and police explorer the court concluded that the error in this case was harmless. In reaching this conclusion the court relied upon the following standard to conclude that the error was harmless:

“However, given all of the other evidence as to William’s guilt we cannot conclude that this error necessarily deprived Williams a fair trial to warrant reversal.” Based on this conclusion the District court affirmed petitioner’s conviction.

Petitioner filed a timely petition to invoke discretionary review in this Court.

QUESTION PRESENTED

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH REQUIRES THE DEFENDANT TO ESTABLISH THAT ERROR COMMITTED AT TRIAL DENIED HIM A FAIR TRIAL DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *STATE V. DIGUILIO*, 491 So.2d 1129 (Fla. 1986) AND *GOODWIN V. STATE*, 751 So.2d 537 (FLA. 1999).

SUMMARY OF ARGUMENT

The Third District Court of Appeal concluded that the error in not allowing Petitioner to respond to the state's improper bolstering of their key witness with evidence that the witness was expelled from the police explorers was harmless because "given all of the other evidence as to William's guilt, **we cannot conclude that this error necessarily deprived Williams a fair trial to warrant reversal.**"

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), the court confirmed the continuing validity of the *DiGuilio* test. Specifically, the *DiGuilio* 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 present case directly and expressly conflicts with *DiGuilio* in that it disregards the requirements of *DiGuilio* and applies a wholly different harmless error analysis adopted by the Third District Court of Appeal which puts the burden on the defendant to establish

that the error deprived him of a fair trial. Therefore, this Court should accept jurisdiction and resolve the conflict which now exists concerning who has the burden of establishing harmless error.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH REQUIRES THE DEFENDANT TO ESTABLISH THAT ERROR COMMITTED AT TRIAL DENIED HIM A FAIR TRIAL DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *STATE V. DIGUILIO*, 491 So.2d 1129 (Fla. 1986) AND *GOODWIN V. STATE*, 751 So.2d 537 (Fla. 1999)

In *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999), this Court once gain recognized that *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), properly states the harmless error in the State of Florida. 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. 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....Application of the test requires an examination of the 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....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.**

DiGuilio, 491 So. 2d at 1135-1139. Accordingly, Florida courts have repeatedly applied this specific test, as enunciated in *DiGuilio*, to determine whether improper comments by a prosecutor during closing argument necessitated a new trial. *See Cisneros v. State*, 678 So. 2d 888 (Fla. 4th DCA 1996); *Davis v. State*, 663 So. 2d 1379 (Fla. 4th DCA 1995); *Stewart v. State*, 622 So. 2d 51 (Fla. 5th DCA 1993); *Jenkins v. State*, 563 So. 2d 791 (Fla. 1st DCA 1990).

In this case the Third District Court of Appeal concluded that the trial judge erred in denying Petitioner the right to introduce evidence that one of the state's crucial witnesses had been expelled from the police explorers since the state, on direct examination, had attempted to bolster this witnesses character by establishing that he was a priest at the time of trial and prior to being a priest he was a security

officer and finally, on the day of the incident, he was a member of the police explorers.

The court concluded that the error was harmless despite the fact that the two eyewitnesses who identified defendant as the perpetrator at the time of the crime were unable to make an in-court identification and the witness who testified that defendant had confessed to him shortly after the murder was serving time in federal prison when he testified. In reaching the conclusion that the error was harmless the court concluded that since they **were unable to conclude that the error necessarily deprived defendant a fair trial defendant was not entitle to a new trial.**

It is obvious from both the facts in this case and the language in the opinion that the Third District Court of Appeal wrongfully concluded that the error in this case was harmless due to the fact that defendant failed to establish that the error effected the juries verdict. In *DiGuilio* and subsequently in *Goodwin*, this Court has made it very clear that the state has the obligation of proving beyond a reasonable doubt that the error did not contribute to the jury verdict. Therefore, the opinion in this case which puts the burden on the defense to prove the error is harmless directly conflicts with this Court's decisions in *DiGuilio* and *Goodwin*.

Since the standard used by the Third District Court of Appeal in determining

harmless error directly conflicts with the standard set out by this Court in both *DiGuilio* and *Goodwin* this Court should accept jurisdiction to resolve the conflict that now exists.

CONCLUSION

Based upon the foregoing, this Honorable Court should exercise jurisdiction and quash the decision below.

Respectfully submitted,

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BY: _____

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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, Criminal Division, 444 Bracknell Avenue, Suite 950, Miami, Florida 33131, on this ____ day of January, 2003.

ROBERT KALTER
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

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

ROBERT KALTER
Assistant Public Defender

APPENDIX