

**FILED**

SID J. WHITE

SEP 5 1991

CLERK SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 78,084

PHILLIP EUGENE GUESS,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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## SUMMARY OF ARGUMENT

The trial court error in this case did not place respondent Guess in a position distinguishable from that of any other defendant. Every defendant who goes to trial must choose whether to testify in order to controvert the state's evidence, and thereby assume the risks of impeachment and attacks on credibility, or to not present his version of events. Because, under Florida's procedural rules, a factual determination of the voluntariness of a confession must be made by the jury after the trial court's preliminary determination as to voluntariness as a matter of law, Respondent Guess would have had to **face** the decision of whether to present to the jury his version of events surrounding his statement to Roberson regardless of whether the trial court had made a preliminary voluntariness determination based on all the evidence or on less than all **the** evidence. Moreover, respondent Guess relied upon an affirmative defense of consent and therefore had the burden of establishing that **defense** so as to create a reasonable doubt. Under the circumstances of this case, Guess could not have established his defense unless he testified.

**The** error in this case was not a structural defect which aborted the trial process. The trial court's determination of voluntariness on less than sufficient evidence was an error which is subject to quantitative analysis because, regardless of the procedural aspect of the

error, the ultimate and most prejudicial impact of the court's failure to permit respondent to testify outside of the presence of the jury for purposes of the preliminary voluntariness determination was to permit a coerced confession to go to the jury for consideration. Giving respondent the benefit of a worst case scenario in this case, that is, that his confession was coerced, he was in a position no different from the defendant in Arizona v. Fulminante when, after a full Jackson hearing, the court improperly permitted a coerced confession go to the jury. The court in Jackson ultimately was concerned with the prejudicial impact of a coerced confession on a conviction. When the court receded from Payne v. Alabama, infra, in Arizona v. Fulminante, infra, to hold the harmless error rule applicable to the erroneous admission of a **coerced** confession, and for the first time to equate the erroneous admission of a coerced confession with the admission of evidence obtained in violation of the Fourth, Fifth or Sixth amendments, the court effectively dismantled the philosophical foundation of its decision in Jackson v. Denno, infra.

The error was harmless beyond a reasonable doubt in this case. If, as respondent insists, the ultimate impact of the error **was** to compel him to testify about the circumstances surrounding his statement, it is clear beyond a reasonable doubt that he would have faced an identical compulsion to testify regardless of whether the preliminary

voluntariness determination had been **made** on sufficient or insufficient evidence.

**If**, as is **clear** from a consideration of all the ramifications of the **error** in this case, the ultimate potential for prejudice resulting from the trial court's ruling was to permit a coerced statement to go to the jury for consideration, it is clear beyond a reasonable doubt that the statement did not affect the jury verdict in view of respondent's full explanation of his confusion, **and** the circumstances surrounding his statement, defense counsel's extensive argument regarding respondent's asserted confusion during police questioning, and his extensive cross-examination of Roberson regarding the statement, the exculpatory nature of the statement, the strength of the victim's testimony, the corroboration of her testimony by other witnesses, and the significant damage to respondent's credibility by the implausibilities and inconsistencies in his own testimony.

## ARGUMENT

### ISSUES

WHETHER IN LIGHT OF THE SUPREME COURT OPINION IN ARIZONA V. FULMINANTE, THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

WHETHER UNDER THE CIRCUMSTANCES OF THIS OR SIMILAR CASES THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

(A Infringement on Respondent's Fifth Amendment privilege against self-incrimination.

Respondent argues that a harmless error analysis cannot be applied in this case because the trial court's failure to permit him to testify outside of the presence of the jury forced him to chose between exercising his Fifth Amendment right to remain **silent**, and surrendering that right in order to controvert the state's evidence as to the voluntariness of his statement. Respondent's argument misapprehends the nature of the error in **this case**. Moreover, if respondent's argument had merit, a harmless error analysis could never be applied when evidence was improperly admitted against a defendant, and the harmless error rule would be eviscerated.

**The** trial error in this case did not place Respondent Guess in a position distinguishable from that of any other defendant. Every defendant who goes to trial must choose between testifying in order to controvert the state's

evidence, thereby assuming the risk of impeachment, and exercising his right not to testify. Under respondent's theory, when a trial court erred in permitting evidence illegally obtained in violation of the Fourth or Fifth amendments, irrelevant evidence of a collateral crime or inadmissible hearsay to go the jury, a harmless error analysis could never be performed because the defendant in each instance would have been placed in the position of having to choose whether to testify in order to controvert the wrongly admitted evidence and exercising his right to remain silent. Clearly, however, the harmless error rule is applicable in each of these instances. In Barnes v. United States, 412 U.S. 837, 37 L.Ed. 2d 380, 93 S.Ct. 2357 (1973), the defendant raised an argument nearly identical to that presented by respondent in this case, asserting that a statutory inference, stating that knowledge that property was stolen could be inferred from the defendant's unexplained possession of recently stolen goods, infringed on his privilege against self-incrimination by effectively compelling him to testify. The court rejected the argument, noting that

[i]ntroduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded **as** a violation of his privilege against self-incrimination.

Id., 69 L.Ed. 2d at 907. Respondent's argument misapprehends the ultimate prejudicial effect of the trial

court's error because, giving respondent the full benefit of a worst-case scenario, the most unfavorable impact of the trial court's determination of voluntariness on less than all the evidence, was to make an improper ruling that the statement **was** freely and voluntarily obtained, and thereby permit a conviction based on a coerced confession.

It is clear that no compulsion to testify arose solely from the trial court's failure to permit respondent to testify outside of the presence of the jury on the voluntariness issue. **Under:** Florida law, after a preliminary determination of voluntariness as a matter of law is made by the trial court, the issues of the voluntariness and trustworthiness of the confession go to the jury for factual resolution. Palmer v. State, 397 So.2d 648,653 (Fla. 1981); Florida Standard Jury Instructions in Criminal Cases, s. 2.04(e). (1981 ed.) In view of the fact that the voluntariness and trustworthiness of Respondent Guess's statement were jury issues as well as trial court issues, Guess would have had to **face** the identical choice **as** to whether to controvert the state's evidence as to the events surrounding the obtaining of **the** statement **or** to not testify, regardless of whether the trial court had made its preliminary voluntariness determination on sufficient or insufficient evidence. Furthermore, Guess relied upon an affirmative defense of consent. He had the burden of establishing that defense in order to create a reasonable doubt. Ralston v. State, 350 So.2d 791 (Fla. 3rd DCA 1977).

Under the circumstances of this case, showing that only Guess, the victim and the victim's 2-year-old child were present at the time of the offense, Guess could not have met his burden to establish his affirmative defense without testifying.

While the possibility that an accused may be deterred from testifying in front of the jury as to the voluntariness of his confession because of his vulnerability to impeachment or attacks on credibility may provide a compelling rationale for requiring the trial court to make a preliminary determination of voluntariness outside of the presence of the jury, that rationale does not provide a compelling basis for precluding application of a harmless error analysis where the trial court did make a preliminary determination of voluntariness, although on less than all the evidence, and where, under Florida law, the jury was required to make its own factual determination as to the voluntariness and trustworthiness of the confession.

(b) **The** trial court error in this case is subject to harmless error analysis.

The error in this case cannot be regarded as a structural **defect** comparable to deprivation of the right to counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963), adjudication by a biased judge, Tumey v. Ohio, 273 U.S. 510 (1927), failure to instruct on the state's burden to prove the crime beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307 (1979), or the directing of a judgment of

conviction by the **trial** judge, Carpenters v. United States, 330 U.S. 395, 91 L.Ed. 2d 973, 67 S.Ct. 775 (1947). To date, these are the only instances in which the United States Supreme Court has recognized that a constitutional error requires reversal without regard to the evidence in a particular case. The court in Rose v. Clark, 478 U.S. 570, 92 L.Ed. 2d 460, 106 S.Ct. 3101 (1986) stated that "[h]armless error analysis ... presupposes a trial, at which the defendant, represented by counsel, may present evidence **and** argument before an impartial **judge and jury**." Id. 478 U.S. at 5577, 92 L.Ed. 2d at 470. The court characterized those **errors** not subject to harmless **error analysis** as those which "aborted the trial process," and noted that such errors are the exception rather than the rule. Id., 478 U.S. at 578 n.6.

The trial court's failure to **permit** respondent Guess to testify when it made its preliminary determination of voluntariness outside **the** presence of the jury cannot be viewed as aborting the trial process in this case when the voluntariness issue was also **properly considered** and determined **by** the jury, defense counsel argued the basis for respondent's claim of involuntariness to the trial court and to the jury, the claim was not **based** on any assertion of police coercion but rather on respondent's confusion when he was questioned,<sup>1</sup> and the challenged statement was not a

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<sup>1</sup> Respondent's failure in the trial and appellate courts to allege any facts showing police coercion to support his claim of involuntariness warrants a finding of no reversible

confession but rather an exculpatory statement which had only impeachment value. When the statement was admitted on a voluntariness determination made with less than all the evidence, the most prejudicial impact possible to respondent Guess was that the voluntariness determination was in error, and the jury was permitted to consider an involuntary statement.

Respondent Guess argues that the United States Supreme Court in Arizona v. Fulminante did not speak to the issue **decided** in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). However, in receding from Payne v. Alabama, 356 U.S. 560 (1958) to hold that harmless error analysis is applicable to the improper admission of coerced confessions, the court effectively receded from the

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error in this **case**. See Miller v. Dugger, 838 F. 2d 1530 (11th Cir. 1988). Federal courts have denied relief when a defendant fails to allege police coercion as a basis for an involuntary confession claim, and have characterized Jackson violations as harmless error in these circumstances. Martinez v. Estelle, 612 F. 2d 173,180 (5th Cir. 1980) (Before a prisoner is entitled to a hearing on the voluntariness of his confession the petitioner must 'show that his version of the events, if true, would require the conclusion that his confession was involuntary.');

United States v. Espnoza-Seanez, 862 F. 2d 526 (5th Cir. 1988); United States v. Davidson, 768 F. 2d 1266 (11th Cir. 1985). Petitioner notes respondent's assertion that coercion arose from the simultaneous questioning of him about more than one crime. Respondent's characterization of Justice Douglas's concurring opinion in United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951) as criticizing a police tactic of simultaneously accusing a suspect of more than one crime is incorrect. Justice Douglas instead criticized the use of detention for one crime to provide police with a vehicle for investigation of another crime. Moreover, the majority in Carignan found that the defendant's confession to a murder after his arrest for an unrelated assault did not render the confession involuntary or otherwise inadmissible.

philosophical underpinnings expressed in Jackson v. Denno.

Those philosophical concerns were stated as follows:

It is now axiomatic that a defendant in a criminal case is deprived of due **process** of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the **confession, Rogers v. Richmond, 365 U.S. 534, 5 L.Ed. 2d 760, 81 S.Ct. 735, and even though there is ample evidence aside from the Confession to support the conviction. Malinski v. New York, 324 U.S. 401, 89 L.Ed. 2d 1029, 65 S.Ct. 781; Stroble v. California, 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599; Payne v. Alabama, 356 U.S. 560, 2 L.Ed. 2d 975, 78 S.Ct. 844. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Rogers v. Richmond, supra. (e.s.)**

Jackson, 378 U.S. at 377, 12 L.Ed. 2d at 916. The court distinguished between the impact of a coerced confession on a conviction and the admission of illegally seized evidence, stating:

Reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping or larceny may be and often is of the utmost verity. Such police **lawlessness** therefore **may** not void state convictions while farced confessions will do so.

Jackson, 378 U.S. at 383, 12 L.Ed. 2d at 919-920 n. 11.

It is clear that the Jackson court required a preliminary determination of the voluntariness of a confession by the trial court because it believed that the admission of a coerced confession could never be harmless error. The preliminary determination was necessary because

"if the jury found a confession involuntary an additional instruction to ignore its contents was futile, and the consideration of the confession destroyed a fair trial." Espinoza-Seanez, 862 F.2d 526, 535 (5th Cir. 1989) In Arizona v. Fulminante, five members of the court rejected the proposition that "a forced confession is a **false** foundation for any conviction" distinguishable in its impact upon a conviction from evidence obtained in violation of the Fourth Amendment right against unreasonable searches and seizures or the Sixth amendment right to counsel. Chief

**Justice** Rehnquist stated:

The evidentiary impact of a coerced confession and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment - of evidence seized in violation of the Fourth Amendment - or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment.

Arizona v. Fulminante, 5 F.L.W. Fed. at §158.

The worst possible impact of the error in this case was a conviction based on a coerced confession. The error in this **case** therefore is indistinguishable from the trial error which occurred in Arizona v. Fulminante.

If this court decides that harmless error analysis is inapplicable to the error in this case, petitioner requests the court to reconsider its decision in Green v. State, 351 So.2d 941 (Fla. 1971), holding that a failure to conduct a Jackson hearing requires reversal of the conviction and remand for **new** trial. Under federal case law, a trial court's failure to conduct a Jackson hearing does not result in automatic reversal of a defendant's conviction. Rather, the case is remanded for an evidentiary hearing on the voluntariness issue, and a new trial is mandated only when the confession is determined to have been involuntary. See United States v. Davidson, 768 F. 2d 1266 (11th Cir. 1985); United States v. Espinoza-Seanez.

(c) Application of a harmless error analysis in this **case.**

Petitioner will **rely** upon the argument set forth in its initial brief on the merits as to the harmless nature, beyond a reasonable doubt, of the error in this case. In addition, petitioner argues as follows:

If, as respondent insists, the error in this case is a procedural one which infringed upon his Fifth Amendment right to remain silent, the error was harmless beyond a reasonable doubt **because** the voluntariness and trustworthiness of respondent's statement was a jury issue as well as a trial court issue. Respondent was not forced by the trial court's failure to permit him to testify at the hearing to present his testimony to the jury.



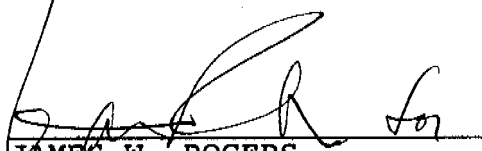


CONCLUSION

Based on the foregoing argument and citations of authority, petitioner requests this court to answer the certified questions in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by U.S. Mail to Dennis E. Gunson, Esquire, Springfield & Gunson, P.A., 605 N.E. 1st Street, Suite G, Gainesville, FL 32601 this 4th day of September, 1991.

  
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