

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR HASSINE : CIVIL ACTION
 :
 v. :
 :
 CHARLES ZIMMERMAN, Superintendent :
 THE ATTORNEY GENERAL OF THE :
 STATE OF PENNSYLVANIA : NO. 86-6315

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J.

OCTOBER 30, 1997

I. PROCEDURAL HISTORY

Before the court is a petition for a writ of habeas corpus, under 28 U.S.C. §§ 2254 and 2242, on behalf of Victor Hassine ("Hassine"), a prisoner at the State Correctional Institution at Pittsburgh, Pennsylvania. Following a jury trial in the Bucks County Court of Common Pleas, Hassine and his co-defendant George Gregory Orłowski ("Orłowski") were found guilty on June 11, 1981 of first degree murder, several attempted murders, and multiple counts of criminal conspiracy and criminal solicitation. Post-verdict motions for a new trial and arrest of judgment were heard and denied. On January 4, 1983, Judge Beckert sentenced Hassine to life imprisonment for the murder conviction, plus consecutive prison terms of ten to twenty years for the conspiracy conviction and two to five years for criminal attempt. A fine of \$20,000.00 was also imposed.

An appeal to the Superior Court of Pennsylvania, filed on December 8, 1983, alleged fifteen trial errors. On February 8,

1985, the court denied relief and affirmed judgment of sentence. Commonwealth v. Hassine, 490 A.2d 438 (Pa. Super. 1985).¹

On May 13, 1985, Hassine, filing a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, claimed that:

1. the prosecution improperly questioned Hassine at trial about his pre-arrest as well as post-arrest silence;
2. a mistrial should have been granted upon Commonwealth's introduction of irrelevant testimony that an investigator employed by defense counsel had bribed a prosecution witness in order to secure a copy of the District Attorney's file; and
3. Hassine should have been tried separately from his co-defendant, Orłowski.

The petition was denied on April 15, 1986. Commonwealth v. Hassine, No. 583 E.D. Allocatur Docket 1985.

Hassine, subsequently filing a petition for writ of habeas corpus, then claimed:

1. his conviction was obtained by use of his silence during the period between his arrest (and Miranda warnings) and his trial to impeach his exculpatory trial testimony;
2. his conviction was obtained by (a) violating his right to present a defense; and (b) penalizing him for exercising his right to counsel regarding information introduced by the Commonwealth that defense counsel's investigator bribed a prosecution witness to secure a copy of the District Attorney's file; and
3. serious prejudice by denial of his motion to sever his trial from co-defendant Orłowski.

¹ The judgment of sentence of co-defendant Orłowski was also affirmed. Commonwealth v. Orłowski, 481 A.2d 952 (Pa. Super. 1984).

The petition was referred to the Chief Magistrate Judge for a Report and Recommendation under 28 U.S.C. § 636 (b)(1)(B). The Chief Magistrate Judge concluded that it was unconstitutional for the prosecutor to use Hassine's post-arrest, post-Miranda silence to impeach his exculpatory testimony at trial. (Report and Recommendation of Magistrate, 10). Although the Magistrate Judge found the error to be of constitutional magnitude, he concluded that the error was harmless and that the writ of habeas corpus should be denied. (Report and Recommendation of Magistrate, 10). Hassine filed timely written objections to the Report and Recommendation.

This court granted de novo review of the Chief Magistrate Judge's findings in accordance with 28 U.S.C. § 636(b)(1)(C). After hearing and independent review of the relevant portion of the record, the court agreed with the Chief Magistrate Judge that error of constitutional magnitude was committed by the Court of Common Pleas in allowing the prosecution to refer to Hassine's post-arrest, post-Miranda silence at trial. (Memorandum and Order of November 15, 1989, 12). However, the court ordered that the Report and Recommendation be continued under advisement on the grounds that the Chief Magistrate Judge applied an incorrect standard of review in determining the effect of the constitutional error on the verdict obtained.² In view of the

² In determining that the error was harmless, the Chief Magistrate Judge stated that it was "'highly probable that the error did not affect the judgment.'" (Report and Recommendation of Magistrate, 10, quoting Government of Virgin Islands v.

length of the trial record and the importance to both the Commonwealth and Hassine, this court requested briefing and heard argument on several occasions specifically to address the issue of whether or not the error, although of constitutional dimension, was harmless.

The delay in deciding this case has been excessive. As an explanation but not an excuse, the standard of review changed while the court was reviewing the extensive state court record to determine if the constitutional error was harmless. This change necessitated more briefing and another careful review of the record. The prosecutor's conduct was flagrant and uncorrected or disciplined by the trial judge. The temptation to sanction it by granting a new trial was great. But the crimes of which petitioner was convicted (first degree murder, attempted murder, and multiple counts of criminal conspiracy and solicitation) were most serious.

Another factor was the extraordinary rehabilitation of the prisoner. Because he has used his legal training for the benefit of other prisoners, the Pennsylvania Prison Society acknowledged his efforts by a special recognition he was permitted to receive in person at an annual meeting. He has written a book, Life without Parole: Living in Prison Today, devoted to comments on his prison experiences, interviews with other inmates, and op-ed

Martinez, 847 F.2d 125, 130 (3d Cir. 1988). The "highly probable" standard is appropriate for evaluating the effect of trial error that is not of constitutional magnitude, but is not the correct standard for reviewing constitutional error.

pieces. A reviewer found it "compelling." Tara Gray, Life Without Parole: Living in Prison Today, 14 Just. Q. 193 (1997)(book review). Post conviction rehabilitation, even in prison, deserves consideration under the federal sentencing guidelines, United States v. Sally, 116 F.3d 76, 79 (3d Cir. 1997), but in a habeas petition by a state prisoner, the only consideration must be federal constitutional error and its effect on the verdict. Pardon or parole consideration because of rehabilitation is an executive prerogative in Pennsylvania, not to be usurped by the courts, especially a federal court.

The Supreme Court has now directed that even constitutional error is harmless unless the habeas court is convinced it "had a 'substantial and injurious effect or influence' on the verdict, or if it is in 'grave doubt' whether that is so." Smith v. Horn, 120 F.3d 400, 418 (3d Cir. 1997)(citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); and O'Neal v. McAninch, 513 U.S. 432, 437 (1995)). Although one could argue that the delay in deciding establishes grave doubt per se, after an exhaustive, thoughtful review, the court is not in doubt, but is firmly convinced that the error it found did not have a substantial and injurious effect or influence in determining the jury's verdict.³

³ The court expresses appreciation for the excellent advocacy of counsel for the petitioner and the Bucks County District Attorney and for their forbearance.

II. DISCUSSION

A. Legal Standard

In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; Rose v. Hodges, 423 U.S. 19, 21 (1975) (per curiam). It is not the province of a federal habeas court to reexamine state court determinations on state law questions. See Estelle v. McGuire, 112 S. Ct. 475, 480 (1991)(citing Lewis v. Jeffers, 110 S. Ct. 3092, 3102 (1990) ("federal habeas corpus relief does not lie for errors of state law")). A state harmless-error rule applies to errors of state procedure or state law. An error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. Compare Commonwealth v. Turner, 454 A.2d 537 (Pa. 1982) (reference by prosecutor, in his cross-examination of defendant, to defendant's silence before trial constituted reversible error warranting grant of a new trial on direct appeal from the judgment of sentence) and Commonwealth v. Clark, 626 A.2d 154 (Pa. 1993) (grant of a new trial on the grounds that trial counsel was ineffective for failing to object to the prosecutor's impermissible reference to appellant's post-arrest silence) with Brecht, 507 U.S. 619 (accused not entitled to federal habeas corpus relief on the ground of the prosecution's Doyle error, because the error did not substantially influence the jury's verdict and was therefore

harmless.)

Federal rather than state law is applicable in fashioning a rule on harmless error regarding denial of federal constitutional due process rights to a defendant convicted after a state criminal trial because 28 U.S.C. § 2254(a) allows a federal court to entertain a habeas petition on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Under Doyle v. United States, 426 U.S. 610 (1976), it is impermissible for a prosecutor to use defendant's post-arrest, post-Miranda silence to impeach exculpatory testimony offered at trial. Accord, United States v. Cumiskey, 728 F.2d 200 (3d Cir. 1984), cert. denied, 471 U.S. 1005 (1985). This rule rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation offered at trial. Wainwright v. Greenfield, 474 U.S. 284, 291-92 (1986). The "implicit assurance" upon which the Doyle line of cases has relied on is the right-to-remain silent component of Miranda. See Miranda v. Arizona, 384 U.S. 436 (1966). However, once a defendant creates the impression that he actively cooperated with the police following his arrest, his testimony may be impeached by the use of his post-arrest silence if, in fact, he did not cooperate.⁴

⁴ The Commonwealth argues that the prosecutor's reference to Hassine's post-arrest silence at trial does not constitute a Doyle violation on the grounds that the government was not using Hassine's right to remain silent against him, but was attempting

to discredit the impression left by Hassine that he had been ready and willing to cooperate with the authorities.

On direct, Hassine testified that he contacted an attorney because his father's gun had been the weapon used in the shootings (N.T. 1479). His testimony was as follows:

BY DEFENSE COUNSEL:

Q. Did you receive advice from him as to how you should conduct yourself in relation to this investigation?

A. Yes.

Q. Did you follow that advice?

A. Yes, I did.

Q. What I specifically want to know: Did you go to the police at any time and tell them the facts as you narrated them now?

A. No, I did not.

Q. Why is that?

A. Under advice of my attorney we were only to contact the police through my attorneys and with counsel present.

Q. Did your attorney offer to make you available to the police?

A. Yes, he did.

Q. Did your attorney offer to make available your father, for example, in connection with identifying the gun?

A. Yes, he did.

Q. Were any of these offers ever taken up by the police authorities?

A. They were not.

N.T. pp. 1480-81.

This court agreed with the Chief Magistrate Judge and held that Hassine merely testified that he was available to the police and did not imply that he had actively cooperated or that he had previously told police the story first offered during his direct testimony. The situation presented here is unlike the one at issue in Fairchild, supra, and is not subject to the exception stated in Doyle, supra at 619 n.11, because Hassine's post-arrest, pre-trial

United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975).
Cf. Doyle, 426 U.S. at 619 n.11 (use of post-arrest silence by prosecutor to challenge defendant's testimony regarding defendant's behavior following arrest is permitted if defendant claims he previously told his exculpatory story to police upon arrest).

Although the use of defendant's post-arrest silence is prohibited, a mere question or comment may constitute harmless error if the trial court effectively and explicitly quashed the prosecutor's use of the inappropriate reference. Greer v. Miller, 483 U.S. 756 (1987). If the Doyle violation was harmless, the violation is not a ground for granting a new trial or overturning the conviction. Id. at 765-66.

The standard for determining whether a conviction must be set aside for federal constitutional error had been whether the error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967) (prosecution's reference to defendants' failure to testify at trial, in violation of the Fifth Amendment privilege against self-incrimination, required reversal of their convictions). However, the Supreme Court subsequently decided in Brecht v. Abrahamson that a less onerous harmless-error standard should be applied in determining whether habeas relief must be granted because of unconstitutional "trial error" such as a Doyle violation. Brecht v. Abrahamson, 507 U.S.

silence was not inconsistent with his claimed pre-arrest offer of availability.

619 (1993). Trial error "occur[s] during the presentation of a case to the jury," and is amenable to harmless error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." Brecht, 507 U.S. at 629, quoting Arizona v. Fulminante, 449 U.S. 297, 307-8 (1991).

In Brecht, a suspect in a fatal shooting was arrested, given Miranda warnings, and charged with first-degree murder. At trial, the accused took the stand and admitted shooting the victim, but claimed that it was an accident. Over the objections of defense counsel, the state made several references during cross-examination and closing argument to the accused's pre-trial and post-Miranda silence about this alleged accident. The jury found Brecht guilty; he was sentenced to life imprisonment. After exhausting state court remedies, Brecht applied for federal habeas corpus relief based on the prosecutor's trial references to his post-arrest, post-Miranda silence. The Supreme Court held that Brecht was not entitled to federal habeas corpus relief for the prosecution's Doyle error, because the error did not have a "substantial and injurious effect or influence in determining the jury's verdict," and was harmless. See Brecht, 507 U.S. at 639 ("the State's evidence of guilt was, if not overwhelming, certainly weighty" while "other circumstantial evidence, including the motive proffered by the State, also pointed to petitioner's guilt.").

The Court had previously applied the Chapman reasonable

doubt standard, see e.g., Yates v. Evatt, 500 U.S. 391 (1991); Rose v. Clark, 478 U.S. 570 (1986); Milton v. Wainwright, 407 U.S. 371 (1972); Anderson v. Nelson, 390 U.S. 523 (1968) (per curiam), but decided in Brecht that the historical distinction between direct review and collateral review of a criminal conviction should be respected. The appropriate standard on habeas review of a Doyle violation now is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict" rather than whether it was harmless beyond a reasonable doubt. Brecht, 507 U.S. at 638, quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).⁵

Petitioner asserts this action is still governed by the harmless error test of Chapman v. California, 386 U.S. 18 (1967), and there should be no Brecht analysis. Citing cases in the Second and Eighth Circuits, petitioner argues that Brecht analysis applies only when the Chapman standard has already been applied in state court. See Field v. Leapley, 30 F.3d 986 (8th Cir. 1994); Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993),

⁵ Neither party has argued that the court cannot apply Brecht because it was decided after Hassine brought this petition, nor does applying the Brecht standard present a retroactivity problem. In Teague v. Lane, the Supreme Court held that a new constitutional rule of criminal procedure may generally not be applied retroactively to a case on collateral review. Teague v. Lane, 489 U.S. 288, 307 (1989). However, Teague also held that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Since the Supreme Court applied the Brecht standard to Brecht himself, Brecht, 507 U.S. at 639, "evenhanded justice" requires that this court apply it to Hassine as well.

cert. denied, 511 U.S. 1063 (1994); Lyons v. Johnson, 912 F. Supp. 679 (S.D.N.Y.), aff'd 99 F.3d 499 (2d Cir. 1996). The government, arguing that the Brecht standard applies, cites decisions in the Fourth, Seventh, Tenth and Eleventh Circuits. See, e.g., Castro v. State of Oklahoma, 71 F.3d 1502 (10th Cir. 1995); Tyson v. Triqq, 50 F.3d 436 (7th Cir. 1995); Horsley v. Alabama, 45 F.3d 1486 (11th Cir. 1995); Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, 513 U.S. 841 (1994). In Hanna v. Riveland, 87 F.3d 1034 (9th Cir. 1996), the Court of Appeals noted the split of authority, but found it unnecessary to decide because the error there was not harmless under either standard.

The Court of Appeals for the Third Circuit has not directly addressed the applicability of Brecht if a state court Chapman analysis has not been undertaken, but has consistently held that "[i]n a collateral proceeding the standard for harmlessness is 'whether the error had substantial and injurious effect or influence in determining the jury's verdict.'" Smith v. Horn, 120 F.3d 400, 417 (3d Cir. 1997)(citing California v. Roy, --- U.S. ---, 117 S. Ct. 337, 338 (1996); Brecht v. Abrahamson, 507 U.S. at 637). The Court of Appeals has applied this test for harmless error whether or not a state court Chapman review was conducted. Yohn v. Love, 76 F.3d 508 (3d Cir. 1996). "[T]he Supreme Court's rationale (advancing comity, federalism, finality, and the importance of the trial) for the Brecht rule," Horsley, 45 F.3d at 1492 n. 11, applies whether or not a state court has previously conducted a Chapman analysis. This court must apply

the Brecht standard.

B. Factual Analysis of the Evidence of Guilt

Hassine was arrested and charged with criminal homicide, criminal attempt, criminal conspiracy, burglary and criminal solicitation. Sometime during June, 1980, Hassine along with Orlowski and Eric Decker ("Decker") planned the murder of Albert "Skip" Kellet, Jr. ("Kellet"). In accordance with their plans, Decker went to Kellet's apartment on the evening of August 22, 1980. Kellet and his wife occupied a second floor apartment, but Decker found them in a neighbor's first floor apartment living room with George Sofield and James Puerale ("Puerale"). Decker entered the apartment and began shooting; Puerale was killed instantly and Kellet and his wife sustained serious injuries.

At trial, Hassine offered an exculpatory explanation for his alleged participation in the conspiracy to murder Kellet. This explanation was offered for the first time during his direct testimony and was never stated to the police at his arrest or anytime prior to his trial. (N.T. 1480-1481). Hassine testified that he had a business relationship with co-defendant Orlowski; his family and Orlowski were partners in a meat market business managed by Orlowski (N.T. 1416-1419). He also testified that: a stormy relationship existed between Orlowski and Kellet; Orlowski was physically afraid of Kellet and asked Hassine to get Orlowski protection from Kellet; and Hassine subsequently contacted his father and obtained his father's gun. (N.T. 1430).

Hassine also testified: he knew Decker through the family meat market business (N.T. 1442); he learned from Orłowski that earlier the day of the murder, Decker had "entered the store ranting and raving, saying he was going to get Skip Kellet;" and Decker had taken Hassine's gun from the store for that purpose. (N.T. 1412). Hassine then stated that he set out to find Decker to stop him from carrying out his plan and to retrieve his father's gun. (N.T. 1468). He added that apart from such involvement, he had nothing to do with the killing or attempted killings; he contacted an attorney because he was concerned that his father's gun had been the weapon used in the shootings. (N.T. 1479-1481, 1484). His attorney advised him that contact with the police should be through his attorney and in his attorney's presence. (N.T. 1480).

On cross-examination, the prosecutor asked a series of questions regarding Hassine's silence after his arrest, but prior to trial:

Q. How long have you been sitting in jail, sir?

A. Close to seven months.

Q. And you have been sitting in Bucks County Prison?

A. No, sir.

Q. You were in Bucks County Prison for a time?

A. About a month and a half.

Q. You were sitting in Holmesburg Prison?

A. For about five months.

Q. And another prison?

A. Delaware County.

Q. And conditions are not very good?

A. No, sir.

Q. You sat for seven months in prison with the knowledge of what was really involved in regard to this gun, and you just kept it to yourself because your attorney said to keep it to yourself?

DEFENSE COUNSEL: Objection.

THE COURT: Sustained.

BY THE DISTRICT ATTORNEY:

Q. But you kept it to yourself until you came in to a court of law today and said it for the first time, in any event, outside of perhaps your family or your lawyer?

DEFENSE COUNSEL: Objection

BY THE DISTRICT ATTORNEY:

Q. For the first time?

DEFENSE COUNSEL: That is objected to.

THE COURT: Sustained.

(N.T. 1543-1544).

Although defense counsel objected immediately to each question concerning Hassine's reasons for not coming forward with his exculpatory explanation prior to trial, the record indicates that no curative instructions were given during Hassine's testimony or in the jury charge.⁶ The sequence of events (three specific inquiries, three sustained objections, absence of any curative instructions and further comment made during closing) could lead the jury to draw an impermissible inference of guilt from Hassine's silence. (Memorandum and Order of November 15, 1989,

⁶ The judge's failure to give curative instructions at the time of the objectionable questions or admonish the prosecutor for ignoring the court's rulings encouraged the prosecutor to comment again in closing on Hassine's post-arrest silence.

12). This infringed on Hassine's due process rights in violation of Doyle.

But the Doyle error at Hassine's trial did not "substantially influence" the jury's verdict within the meaning of Kotteakos as articulated by the Court in Brecht: the record, considered as a whole, demonstrates that the direct and circumstantial evidence of his guilt was overwhelming. Hassine's trial lasted ten (10) days and comprised 1,800 pages of testimony. Thirty-four (34) Commonwealth witnesses were called, several of whom, including co-conspirators Decker and Orlowski, testified to Hassine's involvement in the conspiracy to murder Kellet. The evidence of Hassine's guilt is as follows:⁷

In 1979, Hassine met Orlowski and decided to go into the meat market business with him. For various reasons, the business did not prosper, and the two began selling marijuana and methamphetamine at the store to supplement the store's income. In early June, 1980, Kellet purchased some methamphetamine from Orlowski for one hundred and fifty (\$150.00) dollars. Upon the discovery that the drugs were of an inferior quality, Kellet became enraged and threatened Orlowski's personal safety. A few days later, a meeting was held at the meat market. Present were Orlowski, Hassine, various employees of the meat market, and Decker, a convicted drug felon, who had been working for Hassine.

⁷ The following materials were used in compiling the factual analysis of the evidence of Hassine's guilt: Notes of Testimony, Commonwealth v. Hassine, 490 A.2d 438 (Pa. Super. 1985); trial transcript of hearing-oral argument dated December 1, 1989.

At this meeting, Hassine told Decker, in Orłowski's and Ronald Wharton's ("Wharton") presence, that he wanted Kellet killed, or "wasted." (N.T. 744). (In addition to Orłowski and Wharton, Joseph "Crittter" Schwab ("Schwab") (N.T. 628) and Fred Tuite ("Tuite") (N.T. 562) also testified that during the summer of 1980 they heard Hassine say he wanted to see Kellet either killed or wasted.) Hassine also said that if Kellet's wife, Lois, was there, she "was to go also, because any witnesses had to go." Hassine, 490 A.2d at 445. Hassine also asked Billy Hayes, an employee who lived next door to Kellet, if he could shoot Kellet from Hayes' bedroom window with Hayes' father's gun. Hassine then asked everyone present to attempt to procure a gun.

In an attempt to achieve their goal, Decker accompanied Hassine to the apartment of Ted Camera, tenant of a Hassine family apartment in Trenton, to ask for a gun but they did not obtain one. In early July, Hassine obtained a .25 caliber automatic handgun from Tom Easterwood for seventy-five (\$75.00) dollars and sometime thereafter gave it to Decker and said, "here, hit him in the head and leave it there." Id.; (N.T. 709, 933, 955). Several people witnessed Hassine and Decker test fire the gun in the back of Hassine's butcher shop only to discover that it was defective. (N.T. 30, 59, 62, 708-09, 750-52, 811, 815). Although they were unable to get a replacement part to fix the gun, Hassine purchased one box containing fifty rounds of .25 ammunition for which he signed the store's register. (N.T. 60, 708-9). Hassine's subsequent efforts to secure a firearm from

several acquaintances were unsuccessful. Hassine asked Tuite and Schwab about finding a gun; they showed him a .357 Magnum, but it was too expensive for him to purchase. (N.T. 555-56, 626-27). Hassine also asked Wharton if he could obtain a gun, but he refused. (N.T. 744, 747). Ultimately, Hassine's father's gun was used to commit the crimes.

On or about August 5, 1980, Orłowski and Hassine met with Tuite and Schwab at Orłowski's house. Tuite and Schwab were members of the Breed Motorcycle Gang and Tuite was an acquaintance of a friend of Orłowski's who also worked for Hassine. Hassine asked Tuite and Schwab how much it would cost to have Kellet killed to which they replied fifteen hundred (\$1,500.00) dollars. (N.T. 561-63, 627-28). Shocked at the price, Hassine paid them two hundred and fifty (\$250.00) dollars to have Kellet beaten up instead. (N.T. 564-65, 628-30). However, Tuite and Schwab never carried out the plan.

Later that month Hassine approached Decker about killing Kellet and any witnesses in exchange for an apartment. Hassine, 490 A.2d at 445. Wharton and Billy Hayes, both of whom were present at the meeting between Hassine and Decker, confirmed this. (N.T. 743, 813). About two and one-half weeks before the shooting, Paul Koenig, from whom Orłowski had tried to obtain an unmarked, unregistered handgun, asked Orłowski if he still needed a gun. Orłowski answered, "No, we don't need it. Victor got one"; he also stated that, "We're going to do it Victor's way." (N.T. 958-59).

On the night of the shootings, Decker testified that Hassine drove him to Hassine's parents house in Trenton, New Jersey, to pick up Hassine's father's .380 Llama handgun and then dropped him off near Kellet's apartment. (N.T. 80, 83-86). Co-defendant Orłowski witnessed Hassine and Decker driving together towards Trenton on the night of August 22, 1980. (N.T. 1219-20). When Hassine dropped Decker off in the vicinity of Kellet's residence, he gave Decker a baseball batting helmet to cover his hair and directions to Kellet's apartment. Decker responded, "Tonight's the night - this cat's got to go. We'll use your (Hassine's) gun." Hassine, 490 A.2d at 446.

Hassine then went to Orłowski's house; the two of them and a third person, Michael Thompson ("Thompson"), went for a ride in Thompson's car. Hassine directed Thompson first to drive up and down certain streets while Hassine whistled out the window, and then told Thompson to stop in various parking lots near Kellet's apartment. Then they drove to a Dunkin' Donuts across from the meat market; Hassine acknowledged that he had been seen. (N.T. 867). They got back into the car and drove towards Kellet's apartment, and as they were driving they heard two shots. (N.T. 868). Hassine stated: "oh ..., that's my father's gun. I hope that a... doesn't get caught." (N.T. 868-69, 881, 1224). They proceeded up the street; then Hassine asked Thompson to get out of the car and call for Decker; no one responded. (N.T. 869). Thompson dropped Hassine and Orłowski at Orłowski's house.

In addition to extensive testimony regarding Hassine's

extensive involvement in the conspiracy to murder Skip Kellet, there was also substantial evidence that Hassine was involved in an attempt to cover up his participation after the crime had been committed. Decker's girlfriend, Valerie Lynch ("Lynch"), with whom Decker was living that summer, testified that Decker left the apartment around 9:00 p.m. on the night of the shootings and came in early the next morning, August 23, 1980, with a gun and placed it between the bed mattresses. (N.T. 1038-41). After the police came by and arrested Decker, Lynch called Hassine. (N.T. 1041-44). Hassine asked her if there was a gun around and told her to get rid of it, and she did. (N.T. 1044-45). Wharton later drove her to Hassine's brother's house where she and Hassine took a walk and he asked her to lie about Decker and his whereabouts the night of the crimes. Hassine stated: "Remember Valerie, I was in New York and Eric Decker was at home." (N.T. 1050-51). Lynch later retrieved the gun and gave it to the police. (N.T. 1054).

Other witnesses also testified to Hassine's substantial efforts to cover-up his involvement in the conspiracy to kill Skip Kellet. During an intercepted telephone call between Hassine and Thompson, Hassine confirmed with Thompson that Thompson had told the police he was not with Hassine that night. (N.T. 901). According to co-defendant Orlowski, Hassine also told Orlowski to keep his mouth shut concerning the incident after the shootings took place. (N.T. 1228). According to Tuite and Schwab, Hassine considered paying them ten thousand

(\$10,000.00) dollars to hush up Commonwealth witnesses. Hassine made the statement that he would get back to them later, because he would first have to "talk to his old man to see if he could come up with some bucks." (N.T. 577, 631).

The only evidence Hassine had nothing to do with the crimes and was looking for Decker to retrieve his father's gun and prevent its use was that of Hassine. The prosecutor's cross-examination on his post-arrest silence attacked his credibility but it could not have substantially affected the verdict in view of the circumstantial evidence of his guilt from untainted as well as tainted witnesses.

III. CONCLUSION:

Determining whether an error constitutes harmless error is always a difficult task. It is not possible to reconvene the jury and establish with exact certainty what they considered in reaching a verdict. Harmless error analysis must be conducted on a case by case basis; the reviewing court must weigh the evidence of guilt against the egregiousness of the error in order to determine whether, for purposes of collateral review, it substantially influenced the jury's verdict at trial. If after reviewing the record, a court concludes that the evidence of defendant's guilt was so overwhelming that the trial error of constitutional magnitude could not have affected the integrity of the proceedings, in the interest of justice, it must deny habeas relief on the grounds that the error could not have substantially influenced the jury's verdict within the meaning of Kotteakos and

Brecht.

The court is reluctant to conclude that any error of constitutional magnitude should be characterized as harmless, but upon consideration of the overwhelming evidence of guilt presented by the Commonwealth, Hassine's petition for writ of habeas corpus is denied on the grounds that the prosecutor's improper reference to Hassine's post-arrest silence, although a constitutional violation under Doyle, did not have a substantial and injurious effect or influence on the jury's guilty verdict.⁸ The record provides clear and convincing evidence that Hassine was guilty beyond a reasonable doubt of the offenses of which he was charged. Although reference to defendant's silence was unconstitutional because jurors might view exercise of a Fifth Amendment right to remain silent as a tacit admission of guilt, the prosecutor's illegal references to Hassine's post-arrest silence were not trial errors requiring habeas relief in the face of the overwhelming evidence of Hassine's guilt. Plaintiff's petition for habeas corpus is therefore denied. An appropriate order follows.

⁸ Although the legal standard applicable to harmless-error analysis for purpose of collateral review of a criminal conviction has become less onerous as a result of the Supreme Court's ruling in Brecht the record establishes sufficient evidence of Hassine's guilt to suggest that the Doyle error would have been harmless under the Chapman reasonable-doubt standard as well.

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 STATE OF PENNSYLVANIA : NO. 86-6315

ORDER

And now, this 30th day of October, 1997, upon consideration of the pleadings and record herein, after review of the Report and Recommendation of Tullio Gene Leomporra, Chief United States Magistrate Judge, the objections filed thereto, and for the reasons set forth in the foregoing Memorandum, it is **ORDERED** that the petition for writ of habeas corpus is **DENIED**.

J.