Supreme Court of Florida

CASE NO. SC04-2274

JESUS DELGADO

Appellant,

-vs.-

THE STATE OF FLORIDA

Appellee.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCES OF DEATH BY THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

A. Introduction:

This is a direct appeal from a judgment of conviction and two death sentences in a first degree murder case. R.II-357, 363. The Defendant, Jesus Delgado, was indicted on July 27, 1993 for two counts of first degree murder, armed burglary, and use of a firearm during the commission of a felony. R.I-44. That indictment alleged that the Defendant shot and killed Tomas Rodriguez on August 31, 1990 and stabbed to death Violetta Rodriguez on that date. R.I-44.

The present appeal follows the second trial of the case. In the first trial the prosecution asserted alternative theories of preditated murder and felony murder. R.I-54. Mr. Delgado was found guilty on all counts in that first trial and was sentenced to death for each of the murders. R.I-53. The verdict did not reflect whether the jury found the Defendant guilty of premeditated murder or felony murder. On appeal, this Court reversed the convictions, holding that the State's "theory of burglary (and felony murder) is legally inadequate" because Mr.

Delgado's presence in the victims' home was consensual. RI-70. This Court's opinion reversing Mr. Delgado's convictions after the first trial is reported at *Delgado v. State*, 776 So. 2d 233 (Fla. 2000)(hereinafter "*Delgado I*").

B. Pretrial Proceedings and Dispositions After Prior Reversal:

After preliminary proceedings following remand from this Court, the case was set for trial before visiting Circuit Judge Oliver Green.[1] Before the start of the second trial, defense counsel filed a Motion to Bar Imposition of Death Sentence on grounds that Florida's Capital Sentencing Procedure is unconstitutional under *Ring v. Arizona,* 436 U.S. 584 (2002). R.I-161. That motion was denied. R.III-83.

[1] That reassignment to a visiting judge was made following grant of the Defendant's Motion to Disqualify Trial Judge based upon the fact that a former police detective who was one of the State's material witnesses was Judge Israel Reyes, who had in the interval between the two trials taken office as a circuit court judge in Miami-Dade County. R.I-113, 116. Judge Reyes, whose status as a judge was not revealed to the jury, testified at trial; he is referred to in this brief as Detective Reyes.

Before jury selection began, the Defendant filed a *pro se* motion to dismiss based on "the grounds that the defendant is charged with offenses for which he has previously been placed in jeopardy, and judicially acquitted of those charges." R.II-207. Defense counsel adopted that motion. R.III-137. The motion was denied. *Id*.

C. The Prosecution's Theory of the Case and Evidence Thereon:

The State took the position at trial that Mr. Delgado killed the victims as revenge for them selling an unsuccessful laundry business to Horacio Llamelas, the father of Defendant's girlfriend Barbara, who allegedly purchased the cleaners for his daughter and Mr. Delgado to run. R.XIX-2183-86. There were no eyewitnesses to the crimes. No weapons involved in the murders were linked to the Defendant. No one saw the Defendant at the crime scene. There was no DNA evidence implicating Mr. Delgado.

The prosecution took the position that the following circumstantial evidence supported the inference that Tomas and Violetta Rodriquez were killed by someone well known to them, who they admitted into their home even though the visit was unexpected:

- The Rodriguezes were very security conscious and unlikely to open their door for a stranger. R.XII-1396-98, 1411.

- There was no sign of a forced entry. R.XIII-1622-23.
- Violetta's keys were still in the lock inside the entry gate to the house the morning after the murders. R.XII-1413.
- There were no signs of a struggle in the rooms adjacent to the exterior doorway. R.XII-1429, 1435.
- Mr. and Mrs. Rodriguez were found dead wearing more casual attire than they usually wore when expecting company. R.XII-1405.

The State theorized that the following evidence supported the proposition that the Rodriquezes were not the aggressors who were killed in self-defense:

- A loaded .38 caliber revolver which had not recently been fired was found in a zippered pouch inside a drawer in the victims' bedroom. R.XIII-1480; RXV-1709-10.
- The .22 caliber Ruger pistol that killed Tomas Rodriquez may not have belonged to the victims because there was no unspent .22 ammunition found in the home, while there was some .38 ammunition for the other handgun found there. R,XIII-1483-84.
- That Ruger pistol that killed Tomas was equipped with a homemade silencer and its serial number had been drilled off. R.XIII-1479-80.

- The victims' hands were swabbed by police for gunpowder residue (R.XIII-1584-89) and those test results were negative.
- The victims' bodies were found beside a car parked in the garage, with Violetta's body wedged in between the car's bumper and the wall, possibly indicating that they were seeking refuge from attack there. R.XII-1446-48.
- A kitchen drawer which did not contain knives was found open in this otherwise-immaculate house (R.XIII-1498-99), possibly indicating that the bloody knife probably used to stab and cut the victims had been removed from a drawer by someone unfamiliar with the kitchen storage configuration.

Evidence offered to support the State's theory that the motive for the murders was revenge or something other than robbery included the following:

- A wallet, money and jewelry was located on the dresser in the victims' bedroom the day after the crimes. R.XIII-1476.
- Everything was neat throughout the house except for the kitchen and garage, with no signs of ransacking for valuables. R.XIII-1477.
- A lady's purse was on the dining table with its contents including case intact. R.XIII-1477.

- There was no sign of a struggle inside the Volvo parked in the garage or an effort to steal the car such as might be consistent with the victims surprising a car thief. R.XIII-1518.

Circumstantial evidence relied upon by the State to support its position that Jesus Delgado had been inside the victims' home during the killings included the following:

- A bloody handprint matched to the Defendant was found on the telephone receiver in the kitchen. R.XIII-1544; R.XIV-1668.
- Police installed a device called a pen register to the telephone line used by the telephone with the bloody print on it (R.XIV-1668), and allegedly determined that the last number called from that telephone was a house where police determined the Llamelas family resided.
- A drop of blood found on the garage floor (R.XIII-1522-25) and another one on the kitchen floor close to the telephone (R.XIII-1527) were of the same blood type grouping as that of Mr. Delgado.
- Those two drops of blood displayed the circular characteristic of having been dripped straight down, at a 90 degree angle to the floor, unlike other blood identified as that of the victims which displayed

elongated "tails," indicating that it fell at a different angle. R.XIII-1525.

- Those "90 degree drops" were near a trail of bloody shoeprints leading out of the garage into the kitchen. R.XIII-1425-30.

D. Evidence Creating Doubt About Mr. Delgado's Guilt:

The following are examples of evidence tending to weaken the State's evidence and creating doubt[2] about Mr. Delgado's role as the killer:

- The State presented no direct evidence that Mr. Delgado was at the victims' home on the night of the murders.
- The gun and knife which were the murder weapons were not linked to Mr. Delgado.
- There was no DNA evidence linking Mr. Delgado to the crimes.
- The blood "groupings" relied upon by the prosecution to support the inference that Mr. Delgado had been injured and bled at the victims' home were applicable to a large segment of the population.

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[2] Although no issue is raised in this brief concerning insufficiency of the evidence, these few examples are offered to demonstrate the potential for the other trial errors asserted herein to have contributed to the verdict.

- The victims might have surprised a car thief because there was evidence of some sort of a struggle in the garage, including the garbage can being turned over, a broken ceramic pot, and the side mirror on the Volvo being folded-in toward the car. R.XIV-1616-18.
- Fingerprints taken from the outside of the Volvo in the victims' garage did not match those of Mr. Delgado or either of the Rodriguezes. R.XV-1816.
- The witness who identified for authentication purposes the paper tape (State's Ex. 68) used to record the telephone number which supposedly was called last from the victims' kitchen telephone, then-Detective Israel Reyes, was not trained in utilizing pen registers for such purposes. R.XIV-1669, 1674, 1688.

E. The Jury Instructions and Closing Arguments:

At the close of all the evidence the State *nolle prossed* the count charging the Defendant with the use of a firearm in the commission of a felony. R.XIX-2141. That left only the two first degree murder counts.[3]

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[3] The original indictment contained four counts, one of which was the burglary count found legally insuffient by this Court in *Delgado I*.

Before closing arguments began the trial court began to read the charge to the jury homicide. R.XIX- 2145-48. The State asked for a sidebar during the reading of the instructions and advised the judge that Rule 3.390 required him to wait until after closing arguments to charge the jury. R.XIX- 2148. Defense counsel also requested that the judge "instruct the jury at the end of counsel's arguments." R.XIX- 2149.

The parties and the court at that juncture also addressed whether the portion of the justifiable homicide charge dealing with resisting an attempt "to commit any felony in any dwelling house" would apply in this case, where the house in question was that of the victims. R.XIX- 2149-50. Defense counsel agreed that the court need not instruct the jury on that portion of the defense, and (in light of the fact that the jury already had heard that portion of the instruction) agreed with the court's pronouncement that he would "tell them not to consider that." R.XIX- 2151. The judge reminded the jury of the part of the "instruction on justifiable homicide having to do with occurrence in any dwelling," and advised them that "it has been agreed that based on the circumstances of this case, this instruction is not applicable." R.XIX- 2152. Notwithstanding being informed of Rule 3.390(a), His Honor then continued where he had left off with the balance of the instruction on excusable homicide (R.XIX- 2152-53), and instructed the jury twice on the

elements of first degree murder: once for each of the victim counts in the indictment. R.XIX- 2153-55.

The prosecution presented closing argument. R.XIX- 2155. Before defense counsel commenced his closing, he stated that Mr. Delgado had authorized him to waive the reading of the justifiable homicide instruction. R.XIX- 2211. The Defendant did not waive reading of the charge on excusable homicide. R.XIX- 2240.

Defendant's summation included the argument that the evidence about the "blood grouping" results on the blood samples taken at the scene were scientifically insufficient to establish beyond a reasonable doubt that Mr. Delgado lost any blood in the Rodriguezes' home, much less that the bleeding occurred on the date of their deaths. R.XIX- 2232-33. Defense counsel questioned the idea that more accurate testing could not have been done in 1990, and argued "DNA in 2004, all they got to do is submit it to DNA. You would know positively?" R.XIX- 2233. The State objected to that argument without stating any grounds, and the trial court sustained the objection, stating "Sustained. Sustained. Not in evidence. The jury will disregard it." *Id.*

Before the State's rebuttal argument, the court and counsel again discussed the jury instructions. Although the court had already instructed the jury twice on

the elements of first degree murder (once for each victim)[4], His Honor announced that (after arguments concluded): "I'm going to re-read the whole set." R.XIX-2241. Defense counsel again objected to re-reading the portions of the charge already given, reminding the judge. "You already read the first part of the instructions and the jury heard them. And [Assistant State Attorney] Ms. Dannelly argued them." *Id.*

The trial court seemed to agree with Defendant's position that he should not re-read the instructions previously given, stating in response to the objection: "All right. But what do I provide them?" *Id.* Defendant responded that the jury when it retired to deliberate should be provided with a complete set of the written instructions, but did not withdraw his objection to the court repeatedly reading the charges to the jury. *Id.* As addressed below, the court later read part of the instructions a third and fourth time.

During the State's rebuttal argument, the prosecutor commented on defense counsel's statements in closing to the effect that the Rodriguezes' killings were

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[4] As noted above, those initial instructions had been given to the jury, in large part, even after ***both*** the State and Mr.Delgado had objected to charging the jury prior to closing arguments. See R.XIX-2153-55.

“horrible, premeditated murders.” R.XIX-2243. The State emphasized that “this is a concession at this point in the trial when everything is over” and criticized the defense for its apparent about-face on that point, arguing: “It is all well and good for him to stand up now after we have been in trial for two and a half weeks and tell you that, yeah these are horrible, premeditated murders, but the problem is, two and a half weeks ago, I didn’t hear that concession.” *Id.*

Defendant objected to those comments and moved for a mistrial, arguing as grounds first that the prosecutor improperly suggested that the defense was up to something; second, “that it shifts the burden” onto the defense; “and three, it is a comment on the Defendant’s right to remain silent.” *Id.* The judge cautioned the prosecutor, saying: “Well, you didn’t finish it, but you’re in treacherous waters.” *Id.*

Instead of indicating that she understood the court’s concern and would abide by his warning to stay away from such argument, the Assistant State Attorney at sidebar hotly defended her choice of words, unprofessionally characterizing defense counsel’s closing argument as “ludicrous” and a “load of crap.” R.XIX-2245-46. Judge Green cautioned counsel for the State about such attacks on defense counsel, saying “I don’t want to hear talk like that.” R.XIX-2246. His Honor instructed the prosecutor “don’t interrupt me,” and advised her:

"But you are going to have to calm down . . . [and] stay away from putting any argument—advancing any argument about the Defense having any burden." However, he denied Defendant's motion for mistrial and overruled the objection to the argument, other than to caution the State not "to pursue anything that would suggest a burden on anybody but the State." *Id.*

Once her rebuttal argument resumed, the prosecutor continued her criticism of the Defendant and defense counsel, and compared the defense strategy to other, unrelated cases, remarking: "Counsel says that I went through a pile of evidence and that does not prove that Defendant did it. I would submit to you that ***the Defense is never satisfied*** with anything in ***any*** criminal case." R.XIX-2248(emphasis added). Defendant objected to that argument, which was sustained, and reserved a motion for mistrial. *Id.*

The State then characterized as "ridiculous" defense counsel's argument that the evidence did not support the State's theory of a motive for Mr. Delgado to kill the victims (Mr. Delgado's alleged financial interest in the dry cleaning business). R.XIX-2253. Defendant objected to the State's argument that Mr. Delgado had an interest in the business and that "[t]he man bought the business for them to run." *Id.* Although expressing his lack of recollection that there was such evidence, the

trial court overruled Defendant's objection that the State's argument was outside the evidence. *Id.*

Next the State insinuated that the Defendant should have produced evidence that the dry cleaning business was financially successful in order to refute the State's theory concerning Mr. Delgado's motive. In replying to defense counsel's argument that the State had failed to introduce financial records showing that the business was unsuccessful, the prosecutor argued: "No, we sure didn't show the records of how that business was doing because whose records were they? Well, they were—if there were records, they were records of the common-law life of the Defendant, Barbara Llamelas's records. So did we—[?]" R.XIX-2255.

Defense counsel objected to that argument and moved for a mistrial, asserting that the prosecutor "is making an inference that our client controls the records and therefore they couldn't do anything about it and that is an improper inference." *Id*. The State agreed with defense counsel's characterization of what the State was suggesting to the jury, stating: "That's what the inference was." *Id.*

Defense counsel argued that it was improper for the prosecution to argue that the jury could draw an inference from Mr. Delgado's failure to produce the subject evidence because that evidence was equally available to both sides. R.XIX-2255-56. Defense counsel requested that the trial court give a curative

instruction to the effect that no such averse inference should be drawn. *Id*. The trial court denied the motion for mistrial and declined to give the requested instruction. R.XIX-2256.

The Assistant State Attorney next argued that defense counsel's challenges to the sufficiency of the blood testing "happens to be clearly the most absurd conclusion." R.XIX-2263-64. Defense counsel objected to the "improper comment," and stated: "I would like to reserve a motion." The trial court responded: "I agree. Tone it down." *Id.*

After the prosecution completed rebuttal argument, defense counsel argued the motions for mistrial he had reserved when the State "argued the defense is never satisfied" and when she referred to defense counsel's "'absurd' argument." R.XIX- 2271. Those motions were denied. R.XIX-2272.

The parties and the trial court next revisited the issue whether the instructions which previously had been read to the jury before closing argument should be re-read in toto. R.XIX-2273. Defendant argued that it was not "appropriate for the court to read that a second time" and stated that "it places undue emphasis on that" to have the definition of first degree murder and related instructions repeatedly read to the jury. R.XIX-2273. The trial court ruled that he would read the instructions in their entirety over defense counsel's objection.

R.XIX-2274. The trial court re-instructed the jury, modifying the previous instructions to reflect the withdrawal of Defendant's request for an instruction concerning justifiable homicide. R.XIX-2277. At the conclusion of the charge to the jury, defense counsel renewed all previous objections made about the jury instructions, including the objection to "reading them murder instruction twice and then re-reading [it] again twice."[5] R.XIX-2289.

F. Penalty Phase Proceedings:

The penalty phase was conducted on July 8, 2004. R.XX-2347. Defense counsel advised the court that Mr. Delgado had instructed his attorneys to refrain from making any opening statement, cross examining the prosecution's witnesses, presenting mitigation evidence, or arguing for mercy in closing. R.XX-2350. Mr. Delgado confirmed on the record that he had so directed his attorneys not to do anything on his behalf at the sentencing phase. R.XX-2351. The trial court found that Mr. Delgado had made a knowing voluntary and intelligent waiver of his right to present matters in mitigation. R.XX-2353.

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[5] The trial court had read each murder instruction separately for the count pertaining to each victim, for a total of four readings of those instructions.

Defense counsel proffered the non-statutory mitigation evidence which would have been introduced if Mr. Delgado had permitted it. As noted by the State in its sentencing memorandum, "[t]he defense first stated that it would rely upon the non-statutory mitigation enumerated by the prior trial judge and reflected in the Florida Supreme Court's direct appeal opinion [in *Delgado* I]." R.II-331. Defense counsel then continued the proffer as follows:

> What the court needs to know, we would have presented to the jury that when Jesus' mother was pregnant with him, it was a very difficult pregnancy. He turned out to be a breach baby. There was oxygen deprivation. Because of that, he turned out to be a blue baby.
>
> He was hospitalized for 25 days and contracted viral meningitis which caused encephalitis, enlargement of the brain, and as a result of that the doctors in Cuba treated him with Thorazine which is used as a medication for people who have mental problems.
>
> These things, we believe, retarded his cognitive development and could have developed and could have led to the learning disabilities which we would have shown, which was later discovered by Dr. Herrera.
>
> He spent the first couple of months of his life in and out of the hospital and was given other medications such as Tergol and Haldol.
>
> You Honor, we were prepared and we have been in contact with a social worker who lived in South America, I believe, who had the

ability to go to Cuba and we would have sent her to Cuba to gather more records because the records that we have are incomplete and which would have explained the exact medications that Mr. Delgado was receiving.

In the first two years of his life, like I said, he was in and out of hospitals, he was receiving growth hormones, seizure drugs and antidepressants.

We were unable, because Mr. Delgado did not wish to give any kind of imaging technology which I cannot remember what was available in 1995, but certainly which was at the time of the last trial. But certainly, the imaging techniques have improved since 1995 such as CAT scans and other things we would have given Mr. Delgado to show the jury and the court an potential brain damage that may have resulted from his early development.

He had asthma on and off as a kid and was given Prednisone, which happens to be a steroid. We do not know nor were able to investigate what would happen to someone who takes Prednisone for asthma as a young child.

He was a very sick baby for the first two years. Because we were unable to send someone to Cuba, we could not find exactly what treatment was available.

While Mr. Delgado was in school, a word that was used was called discontrolled. His mother, according to his sister, she would have testified, gave the teachers permission to beat Mr. Delgado because he was inattentive and later diagnosed as having ADHD. We

would have presented the fact that his maternal grandmother was the main care-giver in the house, not his mother.

She was a difficult person, not nurturing and at times we would present to the jury that his mother would tie him to the chair, not to a chair, not because Jesus was being bad, because she did not want to deal with him, which goes back to some of the problems he would have resolved as a result of his early development.

His maternal side has been diagnosed with psychiatric problems. I will tell the court also his paternal side which we think might have been relevant, his father left home while she was pregnant and she was very young. His mother remarried.

A Dr. Conroy, I think, that came up in the last trial, who raised him until a teenager. He abused alcohol and wold beat his family in front of Jesus.

Jesus would get in between them. When we did that, we would present testimony that the father would withhold food from the family because of what Jesus did.

Around 1980, I don't know if the court recalls, that was the time of the Mariel Boat Lift, people were leaving Cuba. His family was ostracized by the neighbors because they found out they wanted to leave. They, in essence, became prisoners in their own house and at times Jesus wasn't even allowed to play on the porch because of what the neighbors would have done.

Around the time Jesus received psychiatric treatment in a clinic in Havana for what is described as agitation and insomnia. As I said, he could have had a social disorder.

He was diagnosed with clinical depression and organic brain syndrome which might have been related when he suffered as a child, which resulted in learning problems.

Again, Your Honor, because we were unable to get neuropsychologist to go visit Mr. Delgado, we could not develop this further.

Apparently, Mr. Delgado avoided military conscription which I understand in Cuba is extremely rare because of some of his psychiatric problems.

We would have shown the court the jury that he lived in an environment of stress, violence and anger and we would have tried to show how this would retard development not only as a child but through being an adult.

He was put in daycare due to some of his psychological problems and his mother was given classes in how to deal with him.

In 1994, we would show Mr. Delgado left Cuba, went to live with his father, Juan Maldonado, and Naomi Ponce.

I think the court in the opinion refers to Naomi as being one of the witnesses in the last case.

Apparently, Jesus' father would beat him along with Reiza, his sister, and again Mr. Delgado would get in between the two of them, his half brother John Alex Luis, the son of Juan Antonio has been diagnosed with mental problems, bipolar mental problems, to show the jury that both his maternal and paternal side have had psychiatric problems.

Juan Antonio would have trouble controlling his temper, and he lived in another environment of violence and at that time also Jesus was exposed to crime, because it turns out Juan Antonio was a drug dealer, as I mentioned before.

Dr. Herrera had diagnosed him with ADHD. At that time, I believe it's 1997, Mr. Delgado went to prison for aggravated assault. He had no DR's of any note whatsoever. Received an 18 month sentence and he tried ot rehabilitate himself while he was in prison. He participated in work and study programs for the seven months that he was in the medium custody level prison.

While he was awaiting trial, Your Honor, in 1992 to 1995, we would have shown he had good behavior while in Dade County Jail. We also would have shown that he had good behavior in Dade County Jail awaiting this trial.

From approximately 1996 to 2001, Mr. Delgado was on death row, we would have shown while on confinement he tried to improve himself. He taught himself English as the court knows. We would have shown the jury, even though we use the interpreter, Mr. Delgado is pretty fluent, close to, in English.

We are using this interpreter to make sure there are no words or nuances Mr. Delgado does not understand.

While in prison he studied art, pictures, mostly portraits. We would have shown the jury some of that art. You could truly, Your Honor, see they're quite astounding, how good he is at that.

His family members have continued to visit him. They requested visitation after sentencing. I will tell the court why that is important in a moment after being sentenced to death. This family remained close to him and visited him while in custody.

He showed the ability to handle problems appropriately. There was a problem with the visit of his half brother. As opposed to acting out, Mr. Delgado followed procedure, filed a grievance.

He received no DR's of any significance nor was there any violence to others while he was on death row. He was at the time designated a psych grade three due to his history of anxious attitude which was treated with psychotropic medications. Then in the year 2000 he attempted a suicide.

We would have shown the jury this: He hanged himself with knotted material and he fell slamming his head. And the report would have shown there was blood coming from both his ears.

A CAT scan performed at that time would have shown the injury that he received, extensive internal injuries, head injuries, including a skull fracture. He was taken to a hospital in Jacksonville.

At that time Jesus denied any knowledge of trying to hang himself which the doctors found to be a credible report. He was diagnosed at North Florida Reception Center with an anxiety disorder with depressive features.

Since Mr. Delgado has been in custody here in Dade County which, I guess, is 2001 his nephews have visited him. That would be Reiza, his sister's sons. We would have presented them to show that while they visited him, he played with them. They would call them on the phone, ask for his advice and we would have shown that Jesus had become a positive influence on them.

Your Honor, I alluded to the one doctor we did hire solely to perform his preliminary work and did not need to talk to Mr. Delgado. So we did that on our own. The doctor we hired was a gentleman by the name of Mark Cunningham who is a Ph.D. He is an expert in forensic psychiatry and specifically in the methodology and data specific to violence risk assessment and capital sentencing.

What we would have shown, Dr. Cunningham is out of Louisville Texas and I don't know if the court is familiar with this, in Texas before one can be sentenced to death, the state has to show that he will be danger, hr or she will be dangerous in the future.

So Dr. Cunningham is often called upon as an expert for the defense to show that people are or are not dangerous in the future. And we had Dr. Cunningham put together statistical data analysis including, Your Honor, we had the Department of Corrections through the State of Florida put together data solely for Dr. Cunningham concerning capital inmates and their risk assessment.

Dr. Cunningham gave us a very long report, but the nub of it is that applying well known statistical methodology, Dr. Cunningham would have testified that, in essence, because of Mr. Delgado's closeness with his family, his age, his previous incarcerations with no DR's, that Mr. Delgado was a very low risk to commit any future assaults or crimes while in jail.

The percentages of the last report we would have had that in a 40 year risk, that application of a scale that Dr. Cunningham would have testified to, Mr. Delgado in a 40 year period of time would have show a risk of institutional violence of 12.9 percent.

This risk principally reflects the risk of inmate assaults in a lifetime. The risk of an aggravated assault on a corrections officer would have been approximately one percent in the lifetime, and the likelihood of homicide on an inmate would have been approximately point two percent.

What we were hoping to show to the jury by imprisoning Mr. Delgado for the rest of his life, he was a very low risk to anyone, perhaps other than himself, but clearly a risk to no one. They could safely have sentenced him to life where he would have spent the rest of his life.

Dr. Cunningham would have testified to studies that were done in other states. For example, they have studies from the Missouri Department of Corrections to show that death sentence and life without parole inmates were only half as likely to be involved in assaults and misconduct. As parole eligible inmates, he would have

> testified about data collected from Texas, that despite the predicted behavior only five percent of the capital offenders resulted in staff or other inmates injury more than injuries resulting from first aid treatment.
>
> In other words, sentencing Mr. Delgado to life is very low risk. There would have been no need to sentence Mr. Delgado to death. So what we were hoping to show the jury, not only from his background and raising that there were substantial mitigation to be presented to the jury and Your Honor, but also once he was in prison he had adjusted well.

R.XX-2331-42.

The state called as a witness Detective Timothy Bahn of the Broward County Sheriff's Office. R.XX-2361. Detective Bahn gave testimony concerning an alleged prior violent felony committed by Mr. Delgado in which a witness reported to him that "Mr. Delgado brandished a small blue steel revolver," threatened the witnesses by stating "do you want trouble," and that Mr. Delgado struck one of the victims with his fist during that encounter. R.XX-2263-64. Upon the state's request, the trial court took judicial notice that Mr. Delgado had entered a plea of guilty to one count of aggravated assault leading to entry of a judgment of conviction entered on April 20, 1987. R.XX-2368.

The state called Deputy Chief Medical Examiner Emma Lew, who testified that Tomas Rodriguez had sustained five stab wounds and five gunshot wounds to his body. R.XX-2371. The stab wounds were not fatal, appearing to have been inflicted as Mr. Rodriguez was dying or had already died. Three of the gunshot wounds contributed to his death. *Id.* The witness presented evidence that Mr. Rodriguez suffered physical pain and physic horror as the wounds were inflicted leading to his death. R.XX-2375-80.

The Deputy Medical Examiner next testified concerning the autopsy findings pertaining to Violetta Rodriquez. R.XX-2382. She sustained ten lacerations to her head, four of which were associated with fractures of her skull. R.XX-2383. She also sustained defensive injury and twelve stab wounds, some of which were fatal. R.XX-2387-89.

Denise Reinhart was called to present victim impact testimony. R.XX-2395-2406.

The State presented closing argument. R.XX-2407.

Defense counsel presented no evidence and made no argument to the jury. R.XX-2425.

The court instructed the jury on the law applicable to the penalty phase. R.XX-2425-34. During deliberations the jury presented a piece of paper

containing two questions for the court. The first of those questions was "has the Defendant already served any time in prison for this" which would "be applied [to the] twenty-five years minimum mandatory before being considered for parole?" R.XX-2436. The second question was, "if life sentence[s] are to be considered, are they concurrent and [sic] consecutive?" *Id*.

The State argued that the questions were improper as being "outside the matters for the jury's consideration" and that the trial court "can't legitimately answer either of these questions without invading the sanctity of their deliberations." R.XX-2438. Defense counsel argued that there was no evidence in the record concerning whether Mr. Delgado already had served time which would be credited to his life sentence, and stated that the defense had no position on the second question. R.XX-2437-38.

The trial court initially had expressed that its "inclination is to tell the jury to rely on their collective memory with respect to the facts and that we cannot answer question one [but], as to question two, I think they are entitle[d] to know that these sentences could be run either concurrent or consecutively purely at my discretion, but they have no part of that. R.XX-2436. However, after hearing the parties' positions regarding those questions, advised the jury as follows:

> We have all read the questions and you [sic] respectfully decline to answer the question.
>
> The reason is this trial have [sic] been completed and the matters that have been presented for your collectively [sic] consideration are finished [sic] and these are things that would be in addition thereto and; therefore, the question will be placed before the court, but you must continue your deliberations with respect to the matters that have been presented.

R.XX-2440.

After further deliberations the jury returned advisory verdicts (R.II-312, 313) recommending by a vote of nine to three that the court impose the death penalty for the murder of Violetta Rodriguez and recommended by a vote of nine to three that the court impose the death penalty upon Mr. Delgado for the death of Tomas Rodriguez. R.XX-2441-42. The jury was polled, acceded to the penalty phase verdict and was discharged. R.XX-2442. The court referred the matter for a pre-sentence investigation, over the Defendant's objection. R.XX-2443.

G. The *Spencer* Hearing and Pronouncement of Sentence:

The parties appeared before the court on September 30, 2004 for a *Spencer* hearing. R.XX-2448. At that time, the Defendant declined to present any matters in mitigation. R.XX-2451-52. The prosecution advised the court that it had prepared a sentencing memorandum, but it was still being typed and was not ready

to be presented at that time. R.XX-2452-53. After a brief recess, the twenty-four page sentencing memorandum was presented to the court and the defense counsel. R.XX-2454.

Defense counsel observed that on page seven of the State's sentencing memorandum, reference was made to "the bullet that entered the Defendant's arm was retrieved and examined as expressly noted by defense counsel at the trial," and defense counsel stated that while he "did have the bullet retrieved and examined[,] due to the way our trial proceeded we did not present any evidence about the bullet from Mr. Delgado's arm." R.XX-2456. The court agreed that there is no evidence in the record about the bullet taken from Mr. Delgado's arm. R.XX-2457. The court also observed that there was no evidence in the record pertaining to a reference in the State's sentencing report to the effect that a doctor surmised that the bullet from Mr. Delgado's arm resulted from him shooting himself, and the court remarked that he did not "see that it has any significance." R.XX-2457. The matter was adjourned until October 18 for imposition of sentence. R.XX-2459.

At that sentencing hearing Mr. Delgado again declined to present any matters in mitigation. R.XX-2464. The court first noted that "there was a contemporaneous murder here involving two non-participating victims. And in addition to that, your previous criminal history includes aggravated assault with a

firearm. And a combination of those factors are provided for by Florida Statute [921.141(5)(d)]. And I gave that combination substantial weight." R.XX-2465. The court next found that the murder of Tomas Rodriguez "was especially heinous, atrocious, and cruel, which aggravating factor he gave "significant weight." R.XX-2465. Although stating that, as to Violetta Rodriguez, the trial court "likewise concluded that the distress that she experienced, the pain that she experienced because of the multitude of injuries lifted her experience above the norm and [sic] First Degree Murder," the trial court made no oral express finding[6] that the murder of Violetta was especially heinous, atrocious, and cruel. R.XX-2465-66.

The trial court found that the prosecution established the aggravating factor "that the murder was committed in cold, calculated, and premeditated manner without any pretense or legal justification," based upon the fact that the pistol had its serial number removed and a silencer attached. R.XX-2466.

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[6] The trial court in a written sentencing order filed on October 18, 2004 did find that the murder of Violetta was especially heinous, atrocious and cruel; that sentencing order also reflected the court's oral pronouncements at the sentencing hearing. R.II-345-55.

Turning to any mitigation, the court found no evidence support any statutory mitigators. R.XX-2466-67. His Honor "gave moderate weight to the circumstances that apparently [Mr. Delgado] did not use drugs or alcohol . . . [,] gave moderate weight to the circumstance that [the Defendant] had a difficult childhood, including the later years when [his] mother was abused and abused [him], and that [he] also had a difficult relationship with [his] stepfather and father." R.XX-2467. The judge gave only minimal weight to the affection Defendant had for family members. R.XX-2468. Finding that Mr. Delgado's courtroom behavior "has been exemplary," the trial judge gave that mitigation factor moderate weight. R.XX-2468. The court then pronounced sentence of death for each of the two counts of murder. R.XX-2468.

SUMMARY OF THE ARGUMENT

Mr. Delgado was judicially acquitted of first degree felony murder in *Delgado I*, the Court finding the elements of the underlying felony of burglary were not met. That burglary under the State's theory contained the elements of intent to commit murder, so the Defendant's acquittal of that charge constitutes a bar to his re-trial under Double Jeopardy protections.

The State in closing argument engaged in prosecutorial misconduct which the trial court erroneously failed to cure when defense counsel objected and moved

for mistrials. The State's improper argument included impermissible attacks upon Defendant and his attorneys, improperly shifted the burden of proof to the Defendant, and amounted to impermissible comments on his failure to testify. The Defendant was deprived of a fair trial as a result of those improper arguments, necessitating reversal.

The trial court erroneously admitted into evidence the State's exhibit 68, a pen register tape purporting to reflect that the last call from the victim's telephone had been made to Mr. Delgado's girlfriend's residence. There was insufficient foundation for the admission of that exhibit because the authenticating witness, Detective Reyes, had neither first-hand knowledge regarding the reliability of the pen register device nor sufficient training and experience to render an opinion on that subject. Defendant was harmfully prejudiced because that exhibit provided a link between him and the State's theory of a revenge motive for the murders.

Judge Green unduly emphasized the jury instructions containing the definitions and elements of first degree murder by repeating those portions of the instruction four times, over Defendant's objections. The frequent repetition of those instructions to the jury improperly emphasized that portion of the State's case, resulting in unfair prejudice to Mr. Delgado. The trial court committed fundamental error by instructing the jury that it would (not "might") hear

mitigation evidence if it returned a guilty verdict. That instruction improperly placed a burden onto the Defendant to produce some mitigation evidence, and prejudiced the Defendant by making it appear that he was disobeying the trial court's plan for the structure of the trial.

The trial court erroneously limited defense counsel's closing argument and instructed the jury to disregard relevant argument.

The imposition of the death penalties without unanimous jury findings on the pertinent aggravating factors violated Mr. Delgado's Sixth Amendment right to trial by jury, as applied under *Ring* and *Apprendi.* This is not a case involving a unanimous jury recommendation of the death penalty, nor a case in which only the single aggravator of a prior violent felony would necessarily have resulted in imposition of the death penalty.

The errors in this trial were harmful because it cannot be said that, beyond any reasonable doubt, they did not contribute to the verdict of conviction or the death sentences. Therefore, reversal is required.

ARGUMENT

I.

MR. DELGADO MUST BE DISCHARGED BECAUSE HIS RETRIAL VIOLATED FEDERAL AND

FLORIDA PROHIBITIONS AGAINST DOUBLE JEOPARDY

This Court should reverse Mr. Delgado's conviction and sentence with instructions to discharge the prisoner because his re-trial violated his Double Jeopardy protections under the Florida and Federal constitutions and statutes. The standard of review of this pure question of law is *de novo*. "The Fifth Amendment to the United States Constitution provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb." 15B Fla. Jur. 2d, *Criminal Law* §3111 (2001). The Federal Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment. *Arizona v. Manypenny*, 451 So. 2d 232 (1981). Similarly, Article I, §9 of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offense. . . ."

In addition to those constitutional protections against double jeopardy, there are similar statutory protections against being tried twice for the same crime. Section 910.11, Fla. Stat. (2005) provides in pertinent part as follows: "No person shall be held to answer on a second indictment, information, or affidavit for an offense for which the person has been acquitted. The acquittal shall be a bar to a subsequent prosecution for the same offense, notwithstanding any defect in the form or circumstances of the indictment, information, or affidavit."

In the prior appeal in this case, Mr. Delgado was acquitted[7] by this Court of the crime of felony murder. The evidence introduced in that trial of Mr. Delgado's consensual entry into the victims' home with the intent to murder them was legally insufficient to establish the underlying felony of burglary necessary to support that felony murder charge. Although he was tried under a theory of premeditated murder during his second trial, the evidence upon which both theories were based are the same and Mr. Delgado was impermissibly tried twice for the "same offense." In *State v. Katz*, 402 So. 2d 1184, 1186 (Fla. 1981), this Court reaffirmed the test usually employed to determine whether double jeopardy protections are available: "Florida's test for determining whether successive prosecutions impermissibly involve the same offense is based upon the sufficiency of the allegations in the second information with regard to a conviction of the offense charged in the first. If the facts alleged in the second information, taken as

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[7] As will be demonstrated, the requirement of an acquittal for double jeopardy protections to arise is not limited to an acquittal by the jury, or even the trial judge; a reversal of a conviction by the appellate court for reasons other than trial error often constitutes an acquittal for double jeopardy purposes.

true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred."

That is Florida's version of the *Blockburger*[8] test. Section 775.021(4)(a) provides that "offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." This Court has held that "[a]bsent an explicit statement of legislative intent to authorize separate punishments for two crimes, application of the *Blockburger* 'same-elements' test pursuant to section 775.021(4) . . . is the sole method of determining whether multiple punishments are double-jeopardy violations." *Gaber v. State*, 684 So. 2d 189, 192 (Fla. 1996).

The crime of premeditated murder for which Mr. Delgado was tried in the second trial shared all of the legal and factual elements with the crime of felony murder, of which this Court acquitted Mr. Delgado in his prior appeal. To begin

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[8] *Blockburger v. United States*, 284 U.S. 299 (1932) ("The applicable rule is that were the same act or transaction constitute a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not").

with, although the crime of premeditated murder seems to involve an additional element of intent not necessarily present in felony murder—and many felonies would seem to involve elements not necessary to be proven by the prosecution in a trial on premeditated murder charges—this Court and the other appellate courts of Florida have applied the *Blockburger* test in such a way as to preclude re-prosecution for one of those forms of homicide when jeopardy had attached in a trial on the other theory of murder. In *Gordon v. State* 780 So. 2d 17 (Fla. 2001), this Court noted that a defendant cannot be tried twice; once for felony murder and once for premeditated homicide, stating as follows:

> In a similar argument, Gordon highlights the principle that convictions for both premeditated murder and felony murder are impermissible when only one death occurred. *See Gross v. State*, 398 So. 2d 998, 999 (Fla. 5th DCA 1981). We have held repeatedly that section 775.021 did not abrogate our previous pronouncements concerning punishments for singular homicides. *See Goodwin v. State* 634 So. 2d at 157-58 (Grimes J. Concurring) ("I believe that the Legislature could not have intended that a defendant could be convicted of two crimes of homicide

> for killing a single person."); *State v. Chapman*, 625 So. 2d 838, 839 (Fla. 1993); *Houser v. State*, 474 So. 2d 1193, 1196 (Fla. 1985) (noting that "only one homicide conviction and sentence may be imposed for a single death"); *Campbell-Eley*, 718 So. 2d at 329; *Laines v. State*, 662 So. 2d at 1250; *Gross v. State*, 398 So. 2d at 999. Indeed, this principle is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishment for a singular killing. As Justice Shaw noted in his *Carawan* dissent, "physical injury and physical injury causing death merge into one and it is rationally defensible to conclude that the legislature did not intend to impose cumulative punishments." *Carawan*, 615 So. 2d at 173 (Shaw, J., dissenting).

780 So. 2d at 25.

Although holding that double jeopardy protection was unavailable in the *Gordon* case "because felony causing bodily injury does not punish the intent to kill" necessary for attempted premeditated murder, the *Gordon* court reaffirmed

the line of cases holding that double jeopardy applies to prevent prosecution for both intentional homicide and felony murder. In the present case, intent to kill was an element in the legally-insufficient felony murder charge, as well as in the second trial on a premeditated murder theory.

The present case is unlike cases in which the two crimes involved do not involve the same "core offense" which the legislature intended to punish in outlawing those crimes. *See Battle v. State*, No. SC 3-773, 2005 Fla. LEXIS 1697 (Fla. Sept. 1, 2005) ("Thus, the offenses of attempted second-degree murder and attempted felony murder seem to be aimed at the same evil, namely the perpetration of some act that may inflict death, albeit from a depraved mind or in the course of committing another felony") (Quince, J., concurring in part and dissenting in part). It cannot be doubted that the offenses of premeditated murder and felony murder involve the same "core offense" and are "aimed at the same evil," as discussed by Justice Quince in *Battle*. Therefore, we are not bound by the strict comparison of the elements of the two offenses under the *Blockburger* test, and double jeopardy require reversal.

Further, even if this Court eventually should recede from the well-established principle that a defendant may not be tried for both felony murder and premeditated murder—at least in cases involving a felony which does not, in and

of itself include any intent to kill or particular risk of death to the victim—the particular facts of the present case would still necessitate the conclusion that the *Blockburger* test has been met. The underlying felony which the State sought to prove in the first trial of this case, burglary, required proof of Mr. Delgado's intent to kill the victims, because there was no other sort of crime even remotely theorized by the prosecution in its attempt to establish the underlying felony of burglary.

First the jury instructions in *Delgado I* required the jury to find that Mr. Delgado intended to commit murder—and no other lesser crime—to find him guilty of burglary.[9] The instructions did not inform the jury of any law that would permit it to find a burglary based on an intent to commit an offense other than murder while within the Rodriguezes' home. The trial court instructed the jury that the offense of burglary had three elements: presence within the premises, absence of permission, and that "[a]t the time of entering or remaining in the structure the defendant had a fully-form[ed], and conscious ***intent to commit the offense of murder*** in that structure." R.XIII-1513. (Emphasis added).

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[9] The Appellant respectfully requests this Court to take judicial notice of its file in *Delgado 1*, and of the record in that appeal.

Second, there was no evidence adduced in the first trial of any intent on the part of Mr. Delgado to commit any offense while in the Rodriguezes' home, other than murder. There was no forced or surreptitious entry, nothing stolen or damaged within the home, no sexual assault suggested, nor any other evidence of intent to commit a crime other than murder. Money and jewelry was found by detectives undisturbed in the home. R.VI-642.

Even the State itself in *Delgado I* conceded that it had to demonstrate that Mr. Delgado intended to commit murder to establish that he committed burglary when he remained in the Rodriguezes' home after their consent to Mr. Delgado's presence was supposedly implicitly withdrawn. The prosecution agreed that for it to prove that the Defendant committed the underlying felony of burglary and to convict him of felony murder as charged, "[h]e would have had to have premeditated to kill at the time of the event," further explaining as follows:

> He would have to have premeditated to kill at the time of the event [to be guilty of burglary as charged]. We seem to forget the State is not proceeding under the classic burglary, breaking and entering and having the intent at that time does not form until such time as the defendant chooses to remain in [the premises without consent]. Once the obvious consent is withdrawn, and he remains in there at that time with and [sic] intent to kill them, which would obviously be the State's position. Then that is the full[y] form[ed] intent to commit murder when he remains there.

Is that not correct? That is the way I see the case.

Delgado I record at R.XII-1384.

Further reflecting the need for the State in *Delgado I* to prove intent to murder during the burglary—and no other crime—to establish the underlying offense, was the trial court's deletion from the verdict form of the lesser-included offense of burglary with intent to commit an assault. *See Delgado I* record at R.XII-1367. There being no proof that the Defendant intended any crime on the subject premises, other than perhaps to kill the Rodriguezes, that lesser-included crime was omitted from the instructions and the verdict with the State's acquiescence. *Id.* Thus, to find the Defendant guilty of felony murder, the underlying crime of burglary required the jury to find the intent to commit murder, and no other crime while within the dwelling.

The evidence to support that crime was legally insufficient, and Mr. Delgado was acquitted of the unique felony murder charge—with its "intent to kill" element—by this Court. Mr. Delgado was tried twice for the same offense, in contravention of his state and federal rights to be protected from double jeopardy.

This Court Judicially Acquitted Mr. Delgado of Felony Murder as Opposed to Reversing for Trial Error:

This Court's reversal of Mr. Delgado's conviction in his first appeal was not based upon some trial error or other procedural defect in the proceedings. Instead, this Court acquitted Mr. Delgado of the charge of felony murder, holding that, as a matter of law, "Appellant's actions are not the type of conduct which the crime of burglary was intended to punish." *Delgado v. State*, 776 So. 2d 233, 241 (Fla. 2000). Thus, this is not a case involving the exception to the double jeopardy clauses' prohibition against successive prosecutions which "does not prevent the State from retrying a defendant who succeeds in getting his conviction set aside on appeal, due to some error in the proceedings below." *See Gore v. State*, 784 So. 2d 418 (Fla. 2001). *See also Ruiz v. State*, 743 So. 2d 1, 9-10 & n. 11 (Fla. 1999); *Keen v. State* 504 So. 2d 396, 402 & n. 5 (Fla. 1987) (holding double jeopardy did not prevent a retrial of the defendant arising from prosecutorial misconduct).

A defendant is "acquitted" of a crime or death sentence either by the trier-of-fact returning a "not guilty" verdict or by the court overturning a guilty verdict based upon insufficiency of the evidence to support the conviction. *E.g., Bullington v. Missouri*, 451 U.S. 430 (1981)("it is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been *acquitted* of the crime charged"). *Id*. at 437. Such an acquittal may be rendered by the jury, the

trial court in vacating an unsupported verdict, or by the appellate court in determining that, as a matter of law, the verdict cannot stand.

While a reversal of a conviction based upon evidentiary rulings, improper argument, or other trial errors will essentially "wipe the slate clean" of the first proceeding and allow the prosecution to try the defendant for the same crimes as previously litigated, "the 'clean slate' rationale . . . is inapplicable whenever a jury agrees ***or an appellate court decides*** that the prosecution has not proved its case." *Id.* at 443 (emphasis added).

In *Burks v. United States*, 437 U.S. 1 (1978), the Court rejected the argument that a defendant who seeks a new trial cannot invoke the Double Jeopardy Clause to prevent that new trial where he or she is acquitted of the charge in that appeal. "In our view it makes no difference that defendant as sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningly said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." *Id*. at 18 (holding "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support the conviction).

This Court has noted that the *Burks* decision recognizes an acquittal of a charge by the appellate court to be just as effective as such an acquittal by the jury

because “to hold otherwise would create a ‘purely arbitrary distinction’ between a defendant who received the benefit of a correct lower court decision and one who did not.” *Tibbs v. State* 397 So. 1120, 1122 (Fla. 1981) (quoting *Burks v. Unites States*, 437, U.S. 1, 11 (1978)). Further, the *Tibbs* decision notes that in *Burks* “[t]he court was careful to distinguish reversals for procedural errors in a trial, where double jeopardy does not bar retrial,” from cases such as this one in which the conviction was reversed for legal insufficiency. 397 So. 2d at 1122, *affirmed Tibbs v. Florida*, 457 U.S. 31 (1982). Defendant having been once acquitted of a murder charge involving the same victims and elements, his present conviction must be reversed.

II.

REVERSAL IS REQUIRED TO REMEDY THE STATE’S IMPROPER ARGUMENTS

Introduction:

Florida courts maintain the position that prosecutors should avoid misconduct which “evidences an excessive preoccupation with obtaining a conviction at any cost.” *Briggs v. State*, 455 So. 2d 519, 521 (Fla. 1st DCA, 1984).

"Such preoccupation disregards the prosecutor's duty in representing the people of the state of Florida to see that justice is done because obtaining a conviction at the expense of a fair trial is not justice." *Id*. Prosecutorial misconduct can be guised in the form of improper attacks on the role of defense attorneys, personal attacks on opposing counsel, suggestions that shift the burden of proof to the defendant, or that the defendant's failure to testify is somehow indicative of his guilt. The improper arguments made by the State in this case took all of those forms, resulting in substantial prejudice to Mr. Delgado.

This Court has elucidated the following standard of review to determine when improper prosecutorial argument warrants reversal:

> In order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Anderson v. State, 863 So. 2d 169, 187 (Fla. 2003); accord, *Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000)**;** *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994); *Blair v State*, 406 So. 2d 1103, 1107 (Fla. 1981). That test must be met here.

The rule is well settled that it is never the defendant's duty to establish his innocence. *Davis v. State,* 90 So.2d 629 (Fla. 1956); *Crowley v. State*, 558 So. 2d

529, 530 (Fla. 4th DCA 1990). It is improper for a prosecutor to attempt to shift this burden of proof to the defendant in a criminal case through inference to the jury that the defendant failed to call an available witness for support. This type of comment places the burden squarely on the shoulders of the defendant and is therefore prejudicial. *Dunbar v. State*, 458 So. 2d 424 (Fla. 2d DCA 1984). Accordingly, the State cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. *Jackson v. State*, 575 So. 2d 181 (Fla. 1991).

"When the prosecutor refers to a defendant's failure to call witnesses, it may mislead the jury to believe that the defendant has the burden of introducing evidence. . . . it may also violate the constitutional right to remain silent, i.e. the right against self-incrimination." *Lawyer v. State*, 627 So. 2d 564, 566 (Fla. 5th DCA 1993). Accord *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991).

Cases where comment on failure to present a witness has been allowed are distinguished from the instant situation because "when such witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness." *Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990); *State v Michaels*, 454 So. 2d 560, 562 (Fla. 1984).

The prosecutor's re-characterization of defense counsel's arguments during closing constituted just the type of shift in the burden of proof that this Court has warned against. Characterization of the argument as a being "a concession at this point in the trial when everything is over," shifts to the defense the burden of proving innocence as well as comments on the defendant's right to remain silent. It is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the state has proved its case beyond a reasonable doubt. *Gore v. State*, 719 So.2d 1197, 1200-1201 (Fla. 1991); *See Northard v. State*, 675 So. 2d 652, 653 (Fla. 4th DCA 1996); *Clewis v. State*, 605 So. 2d 974, 974 (Fla. 3d DCA 1992); *Bass v. State*, 547 So. 2d 680, 682 (Fla. 1st DCA 1989).

In defense of her words the prosecutor then made statements that this court have also found to be improper. The Assistant State Attorney's characterization of defense counsel's argument as "ludicrous" and a "load of crap"[10] constituted an

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[10] Although some of the assistant state attorney's unprofessional attacks upon defense counsel were made outside the hearing of the jury, even those improper remarks made at side bar are relevant to provide this Court with the complete picture of the atmosphere at trial.

improper attack on the defendant's theory of the case. *See, e.g. Henry v. State*, 743 So. 2d 52, 53 (Fla. 5th DCA 1999) (holding that it was improper to refer to defendant's version of events as the "most ridiculous defense" the prosecutor has ever heard); *Izquierdo v. State*, 724 So. 2d 124, 125 (Fla. 3d DCA 1998) (improper to refer to defense as a "pathetic fantasy"); *Rosso v. State*, 505 So. 2d 611 (Fla. 3d DCA 1987) ("A prosecutor may not ridicule a defendant or his theory of defense"); *Waters v. State*, 486 So. 2d 614, 616 (Fla. 5th DCA 1986) (improper to refer to defense counsel's closing arguments as "misleading and as a smoke screen").

The prosecutor's comments during trial also constituted an impermissible attack on defense counsel. "The law is clear that attacks on defense counsel are highly improper and impermissible." *Lewis v. State*, 780 So. 2d 125 (Fla.3d DCA, 2001).

"A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence." *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999).

This Court should consider the cumulative effect of all of the prosecutor's comments made during summation. Florida's Third District Court of Appeal has interpreted this Court's decision in *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999) to allow

review of all comments made by the prosecutor during summation. *Lewis v. State*, 780 So. 2d 125, 128-129 (Fla. 3rd DCA 2001). Even if, when considered on an individual basis, the specific acts of impropriety discussed here may have had a minimal effect on the Defendant's trial, in combination they caused substantial prejudice to the defense. Defendant's motions for mistrial should have been granted.

The improper prosecutorial comments made during trial acted to deprive the Defendant of a fair and impartial trial and were so inflammatory as to give rise to the likelihood that they improperly influenced the verdict. Therefore, this Court should reverse the judgment of conviction and vacate the sentences.

III.

THE PEN REGISTER TAPE WHICH SUPPOSEDLY RECORDED THE LAST NUMBER DIALED FROM THE VICTIMS' TELEPHONE WAS ERRONEOUSLY ADMITTED INTO EVIDENCE WITHOUT PROPER EVIDENTIARY FOUNDATION FROM AN EXPERT

A. Factual Insufficiency of Foundation for Exhibit 68:

A key piece of the prosecution's evidence was the State's Exhibit 68. That exhibit was a paper tape from the pen register device that ostensibly recorded the last number dialed from the kitchen telephone of the Rodriguezes. The foundation for that exhibit was the testimony of former Detective Israel Reyes, who had only

watched the pen register being installed and set up on the Rodriguezes' phone lines. Reyes testified that Detective Schaffer used the pen register instead of him because Reyes "had no idea how to connect it to the phone line." R.XV-1695. Officer Reyes did not actively participate in utilizing the pen register. R.XV-1696.

Defendant had objected to introduction of the pen register tape on the grounds that Detective Reyes could not provide a sufficient evidentiary foundation for the exhibit. Counsel argued: "The content of the tape requires authentication by a person who did the work, could testify as to the accuracy . . . ; can testify as to the procedure employed . . .; the validity of the results . . .; the expertise of the person testifying . . .; [and] the machinery or whatever device was used, in fact." R.XV-1688.

The trial court initially overruled those objections (*id.* at 1690), whereupon defense counsel analogized the situation to a breathalyzer, arguing "that a police officer who is not an expert in utilizing a breathalyzer but who was simply present when the breathalyzer technician did the work" could not suffiently establish a foundational elements of "the authenticity, results, the propriety or the functionality of the machine." *Id.* at 1691. At that point, Judge Green instructed the Assistant State Attorney: "I want you to qualify him better," but still indicated to defense counsel: "I anticipate overruling your objection. But we'll see." *Id.*

The State in further qualifying the witness only asked Det. Reyes questions confirming the identification of the paper tape, such as whether he had seen Walter Schaffer using the pen register, and seen Exhibit 68 “come out of that exact machine.” *Id.* at 1692. No questions were asked by the State of Det. Reyes about his qualifications or knowledge of the accuracy and workings of the device. On voir dire by the defense, Det. Reyes testified generally that Det. Schaffer possessed expertise in utilizing pen registers, but expressed ignorance about what training and education concerning the devices Det. Schaffer had undergone. *Id.* at 1694.

In response to Defendant’s voir dire about his own credentials concerning pen registers, Det. Reyes testified that he “was a monitor on a couple of wiretap cases,” and had been “involved in many cases, a dozen or two cases” in which pen registers had been installed on suspects’ telephones, apparently by other detectives.[11] Although vaguely and inexplicably claiming “some expertise” regarding the device, Det. Reyes, when asked to agree that he was “not an expert

[11] As noted above, Det. Reyes said he “had no idea how to connect it to the phone line,” so his experience in other cases could not have been significant.

in the employment of and the utilization of . . . a pen register," responded: "Okay. ***I would not be an expert***." *Id.* at 1695 (emphasis added).

Defendant renewed his objection to the pen register tape; that objection was overruled and the tape was admitted into evidence as the State's Exhibit 68. R.XV-1696. That tape purportedly reflected that the last number dialed from the telephone in the victims' kitchen was (305) 448-7641. R.XV-1699, 1701. The prosecution used the pen register data to locate the address associated with that telephone number: 3621 S.W. 5th Terrace, Miami. R.XV-1777.

The BellSouth telephone billing records show that the account at that address was in the name of George Marino Deayala, who has nothing to do with this case. *Id.* at 1778. However, upon travelling to that address, Det. Reyes determined that it was the home of Horacio Llamelas and his wife and daughter, both named Barbara. R.XV-1716, 1718. Thus, without a single word of expert testimony or first hand knowledge, the prosecution placed before the jury the fact that the last call made from the Rodriguezes' bloody kitchen telephone was to the residence of Mr. Delgado's girlfriend and her family, adding significant weight to the State's circumstantial case that the Defendant killed the victims in revenge for something having to do with the laundry Mr. Llamelas bought from them.

B. Authorities Addressing Need For Experts on Pen Register Evidence:

The trial court erroneously overruled the Defendant's objections to introduction of Exhibit 68 because Det. Reyes lacked both first-hand knowledge concerning the utilization of the subject pen register and even a modicum of expertise in the field. The courts that have dealt with the sufficiency of evidentiary foundations for pen register evidence recognize that this is a technical field which requires the testimony of an expert witness.

In *People v. Medure*, 683 N.Y.S.2d 697 (1998) the court held that expert testimony was so vital to both the prosecution and the defense on technical matters concerning pen registers used to monitor telephone lines, that the defendant would be allowed to have his expert sit through the testimony of other witnesses during trial:

> A "pen register" is a "device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached" (*CPL 705.00* [1]). . . .
>
> In this case, the Bronx District Attorney acquired three pen register orders for four telephone lines and, in furtherance thereof, installed equipment on each line to identify the numbers dialed on the lines and other information. The equipment, manufactured by Voice Identification, Inc., consists of a "dialed number recorder", a device resembling a laptop computer, and a "slave", a device about the size of a cigarette box. Whether this equipment constitutes a pen register, requiring only an order based on reasonable suspicion, or is actually an eavesdropping device, requiring a warrant based on probable cause, is to be decided on another day. ***The nature of the pen***

> ***register(s)--its function, engineering components and technological capabilities--is central to said decision. Only expert testimony is adequate to appropriate consideration,*** a fact not lost on either the People or the defense, both having indicated their intention to bring forth expert witnesses.

Id. at 879-80(emphasis added).

In *United States v. Kohne*, 358 F. Supp. 1053 (W.D. Pa. 1973) the court considered the defendants' motions for new trial based partly on the argument that pen register evidence was introduced with insufficient foundation in expert testimony. Although denying those motions because the detective who testified in that case was sufficiently qualified, the *Kohne* decision sets forth the minimum level of expertise that courts should require in considering such objections:

> Special Agent Meek gave his opinion that the pen register, an instrument used in this case to determine the outgoing telephone numbers being dialed on monitored phones, was an accurate instrument. Agent Meek had not tested the pen register used in this particular case, but testified to the accuracy of the pen register generally. Agent Meek was a college graduate; he had ***one month of specialized training by the Federal Bureau of Investigation in electronic surveillance***, and ***eight months practical experience*** in such work; he had ***read books dealing with the pen register***; and ***he had used the pen register*** when working on two other wiretap cases. While Agent Meek was not an eminently qualified expert, we believe he was sufficiently qualified to give his opinion as to the pen register's reputation for accuracy.

Id. at 1059 (emphasis added). Det. Reyes had no similar FBI training, had not read books on pen register operation, and had no significant experience in the field,

leaving him admittedly unqualified to utilize a pen register, or to render implicit opinions about the reliability and accuracy of the readings on Exhibit 68.

The error was not cured or rendered harmless by the testimony of the State's next witness, Sgt. Gary Smith, who also identified Exhibit 68 as the paper tape that was produced by the pen register being operated by Det.Schaffer at the home of the victims in this case. Sgt. Smith was not qualified as an expert in the use of pen registers. The only evidence concerning his exposure to pen registers is his testimony responding to a question of "approximately how many times you worked with such a device," to which he answered "Approximately 50 to 60 times." R.XV-1765.

Sgt. Smith did not shed any light on the nature of his duties when he "worked with" pen registers, and for all we know he did no more than he did on the day he observed Det. Schaffer use the pen register at the Rodriguezes' home: he watched Det. Schaffer hook up the device and then assisted in "initiating the dialing of the kitchen phone." R.XV-1768. Like Det. Reyes, Sgt. Smith had neither first hand knowledge of the accuracy and reliability of the pen register, nor expertise sufficient to render opinions on that subject. There was no foundation for Exhibit 68 and reversal is required.

IV.

THE TRIAL COURT'S UNNECESSARY REPETITION OF SEVERAL JURY INSTRUCTIONS UNDULY EMPHASIZED THOSE INSTRUCTIONS

The trial court deviated from the requirement of Fla. R. Crim. P. 3.390 which provide that the "judge shall charge the jury only on the law of the case at the conclusion of argument of counsel." Notwithstanding being informed of this rule by counsel when His Honor began instructing the jury before closing argument, he instructed the jury twice on the elements of first degree murder before arguments commenced: once for each of the victim counts in the indictment. R.XIX-2153-55.

Judge Green again after closing arguments, and over objection by the Defendant, instructed the jury a third and fourth time concerning the definitions and elements of first degree murder. Those repeated instructions unduly emphasized those aspects of the case, thereby prejudicing the Defendant.

This Court has noted the danger of repeatedly reinstructing the jury on given aspects of the instructions (assumedly as contrasted to re-reading the instructions in

their entirety) in *Lithgow Funeral Centers v. Loftin*, 60 So. 2d 745 (Fla. 1952). That case involved a similar situation in which a "Appellant further complains of undue stress on one important phase of the case by frequent repetition thereof by the Court in its instructions to the jury." *Id*. at 745 (citing section 54.172), Fla. Stat., which like Rule 3.390 provided that "the judge presiding shall charge the jury on the law of the case in the trial at the conclusion of the argument of counsel"). This Court reversed the judgment against the party objecting to the repetition of the instructions, holding as follows:

> There's no reason for saying the same thing more than once except for the purpose of adding emphasis to the statement. This Court has criticized such undue emphasis in a number of cases. *See Biscayne Beach Theater v. Hill* . . .; *Farnsworth v. Tampa Electric Co. . . ; Jacksonville Electric Co. v. Adams* . . . . There was undue repetition of and hence too much emphasis placed on the duty of the ambulance driver.

60 So. 2d at 747. In the present case there was too much emphasis placed upon the definition and elements of murder, as compared to the other instructions—such as the burden and standard of proof upon the prosecution—which were not similarly repeated. Therefore, this Court's prior precedent requires reversal.

V.

THE TRIAL COURT FUNDAMENTALLY ERRED BY INSTRUCTING THE JURY THAT IT WOULD HEAR MITIGATION

EVIDENCE IF IT RETURNED A GUILTY VERDICT

After the jury was empaneled and prior to the reception of evidence, the trial judge gave an instruction explaining the bifurcated nature of the proceedings in a death penalty trial. Part of those instructions included the following:

> If the jury returns a verdict of guilty of murder in the first degree in this case, the jury will reconvene for the purpose of rendering an advisory recommendation as to which sentence, death by life in prison without the possibility of parole.
>
> At this hearing, the ***evidence of*** aggravating and ***mitigating circumstances will be presented*** for you to consider.

R.XI-1234 (Emphasis added).

By informing the jury that hearing evidence of mitigation during the penalty phase was a certain and expected component of the structure of a first degree murder trial—instead of informing the jury that it ***might*** hear mitigation evidence—the trial court provided the opportunity for puzzlement by the jurors during the penalty phase when no mitigation evidence was presented by the Defendant. During the penalty phase, in light of the court's earlier instruction that such evidence ***would be*** presented, the jury would be forced to find that the Defendant was deviating from the established protocol by failing to present

mitigation evidence. At best for Mr. Delgado, the jury during the penalty phase (when it heard no mitigation evidence) would regard the Defendant as having violated the judge's blueprint for the trial, a rule-breaker silently contradicting His Honor's instructions. Worse still, the judge's instruction that proof of mitigating circumstances ***will be presented*** casts a burden on the defense not present under the law, a burden unmet in this trial. The instruction likewise could readily be construed as an advance comment concerning the Defendant's right to remain silent.[12]

Even though Mr. Delgado instructed his trial counsel to refrain from putting on such evidence of mitigation, that tactical decision would have gone less noticed by the jury had the trial judge not instructed them that such evidence surely would be forthcoming. By emphasizing Defendant's failure to put on such evidence, the

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[12] Of course it should go without saying that no rational juror could expect that the promised mitigation evidence would be offered by the prosecution, or by the court itself. The only possible source of that evidence would be the Defendant, who by that early point of the trial had no reason to decide whether or not to offer such evidence.

trial court unfairly commented on the Defendant's right to remain silent. That is reversible error, even when not the subject of a timely objection.

VI.

IMPOSITION OF THE DEATH PENALTY ABSENT UNANIMOUS JURY RECOMMENDATION OF DEATH VIOLATES *RING* AND *APPRENDI*

As has normally been the case under Florida's hybrid sentencing system in death penalty cases, the jury's advisory verdicts on the sentencing issue made no findings of any aggravating or mitigating factors. Further, those advisory verdicts were not unanimous, with three jurors on each verdict not assenting to the recommendation that the court impose the death penalty. The trial court's imposition of two sentences of death absent unanimous jury verdicts on the factual issues supporting those sentences violates Mr. Delgado's rights to trial by jury under the Sixth Amendment to the United States Constitution, as applied in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and as expressly rendered applicable to death penalty cases on direct appeal in *Ring v. Arizona*, 536 U.S. 584 (2002).

This case is distinguishable from those in which this Court has rejected the *Apprendi/Ring* claim based upon unanimous jury recommendations of death penalties. *Compare Crain v. State*, 894 So. 2d 59 (Fla. 2004); *Anderson v. State*, 863 So. 2d 169 (Fla. 2003); *Conahan v. State*, 844 So. 2d 6239 (Fla. 2003); *Chavez*

v. State, 832 So. 2d 730 (Fla. 2002). By voting only nine-to-three to recommend death after hearing the evidence concerning the aggravating factors and considering the jury's assessment of Mr. Delgado during trial, some of the jury exhibited a likelihood of not finding aggravating circumstances found by the trial judge, if it had been allowed to make such findings. There were factual weaknesses which reasonable jurors could find in some of the aggravators.

For example, the trial court's finding of the CCP aggravator was based in part upon the factual determination that Mr. Delgado "took with him into the Rodriguez home a bulky, carefully crafted murder weapon," the .22 caliber Luger handgun equipped with a silencer. R.II-349. Although there was circumstantial evidence supporting the State's theory that the Luger did not belong to the Rodriguezes (such as the fact that its serial number had been drilled off and the absence of any .22 ammunition in a home where a .38 revolver was kept along with ammunition), there was no direct or circumstantial evidence linking that weapon to Mr. Delgado. He was not seen with the Luger. No witness testified that he ever owned such a weapon. It might not make sense to the jury that the Defendant "calculated" the killings by selecting what the trial court characterized as "a bulky" weapon instead of something more easily concealed on his person.

This Court should reject the temptation to independently weigh the evidence and decide that it would have been unlikely for the jury to make a different finding on the aggravators than the ones made by the trial judge. There is no exception to the Sixth Amendment's requirements explained under *Apprendi/Ring* permitting partial direction of a verdict in favor of the prosecution, even where the evidence supporting an aggravator is overwhelming. Further, for the court to engage in such weighing of the evidence on aggravating factors to determine whether a jury issue exists on a given aggravator would run afoul of principles of harmless error analysis, which do not permit appellate courts to re-weigh the evidence, and would judicially abrogate the "jury pardon" power long recognized in Florida and federal jurisprudence.

Further, this Court should recede from its decisions rejecting *Apprendi/Ring* claims in cases involving both the aggravating factor of a previous violent felony conviction and other aggravating factors. Even if a death sentence can constitutionally be based only upon a finding of the single aggravator of such a prior violent felony—and even if that lone particular aggravator may be found by the trial court instead of the jury without running afoul of the Sixth Amendment—the death penalties imposed in this case were not based solely on the prior violent felony conviction aggravator. To accept the proposition that a death penalty may

be imposed by the trial court solely upon finding the prior violent felony aggravator does not compel the conclusion that the trial court would have imposed the same sentence if the other aggravating factors had not been determined by the jury. For all we know, if the jury had been called upon to decide the CCP factor and had rejected that aggravator, the vote on the recommended sentence could well have been a lesser majority than nine-to-three, or even a majority recommending in favor of life imprisonment. Further, whether or not the vote count on the jury's recommended sentence had been changed by the jury's finding of no CCP, the trial court may well have imposed a different sentence based upon the jury's rejection of that aggravator.

Thus, even though a death sentence may constitutionally be supported by only a single aggravator found by the trial court instead of the jury (prior violent felony conviction), it is not preordained that such a sentence necessarily will follow if the jury were allowed to consider the other aggravators and determine them by a unanimous vote. Therefore the death sentences should be reversed.

VII.

THE DEFENDANT SUFFERED A SEVERE PREJUDICE FROM ERRONEOUS LIMITATION ON DEFENSE COUNSEL'S CLOSING ARGUMENT

The trial court deprived the Defendant of a fair trial by sustaining the State's objection to defense counsel's closing argument that the evidence was insufficient to convict Mr. Delgado of first degree murder. Defense counsel properly questioned why the State had not presented more reliable forms of evidence, such as DNA. The State objected to that permissible argument without stating any grounds, and the trial judge took it upon himself to sustain the objection as commenting on matters outside of the evidence. That error was compounded by an instruction to the jury to disregard defense counsel's argument.

The argument in question was a fair comment on the evidence. The trial court's ruling constituted reversible error. *See Blanks v. State*, 42 So. 2d 557 (Fla. 2d DCA 1986).

VIII.

THE TRIAL ERRORS HARMFULLY CONTRIBUTED TO THE VERDICT

This Court should not conclude that the improper argument of the prosecution, the erroneous admission of Exhibit 68, and the jury instruction errors

were harmless because it is likely (or even virtually certain) that the Defendant would have been convicted, even without those errors.

In *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) this Court set out the still-applicable test to determine whether error committed in the course of a criminal case is harmful:

> 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 must remain 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.

Id. at 1139 (emphasis added).

Error is not harmless under the *DiGuilio*standard simply because a guilty verdict would doubtless have occurred, even without the error. As the U.S. Supreme Court has explained: "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely ***unattributable*** to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)

(check emphasis). Error may well have "contributed" to the verdict even if the evidence apart from the error was sufficiently strong to make conviction likely even in the absence of the error. Error need not be "substantial" to have contributed to the verdict and to be harmful under *DiGuilio.*

In *State v. Lee*, 531 So. 2d 133, 137 (Fla. 1988), this Court reaffirmed the *DiGuilio* standard for harmful error and held that the standard applied even in cases in which the error did not reach the level of harmfulness defined in the harmful error statutes. *Id.* at 138. Specifically, the Court approved the First District's reversal of a conviction affected by error that could not be said to amount to a miscarriage of justice. The admission of the inadmissible evidence in *Lee* could not have met the "miscarriage of justice" standard for harmfulness under one of the statutes because "the permissible evidence of Lee's guilt was overwhelming, if not conclusive." *Id.* at 136.

The Court in *Lee* quoted with approval from former California Chief Justice Traynor's dissenting opinion in *People v. Ross*[13], previously cited in *DiGuilio*, to explain that the applicable harmless error standard will require reversal where error contributed to the verdict, even though the same verdict would almost certainly

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[13] 429 P.2d 606 (Cal. 1967), *rev'd*, 391 U.S. 470 (1968).

have been reached upon only the admissible evidence in the case. *Id.* Later decisions of this Court continue to reaffirm the *DiGuilio* standard.

In 2003 this Court rejected the proposition that, in a direct appeal, the effect on a verdict from error need be "substantial" in order for the error to be harmful and reversible. In *Knowles v. State*, 848 So. 2d. 1055, 1057 (Fla. 2003), the Court reversed the Second District's use of a harmless error standard under which a conviction tainted by error was affirmed because "the error did not substantially influence the jury's verdict." *Knowles v. State*, 800 So. 2d 259, 264 (Fla. 2d DCA 2001) (emphasis added).

This Court in *Knowles* reaffirmed the *DiGuilio* standard as follows:

> We reaffirm that *Goodwin* did not alter the test of harmless error and that the *DiGuilio* standard remains the benchmark of harmless error analysis. 'The question is whether there is a reasonable possibility that the error affected the verdict, not whether the error substantially influenced the jury's verdict. 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."

848 So. 2d at 1058-59 (quoting from *DiGuilio*, 491 So. 2d at 1139).

This Court's standard for finding error harmful under *DiGuilio* does not require any finding that the verdict would likely have been different, but-for the error. Even if the defendant still would have been convicted without the

inadmissible evidence, that error may be found to have "contributed to" or "affected" the verdict. Error will "contribute" to a verdict when that error involves an area of evidence or procedure which is germane to the issues at trial, or a matter which is legally extraneous but unfairly prejudicial, even if the jury's decision was otherwise supportable, and likely to have been reached, without the error. "Here, the focus is not on whether the jury got the case right, but rather on whether the court is convinced that the tainted evidence did not contribute to the result." Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 19 (2002).

If the erroneously-admitted evidence was likely to have been considered by the jury, and if that inadmissible evidence would have tended to support a conviction, then the error must be found to have contributed to the verdict, even if a conviction would have been assured without that evidence. Wigmore recognizes that there is a difference between the standard—that the error "contributed to the judgment"—and the standard which assesses the "likelihood that the original factfinder would have reached the conclusion it originally did in the absence of any error." I John Henry Wigmore, *Evidence in Trials at Common Law*, § 21 at 933 (Tiller's Rev. 1983) Wigmore's treatise notes that "it may be possible to say that an erroneously admitted piece of evidence materially contributed to the factfinder's

belief about a certain matter without having to say that the jury probably would have reached a different conclusion in the absence of the erroneously admitted evidence." *Id.* n. 24.

Similarly, other "commentators view the 'contribute' test as quite different from the 'overwhelming' test." Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 135 (Fall 1993). An error certainly may "contribute" to a verdict, even though there is overwhelming evidence that would produre same verdict, absent the error. It is not a "but-for" test of harmfulness. The errors in this trial were harmful and require reversal.

CONCLUSION

WHEREFORE, Defendant having been tried a second time in violation of his Double Jeopardy protection, and the trial itself having been rendered fundamentally unfair by prosecutorial misconduct and the court's erroneous rulings, the judgment and sentences should be reversed and Mr. Delgado be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by U.S. Mail to Attorney General Charlie Crist and Sandra S. Jaggard, Assistant Attorney General, Capital Appeals Division, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, FL 33131-2407; the Office of the State Attorney, E.R. Graham Building, 1350 Northwest 12 Avenue, Miami, Florida 33136; Bennett H. Brummer, Public Defender, and Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida 1320 NW 14 Street, Miami, Florida 33125; on this the 16th day of September, 2005.

By: ______________________________

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

By: ______________________________

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