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 CORRECTED REPLY BRIEF

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I.

MR. DELGADO MUST BE DISCHARGED BECAUSE HIS RETRIAL VIOLATED FEDERAL AND FLORIDA PROHIBITIONS AGAINST DOUBLE JEOPARDY

A. Introduction:

The State in its Answer Brief agrees that this Court in its prior opinion[1] "determined that the evidence was legally inadequate to convict Defendant of burglary," and that "[b]ecause the State's felony murder theory was ***based on the burglary*** and the burglary was legally inadequate, this Court reversed Defendant's convictions for murder." (Answer Brief at 38)(emphasis added). Thus, the State agrees that the Defendant's murder convictions were reversed based upon the legal inadequacy of the evidence to support those convictions. Therefore, double jeopardy precluded the retrial of Mr. Delgado for murder, even if the State's slant was to characterize the second trial as being based only on premeditated murder.

B. *Delgado I* Did Not Establish the Law of the Case on Double Jeopardy:

[1] *See Delgado v. State*, 776 So. 2d 233 (Fla. 2000)("*Delgado I*").

The Appellant's double jeopardy argument was not addressed by this Court's prior opinion in *Delgado I*, because the parties did not brief and argue the double jeopardy issue. This Court has recognized that "'the law of the case doctrine is limited to rulings on questions of law ***actually presented*** and considered on a former appeal.'" *Florida Department of Transportation v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001). This Court has made it clear that comments in an appellate decision involving an issue that was not briefed and argued will not bar the parties from addressing that issue in a later appeal, instructing that "the law of the case doctrine 'has no applicability to, and is not decisive of, points presented upon a second writ of error that were ***not presented upon a former writ of error*** and consequently were not before the appellate court for adjudication.'" *Florida Department of Transportation v. Juliano*, 801 So. 2d at 106 (quoting *Wilder v. Punta Gorda State Bank*, 100 Fla. 517, 129 So. 865, 866 (1930)(emphasis added).

The Appellant requests that this Court take judicial notice of the briefs in *Delgado I* to determine that the question of double jeopardy was not presented to the Court in that appeal. Until the State of Florida re-tried him on charges involving the same murders for which he had been acquitted by this Court, Mr. Delgado had no reason to raise double jeopardy. This Court's reference to the

State's right to re-try the Defendant for crimes other than burglary was dicta that does not constitute the law of the case.

C. Reversal Based on Legal Insufficiency of Evidence Implicates Double Jeopardy:

The State in its Answer Brief—after conceding that the reversal in *Delgado I* was based upon the legal insufficiency of the evidence to establish the crime of felony murder—argues that "this Court did not determine that the evidence was insufficient to convict the Defendant of [premeditated] first degree murder." (Answer Brief at 40). However, the Double Jeopardy prohibition against successive prosecutions following an acquittal is not limited to the situation in which the evidence was insufficient to support the theory of the crime advanced in the second trial. Instead, so long as there was an acquittal based on legal insufficiency of the evidence for any reason in the first trial, the second trial is barred by double jeopardy.

This case involves a situation somewhat like that presented to the court in *DuBois v. Lockhart*, 859 F.2d 1314 (8th Cir. 1988). That was a case in which the defendant was convicted of first degree murder and sentenced to death. The Arkansas Supreme Court reversed his conviction because the state had failed to

offer evidence corroborating the testimony of two accomplices, as required by Arkansas statute. Thus, the prosecution had failed to satisfy the prerequisites for a conviction, just as the State of Florida in this case failed to satisfy the statutory requirements for establishing the crime of burglary, essential to the conviction for felony murder.

In noting the differences between this situation of statutory insufficiency of the evidence from that confronted by the court in *Burks v. United States*, 437 U.S. 1 (1978), the 8th Circuit in the *DuBois* case held: "The Double Jeopardy Clause . . . does not offer less protection when a state court makes a ruling on evidentiary insufficiency based on an application of a valid state statute than when a state court makes ruling on evidentiary insufficiency based on a consideration of the evidence adduced at trial. In either instance, a reversal means the prosecution has failed to present a submissible case." 859 F.2d at 1317.

This Court's holding in *Delgado I* similarly meant that the prosecution failed to present a submissible case based on felony murder. A defendant may not be tried and acquitted of felony murder and then be re-tried on premeditated murder, any more than it can be convicted of felony murder and then convicted of premeditated murder. *Cf. State v. Chapman*, 625 So. 2d 838, 839 (Fla. 1993);

Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985)(stating that "only one homicide conviction and sentence may be imposed for a single death").

D. The State's Cases on Double Jeopardy and the Law of the Case:

The Appellant disagrees that the State has accurately interpreted this Court's decision in *Patten v. State*, 598 So. 2d 60 (Fla. 1992)("*Patten II*")as involving a double jeopardy argument. In the first appeal in that case, the defendant had argued that the jury's initial deadlock on the penalty phase amounted to a sentencing recommendation of life that was overridden by the trial judge. *See Patten v. State*, 467 So. 2d 975, 980 (Fla. 1985)("*Patten I*"). In *Patten II*, the defendant made the same argument "that the death sentence should not be imposed because, when the jury became deadlocked in the first sentencing proceeding, the trial judge gave the jury an '*Allen* charge,' which resulted in a recommendation of death." *Patten II* at 63.

The defendant in *Patten II* did not argue that the jury acquitted him in *Patten I* or that this Court judicially acquitted him by reversing for a second sentencing proceeding. Instead, the defendant in that case simply asked this Court to revisit its prior ruling concerning the effect of the jury deadlock being a recommendation of a life sentence. No double jeopardy issue was involved. The law of the case

doctrine barred revisiting the issue in *Patten II*. That doctrine does not bar the double jeopardy claim here.

The State's position is not supported by the case of *United States v. Jordan*, 429 F.3d 1032 (11th Cir. 2005). In that case, the Eleventh Circuit held that the law of the case doctrine prevented it from addressing the defendant's double jeopardy argument because double jeopardy had been briefed and argued in an earlier appeal of the case at *United States v. Jordan*, 316 F.3d 1215 (11th Cir. 2003). Unlike the *Jordan* case, this Court in *Delgado I* did not address the double jeopardy issue and neither the prosecution nor the defense briefed any question of double jeopardy in *Delgado I.*

The State in its Answer Brief argues that "it does not follow that under *Burks* [*v. United States*, 437 U.S. 1 (1978)], the determination of legal inadequacy under *Yates* [*v. United States*, 354 U.S. 298 (1957)] that requires reversal of a jury's general verdict supports a claim that the defendant has been acquitted of the alternative theory of prosecution." *See* Answer Brief at 41. The State cites *United States v. Ellyson*, 326 F.3d 522 (5th Cir. 2003)[2] in support of that proposition.

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[2] The State's Answer Brief mistakenly cites the *Ellyson* case at "362" F.3d 522.

However, the *Ellyson* case reaffirms the proposition that a "reversal based on the legal insufficiency of evidence is, in effect, a determination that the Government's case was so lacking that the trial court should have entered a judgment of acquittal rather than submitting the case to the jury," thereby entitling the defendant to discharge based upon the Double Jeopardy Clause. *See Ellyson* 326 F.3d at 532 (quoting *United States v. Akpi*, 26 F.3d 24, 25 (4th Cir. 1994)).

The *Ellyson* case did not reject the double jeopardy argument on the ground that it is inapplicable where the evidence was legally insufficient to support the conviction in the first trial, as opposed to factually insufficient. Instead, the court in that case found that "the basis for setting aside Ellyson's conviction is not an insufficiency of evidence; rather we must set aside the verdict because of the erroneous jury instruction." 326 F.3d at 532. The *Ellyson* court simply applied the exception to double jeopardy that "[w]hen an appellate court vacates a conviction based on an error in the trial proceeding, the Government is generally free to retry the defendant." *Id*. In the present case, however, the reversal in *Delgado I* was not based upon an error in the trial proceedings, but based upon the legal insufficiency of the evidence to support the state's felony murder theory. Therefore, double jeopardy barred the retrial.

Similarly, the other case cited for the proposition that reversal due to legal inadequacy of one theory will not implicate double jeopardy does not deal with reversal based upon legal insufficiency of the evidence. In *United States v. Kavazanjian*, 623 F.2d 730, 739 (1st Cir. 1980) the reversal was based upon the fact that "the indictment and the judge's charge [to the jury] were ambiguous." That was trial error which will support retrial under the exception to the Double Jeopardy Clause. In our case, however, the reversal was based upon the legal insufficiency of the State's felony murder case, constituting a judicial acquittal and barring retrial of the first degree murder charge.

The State argues that the Florida cases referenced in *Gordon v. State*, 780 So. 2d 17 (Fla. 2001) holding that double jeopardy precludes convictions for both felony murder and premeditated murder do not support Appellant's argument that double jeopardy bars retrial or premeditated murder after a judicial acquittal of felony murder that argument ignores the fact that the same Double Jeopardy Clause prohibits both successive convictions and retrial after an initial acquittal. *See, e.g., Hall v. State*, 823 So. 2d 757 (Fla. 2002). "This Court has recognized well-settled jurisprudence relative to the Double Jeopardy Clause: '[Double jeopardy] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And

it protects against multiple punishments for the same offense.'" *Id*. at 761 (brackets by court)(quoting *Goene v. State*, 577 So. 2d 1306, 1307 (Fla. 1991)).

The State on page 42 of its Answer Brief argues unpersuasively that "this is not a case in which the State had only prosecuted on one of the alternate theories of first degree murder, an acquittal that charge had been obtained and a second indictment charging the other theory had been pursued." The State seems to concede the possibility that, if the case had only been tried on the felony murder theory the first time, this Court's acquittal in *Delgado I* would bar re-trial on premeditated murder. That preclusive effect of such a judicial acquittal was no different here, where both theories were tried in the first case.

The State argues that this Court should not look at the indictment or evidence to determine whether Florida's version of the *Blockburger* test has been satisfied, but must view only the statutory elements of the two offenses in a vacuum, citing *Gaber v. State*, 684 So. 2d 189 (Fla. 1996). Such an argument is contrary to this Court's double jeopardy analysis in cases involving technically different statutory crimes, but involving the same "core offense." To the extent that this Court's *Gaber* decision is inconsistent with the double jeopardy approach of precluding multiple trials for the same core offense (following either a

conviction or an acquittal in the first case), then this Court should recede from that portion of its *Gabers* holding and reverse in this case.

E. Double Jeopardy Allows Only One Bite at the Apple:

The State argues that it always can re-try a defendant for premeditated homicide following trial on a felony murder charge and an acquittal by the jury or reversal based upon legal insufficiency of the evidence. This Court should squarely reject such an approach that would permit the prosecution to have multiple opportunities to obtain a conviction. Where reversal of the first conviction is required—as it was in *Delgado I*—due to factual or legal insufficiency of the evidence underlying a felony murder theory, double jeopardy should bar any effort to retry the Defendant on a premeditated murder theory. A single bite at the apple is all the State of Florida should be permitted, and this Court should reverse with instructions to discharge the Defendant.

II.

REVERSAL IS REQUIRED TO REMEDY THE STATE'S IMPROPER ARGUMENTS

A. Preservation of Error Issues:

The State asserts that Defendant did not preserve for appeal the trial court's error in allowing the prosecution's improper argument in closing[3] the State argues (Answer Brief at 46) that "Defendant never obtained a ruling on his objection." However, the court did make such a ruling stating "I'm not sustaining the

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[3] The State in its Answer Brief characterizes this issue as involving "unspecified comments during closing" *see* Answer Brief at 46. However, Appellant clearly specified those arguments on pages 11 to 14 of the Initial Brief, quoting the prosecution's closing at R.XIX-2243 commenting upon defense counsel's concession that "these are horrible, pre-meditated murders, but the problem is, two and a half weeks ago, I didn't hear that concession." The characterization of Defendant's position as "ridiculous" is specifically raised in the Initial Brief. Also quoted is the State's argument at R.XIX-2248 stating "that the defense is never satisfied with anything in any criminal case." The State in its brief clearly expressed understanding of the comments and arguments that are the subject of the present appeal. However, to the extent that it may be required, the Appellant hereby formally moves to amend Argument II of his Initial Brief to reflect the fact that the improper comments and arguments that are the subject of that section are those quoted in the Initial Brief at pages 11 to 14.

objection, except to the extent that I don't want you [the prosecutor] to pursue anything that would suggest a burden on anybody but the State." R.XIX-2246. The trial court plainly overruled defense counsel's objection, and the improper argument issue was adequately preserved.

The State also argues that the trial court "did not distinctly rule on Defendant's objection to the comment concerning the lack of presentation of business records." *See* Answer Brief at 36-37. However, the trial court only overruled that objection and it stated: "I'm denying the motion for mistrial. I decline to give the [curative] instruction. But ***you can comment on that to the jury if you want to***, but my suggestion is to leave it alone." R.XIX-2256 (emphasis added). That mere advice that the prosecution[4] avoid the area of argument was

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[4] The Assistant State Attorney Susan Dannelly obviously realized that the Court's reference "you" in the sentence "you can comment on that to the jury if you want to"—followed by the suggestion that she "leave it alone"—was a reference to the prosecution, as reflected by her response: "Judge, every single time I want to make a point about what the evidence proves ***I have to leave it alone*** because Greenstein is going to pop up and interrupt my closing comments . . . ." R.XIX-2256 (emphasis added).

completely undercut by the statement: "you can comment on that to the jury if you want to." The trial court effectively overruled defense counsel's objection to the improper comment concerning failure to produce the evidence. The issue was preserved.

B. The Arguments Were Improper and Prejudicial:

The State argues that it was proper for the prosecution to comment on the failure of Defendant to present evidence of the financial condition of the laundry because that evidence "would have been in Barbara Llamelas' control and she had a spousal relationship with Defendant." *See* Answer Brief at 50. To begin with, there was no husband-wife relationship that would give rise to any sort of privilege providing Defendant with a greater accessibility to such evidence than the prosecution. There was no marital relationship between the parties, and the prosecution's reference to Barbara Llamelas as being "the common-law wife of the Defendant." R.XIX-2255. The alleged common law relationship between the Defendant and Barbara Llamelas did not render the subject evidence any more available to the defense than to the prosecution, and that relationship does not justify the improper argument which had the effect of improperly shifting the burden of proof.

The State argues (Answer Brief at 51) that its comments during closing about the Defendant's hypothesis of innocence is simply a proper comment that Defendant's hypothesis of innocence was "not reasonable." The State cites as support for that argument this Court's decision in *Pace v. State*, 854 So. 2d 167 (Fla. 2003). To begin with, the State's argument at trial was inflammatory and impermissible for the very reason that it was ***not*** an argument that defendant's hypothesis of innocence was unreasonable. Instead, the prosecution ridiculed the Defendant and his theory of defense by calling it "completely ridiculous." R.XIX-2253. The prosecution literally ***ridiculed*** Mr. Delgado and "[a] prosecutor may not ridicule a defendant or his theory of defense." *Rosso v. State*, 505 So. 2d 611 (Fla. 3d DCA 1987). *Accord, e.g., Henry v. State*, 743 So. 2d 52, 53 (Fla. 5th DCA 1999).

The State in its Answer Brief essentially concedes error in the improper argument concerning the defense being "never satisfied." The Appellee does not argue that the comment was fair or that denial of a mistrial was legally correct. Instead, the Appellee simply argues that "there was no ***absolute necessity*** for a mistrial." (Answer Brief at 52)(emphasis added). The State tacitly concedes that it is improper for a prosecutor in closing to refer to cases other than the one being tried. That improper comment in this case did just that, lumping Mr. Delgado

together with all defendants everywhere and asserting that his counsel's argument should be discounted because he was essentially ***one of them***.

A mistrial was absolutely necessary in this case because the prosecution improperly slanted the playing field to associate Mr. Delgado with "never satisfied" defendants in other cases, all of whom obviously (the State implied) were equally guilty and deserving of punishment. It is hard enough to defend someone accused of a terrible crime such as murder without the prosecution unfairly tilting the scales through improper argument and guilt by association, such as was done in this case. The variety of improper and however prejudicial arguments made in this case necessitates reversal.

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. Expert Testimony Required to Lay Foundation for Pen Register Tapes:

The State in its Answer Brief cites several cases as purportedly supporting the proposition that "expert testimony is not necessary to admit a pen register tape." (Answer Brief at 55). However, none of those cases even remotely address

the question of the necessity of expert testimony to lay the foundation for pen register tapes.

In *Smith v. Maryland*, 442 U.S. 735 (1939), the only issue was whether the Government's obtaining of pen register records was a search subject to protection under the Fourth Amendment. The word "expert" does not appear anywhere in the Supreme Court's opinion.

Likewise, there was no issue before the court concerning the necessity for expert testimony in *United States v. Walt*, No. 95-50328, 1897 U.S. App. LEXIS 16374 (9th Cir. 1997). The issue in *Walt* was whether the records of the pen register were hearsay subject to the business records exception. In supporting the admissibility of the pen register data over the defendant's hearsay objection, the court in *Walt* noted that the subject records should be reliable because "they were installed by experts." *Id*. at *12. That case is not authority for the proposition that expert testimony is not required to lay a foundation for the records of a pen register. Such a device is uncommon to the average juror, and expert testimony would be useful to establish the reliability of the data generated by the device.

The State insinuates that the Fourth District's holding that it is permissible for a witness who observed a caller ID unit printout to testify what was on the printout supports the argument that expert testimony is not necessary to admit a

pen register tape. *See Bowe v. State*, 785 So. 2d 531 (Fla. 4th DCA 2001). However, the *Bowe* case, like the other cited cases, has nothing to do with the necessity of expert testimony for laying the foundation for pen register printouts. The only argument made by the defendant in the *Bowe* case is that the printout was hearsay.

Unlike the present case involving a valid question concerning the reliability of the pen register data in the absence of expert testimony, "Bowe did not challenge the reliability of caller I.D. technology to pinpoint the source of a phone call." *Id*. at 532. The *Bowe* court did not hold as the State implies that expert testimony is not required to lay the foundation for such evidence, only that "there was no message transmitted that fell within the definition of hearsay, ***nor was there any other evidentiary objection***." *Id*. (emphasis added).

B. Detective Reyes Was Not a Qualified Expert:

The State argues (Answer Brief at 57) that, even if expert testimony is necessary to lay the foundation for the admissibility of pen register data, the trial court could properly have found Detective Reyes to be an expert because he "is both a college and law school graduate." It goes without saying that neither an undergraduate nor legal education prepares anyone to install, operate, and vouch for the accuracy of a pen register. Although he had limited experience using pen

registers, he had not installed a pen register and did not know how to do so. Detective Reyes himself conceded: "I would not be an expert" in the field of using a pen register. R.XV-1695. There is no evidentiary basis to find Detective Reyes to be such an expert.

C. The Error Concerning the Pen Register Data Was Harmful:

The State argues that any error in admitting the pen register evidence was harmless citing other testimony as curing any harm. The State first argues that Detective Smith also testified regarding how a pen register works. However, he did not testify concerning the reliability of the results of ***this*** pen register. It is irrelevant how a pen register works in the abstract, unless some witness connects it to the case at bar.

The State argues that the error was harmless because "Maria Hernandez testified that Defendant was angry with the Rodriguezes over the sale of the business," and that "Defendant's prints were found on the phone," as well as other evidence linking him to the crime scene. However, the error in admitting the pen register would be harmful because it supplied a link in the prosecution's chain of evidence not already supplied by that other testimony. The fact that the pen register showed that the last call placed from the kitchen telephone was to a telephone number associated with the Llamelases dovetailed with the prosecution's

theory of Mr. Delgado's motive for the killing: as revenge for their actions in connection with the sale of the laundry business to the Llamelases. By supplying that link in the prosecution's case, "there is a reasonable possibility that the error ***affected*** the verdict," rendering it harmful under the tests followed by this Court established in *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986)(emphasis added).

The State in its Answer Brief argues that there was a great deal of evidence supporting a conviction apart from the pen register evidence. However, "[t]he test [for harmfulness] is not . . . an overwhelming evidence test." *Id*. Error certainly can "affect" or contribute to a verdict, even if the same verdict would have likely been returned in the absence of that evidence.

There is no need for this Court to find that the verdict would likely have been different, but-for the inadmissible evidence. This Court held in *Knowles v. State*, 848 So. 2d 1055 (Fla. 2003), that it is not necessary for error to have "substantially influenced the jury's verdict" in order to require reversal. *Id*. at 1058-59. Of course, any error that caused the jury to convict a defendant when it would not have convicted him otherwise would be an error that "substantially influenced" the jury's verdict. If it is not necessary to show such a substantial influence, then it likewise is not necessary to show that the verdict would have

been different in the absence of the error. The verdict here was rendered more likely in light of the erroneous admission of the pen register tape and reversal is required.

IV.

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

The prosecution in its Answer Brief offers no valid explanation for the trial court's multiple instructions to the jury on the elements of first degree murder. The argument that "the State is entitled to have the jury instructed fully" does not support the giving of the same instruction several times. Moreover, the State points out that the court explained that he re-read the subject instructions "because of a change Defendant had requested in the introduction to homicide." (Answer Brief at 63). That explanation would not have remedied the over-emphasis that the jury would place on the court's repetition of the instructions. To the contrary, the explanation that the repetition was due to something the Defendant requested could only have served to further prejudice the defense by associating the repetition with something Mr. Delgado did in the trial proceedings.

Again, the State mischaracterizes the harmless error test applicable in Florida by arguing harmlessness results from "the fact that Defendant committed

the murders was [allegedly] overwhelmingly proven." The undue emphasis on the homicide instruction surely contributed to the verdict, so the alleged overwhelming character of the proof is not relevant to the harmless error analysis and reversal is required.

V.

THE TRIAL COURT FUNDAMENTALLY ERRED BY INSTRUCTING THE JURY THAT IT WOULD HEAR MITIGATION EVIDENCE IF IT RETURNED A GUILTY VERDICT

The State spends considerable effort in its Answer Brief in establishing that the Defendant at trial failed to preserve any objection the jury instruction that informed the jury that it would hear mitigation evidence if it returned a guilty verdict. That preservation argument is unnecessary because the issue was phrased as one of fundamental error in Appellant's Initial Brief. Errors in jury instruction certainly can be fundamental error and grounds for reversal even in the absence of a timely objection at trial. *E.g. Davis v. State*, 804 So. 2d 400, 404 (Fla. 4th DCA 2001).

Further, contrary to the State's argument that prospective jurors have no duty to heed instructions provided during *voir dire*, courts cannot assume that prospective jurors ignore things that they are told by the judge. To the contrary,

instructions that are fundamentally erroneous given by the trial court prior to empaneling the jury require reversal. *See Pierce v. State*, 671 So. 2d 186 (Fla. 4th DCA 1996); *Wilson v. State*, 668 So. 2d 998 (Fla. 4th DCA 1995).

The State argues that "the comment in question did not state that Defendant would be presenting any mitigation," but that instruction "only stated that mitigation would be presented." (Answer Brief at 70). However, a reasonable juror would have understood the comment to mean that the Defendant would be putting on that evidence. Further, there is nothing to indicate that the jury was aware of the fact that "the constitutional scope of mitigation must include any aspect of the Defendant's character [including] . . . a defendant's behavior during trial," and other, non-testimonial factors. (Answer Brief at 70).

A fair reading of the instruction in question would be that the jury should expect the Defendant to put on evidence in mitigation. As such, the evidence was an impermissible comment on the Defendant's right to remain silent and reversal is required.

VI.

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

The Defendant raised *Ring v. Arizona*[5] in order to preserve the issue. Nothing further needs to be said about that argument in this Reply Brief.

VII.

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

The argument made by defense counsel in closing about the State's failure to conduct DNA testing was a fair comment on the evidence. Crime scene investigator Victor Alpizar did not, as the State argues in its Answer Brief, testify that the reason DNA testing was not done on the crime scene back in 1990 was that DNA testing had not been validated for use in the County. (*See* Answer Brief at 76-77). While DNA testing "had not yet been validated" in Dade County in 1990, that was not given as the reason why such testing was not done on this crime scene. It was fair argument to question the lack of such testing.

Further, this Court should reject the State's argument that there was no evidence to support the objected-to statement in Defendant's closing that DNA testing could have been done on the subject evidence shortly before trial. There was no need for direct testimony to support the proposition that such testing could

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[5] 536 U.S. 584 (2002).

have been performed in 2004, due to the widespread knowledge of the general public concerning the availability of DNA testing on very small samples of material. It was a fair comment on the evidence and the objection was improperly overruled. Therefore, reversal is required.

VIII.

THE TRIAL ERRORS HARMFULLY CONTRIBUTED TO THE VERDICT

This Court should reject the State's argument that the *DiGuilio* standard is to be applied differently in a case where the evidence supporting conviction is strong, as compared to cases involving fairly weak evidence of guilt. The test for harmful error under *DiGuilio* is whether there is any reasonable possibility that the error contributed to the verdict or affected the verdict. Errors contribute to verdicts without regard to the strength of the other evidence to support the verdict, because there is no need for the Defendant to show that, but-for the error, the conviction would not have resulted.

The Appellant submits that the following is the appropriate analysis for this Court to employ when determining whether the State has satisfied its burden of demonstrating the lack of any reasonable possibility that error contributed to the verdict:

The evidence, argument, instructions and other aspects of a trial are placed before the jury like a pile of bricks available for stonemasons to build a wall. The jurors during deliberations, like masons, take the bricks one-by-one from the pile and examine them. Many doubtless will be suitable for every juror to select as part of the consensus wall they are building: the verdict. Those obviously suitable bricks will be moved from the pile to the structure itself, joining others which already were selected.

Some of the bricks in the stonemason's pile may be obviously unsuitable for the wall—of the wrong size or shape or color—and will be passed over by the masons and discarded, or returned to the pile. Similarly, some evidence (and arguments and so on) will likely be ignored or examined cursorily and found to be unsuitable to support a guilty verdict.

Some evidentiary bricks introduced in error are likely to be selected for use in the wall, and very possibly will be, by at least some of the jurors, even if there are plenty of other bricks, untainted by error, which could build the entire wall. Those bricks which should not have been made available for use in the wall (but were selected by the jury) "contribute" to the wall when laid in place with mortar.

The availability of plenty of untainted bricks to support the wall—even an overwhelming number of them—cannot change the fact that tainted bricks selected for use contributed to the structure. The wall is affected by those erroneously-introduced bricks, even if the same wall would have been constructed by the jury without those bricks. Only those bricks ignored by the masons and left in the pile unused, or considered and discarded, can be said, beyond a reasonable doubt, not to have "contributed" to the wall.

If any juror[108] could have considered the evidence (or argument or instruction) which resulted from an error in reaching the decision to vote "guilty," then the error contributed to the verdict, even if that juror's guilty vote could have been based on other "bricks." Only if an error was so unrelated to the jury's work that it ***could not*** have been selected by any[109] juror to support the verdict—like a misshapen white brick rejected for inclusion in the red wall and set aside by the mason—can that error be said to have not contributed to the verdict.

An error involving such a minuscule or extraneous matter that it would not have even entered into the deliberative process is not harmful. If, on the other hand, erroneously-admitted evidence (or pertinent jury instructions, or prosecutorial comments, or other errors) were of a character from which we could expect them to be selected by the jury as supporting the verdict (the red bricks of the verdict), those errors must be said to "contributed" to the verdict, even if it—like the brick wall—would still stand (albeit pocked) once those defective components were removed.

This definition of "contributed" to the verdict is supported by the writers. "When, for example, evidence is wrongly admitted, the evidence must have been so nugatory or farfetched that ***no juror could have possibly relied on it*** [to permit a finding that its introduction was harmless]."[110] There is no need for the court to inquire whether the verdict was different, as a result of the error, than it would have been without the error; merely that the error played some part in—or contributed to—the verdict.

Nothing in the *Chapman* harmless error standard adopted[111] by the Florida Supreme Court in *DiGuilio* indicates that error is harmless when the admissible evidence is so strong that the jury would not have acquitted the accused absent the error. To the contrary, the *Chapman* Court focused on whether other evidence would have produced the same verdict; the Supreme Court held, "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut* . . . : 'The question is whether there is a reasonable possibility that the evidence complained of *might have contributed* to the conviction.[112]

[108] "The *Chapman* test requires an examination of whether the error in question possibly affected the decision of 'at least one member of the jury.' Gregory Mitchell, *Against Overwhelming Appellate Activism, Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1358 (1994)(quoting *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1097 (6th Cir. 1990)(en banc)) ("The Court must entertain with an open mind the possibility that at least one member of the jury took the

language of the [erroneously admitted] confession seriously and relied on the harshness of its description to tip the balance in favor of the death penalty.")(emphasis added).

[109] While the entire verdict can be analogized as a brick wall, constructed by the jury as a whole, each juror's vote of guilty is itself a wall constructed from those evidentiary bricks. One juror's guilty vote may have been decided upon without consideration of the erroneous matter, while another juror included the erroneous matter as one of the elements or bricks in his or her vote to convict.

[110] Mitchell, *supra* at 1358(emphasis added).

[111] Commentators have noted that the U.S. Supreme Court, in cases decided after *Chapman* and before *DiGuilio,* was not true to its own *Chapman* standard. *E.g.,* Stephen H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 428 (1980). Notably, the Florida Supreme Court in *DiGuilio* did not follow the different standard (if it is any different) set out in the post-*Chapman* federal decisions, so the Florida Court's later deviations from the *DiGuilio* standard cannot be attributed to adherence to the then-current state of federal law on harmless error.

[112] *Chapman*, 386 U.S. at 23 (emphasis added). "Might have contributed" is a far cry from "verdict would have been different" or even "would likely have been different."

Roy D. Wasson, *The Appellate Process: The* Riddling *of the* DiGuilio *Harmless-Error Standard: Whether Error "Contributed" to the Verdict*, 5 Barry L.Rev. 57, 73-75 (Spring 2005)(emphasis in original).

The errors committed by the trial court were harmful and this Court should reverse the Defendants convictions and death sentences.

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 on this the —— day of March, 2006.

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.

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