IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-457

JAVIER D. VENTURA,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

FLORIDA CASES

FLORIDA STATUTES

FLORIDA RULES OF COURT

INTRODUCTION

Appellant Javier D. Ventura was the defendant below and the State of Florida was the prosecution. The parties will be referred to as they stood in the trial court. For purposes of this brief, the symbol "R." refers to the record on appeal and the symbol "T." refers to the separately bound trial transcripts, and "S.R." refers to the supplemental record.

STATEMENT OF THE CASE AND OF THE FACTS

The State of Florida charged Mr. Ventura with three counts of armed robbery with a deadly weapon, in violation of Section 812.13(2)(A), Florida Statutes (R. 16-18). Both the original information and the amended information alleged that the robbery had been committed on October 31, 2002, that a pellet rifle had been used in the commission of the robbery, and that Mr. Ventura had committed the robbery with other persons; Count 1 of the amended information alleged a robbery from Silvina Burstein, Count 2 alleged a robbery from Dina Szejnblum and Count 3 alleged a robbery from Vladimiro Rojas (R. 1-25).[1]

Vladimiro Rojas testified that at about 2 A.M. on October 31, 2002 he was walking from a café toward his car at Collins Avenue and 8th Street in Miami Beach with his friend Silvina Burstein and her friend. At the corner a car pulled up

[1] The court dismissed Count 2 upon the defendant's motion for judgment of acquittal.

next to them. Two men got out with guns and demanded their property. One man was skinny and the other was fat. The skinny one had his head shaved, and he was wearing a white and black tank shirt. He was holding a gun that looked like a rifle. Mr. Rojas gave them his cellular phone and his jacket. Then the two men went to his friends and got their stuff. Then they ran back to the car. (T. 158-64.)

When the car left, he summoned police, and reported what had happened. Soon police told him they had stopped the car he had described. An officer drove them to where they had stopped the car, on the McArthur Causeway. There were several police cars, and they brought out the suspects; he identified the defendant as the person who pointed the gun at him, and he also identified the car. Mr. Rojas identified the defendant in the courtroom as the person who had pointed the gun at him. He testified that he got his property back from the police. (T. 165-71.) On cross- examination Mr. Rojas testified that everyone on the McArthur Causeway when he made his identification was in police uniform, except the suspects (T. 173). He also testified that he had seen the defendant again at the police station after he identified him (T. 174).

Silvina Burstein testified that at about 2 A.M. on October 31, 2002 she was walking with her friend Vladimiro and her friend Dina Szejnblum on Collins Avenue in Miami Beach when she was robbed. Two men came at her and

demanded her property; one of them had a gun -- he was tall and thin with short hair. She gave them her purse, with her cell phone and credit cards. (T. 178-83).

Police arrived and subsequently told them that a car had been stopped on the McArthur Causeway. Police took them there. The road was closed and there were lots of police cars and a police helicopter. She identified the car, and identified defendant as one of her assailants; she also identified defendant in the courtroom. She got some of her property back from the detective. (T. 184-90) On cross-examination she testified that she had also seen the suspects in the police station after she had identified them. (T. 193).

Detective Teppenberg identified a photograph of Vladimiro Rojas with the property taken from him in the robbery and subsequently recovered, a photograph of Silvana Burstein with the property taken from her in the robbery and subsequently recovered, and a photograph of a BB rifle recovered by police during the investigation. (T. 615-20.) Detective Teppenberg also testified as follows:

> Q. And when you got there what did you do?
>
> A. Well, I spoke to the victims and to the officer. [Their] stories were consistent to that offense report about what had occurred in the robbery. **I also had requested I.D. to take pictures of the recovered stolen property. Along with the victims, the defendants wouldn't give any statements.**
>
> [Defense counsel]: I reserve a motion on that.
>
> * * *

Q. You were you informed by the officer what they did [at] the scene?

A. Yes. The suspects were in custody [and] they **declined to make statements**.

[Defense counsel]: I reserve a motion.

THE COURT: Noted.

(T. 614-18) (emphasis supplied).

The State rested following Detective Teppenberg's testimony, and the jury was removed from the courtroom. Defense counsel then moved for a mistrial on the ground that Detective Teppenberg had improperly told the jury that the defendant had refused to make a statement explaining the stolen property in the vehicle when he was entitled to exercise his right to remain silent, and such comment before the jury was improper and highly prejudicial. (T. 624). The trial court denied the motion.

During its deliberations the jury sent the court a note, asking where in the car the victim's property had been found, and how police collected it. The court responded that the jurors should rely on their recollection. (R. 88-90; T. 674-76).

The trial court sentenced Mr. Ventura to 30 years in State Prison as a prison releasee reoffender, with a thirty year minimum/mandatory. (T. 174; R. 134-36). Mr. Ventura subsequently moved, pursuant to Florida Rule of Criminal Procedure 3.800(b), to correct the sentence on the ground that the State had not submitted

competent proof that defendant met the criteria for sentencing as a prison releasee reoffender sentence (SR. 7).

The trial court denied the motion, holding that the documents in the record at pages 124 and 128 of the record were documents under seal, and thus self-authenticating documents, and that they authenticated themselves as public records admissible under the hearsay exception for public records, under *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006) (en banc). (SR. 120).

On appeal, the district court held that Detective Teppenberg's comments on Mr. Ventura's silence were improper, calling them "an intentional cheap shot at Ventura's constitutional rights." *Ventura v. State*, 973 So. 2d 634, 637 (Fla. 3d DCA 2008). The court, however, found the error harmless "given the overwhelming evidence of guilt." *Id.*

The court also affirmed the denial of Mr. Ventura's Rule 3.800(b) motion. First it held that the issue was waived by the lack of a contemporaneous objection, and could not be preserved by a motion pursuant to Rule 3.800(b). *Id.* at 637-38. On the merits, the court held that the letter used to establish Mr. Ventura's release date was admissible as a public record, relying on *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006) (en banc), *disapproved in part*, 993 So. 2d 952 (Fla. 2008).

SUMMARY OF THE ARGUMENT

The district court erred in finding the comments on Mr. Ventura's silence to be harmless beyond a reasonable doubt "given the overwhelming evidence of guilt." *Id.* This conclusion was directly contrary to this Court's precedent concerning harmless error. . The harmless error 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**." *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986) (emphasis supplied). An appellate court may not "substitute[] itself for the jury, examine[] the permissible evidence, exclude[] the impermissible evidence, and determine[] that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." *DiGuilio*, 491 So. 2d at 1136. The defense put the witnesses' identification testimony in issue. The district court erred when it took it upon itself to reweigh the evidence and applied a standard expressly rejected by this court.

The district court erred when it concluded that a "release-date letter" was admissible under the public document exception to the hearsay rule. Counsel concedes, however, that the letter was accompanied by a "crime and time" report, and the combination has been held admissible by this court in *Yisrael v. State*, 993 So. 2d 952 (Fla. 2008).

To the extent that the defendant's motion may be characterized as a retroactive evidentiary objection, counsel concedes that *Jackson* forecloses any reliance on Rule 3.800(b).

ARGUMENT

I. THE DISTRICT COURT'S APPLICATION OF THE HARMLESS ERROR TEST IS CONTRARY TO THIS COURT'S DECISIONS, AND THE DISTRICT COURT ERRED IN FINDING THAT THE COMMENTS ON MR. VENTURA'S POST-MIRANDA SILENCE WERE HARMLESS.[2]

Post-arrest silence is inadmissible in Florida, whether the silence occurs before or after *Miranda*[3] warnings. *State v. Hoggins,* 718 So. 2d 761 (Fla. 1998). Yet Detective Teppenberg testified as follows:

> Q. And when you got there what did you do?
>
> A. Well, I spoke to the victims and to the officer. [Their] stories were consistent to that offense report about what had occurred in the robbery. **I also had requested I.D. to take pictures of the recovered stolen property. Along with the victims, the defendants wouldn't give any statements.**
>
> [Defense counsel]: I reserve a motion on that.
>
> * * *
>
> Q. You were you informed by the officer what they did [at] the scene?
>
> A. Yes. The suspects were in custody [and] they **declined to make statements**.
>
> [Defense counsel]: I reserve a motion.

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[2] In the event that the Court concludes that this argument does not present a conflict, it may nonetheless review the issue. "When this Court has accepted jurisdiction in a case to resolve a legal conflict, 'we may, in our discretion, consider other issues properly raised and argued.'" *Jenkins v. State*, 978 So. 2d 116 (Fla. 2008) (quoting *Savoie v. State,* 422 So. 2d 308, 310 (Fla.1982)).

[3] *Miranda v. Arizona,* 384 U.S. 436 (1966).

THE COURT: Noted.

(T. 614-18) (emphasis added).

The district court found this testimony to be an improper comment on the right to silence. *Ventura v. State*, 973 So. 2d 634, 637 (Fla. 3d DCA 2008). Indeed, that court observed: "We fail to see how the detective's comment, twice repeated, could have been anything other than an intentional cheap shot at Ventura's constitutional rights." *Id.* Nevertheless, the court found the error harmless "given the overwhelming evidence of guilt." *Id.* That holding is contrary to this Court's decisions governing harmless error.

The state bears the burden of proving that the trial court's error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). The Court has explained:

> ... The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. *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*.

Rigterink v. State, 2 So. 3d 221, 257 (Fla. 2009) (per curiam, with three justices

concurring and one justice concurring in the result) (quoting *DiGuilio*, 491 So. 2d at 1135-39) (emphasis supplied by the Court in *Rigterink*). "**[H]armless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence."** *DiGuilio*, 491 So. 2d at 1136. In Mr. Ventura's case, the district court substituted itself for the jury and expressly applied the "overwhelming evidence" test rejected by this Court in *DiGuilio* and its progeny.

The question before the jury was whether Mr. Ventura had participated in the robbery.[4] The descriptions of the man with the BB rifle differed. Mr. Rojas said he particularly noticed that the robber had a shaved head. (T. 161). Ms. Burstein said he had short hair. (T. 180). Mr. Rojas described the man's shirt as a "tank that was white with black." (T. 162). Ms. Burstein agreed with the prosecutor that it was a "colored T-shirt with colors on it." (T. 193). The two witnesses made their out-of-court identifications on the side of the MacArthur causeway, standing approximately five feet apart from one another, having heard

[4] The defense explicitly raised this question in closing argument. For example, at page 655 of the transcript, counsel argued: "The dispute is whether Mr. Ventura participated and took part in that," and "He didn't do anything or know what was going on the [sic] evening."

the police say that that they "had stopped the car. The car that we described." (T. 167, 192-93). The four people the witnesses identified were the only ones present at the scene who were not wearing police uniforms. (T. 173, 192-93). The in-court identifications, of course, came after the show-up and were likely the fruit of that encounter. The prosecution was sufficiently concerned about the effect of these contradictions that it felt compelled to address them in closing argument. (T. 644).

The property recovered from the car gained significance in light of the contradictions impacting the credibility of the witnesses. Although the witnesses testified that their property was returned to them, the state did not establish where the property was found. (T. 460, 478-79). Not all of the property was recovered. (T. 479). The jury found information concerning the location of the property to be important to their deliberations. The jurors sent out a note asking:

> Where was the victims' property found in the car?
>
> How was it collected by the police?

(R. 90).

These questions suggests that the jurors believed Mr. Ventura's relative proximity to any property recovered would have a bearing on whether he was a participant in the offense. In light of the jurors' concern on this point, Mr. Ventura's failure to explain his presence in the car and proximity to the property

achieves greater significance. Indeed, Detective Teppenberg's improper comments came in the context of the recovery of the property: "I also had requested I.D. to take pictures of the recovered stolen proeperty [sic]. Along with the victims, the defendants wouldn't give any statements." (T. 615). The detective's second comment on Mr. Ventura's silence also came just after a discussion of the retrieval of the property.

Given all this, the state cannot carry its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. Error contributes to the verdict where the improper evidence may have been relied on, even though the jury may have reached the same result without the error. *DiGuilio*, 491 So. 2d at 1136, (citing *People v. Ross*, 429 P.2d 606 (1967) (Traynor, C.J. dissenting), *rev'd sub nom*, *Ross v. California*, 391 U.S. 470 (1968). It is very likely that the jury considered Mr. Ventura's silence in resolving questions about the witnesses' credibility and his proximity to the stolen property.

The district court did not ask itself the question of whether the improper comments contributed to the conviction. Instead, it employed a test expressly rejected in *DiGuilio*, concluding the comments were "harmless beyond a reasonable doubt given the overwhelming evidence of guilt." 973 So. 2d at 637. The district court further diverged from *DiGuilio* by substituting itself for the jury and reweighing the evidence in the absence of the error. The jurors resolved the

reliability of the identifications in reaching their verdict, and they did so in light of evidence that Mr. Ventura had failed to explain himself to the police. It is not for the district court to decide how *it* would resolve that issue in the absence of the improper evidence. In so doing, the district court substituted a jury of three for a jury of twelve, and determine[d] that the evidence of guilt [was] sufficient or even overwhelming based on the permissible evidence." *DiGuilio*, 491 So. 2d at 1136. The Court must reverse the district court's decision and remand with directions to order a new trial.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE RELEASE-DATE LETTER WAS ADMISSIBLE AS A PUBLIC RECORD.

The trial court sentenced Mr. Ventura as a prison releasee reoffender (PRR), pursuant to subsection 775.082(9)(a), Florida Statutes. (R. 134-36). That designation required the court to sentence Mr. Ventura to thirty years in prison with a thirty-year minimum mandatory term. Before a defendant may be designated a PRR, the court must find that the defendant committed the offense within three years of his last release from prison. § 775.084(9)(a), Fla. Stat. (2002). Relying on *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006) (en banc), *disapproved in part*, 993 So. 2d 952 (Fla. 2008), and *Ward v. State*, 965 So. 2d 308 (Fla. 3d DCA 2007), *quashed*, 34 Fla. L. Weekly S292 (Fla. March 19,

2009), the district court held that the release-date letter established competent proof that Mr. Ventura qualified for sentencing as a PRR. *Ventura v. State*, 973 So. 2d 634, 638 (Fla. 3d DCA 2008).

The district court's opinion is in direct conflict with this Court's opinion in *Yisrael v. State*, 993 So. 2d 952 (Fla. 2008). In *Yisrael*, this Court held that a release-date letter is not admissible as a public record. The Court disapproved the Fourth District Court of Appeal's opinion to the contrary – the opinion upon which the Third District relied in deciding this case. The release-date letter admitted against Mr. Ventura is indistinguishable from the one at issue in *Yisrael*. 993 So. 2d at 962. The Court must quash or disapprove the Third District's opinion and remand for a decision consistent with *Yisrael*.[5]

III. THE PRESERVATION OF *YISRAEL* ERROR THROUGH A MOTION PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B).[6]

The district court held that Mr. Ventura's motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b) failed to preserve the

[5] As noted in the Petitioner's Reply to Order to Show Cause, counsel for petitioner concedes that the letter relied upon by the district court was accompanied by a "Crime and Time" report. Appendix 1. In *Yisrael*, this Court held that a Crime and Time report, accompanied by a release-date letter under seal, is admissible as a public record to prove the date of release.

[6] This issue is rendered moot by the resolution of the substantive *Yisrael* issue in this case, discussed in Argument II, above.

Yisrael error. 973 So. 2d 637-38. In *Yisrael*, the Fourth District Court of Appeal held that the same error *was* preserved by a Rule 3.800(b) motion. 938 So. 2d 547 n. 1. In this Court's *Yisrael* opinion, the Court expressly declined to consider the issue. 993 So. 2d 954 n. 3.

All three opinions were issued before *Jackson v. State*, 983 So. 2d 562 (Fla. 2008). There the Court held that Rule 3.800(b) "permits preservation of errors in orders entered as a result of the sentencing process, not all errors that happen to occur during that process." *Id.* at 578. The Court observed: [D]efendants do have the opportunity to object to many errors that occur during the sentencing process-for example, the introduction of evidence at sentencing. The rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b)." *Id.* at 573.

The decisions in this case and *Yisrael*, treat the error at issue as purely evidentiary rather than a failure of proof. To the extent that a defendant's motion may be characterized as a retroactive evidentiary objection, counsel concedes that *Jackson* forecloses any reliance on Rule 3.800(b). To the extent that the error in this case, however, may be properly considered as an error in the ultimate sentence, it is susceptible to a Rule 3.800(b) motion. The state failed to establish by competent proof that Mr. Ventura qualified for PRR sentencing. An enhanced

sentence imposed in the absence of the required predicate may constitute an illegal sentence correctable in a motion pursuant to Rule 3.800(a). *Bover v. State*, 797 So. 2d 1246 (Fla. 2001). An error that may be corrected in Rule 3.800(a) motion may also be raised in a motion pursuant to Rule 3.800(b). *Jackson*, 983 So. 2d at 574.

CONCLUSION

For the foregoing reasons, the Court must quash the district court's opinion and remand with instructions to order a new trial.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I Andrew Stanton, counsel for the Appellant, HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to counsel for the Appellee, Rolando Soler, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on May 4, 2009.

_____
ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

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

_____
ANDREW STANTON
Assistant Public Defender