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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JONATHAN CYRIL KNIGHT,

Petitioner,

vs. CASE NO. SC13-564

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

JAMES S. PURDY
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ARGUMENT

THE CURRENT STANDARD FOR REVIEWING CIRCUMSTANTIAL EVIDENCE CASES SHOULD BE RETAINED.

I. THE APPELLATE COURT DOES NOT HAVE TO "DISCERN" WHAT THE HYPOTHESIS OF INNOCENCE IS.

It is not correct to say, as the State suggests, that an appellate court must "discern" what the hypothesis of innocence is. Trial courts are only required to consider arguments presented. An appellate court considers no other hypothesis than that presented to the trial court. *Allen v. State*, 137 So. 3d 946, 958 (Fla. 2013) ("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court.") (quotations omitted).

II. THE APPELLATE DECISION DOES NOT ATTACK THE VERDICT

The State's argument that reversing a trial court's decision on a judgment of acquittal amounts to an attack on the jury's verdict is illogical. The ruling on a judgment of acquittal is a purely legal question. Appellate courts make these types of decisions in every type of trial appeal while completely disregarding the verdict of the jury. This can be done even in cases in which no judgment of acquittal is even raised at the trial level. *F.B. v. State*, 852 So. 2d 226, 230 (Fla.

2003) ("The second exception to the requirement that claims of insufficiency of the evidence must be preserved occurs when the evidence is insufficient to show that a crime was committed at all.").

A jury's verdict is immaterial no matter which standard is applied. Applying the special standard of review treats a case no differently than the normal standard of review. In both situations, the appellate court reviews the evidence and applies the law to the evidence. If the State has not succeeded in its burden, the case is reversed irrespective of the jury's verdict.

III. THE STANDARD OF REVIEW IS NOT TOO DIFFICULT OR CONFUSING TO APPLY.

Florida's "special standard of review" simply asks the trial court to determine (and an appellate court to review) whether the defendant's hypothesis of innocence is reasonable enough to consider in the light of the surrounding facts. If so, the State's case must contain evidence inconsistent with it to avoid being insufficient as a matter of law. If the State's case does, the case goes to the jury subject to regular jury instructions.

A. Harmless error analogy

The process which the State would change is no more difficult or confusing than that of determining whether an error is harmless. Although appellate courts

have misapplied the standard espoused in *State v. DiGuilio*, 491 So. 2d 1129 (Fla.1986), this Court has stood steadfast in its application and only reminded the lower courts of its proper application.

Four times within the last four years this Court has had to remind an appellate court what the proper standard is for harmless error. *Johnson v. State*, 53 So. 3d 1003, 1006 (Fla. 2010) ("The Third District actually used an incorrect harmless error test by focusing only on the "overwhelming evidence."); *Ventura v. State*, 29 So. 3d 1086, 1089 (Fla. 2010), (emphasizing an "overwhelming evidence" test is not the correct test for determining whether an error was harmless); *Cooper v. State*, 43 So. 3d 42, 43 (Fla. 2010) ("Although the Second District cited *DiGuilio*, it failed to follow the *DiGuilio* standard when it relied on what it deemed the "strong evidence of Cooper's guilt."); *Hojan v. State*, 3 So. 3d 1204, 1220 (Fla. 2009) (Pariente, J., concurring) ("Yet, it is always helpful to remember that the harmless error test is not one of 'overwhelming evidence' "); *See also, Williams v. State*, 863 So. 2d 1189, 1189-90 (Fla. 2003);

Few would venture to suggest, however, that courts should abandon the harmless error analysis set forth in *DiGuilio*. All would agree that all that is necessary for proper review in such cases is a proper application of the law set forth in *Diguilio*.

So it is with *State v. Law*, 559 So. 2d 187(Fla. 1999) and *Beasley v. State*, 774 So. 2d 649 (Fla. 2000). That Courts have sometimes failed to follow the requirements spelled out in such cases does not mean that such requirements are incomprehensible or difficult to apply.

Even assuming *arguendo* that the review process is as difficult as the State asserts, that alone is not reason to abandon it. It only gives reason to clarify the standard just as the Supreme Court of New Hampshire did in *State v. Germain,* 79 A. 3rd 1025 (N.H. 2014). Justice is served solely by obtaining as just a result as possible, not by obtaining a result in the easiest manner possible.

B. Failure to consider the second step.

The process of applying the "special standard" of review is less difficult than the State portrays it to be. A rereading of *Law* and *Beasley* makes clear the task of the trial Court, the prosecutor, and the appellate court on review.

The State's analysis is faulty because it fails to consider the second step in the process: requiring that the State submit competent and substantial evidence inconsistent with the appellant's reasonable hypothesis. This Court has said:

> [I]t is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. *If the state fails in this initial burden*, then it is the court's duty to grant a judgment of acquittal to the

> defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence.

Law, 559 So. 2d at 189 (Fla. 1999)(quoting *Fowler v. State*, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986)) (Emphasis added).

When the prosecutor does submit competent and substantial evidence inconsistent with the hypothesis, an appellate court can affirm the trial court's judgment of conviction irrespective of the trial court's reasoning. Where a prosecutor cannot find and offer evidence inconsistent with a defendant's reasonable hypothesis of innocence, the case must be dismissed.

IV. "WHOLLY CIRCUMSTANTIAL" SHOULD BE DEFINED AS ANY CASE IN WHICH AT LEAST ONE ELEMENT IS PROVEN BY WHOLLY CIRCUMSTANTIAL EVIDENCE.

The State's position that for a case to be "wholly circumstantial" every element of the crime need be proven by circumstantial evidence is impractical. If this Court were to adopt the State's position, Amilcar Jaramillo (*Jaramillo v. State*, 417 So. 2d 257 (Fla. 1982)) would likely be dead; and Carl Dausch, (*Dausch v. State*, 141 So. 3d 513 (Fla., 2014)) would be on death row today. This is because the first element to be proven in a homicide case, the victim being dead, is generally proven by direct evidence. Most homicides begin with the discovery of a dead body.

Even though *Law*, *Beasley* and *Kocaker v. State*, 119 So. 3d 1214 (Fla. 2013) all affirmed convictions (each case having found record evidence inconsistent with the hypothesis presented), they all applied the special standard because this Court treated those cases, too, as "wholly circumstantial."

If this Court chooses to retain the special standard, it would seem wiser to continue to consider any case in which one or more element can be proven only by circumstantial evidence to be a "wholly circumstantial" case. Otherwise, so few cases could be considered "wholly circumstantial" that the State's (and the District Court's) proposed application would render the special standard virtually unnecessary.

V. CIRCUMSTANTIAL EVIDENCE IS NOT THE FUNCTIONAL EQUIVALENT OF DIRECT EVIDENCE

Appellant disagrees with the basic premise made in *Holland v. United States*, 348 U.S. 121 (1954): that circumstantial evidence is functionally equivalent to direct evidence. Direct testimonial evidence is subject to visual and auditory scrutiny of the witness' demeanor on the stand. Most importantly, it is subject to cross-examination–which has been called "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence, § 1367 (1976 ed). But one cannot cross-examine a circumstance or measure its demeanor.

Not all jurists are convinced that circumstantial evidence is equated to direct evidence. In a recent concurring opinion, Judge Northcutt stated:

> I fully and easily concur in the affirmance of Westbrooks' convictions because the State presented evidence of circumstances that refuted Westbrooks' hypothesis of innocence. I do not share my colleagues' view about the efficacy of the circumstantial evidence rule. To the contrary, I believe the rule is what prevents a purely circumstantial case from devolving into little more than a trial by ordeal.

Westbrooks v. State, 145 So. 3d 874, 881 (Fla. 2d DCA 2014) (Northcutt, J., concurring).

The Fourth District Court of Appeal pointed out a clear issue involving the fallacy of circumstantial evidence in *Grover v. State*, 581 So. 2d 1379 (Fla. 4th DCA 1991). It succinctly found that "when circumstances are reasonably susceptible of two conflicting inferences they are probative of neither. There simply would be no 'proof.'" *Id.*, at 1381.

Where the State has met its minimal second-step burden, the challenged process does not even foreclose jury consideration of competing inferences. It simply affords the State more evidence from which to argue in closing that the defense's inference is less worthy of belief than its own.

The State argues, but cites to no statistical studies for support, that the federal system has produced no "plethora" of wrongful convictions. Even Judge Torpy, in his concurring opinion below, noted the likelihood of wrongful convictions. *Knight v. State*, 107 So. 3d 449, 469 (Fla. 5th DCA 2013) (Torpy, J., concurring) ("I think courts could have, and *for the most part* would have, reached the same results using the rational trier of fact standard.) (Emphasis added).

As the above excerpts from Judge Torpy's concurring opinion in *Knight* and Judge Northcutts's concurring opinion in *Westbrooks* imply, the only reasonable conclusion to be drawn from instituting such a change is that it increases rather than decreases the probability that wrongful convictions will occur.

The critical consideration in retaining this process measures the weight of its second-step burden on the one hand against possibility of convicting an innocent defendant on the other. As expressed by Sir William Blackstone in his *Commentaries on the Laws of England* "It is better that ten guilty persons escape than that one innocent suffer."

As applied to the standard of review which the State's brief has placed under attack, this translates to the passionate language found in *Jones v. State*, 466 So. 2d 301, 326 (Fla., 3rd DCA 1986) (Hubbard, J., dissenting):

> The finger of suspicion implicit in circumstantial evidence is a long one and may implicate both the innocent and guilty alike. Persons caught in a web of circumstances may often appear guilty upon first impression, but in fact be entirely innocent as surface appearances are frequently deceiving. A person ought not be convicted of a crime, it is thought, and his freedom taken from him based on such tenuous and ambiguous evidence. To avoid, then, convicting entirely innocent people based on suspicion and innuendo, the law has long demanded a high standard of proof when reviewing convictions based entirely on circumstantial evidence. Given our long-standing commitment to the ideal of individual freedom, this result seems both fair and reasonable. As has been often stated, "[o]ur responsibility in such circumstances—human liberty being involved—is doubly great." *Head v. State*, 62 So. 2d 41, 42 (Fla., 1952), because "[the] cloak of liberty and freedom is far too precious a garment to be trampled in the dust of mere inference compounded." *Harrison v. State*, 104 So. 2d 391 (Fla., 1st DCA 1958).

Indeed, retaining the current system of review in circumstantial evidence cases does best serve the ends of justice. Collectively, courts and counsel alike are engaged in a noble endeavor only because we all dedicate ourselves to serving those ends.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the undersigned counsel respectfully asks that this Court reverse the decision of the Fifth District Court of Appeal in this cause, and remand the matter to the Circuit Court in and for Orange County with direction that it discharge Mr. Knight from the offense charged.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary), wildridge.robert@pd7.org (secondary) and weiss.ed@pd7.org (tertiary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; electronically delivered to the Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and mailed to Mr. Jonathan C. Knight, #146365, Suwannee Correctional Institution - Main, 5964 U.S. Highway 90, Live Oak, Florida 32060, on this 17th day of November, 2014.

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