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IN THE FLORIDA SUPREME COURT

Case No. SC17-805  
DCA No. 3D15-2339

**FRANCISCO RODRIGUEZ**  
*Petitioner*

v.

**THE STATE OF FLORIDA,**  
*Respondent*

*On Discretionary Review*  
*From the Florida Third District*  
*Court of Appeal*

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**JURISDICTIONAL BRIEF OF PETITIONER**

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## STATEMENT OF THE CASE AND FACTS

Appellant Francisco Rodriguez appealed his conviction for burglary with simple assault. The Third District Court of Appeal affirmed his conviction in *Rodriguez v. State*, 42 Fla. L. Weekly D789a (Fla. 3d DCA April 5, 2017), on the ground that any error was harmless. The opinion applies the miscarriage of justice standard for harmless error as follows:

Any error by the trial court in admitting the hearsay statements at issue was, at best, harmless. See § 59.041, Fla. Stat. (2015) (“No judgment shall be set aside or reversed...on the ground of...the improper admission or rejection of evidence...unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.”).

(App. 2). Mr. Rodriguez timely invoked this Court’s jurisdiction and now requests that the Court accept review of his conviction and sentence.

## SUMMARY OF THE ARGUMENT

This Court has repeatedly affirmed that the correct harmless error analysis to be applied on direct appeal is the one articulated in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), requiring the State to “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict.” But in this case, the Third District instead applied the standard pronounced in section 59.041, Florida Statute (2015), stating that an error is harmless unless it has “resulted in a miscarriage of justice.” The decision in this case directly conflicts with this Court’s decision in *State v. Lee*, 531 So. 2d 133 (Fla. 1988), which specifically rejects the miscarriage of justice standard for harmless error. The decision of the Third District also conflicts with numerous other decisions of this Court that reaffirm the *DiGuilio* standard, including *Ventura v. State*, 29 So. 3d 1086 (Fla. 2010), where the Third District incorrectly applied an overwhelming evidence standard similar to the miscarriage of justice standard it used here. The Third District’s misapplication of the law warrants this Court’s discretionary review.

## ARGUMENT

### **The Third District's Decision Applies the Wrong Harmless Error Standard, Directly Conflicting with this Court's Decisions in *Lee* and *Ventura*, as Well as Numerous Other Cases Holding that the *State v. DiGuilio* Analysis is the Correct Standard to be Applied.**

The Third District affirmed Mr. Rodriguez's conviction on the basis that any error of admitting hearsay testimony was harmless. (App. 2). Rather than apply this Court's harmless error standard first articulated in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), the Third District relied upon the standard found in section 59.041, Florida Statute (2015). (App. 2). This deviation is significant, as the two standards differ drastically from each other. The *DiGuilio* standard "places the burden on the State...to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the verdict." *DiGuilio*, 491 So. 2d at 1135. In contrast, section 59.041 states that an error is harmless unless it "resulted in a miscarriage of justice." § 59.041, Fla. Stat. (2015).

This Court has recognized that while the legislature has the power to enact harmless error statutes, "the inherent authority to determine when an error is harmless and the analysis to be used in making the determination" lies solely with the Supreme Court. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999), citing *State v. Lee*, 531 So. 2d 133, 136 n.1 (Fla. 1988). Pursuant to that authority, this Court

created the *DiGuilio* harm standard in 1986, and has repeatedly reaffirmed its validity over the years. *See Goodwin*, 751 So. 2d at 546 (“The *DiGuilio* standard of harmless error remains the applicable analysis to be employed in determining whether the error requires a reversal on direct appeal.”); *Lee*, 531 So. 2d at 136 (declining to modify the *DiGuilio* test); and *Knowles v. State*, 848 So. 2d 1055, 1058-59 (Fla. 2003) (“The *DiGuilio* standard remains the benchmark of harmless error analysis.”).

This case is in direct conflict with *State v. Lee*, 531 So. 2d at 136, in which this Court explicitly rejected the “miscarriage of justice” standard of section 59.041 in favor of the *DiGuilio* test. The lower court’s decision in *Lee v. State*, 508 So. 2d 1300 (Fla. 1st DCA 1987), demonstrates the difference between the two standards. The First District first analyzed the erroneous admission of collateral crimes evidence under the “miscarriage of justice” standard, finding that it was *not* a miscarriage of justice as the evidence of the defendant’s guilt was overwhelming. *Id.* at 1304. However, applying the *DiGuilio* standard, it found the error *was* harmful, as the State could not prove beyond a reasonable doubt that the error had not contributed to the verdict. *Id.* It certified the question of whether an error which is not a miscarriage of justice but also cannot be proven to not have affected the verdict, should be considered harmful. *Id.* This Court answered that question in the affirmative, rejecting the “miscarriage of justice” standard and reiterating the

authority of *DiGuilio. Lee*, 531 So. 2d at 136. Disregarding this holding, the Third District here applied the “miscarriage of justice” standard to find any errors in this case were harmless. (App. 2).

This case further conflicts with *Ventura v. State*, 29 So. 3d 1086, 1088 (Fla. 2010), where this Court reversed the Third District’s use of an “overwhelming evidence” harm analysis similar to the “miscarriage of justice” standard applied here. *Ventura* “explicitly rejected the overwhelming evidence test” and repeated that the crux of the *DiGuilio* test is “the effect of the error on the trier-of-fact,” not the strength of the remaining evidence. *Id.* at 1089, 1091. Importantly, this Court refused to assume that the Third District had considered the *DiGuilio* standard in the absence of any suggestion of such in the appellate opinion: “We cannot assume that an analysis was conducted or review that which remains hidden behind the written opinion.” *Id.* at 1091. This Court reversed the Third District and remanded for the correct application of the *DiGuilio* standard. *Id.* The same result is needed here, as the Third District has once again applied an erroneous harm standard, with no indication that it considered the proper *DiGuilio* standard. (*See* App. 2).

Because the decision below directly conflicts with *Lee* and *Ventura*, as well as other *DiGuilio*-progeny cases such as *Goodwin* and *Knowles*, this Court has jurisdiction to hear the case. Fla. Const. art. V, § 3(b)(3); *see also Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986) (“Based on the conflict created by this



misapplication of law, we have jurisdiction under article V, section 3(b)(3), Florida Constitution.”).

### **CONCLUSION**

Whereas this Court has repeatedly reaffirmed that the *DiGuilio* standard is controlling for harm analysis, the Third District has disregarded that mandate and substituted a “miscarriage of justice” standard. That misapplication of law warrants review.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Undersigned counsel certifies that the foregoing document has been furnished to the Office of the Attorney General, Criminal Division, One SE Third Avenue, Suite 900, Miami, Florida 33131, by email at [CrimAppMia@myfloridalegal.com](mailto:CrimAppMia@myfloridalegal.com), and to Assistant Attorney General Nikole Hiciano at [Nikole.Hiciano@myfloridalega.com](mailto:Nikole.Hiciano@myfloridalega.com) on this 5th day of May, 2017.

Pursuant to Rule 2.516, undersigned counsel hereby designates the following email addresses for service of all documents in this proceeding: [appellatedefender@pdmiami.com](mailto:appellatedefender@pdmiami.com) (primary); [NZB@pdmiami.com](mailto:NZB@pdmiami.com) (secondary).

*/s Natasha Baker-Bradley*  
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## CERTIFICATE OF FONT

Undersigned counsel certifies that the font used in this brief is 14-point Times New Roman.

*/s Natasha Baker-Bradley*  
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