

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC07-2238

THIRD DISTRICT CASE NUMBER 3D05-2798

JESUS GUTIERREZ,

PETITIONER,

V.

THE STATE OF FLORIDA,

RESPONDENT

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ON APPLICATION FOR DISCRETIONARY REVIEW

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**PETITIONER'S BRIEF ON JURISDICTION**

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### Arguments

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## **INTRODUCTION**

Petitioner's brief on jurisdiction request that this Honorable Court grant discretionary review pursuant to Rule 9.030(a)(2)(A)(iv), Fla R. App. P. , to review the decision of the Third District Court of Appeal, rendered June 7, 2007, based on express and direct conflict between that decision and decisions of this court, The Florida Supreme Court, as well as the Fourth District Court of Appeal concerning the same question of law: Whether or not the introduction of a transcript, of an audio taped telephone call, in which the defendant implicates himself shall be permitted in the jury room.

In this brief the clerk's record will be designated by the letter "R" followed by the volume number and then appropriate page number; the trial transcript by the letter "T", followed by the appropriate volume and page number. The letter "A" will constitute a reference to the appendix being filed along with this brief.

## **STATEMENT OF THE CASE**

The Petitioner was arrested and charged with thirteen counts of lewd and leucivious acts on a minor. A jury trial in this cause was held on September 26, 27, 28 and 29, 2005. The judge at trial dismissed seven counts as being duplicitous(T.III:387-390) The remaining six counts were submitted to the jury. The jury acquitted the appellant of three counts and found him guilty of 3 counts. (T.II: 600-601) On December 2, 2005 the lower court sentenced the appellant to

consecutive 10 years terms in Florida State Prison, or total of 20 years, followed 10 years of probation. (R.III:541-542)

A timely notice of appeal was filed and the Third District rendered an opinion on October 3, 2007. A timely motion for rehearing and reconsideration was filed on October 15, 2007. The Third District denied the motion for rehearing on November 1, 2007 and issued a mandate on November 21, 2007. A timely notice to invoke the discretionary jurisdiction of the Florida Supreme Court has been filed.

On appeal to the Third District Court of Appeal, the Petitioner, Jesus Gutierrez, challenged the trial court's allowing into the jury room, over defense objection, a transcript of a secretly recorded audiotape, in which the Petitioner incriminates himself, during deliberations.

### **QUESTIONS PRESENTED**

Does the decision of the Third District Court of Appeal directly and expressly conflict with three previous decisions of the Florida Supreme Court, *Hill v. State*, 549 So.2d 179 (Fla. 1989), *Martinez v. State*, 761 So. 2<sup>nd</sup> 1074 (Fla. 2000); *McCoy v. State*, 853 So.2d 396 (Fla. 2003) as well as the Fourth District Court of Appeal's decision in *Macht v. State*, 642 So. 2d 1133 (Fla 4<sup>th</sup> DCA 1994) all of which hold that a jury may view a transcript of a recorded telephone call, as an aid to understanding the evidence, but that the transcript can not go back to the jury room during deliberations?

Does the decision of the Third District Court of Appeal directly and expressly conflict with the previous decision of the Florida Supreme Court in *State v. DiGuilio*, 491

So.2d 1139 (Fla. 1986) which holds that in the event of error the State must prove beyond a reasonable doubt that the complained of error was harmless beyond a reasonable doubt?

### **SUMMARY OF THE ARGUMENT**

The decision under review is in express and direct conflict with three previous decisions of this court, the Florida Supreme Court, *Hill v. State*, 549 So.2d 179 (Fla. 1989), *Martinez v. State*, 761 So. 2nd 1074 (Fla. 2000) *McCoy v. State*, 853 So.2d 396 (Fla. 2003) as well as with the decision of the Fourth District Court of Appeal in *Macht v. State*, 642 So. 2d 1133 (Fla 4<sup>th</sup> DCA 1994). All of the aforementioned cases specifically hold that a jury may view a transcript of an audio tape but that the transcript shall not be permitted to be taken into a jury room during deliberations.

In addition the decision under review is in express and direct conflict with this courts previous decision in *State v. Diguilio*, 491 So.2d 1129 (Fla. 1986) which requires that a court applying the harmless error test demonstrate beyond a reasonable doubt that the error complained of did not contribute to the jury verdict.

### **ARGUMENT I**

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT AND/OR DISTRICT COURTS OF APPEAL CONCERNING WHETHER A TRANSCRIPT OF AN AUDIO TAPED CONVERSATION SHALL BE ADMITTED INTO THE JURY ROOM DURING DELIBERATIONS.

In the instant case it is uncontroverted that a transcript of a secretly recorded audio tape in which there are purported admissions made by the defendant ended up in the jury room over defense objections, during deliberations, and that this is error. *Appendix* Page 7-8. It is unclear how long the jury had the transcript because while waiting for the jury verdict the judge at trial apparently realized his error declared the transcripts inadmissible and retrieved them from the jury room. (T:III:598-599)

One of the seminal cases dealing with the issue of providing transcripts of recorded conversations to a jury, during trial, was rendered by this court in 1989 in the case of *Hill v. State*, 549 So.2d 179 (Fla. 1989). In *Hill* the petitioner argued that the trial court erred by allowing a transcript of a inculcating statement to the police to be used by the jury during the trial. *Id* at 182 This court, while upholding the trial court, held there is no suggestion that the transcript conflicted with or added information to the tape itself. The transcript was not carried into the jury room and there is no suggestion it became the focal point of inquiry. *Id* at 182.

The next major decision in regards to the use of transcripts, by a jury, during trial was issued by the Fourth District Court of Appeal in *Macht v. State*, 642 So.2d 1133 (Fla 4<sup>th</sup> DCA 1994). In *Macht* the Fourth Circuit relying on *Hill* stated: We believe *Hill v. State*, 549 So.2d 179 (Fla. 1989) supersedes the relevant language in *Stanley* and authorizes a jury to view a accurate transcript of an admitted tape recording as an aid in understanding the tape so long as the unadmitted transcript

does not go back to the jury room or become a focal point of the trial. *Id* at 1138.

In 2000 this court issued an opinion in *Martinez v. State*, 761 So.2nd 1074 (Fla. 2000). The holding in *Martinez* states how and under what circumstances transcripts can be used by a jury during trial. In *Martinez* this court specifically emphasized under what circumstances a transcript can be used by the jury. *Id* at 1084-1085. In addition this court specifically addressed the issue of the dangers of a trial court allowing a jury to view a transcript in the jury room during deliberations. In *Martinez* this court citing *United States v. Holton*, 116 F.3<sup>d</sup> 1536, 1540 (DC Cir. 1997), *cert denied* 522 U.S. 1067 (1998) held :

One of the primary dangers of allowing the jury to use an unadmitted transcript is that it may become the evidence that the jury relies upon rather than the tape itself. *Id* at 1084. Placing a transcript in the jury room during deliberations--after the completion of the supervised, adversarial portion of the trial--opens up the possibility that jurors will see the transcript as a neutral exhibit placed before them by the court and increases the chance that the document will be read without the tape recording playing alongside for the purpose of comparison. *Id* at 1084.

Furthermore this court in *Martinez* gave specific instructions on how a trial court should deal with situations in which the contents of a tape are disputed. This court held that in situations in which the contents of the transcript are disputed there are three courses of action a court can take; first, the parties can stipulate to its accuracy, second; the judge can listen to the tape and make a pre-trial determination of its accuracy by playing the tape and reading it against the transcript to determine

it's accuracy and third, the parties can each submit a copy of their version of the transcript and allow the jury to view both. *Id* at 1085. The judge at trial chose a fourth alternative which was to decline to listen to the tape prior to allowing the jury to review the transcript. (R:III:97) He then admitted it into the jury room.

The decision in *Martinez* has been upheld by this court in *McCoy v. State*, 853 So.2d 396 (Fla. 2003). The decision in the instant case is clearly in direct and express conflict with all of the previously cited cases. To begin with this court, as well as the Fourth District in *Macht*, while upholding the use of transcripts by a jury, all made specific findings that the use of transcripts is permissible, as an aid to understanding the evidence, as long as the transcripts do not go back to the jury room and become a focal point of the trial. The decision of the Third Circuit in the instant case, *Gutierrez*, now stands alone in annals of Florida legal history as the only case ever decided that permits the use of transcripts, of this nature, in the jury room during deliberations. As such, there is express and direct conflict between the Florida Supreme Court and the Third District Court of Appeal. In addition there is also express and direct conflict between the Fourth District Court of Appeal and the Third District Court of Appeal.

What occurred in the *Gutierrez* case is exactly what this court warned against in all of the previously cited opinions. That a jury could view the transcript as a neutral exhibit during the trial but not rely upon it while deliberating a case.

Based on the facts of this case the jury requested, and then received, a copy of the transcript, during deliberations, and then rendered a verdict. (T:III:598-599) This case was far from a slam dunk as the jury acquitted Gutierrez on three of the counts. In the transcript the Gutierrez purportedly admits to having sex with the victim on three occasions and only after being presented with the transcript in this matter does the jury convict Gutierrez.

The opinion of the Third District Court of Appeal seems to hold that if a transcript is deemed accurate then there is no error in allowing them into the jury room.<sup>1</sup> It would then be up to the defendant to prove prejudice and not the state. This is completely contrary to this Court's decisions in *Hill*, *Martinez*, *McCoy* and the Fourth District in *Macht*.

## II.

THE DECISION BELOW IN WHICH THE PANEL OF THE THIRD DISTRICT COURT OF APPEAL INDEPENDENTLY REVIEWED THE EVIDENCE AND FOUND THE ADMISSION OF A TRANSCRIPT IN THE JURY ROOM WAS HARMLESS ERROR IS IN DIRECT CONFLICT WITH STATE v. DiGUILLIO, 491 So.2d 1129, (FLA 1986) WHICH HOLDS THAT AN APPELATE COURT CANNOT SUBSTITUTE ITS JUDGEMENT FOR THAT OF A TRIER OF FACT BY SIMPLY WEIGHING THE EVIDENCE AND THAT THE STATE NOT THE DEFENDANT HAS THE BURDEN OF PROVING THE ERROR WAS HARMLESS.

The standard for harmless error review used in Florida was set out in this court in *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) Adopting the test outlined in

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<sup>1</sup> Appendix pages 8-9.

*Chapman v. California*, 386 U.S. 18 (1967), this court held:

The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, there is no reasonable possibility that the error contributed to the conviction. *Id* at 1135.

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.

In the instant case the Third District apparently listened to the tape, which by the time of trial was digitally enhanced and placed on a compact disc, (T.III:355) and determined that the error was harmless. The Third District made this determination without applying the harmless error test, as set forth by *DiGuilio* and its progeny, and therefore did not require the State, who was the recipient or beneficiary of the error, to prove beyond a reasonable doubt that the error was harmless.

A careful analysis and application of the facts, as applied to the error, would indicate that in all likelihood the evidence *may have been the direct cause of the verdict.* The fact of the matter is that on in the transcript Gutierrez purportedly

admits to having sex with the victim on three occasions. The jury convicted Gutierrez on three counts and acquitted him on three counts. The only inference that could be made from the record is that during deliberations there was a discussion amongst the jurors and at least one of them suggested that they review the transcript to determine what was said. If there were no debate amongst the jurors why else would they request the transcript?

Because the opinion of the Third District does not focus its analysis on the possible effects of this error on the trier of fact, or jury, there is no way to determine whether or not this evidence did not effect the jury beyond a reasonable doubt. In fact the Third District did the exactly what this court has warned against which is to substitute itself for a jury by simply weighing the evidence. The opinion of the Third Circuit does not discuss how the state meet their burden of demonstrating beyond a reasonable doubt that the evidence did not effect the verdict.

Furthermore the opinion of the Third District Court of Appeal reverses the burdens as set forth by *DiGuilio* and its progeny. In their opinion the Third District holds:

Here, although defense counsel objected to the use of the transcript in the jury room, he did not object based on the accuracy of the transcript. Thus, Gutierrez has not shown how he was prejudiced. *Appendix* at page 9.

This holding of the Third District Court of Appeal is in express and direct conflict with the Florida Supreme Court in *DiGuilio* and its progeny. It completely misstates the law in Florida. The State, not Gutierrez, having benefited from the error, is the party that has to prove beyond a reasonable doubt that the error did not contribute to the verdict.

### **CONCLUSION**

The decision of the Third District Court of Appeal is clearly in express and direct conflict with this Court as well as other Courts of Appeal. For the foregoing reasons this Court should grant this petition for discretionary review.

### **CERTIFICATE OF FONT**

Counsel would certify that the typeset and font utilized in the printing of this brief is Times New Roman 14 point in compliance with Florida Rule of Appellate Procedure.

### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this document was furnished by deposit in the U.S. Mail to the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Fl. 33131 this \_\_\_\_ day of December, 2007.

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