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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE SUPREME COURT

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RAFAEL A. PADILLA,
Defendant Below,
Appellant

v.

No. 76, 2003

STATE OF DELAWARE,
Plaintiff Below,
Appellee

MOTION TO REMAND

The State of Delaware moves to remand the instant appeal to the Superior Court with directions to allow the entry of a *nolle prosequi* pursuant to Criminal Rule 48(a). In support thereof, the State submits the following:

1. In April 2001, a grand jury indicted Rafael Padilla, charging him with various drug offenses. His first trial, in March 2002, ended prematurely when Superior Court granted a defense motion for a mistrial because of an alleged discovery violation. Thereafter, the defense moved to bar retrial on double jeopardy grounds. That motion was denied, and in November 2002, the defendant was tried and convicted of possession with the intent to deliver cocaine, delivery of cocaine, use of a vehicle to transport cocaine, and second degree conspiracy. On Superior Court's denial of his motion for a judgment of acquittal or a new trial, the defendant appealed to this Court, alleging primarily that the prosecution had severely prejudiced his right to a fair trial by failing to comply with the discovery rules set out in Criminal Rule 16 and *Brady v. Maryland*, 373 U.S. 83

(1963). After briefing and oral argument, the Court directed the State to expand the record in certain respects and further directed the filing of supplemental memoranda.

2. Following oral argument, the Attorney General learned of the complaints presented in this appeal regarding the prosecution's discovery responses. As a result, she has personally reviewed this case, including the briefs filed with this Court, the tape recording of the oral argument, and the Criminal Division file. The State continues to assert, as it previously argued in its answering brief, that there is no basis for any extension of the double jeopardy clause to have barred the retrial of the appellant. Notwithstanding the State's initial position on appeal, the Attorney General has determined that in light of the particular errors in the prosecution's discovery responses, leading to the declaration of a mistrial in appellant's first trial, no retrial should have been undertaken and a *nolle prosequi* should have been entered as a matter of prosecutorial discretion. As this Court wrote in 1988, "The Attorney General recognizes a continuing need to internally review cases to ensure that justice is done." *Weddington v. State*, 545 A.2d 607, 612 (Del. 1988). Although a change in the State's original position at trial and on appeal is extremely rare, the State submits that upon further internal review, it appears that a retrial, which led to appellant's instant convictions, was not in the interests of justice. See

Weddington, 545 A.2d at 612 (Attorney General acknowledged that error had occurred as result of improper questioning).

3. In light of the foregoing, the Attorney General suggests that the appropriate measure of relief would be the entry of a *nolle prosequi* in the Superior Court. Such a remedy would effectively grant appellant the relief he seeks in the instant appeal and place him in the position he would have been had the Superior Court granted his motion to dismiss following the mistrial. In light of the State's confession of error, see *Weddington*, 545 A.2d at 612, the Attorney General accordingly submits that the case should be remanded to Superior Court with directions to allow the entry of a *nolle prosequi* under Criminal Rule 48(a).

4. Andrew G. Ahern, III, Esq., counsel for appellant, has been contacted and consents to the requested remand and to the entry of a *nolle prosequi* in the Superior Court.

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WHEREFORE, the State of Delaware prays that the case be remanded to the Superior Court with directions that the Superior Court allow the entry of a post-trial nolle prosequi under Criminal Rule 48(a).

Loren C. Meyers
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February 2, 2004

SO ORDERED this 3d day of February, 2004.

E. James Veary
Justice

Supreme Court of the State of Delaware
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