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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 87,575

MILO WILSON,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court, and he was the appellant in the District Court of Appeal. He will be referred to as Wilson and as Respondent in this brief.

The record on appeal, including the volumes of transcribed testimony, is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

RESPONSE TO PETITIONER'S JURISDICTIONAL STATEMENT

Jurisdiction of the certified question

Petitioner timely filed a notice invoking the Court's jurisdiction on a certified question. The Court has jurisdiction to review the decision in this case.

Respondent does not agree that the case is of great public importance premised upon the inventory of other cases Petitioner has listed because those matters are outside the record and, except for some of them, are not reported decisions. Those cases that have proceeded to decision through to denial of certiorari by the United States Supreme Court and are final. They will be unaffected by the decision in this case. E.g. Jones v. State, 656 So. 2d 489 (Fla. 4th DCA 1995); Jones v. State, 662 So. 2d 365 (Fla. 4th DCA 1995); Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA 1995). Others cases Petitioner has listed involve differently worded remarks by several other judges in the 17th Judicial Circuit. They may or may not be controlled by the decision herein. The reported case of Bove v. State, 21 Fla. L. Weekly D709 (Fla. 4th DCA March 20, 1996), shows the extent to which such improvised explanations of reasonable doubt may infringe other essential concepts such as the burden of production of evidence, when the court explained that absence of proof that a person possessed a screwdriver would eliminate any reasonable doubt of his means of entry into a room through an air-conditioning duct. These kinds of extremes to which the mischief of these ad hoc instructions have gone can be reviewed through decisions issued and reported and thus may be considered by the Court as they may bear upon the Court's decision whether the departure from the approved standard instruction on reasonable doubt, of the type shown in this case, is a fundamental

error.

The other pending cases are outside the record in this case. They are not fair for consideration in deciding the legal issue presented regarding the judge's reasonable doubt instruction to the jury during the selection process. Neither this Court nor Respondent can fairly or fully examine the records in them so as to determine their proper role as affecting decision of the issue before the Court.

Respondent does not disagree that the trial judge has been making preliminary instructions for years defining reasonable doubt in terms of less than certainty. Respondent does not agree that instruction now used has been used in previous years. The precise remarks in this case are all that is before the Court in this case.

Respondent has no knowledge whether the other cases Petitioner has mentioned would or would not be difficult for the State to retry. Petitioner's argument that if cases are to be retried that victims and witnesses would be affected is an irrelevant and inappropriate consideration to the legal issue of whether the proceeding was fundamentally flawed or deficient.

Jurisdiction of the second issue based on conflict of decisions

Respondent disagrees that there is any conflict of decisions on the issue the court decided below in this case regarding the whether grand theft is a necessarily included lesser offense to robbery. The decision asserted for conflict, J.C.B. v. State, 512 So. 2d 1073 (Fla. 1st DCA 1987), does not assert any contrary rule of law to that applied by the court in the present case. There is no conflict within the four corners of the decisions. J.C.B. did not approve a grand theft lesser conviction. The information was held to have been insufficient to encompass grand theft because the information did not lead to the necessary conclusion that value exceeded the felony amount. The court held it was not adequate to possibly, and uncertainly, constitute a felony amount. The charge must put the accused on notice that value is an element. The dicta which Petitioner bases its claim of conflict jurisdiction over that issue herein is a mere passing reference, in contradistinction to the holding itself, that some charging document might in some circumstance name property unmistakably informing an accused that a felony amount was

involved. Such is insufficient upon which to base jurisdiction over that issue in this Court on ground of conflict of decisions.

The District Court of Appeal reversed Respondent's convictions on two counts of grand theft for new trial based upon its decision in the case of Jones v. State, 656 So. 2d 489 (Fla. 4th DCA 1995), rev. denied, 663 So. 2d 632 (Fla. 1995), cert. denied 64 U. S. L. W. 3691 (April 15, 1996). The district court reversed on two grounds: the trial judge's self-styled instruction explaining reasonable doubt given to the jury during voir dire were found fundamentally erroneous and prejudicial and a new trial was ordered on that point, and on the second ground the court ordered the adjudications for grand theft reduced to petit theft because the information failed to include an allegation of value.

On Motion for Certification of Question, the district court certified to this Court the question whether the instruction given in this case, quoted in the court's order on motion to certify, impermissible reduced the reasonable doubt standard below the protection of the due process clause and, if so, is such an instruction fundamental error? Respondent submits that the first question subsumes the second in that if the instruction violates the protection of due process of law such it would be fundamental error.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case subject to the following relevant exceptions and additions:

1. The second count of the information charged in Count II Respondent and a co-defendant Antwan Ricks with having taken money from custody of Clara Wells without stating the amount of money taken (R-455). The Respondent concedes that this allegation is insufficient to base a grand theft conviction upon and that the felony conviction on that count must be vacated and a misdemeanor conviction entered instead. (Petitioner's Brief on the Merits, p. 49, fn 9).

2. The record shows that Respondent made clear to the trial court that he requested an instruction on petit theft and not grand theft because grand theft was not a necessarily included

lesser offense. The trial judge asked Respondent what lesser included offenses were being requested (R-369). Respondent replied, "Just the standards, Judge, just the category ones." The court asked Respondent to "be more specific." (R-369). Respondent stated the three lesser included offenses he meant: "Robbery with a weapon. Strong armed robbery, and petit theft I believe are the category ones for --" (R-369). The court, again, asked if Respondent wanted petit theft or grand theft (R-369). Respondent stated: "Petit theft." (R-369).

When the prosecutor requested grand theft, Respondent further stated that it was not necessary for the court to instruct on category two lesser offenses and that the law requires only category one lesser included offenses (R-369). Petitioner's facts regarding the charge conference omitted these relevant portions. No motion was made by Petitioner to amend its information to include any allegation to support a grand theft instruction.

3. Respondent does not accept as accurate the emphasis supplied throughout the Petitioner's brief in quoted transcript portions to reflect the manner in which the words were spoken at the trial.

STATEMENT OF THE FACTS

Respondent's statement of the facts are accepted subject to the following relevant additions because the statement in Petitioner's brief is incomplete, copied from Respondent's brief in the district court but without relevant portions necessary for a full and accurate understanding of the evidence and proceedings at trial so as to be inclined most favorably to the verdict Petitioner wishes it had received, not most favorably to the verdicts that were received. The Statement of the Facts is accepted with the following relevant additions:

1. Concerning the identifications of Respondent, on cross-examination Mr. Ramsaroop conceded that in earlier deposition testimony he had stated that the suspect wore a long sleeved green shirt that looked like a sweater (R 165). The suspects he identified the night of the robbery were wearing different clothes (R 165-166). Mr. Ramsaroop stated that Respondent's hair at trial was different than it appeared at time of the robbery (R 175).

Ms. Wells testified that the robbery occurred at about 10:10 p.m., and that the parking

lot was "not very bright" (R 179). The two black males who approached were 5'7" - 5'9", one wore a baseball cap and a dark green sweatshirt and dark baggy pants. The other wore a white t-shirt and baggy pants (R-179-180). The one in the sweatshirt had the gun, and Ms. Wells at trial identified this person as Respondent (R-180-181). According to Ms. Wells she gave him $120.00 in twenty dollar bills, which was found on co-defendant Antwan Ricks, not Respondent (R-183-185). She said it was Respondent who looked through her wallet for money (R-182). The wallet was tested for fingerprints (R-204). The examiner found a print that was not Respondent's print on the wallet (R-315). The print remained unidentified (R-204,315).

2. Respondent was stopped twenty minutes after the robbery, Ms. Wells was unable to identify Respondent although the area where this occurred was well-lighted and the police turned Respondent around to different angles for her to view him (R-189-190,206-207). She identified Antwan Ricks at the scene, and she knew him immediately (R-190). At this time he had on a white t-shirt and baggy pants (R-190). At the time of the robbery Ricks had a "nasty attitude" and had the same attitude when taken out of the car (R-190).

She then told the officers to check Respondent's pockets to see if their property was there (R-189-190,206). Some money and Mr. Ramsaroop's bracelet was found in Respondent's pocket (R-190). Ms. Wells went to the police station, where she had another opportunity to view Respondent through a one-way glass as a detective questioned Respondent (R-192). She was again not able to identify Respondent (R 192). She explained that both persons in the robbery wore hats which precluded her from being able to describe their hair (R-205-206). Her testimony was that, after at least three opportunities to view Respondent and being unable to make an identification, the police kept asking her if could make an identification (R-207). Ms. Wells then told the police she felt she knew the eyes and voice of the person (R-193-195,208). The police went back in and talked with Respondent some more (R-192). She was able to hear and observe while the officer told Respondent that people thought he robbed them, and she observed saw how Respondent stared when he turned his head and rolled his eyes and made them very large, and this is when she made an identification of Respondent (R-193-194).

4. The detective's testimony at trial conflicted with Ms. Wells when he stated that when both suspects were brought into the room with one-way glass, they were immediately and positively identified by Ms. Wells (R-342-344). The detective said she was given one chance to make an identification at the station and that she never said she could not (R-354).

5. When Antwan Ricks testified at trial implicating Respondent, Ricks admitted on cross-examination that he had been aware of the mandatory minimum three-year sentence for use of a firearm when he plea guilty in return for a non-mandatory sentence of three-years and three months and two year probation (R-327-329). He had originally testified that nobody changed clothing, but he later changed his mind and had said that Respondent took off his sweater and left it at "Mike's" (R-333). He had not told the police that Respondent took off a sweater (R-333). As far as he knew no sweater was ever found (R-333).

6. An officer's testimony at trial that a one-hundred dollar bill was pulled out of the back seat of the police vehicle after transporting one of the suspects back to the station also included the officer's testimony that the person transported was in the courtroom (R-296-297). The person transported by the officer was the "light skinned" male (R-297).

7. When Officer India patten down Respondent and Antwan Ricks, a bracelet and $137.00 on Respondent's person (R-253). The officer described this bracelet as not unusual and like others the officer had seen before (R-262-264). There was $180.00 found on Antwan Ricks (R-253).

8. Respondent argued the conflicts and potential doubts in the evidence during closing argument to the jury when he pointed out the problems with Ms. Wells identification, and the detective's inconsistent testimony about it (R 378-379, 398). Mr. Ramsaroop's testimony about the hair on the robbers was contrasted against Ms. Wells testimony that they wore hats (R 378, 398). The inconsistent testimony about whether the bracelet was unusual was argued (R 377). The lack of credibility of Mr. Ricks testimony concerning switching the property and his motivation to avoid being identified as the person with the gun was argued, (R 384, 399), along with the facts that the officer who found the $100.00 bill in the police vehicle could

not state that it was Respondent that she had transported and could not identify Respondent at trial, (R 382-383), and that the wallet held by the robber did not have Respondent's fingerprint on it and contained a fingerprint that has not been identified (R 383-384)

During deliberations the jury requested the testimony of two officers re-read to them (R-432). The jury returned verdicts of guilty on grand theft (R-441, 466-467).

SUMMARY OF ARGUMENT

The Respondent will argue that the district court of appeal applied sound principles of law in ruling that the ad hoc, admonition or instruction, given to the jury that informed the jury that certainty was not essential to a criminal verdict of guilt was proper and within that court's authority to decide questions of law. The use of fundamental error is consistent with this Court's prior decisions on deviations from the approved reasonable doubt instruction.

The trial court's attempt to define reasonable doubt in a manner that eased the jury's determination of guilt was prejudicial and the decision below was correct both on the merits of the instruction and in the use of fundamental error. There is little in our constitutional law more established than that the reasonable doubt standard is essential to the core of a lawful verdict and to the validity of the outcome of a criminal proceeding. The court below did not err in its determination.

Secondly, the Respondent did let the trial court know clearly that a petit theft, and not a grand theft, instruction was requested as it was the only one that was a category 1, or necessarily included lesser offense in this case. The court below was following established authority in determining that the only proper lesser included theft offense was petit theft and in reducing the conviction. Without notice and opportunity to prepare for a charge of grand theft, which was not noticed in the information, the Respondent was correct in his objection and there was no waiver because Respondent did not request the instruction, made known that he did not want it, and did not rely upon it.

The Court should approve the decision below and answer the certified questions in the affirmative.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT FUNDAMENTALLY ERRED IN MAKING THE INTRODUCTORY COMMENTS TO THE JURY VENIRE PRIOR TO THE SELECTION OF THE JURY, WHEN THE APPROVED STANDARD JURY INSTRUCTION ON REASONABLE DOUBT WAS FULLY READ TO THE JURY DURING THE INSTRUCTIONS TO THE JURY IMMEDIATELY BEFORE THE JURY RETIRED TO DELIBERATE?

(a) The Question before the Court and Victor v. Nebraska.

The Petitioner's framing of the issue is somewhat different from the certified question and partly begs the question. The question before the Court is clearly that the district court found a substantial deviation from a correct instruction about the standard of proof for a jury to find an accused guilty in a criminal trial. The court below relied upon Cage v. Louisiana, 498 U.S. 39 (1990), and followed its decision in Jones v. State, 656 So. 2d 489 (Fla. 4th DCA 1995), rev. denied, 663 So. 2d 632 (Fla. 1995), cert. denied 64 U. S. L. W. 3691 (April 15, 1996), in reversing Respondent's conviction for a new trial.

Petitioner's assertion is that the decision below is at odds with the decision of the Supreme Court in Victor v. Nebraska, 511 U. S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583 (1994). That will be the first issue addressed by Respondent.

The Supreme Court in Victor held, while ruling on a challenges to instructions in two consolidated cases due to use of the term "moral certainty" or "moral evidence." in describing the degree of certainty required. While considered antiquated, the Court found that term as a whole focused upon the requirement that the jury reach a state of certainty of based on the evidence of guilt and not upon the morality or ethics of the acts of the accused.

That is a very different issue than the one before the Court regarding the trial court's excursion into describing reasonable doubt in terms of remaining doubts and lack of a need for certainty. The court expressly told the jury that it could have doubts and still convict. The Court in Victor approved an instruction that included telling the jury that "strong probabilities"

of the case could support a guilty verdict. What distinguishes that instruction is that it also was balanced with a clear admonition that could only be viewed as having impressed upon the jury the need to reach the subjective state of near the kind of certitude inherent in human or moral affairs. Citing to Jackson v. Virginia, 443 U.S. 307, 315 and 320, n. 14 (1979), the Court found that instruction to be constitutionally acceptable because it could not reasonably be understood to invite conviction on less than the constitutionally required proof. The instruction in the present case fails in that regard. When the trial court told the jury it had to attach a reason to any doubt or doubts it that would influence a not guilty verdict the standard of proof was reduced the level below that approved in Victor.

Moreover, the Court in Victor did not approve singling out for special emphasis having doubts and still convicting. This is unprecedented in its deviation from the required instruction by the manner in which the pre-trial admonition was directed as easing the standard, and in expressing that the trial judge was concerned not with the jury being, in their minds and conscience convinced, but in their not worrying about being certainty or doubt free in finding guilt. When an instruction affirmatively directs a trial jury to a potential conviction based on less than the Due Process requirement of proof beyond a reasonable doubt it is equivalent to reducing the proceedings to no verdict at all. Sullivan v. Louisiana, 508 U. S. ___, 113 S. Ct. 2078, 124 L. Ed 2d 182 (1993)(constitutionally defective instruction in a state trial on reasonable doubt cannot be harmless error).

The Court in Victor simply did not confront an instruction such as given by the judge in this case. Respondent submits that the Court should not find that the district court was not in error in its decision because this Court has over a century adhered to the use of correct and approved instructions that express the standard of proof as equivalent to certainty. The Court has disapproved instructions that depart from that concept. It is a too much of a stretch to view Victor as approving such a departure as occurred in this case, especially when the subject was singled before the jury apart from the complete reasonable doubt instruction and from the other law the jury was required to apply.

As Petitioner has noted, the Court did note in Victor that it on one occasion found an instruction on reasonable doubt in violation of the Due Process Clause. Cage v. Louisiana, supra, 498 U.S. 39 (1990). Regardless of the number of cases, since the Supreme Court is reluctant to dictate precise wording for a state's standard instruction, the principle is established that anything below the level of beyond a reasonable doubt is contrary to fundamental concepts and values expressed in our constitution.

While the trial court in the present case utilized some of the words from instruction quoted in Victor, it abandoned the full meaning and scope of what that is intended to convey by directing the Respondent's trial jury away from the rigorous standard of elimination of uncertainty, within human reason, and toward a less rigorous but undefined standard. The failure to define some definite standard is a departure from the essential requirement that the jury be informed of the standard the constitution requires for conviction in a criminal trial.

(b) The Timing of the Pre-Trial Instruction.

The Respondent argues that the pre-trial timing of this erroneous instruction makes it harmless. Yet, it was given while the jurors were being qualified on their oaths. It not only instructed them, it emphasized the admonition and made what it said a part of their very qualification to serve in this case. The jury was pre-conditioned to understand the later jury instruction to mean what they had been qualified to understand them to mean. It would not matter if the judge read the standard instructions several times, without further advising them to affirmatively disregard what they had understood the "explanation" to mean earlier, the harm would not be erased. The admonition during voir dire included a very direct admonition to apply nothing stronger than something less than certainty while failing to convey any kind of moral certainty that is the hallmark of what the instruction seeks to convey. The instruction was designed to ease the burden of conviction. The judge additionally specified that this same concept, or idea of what proof beyond a reasonable doubt means, would be expounded upon more fully during the final instructions thus linking these early instructions to what the jury would hear later. This is the opposite of correction and curing an erroneous instruction. The

primacy of this explanation and the way in which it was stressed to a jury as a mistake they might make by applying too high a standard of proof destroyed the fairness of the proceeding.

The timing of the admonition does noting to eliminate its harm. Accordingly, the later giving of the standard instructions were tainted earlier by the emphasis and the primacy of the non-standard explanation of the doubts that could remain for a verdict of guilty. The length of time this remained before the jury, as the entire case was tried, for ninety-percent of the jury's service was significant enough to be susceptible of overcoming a standard instruction when no warning was given to disregard what the jury had earlier been carefully admonished to believe when the standard instruction was heard.

(c) The Instruction Violates Prior Decisions of the Court. Respondent believes Petitioner is incorrect in stating that the instruction was correct as far as it went. This Court has over 100 years adhered to the rule that moral certainty is exactly what is meant by the state's burden of proving guilt beyond a reasonable doubt in a criminal case. Beyond a reasonable doubt, and moral certainty, mean the same thing. The proof required is beyond a reasonable doubt, not simply to a reasonable doubt. Nothing less is permissible, and neither a tie nor a preponderance, not even a clear and convincing quantum of proof, go to the plaintiff in a criminal case.

The standard of proof is as fundamental to the principle that to try an incompetent defendant violates due process. Medina v. California, 505 U. S. 546, 453 (1992); Drope v. Missouri, 420 U. S. 162, 171-172 (1975). Recently in Cooper v. Oklahoma, ___U. S. ___, (April 16, 1996), the Court engaged in a similar analysis to determine whether the standard of proof to prove incompetency is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id., at___ ,(quoting Patterson v. New York, 432 U. S. 197, 202 (1977). Finding that the presumption of competence offends no fundamental principle, the Court held that the "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." Id., at ___, (quoting Cruzan v. Director, Mo. Dept. of Health, 497 U. S. 261, 283 (1990).

The standard of proof is a basic concept rooted in our criminal justice system, and inherent in the individual protections afforded by our Constitutions. The Court stated, in Cooper, at ___, quoting from Addington v. Texas, 441 U. S. 418, 423 (1979):

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Quoting, In re Winship, 397 U. S. 358, 370 (1970) (Harlan, J., concurring).

This Court has a long ago adopted and has consistently adhered to requiring proper instruction to a jury of the standard, and burden, of proof in a criminal trial. In Lovett v. State, 30 Fla. 142, 11 So. 550 (1892), the Court considered in depth the necessary and correct instruction that should be given on reasonable doubt in a criminal trial. Formulating what has become Florida's long adhered to standard instruction, the Court recognized "the difficulty of defining a reasonable doubt" and utilizing what it termed "eminent judicial sources," framed the instruction used to this day. Most enlightening is the discussion in numerous cases teaching that it is an evaluative, weighing, by the jury to inform and convince their minds and consciences. After setting forth the instruction, much the same used today, the Court said in Lovett, 30 Fla. at 163, 11 So at 554:

> From what is said in the last preceding paragraph we think there will be no difficulty in the future in formulating a brief but sufficient charge on the question of a reasonable doubt, adhering to the idea of it heretofore sanctioned by this court (Earnest vs. State, 20 Fla., 383), and avoiding any of the questionable expressions as to it.

Throughout our state's history, the Court has made clear that the standard of proof requires a conviction in the minds and conscience of the jurors, in Lovett, supra, 30 Fla. at 157-158. A conclusion formed after weighing all the evidence or circumstances "without being fully convinced of the correctness of the such conclusion" is "altogether insufficient for a conviction in a criminal case." Id.

In Woodruff v. State, 31 Fla. 320, 12 So. 653 (1893), the Court, following Lovett, equated proof beyond a reasonable doubt to evidence or testimony evidence that "produces an abiding conviction to a moral certainty of the guilt of the accused [for] there is no reasonable doubt; whatever doubt may co-exist with such a state of proof is not reasonable. 31 Fla. at 337-338, 12 So. at 658. The Court in Woodruff held that it was permissible to use words equating "to a moral certainty" and an instruction could be correct without that phrase if, and conditioned upon, another expression of equivalent terms. Thus, the Court made clear that certainty, of a kind inherent in the nature of human affairs, is required. A proper instruction must, in substance be consistent with what has been approved by the Court. Woodruff, supra 31 Fla. at 337, 12 So. at 658. See also, Thomas v. State, 220 So. 2d 650 (Fla. 3d DCA 1969), holding that proof beyond a reasonable doubt and to "a moral certainty" are interchangeable and synonymous.

Respondent believes the court below was correct in holding that a court's admonition to a jury that it may have doubts and still find the defendant guilty departs by conveying a contrary standard, less than proof to a moral certainty. It conveys lesser that risks a verdict that carries less than the confidence in a criminal conviction required by the Due Process Clause of both the Florida and United States Constitutions.

This Court in Archer v. State, 21 Fla. L. Weekly S119 (Fla. March 14, 1996), stated the rule that "jury instructions are subject to the contemporaneous objection rule" and that absent an objection at trial an error can be raised on appeal "only if fundamental error occurred." 21 Fla. L. Weekly at S120. Fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. The Court quoted State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991), which quoted from Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). In considering whether an instruction attempting to define what is reasonable doubt is fundamentally erroneous, the Court will affirm when there is "nothing misleading or confusing about the charge." McLeod v. State, 128 Fla. 35, 44, 174 So. 466, 469 (1937).

An instruction that indicates that certainty is not required is misleading and confusing because it directs that something less than moral certainty in the minds of the jury can suffice to support a lawful verdict of guilt. Davis v. State, 90 Fla. 816, 107 So. 245 (1925). If a court decides to instruct that an "absolute metaphysical and demonstrative certainty," is not required, it is misleading to fail to inform the jury that certainty of a moral kind, of the nature inherent in human affairs is required. Simply put, guilt must be conclusive, a satisfactory conclusion to a moral certainty is essential. Id. Asher v. State, 90 Fla. 75, 105 So. 140 (1925).

To determine if a deviation is fundamental the Court has looked to whether harm could have "reasonably resulted." A misinstruction on reasonable doubt the error can be deemed fundamental and is not only when such substantial harm could not have reasonably resulted. Witherspoon v. State, 76 Fla. 445, 80 So. 61 (1918).

In light of the facts in this case, where the witness failed to identify the Jones several times immediately following the crime, where no sweater was found, and where the witness and officer were in conflict regarding any earlier identification at the station the jury could have, and did have by its reduced verdict, substantial doubts of the guilt of Jones to the crime charged. Without the flawed instruction the jury there is a likelihood the jury could have reasonably have found him not guilty of any charge. It is not shown beyond a reasonable doubt that the instruction did not deter the jury from assuring that it had a moral certainty of Respondent's guilt in this crime, as opposed to being either an unwilling assistant once the co-defendant initiated a robbery or that he was an accessory after the fact. The error in the instruction is therefore harmful constitutional error. It goes to the core Due Process interest in assuring the required level of confidence in criminal judgments and the district court should not be found in error in deciding that it was a fundamental deviation necessitating a new trial.

The judge's attempt to equate "reasonable doubt" with a doubt it could attach a reason to is fallacious. A reasonable doubt need not be more than a simple doubt of some kind arising from the evidence in the minds of the jury. It is not an objectified or quantified

standard as the last line of the judge's instruction, also non-standard, states. It is a qualitative, evaluative, standard. In Hampton v. State, 50 Fla. 55, 39 So. 421 (1905), the Court had occasion to consider an admonition that is very similar to the instruction disapproved below that the jury had to be able to attach a reason to any doubts in order to acquit:

> The court charges you that a reasonable doubt is that state of the case which after the comparison and consideration of all the evidence in the case leaves the minds of the jurors in that condition, that they can not say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. (If you have a simple doubt, you are not to acquit, but it must become a reasonable doubt, that is comfortable to reason, which would satisfy a reasonable man, under all the facts and circumstances as testified to in this case.)

Of this the Court said, 50 Fla. at 79, 39 So. at 429:

> The last clause of this charge that we have enclosed in parenthesis is erroneous for several reasons. A "simple" doubt, as contradistinguished from an intricate or complicated doubt, may be such a reasonable doubt as would require an acquittal -- indeed every reasonable doubt may be accurately said to be a simple doubt; and it is error to instruct a jury that it must not acquit if it has a simple doubt. The charge is erroneous also because it requires the reasonable doubt that justifies acquittal to be such a doubt "as would satisfy a reasonable man under all the facts and circumstances as testified to in the case." Satisfy the reasonable man of what? Of the fact that his mind was in a state of doubt, or satisfy him of the guilt or innocence of the accused? The charge does not at all tend to elucidate the meaning of the phrase "reasonable doubt," but on the contrary confuses and beclouds the subject, and leaves the minds of the jury mystified and in a more unsatisfied state than they would be in if laboring under a half dozen reasonable doubts. Hall v. State, 31 Fla. 176, text 190, 12 South. Rep. 449; Wood v. State, 31 Fla. 221, 12 South. Rep. 539.

At bar, the trial judge departed on another aspect of the standard of proof by shifting the burden of persuasion when it admonished that a reason need be attached to any doubt considered reasonable. See, Mullaney v. Wilbur, 421 U.S. 684 (1975). This in effect truncates the concept and suggests a test for either specific evidence of innocence or such a high level of doubt that approaches either a clear and convincing standard or whatever standard the jury actually determined short of the assuredness required.

In Bryan v. State, 141 Fla. 676, 194 So. 385 (1940), the Court stated that an instruction

requiring a doubt to be "founded in reason" would be erroneous. Only when that language of attaching a reason to doubt is used is fully balanced with the requirement of proof satisfying the jury to a moral certainty in the guilt of the accused, has the Court affirmed or allowed a conviction to stand based upon such an instruction. There was no such balancing in the trial of Respondent. The Court in Bryan, the Court said that a charge stating the following about being instructed as the one below as to the jury having to find "reason" for to support a conclusion that the proof is not beyond a reasonable doubt 141 Fla. at___, 194 So. at 386:

> If the charge had read, "A reasonable doubt is a doubt founded in reason. To be convinced beyond a reasonable doubt you must be so thoroughly convinced that you would act upon the conviction in the transaction of ordinary affairs of life," -- it would have possessed the infirmity complained of. See Lovett v. State, 30 Fla. 142, 1i Sou. 452.

The Court distinguished instruction that a reasonable doubt is one "conformable to reason," and "that would satisfy a reasonable person," also erroneous but not so flawed as to be a fundamental error deviation. Kimball v. State, 134 Fla. 849, 184 So. 847 (1938). The important characteristic distinguishing fundamental from simply erroneous may be the inclusion of words signifying certainty, such as "to a moral certainty" that was contained in the Kimball instruction. That is the key concept, one of certainty, that was diminished in the proceedings below by the expressed instruction that tended toward confusion by equating proof beyond a reasonable doubt with a definite or quantum of proof. This is true of the elements, but it is not true of the jury's inherent decision of the convincing nature of that proof. This Court has disapproved similar expressions that tend to diminish or relax the high level of confidence expected. See also, Hulst v. State, 123 Fla. 315, 166 So. 828 (1936).

At bar, the trial judge abandoned both requirement by misstating the standard and going further and giving a definition of the term that further strayed from the moral certainty that the term embodies. This is the kind of fundamental error the Court has ruled will be reviewed directly on an appeal, and the court below did not err in considering the issue.

The departures from the instructions utilized for over a century, as shown by the

various cases in which several judges of the Seventeenth Judicial Circuit have also ventured into an ad hoc but routine demonstration to ease the jury's concern with the strictures of the burden of proof show the dangers of such personal admonishments on the law. In Bove v. State, 21 Fla. Law Weekly D709 (Fla. 4th DCA March 20, 1996), a judge from the same circuit instructed that "we do not use the scales of justice in a criminal courtroom. There is no proper percentage to begin to figure out when a defendant can properly be found guilty or when he is not guilty." Such a drastic departure devastates any later instruction on reasonable doubt and instead replaces the burden and standard of proof with an unstructured whatever feels right, probability judgment as if any other considerations that may be involved in the case are of equal stature with the proof requirement. Alarmingly in another case, McInnis v. State, 21 Fla. L. Weekly D934 (Fla. 4th DCA April 17, 1996), considered a variant also among the judges of the Seventeenth Circuit whereby the existence of a screwdriver to proof a doubt was used, thus suggesting that the accused must have evidence, rather than the jury determining whether the evidence the state produces convinces them. These examples show the need for this Court to require adherence to the standard method of instructing on this important matter and to permit the district court of appeal to guard this right as it did below. The danger to the entire system of justice is that there would be a different standard of proof in differing circuits, or courtrooms, if judges are making their own personal views of reasonable doubt to convey to a jury. The place for explanation is closing argument, and even there the proper statement of the law is required. Respondent urges the Court to view this issue as an unacceptable attempt to sway the standard beyond its strictness in requiring the jury to have that state of mind of moral certainty to a pragmatic appraisal of the whether there is proof on all the elements of the crime and on the strength of the probabilities. As the district court stated in Jones the instruction tells a jury that a remarkable strong probability is sufficient.

The court below and in Jones considered the evidence as it related to the proof. In both cases the jury had questions, and there was conflict in the state's proof of essential matters to establish guilt.

The fundamental nature of an incorrect or inadequate instruction, tending to mislead a jury about the burden and standard of proof in a criminal trial, has been considered by this Court of such importance to the essential interests of justice that it is considered fundamental. Bennett v. State, 127 Fla. 759, 173 So. 817 (1937). In Bennett, although a capital case, the Court stated the rule that when essential rights are deprived or invaded, the appellate court will consider whether a fair trial was denied by the error, id. 127 Fla. at 762-763, 173 So. at 819:

> The record shows that no exception was taken to the instruction when given nor was it assigned as error, but it is argued in the brief. Inasmuch as this charge of the court complained of involved instructions pertaining to the fundamental rights of the defendant who was being tried at that time on a charge of murder in the first degree, a capital offense, we will consider the correctness of the instruction, though it was not excepted to below nor assigned as error. See Gunn v. State, 78 Fla. 599, 83 So. 511.
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> > In the exercise of its power to do so, an appellate court will consider questions not raised or reserved in the trial court when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights. The court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved, or the question is imperfectly presented.

In Bennett, supra, a trial court gave an instruction a to jury stating that by the term reasonable doubt meant "one conformable to reason, a doubt which would satisfy a reasonable person. The Court disapproved of it, and reversed, stating that it taken as an entirety "is likely to lead to confusion and is erroneous." The Court said, id., 127 Fla. at 763, 173 So. at 819:

> The first part of the instruction in defining "reasonable doubt" states that by that term "is not meant a mere possible or speculative doubt, but one conformable to reason' (a doubt which would satisfy a reasonable person.") An instruction in the identical language as that here enclosed in brackets was held to be erroneous in the case of Vaughn v. State, 52 Fla. 122, 41 So. 881. In discussing this matter this Court, in the case of Vasquez v. State, 54 Fla. 127, 44 So. 739, 127 A. S. R. 129, said:

> For we think it is perfectly clear there is a very great difference between a 'doubt conformable to reason, a doubt which a reasonable man would entertain' and a 'doubt which would satisfy a reasonable man.' It is difficult to conceive how a doubt could ever be satisfying, and because it is not satisfying is the very reason why a defendant should not be convicted when a reasonable doubt of his guilt exists in the minds of reasonable men.

The instruction under review here violates the basic nature of the standard of proof as a weighing, an evaluative judgment of the tiers of fact, leading them to a certain judgment consistent with the nature of moral affairs. It is not an objective or quantitative amount of proof. It is that which satisfies the jury in a way that the triers of facts are confident, convinced or the correctness of the charge, not simply the amount of evidence.

(d) The trial judge deviated from essential judicial neutrality by giving this instruction.

The Petitioner asserts that the judge was actually "helping" Respondent on the theory that unqualified jurors would be discharged for cause because of an erroneous belief that all doubts, such as mathematical and metaphysical certainty, was required. However, not only is that inconsistent with the plain meaning of the words, those jurors would be excused only if they were unable to follow the correct law, not because of some lack of understanding when each arrived for their voir dire. This argument is fallacious and should be rejected.

The state has argued that the trial court assisted the defense, either by the preservation of "defense oriented jurors," or by misstating the standard in a way benefiting the accused. This concession that the judge was attempting to benefit a party, departing from the cold neutrality and complete impartiality that is necessary to an independent tribunal, is an aspect of this matter that should concern the Court for the implication that these pre-trial remarks were intended to convey a benefit to some side or the other.

The Court has pointed out the "vital necessity of the neutrality and impartiality of a judge who presides over the determination of a person's life, liberty, or property." Arnold v. Revels, 113 So. 2d 218 (Fla. 1st DCA 1959). See this Court's decision in State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939) where this principle was stated in the following manner:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his disqualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

In Davis v. Parks, supra at 223:

> We know of nothing more vital in the administration of justice in America than that the judge who sits in judgment on the life, liberty, or property of persons before his court be perfectly impartial. We think it a judge's duty not only to harbor no prejudice toward such persons but also to avoid the appearance of such prejudice.

The trial court's practice reflects upon the administration of justice by an impartial judiciary. This Court has not equivocated on the issue of impartiality by judicial officials in trial proceedings in this state at any level. Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981), quoting from the words of Justice Terrell in State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939):

> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

The Court should approve the decision below and answer the certified questions in the affirmative.

POINT II

WHETHER THE CONVICTION FOR GRAND THEFT CAN BE AFFIRMED WHERE THE INFORMATION DID NOT ALLEGE THE VALUE OF THE PROPERTY TAKEN, BUT THE JURY WAS INSTRUCTED ON THE PERMISSIVE LESSER INCLUDED OFFENSE OF GRAND THEFT AND THE INFORMATION AND THE EVIDENCE SUPPORTED THE VERDICT REACHED BY THE JURY?

A charge of robbery unavoidably includes the elements of the crime of petit theft, making petit theft a necessarily included offense of robbery. Pierce v. State, 641 So. 2d 439, 440 (Fla. 4th DCA 1994). However the same is not true for grand theft.

> It is only where the charging document sufficiently alleges the appropriate value that grand theft becomes a permissive lesser included offense of the charge of robbery. [J.C.B. v. State,] 512 So. 2d at 1074-1075, [Fla. 1st DCA 1987]. Where the only charge is robbery, the state can preserve its right to a lesser included conviction for grand theft only by including in the information an allegation that sufficiently states the value of the property taken. 512 So. 2d at 1075 (value of property taken must be clear from accusatory pleading).

Pierce, at 440. See, State v. Rodiguez, 500 So. 2d 120, 122 (Fla. 1986).

It is not enough that the crime of grand theft might be comprehended within the general scope of the principal charge of robbery; the elements of the lesser crime must be specifically set forth within the pleading. J.C.B. at 1075. In respondent's case the charging document failed to allege any value of the property taken or the amount of the cash.

A criminal defendant cannot be convicted of a permissive lesser offense when the elements of that lesser were not pled in the charging document. When the charging document alleges a robbery, but does not mention the value of the items stolen, a court errs by entering a judgment for grand theft. See, E.W. v. State, 616 So. 2d 1194 (Fla. 4th DCA 1993); J.C.B., supra; Tillman v. State, 329 So. 2d 370, 371 (Fla. 2nd DCA 1976); see also Santiago v. State, 479 So. 2d 975 (Fla. 4th DCA 1986) (grand theft could not be found when information charged burglary with intent to commit theft without specifying amount). Due process requires that the charging document state the elements of the lesser crime. Convicting a defendant of a charge not alleged in the accusatory document violates due process and is

fundamental error. See, In the interest of C.T., 582 So. 2d 1245, 1246 (Fla. 4th DCA 1991); Falstreau v. State, 326 So. 2d 194 (Fla. 4th DCA 1976); Haley v. State, 315 So. 2d 525, 527 (Fla. 2nd DCA 1975); see also, Mitchatka v. State, 506 So. 2d 1, 2 (Fla. 1st DCA 1987) (information which charged defrauding innkeeper with no value of stolen services was fundamental error).

CONCLUSION

WHEREFORE, the Court should approve the decision below and answer the certified questions in the affirmative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 29th day of APRIL, 1996.

LOUIS G. CARRES
Assistant Public Defender