IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

KENNETH M. PIERCE,

Respondent.

CASE NO. 87,862

RESPONDENT'S ANSWER BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

CASES — PAGE

FLORIDA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant and the defendant, respectively. In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

"R"	Record on appeal
"SR"	Supplemental Record, transcript of pretrial hearing on computer animation video

STATEMENT OF THE CASE

Respondent accepts the statement of the case as contained in Petitioner's initial brief on the merits, but adds the following pertinent information:

The State noticed its intent to use computerized animation to re-enact the accident (R 2215, 2216, 2218-2225). Respondent's objection to the admission of this evidence was overruled (R 2244, 2337-2342). The State's animated version of the accident was admitted at Respondent's jury trial as a court exhibit (R 1123). The jury returned its verdicts findings Respondent guilty of each offense charged (R 2324-2328) after requesting an additional opportunity to view the vehicle in question (R 2333).

The State having previously noticed its intent to habitualize Respondent (R 2235, 2334-2336), the trial court sentenced Respondent to serve thirty years in prison as a habitual offender on Count I (R 2367-2369), with three consecutive ten year prison terms as a habitual offender on Counts II - IV (R 2370-2372, 2373-2375, 2376-2378). A concurrent ten year habitual offender term was imposed on Count V (R 2379-2381).[1] Credit was given for 183 days time served. This total

---

[1]Respondent also argued in the instant case that he could not be separately convicted of both vehicular homicide and failing to stop and the offense of leaving the scene of an accident involving death, since the elements of the latter are included within the elements the State must prove in the former offense. Wright v. State, 573 So. 2d 998 (Fla. 1st DCA 1991) is dispositive. The Fourth District Court of Appeal declined to address this issue, apparently in the belief that it had been rendered moot by the reversal of Respondent's conviction on the basis of the trial court's improper instruction on reasonable doubt. The same is true of Respondent's additional argument that Appellant could be convicted only of a single count of leaving the scene of an accident, since the statute in question proscribes the leaving of "any" accident resulting in "any" death or injury. Boutwell v. State, 631 So. 2d 1094 (Fla. 1994). In addition, since only one death resulted from the accident, there could be only one homicide-related conviction. Houser v. State, 474 So. 2d 1193 (Fla. 1985).

Finally, Respondent challenged the imposition of consecutive enhanced sentences pursuant to the habitual offender statute for offenses which were unquestionably all committed during a single criminal episode. Such a sentencing scheme is clearly in violation of Hale v. State, 630 So. 2d 521 (Fla. 1993); Brooks v. State, 630 So. 2d 527 (Fla. 1993). Moreover, although this error was not objected to below, it must be considered fundamental, since ignoring it would result in Respondent serving a sentence which the trial court had no

sentence of sixty years in prison was far in excess of the sentencing guidelines recommendation of seventeen to twenty-two years in prison (R 2389).

---

power to impose. Id.; Daniels v. State, 595 So. 2d 952 (Fla. 1992) [trial court does not have discretion to impose consecutive mandatory minimum violent felony offender terms for offenses arising from single criminal episode]; Young v. State, 601 So. 2d 636 (Fla. 4th DCA 1992). Indeed, this Court has held such error to be so fundamental that it deserves retroactive application: it may be raised in a motion for postconviction relief, even where it has never been argued at trial or on appeal. State v. Callaway, 658 So. 2d 983 (Fla. 1995).

Consequently, in the event that this Court disagrees with the decision of the Fourth District Court of Appeal reversing Respondent's convictions for a new trial, at an absolute minimum, this cause must be remanded to the district court for resolution of these previously unaddressed sentencing issues on the merits.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement of the facts insofar as they summarize the circumstances surrounding the trial court's instruction to the jury on reasonable doubt during its voir dire. The following additional facts are stated in support of Respondent's objection to the admission of a computer-animated video at his trial, as argued in Point III, infra.

On June 23, 1992, school was over, and ten-year-old Brooke Mansey and her twelve-year-old brother, Joel, were playing with friends in the neighborhood, until 9:00 p.m., when they were to be back home (R 474-475, 537-538). They lived in a residential, rental area that had no sidewalks (R 475). It had been raining for days prior to the accident, sometimes torrentially (R 524), and there was a large, ankle-deep puddle in the driveway leading from the street to an adjacent apartment complex (R 478). The puddle was "a little bit in the street and a lot in the parking lot." (R 588, 611). The area was dark (R 749), lit only by a single security light (R 484). An officer familiar with the road agreed that "you had to be careful" when it rained because of the conditions (R 640).

Joel, his sister, and her friends, Gina and Michelle Vitello, 11, and Nicole Walker, 6 (R 554), who was being carried by Michelle (R 540, 586, 599, 611), went through the puddle, some of them walking backwards (R 541). They had begun playing Truth or Dare, a kissing game (R 555, 611), when Joel noticed a truck at the end of the road. There was lots of traffic, and he did not pay much attention until it swerved into the puddle toward them (R 541). Joel and Gina testified that the truck began to swerve before it entered the puddle (R 592, 599, 696). Then Joel saw a big silver grille with the letters "F" and "O" on it (R 563) and normal-sized wheels approaching him (R 548). He observed no bumper stickers on the vehicle (R 564). The truck, which all the witnesses to the incident described as green (R 551, 572, 703, 724) or dark (R 949), made a loud noise, as though it had an especially large engine (R 559). It seemed to be in good condition (R 563). Under hypnosis, Joel later confirmed this description (R 552, 1298, 1305-1306). Gina also noticed a white camper top (R 604-605).

Joel pushed Gina out of the way (R 542). The truck struck Brooke and Michelle (R 600) before swerving out of the puddle and leaving the scene (R 548, 600). A bystander who chased the

vehicle, a man who had worked in a body shop for ten years (R 724), believed it to be a 1989 or 1990 Silverado (R 724-725) equipped with regular street tires (R 728).

Michelle Vitello's injuries included a broken arm, broken leg, and a cut on her liver (R 587). She was in the hospital for two months (R 588). Brooke suffered a hairline fracture at her left shoulder blade (R 484). Nicole, lying at the south end of the puddle "close to the edge of the street" (R 665), died of multiple injuries (R 1913).

When the police arrived shortly afterwards, they found that the two injured girls had been moved (R 24). A bystander provided a description of the vehicle involved as a silverish Chevy Silverado truck with a light top (R 629). A neighbor found a piece of grille in a shallow part of the puddle about three to five feet away from and further to the south and west of Nicole Walker's body (R 665-666). At trial, Deputy DeGuiceis testified that Deputy Lamey retrieved the grille (R 652) from the north part of the puddle (R 634, 636). Michael Jones, on the other hand, testified that he found the grille three to five feet from Nicole Walker, further south and west of her (R 666). She was at the southernmost part of the puddle (R 654). Jones said he turned the grille over to a female deputy (R 669). The police never asked him where he found the grille (R 669).

Many people arrived to help the injured children, their parents, and to soak up the puddle with blankets (R 671). Yet photographs taken of the scene on the night of the accident depicted the north end of the puddle as extending way out into the road (SR 246-247).

Earlier that evening, neighbors heard a truck hit some garbage cans (R 736, 750, 765). The driver just drove on, dragging the can fifteen or twenty feet without swerving (R 736). There were no stripes on the dark vehicle the witnesses saw, nor were any bumper stickers observed (R 761-762, 769). Although the only scuff mark found on the garbage can was white (R 940),[2] the police decided that the same vehicle was involved in this incident and in the fatal accident. The expert basis for this opinion was basically that it was just too big a coincidence (R 833, 1101-1102).

---

[2]And although no damage which could be related to a collision with a garbage can was found on Appellant's truck -- even though normally such damage would be expected after such a collision (R 1527, 1533).

Although Detective Babcock hypothesized that the white smear on the garbage can was caused by impact with a white stripe on Respondent's truck (SR 73), two witnesses to the garbage can impact testified that they did not see a white stripe on the truck which hit it (R 761, 769). Inconsistent descriptions by some of the witnesses were discounted by the police (R 949-950, 954, 1013).

Subsequent investigation revealed a blue paint fragment in Nicole Walker's clothing (R 835). Flecks of green paint fell from Brooke Mansey's clothes when they were shaken out (R 1017). The medical examiner suggested that Nicole's head injury indicated that there might be a dent in the vehicle which struck her (R 842). A piece of plastic turn signal lens was found at the scene (R 876), together with other pieces of plastic that were never identified (R 878-879). Detective Babcock, the lead investigator, dismissed these other plastic objects as having nothing to do with the case (R 878-881). In his opinion, the debris found at the scene was not useful in reconstructing the accident (R 882). The puddle was never drained, and no objects were retrieved from beneath the water (R 884).

The police issued a bulletin seeking information about a 1980, blue Chevrolet Silverado with a white topper and damage to the front end grille at the center right (R 775). In response to extensive publicity, the police received hundreds of tips as to the possible identity of the vehicle involved (R 773, 839, 1110). It was a month after the accident that police attention was directed toward a truck owned by Respondent's wife (R 783, 938, 1236), a 1980 blue Chevrolet Silverado (R 775). It was parked in Respondent's yard between three other vehicles. When the police inspected it, they noticed that there was a dent at the front where the hood meets the grille (R 779). There also appeared to be repair work at the headlight lens cover (R 780, 1121), the grille was not a Silverado grille (R 847, 1121), and it was held in place with blue wire (R 851, 1158). Although the truck did not have a camper top, neighbors indicated that Respondent had recently removed a camper top from the vehicle (R 859). Respondent's driver's license had been suspended (R 1231-1232).

The truck was seized. Animal -- not human -- hairs were found on the front grille (R 977, 1326). The truck had been previously painted at least once, and there was some old damage to the front end as well (R 977-978). The right turn signal, not the truck's original equipment, was held

on by tape (R 1156-1157). The paint chip from Nicole Walker's clothes, which had originally been analyzed as containing, in order from the outside in, layers of blue metallic, blue non-metallic, gray primer and black primer paint (which would not match a paint sample from Respondent's truck), was now discovered to contain blue metallic, blue non-metallic paint, gray body filler, then blue metallic, white primer, and black primer paint (R 981, 1556).[3] Over Respondent's hearsay objection, Detective Babcock told the jury that he was informed that the paint samples from Nicole Walker and Respondent's truck matched (R 1006).[4]

Respondent's truck had white "wagon" wheels, larger tires than ordinary (R 990). There were bumper stickers on the back of the truck (R 1019) and it had a large white stripe along the side (R 1020), not pinstriping (R 1021). It was not green (R 1021). Rust stains on the truck bed corresponded to rust stains on the camper top (R 1166) The jury was shown the truck. They were told that a small bruise on the back of Nicole Walker's head was consistent with a dent on the front end of the truck (R 1160, 1907, 1910), and matched a pattern on the truck, if she were positioned at a 22 degree angle (R 1160, 1911).[5] Moreover, the height of the impact area on the truck was somewhat higher than she was: she would have to have been flexed and extended to reach that far (R 1914).

A tip[6] also led the police to Terry Jones, who at first denied his identity when the police

---

[3]The forensic expert testified that he originally received three-layer paint samples from Brooke Mansey's clothing, some of which were inconsistent. The expert believed that the suspect vehicle had a four-layer paint system (R 1555). It was not until later that he was told that maybe these three-layer samples should be combined into a single six-layer sample. If that combination were made, then the six-layer samples were consistent with the paint on Appellant's truck (R 1544-1545).

[4]But a red paint chip was also recovered, which had no identified source (R 1553-1554).

[5]But the photograph the medical examiner used to demonstrate this congruity was upside down (R 2043).

[6]The tip was that Jones was a passenger and Trent Pierce, Appellant's son, was the driver of the truck in the accident (R 1444). After further investigation, the police decided to discount the

came to his house (R 862). Police discovered that a camper top was at Jones's residence (R 866). Jones told police Respondent admitted that he had hit a garbage can the night of the accident, but did not believe he had struck any of the children (R 1687-1688).[7]

The State further introduced testimony from a jailhouse informant, William Brown, a ten-time felony loser (R 1738) who was housed in the cell next to Respondent while he awaited trial on charges of burglary and battery on a police officer (R 1732). Brown said he found God and was witnessing to other inmates (R 1734).[8] He said Respondent told him Respondent was in jail charged with running over some children. According to Brown, Respondent said he had been drinking one rainy night and remembered hitting something, but did not know what it was (R 1735). Brown claimed Respondent told him he saw a dent and blood on the truck the next day and cleaned it up (R 1736). He thought he had hit a dog (R 1769), which was consistent with the animal hair found on the truck by the police (R 1799).

There were several blue vehicles, including blue pick-up trucks, in the neighborhood (R 560).

A central feature of the State's case was a computerized animated reconstruction of the accident which was shown to the jury as a court exhibit (R 1123, 2337) over defense objection (R 1124-1125, 1951). The videotaped reconstruction showed three views of the accident: first, a view taken from above, then a view tracking the accident through the truck's windshield, and finally, a view from the eyes of the children playing in the puddle (R 1127-1128). This computerized animation was prepared based on information given to the animators by Detective Babcock (R 1029). The images presented were admittedly not accurate with respect to the lighting and weather at the

---

accuracy of this information, however (R 1445-1446).

[7] In addition to lying to the police about his identity, Jones lied to them about someone else helping him to remove the camper top (R 1689), and finally made his statement implicating Appellant only after the police, searching his house, had discovered marijuana which they flushed down the toilet in a conscious effort to "build a relationship" with Jones (R 1691).

[8] Brown's conversion appears to have been short-lived. After receiving a light sentence on his pending charges, he is back in custody in Broward County on a new case.

time of the accident (R 1034). The vehicle involved was blue, because that was the color of the vehicle that the sheriff's office had in its possession (R 1036). The location, shape, and size of the puddle were estimated based on witness statements taken in December, 1992, six months after the accident (R 1085). Photographs taken in June, when the accident occurred, were not used in designing the animation.

At the pretrial hearing on the computer animation video, Detective Bjorndalen-Hull testified that her original computerized drawing showed a larger puddle, based on Detective Babcock's observation of the water at the time of the collision (SR 42-43). The puddle was later reduced in size for the final version of the information given to the computer animators, based on Detective Babcock's "follow-up investigation" (SR 35). These measurements were made December 14-15, six months after the accident occurred (SR 116). At trial, Michael Jones had testified that more than twenty people were at the scene after the accident, helping by using blankets to soak up the water in the puddle (R 671). Detective Babcock testified at the computer animation video hearing that he had several statements as to the side of the street the truck was travelling, ranging from the middle of the street to the far left (wrong) side of the street (SR 108, 110).

Since the accident, a drain had been added to the apartment driveway to prevent the formation of extensive puddles, and streetlights had been added to the area (R 524, 688).

SUMMARY OF THE ARGUMENT

I.

The District Court applied sound principles of law in ruling that the trial judge's improvised instruction to the jury, that certainty was not essential to a verdict of guilt, was proper and within the District Court's authority to decide questions of law. The trial judge's definition of reasonable doubt lessened the state's burden of proof and authorized the jury to return a guilty verdict on less than proof beyond a reasonable doubt. 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.

II.

The District Court's finding of fundamental error is consistent with this Court's prior decisions on deviations from the approved reasonable doubt instruction. Petitioner's attempt to justify the improper instruction as helpful to the Respondent at trial is, and shows the instruction itself to be, a violation of judicial neutrality. The error was especially damaging to Respondent, and therefore fundamental, because his defense rested largely on reasonable doubt.

III.

A computer-generated animation purporting to show the accident in this case from three different perspectives was improperly admitted where the State never established that the procedure utilized was scientifically accepted, where the State's animation was misleading to the jury because the facts underlying the depiction were not consistent with the witnesses' testimony in crucial respects, but rather represented the State's one-sided theory of what happened, and where the animation amounted to inadmissible hearsay, as it illustrated statements made by witnesses who did not testify at trial.

ARGUMENT

POINT I

DOES THE JURY INSTRUCTION GIVEN IN THIS CASE IMPERMISSIBLY REDUCE THE REASONABLE DOUBT STANDARD BELOW THE PROTECTIONS OF THE DUE PROCESS CLAUSE?[9]

This question must be answered in the affirmative.

A. VICTOR V. NEBRASKA DOES NOT AUTHORIZE THE INSTRUCTION GIVEN BY THE TRIAL COURT BELOW.

The Fourth District below relied upon Cage v. Louisiana, 498 U. S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 337 (1990), and followed its own decision in Jones v. State, 656 So. 2d 489 (Fla. 4th DCA 1995), rev. den., 663 So. 2d 632 (Fla. 1995), cert. den. 64 U. S. L. W. 3691 (April 15, 1996). 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).

The Supreme Court in Victor ruled on challenges to jury instructions using the term "moral certainty" or "moral evidence." Though considering the term antiquated, the Court found that the term as a whole focused upon the requirement that the jury reach a state of certainty based upon the evidence of guilt and not upon the morality or ethics of the acts of the accused.

That was a very different issue than the one before this Court regarding the trial court's excursion into describing reasonable doubt in terms of remaining doubts and lack of a need for certainty. The trial court here 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 impressing upon the jury the need to reach the subjective state of

---

[9]Respondent rejects Petitioner's reformulation of the questions certified by the District Court. It is conclusory and slanted toward Petitioner's arguments. The questions as certified define the issues to be decided by this Court. They are also the same as those certified in the lead case before this Court, Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995), Supreme Court Case No. 87,575, orally argued June 7, 1996. The arguments in this brief are largely the same as those of the respondent in Wilson.

near 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 the instruction to be constitutionally acceptable because it could not reasonably be understood to invite conviction on less than the constitutionally required proof.

The instruction here failed in that regard. When the trial court told the jury here that it had to attach a reason to any doubt or doubts that would influence a not guilty verdict, the standard of proof was reduced to a level below that approved in Victor.

Moreover, Victor did not approve singling out for special emphasis convicting even in the face of doubts. Such emphasis is unprecedented in the manner by which the judge's pre-trial admonition here was directed at easing the reasonable doubt standard. Above all the instruction conveyed that the trial judge was concerned not with the jury being convinced, but with their not worrying about being free of uncertainty and doubt when voting to convict. When an instruction affirmatively directs a trial jury to convict 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 that given by the judge here.

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. 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 constitutional concepts.

While the trial judge here utilized some of the words from instructions quoted in Victor, it abandoned the full meaning and scope of reasonable doubt by directing 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 state 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 WAS ESPECIALLY SENSITIVE AND PREJUDICIAL, COMING AS IT DID AT THE VERY INTRODUCTION OF THE JURY TO THE CRIMINAL JUSTICE SYSTEM.

Petitioner argues that the pre-trial timing of the erroneous instruction here makes it harmless. Yet, the instruction 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 instructions 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, if he did not also further advise the jury to affirmatively disregard what they had understood the "explanation" to mean earlier. The instructions during voir dire included a very direct admonition to apply a standard less than certainty, and failed to convey any kind of moral certainty, the essence of what the standard instruction seeks to convey. The pre-trial instruction was designed to ease the burden of conviction.

The judge's statement that the concept of proof beyond a reasonable doubt would be expounded upon more fully during the final instructions linked the early instructions to what the jury would hear later. This is the opposite of correcting and curing an erroneous instruction. The early instructions stressed to the jury that they might make a mistake by applying too high a standard of proof.

The timing of the admonition did nothing to eliminate its harm. The later standard instructions were tainted by the earlier emphasis on the non-standard explanation of the doubts that could remain for a verdict of guilty. The erroneous admonition remained with the jury throughout the entire trial. By the time the standard instructions were given at the conclusion of the trial, the earlier erroneous instructions had long before been absorbed, and had distorted the jury's view of the case throughout the evidentiary portion of the trial. Only an extraordinarily forceful concluding instruction to disregard could have countered this effect. No such instruction was given, and the standard instruction was insufficient.

C. THE REQUIREMENT THAT THE STATE'S PROOF BE TO THE EXCLUSION OF EVERY REASONABLE DOUBT IS A FUNDAMENTAL CONSTITUTIONAL PRINCIPLE.

This Court has for 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. See, Lovett v. State, 30 Fla. 142, 11 So. 550 (1892). 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 as the principle that to try an incompetent defendant violates due process. Medina v. California, 505 U. S. 546, 453, ___ S.Ct. ___, 120 L. Ed. 2d 353 (1992); Drope v. Missouri, 420 U. S. 162, 171-172, 95 S. Ct. 896; 43 L. Ed. 2d 103 (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, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (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, 110 S. Ct. 2841, 11 L. Ed. 2d 224 (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, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (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 consistently required proper instruction to a jury on the standard, and burden,

of proof in a criminal trial. In Lovett v. State, supra, this 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 of 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, 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, this Court has made clear that the standard of proof requires a conviction in the minds and conscience of the jurors. Id. 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), this Court, following Lovett, equated proof beyond a reasonable doubt to evidence or testimony 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. This Court in Woodruff held that it was permissible to use words equivalent to "a moral certainty," and that an instruction could be correct without that phrase if, and conditioned upon, another expression of equivalent terms. Thus, this 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 this Court. 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. The District Court below was correct in holding that a trial court's admonition to a jury that it may have doubts and still find the defendant guilty

conveys a contrary standard, less than proof to a moral certainty. It authorizes 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.

POINT II

IF SO, IS THE INSTRUCTION FUNDAMENTAL ERROR?

This question must also be answered in the affirmative.

A. THE TRIAL COURT'S MISINSTRUCTION TO THE JURY ON REASONABLE DOUBT IS FUNDAMENTAL ERROR.

This Court in Archer v. State, 21 Fla. L. Weekly S119, S120 (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." 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. This 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 reasonable doubt is fundamentally erroneous, this 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 permits less than moral certainty in the minds of the jury 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, and 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, this Court has looked to whether harm could have "reasonably resulted." A misinstruction on reasonable doubt can be deemed fundamental, and is not fundamental only when such substantial harm could not have reasonably resulted. Witherspoon v. State, 76 Fla. 445, 80 So. 61 (1918).

The nature of an 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 this 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, 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.
>
> 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, a trial court instructed a jury that the term reasonable doubt meant "one conformable to reason, a doubt which would satisfy a reasonable person." This Court disapproved it, stating that, taken as an entirety, it "is likely to lead to confusion and is erroneous." This Court said, 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 here violates the basic nature of the standard of proof as a weighing, an evaluative judgment of the triers of fact leading them to a 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 leaves them confident, convinced of the correctness of the charge, not simply the amount of evidence.

The judge's attempt here to equate "reasonable doubt" with a doubt to which a reason could be attached 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), this Court had occasion to consider an admonition that is very similar to the instruction here:

> 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.)

This 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.

Here, the trial judge departed on another aspect of the standard of proof by shifting the burden of persuasion when it instructed that a reason need be attached to any doubt considered reasonable. See, Mullaney v. Wilbur, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (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 it approaches a lesser "clear and convincing" standard.

In Bryan v. State, 141 Fla. 676, 194 So. 385 (1940), this Court stated that an instruction requiring a doubt to be "founded in reason" would be erroneous. Only when such language of attaching a reason to doubt is fully balanced with the requirement of proof to a moral certainty has this Court allowed a conviction to stand based upon such an instruction. There was no such balancing here. In Bryan, this Court said the following about the jury having to find "reason" to support a conclusion that the proof is not beyond a reasonable doubt, 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, 11 So. 550, 17 L.R.A. 705.

In Kimball v. State, 134 Fla. 849, 184 So. 847 (1938), this Court distinguished "conformable to reason" and "that would satisfy a reasonable person," finding the latter also erroneous but not so flawed as to be a fundamental error deviation. The important characteristic distinguishing fundamental from simply erroneous may be the inclusion of words signifying certainty, such as "to a moral certainty," as in Kimball. It was this key concept, certainty, that was diminished in the instruction here. It tended toward confusion by equating proof beyond a reasonable doubt with a definite quantum of 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).

Here, the trial judge abandoned both requirements by misstating the standard and then giving a definition that further strayed from moral certainty. This is the kind of fundamental error this Court has ruled will be reviewed directly on an appeal.

The improvised instructions on reasonable doubt now used by other judges of the Seventeenth Judicial Circuit, and which this Court may soon have occasion to review, show the dangers of such personal admonishments on the law. For example, in Bove v. State, 21 Fla. Law Weekly

D709 (Fla. 4th DCA March 20, 1996), another judge from the 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 replaces the burden of proof with an unstructured "whatever feels right." In McInnis v. State, 21 Fla. L. Weekly D934 (Fla. 4th DCA April 17, 1996), the same judge instructed that the state need not prove its case "to perfection or certainty." These examples show the need for this Court to require adherence to the standard instruction on reasonable doubt and to permit the District Court to guard this right as it did here. The danger to the entire system of justice, if judges are permitted to give their own personal views of reasonable doubt to juries, is that there would be different standards of proof in different courtrooms. The place for explanation is closing argument, and even there a proper statement of the law is required.

B. THE INSTRUCTION GIVEN BY THE TRIAL COURT VIOLATES JUDICIAL NEUTRALITY.

Petitioner asserts that the error here should not be reviewed as fundamental because the judge was actually "helping" Respondent (pp. 22-23 of brief). Supposedly, the judge was helping rehabilitate potential jurors who would have been excusable for cause because they thought the prosecution's burden was beyond all doubt. However, not only is this theory inconsistent with the plain meaning of the judge's words, but also such jurors would be excused only if they were unable to follow the correct law, not because of some lack of understanding when they arrived for their voir dire. The argument is fallacious and must be rejected.

Petitioner's argument amounts to a 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. This Court should be disturbed by such open disregard for judicial neutrality.

"... [T]he neutrality and impartiality of a judge who presides over the determination of a person's life, liberty, or property" is a "vital necessity." Arnold v. Revels, 113 So. 2d 218 (Fla. 1st DCA 1959). Further, 113 So. 2d 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.

In State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939), this principle was stated by this Court as follows:

> 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.

The trial court's practice here 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, 557 (Fla. 4th DCA 1981), quoting from the words of Justice Terrell in State ex rel. Davis v. Parks, supra:

> 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 damage to the principle of judicial neutrality done not only by Petitioner's position but also by the judge's instruction itself is a further strong reason for the error to be reviewed as fundamental.

POINT III

THE TRIAL COURT ERRED IN ADMITTING THE STATE'S EVIDENCE OF AN ANIMATED VERSION OF THE ACCIDENT.

The computer age has caught up with the legal profession with a vengeance. While twenty, or even ten, years ago, computerized research was a relative rarity and word processing was in its extremely crude infancy, such aids to the profession are now viewed as commonplace, indeed, so essential that it may be deemed virtually ineffective assistance of counsel to fail to avail oneself of such techniques. Nevertheless, not every computer-assisted technique is automatically beneficial. The instant case presents an example of a utilization which must be examined with the utmost caution in order to avoid misleading manipulation under the guise of an "advanced" application with a reliability that appears to be -- but is not necessarily -- enhanced by the involvement of that magician of the modern age, the computer.

Although not the basis for the claim of jurisdiction in this cause, the issue herein raised is one of fundamental significance to the jurisprudence of this State. In upholding the admission of the videotape in the instant case, the district court below has thrown caution to the winds and embraced a new age of technological fireworks which will not only considerably up the financial ante of criminal prosecutions, as each side competes to engage experts to illustrate, via the "science" of computer imaging, its own version of what happened, but will also effectively minimize the import of what a jury should properly consider: the difficult balancing of the testimony of witnesses and the facts on which such testimony is based, in exchange for the easy and facile alternative of deciding which party's picture looks better and makes a stronger impact. While such tactics may be acceptable in civil cases where the only thing at stake is money, it should not form a new basis of prosecution in criminal cases, which implicate vital liberty interests -- especially where the accused is, virtually by definition, based on an unequal financial footing with the State.[10]

---

[10]The prosecution below was charged half price for the videotape prepared for its case, in the admitted hope of Jack Suchocki, its programmer, of future profits to be earned in other cases should the tactic prove successful. Appellant, of course, received no such special deal for the preparation of his own videotape, which he unsuccessfully sought to introduce into evidence.

In the instant case, the trial court permitted the State to introduce, as a court exhibit (R 1123), a so-called computerized animation of the accident which resulted in the death of Nicole Rae Walker. In fact, this "animation" was no more than a cartoon,[11] made with the assistance of computer-generated images which appeared to be three-dimensional (R 1027) and purported to recreate the accident from not one but three different perspectives: an aerial view, a view from the driver's vantage point, and a view from the vantage point of the children (R 1127-1128). The dramatic impact of such multiple, varied, and graphic representations of the accident need hardly be belabored. Respondent objected to the introduction of this videotape, but his objection was overruled (R 1124-1125). This amounted to reversible error, which was compounded when the trial court refused to allow Respondent to introduce his own computerized, animated version of the accident into evidence as a court exhibit.

The information which provided the basis for the images created on the State's videotape did not originate from a scientific, computer-analyzed program. The cartoon introduced sub judice, therefore, was not a *simulation*, where a computer program purports to reconstruct how an accident occurred by analyzing specific data and generating conclusions based on assumptions contained in the software program being used, so that the computer helps supply missing information, such as the speed of the vehicles. See, O'Connor, Kathleen. "Computer Animations in the Courtroom." 67 The Florida Bar Journal 20, 22 (November 1993). Neither did the video in the present case act as a *tutorial* which is used to explain a complicated scientific concept to a jury. Rather, the animation below served as an *illustration* used to show "facts presented by lay witnesses. The computer animator essentially uses the graphic capabilities of the computer as a canvas on which to 'draw' an illustration of factual or opinion testimony in regard to how an event happened." Id.

The admissibility of such evidence is a question of first impression in Florida, and, indeed,

---

[11] "A computer animation is a series of still images created on a computer. The images, when shown in rapid succession, create the illusion of movement." O'Connor, Kathleen. "Computer Animations in the Courtroom", 67 The Florida Bar Journal 20 (November 1993); Sullivan, Barry, "Computer-Generated Re-enactments as Evidence in Accident Cases," 3 High Tech. L. J. 193 (1989).

has not received enormous attention in the courts of other states. However, in a case which also involved the introduction of a computer *illustration*, a New York court held the evidence admissible, analogizing it to other visual aids, such as charts or a diagrams:

> Whether a diagram is hand drawn or mechanically drawn by means of a computer is of no importance.... A computer is not a gimmick and the court should not be shy about its use, when proper. Computers are simply mechanical tools -- receiving information and acting on instructions at lightning speed. When the results are useful, they should be accepted, when confusing, they should be rejected.

People v. McHugh, 476 N.Y.S. 2d 721, 722-723 (N.Y. Sup. Ct. 1984). This statement of the law echoes Florida's approach to demonstrative exhibits which aid the jury's understanding of the issues in a case: such evidence is admissible when relevant, but only if it constitutes an accurate and reasonable reproduction of the object involved. Brown v. State, 550 So. 2d 527 (Fla. 2d DCA 1989). In the same way, the McHugh Court, while approving the admission of properly prepared animations, issued the following caveat:

> What is important is that the presentation be relevant to a possible defense, that it fairly and accurately reflect the oral testimony offered and that it be an aid to the jury's understanding of the issue.

Id.

In the instant case, Detective Babcock and Deputy Bjorndalen-Hull provided the information used by the technicians to prepare the tape (R 1030-1031, 1073). Specifically, the dimensions and extent of the puddle was arrived at by Detective Babcock after interviews with witnesses to the accident (R 1077). The final interviews -- and thus the final input with respect to the representation of the puddle -- took place in December, six months after the accident (R 1097-1098). The puddle, which was irregularly shaped in real life, was given an elliptical form on the State's cartoon because this was the closest the technology could come to duplicating nature (R 1084-1085). Importantly, although at the time of the offense, the witnesses described the puddle as extending at least partially into the street (R 588, 611), and although photographs taken the night of the accident agreed with that description (R 521-522, 534), the videotape showed the puddle extending only to the edge of the street, apparently on the basis of statements taken from witnesses during September to December,

1992 (R 1085), well after the accident occurred. While some of the witnesses who testified at trial agreed that the puddle shown on the animation appeared to be accurately drawn (R 549, 589), at least one witness specifically disagreed, noting that the puddle had really been "a little bit bigger" than shown on the tape (R 614). The cartoon puddle differed substantially from the sketch of the puddle prepared by police shortly after the accident occurred (R 1041-1043).

The vehicle depicted in the cartoon, a blue Chevrolet Silverado was not the one described by witnesses, all of whom stated that the truck they saw was green (R 551, 572, 703, 724) or dark (R 949) -- not blue. Instead, the truck was expressly drawn to conform to the vehicle that the police had taken into custody (R 1036, 1038, 1056, 1060). In fact, Respondent's truck was electronically scanned at the animation studio "to be sure that the basic vehicle itself, a 1980 Silverado, was accurately constructed" on the video (R 1060). Even bumper stickers -- never described or even mentioned by the eyewitnesses to the accident -- were reproduced on the animated sequences (R 1060). The driver of the vehicle in the videotape was drawn to reflect Respondent's height (R 1061). Moreover, the weather conditions on the night of the accident were not replicated in the tape: rather, both the lighting conditions and the weather were enhanced "to enable the jury to see better" (R 1034-1035).

Thus, the facts used to underpin the cartoon representations shown to the jury were not consistent with the testimony of the trial witnesses. Instead, they presented a one-sided version of what the police believed happened, based on their conclusion that Respondent was guilty, even when the facts necessary to support their conclusion contradicted the testimony of the witnesses. In crucially important details, such as the color of the truck, the extent of the puddle's intrusion into the street, and the lighting and weather conditions which existed that night, the videotape was a self-confessed fraud.

Nevertheless, the trial court admitted the cartoon, over Respondent's repeated objections, apparently on the basis that the State, by offering the testimony of the tape's preparer who explained the methodology employed, sufficiently established the necessary predicate for its introduction. This was an oversimplification. Cautioning against such an attitude, the author of the above-cited Bar

Journal article warns:

> This does not mean that an illustration is automatically admissible simply because an expert "vouches" for its accuracy. The illustration must accurately depict the testimony presented and it must also fairly represent the scene in question.

O'Connor, Kathleen, "Computer Animations in the Courtroom," 67 The Florida Bar Journal at 24. This the animation in the instant case failed to do.

Section 90.403, Fla. Stat. (1991) provides that even relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." The potential for unfair prejudice to Respondent by the State's presentation of its animated version of the accident, repeated three from three separate perspectives, is inescapable. The jury was assured that the use of the computer made the presentation "very, very accurate":

> A 3-D Studio is a software package. It is basically a computer aided design or C.A.D. package which allows an operator to very, very accurately reconstruct or build within the computers world any object.
>
> as many C.A.D. packages are only two-dimensional, two different dimensions. Three dimensional animation allows the computer to construct the object within it's [sic] own world.
>
> Once that's been completed, you can then rotate the object, you can move about the object through the eyes of the computer. And as far as the computer is concerned, that object then is a very real object.
>
> Q When you say "very, very accurate," can you give the jury an example as to how accurate the program is?
>
> A The ability of the program depends upon the scale of the scene which you're going to reconstruct.
>
> For example, if we take an area that is approximately one mile by one ,mile, the accuracy of the scene is down to something less than one inch. Once we look at objects like vehicles or even a house, you're talking about accuracies down to between 100 and one 1,000 of an inch. It's an incredibly accurate software package....

(R 1027-1028). This appearance of exceptional accuracy because of the computerized nature of the

technology used[12] was reinforced when, in describing the cartoon as it was shown to the jury, Detective Babcock repeatedly referred to the "camera" angle of each of the viewpoints shown (R 1127-1128).

By virtue of the visually arresting images contained in the videotape, images described as made with a "camera," the jury was imprinted with a version of the accident which ignored any testimony of the witnesses which was contrary to or inconsistent with the State's theory. Thus, Respondent's primary defense, that he was not the driver and his was not the truck involved in the incident, a defense which found substantial support in the eyewitness accounts that it was a green truck which struck the children, was effectively exploded by the graphic depiction of his exact vehicle, with a driver of his exact height, ramming into the group of children.

Likewise, his secondary defense that the accident was not caused by recklessness but the unavoidable result of a sudden loss of control upon entering the puddle found support in the testimony of one of the State's own police officers, who agreed that "you have to be careful" when driving on the street where the accident occurred when it rains because of the formation of the large puddle (R 640). But the image of the puddle contained in the cartoon was one which minimized its incursion into the street, based upon witness interviews six months after the accident and in contrast to those witnesses who placed the puddle as extending at least partially into the street.

Finally, and also relating to Respondent's defense against the element of recklessness, the cartoon intentionally did not reflect the lighting and weather conditions on the night of the accident, which were admittedly dark (R 749) and inclement. Obviously, under those conditions, the children playing in the puddle would have been all but invisible until a vehicle was right upon them, a factor

---

[12]The same assertion of accuracy to the thousandths of an inch -- accuracy neither necessary nor particularly desirable in this case -- would hardly have been flaunted if the animation in the present case had been hand-drawn, even though the validity of such an old-fashioned animated technique would have been exactly the same insofar as the instant case was concerned, since any value the animation may have had lay in its illustration of the State's general theory of facts, not in any new information discovered as a result of the uncanny precision of the measurements depicted.

which would surely be relevant to any consideration of the whether the truck driven that night was operated recklessly. Yet the State's cartoon took no account of these important factors, on the grounds that had the lighting and weather been accurately shown, the jury would not have been able to see anything (R 1035). Just like the driver of the truck. Exactly. The animation shown to the jury below thus presents an object case for the warning stated by Ms. O'Connor in her Bar Journal article:

> If, for instance, the issue in an accident case is whether the driver of a vehicle had an adequate opportunity to see another vehicle and avoid an accident, then the animation should show the event from the perspective of the driver. If an overhead perspective is offered, which would give the jurors a better perspective on the event than the driver had, then the animation might be very misleading and could properly be excluded on that basis.

O'Connor, Kathleen, "Computer Animations in the Courtroom," 67 The Florida Bar Journal at 24.

Petitioner argued in the district court of appeal that the computer animation introduced into evidence in the instant case was accurate, citing to witness testimony which supported its argument and discounting witness testimony which contradicted it. Thus, Petitioner argued that even though none of the witnesses to the accident described the truck as blue, the evidence that it was blue was "overwhelming" because the street was lit (albeit dimly) with lights, because Respondent's truck matched the police description of the truck in the accident (although not that of the witnesses), and because damage to Respondent's truck had been repaired. Petitioner's position was apparently based on its conclusion that Respondent is guilty and therefore any evidence which depicts him as the guilty driver must be accurate as a consequence. Having concluded (as the jury might not) that the evidence it chose to consider trustworthy supported Respondent's guilt, the State then argued that it was appropriate to use the dimensions of Respondent's truck and Respondent himself to prepare the computerized cartoon, because, since Respondent was guilty, "accuracy" was thereby "ensured." To the contrary, the fact that the animation conformed to the State's theory of the case could not establish its accuracy as a re-creation of what happened in the face of the inconsistent and contrary testimony of its own witnesses.

Petitioner further argued that the multiple perspectives used in the cartoon were not

misleading. But in fact, the State's animation contains a view of what the children purportedly saw which, while quite dramatic, is patently false. The final seconds of the state's animation show a closeup of the truck at impact with its headlights on and the grille in sharp focus -- the grille of a truck which police said was like that of Respondent's Chevrolet Silverado before the accident. In fact, testimony of the surviving children indicates that none of them saw that grille. Further, whatever the children did see, their testimony indicates that it was not this grille. Joel Mansey, the only child who could describe the truck at all, testified that he saw the letters "F" and "O" on the front of the truck (R 563), which had a "big grille" (R 548). Further, the chrome bumper of the truck he saw had no bumper stickers on it (R 566), unlike Respondent's truck. Gina Vitello saw even less -- only the truck's headlights and what looked like a camper top (R 604). Patently, the State's cartoon did not depict what these children saw.

Petitioner further argued that no evidence supported the defense theory that the truck skidded uncontrollably after entering the puddle accidentally, rather than intentionally swerving toward the children as the State theorized. But the State's own evidence suggested that the truck had been travelling in the middle or on the wrong side of the road just prior to the accident (R 108, 110). It was thus entirely consistent with the defense and the State's evidence that the truck, seeking to return to the right side of the road, turned in that direction quite incidentally as it approached the children and without any knowledge that they were there[13] but that the driver lost control as the truck entered the puddle, which extended into the street, so that the truck in effect hydro-planed unmanageably into the children. This theory was, of course, contradicted by the computer cartoon, even though it constitutes a cogent, if emotionally less highly-charged, theory of how the accident happened than the State's theory of what amounts to a planned attack.

Consequently, the cartoon in the present case was misleading, presenting as it did only a selective illustration of the accident while it purported to be of camera-like accuracy in showing what occurred. It is an illustration of the well-known principle of the computer world: garbage in,

---

[13]This is particularly likely in view of the poor visibility conditions.

garbage out.

> Q If somebody provides you. let's say, with the term "correct information" then the animation will reflect that information?
>
> A That is correct.
>
> Q And obviously we heard this, "garbage in, garbage out," if somebody gives you incorrect information, then your animation will reflect that?
>
> A That is correct.

(R 1037). "If the illustration misleads rather than enlightens the jury, it should be excluded as being unfairly prejudicial." O'Connor, Kathleen, "Computer Animation in the Courtroom," 67 The Florida Bar Journal at 24.

The instant case presents a textbook example of computer age technology used to dress up a prosecution by lending an aura of infallibity to expert testimony which came down to no more than an opinion that it was the defendant's truck that struck the children, even though the eyewitness testimony suggested otherwise. There was nothing in the expert's evidence which required explication or illustration in order to enhance the jury's understanding. The use of the animation below merely added the seeming imprimatur of science and mathematics to the State's theory of the case by the invocation of "computer technology" as its source. But the only thing the computer did in the instant case was to act as an illustrator: it drew the picture the "expert" wanted the jury to see. *There can be no question that, had the picture been drawn by a human animator, it could never have had the same impact on the jury.*

In a panel discussion reproduced in September 11, 1995, issue of The National Law Journal at C2, contains the following caution stated by Gregory Joseph, the author of Modern Visual Evidence:

> I've seen that animation [prepared for use in the O.J. Simpson trial but not admitted into evidence], too. And I'm aware of at [least] six other criminal prosecutions in which recreations have been admitted. But most of the reported cases exclude re-creations of crimes, even if based on eyewitness accounts, on the theory that they are too potent -- e.g., "Such a portrayal of an event is apt to cause a person to forget that 'it is merely what certain witnesses say was the thing that happened' and may impress the jury with [its] convincing

> impartiality...'" *Lopez v. State*, 651 S.W.2d 413, 414 (Tex. App. 1983).
>
> A real problem of human liberty is at stake, and often only the prosecution has the funds either to do an animation or even to retain an expert to analyze one.
>
> * * *
>
> Some state cases tend to be more liberal than the federal opinions in admitting re-creations in criminal cases, and this is a subject of concern. There are some subtle changes in facts that can be blended into a computer program that even an astute eyewitness will not be able to identify. Courts should be apprehensive that jurors may be so forcefully impressed by sophisticated animations purporting to re-create a crime -- which are illustrative in nature -- that they will overlook the substantive evidence that has been presented to them.

This cautionary statement should be taken to heart. The present case represents a dangerous expansion of technology into the courtroom. The decision of the Fourth District Court of Appeal rests on its conclusion that the animation in the instant case included accurate factual input. Entirely omitted from the decision is the mountain of contrary evidence which was simply ignored in assembling the data which went into the computer program and resulted in the images imprinted on the jury in three separate views over six *silent* minutes. Thus, the picture presented to the jury did not take into account the fact that all the eyewitnesses to the accident said that the truck involved was green (record on appeal at 551, 572, 703, 724) or dark (record on appeal at R 949), not blue, as depicted in the video. Nor did the animation accurately show the shape and extent of the puddle, as described by the witnesses: the elliptical form shown on the tape was the product of limitations in the software program, not an accurate representation of what the witnesses described (record on appeal at 1084-1085). Indeed, although *none* of the witnesses to the accident noticed any bumper stickers on the death truck, the vehicle shown to the jury in the animated video exhibited bumper stickers like those which were on Respondent's truck. Finally -- and importantly -- there was not even an attempt to accurately reproduce the weather conditions which existed on the night of the accident -- dark, rainy, with concomitant poor visibility.

The contradictions between the facts testified to by the witnesses and the images reproduced on the computerized animation video bring the instant case within the class of uses warned against in People v. McHugh, 476 N.Y.S. 2d 721, 722-723 (N.Y. Super. Ct. 1984), when it observed how

important it was to the proper use of a computerized image that "it fairly and accurately reflect the oral testimony offered and that it be an aid to the jury's understanding of the issue."

In conclusion, Respondent notes that "progress" is not always without risk and danger to the greater interests of the criminal justice system in securing not just convictions, but justice. As stated by Judge Van Graffeiland in his dissenting opinion in Perma Research and Development v. Singer Co., 542 F. 2d 111 (2d Cir.), cert. den., 429 U.S. 987 (1976):

> Although the computer has tremendous potential for improving our system of justice by generating more meaningful evidence than was previously available, it presents a real danger of being the vehicle of introducing erroneous, misleading, or unreliable evidence. The possibility of an undetected error in computer-generated evidence is a function of many factors: the underlying data may be hearsay; errors may be introduced in any one of several stages of processing; the computer might be erroneously programmed, programmed to permit an error to go undetected, or programmed to introduce error into the data; and the computer may inaccurately display the data or display it in a biased manner.

Id. at 125. The instant case presents an example of the abuses warned against by Judge Van Graffeiland. This being so, the introduction of the State's animated video in this criminal prosecution deprived Respondent of the right to a fair trial guaranteed him under the United States Constitution, and his convictions must therefore be reversed.

CONCLUSION

Based on the foregoing argument and the authorities cited, Respondent requests that this Court reverse the judgment and sentence below and remand this cause with such directions as it deems appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JAMES J. CARNEY, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 14th day of AUGUST, 1996.

Of Counsel