IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JAMES McINNIS,

Respondent.

CASE NO. 87,915

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

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 Seventeenth Judicial Circuit. They may or may not be controlled by the decision herein. Nevertheless, the 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.

The District Court of Appeal reversed Respondent's conviction on 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 ground upon which the district court reversed was that the trial judge's self-styled instruction and illustrations purporting to explain reasonable doubt to the venire during voir dire were found fundamentally erroneous and prejudicial, thus necessitating a new trial.

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, impermissibly 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, it would be fundamental error.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Petitioner's Statement of the Facts is accepted subject to the following relevant additions because the statement in Petitioner's brief is incomplete, as it excludes relevant portions which are necessary for a full and accurate understanding of the evidence and proceedings at trial. The Statement of the Facts is accepted with the following relevant additions:

1. Prior to the empaneling of a petit jury, the trial court gave the venire the following instruction:

> The state is not required to prove these charges absolutely, or 100 percent, or perfectly to you, because as human beings we know one thing, unless we see and experience something ourselves we can never be that sure in our minds of what's occurred.
>
> Any time we have to listen to what someone else tells us occurred we can always have a doubt. We can always speculate. We can always imagine. We can never be 100 percent sure of anything.
>
> *****
>
> But a jury can never be as sure of what you saw as you the witness were and that's why the law does not require that the State prove its case to perfection, or certainty, or 100 percent, but they prove the case beyond and to the exclusion of every reasonable doubt.

(R. 70-71); McInnis v. State, 21 Fla. L. Weekly D943 n.1 (Fla. 4th DCA April 17, 1996)(opinion on rehearing).

2. After instructing the venire thusly, the trial court proceeded to illustrate this concept, as follows:

> ...[L]let's pretend right now I were in trial, this is to illustrate to you the difference between beyond and to the exclusion of every reasonable doubt and certainty.
>
> How did I as a judge come into this courtroom? Because the one thing you know is when you came in I was here. And you have a little advantage in this case because you can look around the courtroom.
>
> You know there is a door you came through. There looks like there is a door to the right of you. As you sit there, looks like a corridor right behind Deputy Moxy.

So as an inquisitive group one of you is the spokesperson, and you ask the attorneys Mr. Shane, Mr. O'Connell, how did the judge come into this courtroom.

And they tell you the exact same thing. They tell you I came in here through the corridor where Deputy Moxy is seated and I walked up on the bench. And again if you do that, I think you're all going to decide again that's perfectly reasonable that I came in here, as I suggested, but again none of you know that for certain, because you were not there.

Now, some of you may be what we call doubting Tom's or skeptics that like to imagine or force a doubt, so one of you says to the other jurors, geeze, you know, I saw Deputy Moxy when he stood up.

...He's a real tall gentleman. Well, he can easily reach up to the air vent, around the sides of the courtroom, and I'll bet you that in his back pocket he has a screwdriver, and what he does whenever the Judge wants to come into the courtroom, he unscrews the air vent, out pops the Judge.

Well, the first thing you're doing is obviously you're speculating, imagining, forcing a doubt, but most importantly you're doing that on evidence that's not even before you.

Because no one has even begun to tell you -- There is no evidence that Deputy Moxy has a screw driver in his back pocket, nor that I could fit through the air vent, so such a doubt would not create a reasonable doubt because it is forced speculative or imaginary doubt. Okay.

R. 72-74. McInnis v. State, supra, n.1.

SUMMARY OF THE ARGUMENT

The district court of appeal applied sound principles of law in ruling that the ad hoc admonition or instruction and verbal illustration given to the jury that informed the jury that certainty was not essential to a criminal verdict of guilt was improper and it was within that court's authority to decide this question of law as such. The trial court's attempt to illustrate the concept of reasonable doubt further minimized the due process requirement. Inasmuch as the concept of reasonable doubt puts the burden of proving an accused's guilt of the charged crime beyond a reasonable doubt squarely on the State, as embodied within the standard jury instruction, the trial court lessened this burden by informing the venire that doubt cannot arise from the lack of evidence; that jurors cannot disregard any evidence they wish to and to accept all testimony as given; and shifting the burden of proof from the State and on to the accused. Furthermore, the trial court's illustration attacked and demeaned jurors by referring to them as "doubting Tom's or skeptics that like to imagine or force a doubt" if they were to doubt the facts supplied within the trial court's example. Additionally, 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 and demonstrate its operation 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.

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

ARGUMENT

WHETHER THE TRIAL COURT FUNDAMENTALLY ERRED IN MAKING THE INTRODUCTORY COMMENTS, ALONG WITH GIVING ITS "REASONABLE DOUBT" EXAMPLES, TO THE VENIRE PRIOR TO THE SELECTION OF THE JURY, WHEN THE APPROVED STANDARD JURY INSTRUCTION ON REASONABLE DOUBT WAS READ TO THE VENIRE PRIOR TO THE TRIAL COURT'S AD HOC COMMENTS AND READ AGAIN TO THE PETIT JURY IMMEDIATELY BEFORE IT RETIRED TO DELIBERATE?

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

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, 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. R 71. 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 that "the law does not require that the State prove its case to ... certainty," 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 and description such as were given by the judge in this case. Respondent submits that the Court should find that the district court was not in error in its decision because this Court has for 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 too much of a stretch to view Victor as approving such a departure as occurred in this case, especially when the subject was singled out 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.

The State maintained, per Victor, that since the trial court read the entire standard reasonable doubt instruction, it provided an appropriate balance between the erroneous and appropriate reasonable doubt instruction. However, as the district court concluded, "there were no proper balancing instructions" given to the venire. McInnis v. State, Fla. L. Weekly D242 (Fla. 4th DCA January 24, 1996)(original opinion). Returning to Victor, the Supreme Court found balance within the context of a single reasonable doubt instruction. Instantly, the trial court gave various and conflicting instructions regarding reasonable doubt. While one was proper, i.e., the standard instruction, the others were improper variances which lessened the state's burden of proof. Balance, therefore, must be within the instruction itself, not between conflicting instructions which only confused the venire as to which proper reasonable doubt instruction to apply. Inasmuch as the last instruction the trial court offered the venire was its erroneous reasonable doubt illustration (R 72-74), the reasonable likelihood was that the venire and later the petit jury would be utterly befuddled as to what reasonable doubt lawfully meant and how it should be properly applied to trial evidence.

(b) The Trial Court's "Reasonable Doubt" Illustration

Quite apart from the trial court's diminishing of the standard reasonable doubt instruction by informing the venire that its certitude as to Respondent's guilt was not required in order to find him guilty, the trial judge's illustration (R 72-74) as to what his mind's eye perceived to be reasonable doubt fell far below the minimum requirements of due process. Cage v. Louisiana, supra, In Re Winship, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Within its ill-advised attempt to explain reasonable doubt in tangible terms, the trial court told the venire that reasonable doubt cannot arise from lack of evidence, and that jurors cannot disregard any evidence they wish to, but must accept all testimony as given. The example also shifted the burden of proof onto Respondent by requiring him to provide evidence to raise a reasonable doubt. Moreover, in trying to suggest the mechanics upon which reasonable doubt is arrived, the trial court impugned the character and integrity of venire members by referring to those who might be inclined to be skeptical as "doubting Toms" and telling them they would force or imagine doubt, thus not making fair and impartial jurors.

Interestingly enough, Petitioner fails to address the issue of the trial court's illustration in its merits brief, either in its Statement of Facts or within its argument. Nevertheless, this attempt to describe reasonable doubt was far more egregious than the trial court's earlier instruction dispensing with certitude as to reasonable doubt.

Section 2.04 of the Standard Jury Instructions in Criminal Cases provides that the jury may believe or disbelieve any evidence or testimony presented within the trial. However, in its example, the trial court tells the venire that as to the question, "how did the judge come into this courtroom," the parties' attorneys "tell you the same thing, they tell you I came in here through the corridor... and I walked up to the bench." The trial court went on to instruct the venire, with that context, that they ought not speculate about evidence that's not before them, that they may not draw any conclusions contrary to what the witnesses (the parties' attorneys) told them as to the manner in which the judge entered the courtroom. This illustration created an unlawful,

conclusive presumption, compelling the venire that as jurors they must accept as facts evidence presented by the state, without regard to proof beyond a reasonable doubt. Cavella v. California, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989); In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Clearly, the example sent the image to venire members that they had no choice but to accept testimony as presented. In so doing, it failed to inform them that there are many factors to consider when determining witness credibility. § 2.04, Std. Jury Inst. The examples ignored factors such as whether a witness is testifying in a straightforward manner or if a witness made prior inconsistent statements or whether a witness actually perceived what he claimed to have seen or whether a witness's memory seemed accurate. While it is admittedly unnecessary for a judge to inform the venire of the various factors involved in weighing the credibility of evidence, once it hypothetically comments on the nature of evidence and how it influences their individual and collective determination of reasonable doubt, and when, as in the instant case, a trial court fails to explain the variety of factors which could affect the believability of testimony, the net result is a lessening or minimization of the reasonable doubt standard. The trial court's admonition to the jury that they cannot speculate as to how he entered the courtroom was tantamount to instructing them that in order to arrive at reasonable doubt, they would have to hear testimony or be presented with evidence offered by the defense, thus shifting the burden of proof on the accused. See Mullaney v. William, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); Clewis v. State, 609 So. 2d 974 (Fla. 3d DCA 1992). In instructing the venire that it was unreasonable for them to speculate that he entered the courtroom through an air vent with the bailiff's assistance, the trial judge emphasized his point by stating, "Well, the first thing you're doing is obviously you're speculating, imagining or forcing a doubt. But most importantly you're doing that on evidence that's not even before you." [Emphasis Added]. Clearly, the trial court led the jury to believe that in order for them to have a reasonable doubt, they would have to be presented with testimony or evidence by Respondent. In other words, while they need not be certain of guilt to convict based exclusively on the prosecutor's case, there

is no reasonable doubt unless Respondent shows them otherwise. In this vein, the trial court's illustration goes way beyond lessening or minimizing the reasonable doubt standard requiring outright role reversal, whereby Respondent has to prove that there is sufficient reasonable doubt to acquit. The example, given outside the context of the standard reasonable doubt instruction, had no balance. Yet, even if it was, the fact that it seeks to have venire members look to the accused to present evidence in order for them to have reasonable doubt certainly obliterates any notion that this example ever could have been constitutionally balanced to afford Respondent his due process rights. See In Re Winship, supra.

Moreover, there was no balance due to the extreme nature of the example itself. While giving illustrations of forced doubt, the concept of reasonable doubt was lost. The venire, being average lay people, were misguided by the trial court to believe any sort of doubt would be unreasonable, thus eliminating reasonable doubt altogether.

The trial judge, in overemphasizing the point that they could not be certain that he entered the courtroom through the doorway told the venire that, "Now some of you may be what we call doubting Tom's or skeptics that like to imagine or force a doubt..." While the trial court appeared to be attempting to tell the venire not to speculate in their role as jurors, it failed. Instead, its admonition impugned the character of those members of the venire, who, by nature, were skeptics and consequently had a chilling effect on their ability to impartially listen to testimony, review evidence and render a fair verdict, depriving Respondent of a fair trial. Such remarks by a trial judge whether stated explicitly or, as here, referenced by innuendo, may detract from the fairness of the trial by influencing the independent judgment of the jurors. See Saintjoir v. State, 534 So. 2d 874 (Fla. 3d DCA 1988).

The trial court essentially told venire members that he does not want "doubting Tom's" on the jury. Moreover, it sent the message that any sort of skepticism was improper and that jurors must blindly accept what they hear without regard to their personal, common sense or life experience. Not only did this instruction denigrate potential jurors as individuals, but also

countermanded the standard jury instruction on weighing the evidence and rules of deliberation. § 2.04 and § 2.05, Std. Jury Inst.

Judges, whether on or off the bench, must make certain that their remarks are proper and do not convey an image of prejudice or bias to any person or any segment of the community. See Peek v. State, 488 So. 2d 56 (Fla. 1986). Departure from neutrality is readily detectible to jurors upon whom the trial court's influence is great, and as such, jurors will condemn or approve points of view in harmony with the trial court's stated position. See Skelton v. State, 133 So. 2d 477 (Fla. 3d DCA 1961). Moreover, when, as here, a trial judge's improper remark is of such a character that neither rebuke nor retraction may entirely destroy its erroneous influence, no contemporaneous objection is required to preserve reversible error. See Ailer v. State, 114 So. 2d 348 (Fla. 2d DCA 1959).

Instantly, the trial court erred by telling venire members not to doubt what they hear from the evidence presented. If they did, he said, they would be engaging in improper speculation. Moreover, they must only look to the state's direct examination testimony as evidence and guilt and any reasonable doubt must be supplied by Respondent. Simultaneously, the illustration instructed them that they need not be certain that the state proved it's case beyond a reasonable doubt in order to return a guilty verdict.

(c) The Timing of the Pre-Trial Instruction

Petitioner 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 it to mean. It would not matter if the judge read the standard instruction several times, without further advising them to affirmatively disregard what they had understood the "explanation" or "illustration" to mean earlier, the harm would not be erased. The admonitions 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 and that the state's case must not be doubted unless Respondent presents evidence. The instruction and illustration were 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 nothing 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.

(d) 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. For over 100 years, this Court has 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 district court was correct in holding that a court's admonition to a jury that it may have doubts and still find the defendant guilty, as well as to blindly accept prosecution testimony on its face, 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 or not to weigh evidence or doubt its veracity 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).

The flawed instruction made it likely that the jury could have reasonably perceived that it could disregard cross-examination testimony based its verdict solely on evidence elicited by the state, under circumstances wherein they were not necessarily certain that Respondent was guilty. The error in the instruction is therefore harmful constitutional error. It goes to the core Due Process interest in assuring the required burden of proof and 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.

As previously stated, the trial judge departed from 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, supra. This in effect truncated the concept and suggested 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, said that a charge stating the following about being instructed as the one below as to the jury having to find "reason" in order to support a conclusion that the proof is not beyond a reasonable doubt:

> 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.

Bryan, 141 Fla. at___, 194 So. at 386. 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 simple error 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), the same trial judge as involved in the instant case 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. The extent to which the deviations occur necessitate 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 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 of the correctness of the charge, not simply the amount of evidence or the party responsible for presenting evidence.

(e) 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.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sarah Mayer, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 9th day of August, 1996.

Attorney for James McInnis