ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,915

STATE OF FLORIDA,

Petitioner,

vs.

JAMES McINNIS,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

Petitioner reasserts the statement of the facts as it appears at pages 5 through 10 of its Initial Brief.

SUMMARY OF THE ARGUMENT

The challenged comments, which occurred only at the preliminary stage of trial, were made to the venire, prior to jury selection, and when considered in the entire context of the introduction, were accurate. Further, when the comments are taken together with the standard reasonable doubt instruction given to the venire as well as to the **selected** jury just prior to deliberations, they were not only proper, but any error was cured by the giving of the standard instruction. The challenged comment did not impermissibly reduce the reasonable doubt standard below the protection of the due process clause. Thus Respondent is not entitled to a new trial. Therefore, the certified questions should be answered in the **negative**; the District Court's opinion **quashed**, and the conviction affirmed.

ARGUMENT

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN MAKING THE INTRODUCTORY COMMENTS TO THE JURY VENIRE PRIOR TO THE SELECTION OF THE JURY, WHEN THE APPROVED STANDARD JURY INSTRUCTION ON REASONABLE DOUBT WAS FULLY READ TO THE JURY DURING THE INSTRUCTIONS TO THE JURY IMMEDIATELY BEFORE THE JURY RETIRED TO DELIBERATE.

In reply to Respondent's arguments, Petitioner hereby reasserts the arguments made in the initial brief.

In his brief, Respondent urges this Court to take one portion of the trial court's *preliminary comments* to the jury and to convert them into an **instruction** that the jury must have followed, over and to exclusion of all additional instructions, including the standard instruction on reasonable doubt. Additionally Respondent asserts that these comments could not have been corrected by any means. Respondent's position is not persuasive.

Respondent, noting that the district court below found that no balancing instructions were given to the venire, argues that balance must be found "within the instruction itself, and not between conflicting instructions", and asserts that because the last instruction given to the jury in this case was erroneous, the jury would have been "befuddled" as to what reasonable doubt meant. (RB 10). Initially, it must be noted that the **complete** finding by

the district court was: ".... as in Jones, there were no proper balancing instructions. In both cases, the instructions were given to the venire, and the standard instructions were not given until the jury was being instructed before retiring." McInnis v. State, 671 So. 2d 803, 804 (Fla. 4th DCA 1996). Clearly, that finding is incorrect; even Respondent acknowledges that the complete standard instruction on reasonable doubt **was** given to the venire as part of the preliminary instructions (R. 68-69). Because the standard instruction **was** given in this case, a finding that the instructions given by the trial court were not balanced cannot be sustained unless this Court finds that the standard instruction on reasonable doubt is not proper or balanced. It is noteworthy that the Third District has held that where the standard instructions are given to the jury, additional instructions are not required to balance extemporaneous remarks. Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991); Doctor v. State, 21 Fla. L. Weekly D1856 (Fla. 3d DCA Aug. 14, 1996).

Moreover, it is well settled that a sentence or phrase cannot be considered in isolation, but must be examined in context with the **entire** comments made to the jury. Higginbotham v. State, 19 So. 2d 830 (Fla. 1944). Indeed, the Court in Victor v. Nebraska, 511 U.S. ___, 115 S. Ct. 1329, 127 L. Ed. 2d 583 (1994), repeatedly

construed the complained of instructions in conjunction with **all** of the other instructions given by the trial court judges and found that the proper meaning of the words used by the trial courts was reinforced by other instructions given in those cases. Id. at 114 S. Ct. 1247-1251. The record is clear that the comments in the instant case were made by the trial court as part of an overview he gave prospective jurors of a typical criminal trial (R 47-75). While the trial court told the jury that absolute certainty was not required as part of the preliminary instructions, the trial court also read the jury the **complete standard instruction on reasonable doubt** (R. 68-71). Additionally, as in Victor, the judge reinforced the proper reasonable doubt standard by informing the jury of the defendant's presumption of innocence, defining the State's burden of proof, repeatedly stressing that the State was required to prove its charges beyond a reasonable doubt, by giving an example of what analysis, such as weighing evidence and determining credibility, jurors might apply to determine whether reasonable doubt existed as to whether or not a particular event had transpired, and by reiterating that the jurors were to make their decision based on the evidence received at trial (R 66-74).

Further, **contrary** to Respondent's assertion, the **last** reasonable doubt instruction given to the jury was the complete

standard instruction on reasonable doubt. With no deviations, no embellishments, no examples, the complete standard instruction on reasonable doubt was read to the jury just prior to their deliberations. (R. 363-364). Even if review is focused on the trial court's preliminary remarks, the last example given to the jury was that if the State rested its case without presenting any evidence, the jury would be required to find Respondent not guilty because the State had failed to meet its burden of proving Respondent's guilt (R. 74-75). Thus Respondent's claim of "befuddlement" is not supported by the record.

To properly decide this case, the complete, approved, standard jury instructions on reasonable doubt which was **twice** read to the actual sworn jury must be reviewed. The initial instruction was given as follows:

> A reasonable doubt is not a possible doubt. It's not a forced, speculative or imaginary doubt, such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. So that's what is required before you can find someone guilty, is that an abiding conviction of guilt, on the other hand if after carefully considering, comparing, and weighing all the evidence there is not an abiding conviction of guilt, but if having a conviction it is one which is not stable, but one which wavers and vacillates then the charge has is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the

doubt is reasonable.

> It is to the evidence that's introduced into this trial, and to it alone, that you're to look for that proof. A reasonable doubt may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt you should find Mr. McInnis not guilty. If you have no reasonable doubt then you should find him guilty.

(R. 68-69). As can be seen, the trial court did not deviate from the standard instructions so as to create fundamental error. Likewise, the trial court's **final** instruction on reasonable doubt was not a deviation from the standard instructions (R. 363-364).

The comments *sub judice* are not as strong as the instructions found to be constitutional in Victor v. Nebraska. In Victor, the United States Supreme Court found no error with the instruction that, "absolute or mathematical certainty is not required. You may be convinced of the truth of the fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon strong probabilities ... ." If the United States Supreme Court found no error with these comments, the challenged comments at bar cannot be error, much less fundamental error.

Respondent also argues that the trial court's example improperly shifted the burden of proof to Respondent, informed the

jury that reasonable doubt could not arise from the lack of evidence, and that jurors were not permitted to disregard any evidence they wished, but had to accept all testimony as given (RB 11). A review of the trial court's remarks **in their entirety** not only refutes Respondent's contentions, it also reveals that the trial court's remarks were a correct statement of the law.

Respondent argues that the trial court's example led the jury to believe that reasonable doubt could not arise from a lack of evidence. This contention is refuted by the trial court's final comments to the jury, wherein he stated that if the State failed to put on proof so as to sustain its burden, the jury was required to acquit Respondent (R. 74-75). Obviously the jury was correctly informed that reasonable doubt can, and does, arise from a lack of evidence.

Respondent further asserts that the trial court's example wherein all of the witnesses say the same thing gave rise to an inference that the jury had to accept those witnesses' testimony without regard to reasonable doubt (RB 11-12). Respondent **omits** the trial court's additional comments that the jury's job was to weigh that evidence and to determine those witnesses' credibility (R. 71, 93-94). Clearly these comments **were not** tantamount to telling the jury that they were required to believe a witness'

testimony. Further, the trial court **did**, contrary to Respondent's representations, inform the jury that there were many factors which they could consider in determining a witness' credibility, including their opportunity to observe the events, their interest in the case, and the consistency of the testimony (R. 72-73).

Respondent also argues that the trial court's telling the jury by way of his example, that it should not speculate on how he entered the courtroom, led them to believe that in order to have reasonable doubt, they would have to be presented with evidence or testimony by Respondent (RB 12). Respondent's contention that the trial court's example shifted the burden from the State to the defense is not borne out by review of the entire context of the trial court's remarks; moreover, telling the jury not to base their decision on speculation, is a correct statement of the law. The trial court **repeatedly** emphasized to the jury that a defendant does not have the burden of proving his innocence, that he does not have to put on any evidence and does not have to testify (R. 67-68, 74-75). Further, the standard instruction itself states that a reasonable doubt cannot be based on speculation. The standard instruction tells the jury that it must rely solely on the evidence adduced at trial in reaching their verdict. Indeed, in Victor, the Court approved the trial courts' telling juries that their duty was

to determine the facts of the case from the evidence adduced at trial and not from any other source. Victor at 114 S. Ct. 1246-1248, 1251. Thus, taking the trial court's remarks as a whole, not only is there no reasonable doubt that the jury was misled by those remarks, the trial court's remarks were a correct statement of the law.

Respondent, relying on several cases decided by this Court in the 1800's and prior to the approval of the standard jury instructions, argues that the comments here were designed to ease the burden of conviction. The State maintains that "reasonable doubt" is a nebulous concept. Juries all over the United States have to grapple with the concept. The trial court *sub judice* was simply giving an example of the meaning of the term for the prospective jurors as part of his overview of a typical criminal case. The trial court not only gave the *prospective* jurors an example of what the terms mean, but also balanced the example with the exact standard definition of reasonable doubt **at the same time** (R. 68-69). The preliminary comments at bar cannot be separated, or emphasized out of context, as Respondent suggests; instead the preliminary comments must be considered in accordance with the entire comments, and in conjunction with the standard jury instructions read to the jury just prior to retiring to deliberate.

The trial court gave the venire panel an overview of a typical case, and told the venire that he would be instructing them on the law they were to consider in deciding the guilt of innocence of Respondent (R. 67).

Further, as acknowledged by the District Court, the "instructions **were accurate**." Jones v. State, 656 So. 2d 489, 491 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995). Thus, when the challenged comment is considered in conjunction with the complete, approved, standard jury instructions on reasonable doubt, given preliminarily **and** at the end of the evidence, no reversible fundamental error has been established. Consistent with this Court's recent decision in Archer v. State, 673 So. 2d 17 (Fla. 1996), the decision of the District Court must be quashed.

As stated earlier Respondent relies in cases decided in the 1800's and prior to the adoption of the standard jury instruction by this Court to support its argument that a "moral certainty" is the **only** correct definition of "reasonable doubt." However, it must be noted that The Florida Bar's Criminal Rules Committee who is considering amendment to the standard reasonable doubt instruction, has presented the following language be considered by the committee members to submit to this Court as an amendment to the instruction:

> A reasonable doubt is an actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with ABSOLUTE CERTAINTY, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you feel safe to act upon it in a matter of highest concern and importance to you.

(See attached Appendix). While Petitioner recognizes the appendix is only a "working draft" or suggested changes still being considered by the committee, and is not ready to be presented to this Court for approval, Petitioner suggests the language is very telling. The very idea suggested by the trial court *sub judice*, is being considered to be included in the standard reasonable doubt instruction, i.e. that "unless we see and experience something ourselves we can never be that sure in our own minds of what's occurred" (R. 70). Thus, if the language is being considered by this Court's Committee charged with amendments to the standard jury instructions, the concept as stated by the trial court is not in error, and reasonable people believe this is correct definition of a "reasonable doubt."

In conclusion, and for all the above cited reasons, Petitioner states that there was no error, fundamental or otherwise, in the trial court's preliminary comments. This Court should therefore answer the question in the **negative**, disapprove Jones by quashing the District Court's opinion, and affirm the conviction.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** and Respondent's convictions affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by courier to: IAN SELDIN, Assistant Public Defender, Attorney for Respondent, Criminal Justice Bldg./6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 6th day of September, 1996.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 87,915

JAMES McINNIS,

Respondent.
_____/

APPENDIX TO
PETITIONER'S REPLY BRIEF ON THE MERITS

1. WORKING DRAFT OF PROPOSED AMENDMENTS TO STANDARD REASONABLE DOUBT INSTRUCTION.

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CIRCUIT COURT
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FREDRICKA G. SMITH
CIRCUIT JUDGE

METROPOLITAN JUSTICE BUILDING
1351 N.W. 12TH STREET
MIAMI, FLORIDA 33125

May 10, 1996

Florida Prosecuting Attorneys Association
Norman R. Wolfinger, President
700 South Park Avenue
Titusville, FL 32780

Dear Mr. Wolfinger:

The committee on standard jury instructions in criminal cases is currently considering a revision of the instruction on reasonable doubt. Because this instruction is so important, we invite your comments at this early stage in our discussion, so that we may consider your views before we vote on whether to recommend any changes to the Florida Supreme Court. Of course, if we do make a recommendation we will proceed to publish it in the Florida Bar News, soliciting comments from all of the members of the Bar.

I enclose herewith a "working draft" which we will discuss again at our meeting on June 19, 1996. I have included two forms, one which shows how this differs from the current standard instruction, and the other which states the draft instruction as it would read straight thrgugh.

I reiterate that this is a working draft only. The committee has taken no votes.

We look forward to receiving your written comments. Please send them to me by June 5, 1996 so that I can distribute them to the committee members before the meeting.

Sincerely,

Fredricka G. Smith

FGS:cl
Enclosures
(cc:[illegible])

(working draft)

Reasonable Doubt

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial ~~until~~ unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving ~~the following two elements~~:

1. ~~T~~ the crime with which the defendant is charged was committed, and the defendant is the person who committed the crime.

2. ~~T~~ the defendant is not required to present evidence or prove anything [except with respect to the defense of _____].

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is ~~not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.~~ an actual and logical doubt that arises in your mind after an impartial consideration of all the evidence and circumstances in the case. It should be a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you feel safe to act upon it in a matter of the highest concern and importance to you.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you ~~should~~ must find the defendant not guilty. If you have no reasonable doubt, you ~~should~~ must find the defendant guilty.

reason2

(working draft)

Reasonable Doubt

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving: the crime with which the defendant is charged was committed, and the defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything [except with respect to the defense of_____].

A reasonable doubt is an actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense: and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you would feel safe to act upon it in a matter of the highest concern and importance to you.

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reasonable

Reasonable Doubt

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving the following two elements:

1. The crime with which the defendant is charged was committed.

2. The defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything [except with respect to the defense of _____].

A reasonable doubt is an actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you feel safe to act upon it in a matter of highest concern and importance to you.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

May '96
Fla. Bar
Cr. Rules Cmte.