IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs.

LUIS ENRIQUE REYES,

Respondent.
_____/

Case No. 88,242

RESPONDENT'S BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Fourth District

Respectfully Submitted,

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PRELIMINARY STATEMENT

Respondent was the defendant and the appellant in the courts below. Petitioner was the prosecution and the appellee.

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

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts, except for its labelling of the instructions on reasonable doubt as "complete, approved" (p. 4 of brief).

Respondent adds the following summary of the trial:

The alleged victim, Carlos Soto, a five time convicted felon, had 4 gin and orange juices at Club Gemini (R-293-295). He left with Grace Sena and Jennifer because he was too intoxicated to drive his own car (R-205,227,296). The trio went to a Shell gas station (R-205). At trial, Carlos Soto did not recall any incident at the Shell station (R-298).

According to Grace Sena, Carlos got out of the car after she asked him not to because she saw people from Club Gemini (R-209-210). She followed him because she was worried about him. Grace Sena thought everything was alright when someone put a friendly arm around Carlos (R-210-211). She kept walking toward the street (R-211-211).

When Grace Sena turned around, she saw three people hit Carlos in succession (R-212). At first, Carlos fought back (R-238). There were four people on top of him (R-212). Someone hit Carlos twice across the face with an eight inch piece of wood that had a key on the end (R-215-216). Ms. Sena did not see the beginning of the fight and did not know who threw the first punch (R-227). She thought the people were Hispanic but she could not identify anyone in court as a person responsible for beating Mr. Soto (R-225). She did not know if appellant was involved (R-227-228).

Hollywood Police officer Kevin Keitz was sitting in his marked patrol unit with his headlights on at another parking lot approximately 100 feet away from the Shell station (R-240-247,265). Five lanes of traffic and a median separated the two locations (R-264).

Keitz testified that he saw 3 males walk toward a couple of people (R-248-249). He saw one person walk up to Mr. Soto and strike the back of his head (R-248-249). Soto fell forward bumping into another person (R-251). This person and his friend in turn struck and kicked Soto (R-251). Soto fell back toward the initial threesome (R-252). Two of the three struck and kicked Soto causing him to go down to his knees (R-252-253). These two immediately returned to a car (R-253). The initial suspect walked up to Soto and took one last shot to the head (R-253-254). The incident lasted 30 seconds (R-268).

Keitz made these observations as he pulled out of his location, radioed for back up, traveled in the wrong direction around the median and pulled into the Shell station (R-250-253). As he was exiting his patrol car, Keitz claimed that he saw appellant strike Soto's head once with a piece of wood six to eight inches long (R-254-256). Keitz did not see a key on the end of the wood (R-285).

Appellant was entering the passenger door of a car when Keitz ran over grabbed his shirt and pulled him out (R-255-256,276-276). Keitz threw appellant to the ground and handcuffed him (R-275-27). Keitz held a flashlight (R-275-276).

Keitz seized a stick from appellant's right front pants pocket (R-256). Keitz, however, did not see appellant put the stick in his pants (R-268). The wood, a bathroom key chain, was photographed and released to the business owner (R-258).

No blood was on the stick or on appellant (R-269,287). There was alot of blood on the ground near Mr. Soto (R-260,287).

Keitz testified that Soto had a knot sticking out above the left eye and one on the back of his head (R-261-262). Soto was taken to the hospital (R-217-218,260). Mr. Soto described his injuries (R-300-303).

Defense witness Crystal Gomez was at Club Gemini until approximately 3:30 a.m. when she got a ride with a group of appellant's friends (R-318-321). The first time she met appellant was when she got in the car (R-323). They stopped at the Shell station (R-321).

Ms. Gomez went to the bathroom and returned to the car while the driver put gas in the car (R-323). Appellant also went to the bathroom and returned (R-324). Ms. Gomez did not notice if appellant had the bathroom key on him (R-346).

Appellant sat in the front passenger seat with the window open (R-324-325). Carlos Soto came over to the car (R-325). He was mumbling and slurring his speech (R-326). He was cursing and upset about somebody hitting him (R-325). Carlos thought a girl hit him (R-325). Ms. Gomez smelled alcohol on him (R-326).

Appellant got out of the car to find out what the guy was saying (R-328-329). Appellant and Carlos Soto walked as they talked (R-329). From 10 to 15 feet away, Ms. Gomez saw Soto hit appellant from behind (R-329-330). Soto did not have a weapon (R-344). Appellant hit back with his fists (R-330).

Soto and appellant punched each other and went down on the ground (R-331). Other people from other cars got involved (R-331-332). The fight stopped when the police arrived (R-332).

Appellant got back in the car (R-332). Ms. Gomez testified that officer Keitz came to the open car window and hit appellant in the face with a flashlight (R-333). Appellant was removed from the car, taken to the ground and handcuffed (R-333-334). The other male occupants of the car were also ordered out of the car and hit with the flashlight (R-333-334).

Appellant testified in his defense. He had one prior felony conviction (R-376). He had 5 or 6 drinks at Club Gemini and was drunk

that night (R-361,377). He did not know Carlos Soto before that night (R-363).

Appellant used the bathroom at the Shell station (R-363). The station clerk gave appellant the key on the stick which was seized from his pocket by the police (R-363). He forgot to return it because he was intoxicated (R-364).

Appellant's account of Carlos Soto's approach to the car, Soto's initial aggression and appellant's arrest was consistent with that given by Crystal Gomez (R-366-375). Appellant added that he hit Carlos as a reflex in self defense (R-390-391). Appellant was sorry for what happened (R-373).

On cross-examination, appellant stated that he hit Soto once (R-383). Appellant could not be certain that he did not hit Soto with the stick (R-383). However, appellant was not responsible for the injuries Soto received. These were inflicted by the other people that joined in the fight (R-388).

The defense rested and the state closed.

SUMMARY OF ARGUMENT

Point 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.

Point 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 on reasonable doubt.

RESPONSE TO PETITIONER'S JURISDICTIONAL STATEMENT

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

Respondent does not agree that this case is of great public importance premised upon the inventory of other cases petitioner has listed. The other pending cases listed are outside the record in this case and, except for a few of them, are not even reported decisions. The listed cases, both pending and decided, are not fair for consideration in deciding the legal issue presented here. Neither this Court nor respondent can fully examine the records in them so as to determine their proper effect, if any, on this Court's consideration of this case. Those cases that have proceeded to decision through denial of certiorari by the United States Supreme Court are final and 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). Other cases listed by petitioner involve differently worded remarks by several other judges in the 17th Judicial Circuit, and may or may not be controlled by the decision here.

Respondent does not disagree that the trial judge for years has been giving preliminary instructions defining reasonable doubt in terms of less than certainty. Respondent does not agree that the instruction now used has been used in previous years. The precise remarks in this case are all that is before this 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 in this regard is irrelevant and inappropriate in relation to the legal issue.

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?[1]

This question must be answered in the affirmative.

A. Victor v. Nebraska.

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

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[1] 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 and in Variance v. State, 21 Fla. L. Weekly D1052 (Fla. 4th DCA May 1, 1996), Supreme Court Case No. 87,916.

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 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.

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. 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. 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.
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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, 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:
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> 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. L. 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. 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.

C. "100 percent."

The trial judge's instruction to the jury here that "nothing is 100 percent certain" went to the heart of respondent's defense, damaging it so profoundly that it can only be seen as fundamental error. The burden of proof and reasonable doubt were vital to appellant's defense. The jury was called upon to resolve several issues beyond a reasonable doubt, any one of which might have produced and acquittal. The jury was faced with contradictory testimony as to what occurred at the Shell station. The only state witness to identify appellant as the person who hit Carlos Soto with a stick was Officer Keitz. His observations, however, were questionable since they were made as he pulled out of his location 100 feet away from the Shell station, radioed for back up, traveled in the wrong direction around the median and pulled into the Shell station (R-240-247,254-256). Further, the physical evidence was inconsistent with the state's theory in that there was no blood on appellant and the stick that held a bathroom key, although there was alot of blood near Mr. Soto (R-260, 269,287). Even if each of this questions were resolved in favor of

the state, the jury was also required to determine whether the state proved beyond a reasonable doubt that the stick was a deadly weapon. In closing argument, defense counsel emphasized burden of proof, reasonable doubt, and presumption of innocence (R-439-441). The court's instruction that "nothing is 100 percent certain" guaranteed that any doubt the jury had about the issues in the case would be resolved in favor of the state and against appellant, a complete reversal of what the law requires.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal and to dissolve the stay granted by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JAMES J. CARNEY, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 12 day of JULY, 1996.

MARCY K. ALLEN
Assistant Public Defender