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IN THE SUPREME COURT OF FLORIDA

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JAMES SCOGGINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 90,627

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward, Florida, and Appellant in the Fourth District Court of Appeal. Respondent was Appellee, below.

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

STATEMENT OF THE CASE

Petitioner James Scoggins was charged by information filed July 7, 1995 with possession of cocaine (R 272-273). Trial before jury was held December 13-15, 1995 (R 279). At the close of the state's case Petitioner moved for judgment of acquittal (R 200). This motion was denied (R 200). On December 14, 1995 the jury interrupted its deliberations to notify the court that it did not have a unanimous verdict and that those in disagreement felt they would not change their minds (R 251-253, 275). The trial judge questioned the jury regarding its numerical division and gave an improvised "Allen" charge (R 251-253, 292-293, 293-297). The jury resumed deliberations the following day and returned a verdict finding Petitioner guilty as charged (R 266-268, 283). He was so adjudicated (R 269, 281-282). On December 15, 1996, the trial judge imposed a sentence of eighteen months imprisonment, with credit for 7 days time served (R 284-286). Petitioner's motion for new trial was denied (R 292-297, 300). Timely notice of appeal was filed January 12, 1996 (R 301).

The Fourth District Court of Appeals found no reversible error in petitioner's case, conflicting with the Third District Court of Appeals decision in Rodriguez V State, 599 So. 2d 678 (Fla. 3d DCA 1990). At Petitioner's request, this Honorable Court accepted jurisdiction on September 5, 1997.

STATEMENT OF THE FACTS

The facts giving rise to the cause at bar involve the 2:00 a.m. June 20, 1995 traffic stop of Petitioner James Scoggins. The stop occurred at Oakland Boulevard and Andrews Avenue, Wilton Manors, Florida.

City of Wilton Manors K-9 handler Oscar Gonzalez testified for the state that he was on patrol when Officer Chadwick radioed for aid in order to stop a speeding dark pick-up truck (R 126-127).[1] Gonzalez spotted the truck, which his radar clocked traveling about 55 m.p.h. in a 35 m.p.h. zone (R 129-133, 145-146). Gonzalez put on his lights and Scoggins, the driver and sole occupant of the pick-up, stopped immediately (R 132-133, 145-146, 151). Chadwick arrived at the stop and upon Chadwick's request, Scoggins produced his license, registration, and proof of insurance (R 134). Gonzalez told Scoggins that he had a drug dog in his car, and when he asked for consent to search, Scoggins agreed (R 134).

Gonzalez stated that the K-9 Rocky [who was at the witness stand] was trained to alert to the specific odors of cocaine, heroin, hashish, marijuana and methamphetamine only (R 120). Rocky alerted by throwing his head back, breathing deeply, and making erratic movements (R 123-124). For the final alert, Rocky would sit where the odor was strongest (R 125).

Rocky made an exterior search of the pick-up and alerted at the driver's side door seam (R 135). Gonzalez asked Scoggins to step out of the car, and the dog searched inside, making a final alert at the ashtray, which was in the center console between the two front seats (R 137, 141, 187-188). Chadwick then opened the closed ashtray and found three cocaine rocks. There was paper or trash on top of the rocks (R 138). Scoggins indicated that he had loaned his truck

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[1] Gonzalez's K-9, Rocky, was with him in the vehicle (R 127).

to someone else but Gonzalez did not recall if Scoggins referred to his girlfriend (R 175). Scoggins was placed under arrest (R 142).

On cross-examination, Gonzalez reiterated that Petitioner pulled over right away, that he produced his driving documents upon request, and that he consented to and did not at any time try to stop the search (R 147-148, 151). Gonzalez acknowledged that no rocks were in plain view and that no rocks could be seen until Chadwick opened the ashtray (R 150). No other drugs or paraphernalia were found pursuant to the arrest or on Petitioner's person (R 153-154). Petitioner denied that the cocaine was his and testified on deposition that the drugs may have belonged to his girlfriend (R 162-163).

Police Officer Christopher Chadwick testified that he was on patrol in the 1900 block of North Andrews Avenue when he saw Scoggins' black pick-up speeding (R 167-168, 178). He radioed Gonzalez, who stopped the truck (R 171). When Chadwick arrived, he ran a license and tag check while Gonzalez requested consent to search (R 170). The K-9 alerted to the driver's side door, then made a final alert underneath the ashtray inside the car (R 173). Gonzalez directed Chadwick to the ashtray, where he found three cocaine rocks (R 174). Scoggins denied the rocks were his (R 174). Chadwick said that Scoggins indicated he loaned the truck to someone else, but he didn't know if he mentioned his girlfriend (T 175). Chadwick testified that after his arrest, Scoggins was adamant the rocks did not belong to him then allegedly said they did and wanted to make a deal to be an informant (R 175, 185).

On cross-examination, Chadwick admitted that although he completed the arrest report, including the narrative portion, he did not refer to Scoggins' alleged admissions in the written report (R 183-185). Chadwick testified that Scoggins did not try to get away from him at any

time, agreed to the search of the vehicle and did not hamper Gonzalez in the search (R 179-180). Chadwick said that he didn't see anything in plain view until he opened the ashtray (R 181, 185). When the ashtray was open, Chadwick saw just three rocks but no trash or paper in the ashtray (R 182). Scoggins denied that the cocaine was his (R 182). Chadwick found no other cocaine in the vehicle (R 183). On recross-examination, Chadwick stated that the ashtray was in the center console in the middle of the dashboard (R 187-188).

Broward County Sheriff's office expert forensic chemist Mary Ferguson analyzed the cocaine rocks taken into evidence (R 189-190). Ferguson testified that the rocks tested positive for the presence of cocaine (R 194). The contraband and lab report were introduced into evidence (R 194-199).

The state and the defense rested (R 199, 202). Both sides closed (R 208-235).

SUMMARY OF ARGUMENT

I.

After retiring for deliberation, the jury informed the trial court that it did not have a unanimous verdict and that those in disagreement did not feel they would change their minds. Instead of reading the Standard Jury Instruction, the court inquired into the numerical split of the jury and asked them to resume deliberations. This constituted fundamental reversible error.

II.

The jury interrupted its deliberations to request the definition of "exclusive possession." The trial court's reinstruction to rely upon the ordinary meaning as to "exclusive" was reversible error. The reinstruction was inaccurate and relieved the state of its burden of proof on an essential element of the cocaine possession offense charged.

ARGUMENT

POINT I

THE TRIAL COURT REVERSIBLY ERRED WHEN IT ASKED THE JURY THE NUMERICAL SPLIT AND IMPROPERLY DEVIATED FROM THE STANDARD ALLEN CHARGE BY INQUIRING INTO THE NUMERICAL SPLIT OF THE DELIBERATING JURY.

This point involves an inquiry by the trial judge into the jury's split vote during jury deliberations.

A defendant has a right to a hung jury, and

> [nothing should be said by the trial court to the jury that would or could likely influence the decision to abandon his conscientious belief as to the correctness of his position.

(Emphasis added); Lee v. State, 239 So. 2d 136, 139 (Fla. 1st DCA 1970). Nevertheless, when a jury announces that it is deadlocked, the Florida Standard Jury Instructions provide an instruction which explains to the jurors their responsibility to seek agreement, but also emphasizes the right of minority members to maintain their honest disagreement over the verdict.[2] This instruction avoids the pitfalls of the traditional "Allen"[3] charge, which tended to

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[2] 3.06 Jury deadlock.

> I know that all of you have worked hard to try to find a verdict in this case. It apparently has been impossible for you so far. Sometimes an early vote before discussion can make it hard to reach an agreement about the case later. The vote, not the discussion, might make it hard to see all sides of the case.
>
> We are all aware that it is legally permissible for a jury to disagree. There are two things a jury can lawfully do; agree on a verdict of or disagree on what the facts of the case may truly be.
> There is nothing to disagree about on the law. The law is as I told you. If you have any disagreements about the law, I should clear

convey to the minority on the jury that it should accede to the will of the majority. Nelson v. State, 438 So. 2d 1060 (Fla. 4th DCA 1983). Any deviation from the carefully crafted language of this standard jury instruction will be closely scrutinized.

> It is the genius of our jury system that twelve impartial persons, individually, applying a subjective standard, come to a common conclusion of a defendant's guilt beyond a reasonable doubt. This fundamental principle becomes subverted if a jury member is pressured to defer to the opinion of his peers. For unanimity is made a sham thereby.

Nelson, Id. In the case at bar, however the trial judge did not read the standard Jury deadlock instruction, but instead improvised his own charge by inquiring into the numerical split of the deliberating jury and requesting further deliberations by the jury (R.251-252, 294-296).

The United States Supreme Court, in Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345 (1926) addressed the polling of numerical division as follows:

> them for you now. That should be my problem, not yours.
>
> If you disagree over what you believe the evidence showed, then only you can resolve that conflict, if it is to be resolved.
>
> I have only one request of you. By law, I cannot demand this of you, but I want you to go back into the jury room. Then, taking turns, tell each of the other jurors about any weakness of your own position. You should not interrupt each other or comment on each other's views until each of you has had a chance to talk. After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried, and will discharge you with my sincere appreciation for your services.
>
> You may now retire to continue your deliberations.

(emphasis added).

[3] Allen v. United States, 164 U.S. 492, 501-502 (1896).

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself would be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellant courts and may vary widely indifferent situations, but in general its tendency is coercive. It can rarely be reported to without brining to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than the or the evidence and the law as expounded in a proper charge, should be e excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

Under Brasfield, supra, the trial court's inquiry alone results in reversible error and there is no need for the harmless error analysis in cases involving a judicial inquiry of the numerical division of a deliberating jury. Brasfield, supra.

In Petitioner's case, after retiring again for deliberation following a jury question, the jury sent a note to the judge indicating an impasse:

> We do not have a unanimous jury at this time & [sic} those who are in disagreement feel they will not change their minds. What should we do?

(R 251, 275). Thereafter, the following colloquy between the foreperson and the trial judge occurred when the jurors returned to open court:

> THE COURT: Okay. I just have couple [sic] questions to ask you, then -- Miss Horvath [foreperson] --
>
> JUROR HORVATH: Uh-huh.
>
> THE COURT: -- do you think further deliberations would help at all?
>
> JUROR HORVATH: There are those who feel that further deliberations would not help them.

THE COURT: Okay. Can I assume by that, that more than one person--the spit is more than one person?

JUROR HORVATH: Yes.

THE COURT: So, in other words, at least four to two?

JUROR HORVATH: Yes.

THE COURT: Okay. And what if I reset the deliberations until tomorrow, have you come back, you think that would serve any useful purpose?

JUROR HORVATH: You have to do what you feel is right.

THE COURT: Really, I don't want -- this is a very sensitive area, because I'm not allowed to make inquiry about a jury's deliberations, just not allowed to. So I can't ask you more than that.

If you think as a foreperson are advising me that you think in any way that resetting this until tomorrow, that could help this jury come to a decision, I will do it. If you think there's no way -- if you want to talk to the other jurors and if you think there's no way, then I'll declare a mistrial.

JUROR HORVATH: Am I allowed to express my personal feelings?

THE COURT: No.

JUROR HORVATH: Perhaps we should go back into the room, just decide whether or not we should meet tomorrow, and then come back out again.

THE COURT: Okay.

(R 251-252, 294-296) (emphasis added). The jury returned and sent a note indicating it wished to come back the next day and deliberate "a little longer being we are still divided ..." (R 276,

253). The jury, unsequestered overnight, returned the next day and arrived at a verdict following further deliberations. (R 265-266).[4]

The judge's inquiry into the numerical split of the jury denied Petitioner due process and a fair trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments; U.S. Const.; Art I, Sec. 2, 9, 12, 16, and 17, Fla. Const.

This issue is properly preserved for appeal. In moving for a new trial, defense counsel challenged both the trial judge's improvised deadlock charge and inquiry as to the numerical split (R 292-297; SR 15). The trial judge stated:

> It's defense counsel's position that in dependent of whether or not I grant a new trial its still an appellate issue and as an appellate issue, it may very well be grounds for reversal ...

(SR 15)

> ... I'm going to make a ruling on the merits.

(SR 16-17).

As the foregoing establishes, defense counsel clearly and specifically objected to the instruction given in a timely manner on the grounds now raised on appeal (R 292-297; SR 15-19). The record demonstrates that the issue on appeal was presented to the trial judge who was fully aware of the nature of defense counsel's challenge and ruled on the issue (R 292-297; 300; SR 15-19). The present issue is thus preserved for appellate review. See Langon v. State, 636 So. 2d 578 (Fla. 4th DCA 1994) (finding issue properly preserved where trial court made it clear that it understood the issue raised by defense counsel and that the issue would be determined on appeal) and R.S. v. State, 639 So.2d 130 (Fla. 2d DCA 1994) (holding defense challenge in the

[4] See Point II, (R 247-250).

context of the record sufficient to preserve the issue for appeal). Should this Court, nevertheless, conclude otherwise, Petitioner vigorously contends that fundamental reversible error occurred here.

However well intended the trial judge may have been, it was reversible error for the judge to inquire as to the numerical split and to deviate from the standard deadlock charge by emphasizing the numerical break down. As the standard instruction for a deadlocked jury makes clear, the jury cannot be forced to reach a conclusion if there is an honest disagreement about the facts of the case. The numerical split is minimized in the standard instruction for deadlocked juries. In this case, after the jury had informed the court that they were deadlocked and that "there are those who feel that further deliberations would not help" (R 251), the judge then inquired into the numerical split of the jury. Immediately thereafter, the trial judge suggested that the jury continue their deliberations. The message to at least some of the jurors must have been that their job was not completed until they in fact reached a verdict rather than to hold to their positions as it was their true belief. In the improvised instruction given by the judge here, the emphasis on the numerical split effectively placed undue pressure upon the jury as a whole to reach a verdict and minimized the importance of the full airing of areas of disagreement. The inquiry by the court into the numerical split of the jury ["so, in other words, at least four to two" R 251-252)] brought undue pressure upon individual the jurors at odds with the rest of the group to simply change his or her vote in order to reach a verdict. This prejudiced Petitioner's right to a hung jury. See Dixon v. State, 603 So. 2d 86 (Fla 5th DCA 1992) (fundamental error to violate defendant's right to hung jury by pressuring juror to give up convictions for the sake of pleasing the judge or saving the expense of a new trial); Bell v. State, 311 So. 2d 179 (Fla. 3d

DCA 1975) (trial court's comment to jury that they had to agree on verdict, even when combined with proper "Allen" charge, was reversible error). Cf. Kozakoff v. State, 323 So. 2d 28 (Fla. 4th DCA 1975) (finding reversible error for the trial court to inform the jury that it must return a verdict). The trial court's improper emphasis on the numerical split and the prejudicial deviation from the standard deadlock instruction denied Petitioner his right to a hung jury and caused reversible error.

Although the Third and Fourth District Courts agreed that judicial inquiry into the numerical split is error, the decision by the Fourth District in the case at bar is at odds with the Third District in Rodriguez v. State, 599 So. 2d 678 (Fla. 3d DCA 1990). The Third District reversed the case following the Brasfield standard, while the Fourth District applied the totality of the circumstances test to determine if the error was reversible. In Rodriguez, the trial lasted less than a day. After deliberating approximately two hours and 20 minutes, the jury asked for portions of the testimony to be read back to them and the judge responded that he had already ruled on that issue. The judge then inquired of the jury as to the split. Fifteen minutes later, the jury returned with a verdict of guilty. In reversing Mr. Rodriguez's case, the Third District found fundamental error, adopted the reasoning in Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 1135-136, 71 L.Ed 345, 346, (1926), finding such an error is fundamental and indicating that such an inquiry of the jury itself should be grounds for reversal. Id.; also see Warren v. State, 498 So.2d 472, 478 (Fla. 3d DCA 1986), review denied, 503 So.2d 328 (Fla. 1987). Although the Brasfield may not be binding on the states, it is certainly persuasive authority for Florida Courts. Due to the privacy and secrecy involved and protected in jury deliberations, the United States Supreme Court in deciding Brasfield noted:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate court and may vary widely in different situations, but in general its tendency is coercive.

(Emphasis added). Brasfield, supra. at 136.

The Second District Court of Appeals in McKinney v. State, 640 So. 2d 1183 (Fla. 2nd DCA 1994), also addressed this issue. Like the case at bar, in McKinney, the trial judge asked the foreperson about the numerical split. The Second District also found the judicial inquiry was error, but applied the harmless error analysis to determine if the error was reversible. In reversing the McKinney case and in finding the error was not harmless, the Second District stated:

> It is well-established that the trial court in a criminal case may give the standard Allen charge in the event of a jury deadlock. As explained in Judge Hubbard's thorough opinion in Warren v. State, 498 So. 2d 472 (Fla. 2d DCA 1986), review denied, 503 So. 2d 328 (Fla. 1987), appellate courts carefully examine any deviation from the standardized procedure. The fear is that members of a deadlocked jury will improperly interpret the judge's words and actions as support for some position on the merits of the case. There is also great concern that some jurors will place undue significance on events during an Allen charge and will use those events to overcome the conscientious convictions of a juror who is pressured to agree simply for the sake of a verdict. Thus, a judge must be especially cautious during an Allen charge to insure that his or her words and actions do not improperly affect the jury's deliberations.

(Emphasis added); Warren v. State, 498 So. 2d 471 (Fla. 3d DCA 1986).

In Branch v. State, 212 So. 2d 29 (Fla. 2d DCA 1968), the Second District generally discussed the secrecy and privacy involved in jury deliberations as follows:

> It is generally still held that the jurors' discussion in a jury room must be kept secret to prevent uncertainty and distrust, the only exception being where there is a mistake in announcing or recording the verdict, or where there is fraud or corruption. Further, the it is improper and against pubic policy to permit jurors to testify to motives and influences by which their deliberations were governed.... To allow such an inquiry concerning the motives and influences of jurors would extend litigation to attempt to determine the imponderable issue of what, in fact, motivated and influenced each juror in arriving at his own independent judgment in reaching a verdict.

Branch v. State, 212 So. 2d 29 (Fla. 2nd DCA 1968).

Section 90.607.2(b), Florida Statutes (1987),[5] prohibits inquiry into jurors "thought processes, emotions, mental processes, or mistaken beliefs." This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. Branch v. State, 212 So. 2d 29 (Fla. 2nd DCA 1968). This rule rests also on the policy of preventing litigants or the public from invading the privacy of the jury room. Velsor v. Allstate Ins. Co., 329 So. 2d 391, 393 (Fla. 2d DCA) cert. dismissed, 336 So. 2d 1179 (1979). Therefore, neither the trial judge nor appellate court is able to determine with any degree of certainty what effect an erroneous inquiry into the numerical split of a deliberating jury actually has on any given juror. A meaningful harmless error analysis in cases such as Petitioner's is, as a practical matter, impossible. It is the very effect which the judge's numerical inquiry had upon each juror

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[5] The statute provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

which is in issue in determining harmless error. Yet inquiry into that realm is prohibited. Section 90.607.2(b), Florida Statues (1987).

Although the judicial inquiry into the numerical split of a jury in deliberations should itself be regarded as ground for reversal, in the event that this Honorable Court applies the harmless error analysis, the error in this case was not harmless.

The Fourth District's totality of the circumstances analysis is contrary to Florida law under State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The harmless error analysis adopted by this Honorable Court in past cases demands that prejudice be assumed in the form of a rebuttable presumption, and the burden is on the Government to demonstrate then harmlessness of any breach to the defendant. State v. Hamilton, 574 So. 2d 124 (Fla. 1991); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

In its opinion in Petitioner's case, the Fourth District Court of Appeals in applying the totality of the circumstances test found no prejudicial effect demonstrated by the jury's choice to continue to deliberate the next day after the judges inquiry. Scoggins v. State, 691 So. 2d 1185 (Fla. 4th DCA 1997). The opinion then went on to say that "other than the inquiry into the jury's numerical division, the trial judge's interaction with the jury presents none of those factors that courts have identified as being improperly coercive." Id. at 1187. The court's opinion then went on to list what the judge did not say to the jurors in this case, but the Fourth District's opinion failed to apply the harmless error analysis to the judge's inquiry of the numerical split itself. It is the effect of the judge's questions on each juror's thought process that is precisely the issue here. There necessarily will not be a record of each juror's personal thoughts in this area as such inquiries by the court of a juror are prohibited by law. It is the lack

of available data which requires that the inquiry itself be the basis of reversible error rather than to apply the totality of the circumstances or harmless error analysis in such cases. In any given case, there will necessarily be little, if any, evidence, data, or record of the judicial inquiry actual influence upon the juror's hearts and minds in reaching their verdict. By requiring the harmless error analysis in this type of case, the result will necessarily be, as the old saying goes, "you can't get there from here".

In a harmless error analysis the burden of proof is on the State to prove beyond a reasonable doubt that the erroneous inquiry into the jury's split did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). When it cannot be proven beyond a reasonable doubt that the judge's erroneous inquiry into the jury's split did not contribute to the guilty verdict, the error is presumed to be harmful and the case should be reversed.

Due to the lack of data available on what effect the judge's judicial inquiry into the numerical split of the jury had on each juror's ultimate decision in this case, and in most cases, Petitioner urges this court to find that such an inquiry itself is reversible error. On the other hand, if this Court determines that the harmless error analysis should be applied in such cases, it has not been shown that the error by the trial court was harmless, and therefore, Petitioner's case should be reversed and a new trial granted.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN ITS SPECIAL REINSTRUCTION TO THE JURY AS TO "EXCLUSIVE" BECAUSE IT WAS INACCURATE AND RELIEVED THE STATE OF ITS BURDEN OF PROOF ON AN ESSENTIAL ELEMENT OF THE COCAINE POSSESSION OFFENSE CHARGED.

Scoggins was charged with and convicted of possession of cocaine (R 272-273, 265-266, 269, 281-283). The Florida Standard Jury Instruction for the offense of possession of cocaine provides, in pertinent part:

> **Drug Abuse -- Possession F.S. 893.13(1)(f)**
>
> Certain drugs and chemical substances are by law known as "controlled substance." (Specific substance alleged) is a controlled substance.
>
> Before you can find the defendant guilty of (crime charged), the state must prove the following three elements beyond a reasonable doubt:
>
> Elements
> 1. (Defendant) possessed a certain substance.
> 2. The substance was (specific substance alleged).
> 3. (Defendant) had knowledge of the presence of the substance.
>
> Definition To "possess" means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.
>
> Possession may be actual or constructive. If a thing is in the hand of or on the person, or in a bag or container in the hand of or on the person, or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person.

> If a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in the constructive possession of that person.
>
> Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.
>
> If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.
>
> If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Fla. Stnd. Jur. Instr. (Crim.) (1996). During the charge conference, defense counsel stated that she did not want the reference to joint possession and the prosecution agreed (R 205-206). The following colloquy occurred:

> [BY THE COURT]: If a person has exclusive possession, knowledge of its presence may be inferred, if a person does not have exclusive possession, knowledge of its presence may not be inferred or assumed. I assume that's helpful to the Defense.
>
> [BY DEFENSE COUNSEL]: Right.

(R 206) (emphasis added).

The jury was then instructed pursuant to the Florida Standard Jury Instructions for the offense of possession of cocaine as follows:

> The defendant in this case has been accused of the crime of possession of cocaine.
>
> Certain drugs and chemical substances are by law known as controlled substances; cocaine is a controlled substance.
>
> Before you can find the defendant guilty of possession of cocaine, the State must prove the following three elements beyond a reasonable doubt:

> Number one, the defendant possessed a certain substance.
>
> Number two, the substance was cocaine.
>
> And, number three, the defendant had knowledge of the presence of the substance.
>
> To possess means to have personal charge of, or exercise the right of ownership, management or control over the thing possessed.
>
> Possession may be actual or constructive.
>
> If a thing is in the hand of, or on the person, or in the bag or container in the hand of, or on the person, or if it is so close as to be within ready reach, and under the control of the person, it is in the actual possession of that person.
>
> If a thing is in a place over which the person has control, or in which the person has hidden or concealed it, it is in the constructive possession of that person.
>
> If a person has exclusive possession of a thing, knowledge or its presence may be inferred or assumed. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

(R 235-236).

After retiring to deliberate, the jury sent out the question, "... please define exclusive possession" (R 247-248, 277). After some discussion about how to respond, the trial judge indicated that he would say that he already defined what possession was and as to "exclusive", "... you should use its ordinary meaning" (T 248). The defense objected to any reference to the "ordinary" meaning noting that Scoggins was charged with possession and not "exclusive possession" and that the jury had already been given the legal definitions of actual and constructive possession (R 248). The defense asked the court to instruct the jury to rely on the

evidence and the law that's been presented, and nothing more (R 249).[6] The judge reinstructed the jury as follows:

> THE COURT: I've already defined possession for you. That's on the tape and you can re-listen if you want to.
>
> As to the word exclusive, you should rely on your knowledge of what its ordinary meaning....

(R 250) (emphasis added). The jury retired and interrupted its deliberations with several notes, including a reference to the fact that it could not unanimously agree (R 251-253, 259-265, 275-277, 280); [see Point II, infra].

The trial judge's elaboration upon the standard instruction here is improper because it effectively relieves the state of its burden of proof as to knowledge and gives the jury unbridled discretion as to the law they must apply. Yanes v. State, 418 So. 2d 1247 (Fla. 4th DCA 1982).

To be sustained on appeal, jury instructions must include a "... sufficient statement of the statutory elements of the substantive offense charged to enable the jury to arrive at a verdict based upon an accurate statement of the law they are to apply to the evidence before them." Shimek v. State, 610 So. 2d 632, 638 (Fla. 1st DCA 1992) (citations omitted) (emphasis added). See also Sigler v. State, 590 So. 2d 18 (Fla. 4th DCA 1991). In deviating from the standard jury instruction, the trial judge here failed to accurately instruct the jury.

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[6] The defense objected and submitted an alternative instruction. The trial court stated that the defense objection was noted for the record (R 249). Following reinstruction, the court again noted: "... so that record is clear ..." that the instruction was over defense objection (R 250). Thus this issue is properly before this Court on appeal. E.g. James v. State, 615 So. 2d 668 (Fla. 1993) (defendant preserved instruction issue by objecting, asking that a different instruction be given, and submitting an alternative instruction); Gainer v. State, 633 So. 2d 480 (Fla. 1st DCA 1994).

Any deviation by the judge from the standard charge calls into question the efficacy of the fact-finding process. Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986); Rodriguez v. State, 462 So. 2d 1175 (Fla. 3d DCA), pet. rev. denied 471 So. 2d 44 (Fla. 1985); see also McKinney v. State, 640 So. 2d 1183 (Fla. 2d DCA 1994). In telling the jury to rely upon the ordinary meaning of "exclusive" the judge effectively relieved the state of its burden of proof as to proof as to possession, particularly as to the essential element of knowledge. In directing the jury to apply the "ordinary" meaning of exclusive rather than simply referring to the legal definition of possession in the standard instructions, the court, however unwittingly, invited the jury to apply their own definition to a legal term.

This is the very reason that the use of unauthorized materials by the jury is prohibited. See e.g. Yanes v. State, supra (reversing where an entire book of jury instructions was sent to the jury; finding the jury had access to a number of irrelevant instructions which may have prejudiced the case); and Grissinger v. Griffin, 186 So. 2d 58, 59 (Fla. 4th DCA 1966) (reversible error where the jury may have used a dictionary to define legal terms). In referring to the "ordinary" meaning of exclusive, the jury was left without guidance and may have resulted irrelevant and extraneous considerations into the case. See State v. Hamilton, 574 So. 2d 124 (Fla. 1991) (recognizing the prejudicial error where the jury relies on common dictionary definitions of legal terms) and Grissinger v. Griffin, supra, 186 So. 2d at 59 (reversing because the jury may have used the dictionary "to torture the words in the court's charge from their true meaning"). The modified instruction was not superfluous or innocuous. See e.g. McKinney v. State, supra; Cummings v. State, 649 So. 2d 166 (Fla. 4th DCA 1994). Rather, it diluted the

state's burden of proof as to the offense charged. In particular, the improper instruction relieved the state of its burden to prove "knowledge" an essential element of possession.

This was the primary contested legal issue below (R 205-206, 216, 223, 226-228, 230). During closing arguments, the defense emphasized that Scoggins' possession of the vehicle in which the rocks were concealed was not exclusive (R 216). Because Scoggins' girlfriend had access to the truck, the defense maintained that the state could not prove the essential element of knowledge (R 230). The prosecution submitted that the closed ashtray was in Scoggins' actual possession so that the element of knowledge was shown (R 223, 226-228).

Here, the present case was fatally prejudiced where the court's improper instruction essentially left the jury to its own speculation in evaluating whether the state proved the essential element of "knowledge". As a result, the fact finding process was fatally skewed and reversible error occurred. Rawls v. State, 624 So. 2d 757 (Fla. 1st DCA 1993). Therefore, it cannot be said beyond a reasonable doubt that the erroneous instruction here did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

Accordingly, this case must be reversed for a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause for a new trial with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Ettie Feistmann, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 3401-2299 this 29th day of September, 1997.

Peggy Natale

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