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✓ **SID J. WHITE**

**JUN 1 1998**

**CLERK, SUPREME COURT**

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Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 92,927

RODERICK TERRELL PERRIMAN, :

                                  : Petitioner, :

v.                                  : :

STATE OF FLORIDA,              : :

                                  : Respondent. :

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On Petition for Discretionary Jurisdiction  
from Certification of  
the District Court of Appeal of Florida, Third District

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**PETITIONER'S INITIAL BRIEF ON THE MERITS**

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## INTRODUCTION

This is an appeal from a conviction in the Dade County Circuit Court, Criminal Division, for the crime of possession of a firearm by a convicted felon. The District Court of Appeal of Florida, Third District, affirmed the conviction, and certified the following question of great public importance to this Court:

"Whether reversible error is committed when the Court fails to directly answer a jury question, when the correct response would resolve the issue posed in favor of the defendant?"

The defendant below will be referred to in this Brief as "Petitioner," and the plaintiff below will be referred to as the "Respondent".

**TABLE OF CITATIONS**

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### STATEMENT OF THE CASE

On June 12, 1996, a two-count information was filed in the Dade County Circuit Court charging Petitioner with the third degree felony of carrying a concealed firearm in Count I, and the second degree felony of unlawful possession of a firearm by a convicted felon in Count II. (R. 95). Defendant entered his plea of not guilty to both counts of the information, and a jury trial was ultimately scheduled and conducted on September 18, 19, and 20, 1996. (R. 111-163). The first count of the information, charging carrying a concealed firearm, was severed from Count II.

On September 20, 1996, the jury returned a verdict of guilty as to Count II of the information charging possession of a firearm by a convicted felon. The Petitioner was ultimately sentenced to a mandatory minimum ten years imprisonment as an habitual violent felony offender based upon the jury verdict. (R. 70, 71).

Petitioner then filed his Appeal to the District Court of Appeal of Florida, Third District. On February 18, 1998, the District Court of Appeal rendered its opinion affirming the conviction of Petitioner. (R. 184 through 188). Petitioner

timely filed his motion for rehearing on March 5, 1998. (R. 189, 190). On April 1, 1998, the District Court of Appeal denied Petitioner's motion for rehearing, and certified to this Court that its decision passed upon a question of great public importance. (R. 194, 195). On April 29, 1998, petitioner filed his Notice to Invoke the Discretionary Jurisdiction of this Court. (R. 197). By Order dated May 6, 1998, this Court postponed its decision on jurisdiction and directed Petitioner to file his Brief on or before June 1, 1998. Accordingly, Petitioner files this, his Initial Brief on the merits of the certified question.

### STATEMENT OF FACTS

On May 22, 1996, the Petitioner was picked up at his home by one Frank Duke, for the purpose of going to play basketball. (T. 221). Mr. Duke, an employee of Florida Health and Rehabilitative Services, was driving his own vehicle, a Chevrolet four-door with tinted windows. (T. 215). The vehicle that Mr. Duke drove bore a tag from a previous vehicle owned by Mr. Duke. (T. 222).

As the vehicle proceeded on Northwest 12th Avenue and 52nd Street in Miami-Dade County, Florida, Detectives Sergio Ruseska, Wayne Peart, and Florida State Trooper Matt Propalsky, collectively participated in the stop and search of the vehicle because the tag that it bore was not assigned to it according to the Division of Motor Vehicle Records. (T. 176). The formal stop was made by Officer Peart, who utilized his emergency signals. (T. 178).

After the vehicle was stopped, the driver, Mr. Duke, was asked whether or not there were any firearms in the vehicle, to which he responded "no". (T180, 229). Mr. Duke was removed from the vehicle and questioned, while Petitioner remained in the vehicle seated in the front right passenger seat. Detective Ruseska had Petitioner to exit the car, and directed

him to Trooper Propalsky, at which time a search of the vehicle revealed a firearm wedged in the corner between the left part of the passenger seat. (T. 205, 206). Both Mr. Duke and Petitioner testified at trial that Petitioner had no knowledge of the presence of the firearm when he got into the car. (T. 218, 219, 233, 234, 259). Upon determining at the scene that Petitioner had a prior felony conviction, he was arrested for carrying a concealed firearm and possession of a firearm by a convicted felon. (T. 197, 198). No fingerprints were found on the firearm. (T. 174). The prosecution then ensued in the lower Court, ultimately resulting with Petitioner's conviction, and the instant appeal.



CERTIFIED QUESTION ON APPEAL

I.

WHETHER REVERSIBLE ERROR IS COMMITTED WHEN THE COURT FAILS TO DIRECTLY ANSWER A JURY QUESTION, WHEN THE CORRECT RESPONSE WOULD RESOLVE THE ISSUE POSED IN FAVOR OF THE DEFENDANT?

### SUMMARY OF THE ARGUMENT

REVERSIBLE ERROR IS COMMITTED WHEN THE COURT FAILS TO DIRECTLY ANSWER A JURY QUESTION WHEN THE CORRECT RESPONSE WOULD RESOLVE THE ISSUE POSED IN FAVOR OF THE DEFENDANT.

The jury below interrupted its deliberations and asked a very specific question of the Court, which went to the very heart of the Petitioner's defense to the charges. The jury inquired whether it constituted a violation of the law for a convicted felon to be in a vehicle in which a firearm was found if he had no knowledge of the firearm's presence. The answer to that question clearly was "no", and was an answer that was favorable to the Petitioner. Rather than answering the question directly, the trial judge chose to generally refer the jury to the written jury instructions. This directive by the trial court provided absolutely no guidance to the jury, and represented an abdication of the trial judge's responsibility to eliminate confusion from the jury. The failure of the trial judge to provide a direct answer to the jury's question resulted in a failure of Petitioner to have a full and fair trial with the assurance of due process of law. Floyd v. State, 90 So.2d 105 (Fla. 1956). The response further violated

this Court's requirement that jury instructions "eliminate confusion" from the jurors. Miami Herald Publishing Company v. Morphoneous, 467 So.2d 1026 (Fla. DCA 1985). Answers to jury questions should assist the jury in developing the truth of the controversy. Sutton v. State, 51 So.2d 725 (Fla. 1951). While the trial court does exercise some discretion in fashioning its response to jury questions, that discretion is not unbridled, but should clarify the juror's points of concern and should be responded to with concrete accuracy. United States v. Zabic, 745 F.2d 464 (7th Cir. 1984). Here the direct answer to the jury question was one which would have resolved the ultimate issue in Petitioner's favor. Rather than doing that and allowing Petitioner the benefit of the direct answer to the jury question, the trial court used the jury instructions as a kind of "safety net" rather than a guide, and failed to provide the jury with an answer with the "concrete accuracy" that the law requires. Bollanbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946). The refusal to directly answer the question with concrete accuracy constituted an abuse of discretion by the trial judge, and since such answer was favorable to Petitioner, mandates the granting of a new trial to Petitioner.

## ARGUMENT

REVERSIBLE ERROR IS COMMITTED WHEN THE COURT FAILS TO DIRECTLY ANSWER A JURY QUESTION, WHEN THE CORRECT RESPONSE WOULD RESOLVE THE ISSUE POSED IN FAVOR OF THE DEFENDANT.

Petitioner, charged in the Lower Court with the offense of possession of a firearm by a convicted felon, based his entire defense on his lack of knowledge of the presence of the firearm in the vehicle in which he was a passenger. In fact, he entered into a stipulation at trial regarding his status as a convicted felon, and the only factual issue to actually be resolved by this jury was whether Petitioner had knowledge of the presence of the firearm in the car, or, as the driver/owner of the vehicle had testified, the firearm had been placed there prior to Petitioner's entering the car and without Petitioner's knowledge.

The record below reflected that the jury interrupted its deliberations to pose a question of law to the trial court, the answer to which would resolve the ultimate issue in Petitioner's favor. The jury question was as follows:

"If a convicted felon is in a car [sic] a gun (without knowledge) is that against the law?"

Clearly, as the decision by the District Court of Appeal points out, a proper and appropriate answer to that question is "no".

Knowledge of the presence of the firearm was a required element of proof in order to sustain a conviction for possession of a firearm by a convicted felon.

"Keeping in mind that the Court always has the responsibility to instruct the jury on the law of the case, that this was a criminal rather than a civil action, that the point was critical to the appellant's defense, and that the language of such an instruction [on scienter] could have easily been adopted from the Frank case, we hold that the Court erred in failing to instruct the jury that knowledge by the appellant of the presence of the firearm was essential to conviction of the crime." Wilson v. State, 344 So.2d 1315 (Fla. 2nd DCA 1977).

Rather than unequivocally providing the guidance requested by the jury on this, the most basic issue in the case, the Judge chose instead to "refer [them] to the [written] jury instructions". The reference to the jury instructions was a general one, the Court below declining either to directly and unequivocally answer the question no; to refer the jury to that portion of the jury instructions which indicated the necessity of knowledge; or to re-read relevant portions of the

instructions to the jury.<sup>1</sup>

A trial judge has an obligation to make reasonable efforts to answer a question from a jury. United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985).

This Court has recognized that the feasibility and scope of any re-instruction of the jury is generally a matter residing within the discretion of the trial judge. Henry v. State, 359 So.2d 864 (Fla. 1978). Also, under Fla. R. Crim. P. 3.410, upon the request by the jury for additional instructions, the directive to the Court to provide such additional instructions is not mandatory, but discretionary. As a result, under the current reading of Florida law, both directly answering the question and referring the jury to the written jury instructions appear to be permissible responses within the discretion of the trial judge.

It is respectfully submitted however, that the trial court

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<sup>1</sup>In fact, the only portion of the jury instructions in which this jury could have obtained the answer to its question was that section that indicated that "after the [felony] conviction Roderick Perriman knowingly had in his care, custody, possession or control a firearm..." It is only the single undefined word "knowingly" throughout the entire set of instructions that would put the jury on notice that knowledge on Petitioner's part was a required element of proof before a conviction was warranted. That portion of the instructions defining exclusive and non-exclusive possession has specifically been held insufficient to inform the jury that knowledge is a required element of the State's proof. Howard v. State, 467 So.2d 445 (Fla. 1st DCA 1985).

here abused its discretion in choosing simply to refer the Perriman jury to the written instructions. This choice, strenuously objected to by defense counsel below, was inadequate and insufficient as a matter of law to appropriately discharge the full responsibility of the Trial Court Judge.

"That a Trial Judge has a wide discretion in controlling procedure of a criminal trial is unquestioned. Nevertheless, the conduct of the trial must be according to established and accepted procedures, so as to give the accused a full and fair trial and to insure due process of law." Floyd v. State, 90 So.2d 105 (Fla. 1956).

The discretion that is afforded a trial judge in responding to jury questions is not of such latitude that he may abdicate his responsibility to insure fairness and due process of law. "Controlling the jury and insuring a defendant a fair trial is the trial court's responsibility." Medina v. State, 466 So.2d 1046 (Fla. 1985). "The responsibility of the trial court extends to protecting a defendant in a criminal prosecution from inherently prejudicial influences which threaten the fairness of the trial and the abrogation of constitutional rights." Miami Herald Publishing Company v. Morphoneous, 467 So.2d 1026 (Fla. DCA 1985). Inherent fairness requires that the trial judge, to the extent possible under the confines of the law, "eliminate confusion from the jurors".

"Trial judges must have the discretionary power to further explain or define their instructions if the jury is confused or desires further guidance." Campbell v. State, 306 So.2d 482, (Fla. 1975).

The questions as posed by jurors are generally calculated to shed light on the controversy, the answer to which will assist them or the Court in developing the truth of the controversy. Sutton v. State, 51 So.2d 725 (Fla. 1951). It has been held to be an abuse of discretion for the trial court to provide a response that fails to ameliorate the confusion of a jury. Morgan International Realty, Inc. v. Dade Underwriters Insurance Agency, Inc., 571 So.2d 52 (Fla. 3rd DCA 1990).

The discretion exercised by the trial court must be tailored to insure that instructions given by the Court are not merely cursory or pro forma, but in fact assist and provide guidance to the jury on the principles of law it must apply in deciding factual, basic, and fundamental issues in a case. United States v. Anderton, 629 F.2d 1044 (5th Cir. 1980). The exercise of the Court's discretion should be restricted to providing direct responses to specific questions of the jury when such responses do not require the giving of additional evidence, the taking of additional testimony, or otherwise result in some improper comment on the evidence by the trial



court. See: Mack v. State, 487 So.2d 1058 (Fla. 1986). Here the trial court failed to take adequate steps to dispel the confusion displayed by this jury.

The discretion afforded Judges in Florida in responding to jury questions should subscribe to the Federal requirement, set forth by the United States Supreme Court, that the answers be given with "concrete accuracy." In addressing the issue of the exercise of the Court's discretion in answering jury questions in Bollanbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946), the Court stated thusly:

"The jury's questions... indicated that the jurors were confused concerning the relation of knowingly disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (Emphasis added).

The Court went on to point out that a conviction ought not to rest on an equivocal direction to the jury on a basic issue in the case.

The ideal procedure for providing clarity and guidance in addressing a jury question, quite similar to the question by

the Perriman jury, was utilized in United States v. Karlin, 852 F.2d 968 (7th Cir. 1988), cert. denied, 489 U.S. 1021, 109 S.Ct. 1142, 103 L.Ed.2d 202 (1989). There, the jury asked of the District Court, "Can we have a verdict of guilty on circumstantial evidence only?" In responding in open court, the District Court first referred the jury to the portion of the instructions indicating that "all of the evidence in the case, including circumstantial evidence, should be considered by you in arriving at your verdict." The foreperson of the jury then asked "Do we assume that the answer is in the affirmative?", to which the Court responded, "Yes". The Appeal Court held that this "Yes" answer was appropriate when considered in light of the reference to the jury instructions as well. Applying that analysis to the Perriman jury, directing the jury to that portion of the instructions that showed the need for Perriman's knowledge, and/or simply answering the question in the negative, would have insured that the jury was basing its verdict on sound legal principles. United States v. Zabic, 745 F.2d 464 (7th Cir. 1984), stands for the proposition that once questions arise among jurors concerning the original instructions, the trial court must exercise its sound discretion in determining the type of

supplemental instructions that should be given to the jury seeking clarification of the law, and in so doing, is required to respond to such questions with concrete accuracy, thus clarifying the juror's points of concern.

It is important that trial courts throughout the State of Florida do not use standard jury instructions as a "safety net" in responding to specific jury requests regarding basic issues in the case being tried. Carried to its logical extreme, a reference by the trial judge generally to the written jury instructions is probably appropriate in just about every scenario in which a jury may exercise or display some confusion and seek guidance in its deliberations. We must remain mindful that the jury had the benefit of the written jury instructions before it sought clarification and guidance from the court. This Court indicated in Floyd v. State, 497 So.2d 1211 (Fla. 1986) that it cannot sanction a practice which gives no guidance to the jury for considering circumstances [of the case].<sup>2</sup>

It has been recognized that the Standard Jury Instructions

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<sup>2</sup>While the Floyd case involved a jury providing an advisory opinion, it nonetheless highlights the duty of the trial court to provide guidance to the jury, and if true for juries that are simply in an advisory capacity, certainly it must hold true for jurors who make the ultimate decision of guilt and innocence.

in Criminal Cases are (1) intended to assist the trial court in charging the jury on applicable law; (2) intended only as a guide; and (3) not intended to relieve the trial court of its responsibility to charge the jury correctly in each case. Lozono v. State, 584 So.2d 19 (Fla. 3rd DCA 1991).

The Federal rule requiring that judges answer jury questions with "concrete accuracy" is a workable approach in assessing the adequacy of responses of Florida trial courts in answering jury questions.

Petitioner here was deprived of a fair and impartial trial as a result of the trial court's failure to alleviate the confusion on the part of the jury that was made explicit in its question. While the response of the Court may not have been technically incorrect, it was clearly inadequate. It failed to provide the guidance that the Perriman jury needed, and leaves Petitioner's conviction resting upon an equivocal jury directive, when a direct and correct answer was one favorable to Petitioner. This Court must insure not only that the responses of Florida's trial judges to jury inquiries are technically correct, under the law, but also that they are meaningful, and accomplish the purpose for which jury instructions were intended, to assist in guiding the jury to

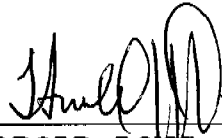
a proper verdict. United States v. Cheramie, 520 F.2d 325 (5th Cir. 1975). The failure on the part of trial judges to do so constitutes a total abdication of their responsibility to insure due process of law to criminal defendants. In this case it was error for the trial court not to answer the jury question with the specificity necessary to insure Petitioner a fair trial. The lower Court committed reversible error when it failed to directly answer the jury question, and the correct response to that question would have resolved the issue posed in favor of the defendant.

## CONCLUSION

Based upon the foregoing citations of authority and legal argument, Petitioner urges this Honorable Court to answer the Certified Question in the affirmative, to reverse the decision of the District Court affirming his conviction and sentence, and to remand this matter to the trial court for a new trial.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Initial Brief on the Merits was furnished to Ms. Terri Leon-Benner, Esq., Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, by hand this 1st day of June, 1998.



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