SUPREME COURT OF FLORIDA

CASE NO. 92,927

RODERICK TERRELL PERRIMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF

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ISSUE ON APPEAL

I.

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.

REBUTTAL ARGUMENT

The parameters of the discretion afforded trial courts in answering specific jury questions about primary legal issues in a criminal trial should properly be adjudicated by this Court as a question of great public importance. The District Court referred to this issue as a "highly significant issue[s] concerning the role of the trial judge in criminal prosecutions which should be considered in light of modern authorities..." Those authorities stand for the principle that the responses of trial judges should "eliminate confusion" from the jurors (Campbell v. State, 306 So.2d 482 ((Fla., 1985)); should assist the jury in developing the truth of the controversy (Sutton v. State, 51 So.2d 725 (Fla., 1951)); should instruct the jury on the law of the case as to points that are critical to the defense (Wilson v. State, 344 So.2d 1315 (Fla. 2nd DCA, 1977)); should provide guidance to the jury on fundamental issues in the case (United States v. Anderton, 629 F.2d 1044 (5th Cir., 1980)); and should be responded to with "concrete accuracy" (Bollenbach v. United States, 326 U.S. 607 (1946)). Contrary to the assertions of Respondent's answer brief, other jurisdictions, federal and state, have consistently ruled affirmatively in response to the certified question. And such a response neither negates or limits the discretion of a trial judge, but provides direction for the exercise of that discretion. It therefore does not overrule decisional case law history of this Court.

Respondent's Brief overlooks the true issue involved in the question certified by the District Court of Appeal. Respondent takes the position that because precedent has established Florida's trial judges with broad discretion in addressing issues relating to the re-instruction of juries, that an affirmative answer to the certified question would overrule such precedent. This is not the case. The wide discretion that is afforded state court judges in addressing jury questions in criminal trials has a purpose. That purpose is to provide the court with all the latitude that it needs to eliminate any confusion that a jury may have, and to adequately communicate relevant law, all to assure defendants of a fair and impartial trial. The decision of the District Court itself recognizes that the discretion afforded the trial judge here is sufficiently broad that one of two responses, or both, were legally permissible by the trial court. The guidance sought by the District Court in its certification seeks directives as to the legal sufficiency of the choice selected by the trial judge. The question here is not whether the judge has the discretion to respond one way or another as it relates to answering such questions. Rather, the question is whether or not the Petitioner was in fact denied a fair and impartial trial resulting from the Court's choice in refusing to affirmatively respond to a very specific jury question which embodied the sole defense that was presented on behalf of the Petitioner.

Respondent contends that the case of Whitfield v. State, 22 Fla. L. Weekly S558 (Fla., 1997), and Waterhouse v. State, 596 So.2d 1008 (Fla., 1992) both deal with a virtual identical issue as that involving the Perriman jury. They establish no precedent, however, that would bind this Court in addressing the certified question. While both those cases determined that an appropriate method of answering a jury question may occur when the court re-reads specific portions of general instructions that were given in the first instance, both the Whitfield and the Waterhouse decisions relate to sentencing, and not to the question of constitutional concerns regarding guilt and innocence. Whitfield was a death penalty case in which the defendant had been already convicted of first degree murder and the jury was deliberating the issue of penalty. Waterhouse likewise was a death penalty case in which the jury was deliberating on the issue of penalty. Under the circumstances in Whitfield, where the jury was faced with recommending one of two alternative penalties to be imposed, it sought reinforcement on an instruction which it read and understood. It's question, "does life really mean no parole," was answered with concrete certainty when the specific jury instruction confirming that life meant no parole was re-read.

In Waterhouse, the question posed involved factual issues. The second question, for example, inquired as to whether or not the defendant would be returned to another state to finish his

sentence. The second portion of the first question inquired as to whether or not the time that he had served in prison will count towards parole. It was clearly appropriate, rather than addressing factual issues, for the trial court to inform the jury to depend upon the evidence and instructions.

Neither the Whitfield nor Waterhouse decisions establishes a precedent that would require this court to answer the instant certified question negatively. In fact, the refusal to answer the jury questions in Waterhouse was quite appropriate because, as the court pointed out, there was no way that the trial court could know if Waterhouse would be extradited to another state or not once he was paroled in Florida.

Respondent also cites Walls v. State, 641 So.2d 381 (Fla., 1994) for the proposition that it is appropriate to refer the jury to instructions previously given in response to a jury question. The Walls decision has no applicability to the Perriman issue. The questions presented by the jury in Walls asked for the definition of "emotional disturbance, both present and pre-existing." This question, by agreement of the parties, was left unanswered. As this Court pointed out in its affirmance, the jury's question in Walls asked for "an interpretation of the law above and beyond what previously had been found acceptable in jury instructions."

Respondent further implies that it was appropriate for the trial court here not to directly answer the jury question because

to do so would "give the appearance of placing the trial judge in the role of an interested advocate rather than an impartial arbiter." Respondent's brief, page 23. Not even a strained interpretation of a direct answer to the Perriman jury question could place the court in any position other than that of informed trial judge. It would simply have been the trial judge discharging his responsibility to properly and correctly charge the jury, a duty it has in every case. In fact, the refusal of the trial court simply to answer "no" to the question posed by the jury, which would clearly have been an answer favorable to the defense, did more damage in making the Court appear an advocate than did its refusal to directly answer this question. A direct answer, with the chips falling where they may, would have evidenced an impartial arbiter.

Respondent also contends that the Petitioner's argument is untenable in that this court would have to overrule an extensive history of case law in order to affirmatively answer the certified question. The cases that Respondent relies upon however, Cunningham v. State, 676 So.2d 1054 (Fla., 3rd DCA 1996), and White v. State, 324 So.2d 115 (Fla., 3rd DCA, 1975), both address the issue of separate charges to the jury requested by the defense, and not questions posed by the jury itself. In Kirkland v. State, 557 So.2d 130 (Fla. 3rd DCA, 1990), the jury question related to intent, and was not one that could be answered yes or no without

expounding upon the appropriate legal definitions. Kirkland likewise therefore is totally inapplicable to the inquiries raised by the Perriman jury. No case law would be overruled in reversing the Perriman decision.

Jurisdictions throughout the country, both Federal and State, do resolve the Perriman question in conformity with an affirmative answer to the certified question. The majority of jurisdictions require some concreteness in responding to jury questions. Bollenbach v. United States, 326 U.S. 607, (1946), United States v. Zabic, 745 F.2d 464 (7th Cir., 1984), United States v. Rodriguez, 765 F.2d 1546 (11th Cir., 1985), and related Federal decisions all require a trial judge to respond to jury questions with concrete accuracy. While some of the decisions may not specifically use the phrase "concrete accuracy", they all require that the trial judge provide assistance, clarity, and accuracy in responding to such questions. See, United States v. Carlan, 852 F.2d 968 (7th Cir., 1988), and United States v. Cheramie, 520 F.2d (5th Cir., 1975). Even the cases cited by Respondent bear this out.

In State v. Bundy, 539 A.2d 713 (N.H. 1988), the following question was posed by the jury:

> "Does the law read that a person has to be driving a car to be charged with the theft?"

The trial court replied "no." As the Respondent's brief points out, the court found that "the jury had merely asked what the law required and the trial judge had plainly answered." Respondent's

brief, page 27. This is precisely what is sought by Petitioner. He only sought that the trial judge plainly answer what the law required which the jury had asked. Likewise in Harrington v. Beauchamp Enterprises, 761 P.2d 1022 (Ariz., 1988), as cited at page 30 of Respondent's brief, the court stated thusly:

> "A number of courts have held that if the jurors... express confusion or lack of understanding of a significant element of the applicable law, it is the court's duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion...[citations omitted]. Although the court in Ott arguably sought to limit its holding to situations where the original jury instructions were incomplete, unclear, or capable of misinterpretation, we feel that there are situations when a question from a jury so clearly demonstrates confusion on the jury's behalf that additional instructions are necessary, even though the original instructions were complete and clear. In such a case, the court has a duty to respond to the jury in a way that insures it reaches its verdict based on issues which are relevant to the case."

In Bottaro v. Schoenborn, 251 A.2d 79 (Conn., 1968), the court stated as follows:

> "the frankly expressed confusion of the jury, which was emphasized by their question, involved a crucial... element in the case. Under such circumstances, it was clearly the court's duty, notwithstanding its prior charge, to give further instructions which fully and adequately met all phases of the confusion which appeared to exist." (Emphasis added)

Respondent's suggestion that an affirmative answer to the certified question would imply that the trial court gave an incorrect answer is without substance, and misconstrues the nature of the certified question. Petitioner's initial brief pointed out

that the trial court's response may not have been technically incorrect, but was legally insufficient. The District Court of Appeal in the Perriman decision points out quite clearly that either the response of referring the jury to the jury instructions already given, or that of affirmatively answering the question in the negative, were technically correct. The question here addresses the sufficiency of the response by the trial judge.

While the standard jury instructions covering the issue of knowledge have been approved as legally sufficient by this court, Respondent's contention that the instructions "amply cover the subject matter" is somewhat misleading. The standard jury instructions set forth as follows:

> "Before you can find the Defendant guilty of possession of a firearm by a convicted felon, the State must prove the following [sic] two elements beyond a reasonable doubt:
> 1. Roderick Perriman had been convicted of three felonies.
> 2. After the conviction Roderick Perriman knowingly had in his care, custody, and possession or control a firearm... (T. 329-330).
>
> If a person has exclusive 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 it is [sic] presence may not be inferred or assumed. (T. 331)."

The word "knowingly" is undefined in the instructions. Without a legal definition provided, it will be incumbent on the trial jury to apply its own generally understood lay definition to the term

"knowingly". As pointed out in Petitioner's initial brief, the definition of exclusive and non-exclusive possession has been held as insufficient to inform a jury that knowledge is a required element of the State's proof. Howard v. State, 467 So.2d 445 (Fla., 1st DCA 1985). "When an instruction uses a term of legal significance, it's meaning must be explained, especially when there is a request [by the jury] for clarifying instructions." United States v. Anderton, 629 Fed.2d 1044 (5th Cir., 1980).

Here, the Court did not even remotely attempt to provide an answer, concrete or otherwise, to the Perriman jury question. Even the section of the instructions on knowledge was not re-read. Rather, the Perriman jury was left in the same condition as it was when it presented its question to the Court. It is impossible to harbor any assurance that this jury understood the affirmative defense which Petitioner presented by trial testimony, before rendering its verdict. The right to have the jury fully apprised of the defense in a criminal case is too fundamental to be left to "appellate guesswork". The response to the jury question did not answer the question, but essentially told the jurors "you answer it yourself." Such a response, under the facts of this case, was essentially meaningless from a practical standpoint, and insufficient from a legal standpoint.

CONCLUSION

Based upon the citations of authority and legal argument as presented in his Reply Brief, Petitioner urges this Honorable court to vacate his conviction and sentence, and to remand this matter to the trial court with appropriate directions to provide Petitioner a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was furnished to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, by mail this 13th day of July, 1998.

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