IN THE SUPREME COURT OF FLORIDA

**DARRYL WALKER,**

Petitioner,

v. **CASE NO. SC03-1555**

**STATE OF FLORIDA,**

Respondent.
_____/

# REPLY BRIEF OF PETITIONER


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## PRELIMINARY STATEMENT

As in the initial brief, Darryl Walker will be referred to in this reply brief as “petitioner,” “defendant,” or by his proper name. Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parenthesis. The initial brief will be referred to as “IB,” and the answer brief will be referred to as “AB.”

## ARGUMENT

IS THE FLORIDA STANDARD JURY INSTRUCTION ON "POSSESSION OF PROPERTY RECENTLY STOLEN" AN IMPERMISSIBLE COMMENT ON THE EVIDENCE?

Respondent recognizes and concedes that Florida law has by statute prohibited judicial commentary on the evidence for a substantial period of time beginning in the 19th century. (AB-16) Beginning as early as 1896, Lester v. State, 37 Fla. 382, 20 So. 232 (1896), and as recently as June 11, 2003, Goodrich v. State, 854 So. 2d 663 (Fla. 3d DCA 2003), Florida courts have adhered to the rule that any comment by the judge on the evidence is strictly prohibited. In Lester, the court noted:

> great care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case, or that intimates his opinion as to the weight, character, or credibility of any evidence adduced. All matters of fact, and all testimony adduced, should be left to the deliberate, independent, voluntary, and unbiased judgment of the jury, wholly uninfluenced by any instruction, remarks, or intimation, either in express terms or by innuendo, from the judge, from which his view of such matters may be discerned. Any other course deprives the accused of his right to trial by jury, and is erroneous.

In Goodrich, the court reiterated that “it should be noted that a trial court should avoid making a remark within

earshot of the jury that is capable ‘directly or indirectly, expressly,

inferentially, or by innuendo' of conveying any impression as to the view it takes of the case or that indicates an opinion as to the weight, character, or credibility of the evidence adduced."

While it is the case that federal courts permit some judicial commentary on the evidence, although not by rule, see Ehrhardt, Florida Evidence 106.1 (2003 ed.), petitioner contends that under the case law, comments such as the one in the present case still would not be permitted. A close reading of Quercia v. United States, 289 U.S. 466 (1933), on which respondent relies, demonstrates that a flight instruction would not be permitted under the federal common law because it distorts the evidence rather than analyzing it:

> And the further charge that the proposition that "the wicked flee when no man pursueth, but the innocent are as bold as a lion," was "a self-evident proposition" which the jury could "take . . . as an axiom, and apply it" to the case in hand, was virtually an instruction that flight was conclusive proof of guilt. Such a charge "put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect"; it "deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth."

Given the similarity between the flight instruction and the instruction challenged in the present case, it appears neither would be permitted. The state has cited no federal

case in which the present instruction was permitted. As the Court noted in

Quercia:

> The privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled . . . . He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight," and "his lightest word of intimation is received with deference, and may prove controlling."

While the state endeavors to restrict the definition of "true" judicial commentary, the fact is that judicial commentary is not restricted to a judge giving his or her opinion as to guilt or innocence; in Florida, the courts have determined that certain instructions which distort the weight to be given certain facts do constitute judicial commentary on the evidence and as such are prohibited. For example, the following instructions on various types of circumstantial evidence have been ruled impermissible commentary on the evidence: evidence of flight (Fenelon v. State, 594 So. 2d 292 (Fla. 1992)); refusal to submit to fingerprinting (Whitfield v. State, 452 So. 2d 548 (Fla. 1984)); inconsistent exculpatory statements as indicating consciousness of guilt (In re Instructions in Criminal

Cases, 652 So. 2d 814 (Fla. 1995)); sale of recently stolen property at a price substantially below fair market value (Barfield v. State, 613 So. 2d 507 (Fla. 1st DCA 1993)). All of these instructions, as well as the instruction under review, distort the relative weight of these factors as they relate to the other evidence, inject an imbalance into jury deliberations, and arguably induce the jury to convict based on that evidence alone. Petitioner also would refer to court back to the discussion of appropriate judicial commentary in Quercia. Further, petitioner contends that, in effect, there is not much difference between the judge instructing the jury they may focus their attention on one particular factor and the judge implying to the jury his or her opinion as to the guilt or innocence of the accused.

The state argues categorically that because jury instructions are instructions on the law they cannot constitute commentary on the evidence. (AB-22) Of course it is true that ideally, when constructed properly, jury instructions are instructions on the law. However, jury instructions are put together by committees of fallible human beings and are not forever unassailable simply by virtue of being labeled jury instructions. There is no magic in the designation of a jury instruction as such, and standard jury instructions have previously been eliminated after further consideration, as the above list demonstrates.

The fact is that when carefully analyzed, this jury instruction and a number of previous jury instructions on circumstantial evidence have proven to have the effect of judicial commentary on the evidence. The instructions have the effect of providing a distorted view of the weight to be given the evidence, which in turn can be seen as commentary on the guilt or innocence of the accused.

The state contends that a permissive instruction can never be a comment on the evidence. (AB-23) On the contrary, the instruction which was the subject of a challenge as a judicial comment on the evidence in Fenelon was a permissive instruction. The problem is not whether the jury is told it may or it must make a particular inference; rather, the problem is that a certain piece of evidence is singled out for particular emphasis by the judge. It simply does not follow, as respondent suggests, that if a permissive instruction is a comment on the evidence then all jury instructions are comments on the evidence. (AB-24) All jury instructions do not direct the jury to focus on one piece of evidence in particular and distort its importance in the context of the case.

Respondent suggests that the giving of the jury instruction on possession of recently stolen property is the equivalent of the court answering a jury query during deliberations. Petitioner disagrees. As in many instances

when jurors pose a question that cannot appropriately be answered, the court can simply tell jurors to rely on their recollection of the evidence, the instructions already given, and the arguments of counsel. Further, it is unlikely jurors would ask the question when counsel are permitted to argue that such an inference can be drawn.

Respondent contends that the instruction represents a correct statement of the law and therefore it cannot also be a comment on the evidence. With all due respect, the two are not mutually exclusive. In evaluating the evidence presented for purposes of a motion for judgment of acquittal, it is important for the court to know that an inference can be drawn from possession of recently stolen property; the statute instructs the judge that the evidence may be considered. However, that does not mean the court can so instruct the jury, thereby drawing undue attention to that fact and lending the authority of the court to the consideration of that single fact. In addition, as respondent recognizes (AB-31) counsel may argue that the inference can be drawn. Argument by respective counsel has a different impact on the jury than instruction from the court.

The cases cited by the state, Consalvo v. State, 697 So. 2d 805 (Fla. 1996), Edwards v. State, 381 So. 2d 696 (Fla. 1980), and Tatum v. State, 857 So. 2d 331 (Fla. 2d DCA

2003), did not involve claims that this instruction constituted a judicial comment on the evidence. (AB-27) In Edwards, which predates Fenelon, the court resolved a due process claim, not a claim of judicial commentary on the evidence. In Tatum, a DCA case, the court resolved the narrow issue of whether an evidentiary predicate had been established for the instruction. In Consalvo, the court found sufficient evidence in the record on which to base the instruction, but again, did not examine the question whether there had been an inappropriate comment on the evidence. Consalvo in turn relied on Edwards, in which the court upheld the instruction in the face of a due process claim, ruling that it did not force the defendant to testify, but again the court did not address a claim that the instruction constitutes a comment on the evidence. As noted in the initial brief, then Judge Pariente stated in Washburn v. State, 683 So. 2d 533 (Fla. 4th DCA 1996), that the supreme court had not ruled on the issue of whether the instruction constitutes a comment on the evidence in State v. Young, 217 So. 2d 567 (Fla. 1968). Although the First DCA relies on Young in its opinion in this case, Young did not resolve the specific issue presented here. See IB-16.

Respondent emphasizes its argument that the basis for giving the instruction is a statute and not the judge's personal opinion. (AB-28) However, as discussed previously

in this brief, whether or not the statement contained in the instruction is a correct statement of the law or embodied in a statute does not resolve the question whether it can be embodied in a jury instruction. The statute is not rendered useless if not used in jury instruction. The statute serves to let the trial court know what inference might be drawn from the evidence when assessing a motion for judgment of acquittal, and counsel are permitted to argue that the inference may be drawn.

Respondent contends that in Fenelon, this court did not rule on the issue concerning judicial commentary on the evidence, and that the language concerning the future use of the flight instruction was mere dicta. (AB-29) However, while the court concluded that the error was harmless in that case, it specifically stated as follows: "[W]e direct that henceforth the jury instruction on flight shall not be given." 594 So. 2d 295. Whether it is called a ruling a holding or characterized in some other way, it is clear the court decided the instruction was a comment on the evidence which would no longer be given, and that this directive was in no sense mere dicta. This court itself characterized the result in Fenelon as a holding in Pietri v. State, 644 So. 2d 1347, 1354 (Fla. 1994). Other Florida courts have treated the Fenelon ruling as determinative. See,e.g., Jacobs v. State, 742 So. 2d 333 (Fla. 3d DCA 1999); Macias v. State,

673 So. 2d 176 (Fla. 3d DCA 1996); State v. St. Jean, 658 So. 2d 1056 (Fla. 5th DCA 1995), and the First District's opinion below in the present case.

In an apparent misstatement, respondent cites Anderson v. State, 703 So. 2d 1105 (Fla. 5th DCA 1998), for the proposition that the flight instruction is not a comment on the evidence. (AB-30) In fact, that case did not address the flight instruction; rather, it addressed the instruction on possession of recently stolen property, which is at issue in the present case.

Respondent apparently argues that Fenelon was wrongly decided and that the flight instruction is not a comment on the evidence because it is permissive and it is a correct statement of the law which the parties may argue. (AB-32) Petitioner agrees the parties may argue the significance of flight, but the court cannot comment on it. There is a significant difference between allowing counsel to argue the fact and permitting the judge to instruct the jury on the fact, given the inherent deference accorded the judge by jurors.

Respondent contends Fenelon is distinguishable from the present case. (AB-32) The First District apparently would disagree. That court has twice stated that it sees no distinction between the flight instruction and the instruction at issue in this case, both in Wedell v. State,

780 So. 2d 324 (Fla. 1st DCA 2001), and in the present case. And as noted in Washburn v. State, 683 So. 2d 533 (Fla. 4th DCA 1996)(Pariente, J. dissenting), in Young, this court specifically analogized evidence of flight to evidence of unexplained possession of recently stolen property. 217 So. 2d at 571 ("It can be seen, therefore, that the rule of evidence respecting possession of recently stolen goods is no different, in kind, from the rule respecting the probative value of any other circumstantial evidence. Flight, concealment, resistance to a lawful arrest, presence at the scene of the crime, incriminating fingerprints--the whole body of circumstantial evidence relevant in a given case--are all incriminating circumstances which the jury may consider as tending to show guilt if evidence thereof is allowed to go to the jury unexplained or unrebutted by evidence of exculpatory facts and circumstances").

Respondent contends any error was harmless in the present case. Petitioner disagrees, and refers the court to his presentation in the initial brief. (IB-21) In this case, given the ambiguities in the evidence, there is a reasonable possibility that the error in giving the instruction affected the jury's verdict. See Williams v. State, 28 Fla. L. Weekly S853 (Fla. Dec. 11, 2003). The fact that counsel might have been able to argue the significance of the evidence does not cure the problem of the court having

instructed the jury on it.

## CONCLUSION

The court should rule that the jury instruction under review constitutes an impermissible judicial comment on the evidence and reversed and remand for a new trial.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Karen Holland, Assistant Attorney General, by U.S. mail The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, FL 32301, and to Mr. Darryl Walker, DOC# 124629, Gainesville Corr. Inst., 2846 East 39th Avenue, Gainesville, FL 32609, on this ____ day of December, 2003.

## CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font require- ments of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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