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FLORES v. STATE: YOU'RE NOT GUILTY IN OKLAHOMA UNTIL YOU'RE PRESUMED INNOCENT

I. INTRODUCTION

On October 11, 1992, Jose Flores brutally raped and strangled Sheila Ann Brown.¹ In a jury trial before the Honorable Clifford E. Hopper, Tulsa County District Judge, Flores was convicted of First Degree Murder.² As part of the jury charge, Judge Hopper instructed the jury:

[T]hat the defendant is presumed to be not guilty of the crime charged against him in the Information unless his guilt is established by evidence beyond a reasonable doubt and that presumption of being not guilty continues with the defendant unless every material allegation of the Information is proven by evidence beyond a reasonable doubt.³

In *Flores v. State*⁴ (hereinafter *Flores I*), the Oklahoma Court of Criminal Appeals unanimously reversed the judgment and sentence of Jose Flores for the crime of Murder in the First Degree because the trial court erroneously instructed the jury.⁵ Writing for the majority, Judge Strubhar noted that the erroneous instructions resulted in a denial of Flores' statutory and constitutional rights.⁶ The court held that the error was not harmless because the instruction constituted a substantial violation of a constitutional or statutory right.⁷ In a concurring opinion, Judge Lumpkin agreed that the case must be reversed,

1. *Flores v. State*, 899 P.2d 1162, 1168 (Okla. Crim. App. 1995) (Strubhar, J., specially concurring).

2. Jose Flores was tried in Case No. CF-92-4472 in the District Court of Tulsa County. *Flores v. State*, 896 P.2d 558, 559 (Okla. Crim. App. 1995), *cert. denied*, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-493).

3. *Id.* at 560.

4. 896 P.2d 558 (Okla. Crim. App. 1995), *cert. denied*, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-493).

5. *Id.* at 559.

6. *Id.* According to the court, the interests of an accused which are protected in a criminal action by a presumed innocent instruction are not sufficiently safeguarded when a presumed not guilty instruction is given. *Id.* at 562.

7. *Id.* at 560. See *infra* note 91 for a discussion of the harmless error doctrine.

The Federal Rules of Criminal Procedure define harmless error in the following manner: "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52.

but wrote separately to "delineate the factors" considered in the decision to reverse and remand.⁸ He argued that the instruction was solely a statutory violation and the proper standard of review should be "whether we have 'grave doubts' the error in instructing the jury did not have a 'substantial influence' on the outcome of the trial."⁹

By this decision, the court effectively established a new rule requiring that the language "presumed innocent" be used in jury instructions in all Oklahoma criminal trials.¹⁰ Where this rule is violated, the Court of Criminal Appeals will find reversible error.¹¹ This new rule, however, was apparently not intended by all members of the court, even though the *Flores I* decision was unanimous.¹² In fact, the court has become deeply divided over this rule, as evidenced by the four separate opinions accompanying the denial of the State's Petition for Rehearing in *Flores v. State*,¹³ (hereinafter *Flores II*). The disagreement within the court relates to the application of the harmless error doctrine to these types of cases, and has even led Judge Lumpkin to urge the court to withdraw the opinion and rewrite it more clearly.¹⁴

This note will first summarize the facts of *Flores I*. It will then briefly examine both the majority opinion and Judge Lumpkin's concurring opinion as well as the opinions contained in the denial of the State's Petition for Rehearing in *Flores II*. This note will show that *Flores I* failed to clearly establish whether its decision rested on rights

8. *Flores*, 896 P.2d at 563 (Lumpkin, J., concurring in result).

9. *Id.* (citing *Simpson v. State*, 876 P.2d 690, 702 (Okla. Crim. App. 1994)).

10. Although the *Flores I* court does not expressly hold that any such instruction is reversible error, it is plain from subsequent cases that this is the new rule. See e.g. *Price v. State*, No. F-92-307, summ. op. at 2, Not For Publication (Okla. Crim. App. filed Feb. 14, 1995) and *Price v. State*, No. F-92-344, summ. op. at 2, Not For Publication (Okla. Crim. App. filed Feb 14, 1995).

In both *Price* cases, the court determined that the judgment and sentence must be reversed and remanded for a new trial. *Price* No. F-92-307 at 2; *Price* No. F-92-344 at 2. The court cited *Flores* for the proposition that faulty jury instructions constitute reversible error. *Price* No. F-92-307 at 2; *Price* No. F-92-344 at 2. Unlike *Flores I*, however, these cases held that the absence of instructions informing the jury on the presumption of innocence and proper burden of proof deprived appellant of a "constitutionally fair trial." *Price* No. F-92-307 at 2 (emphasis added); *Price* No. F-92-344 at 2 (emphasis added). For this reason, the court concluded that a harmless error analysis was not possible and the error required reversal and remand for a new trial. *Price* No. F-92-307 at 2; *Price* No. F-92-344 at 2.

11. See *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995). Since the initial *Flores* decision, the Oklahoma Court of Criminal Appeals has overturned 38 Tulsa County criminal verdicts, at least partially due to "not guilty" jury instructions. See *Instruction Voids Sex Case Verdicts*, TULSA WORLD, Nov. 10, 1995, at News15.

12. See *Flores*, 899 P.2d at 1170 (Lumpkin, J., dissenting).

13. 899 P.2d 1162 (Okla. Crim. App. 1995). See *infra* notes 74-86 and accompanying text for a summary of the separate opinions.

14. See *Flores*, 899 P.2d at 1177 (Lumpkin, J., dissenting).

guaranteed by Oklahoma statute or the United States Constitution. In fact, it will be shown that the court did not apply a clear and unambiguous test for determining whether faulty jury instructions are susceptible to harmless error analysis, and if they are, how this analysis is to be applied. This note will demonstrate that, examined separately, neither the statute nor the United States Constitution demand the decision reached by the Oklahoma Court of Criminal Appeals.¹⁵ Finally, this note will conclude that the *Flores I* rule that “presumed not guilty” jury instructions constitute reversible error, while well intentioned, was not necessary and “presumed not guilty” instructions should be examined on a case by case basis for harmful or reversible error.

II. STATEMENT OF FACTS

On October 12, 1992, the corpse of thirty-year old Sheila Ann Brown was found wrapped in a trash bag and bound with wire in a Tulsa County trash dumpster.¹⁶ Her mouth was stuffed with men’s underwear.¹⁷ Although she was wearing a sweatshirt and jeans, a portion of the crotch of her jeans and panties had been cut out and placed in a jean pocket.¹⁸ Besides numerous bruises, considerable injury had been inflicted on her neck and anus.¹⁹ The cause of death was determined to be asphyxiation by strangulation.²⁰

Between 10:30 and 11:00 p.m. on the night before discovery of the body, a man was seen carrying what appeared to be a large black trash bag on his shoulder in the proximity of the trash dumpster.²¹ A witness testified that the man seemed to be having a hard time balancing the bag and had to adjust it on his shoulder.²² As he neared the dumpster, the man disappeared from the view of the witness, but reappeared a short time later walking down the alley away from the dumpster.²³

15. See discussion *infra* part V.

16. Appellant’s Brief on Direct Appeal at 2, *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995) (No. F-93-977), *cert. denied*, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-493).

17. *Id.*

18. *Id.*

19. State’s Petition for Rehearing at 4, *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995) (No. F-93-977).

20. Appellant’s Brief on Direct Appeal at 2.

21. *Id.* at 2-3.

22. *Id.* at 2.

23. *Id.* Although the witness, John Conley, could only identify the person he saw as a non-black male at the time of the investigation, Flores later admitted that he had disposed of the body. See *id.* at 2-3; State’s Petition for Rehearing at 4.

Mr. Flores lived in an apartment facing the alley where the dumpster was located and, while the police were canvassing the area during the investigation, a detective struck up a conversation with him.²⁴ Mr. Flores gave the detective a false name, but the false name was very similar to the name on an outstanding misdemeanor warrant and, after further investigation, Mr. Flores was arrested on that warrant.²⁵

Mr. Flores waived his *Miranda* rights and agreed to talk with Detective Fred Parke.²⁶ Although he originally told the detective that he had no knowledge of the incident, Mr. Flores later changed his story.²⁷ Mr. Flores subsequently identified a picture of the decedent as a woman he and a man named "Scott" had picked up at a convenience store.²⁸ Immediately after picking her up, they all went back to Mr. Flores' apartment.²⁹

According to Mr. Flores, he and the decedent went to his apartment with "Scott."³⁰ Mr. Flores admitted having sex with the decedent, but claimed that he then returned to the front room and "Scott" went back to the bedroom with the decedent; then "Scott" abruptly left.³¹ Mr. Flores claimed that he remained in the front room drinking beer until the morning, when he discovered the dead body of Miss Brown.³² He subsequently wrapped her up and disposed of her body in the trash dumpster.³³

24. *Id.* at 3.

25. *Id.* Flores gave his name as Michael Torres during the initial conversation with detectives. *Id.* Pursuant to a records check, the police discovered an outstanding misdemeanor warrant for a Miquel Torres. *Id.* Flores was arrested two days later on the misdemeanor warrant because the police believed Flores and Torres to be the same person. *Id.* Flores apparently also used, at various times, the names Miguel Torres, Jose Angel Almanza Perez, and Carlos Rivera. *See* Appellee's Brief on Direct Appeal at 2-5.

26. Appellant's Brief on Direct Appeal at 3-4.

27. State's Petition for Rehearing at 4.

28. Appellant's Brief on Direct Appeal at 4. The identity or even the existence of the man named "Scott" has not been determined. *See id.*; State's Petition for Rehearing at 4.

The circumstances surrounding the pick-up of the victim, however, were determined at the trial. Flores, Denny Childress, and Danny Alvarez were riding around with Glen Leroy Trumbull, and they stopped at a convenience store. Appellant's Brief on Direct Appeal at 4. The victim approached Flores and asked for a cigarette, whereupon Flores asked Glen for a ride to his apartment for himself and the victim. *Id.*

29. Appellant's Brief on Direct Appeal at 4-5. After arriving at the apartment, Mr. Flores asked Glen Trumbull to wait while they went inside because the victim would need another ride to get some drugs. *Id.* Childress, Alvarez, and Trumbull waited outside for about thirty minutes at which time they knocked on the apartment door several times. *Id.* Receiving no response, they eventually left without seeing either Mr. Flores or the victim again. *Id.*

30. State's Petition for Rehearing at 4.

31. Appellant's Brief on Direct Appeal at 4.

32. *Id.*

33. State's Petition for Rehearing at 4.

The police were able to collect samples of blood from a mattress in Mr. Flores' apartment, and at least one of the samples had genetic markers consistent with the decedent.³⁴ Vaginal and oral smears from the decedent indicated the presence of sperm, and the smears had genetic markers consistent with that of both Mr. Flores and the decedent.³⁵

The defense did not present any evidence at the conclusion of the State's case,³⁶ relying instead on requested intoxication instructions.³⁷ At the conclusion of the evidence, the District Judge instructed the jury.³⁸ For purposes of the *Flores* decision, two instructions are relevant.³⁹ The first of these is the now infamous "not guilty" instruction.⁴⁰ The second instruction read:

You are instructed that the burden of proof in this case is upon the State to establish by evidence, beyond a reasonable doubt, all the material allegations contained in the Information and unless the State has met it's [sic] duty in this respect, you cannot find the defendant guilty, but must acquit him.⁴¹

It should be noted that, at the time these instructions were administered, Flores failed to object or to submit any written instructions to correct the errors.⁴² The jury convicted Jose Flores of First Degree Murder and recommended punishment of life without parole.⁴³ The trial court sentenced Flores accordingly.⁴⁴

34. Appellant's Brief on Direct Appeal at 5.

35. *Id.*

36. *Id.*

37. *See id.* at 6-7. The defendant proposed instructions which would have negated the required volition for premeditated murder by reason of intoxication. *Id.*

38. *Flores v. State*, 896 P.2d 558, 559 (Okla. Crim. App. 1995), *cert. denied*, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-493).

39. Although the Appellant raised seven propositions of error, only two were addressed by the court in its decision. *Id.* Appellant's fourth proposition of error was "that the trial court committed reversible error in administering a modified version of Oklahoma Uniform Jury Instruction—Criminal No. 903." *Id.* at 559-60. Appellant's third proposition of error was "that the trial court committed reversible error in administering a modified version of OUJI-CR-109." *Id.* at 562.

40. *See supra* text accompanying note 3.

41. *Flores*, 896 P.2d at 562-63 (citing Instruction No. 1 in Orig. Rec. at 44).

42. *Id.* at 560.

43. *Id.* at 559. Flores was convicted of violating OKLA. STAT. tit. 21, § 701.7(A) (1991), which states:

A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

44. *Flores*, 896 P.2d at 559.

III. FLORES I

A. *The Majority Opinion*

In *Flores I*, the Oklahoma Court of Criminal Appeals reversed the judgment and sentence of the trial court and remanded for a new trial.⁴⁵ The court held that the trial judge “erroneously instructed the jury resulting in a denial of Appellant’s constitutional and statutory rights.”⁴⁶ In its analysis, the court noted that failure to give proper Oklahoma Uniform Jury Instructions (OUJI) only requires reversal where the error “results in a miscarriage of justice” or substantially violates a constitutional or statutory right.⁴⁷ However, Judge Strubhar, writing for the majority, explained that the presumption of innocence until proven guilty is a right guaranteed by statute and is thus entitled to greater protection than typical for jury instructions.⁴⁸ In addition, the court suggested by its discussion that the United States Constitution’s due process guarantee that guilt is to be proved by evidence beyond a reasonable doubt is likewise implicated.⁴⁹ According to the court, the presumed not guilty instruction “obfuscates the presumption of innocence” by diluting the principle that guilt is to be established by evidence beyond a reasonable doubt, and therefore requires reversal.⁵⁰

The trial court administered a modified version of Criminal Instruction Number 903.⁵¹ By statute, trial courts in Oklahoma are required to administer the uniform instructions where they accurately set forth the law.⁵² The Court of Criminal Appeals determined that

45. *Id.*

46. *Id.*

47. *Id.* at 560 (citing *Fontenot v. State*, 881 P.2d 69, 85 (Okla. Crim. App. 1994) (quoting *Brown v. State*, 777 P.2d 1355, 1358 (Okla. Crim. App. 1989) (citing OKLA. STAT. tit. 20, § 3001.1 (1991))). See *infra* note 59 for text of statute.

48. *Flores*, 896 P.2d at 560 (citing *Miller v. State*, 106 P. 538 (Okla. Crim. App. 1910) and OKLA. STAT. tit. 22, § 836 (1991)).

49. *Id.* at 561-62. See *infra* notes 104-29 and accompanying text.

50. See *id.* at 562 (relying on *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (quoting 9 J. WIGMORE, EVIDENCE § 2511 at 407 (3d ed. 1940)) and *Miller*, 106 P. at 539).

51. *Id.* at 559-60. OUJI-CR-903 provides:

The defendant(s) [is] [are] presumed innocent of the crime(s) charged, and the presumption continues unless, after consideration of all the evidence, you are convinced of [his] [her] [their] guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The defendant(s) must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime.

Cf. *supra* text accompanying note 3.

52. *Id.* at 560. OKLA. STAT. tit. 12, § 577.2 (1991) provides in pertinent part:

Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a civil case or a criminal case, giving due consideration to the facts and the

the Oklahoma Uniform Jury Instruction correctly set forth the presumption of innocence and was therefore an accurate restatement of the law.⁵³ Thus, by failing to correctly administer Instruction Number 903, the trial court violated the mandate of the Oklahoma statute.⁵⁴

Even so, the court correctly noted that mere deviation from OUJI does not require automatic reversal of the verdict.⁵⁵ This is especially true where, as here, the defendant failed to object to the given instructions or submit alternative instructions.⁵⁶ In such a situation, the court's review is limited to fundamental or plain error.⁵⁷

Nevertheless, just as mere deviation from OUJI does not require automatic reversal, neither does the discovery of plain error by the court.⁵⁸ In fact, reversal is only mandated where the error is so egregious that it results in a miscarriage of justice or substantially violates either a constitutional or statutory right.⁵⁹ Even where there is plain

prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law.

See also *Fontenot v. State*, 881 P.2d 69, 84 (Okla. Crim. App. 1994) (stating the rule that a relevant uniform instruction "shall be used unless the [trial] court determines that it does not accurately state the law").

53. *Flores*, 896 P.2d at 560.

54. See OKLA. STAT. tit. 12, § 577.2 (1991).

55. *Flores*, 896 P.2d at 560 (citing *Fontenot*, 881 P.2d at 84).

56. Normally in such a situation, any error is waived. See *Rowell v. State*, 699 P.2d 651, 653 (Okla. Crim. App. 1985) (holding that where the appellant has failed to object, failed to submit correcting instructions, and failed to include such proposition in its motion for a new trial, appellate review is waived for all but fundamental error).

57. *Flores*, 896 P.2d at 560. See also *Simpson v. State*, 876 P.2d 690, 694 (Okla. Crim. App. 1994) (quoting *Jones v. State*, 772 P.2d 922, 925 (Okla. Crim. App. 1989) (stating that plain errors are "errors affecting substantial rights although they were not brought to the attention of the court"). Fundamental errors are errors "which go to the foundation of the case, or which take from a defendant a right which was essential to his defense." *Id.* at 695 (citing *Rea v. State*, 105 P. 386 (Okla. Crim. App. 1909)). In addition, the error must be material, which means "of solid or weighty character; of consequence; . . . constituting a matter that is entitled to consideration, such as must be considered in deciding a case on its merits." *Id.* (quoting *Thompson v. State*, 117 P. 216 (Okla. Crim. App. 1911)). This concept of review of fundamental error has been codified at OKLA. STAT. tit. 12, § 2104 (1991).

The proper test in reviewing for fundamental error is whether as a whole, the instructions fairly state the applicable law. *Maghe v. State*, 620 P.2d 433, 437 (Okla. Crim. App. 1980) (citing *Cantrell v. State*, 562 P.2d 527 (Okla. Crim. App. 1977)).

58. *Simpson*, 876 P.2d at 693.

59. *Flores*, 896 P.2d at 560 (citing *Fontenot*, 881 P.2d at 85 (quoting *Brown v. State*, 777 P.2d 1355, 1358 (Okla. Crim. App. 1989) (citing OKLA. STAT. tit. 20, § 3001.1 (1991))). OKLA. STAT. tit. 20, § 3001.1 reads:

No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

error, the court must endeavor to determine whether such error was harmless beyond a reasonable doubt.⁶⁰

Despite these limitations on the court's appellate review, the *Flores I* court found that the presumed not guilty jury instruction diluted the burden of proof required by statute and was therefore harmful.⁶¹ As a result, the court found that the failure to give the required jury instruction amounted to a substantial violation of a statutory right and thus constituted reversible error.⁶² It is not clear, however, how the court reached this decision since the opinion did not specifically state the factors it employed in determining what constitutes a substantial violation.⁶³ In fact, the court did not even deem it necessary to recite the facts of the case, which further complicates efforts to understand the basis of the decision.⁶⁴

B. *The Concurring Opinion*

Although Judge Lumpkin concurred with the majority of the court that the case must be reversed, he wrote separately to set forth the factors used to determine that reversal was necessary.⁶⁵ He stated that the decision was solely based on violation of a statutory right.⁶⁶ For this reason, he felt that the correct standard of review should be "whether we have 'grave doubts' the error in instructing the jury did not have a 'substantial influence' on the outcome of the trial" instead of whether the error was harmless beyond a reasonable doubt.⁶⁷

60. *Flores*, 896 P.2d at 560. See *infra* note 91 for a discussion of the harmless error doctrine. See also *Simpson*, 876 P.2d at 693 (noting that plain error is to be reviewed in order to determine whether it requires reversal or whether it was harmless).

61. *Flores*, 896 P.2d at 562 (noting the "most likely outcome" of changes in Uniform Jury Instructions to be "unnecessary confusion and a constitutionally impermissible lessening of the required standard of proof").

62. *Id.*

63. Rather than showing what happened in the *Flores* trial to warrant reversal, the court reversed in order to protect the principle that guilt be proven beyond a reasonable doubt. *Id.* The court stated that a not guilty instruction "amounts to an impermissible lessening of the burden of proof by expanding the degree of doubt that is permissible." *Id.* In order to safeguard this principle, the court felt that any instruction of "not guilty" must be reversed. *Id.* See also *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995).

64. *Flores*, 896 P.2d at 559. Oddly, the Court of Criminal Appeals felt that a recitation of the facts was unnecessary since they reversed and remanded the case for a new trial. See *id.*

65. *Id.* at 563 (Lumpkin, J., concurring in result).

66. *Id.* ("As the Court correctly states, the presumption of innocence is 'not articulated in the Constitution' and the decision in this case is based on a violation of a 'right guaranteed by statute, [OKLA. STAT. tit. 22, § 836 (1991)]'"). *Id.*

67. *Id.* at 563 (citing *Simpson v. State*, 876 P.2d 690, 702 (Okla. Crim. App. 1994)).

In arriving at his decision that reversal was warranted, Judge Lumpkin suggested using the factors set out in *Kentucky v. Whorton*⁶⁸ to determine whether failure to give a requested instruction on the presumption of innocence violates the Due Process Clause of the Fourteenth Amendment.⁶⁹ As defined by the United States Supreme Court, a failure to properly instruct the jury is to be considered under the totality of the circumstances, which includes such considerations as other instructions given, the arguments made by counsel, and the weight of the evidence.⁷⁰

Like the majority of the court, Judge Lumpkin felt that the jury instructions did not contain an appropriate burden of proof instruction, and the erroneous instruction was therefore “not cured.”⁷¹ In addition, he noted that the prosecutor made some inappropriate comments and that the evidence of guilt, while sufficient, was not overwhelming.⁷² For these reasons, he felt the erroneous instruction expanded the degree of doubt required for conviction, which thereby impermissibly lessened the burden of proof required of the prosecution, and thus reversal was warranted.⁷³

IV. FLORES II

The court had the opportunity to reexamine and clarify its *Flores I* decision when the State of Oklahoma filed a Petition for Rehearing.⁷⁴ Unfortunately, the court denied this petition because it did not meet the minimum requirements of the Rules of the Court of Criminal Appeals.⁷⁵ Nevertheless, in an unusual occurrence, four separate

68. 441 U.S. 786 (1979).

69. *Flores*, 896 P.2d at 563-64 (Lumpkin, J., concurring in result).

70. *Whorton*, 441 U.S. at 789. Prior to *Flores I*, the Court of Criminal Appeals had employed this standard in order to determine if the failure to give an instruction on the presumption of innocence constituted harmless error. See *Hyatt v. State*, 779 P.2d 993, 995 (Okla. Crim. App. 1989).

71. *Flores*, 896 P.2d at 564 (Lumpkin, J., concurring in result).

72. *Id.*

73. *Id.* “I am not certain ‘the error did not influence the jury, or had a very slight effect’ on the verdict.” *Id.* (quoting *Simpson v. State*, 876 P.2d 690, 702 (Okla. Crim. App. 1994)).

74. *Flores v. State*, 899 P.2d 1162, 1163 (Okla. Crim. App. 1995).

75. *Id.*

A petition for rehearing may only be filed if 1) some question decisive of the case . . . has been overlooked by the Court, or 2) the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

Id. (citing OKLA. CT. CRIM. APP. R. 3.14(B)).

opinions from members of the court accompanied the one-paragraph denial of the Petition for Rehearing.⁷⁶

In his opinion supporting the denial of the petition, Judge Chapel noted that the proper “harmless error standard applicable to statutory errors is whether or not the error ‘constitutes a substantial violation of a . . . statutory right.’”⁷⁷ He felt that the original decision clearly stated that the harmless error doctrine had been applied to the presumed not guilty instruction and that the court held this error to not be harmless.⁷⁸

Likewise, Judge Strubhar felt the initial decision was clear, but thought the instruction was akin to a structural error and therefore not subject to harmless error review.⁷⁹ In her opinion, concluding that such an error could be harmless “arises from a specious denial of the role of the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.”⁸⁰

Presiding Judge Johnson, on the other hand, apologized for his concurrence in *Flores I*.⁸¹ Although he agreed with the decision as it related to Mr. Flores, he misunderstood the opinion to mean that the court was applying the harmless error doctrine in arriving at its conclusion.⁸² In his opinion, the harmless error doctrine should be used in these cases “to see whether or not the cases could be affirmed by using such doctrine.”⁸³

Like Judge Johnson, Judge Lumpkin recognized that the court did not subject the presumed not guilty instruction to “an application of harmless error” because the majority felt the error “violate[d] a substantial statutory right.”⁸⁴ He was particularly concerned about

76. *See Id.* at 1162.

77. *Id.* at 1164 (Chapel, V.P.J., specially concurring) (citing OKLA. STAT. tit. 20, § 3001.1 (1991)).

78. *Id.* at 1163.

79. *Id.* at 1168 (Strubhar, J., specially concurring) (citing *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082-83 (1993)).

80. *Id.*

81. *Id.* at 1169 (Johnson, P.J., dissenting).

82. *Id.*

My initial reading of the opinion and my reason for the concurrence was my position that although there was error, which is clear and unambiguous, I would have applied a harmless error test but in *Flores*, I did not find harmless error and, therefore, voted to concur. Now I find that the majority would reverse all *Flores* type cases due to the fact that it is a substantial violation of a statutory right and the harmless error doctrine would not apply. Therefore, I dissent.

Id. at 1169-70.

83. *Id.* at 1170.

84. *Id.* at 1170 (Lumpkin, J., dissenting). *See also id.* at 1163 (Chapel, J., specially concurring) (stating “[T]his court applies the ‘harmless error’ doctrine to errors which neither result in

the court's failure to provide adequate "criteria for determining when a statutory violation is 'substantial'."⁸⁵ He maintained that the Legislature intended for the appellate court to apply the harmless error doctrine in order to prevent "reversal on an error which could not possibly have affected the outcome" of the trial.⁸⁶

V. ANALYSIS

Although the jury instructions at issue in *Flores* differed from those prescribed by OUJI, they would only violate Oklahoma statutory law if the instructions, taken in their entirety, did not fairly and accurately state the applicable law.⁸⁷ The test for determining whether instructions fairly and accurately state the applicable law is to review all the instructions in their entirety.⁸⁸ Unfortunately, the *Flores* court failed to do this;⁸⁹ rather, the court found that the instruction on "presumed to be not guilty" constituted plain error and could therefore be reviewed.⁹⁰

a miscarriage of justice nor constitute a substantial violation of a constitutional or statutory right").

85. *Id.* at 1170 (Lumpkin, J., dissenting).

86. *Id.* at 1170-71. See *supra* note 59 for text of statute.

87. *Flores v. State*, 896 P.2d 558, 560 (Okla. Crim. App. 1995), *cert. denied*, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-493) (citing *Davis v. State*, 763 P.2d 109, 111 (Okla. Crim. App. 1988), *cert. denied*, 489 U.S. 1055 (1989)).

88. *Davis*, 763 P.2d at 111 (citing *DeVooght v. State*, 722 P.2d 705 (Okla. Crim. App. 1986) and *Melvin v. State*, 706 P.2d 163 (Okla. Crim. App. 1985) *cert. denied*, 475 U.S. 1027 (1986)).

89. The burden of proof instruction given by the trial court was as follows:

You are instructed that the burden of proof in this case is upon the State to establish by evidence, beyond a reasonable doubt, all the material allegations contained in the Information and unless the State has met it's [sic] duty in this respect, you cannot find the defendant guilty, but must acquit him.

Flores v. State, 899 P.2d 1162, 1175 (Okla. Crim. App. 1995) (denying the State's petition for rehearing) (Lumpkin, J., dissenting).

While the court does mention that the burden of proof instruction was not adequate to cure the lack of a presumed innocent instruction, it failed to address Jury Instruction No. 3 which read:

You are instructed that no person may be convicted of Murder in the First Degree unless the State has proven beyond a reasonable doubt each element of the crime.

These elements are:

1. The death of a human;
2. The death was unlawful;
3. The death was caused by the defendant;
4. The death was caused with malice aforethought.

Id.

Instruction No. 3 rested the burden of proof solely upon the prosecution to prove the elements of the offense beyond a reasonable doubt, and failure to do so precluded a finding of guilt.

90. *Flores*, 896 P.2d at 560.

In reviewing the presumed not guilty instruction for plain or fundamental error, the court seemed to base its decision on rights guaranteed by Oklahoma statute.⁹¹ It noted that the basis for the instruction on the presumption of innocence emanates from title 22, section 836 of the Oklahoma statutes.⁹² While section 836 states the principle of law that an accused is to be presumed innocent, it does not explicitly require that the jury be instructed on this presumption in those express terms; rather, it seems only to require that the accused's guilt be satisfactorily shown.⁹³ In *Cochran v. State*,⁹⁴ for example, the court identified the purpose of the law on presumption of innocence is to place the burden on the state to produce evidence and to persuade the jury of the accused's guilt beyond a reasonable doubt before allowing the jury to convict.⁹⁵ If the burden of proof is successfully placed on the state, failure to instruct on the presumption of innocence does not mandate reversal.⁹⁶ In fact, Oklahoma courts have held that reversal was not warranted for failure to instruct on the presumption of innocence when the jury was fully instructed on the burden of proof, the failure to instruct was an oversight, counsel failed to object, and the accused was not injured.⁹⁷ Thus, it is clear that Oklahoma law does

91. *Id.* at 560-61. Whether the court based its decision on statutory or constitutional grounds is significant because of the different applications of the harmless error doctrine.

Under the federal harmless error doctrine, automatic reversal is required for "structural defects" that prevent the trial from being fair; these defects include an impartial trier of fact and lack of representation by counsel. *See Arizona v. Fulminante*, 111 S. Ct. 1246, 1265 (1991). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Flores*, 899 P.2d at 1171 (Lumpkin, J., dissenting) (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)). This test requires the prosecution to show beyond a reasonable doubt that the error did not contribute to the verdict and includes such factors as the overwhelming evidence of guilt and existence of cumulative evidence. *See, e.g., Chapman v. California*, 386 U.S. 18, 24 (1967). *See also infra* notes 108-15 and accompanying text, discussing application of the harmless error doctrine to a failure to give a presumption of innocence instruction.

92. *Flores*, 896 P.2d at 560 (citing OKLA. STAT. tit. 22, § 836 (1991)). The presumption of innocence "is a positive legal right appertaining to every accused person, whether guilty or innocent, that he shall not be condemned for a criminal offense in a judicial trial until and unless the evidence produced against him shall be legally sufficient to prove his guilt beyond a reasonable doubt." *Id.* (quoting *Miller v. State*, 106 P. 538, 539 (Okla. Crim. App. 1910)).

93. *See* title 22, § 836. Section 836 provides that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted."

94. 114 P. 747 (Okla. Crim. App. 1910).

95. *Flores*, 896 P.2d at 561 (citing *Cochran*, 114 P. at 748). *See also Culppepper v. State*, 111 P. 679, 680-81 (Okla. Crim. App. 1910) ("[T]he 'presumption of innocence' is in truth merely another form of the expression for a part of the accepted rule for the burden of proof in criminal cases").

96. *See Jenkins v. State*, 145 P. 500, 501 (Okla. Crim. App. 1914).

97. *Flores*, 896 P.2d at 561 n.1 (citing *Jenkins*, 145 P. at 501).

not mandate reversal for failure to instruct on presumption of innocence.

Neither does the United States Constitution require presumption of innocence instructions; in fact, the *Flores I* court noted affirmatively that instruction on the presumption of innocence is *not* constitutionally required, but that each case must be decided on its own facts.⁹⁸ Since the court did not believe it worthwhile to even recite the facts in *Flores I*,⁹⁹ it may be assumed that the decision rested on statutory grounds. If, however, the instruction is not a constitutional right, the defense has the burden of proving prejudice by the error before the court will reverse.¹⁰⁰ To meet this burden, the defense must show that the error had a substantial influence on the outcome of the trial or the error must leave the appellate court in “grave doubt” as to whether it had such an effect when viewed “in relation to all else that happened [procedurally]” during the trial.¹⁰¹

In *Flores I*, the court did not even discuss the facts of the case, much less “all else that happened” during the trial, and therefore failed to require the defense to meet this burden.¹⁰² In fact, the court admitted that the burden had not been met when it said “[t]he actual impact of the instruction in the instant case on the judgment of the jurors is difficult to determine.”¹⁰³ For this reason, the court could have found that the error was non-prejudicial to the defendant.

Although the *Flores* decision may not have rested on the United States Constitution, the court certainly relied on Supreme Court decisions in ascertaining what was meant by the term “presumption of innocence.”¹⁰⁴ The United States Supreme Court has previously addressed the issue of whether such an instruction dilutes the presumption of innocence enjoyed by the defendant in a criminal case and

98. *Id.* at 560-61.

99. *See id.* at 559.

100. *Simpson v. State*, 876 P.2d 690, 701 n.14 (Okla. Crim. App. 1994) (“[A]n appellant must first show prejudice from a non-constitutional error; but in a constitutional error, all he need show is the error, and prejudice is presumed . . .”).

101. *Id.* at 702 (quoting *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))). This is the harmless error test employed in Oklahoma prior to *Flores I*. Judge Chapel, in his *Flores II* opinion, finds fault with Judge Lumpkin’s suggestion to develop a “standard” for applying the harmless error analysis to these types of cases because he feels that the statute is clear and any attempt to define “substantial” would be useless. *See Flores v. State*, 899 P.2d 1162, 1164 (Okla. Crim. App. 1995) (Chapel, J., specially concurring).

102. *See Flores*, 896 P.2d at 559.

103. *Id.* at 561.

104. *See, e.g., Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system

thereby diminishes the State's burden of proof to show guilt beyond a reasonable doubt.¹⁰⁵

As the *Flores I* court correctly notes, however, the issue is not merely whether the instruction on the presumption of innocence must be given, but rather the requirement that the proper burden of proof be placed on the prosecutor.¹⁰⁶ In fact, the presumption of innocence is only one means utilized to guarantee that convictions be based on evidence beyond a reasonable doubt.¹⁰⁷ Where this important task can be accomplished without the instruction, the instruction is not necessary.

For example, in *Taylor v. Kentucky*,¹⁰⁸ the United States Supreme Court reversed a conviction which was based on the failure to administer a requested presumed innocent jury instruction.¹⁰⁹ In so deciding, the Court stated:

While use of the particular phrase "presumption of innocence"—or any other form of words—may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard "against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."¹¹⁰

The Court, however, recognized that an instruction on the presumption of innocence has been identified as just one means of instructing the jury that the burden is on the prosecution to prove the accused's guilt on the basis of the evidence and beyond a reasonable doubt.¹¹¹

of criminal justice."); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation . . . of our criminal law.").

105. See *In re Winship*, 397 U.S. 358 (1970). The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution protect individuals accused of a crime from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

106. "[C]ourts must be vigilant to avoid the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Flores*, 896 P.2d at 561 (citing *Estelle*, 425 U.S. at 503). The court further stated that "[t]he presumption of innocence is 'merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases.'" *Id.* (quoting *Culpepper v. State*, 114 P. 747, 748 (Okla. 1910)).

107. It is the reasonable doubt standard which "provides concrete substance for the presumption of innocence." *Winship*, 397 U.S. at 363.

108. 436 U.S. 478 (1978).

109. *Id.* at 490.

110. *Id.* at 485-86 (citing *Estelle v. Williams*, 425 U.S. 501, 503 (1976)).

111. *Id.* at 486. The Supreme Court held the presumption of innocence instruction was necessary in *Taylor* because the trial court's reasonable doubt instruction was "Spartan." *Id.*

A year after *Taylor*, the Supreme Court was again faced with this issue in *Kentucky v. Whorton*.¹¹² That case arose when the Kentucky Supreme Court interpreted *Taylor* to mean that a presumption of innocence instruction must always be given.¹¹³ The United States Supreme Court, however, noted that the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution.¹¹⁴ The Court stated, “[U]nder *Taylor*, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial.”¹¹⁵

By identifying this “totality of the circumstances” test as the proper device for evaluating the constitutionality of a failure to instruct the jury on the presumption of innocence, the Supreme Court’s reasoning suggests that a presumption of innocence instruction is not necessary when a reasonable doubt instruction and other circumstances convey to the jury that the defendant is presumed innocent. Jurors can certainly appreciate that the defendant is presumed innocent from adequate reasonable doubt instructions because of the complementary relationship between these two concepts.¹¹⁶ Thus, if the accused’s presumption of innocence is self-evident to the jury through the use of adequate reasonable doubt instructions, the failure to give a proper instruction is not error.¹¹⁷

Despite the authority suggesting that instructions are not required to adequately safeguard defendants’ rights, the *Flores I* court made a distinction between the failure to instruct on the presumption

112. 441 U.S. 786 (1979) (per curiam).

113. *Id.* at 788-89.

114. *Id.*

115. *Id.* at 789.

116. See, e.g., *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970); *Coffin v. United States*, 156 U.S. 432 (1895).

117. *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (per curiam). The only other state to deal with this issue has been Ohio in *City of Bucyrus v. Fawley*, 552 N.E.2d 676 (Ohio App. 1988). The instruction given in that case was “You must bear in mind that the Defendant is presumed to be not guilty of the charge against him until and if the City can prove by legal and competent evidence the guilt of the Defendant beyond a reasonable doubt.” *Id.* at 677. The appellate court found that the trial court’s instruction sufficiently satisfied both *Taylor* and *Whorton*. *Id.*

The Oklahoma Court of Criminal Appeals felt that “[t]he Ohio court’s reliance on *Taylor* and *Whorton* is misplaced insofar as those cases address the issue of failure to give a presumption of innocence instruction rather than an erroneous instruction.” *Flores v. State*, 896 P.2d 558, 562 n.7 (Okla. Crim. App. 1995), cert. denied, 64 U.S.L.W. 3379 (U.S. Nov. 27, 1995) (No. 95-493).

at all, as in *Whorton*, and an erroneous instruction.¹¹⁸ Relying on *Mahorney v. Wallman*,¹¹⁹ the court noted that "a misstatement of law that affirmatively negates a constitutional right or principle is often . . . a more serious infringement than the mere omission of a requested instruction."¹²⁰ Such a misstatement, however, must affirmatively negate the presumption of innocence before reversal is required.¹²¹

The *Flores I* court tried to justify its conclusion that Flores' constitutional rights had been "affirmatively negated" by discussing the semantic differences between "presumed to be not guilty" and "presumed innocent."¹²² The court noted that words do have specific meanings, and in the context of jury instructions, they must be used properly.¹²³ The court also made the point that "[t]he presumption of innocence commands the jury to start their deliberations from the premise there exists an absence of guilt while the presumption of not guilty conveys there exists an absence of sufficient proof of guilt."¹²⁴

Based on these arguments, the court found harmful error, even though it recognized that "the distinction is subtle."¹²⁵ In fact, the court made no attempt to show that this distinction had any effect on a particular juror or even that the jury could understand the difference.¹²⁶ It only stated that "[t]he term presumed innocent has a self-evident meaning comprehensible to the lay juror."¹²⁷ Even if this is true, however, it does not necessarily follow that "not guilty" has a different self-evident meaning. The fact that the court recognizes the

118. *Flores*, 896 P.2d at 562.

119. 917 F.2d 469 (10th Cir. 1990).

120. *Flores*, 896 P.2d at 562. (quoting *Mahorney*, 917 F.2d at 473).

121. The *Mahorney* Court was able to show the presumption of innocence had been negated because the prosecutor made improper statements to the effect that the presumption of innocence only applies to those who are actually innocent. *Mahorney*, 917 F.2d at 471.

122. *Flores*, 896 P.2d at 562.

123. *Id.* (quoting *Johnson v. State*, 841 P.2d 595, 596 (Okla. Crim. App. 1992)).

124. *Flores*, 896 P.2d at 562. In its denial of the State's Petition for Rehearing, the court seems to suggest that the presumed not guilty instruction denies the defendant's constitutional right to be judged solely on the basis of evidence adduced at trial. See *Flores*, 899 P.2d at 1166 (Chapel, V.P.J., specially concurring). While the instruction may be one means of explaining the accused's right, it is not necessarily the only one. In fact, the failure to give a presumption of innocence instruction does not affect the fairness of a trial where the defendant is otherwise afforded his right to be proven guilty beyond a reasonable doubt and to be judged solely on the basis of evidence presented at trial. See *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979).

125. *Flores*, 896 P.2d at 562.

126. See generally *id.* In three of the four cases thus far retried because of reversals for erroneous "not guilty" instructions, the defendants have been again found guilty and have received much stiffer sentences when the jury had been instructed that they were "presumed innocent." See Bill Braun, *Longer Term Set In Retrial Of Tulsan*, TULSA WORLD, October 8, 1995 at News19.

127. *Flores*, 896 P.2d at 562.

subtle difference between the two terms¹²⁸ does not explain how jurors will view the terms differently. And even if the instruction diminished the effect of the instruction, it did not remove the State's burden to prove guilt by probative evidence beyond a reasonable doubt.¹²⁹

VI. CONCLUSION

The *Flores I* court should not have reversed the trial court's verdict absent a clearer showing of harmful or prejudicial error. The court should have followed Judge Lumpkin's approach and applied the harmless error doctrine using a totality of the circumstances test to the facts in this particular case. By ruling that the "not guilty" instruction violated a substantial statutory right, the court has essentially required that each case with "not guilty" jury instructions be overturned regardless of how harmless-in-fact such instructions may have been. Certainly, there may have been sufficient facts to warrant a reversal in *Flores I*, but the court did not examine them adequately.

In this case, the trial court instructed the jury that the burden of proof rested solely with the prosecution and that failure to prove the material allegations and elements of the offense beyond a reasonable doubt precluded a finding of guilt. As this note suggests, whether the court wishes to reverse based on statutory or constitutional grounds, it should base its decision on a determination of how the particular instruction in the particular case caused a substantial violation of the accused's rights. It is not enough to merely declare that the instruction itself constitutes reversible error. Where the court fails to adequately weigh the actual harm to the fairness of a defendant's trial, the result is an unnecessary burden on the judicial system of this state. Despite the need for courts to guard against dilution of the principle that guilt is to be established beyond a reasonable doubt, where no dilution is shown, there should be no reversible error.

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128. See *id.* ("[T]he presumption of innocence 'cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the evidence adduced.'" (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) and 9 J. WIGMORE, EVIDENCE § 2511, p. 407 (3d ed. 1940)).

129. See *supra* text accompanying notes 108-17.

