No. 1-09-0131

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CYNTHIA FARIA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois No. 08-CR-2560 Honorable Bertina E. Lampkin, Judge Presiding.

PROOF OF SERVICE

TO: Anita Alvarez, Cook County State's Attorney, 300 Daley Center, Chicago, Illinois 60602;

Cynthia Faria, 1098 1350th Street, P.O. Box 549, Lincoln, Il 62656

The undersigned, being first duly sworn on oath, deposes and says that he personally delivered nine copies of the Reply Brief and Argument in the above-entitled cause to the Clerk of the above Court, served by mail three copies to the State's Attorney of Cook County and mailed one copy to the Defendant-Appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois on APRIL 1, 2010.

_____

FRANK CESARONE
Student Clerk
DePaul Legal Clinic
DePaul University College of Law
14 E. Jackson
Chicago, IL 60604
(312) 362-8294

SUBSCRIBED AND SWORN TO BEFORE ME
on APRIL 1, 2010.

_____

NOTARY PUBLIC

No. 1-09-0131

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CYNTHIA FARIA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois No. 08-CR-2560 Honorable Bertina E. Lampkin, Judge Presiding.

REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

PROFESSOR ANDREA D. LYON
Associate Dean for Clinical Programs
14 E. Jackson Blvd.,
Chicago, IL 60604
(312) 362-8294

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

*FRANK CESARONE, a 2011 law student at DePaul University College of Law, assisted in the preparation of this brief.

No. 1-09-0131

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CYNTHIA FARIA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois No. 08-CR-2560 Honorable Bertina E. Lampkin, Judge Presiding.

ARGUMENT

I. It is proper for this Court to apply a relaxed standard of the waiver rule.

The State first contends that Cynthia Faria forfeited her claim by failing to raise it prior to her appeal in an objection or in a post-trial motion. (St. Br. 7) However, under current precedent "a less rigid standard of waiver applies when the issue involves potential misconduct by a trial judge." *People v. Peden*, 377 Ill.App.3d 463, 470 (1st Dist. 2007) (quoting *People v. Vaughn,* 354 Ill.App.3d 917, 924 (1st Dist. 2004). This relaxed standard is applicable in cases where, as in the present case, a trial judge demonstrates impartiality, bias, pre-judgment, and the appearance of impropriety. *See People v. Eubanks*, 307 Ill.App.3d 39, 41 (3rd Dist. 1999). Moreover, while waiver may limit the parties, it is not a limitation on the reviewing court's ability to consider and review a matter. *Peden*, 377 Ill.App.3d at 470 (citing

to *People v. Meadows,* 371 Ill.App.3d 259, 261 (2nd Dist. 2007). Here, this Court should review the merit of Cynthia Faria's claims because they are based upon transgressions by the trial court. *See Peden*, 377 Ill.App.3d at 470.

II. The trial court's actions constitute reversible error.

The State's brief incorrectly establishes a heavier burden of proof than is required. (St. Br. 39) It has been clearly established that to support a claim for denial of due process based upon judicial bias, the defendant need not prove actual bias or actions that unequivocally reveal the court's preconceived notions about a defendant or her guilt. Instead, the Illinois Supreme Court has stated that in order to prevail on a claim of judicial bias, a defendant need only "demonstrate that there are facts and circumstances which indicate that the trial judge was prejudiced." *People v. Jones*, 219 Ill.2d 1, 18 (2006). Such prejudice can be shown by the trial court's animosity, hostility, ill will, or distrust towards the defendant. *Id.* at 18. Here, the trial court's animosity, hostility, ill will, and distrust of Mr. Douglass clearly demonstrate that Cynthia Faria did not receive a fair an impartial trial.

The State argues that "there is no clear evidence, as in *Wardell*, that the court acted improperly." (St. Br. 9) Under current law, a defendant has the right to a fair trial before a fair judge without any "actual bias but also the absence of the probability of bias." *People v. Hawkins*, 181 Ill.2d 41, 50, 690 N.E.2d 999, 1003 (1998). Similarly, the Illinois Code of Judicial Conduct mandates that judges should avoid even "the appearance of impropriety." Ill. Sup. Ct. Rule 62, Canon 2.

With this in mind, the trial court's frequent disparagement of Mr. Douglass and his case clearly violates this standard and constitutes error.

The State next contends that, because there was no jury to witness the trial court's impropriety, there was no error. (St. Br. 10-12) While an objection in a bench trial might not have the potential to negatively influence a jury verdict, it does not mean there are no risks involved in making such an objection. As a logical matter, it might be more difficult to object to the conduct of the trial court in a bench trial than in a jury trial since the final decision rests in the hands of the person whose conduct is being challenged by such an objection. *See generally People v. Stevens*, 338 Ill. App.3d 806, 810 (1st Dist. 2003); *People v. Smith*, 205 Ill.App.3d 153 (1st Dist. 1990). In a bench trial, "[a] defendant . . . is entitled to the same fair, patient and impartial consideration he would be entitled to by a jury of fair, impartial, careful and considerate peers." *Stevens*, 338 Ill. App.3d at 810; *Smith*, 205 Ill.App.3d at 153. Any presence of bias, impatience, prejudice, or impartiality denies a defendant his or her right to a fair trial. *See People v. Harris*, 384 Ill.App.3d 551, 563 (1st Dist. 2008); *People v. Taylor,* 357 Ill.App.3d 642, 647 (1st Dist. 2005)*; People v. Stokes*, 293 Ill.App.3d 643, 648 (1st Dist. 1997); *People v. Heiman,* 286 Ill.App.3d 102*,* 113 (1st Dist. 1996). Here, the trial court's actions clearly demonstrate pre-judgment, bias, and impatience against the defense. This constitutes reversible error.

Next, the State contends that if the actions of the court were error, that "this error was harmless." (St. Br. 41) However, "there are some constitutional rights so

basic to a fair trial that their infraction can never be treated as harmless error." *Girot v. Keith*, 212 Ill.2d 372, 381, 818 N.E.2d 1232, 1237-1238 (2004) (citing *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705, 710 (1967), and *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)) (involving a judge who was not impartial). The denial of the right to a fair trial before an impartial arbiter cannot be deemed harmless. *People v. Thigpen*, 306 Ill.App.3d 29, 40 (1st Dist. 1999); *Heidorn*, 114 Ill.App.3d at 937; *see also Jones*, 219 Ill.2d at 18; *Vaughn*, 354 Ill.App.3d at 925-26; *People v. Bradshaw*, 171 Ill. App. 3d 971, 976 (1st Dist. 1988).

In claiming that any error by the trial court was harmless, the State attempts to distinguish *People v. Wardell*, 230 Ill.App.3d 1093 (1st Dist. 1992), where the court held that a defendant is entitled to a new sentencing hearing where the sentencing judge relies on an improper factor. (St. Br. 9) The State claims that because "there is no allegation that the trial court used an improper factor such as race in finding defendant guilty . . . there is no clear evidence . . . that the court acted improperly." (St. Br. 9) In its brief, the State improperly limits the scope of *Wardell* by stating that it only applies to the narrow situation where the court uses race as an improper factor. (St. Br. 9) Instead, the court in *Wardell* clearly did not intend such limitations when it broadly used "improper factor" to demonstrate the breadth of potential impropriety that courts must avoid. *Wardell*, 230 Ill.App.3d at 1102-03 (including such factors as using "inflexible policy," "personal policy," and

making comments that indicate a lack of consideration to relevant statutory factors in making decisions).

III. In its brief, the State incorrectly characterized the trial court's interjections as "proper" and not indicative of "any bias or prejudgment against defendant."

The State cites *People v. Urdiales*, 225 Ill.2d 354 (2007), to support its contention that the trial court's interruptions were proper and did not demonstrate bias or prejudice against Cynthia Faria. (St. Br. 21) *Urdiales*, unlike this case, involved remarks made to and about an attorney who was dismissed from representing the defendant. *Id.* at 425. Moreover, the reviewing court stated that the trial court's statements were "irrelevant, given that Sincox [the original attorney] did not, and could not, represent the defendant," and noted "that the court's remarks regarding the attorneys who actually represented the defendant were highly complimentary, and there was no hint of animosity or disparagement therein." *Id.* Unlike in *Urdiales*, here, the biased statements and prejudicial remarks made by the court were about Mr. Douglass, who actually represented Ms. Faria in trial. The State, analogizing to the judgment in *Urdiales*, claims that "the trial court did not show bias . . . [and] no prejudice resulted from the trial court's remarks." (St. Br. 23) The State's reliance on *Urdiales* is misplaced due to the fact that the statements in *Urdiales* were "irrelevant, given that [the attorney at whom the judge's remarks were directed] did not, and could not, represent the defendant." *Urdiales*, 225 Ill.2d at 425.

The State also contends that the trial court's interjections were "within its authority" and only served to "clear up confusion" and to "facilitate prompt proceedings." (St. Br. 12–14) In support of this argument, the State cites to *People v. Thigpen*, 306 Ill.App.3d 29, 40 (1st Dist. 1999). In *Thigpen*, the court interjected to "achieve prompt and convenient dispatch of court business." *Id.* The same cannot be said for this case. Unlike in *Thigpen*, here, the trial court went beyond simply clarifying and acting to ensure a prompt trial. Even before the trial began, the court clearly demonstrated bias and pre-judgment by her critical remarks towards defense counsel, his abilities as an attorney, and his handling of the case. This continued throughout the trial, as the trial court interrupted defense counsel at least *eighty* times during trial. (R. H-1-83) Moreover, it cannot be said that comments such as, "I can't stand the way you do this, Mr. Douglass, it's going to make me scream," "you just waste time and it's unbelievable," and "I mean, it could not continually be somebody else's error," (R. H-23-24, R. E-5) facilitate prompt proceedings or clarify any confusion. Equally telling, is the trial court's lack of comment, remark, or similar interjection of the State's attorney. In the same trial, the court only interrupted the State three times. (R. H-1-89)

The State also cites to *People v. Griffin*, 194 Ill.App.3d 286, 296 (1st Dist. 1990), to support its contention that the trial court's actions were necessary and did not deny Cynthia Faria a fair trial. (St. Br. 17) Unlike in *Griffin*, here, the actions of the court were not provoked by improper remarks and physical acts of defense counsel. Conversely, here, the trial court's verbal assault on defense counsel began

after a clear and concise explanation of the underlying circumstances relating to the absence of a witness. Moreover, unlike in *Griffin*, here, the trial court interrupted defense counsel at will and without provocation. These actions clearly demonstrate the bias, pre-judgment of guilt, and lack of impartiality held by the trial court. This lack of impartiality effectively denied Cynthia Faria her constitutional right to a fair trial.

IV. The trial court's interruptions during closing arguments denied Cynthia Faria her right to make a closing argument.

The State next contends that Cynthia Faria "fully exercised her right to make a closing argument." (St. Br. 32) The State distinguishes *People v. Heiman*, 286 Ill.App.3d 102 (1st Dist. 1996), on the grounds that here, "the trial court made much fewer than forty to fifty interjections during defense counsel's closing argument." (St. Br. 36) As a practical matter, it would be illogical to read the decision in *Heiman* to require "forty to fifty interjections" to establish that a closing argument has been improperly limited. Instead, it is logical to read *Heiman* as looking to the substance of such interjections to see whether the court's actions have effectively denied the right to make a complete and coherent argument. Here, although the trial court did not interrupt defense counsel forty to fifty times, both the relative quantity and substance of the trial court's interjections effectively prevented Mr. Douglass from making his complete closing argument.

Additionally, the State contends that because "defense counsel was permitted to finish his presentation of each argument following the interjections made by the trial court," the right to make a closing argument was not violated. (St. Br. 37) The

United States Supreme Court has made it clear that the right of a defendant to make a closing argument is imperative because it "may correct a premature misjudgment and avoid an otherwise erroneous verdict." *Herring v. New York*, 422 U.S. 853, 863 (1975). The trial court's interruptions and reaction to the defense's closing argument clearly evidenced that her judgment of guilt had already been made. This is a obvious example of the premature misjudgment that *Herring* sought to prevent.

In this case, the trial court's improper remarks and incessant interjections failed to reflect the requisite level of judicial impartiality, and thus undermined confidence in the proceedings. As a result of this judicial impropriety, Cynthia Faria was denied her constitutional right to a fair trial and this Court should reverse and remand for new trial.

CONCLUSION

For the foregoing reasons, Cynthia Faria, Defendant-Appellant, respectfully requests that this Court reverse her conviction and remand the case for a new trial.

Respectfully submitted,

PROFESSOR ANDREA D. LYON
Associate Dean for Clinical Programs
DePaul University College of Law
14 East Jackson Blvd.,
Chicago, IL 60604
(312) 362-8294

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Andrea D. Lyon, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 9 pages.

_____

ANDREA D. LYON
DePaul Legal Clinic