6-3-96

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,575

STATE OF FLORIDA,

Petitioner,

vs.

MILO WILSON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759
FAX (407) 688-7771

Counsel for Petitioner

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PRELIMINARY STATEMENT

Respondent, Milo Wilson, was the Defendant; Petitioner, the State of Florida, was the prosecution, in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Court except that Petitioner will also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

Jurisdictional Statement

The Fourth District certified two questions as being of great public importance:

> DOES THE JURY INSTRUCTION GIVEN IN THIS CASE IMPERMISSIBLY REDUCE THE REASONABLE DOUBT STANDARD BELOW THE PROTECTIONS OF THE DUE PROCESS CLAUSE?
>
> IF SO, IS SUCH AN INSTRUCTION FUNDAMENTAL ERROR?

(Exhibit B). Thus, the first issue in this case is whether a trial judge's unobjected to preliminary comments on reasonable doubt constitute fundamental error. This claim has been raised in at

least eighteen (18) cases, including:

David Jones v. State,
656 So. 2d 489 (Fla. 4th DCA), (reversed)
rev. denied, 663 So. 2d 632 (Fla. 1995).

Bove v. State, 21 Fla. L. Weekly D709 (Fla. 4th DCA March 20, 1996) (reversed based on Jones; questions certified).

Brown v. State, Case No. 95-3997 (pending)

Cifuentes v. State, 21 Fla. L. Weekly D77 (Fla. 4th DCA Jan. 3, 1996) (reversed based on Jones).

Davis v. State, Case No. 95-0300 (pending)

Frazier v. State, 664 So. 2d 985 (Fla. 4th DCA 1995), (reversed based on Jones), rev. denied, Case No. 86,543 (Fla. Dec. 19, 1995).

Jones v. State, 662 So. 2d 365 (Fla. 4th DCA 1995), (reversed based on Jones), rev. denied, Case no. 86,359 (Fla. Nov. 17, 1995).

Lusskin v. State, Case No. 95-0721 (pending)

McInnis v. State, 21 Fla. L. Weekly D242 (Fla. 4th DCA Jan. 24, 1996) (reversed based on Jones).

Pierce v. State, 21 Fla. L. Weekly D629 (Fla. 4th DCA March 13, 1996) (reversed based on Jones)

Poole v. State, 21 Fla. L. Weekly D245 (Fla. 4th DCA Jan. 24, 1996) (reversed based on Jones).

Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA 1995), (reversed based on Jones), rev. denied, ___ So. 2d ___ (Fla. Nov. 17, 1995).

Reyes v. State, Case No. 95-0034 (pending).

Rodriguez v. State, Case no. 95-0749 (pending).

Smith v. State, Case no. 95-1636 (pending).

Variance v. State, 21 Fla. L. Weekly D79 (Fla. 4th DCA Jan. 31, 1996) (reversed based on Jones).

Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA Dec. 20, 1995) (reversed based on Jones) (THE INSTANT CASE) question certified, 21 Fla. L. Weekly D476 (Fla. 4th DCA Feb. 21, 1996), jurisdiction accepted, State v. Wilson, No. 87,575 (Fla. March 20, 1996).

The trial judge in the case at bar, and in Jones, had been making these preliminary comments for many years. Not surprisingly, this issue is also being raised in post-conviction motions. See e.g., Tricarico v. State, 629 So. 2d 142 (Fla. 4th DCA 1993)(trial court case no. 91-8232 CF10).

Obviously, some of theses cases may be difficult to retry. A great number of victims are affected by these cases. Smith involves convictions for kidnaping, extortion, impersonating a police officer and burglary. Pierce involves the killing of a young child. Lusskin involves a conviction for solicitation to commit first degree murder. Bove is a first degree murder case. Rodriguez is an attempted first degree murder case. Tricarico is a first degree murder case.

In McInnis, the Fourth District found the comments of a ***second*** trial judge to be fundamental error under Jones. In Smith, a ***third*** judge's comments are being challenged as impermissible under Jones. In Brown, likewise a ***fourth*** judge's comments are being challenged as impermissible under Jones. This issue is unquestionably one of

great public importance, and must be resolved by this Court so as to correct the Fourth District's far-reaching misapplication of the law as soon as possible.

By order of March 20, 1996, this Court has **accepted** jurisdiction to review the decision of the District Court in the instant case. This Court has held that once its jurisdiction is invoked from the district court of appeal by certified question or otherwise, this Court has discretionary review jurisdiction not merely over the certified question of great public importance but of the entire decision of the district court of appeal. Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982).

In the case at bar, the Fourth District Court found merit and reversed the conviction of grand theft based on the **two (2)** issues raised by Respondent below. The State maintains that the District Court's decision in Wilson v. State, 21 Fla. L. Weekly D47 (Fla. 4th DCA Dec. 20, 1995) conflicts with J.C.B. v. State, 512 So. 2d 1073 (Fla. 1st DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988) on the issue of whether "the mere naming of the articles or goods taken might adequately inform an accused that he faces possible conviction of grand theft." Therefore, since the District Court's opinion reversed the grand theft conviction agreeing with Respondent's position on this second issue, the State maintains

this Court must accept jurisdiction, under the authority of Savoie, to settle the interdistrict conflict. Petitioner urges this Court to review these two issues raised below by Respondent, and ruled upon by the District Court's opinion at bar.

STATEMENT OF THE CASE

Respondent, along with co-defendant Antwan Ricks, was charged with two counts of armed robbery. As to count one, the charging document stated that on September 23, 1993, the two did:

> unlawfully take from the person or custody of Vickraw Ramsaroop certain property of value, to-wit: **money and jewelry** with the intent to permanently deprive Vickraw Ramsaroop, of a right to the property or a benefit therefrom, by the use of force, violence, assault or putting the said Vickraw Ramsaroop in fear, and in the course thereof, there was carried a firearm, said firearm being in the possession of Milo Wilson, contrary to F.S. 812.13(1) and (2) (a), and F.S. 775.087(2).

(R. 455).

The judge presiding over Respondent's trial was the Honorable Mark Speiser, Circuit Court Judge in and for the Seventeenth Judicial Circuit. As was his custom in criminal cases, Judge Speiser instructed the jury venire, prior to jury selection, with introductory comments, as an overview of a typical criminal trial (R. 5- 6-7, 10, 19-20, -30). As the judge's "third cardinal rule," the jury was told:

> Now, the third cardinal rule is that in order for you the jury to find the defendant guilty you must be satisfied, **the State must convince you beyond and to the exclusion of every reasonable doubt that the defendant is guilty**. That's what's known as standard of proof. That's a landmark concept, a bedrock foundation of the American criminal juris--prudence system. That is any time any jury anywhere in the United States of America finds a defendant guilty of committing a crime, whether that be stealing a six pack of beer, robbery, murder, rape, drug trafficking, arson, burglary; no matter what the charge is if the jury finds the defendant guilty that means that jury has been convinced beyond and to the exclusion of every reasonable doubt of the defendant's guilt.
> [Emphasis added.]

(R. 21-22).

Then after advising the venire, **"Now, I'll give you a more elaborate definition of what that phrase beyond to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial."** (R. 22), the judge continued:

> Suffice it to say it's a **very heavy burden** the State shoulders whenever it charges somebody with committing a crime. In order to secure a conviction that is it has to convince a jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt. <u>But even though it's a heavy burden the State does, I repeat, stress, and emphasize, the State does not have to convince you to an absolute certainty of the defendant's guilt</u>. Nothing is one hundred percent certain, nothing is absolutely certain in life other than death and taxes. So the point I'm trying to make is you can still have a doubt as to

> the defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to.
>
> If at the conclusion of this trial you have a doubt as to the defendant's guilt that you can attach a reason to, you must find the defendant not guilty. But if on the other hand at the conclusion of this trial the only kind of doubt you have as to the defendant's is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. If all elements of the crime have been proved to you, you must find the defendant guilty.

(R. 22-23).

The record also shows that, once again before concluding his comments to the venire, the trial court explained that the fifth phase of the trial is "the legal instructions"; and "That's where you get the law you have to apply to the evidence." (R. 28). The defense raised **no** objection to the preliminary comments of the judge.

During the charge conference, the defense raised **no** objections to the standard jury instructions on reasonable doubt (R. 369-375). As an introduction to the charge to the jury, the trial judge stated, "what I'm going to do at this time is read the instructions and law applicable **to this case**." (R. 406). As part of the charge to the jury, the trial judge gave the actual sworn jury the complete, approved, standard jury instructions on reasonable doubt

as follows:

> Remember, the defendant is never required to prove anything. Whenever you hear the words reasonable doubt you must consider the following: A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt. Such a doubt must not influence you to return a verdict of not guilty if in fact you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or, if having a conviction it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof.
>
> A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or lack of evidence.
>
> Bottom line is if you have a reasonable doubt you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

(R. 419-420). No objection was made to these instructions.

As concluding remarks, the trial court reminded the jury, "it is absolutely important you follow the law set out in these instructions in arriving and reaching and deciding a verdict. No other laws apply to this case." (R. 428).

During the charge conference, when asked regarding "any lesser included offenses" (R 369), defense counsel requested the jury be instructed on "robbery with a weapon, strong arm[ed] robbery, and petit theft" (R. 369). The State responded, "Petit theft is a category one. The State would be asking for the grand theft as well **if we're going to include lessers based on the testimony of the witnesses.**" (R. 369). To which defense counsel retorted, "I would have to argue to the Court that it's not necessary for the Court to give a category two instruction. However, I believe the law requires category one instructions." (R. 369). No further arguments or objections were raised by the defense as to this instruction (R. 372-375, 430).

Respondent was found guilty of grand theft (R. 441, 466, 467). The trial court sentenced Respondent to five years in the Department of Corrections on count one, with 294 days credit (R. 470).

Respondent appealed his conviction to the District Court, raising two issues. In its opinion filed December 20, 1995, the District Court of Appeal, Fourth District, found the trial court's "preliminary remarks to the jury" to amount to "**minimization** of the reasonable doubt standard" which violates the due process clause of the state and federal constitutions; and therefore, found "such

instructions to be fundamental error." Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA Dec. 20, 1995) (Exhibit A).

As to the second issue raised by Respondent, the District Court held that since the information failed to include the value of the property taken, the conviction for grand theft could not stand. Therefore, finding merit as to both issues raised by Respondent on appeal, the District Court reversed for a new trial only for petit theft. Id.

The State moved the District Court for Certification of Question and a Stay of Mandate. On February 21, 1996, the District Court issued its opinion "On Motion for Certification of Question and Stay of Mandate" Wilson v. State, 21 Fla. L. Weekly D476 (Fla. 4th DCA Feb. 21, 1996) (Exhibit B). The District Court granted the motion to stay, and certified the following as a question of great public importance:

> DOES THE JURY INSTRUCTION GIVEN IN THIS CASE IMPERMISSIBLY REDUCE THE REASONABLE DOUBT STANDARD BELOW THE PROTECTIONS OF THE DUE PROCESS CLAUSE?
>
> IF SO, IS SUCH AN INSTRUCTION FUNDAMENTAL ERROR?

(Exhibit B).

Based on the certified question, the State invoked the discretionary review jurisdiction of this Court, and by order

issued March 20, 1996, this Court **accepted** jurisdiction of this case, and set a briefing schedule.

STATEMENT OF THE FACTS

At trial the State presented the testimony of the two victims, Ms. Wells and Mr. Ramsaroop, as well as Respondent's co-defendant Antwan Ricks, and several police officers.

Mr. Ramsaroop testified that he and Ms. Wells were in a Wal-Mart parking lot putting their packages into their car when they were approached by two guys (R. 136-137). Mr. Rampsaroop heard one of the two tell him and Ms. Wells to move away from the car (R. 138-139). Respondent was identified as one of the two robbers. (R. 142-143). Respondent pulled out a gun and directed the other person to remove Mr. Ramsaroop's money and jewelry (R. 142-144). Respondent pointed the gun at Ms. Wells (R. 142-143, 174).

Mr. Ramsaroop testified that at Respondent's directions, the other man took Mr. Ramsaroop's watch, bracelet, chain, and wallet containing money (R. 143). Mr. Ramsaroop testified that the watch taken from him was a Citizen gold watch (R. 144), but he cannot remember how much the watch is worth (R. 144-5). Neither the gold watch, nor the chain were ever recovered (R. 145).[1] With reference

[1]Respondent stipulated the value of the chain as $170.00 and the watch $40.00 for purposes of restitution (R. 450-451).

to the bracelet, which was recovered and returned to Mr. Ramsaroop, Mr. Ramsaroop testified the bracelet is gold, and is unique - it came from India (R. 145). The bracelet was passed down from his great grandmother, to his grandmother, to Mr. Ramsaroop's mother, and his mother gave it to him (R. 145).

Mr. Ramsaroop testified he had approximately $230 in cash folded in his wallet that he was keeping aside for his trip to the Islands the following day (R. 146, 148). Mr. Ramsaroop testified he had two fifties, some twenty dollar bills, some singles, and a one hundred dollar bill (R. 169). Some of the money was returned to him that night (R. 146), and the $100 bill was given to him later (R. 146, 170).

Clara Wells, the second victim, testified the man with the gun, Respondent, took $120 [all in twenty dollar bills] from her (R. 184). Nine $20 bills [$180] were recovered from the co-defendant's pocket (R. 211, 253), and returned to Ms. Wells (R. 184, 253).

After the robbery Mr. Ramsaroop and Ms. Wells called the police from Wal-Mart (R. 151-152). Respondent and his accomplice were stopped after Officer Whitfield, who was on his way to Wal-Mar, saw two black males wearing light colored shirts running (R. 229-230). The officer had been looking for suspects fitting that

description (R. 238). The officer chased them and reported his action via radio to other officers (R. 230). The two were apprehended by other officers (R. 233). The police took Mr. Rampsaroop and Ms. Well to another location for the purpose of identifying two suspects (R. 156). Mr. Ramsaroop identified the suspects (R. 156-157), and told the police to check their pockets for property (R. 157). The bracelet and some money was found on Respondent (R. 157). At the scene Ms. Wells was only able to identify one suspect (R. 190), not Respondent (R. 168). At the police station later on, Ms. Well identified Respondent as the one having the gun (R. 195).

Officer India participated in the chase and patted down the suspects for property (R. 253). He found a bracelet and $137.00 on Respondent (R. 253).

Officer Shaw testified that she had transported a light skinned black male suspect in her car (R. 293). According to Officer Shaw, she saw Officer India search this person, and recover money and jewelry from him (R. 293-294). Officer Shaw testified that after she transported this person she pulled out the back seat of her car and found a one hundred dollar bill (R. 294).

Antwan Ricks, the co-defendant, testified that he went to the Wal-Mart to buy cigarettes (R. 319). Respondent went with him (R.

319). When Antwan came out of the Wal-Mart, Respondent was talking with some people. Antwan joined them and saw that Respondent had a gun pointed at the woman (R. 320). Antwan followed Respondent's instructions, and removed the man's money and jewelry (R. 320).

Antwon Ricks also testified that once they ran away from the victims, he and Respondent went to the wall behind the Wal-Mart (R. 321). Respondent showed Mr. Ricks the money he had taken, and Mr. Ricks showed Respondent the jewelry and money he had taken (R. 321). They exchanged the loot. Mr. Ricks stated Respondent had been wearing a black sweater (R. 322). Respondent put the jewelry in the sleeves of the sweater so that he could jump the wall (R. 321). While Respondent jumped the wall, Mr. Ricks threw the gun over by I-95 (R. 323).

Respondent and Mr. Ricks ran into the neighborhood, and asked T.C. for a ride, but T.C. said no (R. 323). Then they decided to go to Mike's house, but Mike was not there (R. 323). Respondent took the sweater off, and "stashed it at Mike's house" (R. 324), in the bushes in front of Mike's house (R. 325). Then Respondent and Mr. Ricks decided to go to Steve's house, but were apprehended on the way (R. 324). Mr. Ricks testified that the $180 found on him was Ms. Well's property (R. 326).

Antwan Ricks pled guilty in the case and was sentenced to

three years and three months in prison followed by two years probation (R. 327).

SUMMARY OF THE ARGUMENT

POINT I - The challenged comments, which occurred only at the prelimary stage of trial, were made to the venire, prior to jury selection, and when considered in the entire context of the introduction, were accurate. Further, when the comments are taken together with the charge given to the **selected** jury just prior to deliberations, were not only proper, but any error was thereby cured. The challenged comment did not impermissibly reduce the reasonable doubt standard below the protection of the due process clause. Thus Respondent is not entitled to a new trial. Therefore, the certified questions should be answered in the **negative**; the District Court's opinion **quashed**, and the conviction affirmed.

POINT II - Where there was no argument at trial that the amount taken was not in excess of $300.00; where the defense was misidentification, and no objection to the wording of the information was made at trial, any error in the failure of the information to assert the value of the property taken was in excess of $300 was not fundamental error. Therefore, the District Court's opinion should be **quashed**; and the conviction for grand theft in count I should be **affirmed**.

POINT I

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN MAKING THE INTRODUCTORY COMMENTS TO THE JURY VENIRE PRIOR TO THE SELECTION OF THE JURY, WHEN THE APPROVED STANDARD JURY INSTRUCTION ON REASONABLE DOUBT WAS FULLY READ TO THE JURY DURING THE INSTRUCTIONS TO THE JURY IMMEDIATELY BEFORE THE JURY RETIRED TO DELIBERATE.

The Fourth District certified two questions as being of great public importance:

> DOES THE JURY INSTRUCTION GIVEN IN THIS CASE IMPERMISSIBLY REDUCE THE REASONABLE DOUBT STANDARD BELOW THE PROTECTIONS OF THE DUE PROCESS CLAUSE?
>
> IF SO, IS SUCH AN INSTRUCTION FUNDAMENTAL ERROR?

(Exhibit B). Thus, the first issue in this case is whether a trial judge's unobjected to preliminary comments on reasonable doubt constitute fundamental error. Petitioner will address each question separately:

> DOES THE JURY INSTRUCTION GIVEN IN THIS CASE IMPERMISSIBLY REDUCE THE REASONABLE DOUBT STANDARD BELOW THE PROTECTION OF THE DUE PROCESS CLAUSE?

Relying on its decision in Jones v. State, 656 So. 2d 489 (Fla. 4th DCA 1995), rev. denied, 663 So. 2d 632 (Fla. 1995), the District Court granted Appellant a new trial. The District Court reasoned that the comments made by the trial court to the jury

panel **prior** to jury selection that "the state does not have to convince the jury to an absolute certainty of the defendant's guilt" amounted to "telling the jury that it could base a guilty verdict on a probability of guilt so long as it was a remarkably strong probability." Therefore, citing to Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), the District Court found the instruction to be fundamental error, because "This kind of minimization of the reasonable doubt standard violates the due process clause of the state and federal constitutions." Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA Dec. 20, 1995).

A review of the record, clearly demonstrates that the "extemporaneous instructions" [as categorized by the District Court] were made by the trial judge as **preliminary**, introductory comments, or as an overview of a typical criminal trial (R. 5- 6-7, 10, 19-20, -30). And more importantly, the comments were made to the entire jury venire, **prior** to jury selection (R. 5-30).

During this overview, the trial court introduced himself (R. 6), and explained to the jury how a criminal trial **in general** is conducted in Florida (R. 6-30). The judge told the jury, a criminal trial is divided into several stages (R. 10): the first phase of the trial is "jury selection" (R. 10-12); and went on to explain the jurors' duties in general in any given trial (R. 12-

14). The judge then said the second phase of the trial was "opening statements" (R. 15), and that the third phase of the trial is the "evidentiary phase" (R. 15). As the judge's explanation of the evidentiary phase of the trial, the judge gave the venire "three cardinal rules that apply to **every single criminal trial** ... ." (R. 20). As cardinal rule number one, the judge said the defendant must be presumed innocent (R. 20). Cardinal rule number two was said to be that "[t]he State ... has the burden [ ] to prove [ ] the defendant is guilty." (R. 20). The third cardinal rule "is that in order for you the jury to find the defendant guilty you must be satisfied, the State must convince you beyond and to the exclusion of every reasonable doubt that the defendant is guilty." (R. 21). In explaining "his" definition of reasonable doubt, the judge advised the panel, "[n]ow, I'll give you a more elaborate definition of what that phrase beyond to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial." (R. 22). The judge then made the following statements:

> Suffice it to say it's a **very heavy burden** the State shoulders whenever it charges somebody with committing a crime. In order to secure a conviction that is it has to convince a jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt. But even though it's a heavy burden the State does, I repeat, stress, and emphasize, the

> State does not have to convince you to an absolute certainty of the defendant's guilt. Nothing is one hundred percent certain, nothing is absolutely certain in life other than death and taxes. So the point I'm trying to make is you can still have a doubt as to the defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to.
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> If at the conclusion of this trial you have a doubt as to the defendant's guilt that you can attach a reason to, you must find the defendant **not** guilty. But if on the other hand at the conclusion of this trial the only kind of doubt you have as to the defendant's [] is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. If all elements of the crime have been proved to you, you must find the defendant guilty.

(R. 22-23). The judge then continued to explain the "evidentiary" phase of the trial (R. 23-26); and then stated that the fourth phase of the trial consists of what's known as closing argument, and explained same (R. 26-28). In explaining the "fifth phase" of the trial "legal instructions," the judge stated "[t]hat's where you get the law you have to apply to the evidence." (R. 28). The judge then concluded with "a couple other points you must bare (sic) in mind" in every criminal case (R. 28-30).

Petitioner notes that the "instruction"[2] found to be

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[2]Because of the wording of the certified questions, Petitioner will refer to the preliminary comments as an instruction. However, Petitioner does not agree that these comments are equivalent to

fundamental error in this case, and in Jones v. State, supra, was a preliminary statement made to prospective jurors before a jury was selected or sworn and before any evidence was taken. These potential jurors had no legal duty to heed the preliminary statements made prior to their being sworn as jurors. United States v. Dilg, 700 F. 2d 620, 625 (11th Cir. 1983). There is no legal basis to assume that they did follow these statements Id.

Additonally, since the challenged comments were only made as "general principles for criminal cases," and the jury was instructed with **standard** jury instructions on burden of proof and the presumption of innocence prior to deliberations, that the making of any unartful comments **at this stage of the proceedings** could at most be harmless error. Pietri v. State, 644 So. 2d 1347, 1351 (Fla. 1994).

Even if these preliminary comments could somehow be considered equivalent to formal instructions to which the later selected and sworn jury was bound, the decision under review is incorrect. In Jones, the Fourth District held that a preliminary jury "instruction" on reasonable doubt constituted fundamental error because it indicated "absolute" or "one hundred percent" certainty was not required. 656 So. 2d at 490.

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formal instructions given to the sworn jury.

In Victor v. Nebraska, 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583 (1994), the United States Supreme Court found no error in the following instruction:

> 'Reasonable doubt' is such doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction *to a moral certainty*, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of the fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon *strong probabilities of the case*, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Id. 127 L. Ed. 2d at 598 (italics emphasis in original, underlined emphasis added).

The challenged comments in the case at bar are not nearly as strong as the instructions in Victor. The trial judge's comment was an accurate statement of the law. It is undeniable that the reasonable doubt standard does not require absolute or one hundred

percent certainty. It is also undeniable that absolute or one hundred percent certainty is an impossibility. In fact, if a prospective juror demands one hundred percent proof by the State, that is grounds to strike the prospective juror. See Drew v. State, 743 S. W. 2d 207, 209-10 (Tex.Cr.App. 1987) and cases cited therein (prospective juror properly struck by State where he said he would require "one hundred percent" proof as that level of proof exceeded the reasonable doubt standard); Ruland v. State, 614 So. 2d 537, 538 (Fla. 3d DCA), rev. denied, 626 So. 2d 207 (Fla. 1993)(same) and United States v. Hannigan, 27 F. 3d 890, 894 n. 3 (3rd Cir. 1994) (reasonable doubt standard does not require 100 percent probability). The trial judge's statement at bar was completely accurate.

Moreover, the trial judge's preliminary comment was balanced. The trial judge repeatedly emphasized that the State shouldered a very heavy burden (R. 22). The trial court also repeatedly emphasized that proof must be beyond and to the exclusion of every reasonable doubt (R. 21-23, 25). See Butler v. State, 646 A. 2d 331, 336 (D.C.App. 1994) (term reasonable doubt has self-evident meaning comprehensible to lay juror). The trial judge stated that a reasonable doubt was a doubt one can attach a reason to, so long as it is not possible doubt, a speculative doubt, an imaginary

doubt, or a forced doubt (R. 22-23). The latter portion of this statement is taken directly from the approved standard instruction on reasonable doubt. See Florida Standard Jury Instruction 2.03. If anything, the language equating reasonable doubt with *any* doubt one can attach a reason to, *overstates* the quantum of proof required. See Victor, 127 L. Ed. 2d at 597 (a reasonable doubt at a minimum, is one based upon reason).

Additionally, the District Court did not mention in Jones, nor in this case, that the complete, approved, standard jury instructions on reasonable doubt were given to the sworn jury at the end of the case. See Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994)(approving the standard jury instruction on reasonable doubt, citing Victor).

In the many cases affected by Jones before the District Court, the State had been arguing to the Fourth District Court, that the Court overlooked the fact that the complete, approved, standard instructions were given. However, subsequent cases make it clear that the Fourth District did not overlook that fact, it simply refused to consider the "balancing effect" of the standard instructions because they were not given until the end of the case:

> In addition, as in Jones, **there were no proper balancing instructions.** In both cases, the instructions were given to the venire, and the standard instructions were not given until the

> jury was being instructed before retiring. Without these balancing instructions, the error was fundamental.

McInnis v. State, 21 Fla. L. Weekly D242, D243 (Fla. 4th DCA Jan. 24, 1996)(emphasis supplied).

The Fourth District's holding that it would not consider the standard, complete, approved standard jury instructions as "balancing instructions" because they were not given until the end of the case, is directly contrary to rudimentary, black-letter law. In Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944), this Court held:

> It is a recognized rule that a single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail (emphasis supplied).

This elementary principle of law has not changed since Higginbotham. See Victor, 127 L.Ed. 2d at 597; Austin v. State, 40 So. 2d 896, 897 (Fla. 1949)(same); Batson v. Shelton, 13 So. 2d 453, 456 (Fla. 1943)(same); Johnson v. State, 252 So. 2d 361, 364 (Fla. 1971)(same); Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994)(same); McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977)(same); Krajewski v. State, 587 So. 2d 1175, 1180 (Fla. 4th DCA 1991); Sloan v. Oliver, 221 So. 2d 435 (Fla. 4th DCA

1969)(same).

The Fourth District in Jones stated that "At bar, the trial judge's instructions ***were accurate*** as far as they went." Id. at 491 (emphasis supplied). It is extremely difficult to see how the preliminary comments, which the Fourth District acknowledged were "accurate as far as they went," could be fundamental error when considered with the standard, approved, complete jury instructions on reasonable doubt, incorporated by reference into the preliminary comments on reasonable doubt. Jones as clarified in McInnis, directly conflicts with Esty, Higginbotham, and all other cases holding that instructions must be considered as a whole.

The Fourth District relied on Cage v. Louisiana, supra, in finding the trial court's comments to be fundamental error. Wilson, 21 Fla. L. Weekly at D37. Cage does not support the Fourth District's holding. In that case the instruction equated a reasonable doubt with an "actual substantial doubt," "such doubt as would give rise to a grave uncertainty." See Victor 127 L. Ed. 2d at 590. Saying that absolute certainty is not required, a completely accurate statement, is world's apart from the "grave uncertainty" language in Cage. The comments in this case were accurate and went further by including the full, approved, standard instructions on reasonable doubt and presumption of innocence. See

Higginbothem, 19 So. 2d at 830; Victor, 127 L. Ed. 2d at 597, 601 (instructions must be read as a whole). Those instructions included the "abiding conviction of guilt" language (R. 419), which Victor specifically held correctly states the Government's burden of proof. Id. at 596. Victor held that when that language was combined with the challenged language in that case, any problem with the instruction was cured. Id. at 596, 600.

In both Victor and Cage, the challenged instructions included virtually identical language to that found to be fundamental error in the case at bar, and in Jones. Both the Victor and Cage instructions stated that an "absolute or mathematical certainty" was **not** required. Victor, 127 L. Ed 2d at 590-91, 598. **Neither** case held that portion of the instruction was in any way incorrect. This was made clear in Victor, where the Court highlighted the portion of the Cage instruction it found problematic. Victor at 590-91. The "absolute or mathematical certainty" language was not in any way found faulty in either opinion. Id. at 590-91, 598. See also Pilcher v. State, 214 Ga. App. 395, 448 S. E. 2d 61, 63 (1994)(in neither Victor nor Cage did the Court find anything objectionable in a trial judge's defining reasonable doubt by stating that mathematical certainty was not required). Accordingly, Cage does not support the Fourth District's holding.

Moreover, subsequent decisions by the United States Supreme Court make clear that Cage, relied on by the District Court below, was incorrect in that it employed the wrong standard of review. In Victor, the Court corrected its standard of review from that relied on in Cage. The Court admitted that "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." Id. at 591 (emphasis in original, quoting from Estelle v. McGuire, 502 U.S. ___, ___, and n. 4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). Nevertheless, the Fourth District continues to incorrectly apply the overruled Cage standard. See Bove v. State, 21 Fla. L. Weekly D709, D710 (Fla. 4th DCA March 20, 1996)(finding fundamental error because the jury "could have" misunderstood the standard).

In Victor, the Court noted that Cage was the ***only*** time in history that it had found a definition of reasonable doubt to violate due process. Victor at 590. The Court then reviewed two reasonable doubt instructions, finding neither improper.

The District Court in Jones faulted the preliminary comments because they indicated "certitude was not required," suggesting the jury may base a guilty verdict on a "probability of guilt so long as it was a remarkably strong probability." Id. at 490. In

Victor, the Defendants made a similar claim. One defendant argued that using "moral certainty" in the instruction was error because a dictionary defined "moral certainty" as "resting upon convincing grounds of probability." Id. at 595. The United States Supreme Court rejected that argument:

> But the beyond a reasonable doubt standard is itself probabilistic. '[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.
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> The problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.

Id. at 595-96 (emphasis added). See also United States v. Williams, 20 F. 3d 125, 127, 131 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 246, 130 L. Ed. 2d 168 (1994) (relying on Victor to reject challenge to instruction equating reasonable doubt to a "real possibility.").

As already stated, the language in this case is not nearly as questionable as that in Victor. Unlike Victor, the comments in the case at bar, and in Jones, involve ***preliminary*** comments, made before a jury was even chosen or sworn. The complete, standard, approved instructions on reasonable doubt were given at the end of

the case and incorporated by reference into the preliminary instructions. The comments in this case and Jones merely stated that absolute certainty was not required. Absolute certainty is not required. It is an impossibility.

The State has been unable to locate any cases decided since Victor (other than Jones and its progeny) that have found statements remotely similar to the ones given here to be error, let alone fundamental error. In fact, many cases with instructions that are much more questionable have been affirmed under Victor. See, e.g., Harvel v. Nagle, 58 F. 3d 1541 (11th Cir. 1995) (equating reasonable doubt with an "actual and substantial" doubt not error under Victor); People v. Reyes, 615 N.Y.S. 2d 450, 451 (A.D.2), appeal denied, 84 N. Y. 2d 871, 642 N. E. 2d 336, 618 N.Y.S. 2d 17 (1994) (instruction referring to reasonable doubt as "something of consequence" and "something of substance" not improper under Victor.); Strong v. State, 633 N. E. 2d 296 (Ind. App. 5 Dist. 1994) (instruction defining reasonable doubt as "fair, actual and logical doubt" was proper under Victor); State v. Bryant, 446 S. E. 2d 71 (N.C. 1994) (instruction defining reasonable doubt as a "substantial misgiving" was not improper under Victor); State v. Smith, 637 So. 2d 398 (La.), cert. denied, ___ U.S. ___, 115 S. Ct. 641, 130 L. Ed. 2d 546 (1994) (instruction

including terms "substantial doubt" and "grave uncertainty" not improper under Victor); People v. Gutkaiss, 614 N.Y.S. 2d 599, 602 (A.D. 3 1994) (use of terms "substantial uncertainty" and "sound substantial reason" not error under Victor); Butler v. U.S., supra, at 336-37 (instruction that defines reasonable doubt as one that leaves juror so undecided that he cannot say he is "firmly convinced" of defendant's guilt, was not error under Victor); Minor v. United States, 647 A. 2d 770, 774 (D.C.App. 1994) (trial judge's misstatement that government was not required to prove defendant's guilt beyond a reasonable doubt was not reversible error under Victor when considered with full instructions) and Weston v. Ieyoub, 69 F. 3d 73, 75 (5th Cir. 1995)("grave uncertainty" language not error under Victor when combined with "abiding conviction" language). The Fourth District's holding on this subject is an anomaly.

Thus, for the above reasons, this Court should answer the certified question in the **negative**, disapprove Jones, quash the District Court's opinion in this case, and affirm the conviction.

The second question certified by the District Court was:

> IF [THE COMMENTS GIVEN REDUCED THE REASONABLE DOUBT INSTRUCTION BELOW THE PROTECTION OF THE DUE PROCESS CLAUSE], IS SUCH AN INSTRUCTION FUNDAMENTAL ERROR?

The defense raised **no** objection to the preliminary comments of

the judge, and raised the issue for the first time on appeal. In a very recent case, this Court stated:

> This Court has held that jury instructions are subject to the contemporaneous objection rule, *see Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995); *Parker v. State*, 641 So. 2d 369 (Fla. 1994), *cert. denied*, 115 S. Ct. 944, 130 L. Ed. 2d 888 (1995), and absent an objection at trial, can be raised on appeal only if fundamental error occurred. **Fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.**" *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)). While the State must prove each element of the crime beyond a reasonable doubt, our cases have not found error when a jury is instructed on this standard but not given a definition of the term. *See Barwicks v. State*, 82 So. 2d 356 (Fla. 1955); *Knight v. State*, 60 Fla. 19, 53 (1910); *accord Victor v. Nebraska*, 114 S. Ct. 1239, 1243, 127 L. Ed. 2d 583 (1994) (stating that a trial court must instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt; however, the United States Constitution does not require a trial court to define reasonable doubt for the jury). Because we find that this instruction appropriately holds the State to the burden of proving each aggravating circumstance beyond a reasonable doubt, we hold that failure to define reasonable doubt to the jury in the sentencing phase of a capital trial is not fundamental error.

Archer v. State, 21 Fla. L. Weekly S119, 120 (Fla. March 14, 1996).

In the case at bar, the communication occurred at the

preliminary stages of trial, and the comments were intended to be general legal principles for criminal cases. Both the State and defense questioned prospective jurors about their inability to be fair and impartial (R. 33-95). In addition, during the charge the judge instructed the jury on the burden of proof and the presumption of innocence pursuant to the standard jury instructions (R. 406-428). Therefore, no reversible error has been shown, Pietri v. State, 644 So. 2d at 1351.

As already stated, defense counsel made no objection when the comments were made at the **preliminary** stage of the trial. Then, during the charge conference, the defense raised **no** objections to the standard jury instructions on reasonable doubt (R. 369-375). As an introduction to the charge to the jury, the trial judge stated, "what I'm going to do at this time is read the instructions and law applicable **to this case**." (R. 406). As part of the charge to the jury, the trial court read the **standard** jury instructions on reasonable doubt

> Whenever you hear the words reasonable doubt you must consider the following: A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt. Such a doubt must not influence you to return a verdict of not guilty if in fact you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing, and weighing all of the evidence there is not an abiding conviction of guilt,

> or if having a conviction it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must finds (sic) the defendant not guilty because the doubt is reasonable.

(R. 419-20). The defense raised **no** objections to the instructions as read to the jury (R. 406-428, 430). As concluding remarks, the trial court reminded the jury, "it is absolutely important you follow the law set out in these instructions in arriving and reaching and deciding a verdict. No other laws apply to this case." (R. 428).

The State, thus, submits that since the challenged comments herein were made during the ***preliminary*** comments to the venire **prior** to jury selection, and comments appropriately told the venire that the State has a very heavy burden of proving its case beyond a reasonable doubt; and then the standard jury instruction was read to the jury just prior to retiring to deliberate, the comments did not amount to fundamental error.

The State would emphasize that since the unobjected to comments found to be fundamental error by the District Court were made at the preliminary stages of the trial, and made to the entire prospective jury venire, prior to jury selection, any prejudice created by the comments could have been cured by curative instructions at that point, or were in fact cured by the trial

court's **proper** standard jury instructions on reasonable doubt and presumption of innocence given to the jury just prior to deliberations. See, Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991) where the Third District held that the giving of the standard jury instruction on reasonable doubt does not rise to the level of fundamental error, where the defendant did not object to the instruction, and when considered in context with the balance of the trial court's extensive and proper jury instructions on reasonable doubt and presumption of innocence. See also, Peri v. State, 426 So. 2d 1021, 1025 (Fla. 3d DCA), pet. for review denied 436 So. 2d 100 (Fla. 1983); Romero v. State, 341 So. 2d 263 (Fla. 3d DCA), cert. denied, 346 So. 2d 1250 (Fla. 1977) (misstatement of the law on the defense of insanity during voir dire was immediately corrected by the court and the curative instruction was sufficient to overcome the possibility of prejudice).

In finding *fundamental* error by the "[f]ailure to give a complete and accurate instruction," Jones, 656 So. 2d at 491, the Fourth District improperly ignored the fact that this was a preliminary comment made at the start of voir dire. The complete, approved, standard jury instructions on reasonable doubt and burden of proof were given at the close of evidence in Jones and in this case (R. 419-20). The jury was told that it *must* follow those

instructions (R. 425, 427-28). It is difficult to see how the preliminary comment, which the Fourth District acknowledged was "accurate as far as it went," could be fundamental, when the trial judge gave the complete approved standard jury instruction at the close of the case. See Rojas v. State, 552 So. 2d 914, 915 (Fla. 1989) (an error during reinstruction is not fundamental and requires an objection to preserve the error). See also Pietri v. State, 644 So. 2d at 1351 (No error when the communication occurred at the preliminary states of trial and the jury was instructed on the burden of proof and the presumption of innocence during jury charge); People v. Reichert, 433 Mich. 359, 445 N.W. 2d 793 (1989) (trial court's remarks during voir dire did not mislead jurors concerning their power to convict or acquit).

The preliminary comment properly informed prospective jurors that absolute certainty was not required in a criminal trial. It is not unusual for inexperienced prospective jurors to believe that the State must prove its case beyond all doubt. If prosecutors think these people may be pro-defense, they might then strike these prospective jurors for cause. The obvious purpose of the instruction was to prevent the exclusion of otherwise qualified prospective jurors who might initially think that the prosecution's proof must be beyond all doubt. This *preliminary* comment was

obviously designed to help the defense retain prospective jurors it felt may be desirable. See Drew, 743 S. W. 2d at 209 (prospective juror properly struck by State where he said he would require "one hundred percent" proof as that level of proof exceeded the reasonable doubt standard); Ruland, 614 So. 2d at 538 (same) and Hannigan, 27 F. 3d at 894, n. 3 (reasonable doubt standard does not require 100 percent probability). It is hardly surprising that Respondent did not object to an instruction that helped him during voir dire. He should not be allowed to take advantage of the instruction at trial and then claim fundamental error on appeal.

In finding *fundamental* error, in Jones the Fourth District indicated it was distinguishing Freeman v. State, supra, because in that case the court also gave extensive and proper jury instructions on reasonable doubt and presumption of innocence. That distinction is illusory. In this case and in Jones, the trial judge gave the complete, approved, standard instructions on reasonable doubt and presumption of innocence (R. 419-20).

In the area of jury instructions, to be fundamental error, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Jackson v. State, 307 So. 2d 232, 233 (Fla. 4th DCA 1975); State v. Delva, 575 So. 2d

643, 644-45 (Fla. 1991). See also United States v. Merlos, 8 F. 3d 48 (D.C. Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1635, 128 L. Ed. 2d 358 (1994) (instruction equating reasonable doubt with "strong belief" in defendant's guilt did not constitute fundamental error); Perez v. State, 639 So. 2d 200 (Fla. 3d DCA 1994) (no fundamental error shown by unobjected to reasonable doubt instruction, citing Victor); Minshew v. State, 594 So. 2d 703, 713 (Ala.Cr.App. 1991) (Cage claim not preserved where no objection made below).

In Esty v. State, 642 So. 2d 1074 (Fla. 1994), the defendant objected to the standard reasonable doubt instruction on the basis that it used certain terms, including "possible doubt." Id. at 1080. This Court found the issue unpreserved because defense counsel never requested or submitted an alternate instruction. This Court went on to hold that the standard jury instruction (the one given here) was proper under Victor. Id. at 1080. See also Sochor v. State, 619 So. 2d 285, 290 (Fla.), cert. denied, ___ U.S. ___, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1993) (failing to instruct on a defense does not constitute fundamental error); Ray v. State, 403 So. 2d 956 (Fla. 1981) (defining fundamental error and holding that constitutional error is not necessarily fundamental error); Van Note v. State, 366 So. 2d 78, 79 (Fla. 4th DCA), cert. denied,

376 So. 2d 76 (Fla. 1979) (improper, unnecessary and wrong preliminary Allen charge did not constitute fundamental error).

In Farrow v. State, 573 So. 2d 161 (Fla. 4th DCA 1990) (en banc), the District Court receded from cases finding a "read back" instruction to be fundamental error. In finding that the instruction was not fundamental error the court noted that this was a preliminary instruction given at the beginning of trial. The District Court also noted that defense counsel could have immediately brought the problem to the attention of the trial court and obtained a curative instruction. See Webb v. State, 519 So. 2d 748, 749 (Fla. 4th DCA 1988) (whether an instruction constitutes fundamental error depends upon its egregiousness and whether a corrective instruction would have obliterated the taint). In those cases the District Court also found that specific and confusing substantive instructions can be held not to be fundamental. Id. at 163. Ignoring its own cases, in the case at bar, the District Court also ignored the fact that even assuming that the preliminary instruction here was somehow unartful, it was not egregious. Any problem could have easily been rectified by a curative instruction.

Petitioner, thus, reiterates that there was no error, fundamental or otherwise, in the trial court's preliminary comments. This Court should therefore answer the question in the

negative, disapprove Jones by **quashing** the District Court's opinion, and affirm the conviction.

POINT II

THE CONVICTION FOR GRAND THEFT CAN BE AFFIRMED WHERE THE INFORMATION DID NOT ALLEGE THE VALUE OF THE PROPERTY TAKEN, BUT THE JURY WAS INSTRUCTED ON THE PERMISSIVE LESSER INCLUDED OFFENSE OF GRAND THEFT WHERE THE INFORMATION AND THE EVIDENCE SUPPORT THE VERDICT REACHED BY THE JURY.

Jurisdiction

Respondent was charged with two counts of armed robbery, but the jury returned verdicts of guilty of grand theft. The Fourth District reversed the convictions because the information did not allege the value of the property taken. The State submits that the District Court's opinion *sub judice* conflicts with J.C.B. v. State, 512 So. 2d 1073 (Fla. 1st DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988). Thus, since this Court has accepted jurisdiction to answer the questions certified to be of great public importance, relying on Zirin v. Charles Pfizer V. & Co., Inc., 128 So. 2d 594, 596 (Fla. 1961); Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982); Jacobson v. State, 476 So. 2d 1282 (Fla. 1985); and Feller v. State, 637 So. 2d 911 (Fla. 1994), the State urges this Court to exercise its discretionary jurisdiction to resolve the decisional interdistrict conflict.

Merits

The information charging Respondent with grand theft in count I stated that Milo Wilson and the co-defendant, Antwon Ricks, did:

> unlawfully take from the person or custody of Vickraw Ramsaroop certain property of value, to-wit: **money and jewelry** with the intent to permanently deprive Vickraw Ramsaroop of a right to the property or a benefit therefrom, by the use of force, violence, assault or putting the said Vickraw Ramsaroop in fear, and in the course thereof, there was carried a firearm, said firearm being in the possession of Milo Wilson, contrary to F.S. 812.13(1) and (2)(a), and F.S. 775.087(2),

(R. 455).

In its opinion of December 20, 1995, the District Court agreeing with Respondent, held that because the information did not allege the value of the property taken, a conviction for grand theft could not stand. Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA Dec. 20, 1995). The State submits that because the information alleged Respondent took "money and jewelry" from the victim, and the evidence presented at trial clearly established that $230.00 in cash was taken from Mr. Rampsaroop, the value of the chain was stipulated to be $170, the value of the watch was stipulated to be $40.00, and the bracelet was an heirloom, the District Court erred in reversing the conviction for grand theft as to **count I**.

In J.C.B. v. State, supra,[3] the First District noted that "there may be circumstances where the mere naming of the articles or goods taken might adequately inform an accused that he faces possible conviction of grand theft". Id. 512 So. 2d at 1075. The State submits that under this rationale, the grand theft conviction should have been affirmed in the instant case.

As stated above, the information charged Respondent with armed robbery of "money and jewelry" in count I, and "money" in Count II (R. 455). When the judge read the information to the jury, the judge commented that "The only difference [between counts] Count I identifies the victim as Vickraw Ramsaroop, and Count II the identified victim is Clara Wells." To that the prosecutor pointed out, "Excuse me, Your Honor. The other difference is Count I the defendant is charged with taking money and jewelry from Vickram Ramsaroop. And in Count II the defendant is charged with taking money." (R. 18). Respondent did not raise the argument he made on appeal at that point, or at any other point during the trial.

At trial, Mr. Ramsaroop testified that at Respondent's

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[3]It needs to be noted that the District Court relied on J.C.B. when it decided both Pierce v. State, 641 So. 2d 439 (Fla. 4th DCA 1994) and In the Interest of E.W., a child, 616 So. 2d 1194 (Fla. 4th DCA 1993). In Wilson the District Court relied in its own opinion of Pierce for reversal, without acknowledging the conflict with J.C.B.

directions, the other man took Mr. Ramsaroop's watch, bracelet, chain, and wallet containing money (R. 143). Mr. Ramsaroop testified that the watch taken from him was a Citizen gold watch (R. 144), but he ccould not remember how much the watch was worth (R. 144-5). Neither the gold watch, nor chain were ever recovered (R. 145).[4] With reference to the bracelet, which was recovered and returned to Mr. Ramsaroop, Mr. Ramsaroop testified the bracelet is gold, and is unique - it came from India (R. 145). The bracelet was passed down from his great grandmother, to his grandmother, to Mr. Ramsaroop's mother, and his mother gave it to him (R. 145). Mr. Ramsaroop testified he had approximately $230 in cash folded in his wallet that he was keeping aside for his trip to the islands the following day (R. 146, 148).

The co-defendant, Mr. Ricks, testified that once they ran away from the victims, he and Respondent went to the wall behind the Wal-Mart (R. 321). Respondent showed Mr. Ricks the money he had taken, and Mr. Ricks showed Respondent the jewelry and money he had taken (R. 321). They exchanged the loot. Respondent put the jewelry in the sleeves of the sweater so that he could jump the wall (R. 321).

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[4]Respondent stipulated the value of the chain as $170.00 and the watch $40.00 for purposes of restitution (R. 450-451).

When the State requested the lesser included offense of grand theft "based on the testimony of the witnesses," defense counsel stated:

> MR. MCNAMEE: I would have to argue to the Court that it's not necessary for the Court to give a category two instruction. However, I believe the law requires category one instructions.

(R. 369). During its charge to the jury, the judge read the standard jury instructions, which includes that the State must establish "the value of the property taken was $300.00 or more, or less then (sic) $20,000.00 which in that event that would be grand theft." (R. 416-17). No other arguments or objections, than those made at R. 369, were raised by the defense as to this instruction (R. 372-375, 430).

The State would submit that because Respondent did not make the arguments he is now making on appeal, he failed to preserve the issue for appeal. State v. Anderson, 639 So. 2d 609, 610 (Fla. 1994); Craig v. State, 510 So. 2d 857 (Fla. 1987) (legal grounds for objection to jury instruction must be specifically stated before jury retires for objection to be reviewable on appeal), cert. denied, 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed. 2d 680 (1988); Tillman v. State, 471 So. 2d 32 (Fla. 1985).

Further, it is settled that the State may substantially amend

an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant. State v. Anderson, 537 So. 2d 1373, 1375 (Fla. 1989); Young v. State, 632 So. 2d 245, 246 (Fla. 3d DCA 1994). Thus, had Respondent made the specific objection now being raised on appeal, the State could have moved to amend the information to include the value of the property taken from the victims. Here, as in Young, any claim of prejudice was nonexistent. Respondent was well aware the State was claiming the value of the property taken was well over three hundred dollars. The currency taken from Mr. Ramsaroop was $237 (R. 146); the gold bracelet was a heirloom (R. 145); and Respondent agreed for restitution purposes that the value of the Citizen watch was $40, and the gold chain $170 (R. 450-451). Therefore, the amendment would not have prejudiced Respondent as to any claimed defense in the case.

It is settled that grand theft is a **permissive** lesser included offense of robbery. See Fla. Std. Jury Instr. (Crim.), pages 294-295; Hand v. State, 188 So. 2d 364, 365 (Fla. 1st DCA 1966) (If a person is charged with robbery under th[e] statute and the jury reasonably finds from the evidence that the stealing was accomplished without force, ... the jury may, under proper

instructions from the trial court, find the defendant guilty of the lesser included offense of petty or grand larceny, ...), reversed on other grounds, Hand v. State, 199 So. 2d 100 (Fla. 1967). Permissive lesser included offenses are those offenses that may or may not be lesser included offenses depending on the pleadings and the evidence presented. Amado v. State, 585 So. 2d 282 (Fla. 1991); Wilcott v. State, 509 So. 2d 261, 262 (Fla. 1987). An instruction on a permissive lesser included offense must be given "when the pleadings and the evidence demonstrate that the lesser offense is included in the offense charged." Amado v. State, 585 So. 2d at 282; Wilcott v. State, 509 So. 2d at 262; Clarke v. State, 600 So. 2d 510 (Fla. 3d DCA 1992).

In the case at bar, the information alleged that money and jewelry was taken from the victim. The currency was proven to be $237 (R. 146). The jewelry was a Citizens watch, a gold chain and the bracelet (R. 143). The bracelet alone was a heirloom (R. 145). The proper value in theft cases is generally market value at the time of the theft, unless the property has some intrinsic or peculiar value. Hicks v. State, 127 Fla. 669, 173 So. 815 (1937); Garland v. State, 291 So. 2d 678, 679 (Fla. 4th DCA 1974). In the area of restitution, this Court has held that in most instances the victim's loss and the fair market value of the property at the time

of the offense will be the same. However, the Court also held that fair market value is not the sole standard because there are instances, such as with heirlooms, were market value of the property will not fully compensate the victim for the loss, State v. Hawthorne, 573 So. 2d 330, 333 n. 4 (Fla. 1991). At trial, Mr. Ramsaroop testify as to the uniqueness of the bracelet, and that it was a family heirloom (R. 145). Luckily for Mr. Ramsaroop the bracelet was recovered, and returned to him (R. 157). The bracelet was shown to the jury at trial. The State submits that because the bracelet was seen by the jury, that the value of the bracelet was more than $70 defies contradiction. See Randolph v. State, 608 So. 2d 573, 574 (Fla. 5th DCA 1992) (there are, of course, cases in which the minimum value of an item of property is "so obvious as to defy contradiction"); Jackson v. State, 413 So. 2d 112, 114-115 (Fla. 2d DCA 1982) (involving theft of a 37-foot sail boat); Sec. 812.012(9)(b), Fla. Stat.

In the case at bar, the $237 taken from Respondent, when combined with the value of the priceless bracelet, the $40 Citizens watch; and the $170 gold chain clearly supported the jury verdict of grand theft. This case falls under the exception set out by J.C.B., 512 So. 2d at 1075, that naming of the articles or goods taken (money and jewelry) adequately informed Respondent that he

was facing possible convictions for grand theft.

An instruction on a permissive lesser included offense should be precluded only where "there is a total lack of evidence of the lesser offense." Amado v. State, 585 So. 2d at 282-283. The objection at bar was only that "it's not necessary for the court to give a category two instruction." (R. 369). In a case factually identical to the case at bar, the District Court held that because the defendant at trial did not argue that the amount taken was not in excess of $100, the issue had not been preserved for appellate review. That the error was **not** fundamental, that the defendant was neither prejudiced nor embarrassed in his defense; therefore, the conviction for grand theft was affirmed. Lumia v. State, 372 So. 2d 525 (Fla. 4th DCA 1979), cert. denied, 381 So. 2d 767 (Fla. 1980), explained with approval, Ray v. State, 403 So. 2d 956, 960-961 (Fla. 1981).

In Ray, this Court considered the circumstances under which a defendant waives an objection to a conviction of a lesser offense not alleged within the charging documents. The Court noted that a waiver is ordinarily found where the defendant himself requests a charge on the lesser offense, or at least acquiesces to the charge. Ray, 403 So. 2d at 961. This Court also held that a waiver would be found where the defendant affirmatively relies upon the charge,

as evidenced by argument to the jury, or other affirmative action. Id. The Ray Court explained that the responsibility lies with the defendant to object to such an "erroneous instruction," thus his failure to do so constitutes a waiver of that objection. Id.

The State submits therefore that because Respondent here likewise was not prejudiced nor embarrassed in his defense at trial; was well aware of the claimed value of the property taken; and defense counsel either failed to properly preserve the issue, or waived it for appellate review, under the authority of Ray, and Lumia, the District Court erred in reversing the conviction as to count one.[5]

Therefore, the District Court's opinion must be **quashed** as to this issue as well, and the conviction for grand theft affirmed.

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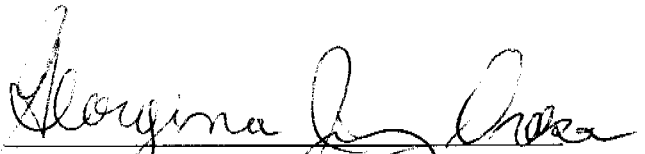
[5]As argued before the District Court, with reference to count II, Clara Wells, the second victim, testified the man with the gun, Respondent, took $120 [all in twenty dollar bills] from her (R. 184). Nine $20 bills [$180] were recovered from the co-defendant's pocket (R. 211, 253), and returned to Ms. Wells (R. 184, 253). Mr. Ricks testified that the $180 found on him was Ms. Well's property (R. 326). As to count II, the proof only established petit theft. The judgment as to count therefore should be corrected to conform to the corrected sentence (R. 483).

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** and the conviction for grand theft in count one affirmed.

Respectfully submitted,

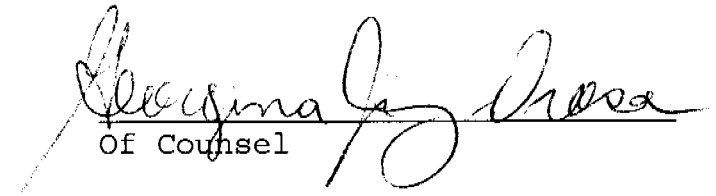
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by Courier to: LOUIS G. CARRES, Assistant Public Defender, Attorney for Respondent, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 8th day of April, 1996.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 87,575
(4th DCA No. 94-02204)

MILO WILSON,

Respondent.
_____/

INDEX TO APPENDIX TO

PETITIONER'S BRIEF ON THE MERITS

		EXHIBIT
1.	Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA Dec. 20, 1995)	A
2.	Wilson v. State, 21 Fla. L. Weekly D476 (Fla. 4th DCA Feb. 21, 1996)	B

EXHIBIT A

affirmed on appeal. *National Envtl. Prods.*, 647 So. 2d at 122. Even though the causes of action in the foreclosure suit were different than those in the unlawful detainer suit, the issue of the validity of Falls' deed had been adjudicated in the foreclosure law suit. Both Falls and NEP were parties to that litigation and are governed by that determination. *Sun-Island Realty.*

NEP scoffs at Falls' attempt to have the court below, as well as this court, look at the pleadings and briefs which were filed in the related proceedings to determine what issues were actually raised and litigated. However, it is fitting and proper that a court should take judicial notice of other actions filed which bear a relationship to the case at bar. *See Gulf Coast Home Health Servs. of Florida, Inc. v. Department of HRS*, 503 So. 2d 415 (Fla. 1st DCA 1987). In fact, many times that is the only way that a court can determine whether to apply the doctrine of estoppel by judgment or "issue preclusion" in a given case.

Accordingly, we find that the circuit court's affirmance of the county court's final judgment departs from the essential requirements of law resulting in a miscarriage of justice. *Haines City Community Dev.* We quash the circuit court's affirmance of the county court final judgment and remand for further proceedings consistent with this opinion. (PARIENTE and SHAHOOD, JJ., concur.)

* * *

Eminent domain—Trial court abused its discretion in disbursing, prior to final judgment, disputed funds from court registry to parties who held leasehold interest in the condemned property and owned billboard located on the property—Parties disputed amount allocated to them, and there was no agreement by the parties or security provided to protect parties' rights and interest in the property

JACK STUDIALE and CAROLYN GREENLAW, as Co-Trustees of the Studiale Grandchildren's Trust, Appellants, v. JEANNE TOWNE, Individually, and STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, Appellees. 4th District. Case No. 95-2772. L.T. Case No. 95-5129. Opinion filed December 20, 1995. Appeal of a non-final order from the Circuit Court for Broward County; W. Herbert Moriarty, Judge. Counsel: Mark S. Ulmer, Miami, for appellants. Robert C. Byrne of Kelly, Black, Black, Byrne & Beasley, P.A., for appellee Jeanne Towne. Marianne A. Trussell, Tallahassee, for appellee State of Florida Department of Transportation.

(PER CURIAM.) This is an appeal from an order disbursing funds from the circuit court's registry prior to final judgment in a "quick taking" eminent domain proceeding. We have jurisdiction to review this non-final order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii). *City of Sunrise v. Steinberg*, 563 So. 2d 704 (Fla. 4th DCA 1990).

Appellants hold a leasehold interest in the condemned property, and own a billboard located on the property. The disbursement order allocated to appellants a portion of the monies in the court registry for their interest in the property. Appellants dispute the amount allocated to them. We reverse the disbursement order. The trial court abused its discretion in ordering disbursement of the disputed funds absent an agreement by the parties or security provided to protect the appellants' rights and interest in the property. *Orange State Oil Co. v. Jacksonville Expressway Auth.*, 110 So. 2d 687 (Fla. 1st DCA), *cert. denied*, 114 So. 2d 4 (Fla. 1959).

Sua sponte, we redesignate the style of this appeal as it appears above.

REVERSED. (GLICKSTEIN, POLEN and PARIENTE, JJ., concur.)

* * *

Criminal law—Jury instructions—Trial court committed fundamental error in giving preliminary instruction to jury pool that the state does not have to convince the jury to an absolute certainty of the defendant's guilt—Instruction minimized reasonable doubt standard in violation of state and federal due process clauses—Conviction of grand theft as lesser included offense of armed robbery was precluded where charging document failed to allege value of the property taken

MILO WILSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2204. L.T. Case No. 93-1673CF10A. Opinion filed December 20, 1995. Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge. Counsel: Richard L. Jorandby, Public Defender, and Karen E. Ehrlich, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

(POLEN, J.) Milo Wilson timely appeals from a final judgment adjudicating him guilty of grand theft. Two points are raised on appeal, both of which require reversal.

Wilson initially appeals the trial court's extemporaneous reasonable doubt instruction to the jury pool as constituting fundamental error. Prior to empaneling the jury, the court discussed certain aspects of a trial with the jury pool. Within that discussion, the court discussed certain "cardinal rules" that apply to criminal trials. The third of those rules was that the jury should not demand proof beyond all doubt or complete certainty before finding the appellant guilty.

Factually, this case is controlled by this court's decision in *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995). In *Jones*, the trial court gave similar extemporaneous instructions to the jury pool prior to voir dire. This court found the instructions to be fundamental error, as it deprived the appellant of his right to rely on the correct standard of reasonable doubt.

We have recently followed the *Jones* decision in *Rayfield v. State*, 20 Fla. L. Weekly D1907 (Fla. 4th DCA Aug. 23, 1995). In *Rayfield*, instructions similar to those in *Jones* were given to the jury pool. This court reversed, citing the "all-but-identical preliminary instructions on reasonable doubt" as grounds for reversal.

In the case at bar, the trial court gave similar preliminary instructions to the jury pool. Again, the judge discussed "cardinal rules," the third being the state does not have to convince the jury to an absolute certainty of the defendant's guilt. These instructions, like those in *Jones*, were tantamount to telling the jury that it could base a guilty verdict on a probability of guilt so long as it was a remarkably strong probability. This kind of minimization of the reasonable doubt standard violates the due process clause of the state and federal constitutions. *See Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). We again find such instruction to be fundamental error.

Wilson also appeals the trial court's decision to instruct the jury on grand theft as a lesser included offense of the charged offenses of armed robbery. The charging document failed to allege any value of the property taken. In *Pierce*, this court clearly held that in order for the state to preserve its right to a lesser included conviction for grand theft, the information must contain an allegation that sufficiently states the value of the property taken. *Pierce v. State*, 641 So. 2d 439 (Fla. 4th DCA 1994).

The information charged Wilson with unlawfully taking "money and jewelry" with the intent to permanently deprive. Like the facts in *Pierce*, the charging statement did not allege the value of the property taken. The state's failure to include such values precludes a conviction for grand theft.

We reverse for a new trial, but because the jury did not find Wilson guilty of armed robbery, he may be tried only for petit theft.

REVERSED. (KLEIN and PARIENTE, JJ., concur.)

* * *

Criminal law—Evidence—Error to permit arresting officer to testify to detailed information he received before arriving at scene where he arrested defendant—State-of-mind exception to hearsay rule was inapplicable because officer's state of mind was not a material issue in the case—Defendant properly preserved evidentiary issue for review by filing motion in limine and by objecting to testimony—Objection to jury instruction regarding the hearsay evidence was unnecessary—Admission of the evidence was not harmless error

ROBERT JAMES YOUNG, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2412 and 94-2472. L.T. Case No. 92-7078 CFA02. Opinion filed December 20, 1995. Consolidated appeals from the Circuit Court for Palm Beach County; Richard I. Wennet, Judge. Counsel: Richard L. Jorandby, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahas-

EXHIBIT B

It has been determined that a trial court may sua sponte impose a public defender's fee pursuant to section 27.56(1)(a), Florida Statutes (1993). *See Gant v. State*, 640 So. 2d 1180 (Fla. 4th DCA 1994); *Mounts v. State*, 638 So. 2d 602 (Fla. 4th DCA 1994). However, pursuant to section 27.56(7), Florida Statutes, the defendant must first be given prior notice of the intent to seek public defender's fees and provided an opportunity to be heard, offer objection, and be represented by counsel. *See Smiley v. State*, 590 So. 2d 1116 (Fla. 4th DCA 1991); *Hostzclaw v. State*, 561 So. 2d 1323 (Fla. 4th DCA 1990); *see also*, Fla. R. Crim. P. 3.720(d)(1). In this case, the public defender's fee was assessed without fulfilling the statutory notice requirements or affording Wilkins the opportunity to object. This was error.

In order to assess and recover costs of prosecution pursuant to section 939.01, Florida Statutes (1993), the state is required to document its expenses and the trial court must consider those expenses along with the defendant's financial resources, his financial needs and earning ability, and such other factors the trial court deems appropriate. *Gant*, 640 So. 2d at 1180; *Sutton v. State*, 635 So. 2d 1032 (Fla. 2d DCA 1994) (citing *Tennie v. State*, 593 So. 2d 1199 (Fla. 2d DCA 1992)); *see also Wheeler v. State*, 635 So. 2d 140 (Fla. 4th DCA 1994); *Pickrel v. State*, 609 So. 2d 65 (Fla. 4th DCA 1992). In this case, the $50.00 assessment for costs of prosecution was ordered by the court without notice to the defendant of the state's intent to seek costs of prosecution, documentation by the state of its expenses, or the court's consideration of the appellant's financial resources. This, too, was error.

Accordingly, we reverse the trial court's assessment of costs of prosecution and remand with directions to consider the state's actual expenses and the appellant's financial resources. We also reverse the trial court's imposition of attorney's fees and remand with directions to provide notice of intent to seek the fee and afford appellant a hearing and an opportunity to contest the assessment of the fee. *See Mounts*.

Affirmed in part; Reversed and Remanded in part with directions. (PARIENTE and STEVENSON, JJ., concur.)

* * *

Dissolution of marriage—Child custody—Trial court apparently evaluated relevant statutory factors in reaching its decision to award primary residential custody to father—Since abolishment of "tender years" doctrine, courts may not, in determining custody, give any preference to mother based solely on age of child

ANGELIA SULLIVAN, Appellant, v. ROBERT L. SULLIVAN, Appellee. 4th District. Case No. 95-2106. L.T. Case No. 94-1765-FR-01. Opinion filed February 21, 1996. Appeal from the Circuit Court for St. Lucie County; Paul B. Kanarek, Judge. Counsel: Angelia Sullivan, Fort Pierce, pro se appellant. Robert L. Sullivan, Port St. Lucie, pro se appellee.

(PARIENTE, J.) This is a pro se appeal by the mother, the former wife, from Final Judgment of Dissolution of Marriage which awarded primary residential custody of the parties' minor child to the father, the former husband. Appellant contests this award claiming that she should have been given custody of the minor child as she is his mother. However, the "tender years" doctrine has been statutorily abolished, and courts may not give any preference in determining custody to the mother based solely on the age of the child. *See* § 61.13(2)(b)1, Fla. Stat. (1993); *Cherradi v. Lavoie*, 662 So. 2d 751 (Fla. 4th DCA 1995). Instead, courts must evaluate all relevant statutory factors affecting the welfare and interests of the child. *See* § 61.13(3), Fla. Stat. (1993). The trial court's determination of custody made after evaluation of these factors is subject to an abuse of discretion standard of review. *See Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980). In this case, there was a final hearing by the trial court at which evidence relevant to each of the statutory factors was presented and considered by the court. Based on the record before us, it appears that the trial court appropriately evaluated the relevant statutory factors in reaching its decision. The record on appeal contains only a brief excerpt of the court's oral pronouncement of its decision to award custody of the minor child to the father and does not contain a transcript of the evidence taken at that hearing. While we are not unsympathetic to the plight of appellant who asserts she cannot afford a transcript of the entire hearing, in the absence of a record demonstrating reversible error, we must conclude that the trial court acted properly. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).

We therefore affirm the final judgment. (GLICKSTEIN and STEVENSON, JJ., concur.)

* * *

Criminal law—Jury instructions—Trial court committed fundamental error in giving preliminary instruction to jury pool that the state does not have to convince the jury to an absolute certainty of the defendant's guilt—Questions certified: Does the jury instruction given in this case impermissibly reduce the reasonable doubt standard below the protections of the due process clause? If so, is such an instruction fundamental error?

MILO WILSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2204. L.T. Case No. 93-1673CF10A. Opinion filed February 21, 1996. Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge. Counsel: Richard L. Jorandby, Public Defender, and Karen E. Ehrlich, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR CERTIFICATION OF QUESTION AND STAY OF MANDATE

[Original Opinion at 21 Fla. L. Weekly D37b]

(POLEN, J.) The State of Florida has moved this court to stay the mandate from our December 20, 1995, opinion and certify the issue in this case as one of great public importance.

We grant the stay and certify the question as being of great public importance; although we do not adopt the state's proposed certified question, we certify the following questions:

DOES THE JURY INSTRUCTION GIVEN IN THIS CASE[1] IMPERMISSIBLY REDUCE THE REASONABLE DOUBT STANDARD BELOW THE PROTECTIONS OF THE DUE PROCESS CLAUSE?

IF SO, IS SUCH AN INSTRUCTION FUNDAMENTAL ERROR?

(KLEIN and PARIENTE, JJ., concur.)

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[1]Prior to empaneling the jury, the judge discussed "cardinal rules" that apply to every criminal trial. During his third "cardinal rule" he discussed reasonable doubt and what the state was required to prove. The erroneous instructions were:

> Now, I'll give you a more elaborate definition of what that phrase beyond to [sic] the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial. Suffice it to say it's a very heavy burden the State shoulders whenever it charges somebody with committing a crime. In order to secure a conviction that is it [sic] has to convince a jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt. But even though it's a heavy burden the state does, I repeat, stress, emphasize, the state does not have to convince you to an absolute certainty of the defendant's guilt. Nothing is absolutely certain, nothing is absolutely certain in life other than death and taxes. So the point I'm trying to make is you can still have a doubt as to the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to.
>
> If you have a doubt at the conclusion of this trial you have a doubt as to the defendant's guilt that you can attach a reason to you must find the defendant not guilty. But if on the other hand at the conclusion of this trial the only kind of doubt you have as to the defendant's is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. If all elements of the crime have been proven to you you must find the defendant guilty.

* * *

SANZARE v. VARESI. 4th District. #95-0465. February 21, 1996. Appeal from the Circuit Court for Broward County. Affirmed on the authority of *Tran v. Bancroft*, 648 So. 2d 314 (Fla. 4th DCA 1995).

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v. ABBATE. 4th District. #94-3542. February 21, 1996. Appeal from the Circuit Court for Palm Beach County. AFFIRMED on the authority of *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995).

* * *