NC 015 w/app

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87862

FILED
SID J. WHITE
APR 30 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

4TH DCA CASE NO. 93-1302

STATE OF FLORIDA,

Petitioner,

v.

KENNETH PIERCE,

Respondent.

****

PETITONER'S BRIEF ON JURISDICTION

****

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. Respondent was the Appellant and the defendant, respectively, in those courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

On March 9, 1993, a jury found Respondent guilty of vehicular homicide/leaving the scene of an accident involving death of a six year old girl; leaving the scene of an accident involving injury to two other children; driving while his license was suspended or revoked and causing death and two counts of tampering with evidence. Pierce v. State, 21 Fla. L. Weekly D629 (Fla. 4th DCA Mar. 13, 1996)(Exhibit 1).

The Fourth District reversed Respondent's convictions, finding fundamental error in the trial judge's unobjected-to preliminary comments on reasonable doubt made during voir dire. The Fourth District reversed, citing Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995)(Exhibit 2), Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA December 20, 1995)(Exhibit 3) and seven other cases reversed on the same grounds. Pierce, 21 Fla. L. Weekly at D630. In reversing, the Fourth District found that the issue in this case was identical to the issue in Jones and Wilson:

> Exactly fact-similar to Jones, 656 So. 2d 489, the trial judge in the instant case instructed the jury as follows:
>
> > And even though it's a very heavy burden however, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt.

> You do not have to be one hundred percent satisfied the Defendant's guilty in order to find him guilty.... So the State does not have to convince you to 100 percent certainty of the Defendant's guilt, but merely beyond and to the exclusion of every reasonable doubt.
>
> As we found in Jones, we agree with Appellant that the reasonable doubt standard, a component of due process of law in criminal proceedings was diminished by the trial court's statement that certitude was not required. See Jones, 656 So. 2d at 490. This kind of minimization of the reasonable doubt standard violates the due process clause of the federal and state constitutions. See Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990).

Pierce, 21 Fla. L. Weekly at D630.

This Court has granted review of this issue in Wilson, cited above (Case no. 87,575). The Fourth District denied Petitioner's motion to stay this case pending resolution of Wilson (Exhibit 6). An emergency motion to stay mandate has been filed with this brief.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction as the issue in this case is identical to the issue in a case pending before this Court. The decision of the Fourth District Court of Appeal also directly and expressly conflicts with a decision of another District Court and this Court.

POINT I

THIS COURT HAS JURISDICTION TO REVIEW THIS CASE AS THE IDENTICAL ISSUE IS PENDING BEFORE THIS COURT IN ANOTHER CASE.

This case was reversed on the authority of Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995)(Exhibit 2). The Fourth District also relied on Wilson v. State, 21 Fla. L. Weekly D37 (Fla. 4th DCA December 20, 1995)(Exhibit 3). See also Wilson v. State, 21 Fla. L. Weekly D476 (Fla. 4th DCA Feb. 21, 1996)(Exhibit 4). In Wilson, the Fourth District reversed on the authority of Jones and certified the issue raised by Jones. This Court has accepted jurisdiction in Wilson. Accordingly, this Court has jurisdiction to review this case. State v. Rhoades, 623 So. 2d 470, 471 (Fla. 1993)(Exhibit 5) and Jollie v. State, 405 So. 2d 418 (Fla. 1994).

POINT II

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT.

In Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994), the defendant challenged a reasonable doubt instruction because it contained the term "possible doubt." This Court also held:

> Moreover, even if properly preserved, we would find no merit to this issue. "'[T]aken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.' There is no reasonable likelihood that the jurors who determined [Esty's] guilt applied the instructions in a way that violated the Constitution." Victor v. Nebraska, ___ U.S. ___, 114 S. Ct. 1239, 1251, 127 L. Ed. 2d 583 (1994) . . ..(emphasis supplied).

In direct conflict with Esty, the Fourth District relied on the standard set forth in Cage v. Louisianna, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990). See Jones at D295. As recognized in Esty, the Cage standard (whether the instruction "could have" been applied in an unconstitutional manner) was overruled and replaced with the Victor "reasonable likelihood" standard. Victor, 127 L. Ed. 2d at 591.

The Fourth District incorrectly applied the overruled Cage standard in this case and continues to do so in all other cases. See Bove v. State, 21 Fla. L. Weekly D709, D710 (Fla. 4th DCA March 20, 1996) (reversing because jury "could have" interpreted the comment as lowering the burden). Accordingly, the decision conflicts with Esty.

Additionally, the decision conflicts with Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944). In Higginbotham, 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).

The Fourth District held that this case was "[e]xactly fact-similar to Jones . . .." Pierce, 21 Fla. L. Weekly at D630. In Jones, the Fourth District refused to consider the complete, approved, standard instructions on reasonable doubt as balancing instructions, apparently because they were not given at the same time as the preliminary comments found to be fundamental error:

> 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 Higginbotham.

CONCLUSION

This claim has been raised in at least eighteen cases to date (Exhibit 7). This Court should accept jurisdiction on this issue as it did in Wilson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Tanja Ostapoff, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 29 day of April 1996.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

4TH DCA CASE NO. 93-1302

STATE OF FLORIDA,

Petitioner,

v.

KENNETH PIERCE,

Respondent.

****

APPENDIX TO
PETITONER'S BRIEF ON JURISDICTION

****

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EXHIBIT

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EXHIBIT 1

chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state; *and includes any person who is appointed by the sheriff as a deputy sheriff pursuant to s. 30.07.*

§ 112.531, Fla. Stat. (1993).

Interestingly, while section 112.531 added deputy sheriffs within its purview, other relevant sections specifically excluded this class of law enforcement officers. For example, section 112.535, labeled "Construction," specifically states that

> [t]he provisions of chapter 93-19, Laws of Florida, shall not be construed to restrict or otherwise limit the discretion of the sheriff to take any disciplinary action, without limitation, against a deputy sheriff, including the demotion, reprimand, suspension, or dismissal thereof, nor to limit the right of the sheriff to appoint deputy sheriffs or to withdraw their appointment as provided in chapter 30. Neither shall the provisions of chapter 93-19, Laws of Florida, be construed to grant collective bargaining rights to deputy sheriffs or to provide them with a property interest or continued expectancy in their appointment as deputy sheriff.

§ 112.535, Fla. Stat. (1995).

And, section 30.079, Florida Statutes (1995), covering sheriffs, which was amended in 1994, specifically provides that

> [t]he provisions of this act shall not be construed to provide deputy sheriffs with a property interest or expectancy of continued appointment as a deputy sheriff, nor shall these provisions serve as a limitation of the sheriff's authority as a constitutional officer to determine unilaterally the purpose of the office or department, to such standards of service to be offered to the public, and to exercise control and discretion over the organization and operations of the sheriff's office or department.

§ 30.079, Fla. Stat. (1995). Lacking this "property interest," the deputy's claim to due process must fail. For this reason, the trial court correctly entered summary judgment in favor of the sheriff.

The deputy's additional argument that the sheriff's establishment of a procedure within the department insured him rights otherwise unavailable must also fail. "[T]hese policies and procedures cannot be read to create the civil service system and do not provide a property interest to Deputy Sheriffs in their employment." *Capsalis v. Worch*, 902 F. Supp. 227, 232 (M.D. Fla. 1995); *see also Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992).

AFFIRMED. (STONE and KLEIN, JJ., concur.)

* * *

Criminal law—Evidence—Prosecution for vehicular homicide/leaving scene of accident involving death, leaving scene of accident involving injury, driving while license suspended and causing death, and tampering with physical evidence—Trial court's extemporaneous jury instruction which minimized the reasonable doubt standard constituted fundamental error requiring new trial—Trial court did not abuse its discretion in permitting jury to view computer generated accident reconstruction animation as a demonstrative exhibit to illustrate accident reconstruction expert's opinion—Trial court on remand should comply with supreme court's decision in *Mancuso v. State* in giving jury instruction concerning knowledge requirement for conviction of leaving scene of accident involving injury or death

KENNETH M. PIERCE, Appellant/Cross-Appellee, v. STATE OF FLORIDA, Appellee/Cross-Appellant. 4th District. Case No. 93-1302. L.T. Case No. 92-19316CF10A. Opinion filed March 13, 1996. Appeal and cross-appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge. Counsel: Richard L. Jorandby, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant/cross-appellee. Robert A. Butterworth, Attorney General, Tallahassee, Joan Fowler, Senior Assistant Attorney General, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee/cross-appellant.

(BROWN, LUCY C., Associate Judge.) On March 9, 1993, a jury found Appellant guilty of vehicular homicide/leaving the scene of an accident involving death of a six year old child; leaving the scene of an accident involving injury to two other children; driving while his license was suspended or revoked and causing death; and two counts of tampering with physical evidence, by removing a camper top from, and by altering front-end damage to, a pickup truck. Appellant was sentenced to a total of sixty years in prison, thirty years of which related to the vehicular homicide count. During the trial, a computer generated animation, illustrating the lead traffic homicide investigator's reconstruction of the motor vehicle accident, was published to the jury as a demonstrative exhibit. The admissibility of this exhibit presents us with an issue addressed by no appellate court in Florida, and by few in other jurisdictions. For reasons set forth below, we find the trial court did not abuse its discretion in permitting the jury to view the computer generated accident reconstruction animation. On other grounds, however, we reverse and remand for a new trial based on fundamental error.

FACTS

On the evening of June 23, 1992, three children were walking home through a residential neighborhood in Dania, Florida. At approximately 9:00 p.m., a pickup truck hit the three children. The six year old child later died as a result, and the two older children were both seriously injured. Eyewitnesses reported that the same vehicle had collided with some garbage cans earlier that evening, shortly before 9:00 p.m., dragging a can fifteen to twenty feet without swerving. The vehicle fled both scenes without stopping.

One eyewitness chased the vehicle and believed it to be a Silverado Chevrolet truck. Other eyewitnesses gave similar descriptions of the vehicle as a pickup truck with a camper top, darker in color on the bottom than on the top.

When the police arrived, a neighbor found a piece of grille from a vehicle in a shallow section of a water puddle close to the six year old child's body. A piece of plastic turn signal lens was also found at the scene. In addition, the medical examiner suggested that there might be a dent in the vehicle caused by the impact on the six year old victim's head.

Approximately three weeks after the accident, the police located Appellant's truck, which had a dent where the hood meets the grille. At that time, the grille was not original equipment and the headlight lens cover had been cut to make it fit. Although the truck did not have a camper top, neighbors stated that Appellant had recently removed a camper top from the vehicle.

Based on an affidavit alleging the above facts, along with the identification of the grille piece found at the accident scene as belonging to a 1980 Silverado truck, a search warrant was issued and Appellant's truck was seized. Thereafter, Appellant was arrested and charged with vehicular homicide/leaving the scene of an accident involving death, as well as leaving the scene of an accident causing injury, driving with a suspended or revoked license and causing death, and two counts of tampering with physical evidence.

BACKGROUND

Before trial, the State Attorney's Office filed a Notice of Intent to offer a computer generated animation of its expert's accident reconstruction. A pretrial hearing concerning admissibility was held in which the state presented three expert witnesses. Detective Bjorndale-Hull, an expert in accident reconstruction, testified that her use of metal tapes and a wheel was reasonably relied upon by accident reconstruction experts in the field. In addition, the AUTOCAD computer program Bjorndale-Hull used was established as accepted in the engineering field as one of the leading CAD (computer aided design) programs in the world. Finally, Detective Bjorndale-Hull's measurements were drawn directly onto a computer, such that they were input with no human contamination of her measurements.

Second, the state presented Detective Babcock, an accident reconstruction expert, who testified that the data he used was of a type reasonably relied upon by experts in the field of accident reconstruction in formulating opinions as to how motor vehicle accidents occur. Babcock supervised every aspect of the animation from inception. His testimony established that the computer animation fairly and accurately reflected his opinion of how the accident occurred. The computer animation was thus established

to be a visualization of Babcock's opinion as to how the accident occurred.

The third witness presented by the state was Jack Suchocki, a computer animation expert, who explained that computer animation consists of individual pictures shown in a rapid sequence to in[illegible]e motion. He testified that the two-dimensional drawings entered directly onto AUTOCAD were then directly transferred into three-dimensional drawings, thus eliminating the possibility of human error in the translation. Suchocki testified the animation was a fair and accurate representation of what it purported to depict, and that the data, information, and evidence utilized was of a type reasonably relied upon by experts in the field of forensic animation.

The state then proffered the computer animation as a demonstrative exhibit to help Detective Babcock explain his opinion to the jury, and also as substantive evidence. The trial court ruled the computer animation admissible as a demonstrative exhibit only. As a preliminary fact, pursuant to section 90.105, Florida Statutes (1991), the trial court found that the original source data, the basis of the State's computer animation, was "reasonably trustworthy and reliable." Noting the issue to be one of first impression, the trial court determined that the proffered computer animation was "merely a device or means to express an expert's opinion." Additionally, the trial judge concluded that in this context the video exhibit was a new form of *expression*, not a scientific or experimental test (such as a DNA test or a blood spattering analysis) and therefore was not subject to the test of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Thus, the animation was permitted to be used during the expert's testimony at trial for the purpose of aiding the jurors in understanding the complex issues, and to illustrate the opinions of the expert witness, Detective Babcock. However, because it was ruled inadmissible as substantive evidence, it was not permitted to be taken to the jury room during deliberations.

ANALYSIS

A) [illegible]SONABLE DOUBT INSTRUCTION

[illegible]ally, we reverse and remand for a new trial due to fundamental error created when the trial court minimized the reasonable doubt standard in its extemporaneous jury instruction, thus depriving Appellant of his defense. *See Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied*, 663 So. 2d 632 (Fla. 1995); *see also McInnis v. State*, No. 94-2792 (Fla. 4th DCA January 24, 1996) [21 Fla. L. Weekly D242]; *Poole v. State*, No. 94-2731 (Fla. 4th DCA January 24, 1996) [21 Fla. L. Weekly D245]; *Variance v. State*, No. 94-3019 (Fla. 4th DCA January 3, 1996) [21 Fla. L. Weekly D79]; *Cifuentes v. State*, 21 Fla. L. Weekly D77 (Fla. 4th DCA January 3, 1996); *Wilson v. State*, 21 Fla. L. Weekly D37 (Fla. 4th DCA December 20, 1995); *Frazier v. State*, 664 So. 2d 985 (Fla. 4th DCA), *rev. denied*, No. 86,543 (Fla. Dec. 19, 1995); *Rayfield v. State*, 664 So. 2d 6 (Fla. 4th DCA), *rev. denied*, 664 So. 2d 249 (Fla. 1995); *Jones v. State*, 657 So. 2d 1178 (Fla. 4th DCA), *reh'g granted*, 662 So. 2d 365 (Fla. 4th DCA), *rev. denied*, 664 So. 2d 249 (Fla. 1995). Exactly fact-similar to *Jones*, 656 So. 2d 489, the trial judge in the instant case instructed the jury as follows:

> And even though it's a very heavy burden however, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt.
>
> You do not have to be one hundred percent satisfied the Defendant's guilty in order to find him guilty.... So the State does not have to convince you to 100 percent certainty of the Defendant's guilt but merely beyond and to the exclusion of every reasonable doubt.

As we found in *Jones*, we agree with Appellant that the reasonable doubt standard, a component of due process of law in criminal [illegible]ceedings was diminished by the trial court's statement that ce[illegible]e was not required. *See Jones*, 656 So. 2d at 490. This kind of minimization of the reasonable doubt standard violates the due process clause of the federal and state constitutions. *See Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990). Thus, this minimization of the reasonable doubt standard constituted fundamental error because it deprived Appellant of his defense, the reliance on the reasonable doubt standard. *See Jones*, 656 So. 2d at 491. Accordingly, we reverse and remand for a new trial on this ground. Nevertheless, because we are faced with an issue of first impression for any court in this state, we write to address the dynamic aspect of computer animations as substantive and demonstrative evidence.

B) ADMISSION OF COMUPTER ANIMATION AS A DEMONSTRATIVE EXHIBIT

Computer animations have been used in the courtroom by civil litigators for reconstructing accidents, including automobile and truck accidents, aircraft collisions, construction equipment accidents, and industrial accidents, as well as in patent litigation. *See "State v. Pierce:* Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?" 19 Nova L. Rev. 374 (1994) at Section II, *citing* David W. Muir, "Debunking the Myths about Computer Animation," Securities Litigation 1992 at 591, 596, 597 (PLI Litig. & Admin. Practice Course Handbook No. 444, 1992). As demonstrative aids to illustrate and explain testimony of witnesses to the fact finder, such exhibits have been useful. Computer animations have also been offered as substantive evidence to supply missing information for the purpose of proving a material fact in dispute. In this context, unlike the case at bar, the expert uses the computer not to illustrate the expert's opinion, but to perform calculations and obtain results which form the basis of the expert opinion. *See generally*, Kathleen M. O'Conner, "Computer Animations in the Courtroom: Get with the Program," 67 Fla. B.J. 20 (1993). Several cases have been decided in other jurisdictions that deal with the admissibility of computer animations as substantive scientific evidence. The *Frye* requirement that scientific evidence be admitted only if derived from principles and procedures that have achieved general acceptance in the scientific field to which they belong has been applied to such computer animations introduced as substantive evidence. *See Starr v. Campos*, 134 Ariz. 254, 655 P.2d 794 (Ariz. Ct. App. 1982); *see also Schaffer v. General Motors Corp.*, 372 Mass. 171, 360 N.E.2d 1062 (1977).

Because the computer animation in the instant case was admitted solely as an illustration of Detective Babcock's opinion of how the accident occurred, we do not now decide the standards applicable to computer animations introduced as substantive evidence. The trial court, following a lengthy pretrial hearing, determined that the demonstrative exhibit was not subject to the *Frye* analysis. We agree, and now turn to address the precise issue before us, whether the trial court abused its discretion in permitting the computer generated accident reconstruction animation to be shown to this jury as a demonstrative exhibit.

In one of the few reported cases addressing this issue, a New York trial court allowed a criminal defendant to introduce a computer animation to illustrate his expert's view of how a fatal crash occurred. Finding, as we have, the *Frye* test inapplicable, the court stated:

> A Computer is not a gimmick and the court should not be shy about its use when proper. Computers are simply mechanical tools—receiving information and acting on instructions at lightening speed. When the results are useful, they should be accepted, when confusing, they should be rejected. What is important is that the presentation should be relevant..., that it fairly and accurately reflect the oral testimony offered and that it be an aid to the jury's understanding of the issue.

People of the State of New York v. Michael McHugh, 476 N.Y.S.2d 721, 722 (1984). Thus, in admitting the animation as a demonstrative exhibit only, the *McHugh* court merely required defense counsel to establish "the proper ground work and qualify the expert." *Id.*

In order to admit a demonstrative exhibit, illustrating an expert's opinion, such as a computer generated animation, the proponent must establish the foundation requirements necessary to introduce the expert opinion. Specifically, (1) the opinion evidence must be helpful to the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion evidence must be applied to evidence offered at trial; and (4) pursuant to section

90.403, Florida Statutes (1991), the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value. *Kruse v. State*, 483 So. 2d 1383, 1384 (Fla. 4th DCA 1986).

In addition, the proponent must establish that the facts or data on which the expert relied in forming the opinion expressed by the computer animation are of a type reasonably relied upon by experts in the subject area. The facts or data need not themselves be admissible in evidence. § 90.704, Fla. Stat. (1991). The reasonableness of the expert's reliance upon the facts and data may be questioned in cross-examination. *See First Fed. Sav. and Loan Ass'n v. Wylie*, 46 So. 2d 396, 400 (Fla. 1950).

Finally, the computer animation must be a fair and accurate depiction of that which it purports to be. This is, of course, the same foundation which must be established to admit any pictoral representation, be it videotape, motion picture or photograph. *Paramore v. State*, 229 So. 2d 855 (Fla. 1969), *vacated as to sentence only*, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972) (videotape admission); *Grant v. State*, 171 So. 2d 361 (Fla. 1965), *cert. denied*, 384 U.S. 1014, 86 S. Ct. 1933, 16 L. Ed. 2d 1035 (1966) (motion picture).

All preliminary facts, constituting the foundation for admissibility of evidence, must be proven to the court only by a preponderance of the evidence, even in a criminal case. *Charles W. Ehrhardt*, Florida Evidence, § 105.1 (1995 Ed.). In the case at bar, the trial court made appropriate findings of preliminary facts which were supported by the evidence adduced at the pretrial hearing. Detective Babcock was found to be qualified as an expert. His opinion as to how the accident occurred was in fact applied to evidence offered at trial, and the trial court found that the data relied on by the expert to form his opinion was of a type reasonably relied upon by experts in the field. Further, the trial court specifically found the computer animation tape was a fair and accurate depiction of the expert's opinion as to how the accident occurred, and found that the opinion, as well as the computer animation, would be helpful to the jury in understanding the issues in the case. Our review of the record has revealed no abuse of the trial court's discretion in these preliminary findings.

Furthermore, our review of the computer animation videotape in the context of this record convinces us that the trial court appropriately exercised its discretion in its balancing analysis pursuant to section 90.403, Florida Statutes (1991). *See Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991) (trial court has broad discretion in determining whether evidence should be admitted when there is a section 90.403 objection). Although evidence in this case indicated a bloody scene with screaming victims, the computer animation videotape demonstrated no blood and replicated no sound. Further, the mannequins used in the computer animation videotape depicted no facial expressions. Although some testimony indicated that the truck was traveling up to twice the posted speed limit, the videotape depicted the truck travelling at the posted speed limit.

Moreover, we find there was no undue emphasis placed upon the computer animation videotape, which was shown to the jury for a total of approximately six minutes in the course of an eleven day trial. The judge appropriately explained to the jury that the videotape was being used only to illustrate the expert's opinion. Cross-examination was permitted and the record demonstrates it was made clear to the jury that if the information entered into the computer was inaccurate, then the computer animation itself was inaccurate.

Accordingly, we find no error in the trial court's decision to permit the computer generated animation to be shown to the jury as a demonstrative exhibit illustrating Detective Babcock's reconstruction of the motor vehicle accident.

C) JURY INSTRUCTIONS CONCERNING KNOWLEDGE REQUIREMENT UNDER SECTION 316.027, FLORIDA STATUTES (1991)

Briefly, we advise that it would be prudent for the trial court to conform, upon remand, to the requirements of *Mancuso v. State*, 652 So. 2d 370 (Fla. 1995). The Florida Supreme Court has held that criminal liability under section 316.027, Florida Statutes (1991), requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed. *Id.* at 372. Even though we have not found reversible error as to the specific instruction given below, we find the better approach would be for the trial court to more strictly comply with *Mancuso* upon remand.

All other issues raised are either affirmed or rendered moot by this opinion.

REVERSED AND REMANDED FOR NEW TRIAL. (STONE, and WARNER, JJ., concur.)

* * *

Dissolution of marriage—Alimony—Although wife may not be able to maintain marriage's standard of living without alimony award, trial court erred in awarding permanent alimony where marriage only lasted six years—Award of five years of rehabilitative alimony exceeded what is required to make wife self-supporting in this case—Argument that award was necessary to enable wife to stay at home with parties' child was not supported by any evidence of agreement between parties that wife would stay at home with the child—Child support—In determining husband's child support obligation, trial court erred in failing to deduct husband's court-ordered support obligation for child from previous marriage in arriving at net monthly income—Error to fail to address wife's request for restoration of her former name

KENNETH J. GREEN, Appellant, v. ELLEN T. GREEN, Appellee. 4th District. Case Nos. 94-2339 and 94-3504. L.T. Case No. CD 93-1548 FA. Opinion filed March 13, 1996. Consolidated appeals and cross-appeal from the Circuit Court for Palm Beach County; Virginia Gay Broome, Judge. Counsel: Kevin F. Richardson of Clyatt & Richardson, P.A., West Palm Beach, for appellant/cross-appellee. Jane Kreusler-Walsh of Jane Kreusler-Walsh, P.A., and Neil Jagolinzer of Christiansen & Jacknin, West Palm Beach, for appellee/cross-appellant.

(WARNER, J.) These two consolidated cases arise from the dissolution of marriage proceedings between the appellant, a golf professional, and the appellee, his wife. The husband challenges the awards of both permanent and rehabilitative alimony, child support, attorney's fees and costs, and the determination of the value and characterization of assets in equitable distribution. In other words, the husband was generally unhappy with the entire final judgment. The wife cross-appeals, arguing that the trial court erred in refusing to restore her former name, which the husband concedes was error. We reverse the awards of alimony and child support, but affirm the equitable distribution and valuations and award of attorney's fees and costs.

This was a short-term marriage. The parties were married for approximately six years at the time of the filing of dissolution. The marriage had been a second marriage for each party, who both had a child or children from their previous marriages. This marriage produced one child. Prior to the marriage, the wife worked as a water exercise instructor on a part-time basis, although she had a bachelor's decree in educational psychology. After the marriage, the wife did not work at all. When the wife consented to marry the husband, they agreed that she would travel extensively with the husband on his golf tours, supporting him emotionally and socially on the tour. While the wife states in her brief that they had an agreement that she would not work while their child was young, we find no record support for this statement. Our review of the record shows that both parties testified that the husband's expectation and their agreement was that she would not work so that she could travel and be with him. In fact, on some tournaments she had to leave her children at home, which bothered her, but she fulfilled her role as his wife. The trial court found that she had made a significant contribution to his career through her efforts.

The wife came into the marriage with no assets. The husband had considerable assets and added to them during the marriage with his golf earnings. The husband made a substantial income, and the parties lived very well. An accountant testified that the family, while together, had living expenses of $30,000 per month, although the trial court found that the husband's monthly

net income was only $15,960. The trial court equitably divided the marital assets on a 50/50 basis, and the wife received $697,893 in assets less the mortgage on the marital home. From the income-producing assets within the wife's share of equitable distribution, she receives an after-tax investment income of $1[redacted] per month.

The wife's vocational expert testified that the wife could obtain a teaching certificate within one year which would allow her to teach, earning a starting salary of $27,000. However, the expert thought it would take another year for her to find a job. Her expert further testified that the wife did not give up much of a career to marry the husband.

At the time of the final judgment, the wife was 36 years old, and the husband was 35. Both were in good health. The wife has lost no career opportunities as a result of the marriage. The wife has gained substantial assets from the marriage, leaving the marriage with a comfortable estate.

The trial court awarded the wife $3,000 per month in permanent alimony, primarily because the trial court found that she could not maintain the standard of living of the marriage without it. We hold that this was error. This was a short-term marriage, and generally permanent alimony is inappropriate unless a genuine inequity is created by the dissolution. *Geddes v. Geddes*, 530 So. 2d 1011 (Fla. 4th DCA 1988). In short-term marriages, the standard of living occupies considerably less prominence than in long-term marriages and is certainly not dispositive of a decision to award permanent alimony. *See Kremer v. Kremer*, 595 So. 2d 214 (Fla. 2d DCA 1992).

Moreover, the facts of this case follow closely the fact pattern in *Wright v. Wright*, 613 So. 2d 1330 (Fla. 4th DCA 1992). In that case, we held that the wife of the five year marriage that produced one child was not entitled to permanent alimony where the wife left the marriage with substantial assets, even though she would not be able to support herself in the extraordinarily lavish lifestyle in which the parties had lived during the marriage. We w[redacted]:

> [redacted] we stated in *Geddes*, the former husband's desire for the support obligation to be temporary must be balanced against the former wife's lost opportunities and ability to become self-supporting. The distribution scheme in the instant appeal enables the wife to leave this marriage at the age of thirty-nine with a great deal more than what she possessed when she entered it. Although we recognize that a short marriage alone does not preclude a permanent alimony award, the present record, considering her share of the equitable distribution, does not support that the wife is permanently without the means of self-support as a result of anything that transpired during the marriage. *Kremer*. Accordingly, we hold that the trial court abused its discretion when it awarded the wife permanent alimony . . . .

Id. at 1333 (citations omitted). Similar cases should yield similar results, and this case is very similar to *Wright*. *See also Childers v. Childers*, 640 So. 2d 108 (Fla. 4th DCA 1994). This is not the exceptional case where a genuine inequity is created by a failure to award permanent alimony. The permanent alimony award is reversed.

The trial court also awarded the wife five years of $3,000 per month rehabilitative alimony, which the court termed "bridge-the-gap." This term refers to awards of rehabilitative alimony, not to retrain or rehabilitate a divorcing spouse, but to ease the transition between married life and being single. *See Iribar v. Iribar*, 510 So. 2d 1023 (Fla. 3d DCA 1987); *Murray v. Murray*, 374 So. 2d 622 (Fla. 4th DCA 1979). In *Iribar*, the court rejected the wife's contention that the rehabilitative alimony award should have been for five years, finding that the trial court's eighteen month award of bridge-the-gap alimony was sufficient where the wife was possessed of sufficient job skills to support herself. *Iribar*, 510 So. 2d at 1024. The wife in the instant case intro[redacted]d evidence of a rehabilitative plan which would place her in the job market within two years, with an income substantially in excess of what she was earning prior to the marriage. Under the traditional rationale, five years of rehabilitative alimony is substantially in excess of what is required to make the wife self-supporting. The wife also contends that rehabilitative alimony is necessary so that she can stay at home with the minor child for several more years, but as we related in the facts, there was no agreement that the wife not work so that she could stay home with the children. Instead, the agreement made was that the wife would travel and take care of the husband. While there is some authority which would justify an alimony award on the necessity to take care of small children, *see, e.g., Zeigler v. Zeigler*, 635 So. 2d 50 (Fla. 1st DCA 1994), first there must be a joint agreement as to the role of the wife in forgoing a career to take care of the children. Here, the agreement was something different. We therefore reverse and remand to the trial court to fashion a new rehabilitative award to accomplish the rehabilitative goals presented in the testimony. The trial court may also reconsider the amount of the award, given our reversal of the award of permanent alimony which changed the plan envisioned by the trial court in the final judgment.

In determining that the husband's child support obligation is $1,650 per month, the trial court failed to deduct the husband's court-ordered support obligation of $1,750 per month for his child from a previous marriage in arriving at his net monthly income. *See* § 61.30(4), Fla. Stat. (1993). We therefore reverse the child support award and remand for recalculation consistent with this opinion.

We affirm the remaining points on the appeals from the final judgment and from the order on costs and attorney's fees. However, we agree that the trial court erred in failing to address the wife's request for restoration of her former name, and on remand we direct the trial court to restore the wife's former name.

Affirmed in part, reversed in part, and remanded. (FARMER, J., concurs. STEVENSON, J., dissents with opinion.)

(Stevenson, J., dissenting in part.) I respectfully dissent from that part of the majority opinion which reverses the five year, $3,000 per month rehabilitative alimony awarded to the former wife. The trial court recognized that this temporary award exceeded the two year period after which the wife was expected to enter the job market as a teacher and expressly based this additional period of rehabilitative alimony on the "bridge-the-gap" theory that was approved by this court in *Murray v. Murray*, 374 So. 2d 622 (Fla. 4th DCA 1979) and further discussed in *Iribar v. Iribar*, 510 So. 2d 1023 (Fla. 3d DCA 1987). The facts of this case support such an award.

During the marriage, at the insistence of the husband, the wife had been a homemaker, was responsible for all domestic duties, and did not pursue any career opportunities. At the time of dissolution, the husband's net monthly income was $15,690 and the wife's projected gross monthly income (after spending approximately two years obtaining a teaching certificate and a teaching job) was optimally around $2,000 per month. The trial court found that "under any scenario of events . . . [the wife] will never be able to attain a standard of living which remotely approaches the standard of living of her married life." In addition, although there was testimony concerning an approximate two year rehabilitation plan, the trial court never expressly placed its imprimatur on the plan and may have considered the wife's past unemployment history as a factor which would prevent her from quickly and easily obtaining employment stability.

Particularly in view of this court's reversal of the permanent alimony award of $3,000 per month, I cannot say that the trial court abused its discretion in determining that a five year period of rehabilitative alimony was necessary to aid the wife in making the transition between living on the extraordinary income which she enjoyed as part of a family unit with her professional golfer husband, and the income which she now must generate on her own. "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

Accordingly, I would affirm the trial court's decision to award the former wife $3,000 per month rehabilitative alimony for a five year period.

* * *

EXHIBIT 2

law, as the employees who cared for and treated Barfuss are the very persons whose actions or inactions form the basis for the complaint.[5]

Lastly, Barfuss has failed to demonstrate that the trial court departed from the essential requirements of law when it ordered her to produce copies of statements made by former employees, excluding the mental impressions of counsel.

Accordingly, the petition is granted in part and the writ is issued to that extent. That portion of the circuit court order requiring the disclosure of expert witnesses is quashed; in all other respects the petition is denied.

RYDER, A.C.J., and THREADGILL and FULMER, JJ., concur.

David JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 93-3248.

District Court of Appeal of Florida, Fourth District.

Feb. 1, 1995.

Rehearing, Rehearing En Banc and Certification Denied July 21, 1995.

Defendant was convicted of attempted burglary of conveyance and resisting officer without violence following jury trial in the Circuit Court, Broward County, Mark A. Speiser, J., and he appealed. The District Court of Appeal, Polen, J., held that: (1) instruction that proof beyond a reasonable doubt does not require absolute certainty minimized reasonable doubt standard in violation of due process, and constituted fundamental error, and (2) reversible error occurred in response to juror's inquiry as to why nothing had been presented as to background of defendant, when court commented that such type of information does not come out unless defendant takes the witness stand.

Reversed and remanded for new trial.

1. Constitutional Law ⇐268(11)
Criminal Law ⇐789(4)

Trial court's extemporaneous instructions to jury prior to commencement of evidentiary portions of proceedings, advising jury that standard of proof beyond a reasonable doubt did not require absolute certainty, minimized reasonable doubt standard in violation of due process. U.S.C.A. Const. Amend. 14; LSA-Const. Art. 1, § 2.

2. Criminal Law ⇐789(4), 1038.1(5), 1172.2

Minimization of reasonable doubt standard by advising jury that it did not require absolute certainty constituted fundamental, reversible error despite fact that defendant did not preserve issue, where trial court failed to give proper balancing instructions. U.S.C.A. Const.Amend. 14; LSA-Const. Art. 1, § 2.

3. Criminal Law ⇐656(1, 7), 1166.22(4.1)

It was reversible error for trial court to make extemporaneous comment in addition to standard jury instructions, in response to juror's inquiry as to why nothing had been presented as to background of defendant, to effect that that type of information does not come out unless defendant takes the witness stand, as comment appeared to link failure to testify with keeping bad evidence from the jury, and subsequent "curative" instruction that there was "nothing else before you" and that they "know nothing about the defendant" merely increased the potential adverse inference.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Asst. Public Defender, West Palm Beach, for appellant.

5. It should be noted that there is no restriction on contact with former employees who were merely witnesses to the care of Barfuss. *See* Carl R. Miller and Angelo J. Calfo, *Ex Parte Contact With Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 Bus. Law 1053, 1068-73 (1987).

Robert A. Butterworth, Atty. Gen., Tallahassee, and James J. Carney, Asst. Atty. Gen., West Palm Beach, for appellee.

POLEN, Judge.

David Jones timely appeals his judgment and sentence, after a jury trial convicting him of attempted burglary of a conveyance and resisting an officer without violence. Jones's arrest, and subsequent conviction, arose out of a confrontation with two Fort Lauderdale police officers who, in full uniform, while patrolling in a marked police car, observed the defendant sitting on a bicycle, trying the handle of a car door. When the officers approached, Jones hit Officer Donisi in the chest, jumped off his bicycle, and ran. A chase ensued, after which Jones was apprehended with the aid of a K9 dog, and arrested. This two-point appeal arose out of the trial judge's having given, at trial, extemporaneous instructions as to what constitutes "reasonable doubt," and his improper response to a juror's question, at the close of jury instructions, as to why they had not heard anything about the defendant's background. We reverse on both points.

[1] The trial court gave extemporaneous instructions to the jury prior to commencement of the evidentiary portions of the proceedings. Those instructions included a segment where the "cardinal rules" were explained to the jury as to how the proceedings should be conducted on the jury's part. The third of those "cardinal rules" was that the jury should not demand proof beyond all doubt or complete certainty before finding appellant guilty. The relevant portion of the court's pretrial extemporaneous instructions were as follows:

> 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 is known as the standard of proof, and that's a landmark concept. That's a bedrock foundation of our American Criminal jurisprudence system. That anytime any jury anywhere in the United States of America, no matter what the charge is the State must demonstrate to the jury and satisfy to the jury beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.
>
> Now, I'll give you a more elaborate definition of what that phrase and concept means. The phrase beyond and to the exclusion of every reasonable doubt means, suffice it to say it's a very heavy burden that the State shoulders. Whenever charging somebody with committing a crime in order to secure conviction from the jury.
>
> *But even though it's a very heavy burden the State does not, I repeat, stress, emphasize, the State does not have to convince you the jury to an absolute certainty of the Defendant's guilt. You do not have to be one hundred percent certain of the Defendant's guilt in order to find the Defendant guilty.*
>
> 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 you can attach a reason to that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. And if all the elements of the crime have been proven to you then you must find the Defendant guilty (emphasis added).

In the instant case, we agree with the appellant that the indispensable reasonable doubt standard, a component of due process of law in criminal proceedings was abridged by the trial judge's statement that certitude was not required. In fact, the instruction was tantamount to telling the jury that it could base a guilty verdict on a probability of guilt as long as it was remarkably strong probability. This kind of minimization of the reasonable doubt standard violates the due process clause of the federal and state constitutions. *See Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), where in the Supreme Court deemed unacceptable a trial court's instruction that reasonable doubt "must be such doubt as would give rise to a

grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof."

[2] At bar, we find that this minimization of the reasonable doubt standard constituted fundamental error as it deprived the appellant of his defense, the reliance on the reasonable doubt standard. In arriving at this conclusion, we specifically distinguish the case at bar from the holding in *Freeman v. State*, 576 So.2d 415, 416 (Fla. 3d DCA 1991). In *Freeman*, the court held that a complaint with the reasonable doubt instruction was not preserved and did not amount to fundamental error. The court based its conclusion (that the jury instruction did not rise to the level of fundamental error) on the balancing effect of the court's having also given extensive and proper jury instructions on reasonable doubt and presumption of innocence. *Id.* at 416.

At bar, the trial judge's instructions were accurate as far as they went. However, the difficulty arises from the lack of completeness. The failure of the trial judge to give proper balancing instructions constitutes reversible error despite the fact that the appellant did not preserve the issue. Failure to give complete and accurate instruction is *fundamental* error, *reviewable in the complete absence of a request or objection*. *See Carter v. State*, 469 So.2d 194 (Fla. 2d DCA 1985).

[3] We also agree with the appellant, pertaining to Point II of his appeal, that it was reversible error for the trial judge to have impermissibly made an extemporaneous comment in addition to the standard jury instructions. In response to a juror's inquiry as to why nothing had been presented as to the background of the defendant, in terms of prior arrests or education, the trial judge's exact comment was:

> [THE COURT]: Well, that type of information doesn't come out at all unless the Defendant takes the witness stand and testifies and then you learn a little more about the Defendant. But he didn't have to testify and no one could hold it against him because he didn't testify.

In *Kelley v. State*, 486 So.2d 578, 584 (Fla. 1986), the court cautioned against deviating from the standard jury instructions, since a trial judge "walks a fine line indeed upon deciding to depart" from them as "the risk is too great that an imprudent instruction" may jeopardize "the conscientious conduct of an otherwise entirely fair trial." In the instant case, the above-quoted response from the trial judge, in response to the jury question, appeared, however unintentionally, to link failure to testify with keeping bad evidence from the jury, something that appellant immediately objected to after the damage had been done. We hold that the trial court's subsequent efforts to rectify the negative impact were insufficient. The trial judge's subsequent "curative" instruction that there was "nothing else before you" and that they "know nothing about the defendant" merely increased the potential inference that this was due to appellant's decision not to testify. At bar, we note that the defendant did request a curative instruction. However, even in the absence of such a request, the trial judge's comments, alone, would have been sufficiently damaging to constitute reversible error. Thus, we reverse and remand for a new trial on this ground.

STONE, J., and DONNER, AMY STEELE, Associate Judge, concur.

WEST KEY NUMBER SYSTEM

CENTRAL FLORIDA REGIONAL HOSPITAL, INC., etc., Petitioner,

v.

Paul WAGER, et al., Respondents.

David C. MOWERE, et al., Petitioners,

v.

Paul WAGER, et al., Respondents.

Nos. 94–2138, 94–2139.

District Court of Appeal of Florida, Fifth District.

March 10, 1995.

Order Certifying Question July 14, 1995.

Parents brought medical malpractice action alleging that negligent prenatal care re-

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affirmed on appeal. *National Envtl. Proas.*, 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-

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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.)

[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).

* * *

EXHIBIT 5

1

STATE of Florida, Petitioner,

v.

Ronnie WOODS, Respondent.

No. 80369.

Supreme Court of Florida.

July 1, 1993.

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance, Fourth District—Case No. 92-0805, Broward County.

Robert A. Butterworth, Atty. Gen., and Joan Fowler, Sr. Asst. Atty. Gen., and Don M. Rogers, Asst. Atty. Gen., West Palm Beach, for petitioner.

Richard L. Jorandby, Public Defender, and Robert Friedman, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for respondent.

PER CURIAM.

We have for review *State v. Woods*, 602 So.2d 698, 698 (Fla. 4th DCA 1992), in which the Fourth District Court of Appeal certified the same question that it certified in *Williams v. State*, 593 So.2d 1064 (Fla. 4th DCA 1992). In *Williams*, the court certified the following question:

> DOES THE SOURCE OF ILLEGAL DRUGS USED BY LAW ENFORCEMENT PERSONNEL TO CONDUCT REVERSE STINGS CONSTITUTIONALLY SHIELD THOSE WHO BECOME ILLICITLY INVOLVED WITH SUCH DRUGS FROM CRIMINAL LIABILITY?

593 So.2d at 1064. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

We addressed this issue in *State v. Williams*, 623 So.2d 462 (Fla.1993), where we held

> that the illegal manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation within 1000 feet of a school constitutes governmental misconduct which violates the due process clause of the Florida Constitution.

623 So.2d at 463. Accordingly, we approve the decision of the district court below.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

McDONALD, J., dissents.

2

STATE of Florida, Petitioner,

v.

Michael Anthony RHODES, Respondent.

No. 79910.

Supreme Court of Florida.

July 1, 1993.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions, Fourth District—Case No. 91-2482, Broward County.

Robert A. Butterworth, Atty. Gen., Joan Fowler, Sr. Asst. Atty. Gen., Bureau Chief, and Patricia G. Lampert, Asst. Atty. Gen., West Palm Beach, for petitioner.

Richard L. Jorandby, Public Defender, and Tanja Osapoff, Asst. Public Defender, West Palm Beach, for respondent.

PER CURIAM.

We have for review *Rhodes v. State*, 597 So.2d 974 (Fla. 4th DCA 1992), in which the Fourth District Court of Appeal reversed the respondent's conviction for purchasing crack cocaine within 1000 feet of a school because the district court found that law enforcement officials' illegal manufacturing of a controlled substance violated the due process clause of

the Florida Constitution.[1] The district court cited its decision in *Kelly v. State*, 593 So.2d 1060 (Fla. 4th DCA), *review denied*, 599 So.2d 1280 (Fla.1992), as the basis of the reversal. The district court certified the issue raised by *Kelly* to this Court in *Williams v. State*, 593 So.2d 1064 (Fla. 4th DCA1992), a case which we subsequently accepted for review. Thus, we accept jurisdiction of the instant case. Art. V, § 3(b)(3), Fla. Const.; *Jollie v. State*, 405 So.2d 418 (Fla.1981).

In *Williams*, the Fourth District Court of Appeal certified the following question as one of great public importance:

> DOES THE SOURCE OF ILLEGAL DRUGS USED BY LAW ENFORCEMENT PERSONNEL TO CONDUCT REVERSE STINGS CONSTITUTIONALLY SHIELD THOSE WHO BECOME ILLICITLY INVOLVED WITH SUCH DRUGS FROM CRIMINAL LIABILITY?

593 So.2d at 1064. We subsequently addressed this issue in *State v. Williams*, 623 So.2d 462 (Fla.1993), where we held

> that the illegal manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation within 1000 feet of a school constitutes governmental misconduct which violates the due process clause of the Florida Constitution.

623 So.2d at 463. Accordingly, we approve the decision of the district court below.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

McDONALD, J., dissents.

1. Art. I, § 9, Fla. Const.

STATE of Florida, Petitioner,

v.

John Francis ROBERTSON, Respondent.

No. 80731.

Supreme Court of Florida.

July 1, 1993.

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance, Fourth District—Case No. 91–2288, Broward County.

Robert A. Butterworth, Atty. Gen., Joan Fowler, Bureau Chief, Sr. Asst. Atty. Gen. and Douglas J. Glaid, Asst. Atty. Gen., West Palm Beach, for petitioner.

Richard L. Jorandby, Public Defender and Joseph R. Chloupek, Asst. Public Defender, West Palm Beach, for respondent.

PER CURIAM.

We have for review *Robertson v. State*, 605 So.2d 94 (Fla. 4th DCA 1992), in which the Fourth District Court of Appeal certified the following question as one of great public importance:

> DOES THE SOURCE OF ILLEGAL DRUGS USED BY LAW ENFORCEMENT PERSONNEL TO CONDUCT REVERSE STINGS CONSTITUTIONALLY SHIELD THOSE WHO BECOME ILLICITLY INVOLVED WITH SUCH DRUGS FROM CRIMINAL LIABILITY?

Id. at 94. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

We addressed this same issue in *State v. Williams*, 623 So.2d 462 (Fla.1993), where we held

> that the illegal manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation within 1000 feet of a school constitutes governmental misconduct which violates the due process clause of the Florida Constitution.

EXHIBIT 6

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

KENNETH M. PIERCE

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 93-01302

L.T. CASE NO. 92-19316 CF10A
BROWARD

April 24, 1996

93-140698

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed March 13, 1996, to stay is hereby denied; further,

ORDERED that appellant's motion filed March 28, 1996, for rehearing and for certification of question of great public importance is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Public Defender 15
Attorney General-W. Palm Beach

/CH

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL

APR 25 1996

CRIMINAL OFFICE
WEST PALM BEACH

EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,575

96-140730

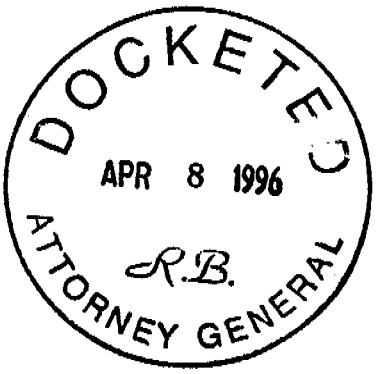
STATE OF FLORIDA,

Petitioner,

vs.

MILO WILSON,

Respondent.



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ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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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.
>
> 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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> * * *
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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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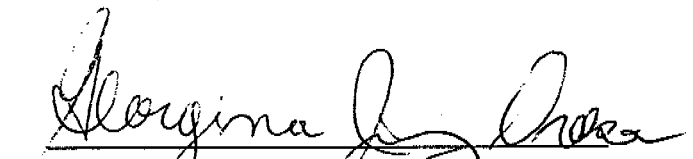
[5]As argued before the District Court, with reference to count II, Clara Wells, the second victim, testified the man with the gun, Respondent, took $120 [all in twenty dollar bills] from her (R. 184). Nine $20 bills [$180] were recovered from the co-defendant's pocket (R. 211, 253), and returned to 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



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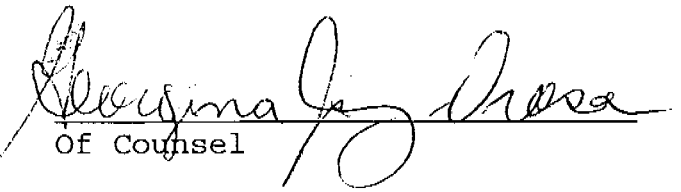
CERTIFICATE OF SERVICE

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 A

affirmed on appeal. *National Envtl. Proas.*, 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 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).

* * *