IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,915

STATE OF FLORIDA,

Petitioner,

vs.

JAMES McINNIS,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, James McInnis, 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) (THE INSTANT CASE)
question certified, 21 Fla. L. Weekly D242 (Fla. 4th DCA Apr. 17, 1996), decision on jurisdiction postponed, McInnis v. State, No. 87,915 (Fla. May 10, 1996);

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); and

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

The trial judge in the Wilson and Jones, cases 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 the instant case, the Fourth District found the comments of a ***different*** 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.

Petitioner urges this Court to review the issue raised below by Respondent, and ruled upon by the District Court's opinion at bar.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with one count of grand theft (R 417-418). He was convicted as charged and sentenced to 5 years incarceration with credit for 525 days as time served (R 383, 422, 425-426)[1].

The judge presiding over Respondent's trial was the Honorable Charles M. Greene, Circuit Court Judge in and for the Seventeenth Judicial Circuit. Prior to the venire being seated, the trial judge discussed with counsel the procedures for jury selection, what instructions he would be giving, and what instructions counsel wanted the court to give (R 15-32). The trial judge stated:

> I'll give the jury the entire reasonable doubt instruction.
>
> Explain to the jury what the standard of proof is in a criminal case, beyond and to the exclusion of every reasonable doubt; it's not a fraction, it's not absolute proof, but it's certainly nothing less than proof beyond and to the exclusion of every reasonable doubt.
>
> I'll give them a couple examples of that, that the burden being on the State the defendant can be presumed innocent.

(R 18). Respondent did not object to the trial court's proposed procedure.

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[1] As Respondent did not challenge any aspect of his conviction except the trial court's preliminary comments, Petitioner submits that no recitation of the evidence as presented to the jury is necessary for this Court's review of this case.

After the venire was seated, Judge Greene instructed the jury venire, prior to jury selection, with introductory comments, as an overview of a typical criminal trial (R 47-75); the trial court gave its initial instructions to the panel, which instructions included the standard reasonable doubt instruction (R 68-69), and the trial court's examples and/or illustrations of reasonable doubt (R 70-74). During his preliminary remarks, in addition to the passages quoted by the Fourth District in its opinion on rehearing in this case (Exhibit B), the trial court repeatedly told the prospective jurors that the State had the burden of proving the defendant guilty and that the State had to do so beyond and to the exclusion of a reasonable doubt (R 66, 67, 68-69, 70). **Contrary** to the District Court's opinion, as part of these preliminary remarks, the trial court **did** read the complete standard instruction on reasonable doubt to the venire (R 68-69). The trial court emphasized that the State's burden was a heavy one: "And certainly nothing less than that either. There is no lesser burden before someone can be found guilty." (R 71). Respondent **did not object** to these instructions.

As part of the charge to the jury before they retired to deliberate, the trial judge gave the actual sworn jury the complete, approved, standard jury instructions on reasonable doubt

as follows:

> Now, whenever the words reasonable doubt are used, you must consider the following. A reasonable doubt is not a possible doubt, a speculative, imaginary or 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 has not been proved beyond a reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced in 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, a conflict in the evidence, or the lack of evidence.
>
> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, then you should find him guilty.

(R 363-364). The trial court instructed the jury that they had to base their verdict solely on the evidence and the final instructions (R 364, 366, 367, 369), and gave the jury written copies of the instructions given (R 360, 374). Appellant did not object to the instructions as given (R 370, 373-374).

As concluding remarks, the trial court reminded the jury, "it's important that you follow the law spelled out in these instructions, in deciding your verdict. There are no other laws

apply to this case." (R 369).

Respondent appealed his conviction to the District Court, raising as his sole issue the trial court's alleged fundamental error in deviating from the standard instructions on reasonable doubt. In its opinion filed January 24, 1996, the District Court of Appeal, Fourth District, found the trial court's preliminary remarks to the venire to amount to '**minimization** of the reasonable doubt standard' which "deprived McInnis of his defense (reliance on this standard)", and therefore, fundamental error." McInnis v. State, 21 Fla. L. Weekly D243 (Fla. 4th DCA Jan. 24, 1996) (Exhibit A).

The State moved the District Court for Certification of Question and a Stay of Mandate. On April 17, 1996, the District Court issued its opinion "On Motion for Rehearing, Rehearing En Banc, and Motion for Certification of Conflict and Certification of Questions". McInnis v. State, 21 Fla. L. Weekly D934b (Fla. 4th DCA Apr. 17, 1996) (Exhibit B). The District Court granted the motion in part 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 May 10, 1996, this Court postponed its decision on jurisdiction of this case, and set a briefing schedule.

SUMMARY OF THE ARGUMENT

The challenged comments, which occurred only at the preliminary 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 considered together with the charge given to the jury which was ultimately **selected** just prior to their deliberations, if any error occurred, it 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.

ARGUMENT

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, i.e. "that the state did not have to prove its case to perfection or certainty", amounted to a minimization of the reasonable doubt standard. Here, as in Jones, wherein the District Court cited 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. In the case at bar, however, the District Court, ignoring the fact that just prior to the allegedly improper comments, the trial court read to the venire the complete, standard jury instruction on reasonable doubt (R 68-69), and found that no balancing instructions had been given because the standard instructions were not given until just prior to the jury's retiring to deliberate. McInnis v. State, 21 Fla. L. Weekly D242 (Fla. 4th DCA Jan. 24, 1996).

A review of the record, clearly demonstrates that the "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 47-75, 70-74). And more importantly, the comments were made to the entire jury venire, **prior** to jury selection (R 68-74).

During this overview, the trial court introduced himself (R 47), and explained to the jury how a criminal trial is conducted **in general** as well as in his courtroom (R 47-66). The judge

discussed the importance of serving as a juror (R 47-54), the daily routine and schedule (R 54-55), introduced the court personnel and described their functions (R 55-57), explained about voir dire (R 60-62), and proceeded to read and explain the significance (or lack of significance) of the information (R 62-65). The judge informed the jury of the defendant's presumption of innocence, and defined the State's burden of proof, repeatedly stressing that the State was required to prove its charges beyond a reasonable doubt (R 66-71). As part of these instructions, the trial court read to the jury the complete standard instruction on reasonable doubt (R 68-69). The judge then made the following statements:

> You understand what I just told you is that the State has to prove the charges beyond and to the exclusion of every reasonable doubt before Mr. McInnis may be found guilty.
>
> The State is not required to prove these charges absolutely, or 100 percent, or perfectly to you, because as human beings we know one thing, unless we see and experienced something ourselves we can never be that sure in our own minds of what's occurred.
>
> Any time we have to listen to what someone else tells us occurred we can always have a doubt. We can always imagine. We can never be 100 percent sure of anything.
>
> * * *
>
> But a jury can never be as sure of what you saw as you the witness were, and that's why the law does not require that the State prove its case to perfection, or certainty, or 100 percent, but they must prove the case beyond and to the exclusion of every reasonable doubt.

> And certainly nothing less than that either. There is no lesser burden before someone can be found guilty, now as I started to do I've instructed you on some of the issues of law that's applicable to the case, and to any criminal case.

(R 70-71). The judge then continued by giving an example of what analysis, i.e. weighing evidence, determining credibility, jurors might apply to determine whether reasonable doubt existed as to whether a certain event had transpired or not (R 72-74).

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

Additionally, since the challenged comments were only made as "general principles for criminal cases," and the jury was instructed with the complete **standard** jury instructions on burden of proof and the presumption of innocence as part of the

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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 formal instructions given to the sworn jury.

preliminary instructions (R 68-69), prior to being selected as well as again prior to deliberations (R 363-364), 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 binding instructions on the jurors who were later selected and sworn, the decision under review is incorrect. In this case, as 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. 21 Fla. L. Weekly D242; Jones, 656 So. 2d at 490.

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 in original, underlined emphasis added).

The challenged comments in the case at bar are not nearly as strong as the instructions in Victor, or for that matter, those in Jones. 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, **contrary** to the District Court's finding, the trial judge's preliminary comment **was** balanced. As part of the preliminary instructions, the trial judge gave the complete standard instruction (R 68-69), as well as repeatedly emphasizing that the State had the burden of proving the defendant's guilt and that this burden required proof must be beyond and to the exclusion of every reasonable doubt (R 66, 67, 68-69, 70). 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 68-69). 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 that the Court had overlooked the fact that the complete, approved, standard instructions were given prior to deliberations. However, the decision in this case makes 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 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, which were also to given to these prospective jurors during the preliminary instructions (R 68-69). The decision in this case directly conflicts with Esty, Higginbotham, and all other cases holding that instructions must be considered as a whole.

In Jones, the Fourth District relied on Cage v. Louisiana, supra, in finding the trial court's comments to be fundamental error. However, 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 worlds apart from the "grave uncertainty" language in Cage. The comments in this case were accurate and were balanced because the preliminary comments included 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,

which was emphasized by the trial court (R. 68-69), 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. ___, ___, at 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.
>
> * * *
>
> 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 both during the preliminary comments as well as at the end of the case. 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. State, 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 78-188). In addition, both before the jury was selected and again prior to deliberations the judge instructed the jury on the burden of proof and the presumption of innocence pursuant to the standard jury instructions (R 66-70, 363-364). 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. 370, 373-374). As part of the charge to the jury, the trial court read the **standard** jury instructions on reasonable doubt

> Now, whenever the words reasonable doubt are used, you must consider the following. A reasonable doubt is not a possible doubt, a speculative, imaginary or 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 has not been proved beyond a reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced in 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, a conflict in the evidence, or the lack of evidence.
>
> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, then you should find him guilty.

(R 363-364). The defense raised **no** objections to the instructions as read to the jury or as submitted to the jury in writing (R 360, 370, 373-374). As concluding remarks, the trial court reminded the jury, "it's important you follow the law spelled out in these instructions, in deciding your verdict. There are no other laws that apply to this case." (R 369).

The State, thus, submits that since the challenged comments herein were made during the **preliminary** comments to the venire **prior** to jury selection (R 68-69), as well as just prior to the jury deliberations (R 363-364), which comments appropriately told the venire that the State has a very heavy burden of proving its case beyond a reasonable doubt, and since the standard jury instruction was read to the jury both during the preliminary comments and well as 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 dissipated 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 both preliminarily and 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 also given at this time, as well as at the close of evidence in Jones and in this case (R 68-69, 363-364). The jury was told that it *must* follow those instructions (R 369). 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 along with the 'non-standard' comments. 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, 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 the trial judge gave the complete, approved, standard instructions on reasonable doubt and presumption of innocence **both** as part of the preliminary comments and as part of the charge to the jury which was ultimately selected and

deliberated (R 68-68, 363-364). 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 decisions, in the case at bar, the District Court also overlooked the fact that even assuming 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 in the instant case, and affirm Respondent's conviction.

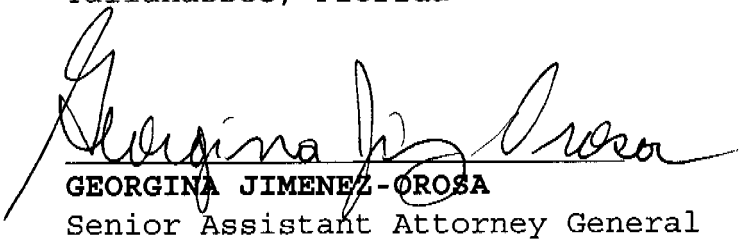
CONCLUSION

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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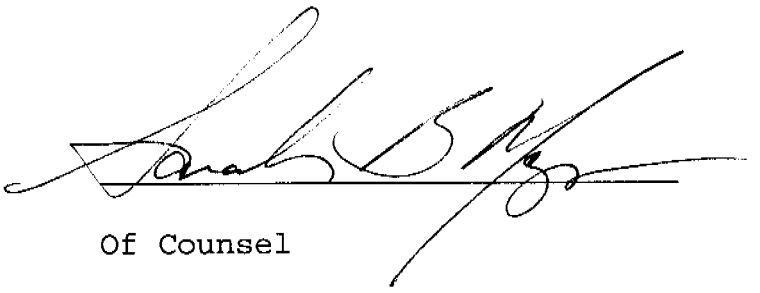
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by Courier to: IAN SELDIN, Assistant Public Defender, Attorney for Respondent, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 4th day of June, 1996.



Of Counsel

APPENDIX

EXHIBIT A

proceedings, the trial judge, even though the ultimate trier of fact, is precluded from weighing the evidence or adjudging its credibility. *E.g.*, *Wygodny*, 644 So. 2d at 581.

Our review of the competent, substantial evidence adduced by appellants in their case in chief reveals that it sufficiently made a prima facie showing of the existence of a contract for insurance; the breach thereof by appellee and resulting damages by appellants. Where such a prima facie showing was made, the trial court was thus precluded from weighing such evidence and/or adjudging its credibility to enter an involuntary dismissal in favor of appellee. Consequently, the entry of the involuntary dismissal and the final judgment entered pursuant to this dismissal constitute reversible error.

Reversed and remanded.

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[1]The final judgment actually recites that it was entered pursuant to a directed verdict but we note that in a bench trial, a Rule 1.420(b), Fla. R. Civ. P. motion for involuntary dismissal is the proper method by which a defendant may obtain a judgment in his favor following the presentation of the plaintiff's case in chief. *Tillman v. Baskin*, 260 So. 2d 509, 510-11 (Fla. 1972); *Wygodny v. K-Site 600 Associates*, 644 So. 2d 579, 581 n. 2 (Fla. 3d DCA 1994); *Thalgott v. Thalgott*, 571 So. 2d 1368, 1370 n. 3 (Fla. 1st DCA 1990).

* * *

Criminal law—Jurors—Challenge—Peremptory—State's objections to defendant's exercise of peremptory challenges were insufficient to trigger requirement that defendant proffer reasons for the challenges—Convictions reversed and remanded for new trial

ANDRE SLATON, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-385. Lower Tribunal No. 93-10228. Opinion filed January 24, 1996. An appeal from the Circuit Court for Dade County, W. Thomas Spencer, Judge. Counsel: Carl J. Mecke, for appellant. Robert A. Butterworth, Attorney General, and Linda S. Katz, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., and NESBITT and JORGENSON, JJ.)

(PER CURIAM.) Andre Slaton appeals his convictions and sentences for attempted armed robbery and burglary with an assault therein. We reverse the convictions and remand for a new trial.

The defendant claims that the lower court, based on inadequate objections by the State, erroneously required him to proffer reasons for peremptorily challenging two different prospective jurors. Both challenges were disallowed and the jurors ultimately sat on the panel that convicted the defendant. We agree that the State's objections in both instances were insufficient to dispel the presumption of validity which attached to the defendant's challenges. *Holiday v. State*, 21 Fla. L. Weekly D4 (Fla. 3d DCA Jan. 5, 1996); *Pride v. State*, 20 Fla. L. Weekly D2709 (Fla. 3d DCA Dec. 22, 1995). Accordingly, we reverse the convictions and remand for a new trial. In view of our resolution of the case on this point we decline to address the defendant's other contentions.

Reversed and remanded for a new trial.

* * *

Unemployment compensation—Unemployment Appeals Commission's denial of benefits reversed and remanded where Commission reweighed evidence

ARLENE RICHARDSON, Appellant, v. HEALTHSOUTH DOCTOR'S HOSPITAL INC., and FLORIDA UNEMPLOYMENT APPEALS COMMISSION, Appellees. 3rd District. Case No. 95-1153. Opinion filed January 24, 1996. An Appeal from the Florida Unemployment Appeals Commission. Counsel: Spiegelman & Spiegelman and Robert I. Spiegelman, for appellant. William T. Moore (Tallahassee), for appellees.

(Before BARKDULL, COPE and GODERICH, JJ.)

(PER CURIAM.) Finding that the Florida Unemployment Appeals Commission reweighed the evidence in denying benefits to the appellant, we reverse with directions to enter an order confirming the findings of fact and award of the appeals referee. *Holloman v. City of Quincy*, 20 Fla. L. Weekly D2681 (Fla. 1st DCA December 8, 1995); *Barreto v. Taco Bell Corp.*, 661 So. 2d 874 (Fla. 3d DCA 1995).

Reversed and remanded with directions.

* * *

FENDER vs. CITY OF MIAMI. 3rd District. #95-3181. January 24, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986), *remanded*, 504 So. 2d 1265 (Fla. 1st DCA 1986); *Shevin ex rel. State v. Public Service Comm'n*, 333 So. 2d 9 (Fla. 1976); *Dawson v. Saada*, 608 So. 2d 806 (Fla. 1992), *remanded*, 612 So. 2d 728 (Fla. 4th DCA 1993); *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311 (Fla. 5th DCA 1987), *review denied*, 528 So. 2d 1181 (Fla. 1988); *Florida East Coast Ry. Co. v. State Land and Water Adjudicatory Comm'n.*, 464 So. 2d 1361 (Fla. 3d DCA 1985); *B.S. Enterprises, Inc. v. Dade County*, 342 So. 2d 117 (Fla. 3d DCA 1977).

FURQUHARSEN vs. STATE. 3rd District. #94-2388. January 24, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *See Burns v. State*, 609 So. 2d 600 (Fla. 1992); *Mills v. State*, 462 So. 2d 1075 (Fla.), *cert. denied*, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985); *Straight v. State*, 397 So. 2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S. Ct. 556, 70 L. Ed. 2d 418 (1981); *Brown v. State*, 550 So. 2d 527 (Fla. 1st DCA 1989), *rev. denied*, 560 So. 2d 232 (Fla. 1990).

MIAMI CHINESE COMMUNITY CENTER LTD. vs. CONSOLIDATED BANK, N.A. 3rd District. #95-1373. January 24, 1996. Appeal from a non-final order from the Circuit Court for Dade County. Affirmed. *Southwest Cycle Sales, Inc. v. Gold Key Mktg., Inc.*, 265 So. 2d 390 (Fla. 3d DCA 1972); *see also Leasefirst v. Allied Mach. of S. Fla., Inc.*, 597 So. 2d 415, 416 (Fla. 4th DCA 1992); *Sierra Holding, Inc. v. Sharp Elec. Corp.*, 471 So. 2d 196, 197 (Fla. 4th DCA 1985).

SIEGEL vs. T J & R JOINT VENTURE. 3rd District. #95-1628. January 24, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *Securities and Exchange Comm'n v. W. J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 , *rehearing denied*, 329 U.S. 819, 67 S. Ct. 27, 91 L. Ed. 697 (1946); *Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979).

VELEZ vs. ALLIED PLATING SUPPLIES, INC. 3rd District. #95-1499. January 24, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *Parrish v. Matthews*, 548 So. 2d 725 (Fla. 3d DCA 1989); *McCarty v. Dade Division of American Hospital Supply*, 360 So. 2d 436 (Fla. 3d DCA 1978).

YOUNG v. YOUNG. 3rd District. #95-2464. January 24, 1996. Appeal from the Circuit Court for Dade County. PER CURIAM. Affirmed. *See Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

* * *

Criminal law—Trial court fundamentally erred by unlawfully minimizing the "beyond a reasonable doubt" standard by instructing venire that the state need not prove its case "to perfection or certainty"

JAMES McINNIS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2792. L.T. Case No. 93-5857CF10A. Opinion filed January 24, 1996. Appeal from the Circuit Court for Broward County; Charles M. Greene, Judge. Counsel: Richard L. Jorandby, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

(POLEN, J.) James McInnis appeals from a final judgment and sentence convicting him of grand theft. McInnis alleges that the trial court fundamentally erred by unlawfully minimizing the "beyond a reasonable doubt" standard by instructing the venire that the state need not prove its case "to perfection or certainty." We agree and reverse.

The instruction given to the venire at bar is substantially similar to the jury instruction given in *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), as the trial court in *Jones* also instructed the venire that the state did not have to prove the defendant's guilt to an absolute certainty. In *Jones*, this court held that the trial court's instruction, in which it stated that certitude was not required, abridged the reasonable doubt standard, a component of due process of law in a criminal proceeding. *Id.* at 490. This court further deemed such a minimization of the reasonable doubt standard fundamental error, as it deprived the appellant of his defense, the reliance on a correct instruction on the reasonable doubt standard. This court also distinguished *Jones* from the third district's opinion in *Freeman v. State*, 576 So. 2d 415 (Fla. 3d DCA 1991).

In *Freeman*, the court held that there was no reversible error in a complained-of portion of a jury instruction on reasonable

doubt. The court noted that no objection was made by the defendant to this instruction, and the giving of the instruction did not otherwise rise to the level of fundamental error, especially when considered in context with the balance of the trial court's extensive and proper jury instructions on reasonable doubt and presumption of innocence. *Id.* at 416. Conversely, this court noted in *Jones* that there were insufficient balancing instructions.

At bar, as in *Jones*, the trial court repeatedly stressed that certitude of the defendant's guilt was not required. In accordance with *Jones*, this minimization of the reasonable doubt standard was fundamental error as it deprived McInnis of his defense (reliance on this standard). 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. Accordingly, we reverse in accordance with our prior opinion in *Jones*. (KLEIN and PARIENTE, JJ., concur.)

* * *

Criminal law—Search and seizure—Warrant—Affidavit—Search of defendant's residence pursuant to warrant that was based on affidavit stating that deputy sheriff set up controlled drug buy and equipped informant with audio transmitter, that informant entered house next door to defendant's, that deputy heard a person say he would go next door to get marijuana, and that officer observed defendant walking to his house and then returning to the first house, where deputy then heard defendant say, "here it is"—Trial court abused its discretion in finding that affidavit in support of search warrant failed to establish probable cause—Fact that deputy did not personally observe defendant in possession of the drugs and did not sufficiently allege that the person overheard saying he intended to go next door was the same person who was observed immediately thereafter going next door did not render the affidavit insufficient

STATE OF FLORIDA, Appellant, v. WILLIAM HOWARD, Appellee. 4th District. Case No. 95-2020. L.T. Case No. 94-2684 CF. Opinion filed January 24, 1996. Appeal of a non-final order from the Circuit Court for St. Lucie County; Cynthia G. Angelos, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and John Tiedemann, Assistant Attorney General, West Palm Beach, for appellant. Bruce M. Wilkinson of Fields & Wilkinson, P.A., Stuart, for appellee.

(PER CURIAM.) The state timely appeals an order granting a motion to suppress physical evidence obtained during a search of the appellee's home conducted pursuant to a warrant. The state contends that the trial court abused its discretion in finding that the affidavit in support of the search warrant failed to establish probable cause. We agree and reverse.

The search warrant was based upon an affidavit which recounted facts relating to a controlled buy that had been conducted approximately ten days earlier. The affiant deputy sheriff recounted the following relevant facts in his sworn application for the warrant:

The deputy used a confidential informant who was alleged to have provided information about drug crimes in the past. The deputy searched both the informant and the informant's vehicle prior to the sale and found no drugs or other contraband. The informant was equipped with an audio transmitter, which was monitored by the deputy. The deputy observed the informant entering the house next door to the appellee's house, for the purpose of purchasing a quarter ounce of marijuana from a female suspect named "Kathy." Once inside the house, the deputy heard Kathy introduce the informant to a man identified as "Billy," who said that he usually did not sell "quarters," but that he would this time. Billy was later identified as the appellee. The deputy heard Billy say, "I have to go next door to get it." The deputy observed Billy walking next door to 2037 Hideaway Circle, enter and leave the house, and return to Kathy's house. Once inside, Billy said, "here it is." Kathy said that the informant could come back any time the informant needed more.

The deputy observed the informant leaving the house and driving away. The informant gave the deputy seven ounces of marijuana, saying that he got it from Billy. The informant told the deputy that Kathy had said that Billy was her main supplier. The deputy searched the informant and the car a second time and found nothing.

No additional facts were presented at the hearing on the motion to suppress, and the appellee did not challenge the truth of the statements contained in the affidavit. The motion to suppress focused on the sufficiency of those statements to establish probable cause. The appellee argued that the affidavit was insufficient to establish that there was contraband located at the appellee's home either at the time of the monitored purchase or at the time the warrant was issued.

The trial court agreed with the defense, making the following findings in the suppression order:

> While the affidavit contains sufficient allegations to establish probable cause under the totality of the circumstances to justify the issuance of a search warrant at the address of 2041 Hideaway Circle [Kathy's house], the Court agrees that the affidavit lacks a sufficient basis for a search warrant being issued on the residence of the defendant at 2037 Hideaway Circle. The affidavit fails to state that the voice heard by the affiant through the electronic surveillance device was that of "Billy" and/or that "Billy" lived next door and/or that "Billy" was the individual who was observed exiting the residence and entering the address of 2037 Hideaway Circle. Further, the affidavit fails to state that the affiant observed any contraband in the hands of the individual at said residence and perhaps most importantly the affidavit fails to state that there was any criminal activity going on in the residence of 2037 Hideaway Circle. An affidavit that fails to show that the target residence contains contraband at the time of issuance is defective, Getreu v. State, 578 So. 2d 412 (2d DCA 1991).

The trial court also noted in the order that "[t]he affidavit does not reflect whether the affiant heard a male or a female voice [when "Billy" was allegedly talking]."

The applicable burden of proof and standard of review of orders on motions to suppress are set forth in *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991) ("*Schmitt I*"), *cert. denied*, 503 U.S. 964, 112 S. Ct. 1572, 118 L. Ed. 2d 216 (1992):

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.

Id. at 409 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). The magistrate's determination of probable cause is entitled to great deference and must not be subjected to a *de novo* review in subsequent proceedings. *Schmitt v. State*, 563 So. 2d 1095, 1099 (Fla. 4th DCA 1990) ("*Schmitt II*"), *aff'd in pertinent part, quashed in part on other grounds*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 503 U.S. 964, 112 S. Ct. 1572, 118 L. Ed. 2d 216 (1992).

The supreme court has stressed that the determination of probable cause requires a fact-based analysis and that the results of that analysis will vary depending upon the context of the case. *Schmitt I*, 590 So. 2d at 409. The evidence in the affidavit need not be conclusive, nor must it meet the "[t]echnical requirements of elaborate specificity" imposed upon legal pleadings. *Schmitt II*, 563 So. 2d at 1098. The magistrate's decision must be upheld unless there was no substantial basis for concluding that probable cause existed. *Id.*

In this case, the trial court held the affiant to a higher standard of proof and pleading than required by the above authorities. A law enforcement officer's supervision of a successful controlled

EXHIBIT B

·iminal law—Sentencing—Community control revocation—·edit for time served on community control to be included in ·itten order

HN ADDERLY, Appellant, v. STATE OF FLORIDA, Appellee. 4th Dis-ct. Case No. 95-0298. Opinion filed April 17, 1996. Appeal from the Circuit ·urt f[redacted] Seventeenth Judicial Circuit, Broward County; Barry E. Gold-·in, Ju[redacted] L.T. Case No. 93-18963CF10A. Counsel: Richard L. Jorandby, ·blic Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm ·ach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, ·d Sharon A. Wood, Assistant Attorney General, West Palm Beach, for appel-·.

OPINION ON REHEARING

[Original Opinion at 21 Fla. L. Weekly D250b]

Editor's Note: Substituted opinion contains extensive changes.]

Per Curiam.) We grant rehearing, withdraw our previous opin-·n of January 24, 1996, and substitute the following opinion.

Appellant violated the conditions of community control and, ursuant to plea agreement, was sentenced to three years in ·rison as a habitual offender with two years of community con-·ol to be followed by ten years probation. Although the trial ·ourt orally pronounced that appellant would receive 404 days ·redit toward the community control portion of his new sentence or time previously served on community control, the court ·ailed to include this credit on the written order. We remand so hat the trial court may correct this omission. In all other re-·pects, we affirm. (GUNTHER, C.J., DELL and STEVEN-SON, JJ., concur.)

* * *

Criminal law—Jury instructions—Reasonable doubt—Questions certified whether instruction as given impermissibly reduced reasonable doubt standard below protections of due process clause and, if so, whether instruction constituted fundamental error

JAMES McINNIS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2792. Opinion filed April 17, 1996. Appeal from the Circuit Cou[redacted] the Seventeenth Judicial Circuit, Broward County; Charles M. Gree[redacted]udge. L.T. Case No. 93-5857CF10A. Counsel: Richard Jorandby, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING, REHEARING EN BANC AND MOTION FOR CERTIFICATION OF CONFLICT AND CERTIFICATION OF QUESTIONS

[Original Opinion at 21 Fla. L. Weekly D242i]

(POLEN, J.) The State of Florida has moved this court for rehearing, rehearing en banc, certification of conflict and certification of questions. We deny all motions except for the motion for certification of questions. We certify the same two questions that were certified as ones of great public importance in *Wilson v. State*, No. 94-2204 (Fla. 4th DCA February 21, 1996) [21 Fla. L. Weekly D476b], to wit:

> 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[1] FUNDAMENTAL ERROR?

(KLEIN and PARIENTE, JJ., concur.)

[1]Prior to empaneling the jury the trial court gave the following instruction:

> The state is not required to prove these charges absolutely, or 100 percent, or perfectly to you, because as human beings we know one thing, unless we see and experience something ourselves we can never be that sure in our minds of what's occurred.
>
> Any time we have to listen to what someone else tells us occurred we can always have a doubt. We can always speculate. We can always imagine. We can never be 100 percent sure of anything.
>
> . . . . .
>
> But a jury can never be as sure of what you saw as you the witness were, [redacted] that's why the law does not require that the State prove its case to perfection, or *certainty*, or 100 percent, but they prove the case beyond and to the exclusion of every reasonable doubt.
>
> . . . .
>
> Let's pretend right now I were in trial, this is to illustrate to you the difference between beyond and to the exclusion of every reasonable doubt and *certainty*.
>
> How did I as a judge come into this courtroom? Because the one thing you know is when you came in I was here. And you have a little advantage in this case because you can look around the courtroom.
>
> You know there is a door you came through. There looks like there is a door to the right of you. As you sit there, looks like a corridor right behind Deputy Moxy.
>
> So as an inquisitive group one of you is the spokesperson, and you ask the attorneys, Mr. Shane, Mr. O'Connel, how did the judge come into this courtroom.
>
> And they tell you the exact same thing. They tell you I came in here through the corridor where Deputy Moxy is seated and I walked up to the bench. And again if you do that, I think you're all going to decide again that's perfectly reasonable that I came in here, as I suggested, but again none of you know that for *certain*, because you were not there.
>
> Now some of you may be what we call doubting Tom's or skeptics that like to imagine or force a doubt, so one of you says to the other jurors, geeze, you know, I saw Deputy Moxy when he stood up.
>
> . . .He's a real tall gentleman. Well, he can easily reach up to the air vent, around the sides of the courtroom, and I'll bet you that in his back pocket he has a screwdriver, and what he does whenever the Judge wants to come into the courtroom, he unscrews the air vent, out pops the judge.
>
> Well, the first thing you're doing is obviously you're speculating, imagining, forcing a doubt, but most importantly you're doing that on evidence that's not even before you.
>
> Because no one has even begun to tell you—There is no evidence that Deputy Moxy has a screw driver in his back pocket, nor that I could fit through the air vent, so such a doubt would not create a reasonable doubt because it is forced speculative or imaginary doubt.

* * *

Civil procedure—Plaintiff seeking to vacate judgment entered in separate action based on "fraud on the court"—Complaint which alleged only intrinsic fraud was properly dismissed with prejudice for failure to state cause of action where there was no demonstration of how complaint could be further amended to state extrinsic fraud

SIME MICHAEL DADIC and MARGARET Z. DADIC, Appellants/cross-appellees, v. MANUAL FARACH; LAW FIRM OF BRACKETT, COOK, SNED, WELCH, HEWITT, D'ANGIO & TUCKER; HAROLD S. STEVENS; and LAW FIRM OF PETERS, ROBERTSON, LAX, PARSONS AND WELCHER, Appellees/cross-appellants. 4th District. Case No. 95-0898. Opinion filed April 17, 1996. Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Roger B. Colton, Judge. L.T. Case No. CL-93-9903-AO. Counsel: Sime Michael Dadic and Margaret Z. Dadic, Wellington, pro se. Marlene S. Reiss and Philip D. Parrish of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for appellees/cross-appellants.

(PER CURIAM.) Appellants appeal the dismissal with prejudice of their amended complaint, seeking to vacate a judgment entered in a separate action. Appellants' claim is based on allegations of Appellees' "fraud on the court" in the other case. We affirm.

Viewing the allegations and making all inferences most favorably to Appellants, it is clear they alleged only intrinsic fraud, not extrinsic. Nor did Appellants demonstrate how they could further amend the complaint to state extrinsic fraud. Therefore, the trial court did not err in dismissing with prejudice for failure to state a cause of action. *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984); *Wescott v. Wescott*, 444 So. 2d 495 (Fla. 2d DCA 1984).

As to Appellees' cross-appeal, we also affirm. (GLICKSTEIN, STONE and GROSS, JJ., concur.)

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Criminal law—Sentencing—Restitution—Error to enter order setting amount of restitution without affording defendant opportunity to be heard

JOE CHANDLER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2498. Opinion filed April 17, 1996. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Susan Lebow, Judge. L.T. Case No. 90-11826CF10B. Counsel: Gary Kollin of Gary Kollin, P.A., Fort Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anne Carrion, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm appellant's conviction. We reverse, however, the order of restitution for $5,494.20. At appellant's sentencing, the trial court reserved ruling on the amount of restitution until a hearing could be conducted on such. Nevertheless,