IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,916

STATE OF FLORIDA,

Petitioner,

v.

RICHARD VARIANCE,

Respondent.

****

ON PETITON FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Sr. Assistant Attorney General
Florida Bar No. 441510

JAMES J. CARNEY
Assistant Attorney General
Florida Bar No. 475246
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
Telephone (407) 688-7759

Counsel for Petitioner

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JAMES J. CARNEY
Assistant Attorney General
Florida Bar No. 475246
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
Telephone (407) 688-7759

Counsel for Petitioner

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PRELIMINARY STATEMENT

Richard Variance was the defendant below and will be referred to as "Respondent." The State will be referred to as "Petitioner." References to the record will be preceded by "R." References to the supplemental record will be preceded by "SR."

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with burglary of a structure (R 186, 201, 204-05).

During preliminary statements to prospective jurors, the trial judge told the prospective jurors that the first cardinal rule in a trial is that they must presume the defendant innocent (SR 18, 19). The second cardinal rule is that the State has the burden of proving the defendant guilty (SR 19). The trial judge also told the jury that the defendant has no burden of proof (SR 19, 25). The defendant is cloaked with a presumption of innocence (SR 20). The trial judge then stated (SR 20-23):

> Now, the third cardinal rule is in order for you, the jury, to find the defendant guilty, the State has the burden of convincing you beyond and to the exclusion of every reasonable doubt that the defendant is guilty. That's what is known as standard of proof. That's a landmark concept, that's a bedrock foundation of the American criminal jurisprudence system.
>
> That is, in order for you to find the defendant guilty, you must be convinced, that is, the State must convince you, quote, beyond and to the exclusion of every reasonable doubt, end quote, of the defendant's guilt so that's a very heavy burden and I will give you a more elaborate definition of what that phrase means when I give you the legal instructions at the conclusion of the trial.
>
> No matter what the charge is, and this is applied in all fifty states of the United States of America, both the state court and federal court, so any time a jury in the United States of America finds the defendant guilty, that means they have been satisfied beyond and to the exclusion of every reasonable doubt that the defendant is guilty

and it doesn't make a difference whether that person is convicted of robbery,, [sic] burglary or stealing a six pack of beer, the burden of proof on the State always remains the same and that is to convince the jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt.

As I said, I will give more elaborate definitions what that phrase means when I give you the legal instructions at the conclusion of the trial, but suffice it to say that it is a very heavy burden that the State shoulders whenever it charges somebody with committing a crime.

In order to secure a conviction, even though its a very heavy burden the State has, in order to convince the jury the defendant is guilty, the State does not, I repeat, stress, and emphasize, the State does not have to convince the jury to an absolute certainty of the defendant's guilty [sic]. Nothing is 100 percent certain in life other than death and taxes, so the point I am trying to make is that you can still, at the conclusion of the trial, find a doubt as to the defendant's guilt and still find him guilty so long as it's not a reasonable doubt. You do not have to be convinced to 100 percent absolute certainty of the defendant's guilt in order to find him guilty.

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 state attorney to Mr. Variance's guilt which you can attach a reason to, then that's a reasonable doubt and you must find the defendant not guilty.

But if at the conclusion of this trial the only kind of doubt you have as to the defendant's guilt, if you have such a doubt, is a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt, that is not a reasonable doubt and if all elements of the crime have been proved to you, you must find the defendant guilty.

Later during voir dire, the trial judge told prospective jurors (SR 29):

> The fifth phase of the trial consists of the legal instructions and that's where I give you the law you apply to the evidence in this case. Any preconceived ideas you have as to what the law is, or what the law should be must be disregarded by you. The only law you apply to the evidence in this case is the law that I give you.

At the conclusion of evidence, the trial judge gave the actual sworn jury the complete, approved, standard jury instructions on reasonable doubt (R 149-50):

> 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 waivers 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 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, lack of evidence, or conflict in the evidence.
>
> The 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.

The trial judge also gave the standard instructions on presumption of innocence (R 149-50). The trial judge told the jury that it must follow these instructions (R 153).

Respondent was convicted as charged (R 186, 201, 204-05). The Fourth District reversed, finding the trial judge's unobjected to preliminary statements on reasonable doubt made to prospective jurors to be fundamental error under Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, ___ So. 2d ___ (Fla. Nov. 7, 1995). See Variance v. State, 21 Fla. L. Weekly D79 (Fla. 4th DCA Jan. 31, 1996). As in Wilson v. State, 21 Fla. L. Weekly D37 (Fla 4th DCA Dec. 20 , 1995), certified, 21 Fla. L. Weekly D476 (Feb. 21, 1996), jurisdiction accepted, State v. Wilson, No. 87,575 (Fla. March 20, 1996), the Fourth District subsequently certified the following 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?

See Variance v. State, 21 Fla. L. Weekly D1052 (Fla. 4th DCA May 1, 1996). This Court then granted Petitioner's motion to stay and postponed its decision on jurisdiction.

JURISDICTIONAL STATEMENT

The Fourth District certified two questions as being of great public importance. This Court has jurisdiction pursuant to Fla. R. App. 9.030(a)(2)(iv). The 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 nineteen cases, including:

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

David Jones v. State,
656 So. 2d 489 (Fla. 4th DCA),
rev. denied, ___ So. 2d ___ (Fla. Nov. 7, 1995)(reversed).

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

Frazier v. State, Case No. 94-0600,
20 Fla. L. Weekly D2102 (Fla. 4th DCA Sept. 13, 1995), rev. denied, Case No. 86,543 (Fla. Dec. 19, 1995)(reversed based on Jones).

Jones v. State, Case No. 94-2267,
20 Fla. L. Weekly D1908 (Fla. 4th DCA Aug. 23, 1995),
rev. denied, Case no. 86,359 (Fla. Nov. 17, 1995)(reversed based on Jones).

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

McInnis v. State, 21 Fla. L. Weekly D242 (Fla. 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, jurisdiction pending in this Court, Case no. 87,862).

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

Rayfield v. State, 20 Fla. L. Weekly D1907 (Fla. 4th DCA Aug. 23), rev. denied, ___ So. 2d ___ (Fla. Nov. 17, 1995) (reversed based on Jones).

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

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

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

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

Jackson v. State, Case no. 95-3738 (pending).

The trial judge 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, and Jackson, the comments of two more trial judge's are being challenged as fundamental

under Jones. This issue is unquestionably one of great public importance. This Court should accept jurisdiction as it did in Wilson and correct the Fourth District's far-reaching misapplication of the law as soon as possible.

SUMMARY OF THE ARGUMENT

I & II

Taken alone, or properly considered with the complete, approved, standard instructions given at the end of trial, the unobjected to preliminary comments on reasonable doubt were an accurate statement of the law. The reasonable doubt standard does not require absolute or one hundred percent certainty. Absolute or one hundred percent certainty is an impossibility. The trial judge's comments were not error, fundamental or otherwise.

ARGUMENT

ISSUE I (RESTATED)

THE TRIAL COURT'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT ERROR.

The Fourth District found the following comments to be fundamental error (SR 20-23):

> Now, the third cardinal rule is in order for you, the jury, to find the defendant guilty, the State has the burden of convincing you beyond and to the exclusion of every reasonable doubt that the defendant is guilty. That's what is known as standard of proof. That's a landmark concept, that's a bedrock foundation of the American criminal jurisprudence system.
>
> That is, in order for you to find the defendant guilty, you must be convinced, that is, the State must convince you, quote, beyond and to the exclusion of every reasonable doubt, end quote, of the defendant's guilt so that's a very heavy burden and I will give you a more elaborate definition of what that phrase means ***when I give you the legal instructions*** at the conclusion of the trial.
>
> No matter what the charge is, and this is applied in all fifty states of the United States of America, both the state court and federal court, so any time a jury in the United States of America finds the defendant guilty, that means they have been satisfied beyond and to the exclusion of every reasonable doubt that the defendant is guilty and it doesn't make a difference whether that person is convicted of robbery,, [sic] burglary or stealing a six pack of beer, the burden of proof on the State always remains the same and that is to convince the jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt.
>
> As I said, I will give more elaborate

definitions what that phrase means ***when I give you the legal instructions at the conclusion of the trial***, but suffice it to say that it is a very heavy burden that the State shoulders whenever it charges somebody with committing a crime.

In order to secure a conviction, even though its a very heavy burden the State has, in order to convince the jury the defendant is guilty, the State does not, I repeat, stress, and emphasize, the State does not have to convince the jury to an absolute certainty of the defendant's guilty [sic]. Nothing is 100 percent certain in life other than death and taxes, so the point I am trying to make is that you can still, at the conclusion of the trial, find a doubt as to the defendant's guilt and still find him guilty so long as it's not a reasonable doubt. You do not have to be convinced to 100 percent absolute certainty of the defendant's guilt in order to find him guilty.

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 state attorney to Mr. Variance's guilt which you can attach a reason to, then that's a reasonable doubt and you must find the defendant not guilty.

But if at the conclusion of this trial the only kind of doubt you have as to the defendant's guilt, if you have such a doubt, is a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt, that is not a reasonable doubt and if all elements of the crime have been proved to you, you must find the defendant guilty (emphasis supplied).

Initially, Petitioner notes that the "instruction"[1] found to

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[1]Because of the wording of the certified questions, Petitioner may 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.

be fundamental error in this case and in Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, ___ So. 2d ___ (Fla. Nov. 7, 1995), 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.

Even if these preliminary comments could somehow be considered equivalent to formal instructions to which the later selected and sworn jury was bound, Jones 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.

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 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 (3rd Cir. 1994) n. 3 (reasonable doubt standard does not require 100 percent probability). The trial judge's statement is completely accurate.

Moreover, the trial judge's preliminary comment was balanced. The trial judge repeatedly emphasized that it was a very heavy burden (SR 20, 21). The trial judge stated that a reasonable doubt was a doubt one can attach a reason to, so long as it was not a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt (SR 22, Petitioner's initial brief p. 11). The latter portion of this statement is taken directly from 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 v. Nebraska, 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583, 597 (1994)(a reasonable doubt at a minimum, is one based upon reason).

The trial court's comments also repeatedly stressed and emphasized that the proof must be beyond and to the exclusion of every reasonable doubt (SR 20, 21, 22, Petitioner's initial brief p. 10). "Reasonable doubt" has a self-evident meaning. See Butler v. State, 646 A. 2d 331, 336 (D.C.App. 1994) (term "reasonable doubt" has self-evident meaning comprehensible to lay

juror). Taken as a whole, the preliminary comment did not understate the burden of proof required. See Victor, 127 L. Ed. 2d at 597, 601 (instructions must be read as a whole).

Additionally, Jones did not mention that as in this case, 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). The State had been arguing in the many cases affected by Jones, that the Fourth District 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 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) and Sloan v. Oliver, 221 So. 2d 435 (Fla. 4th DCA 1969).

Petitioner also notes that the trial judge specifically incorporated by reference the complete, approved, standard instruction on reasonable doubt ***while*** making the preliminary comments on reasonable doubt (SR 20, 21):

> That is, in order for you to find the defendant guilty, you must be convinced, that is, the State must convince you, quote, beyond and to the exclusion of every reasonable doubt, end quote, of the defendant's guilt so that's a very heavy burden and I will give you a more elaborate definition of what that phrase means when I give you the legal instructions at the conclusion of the trial.

* * *

> As I said, I will give more elaborate definitions what that phrase means when I give you the legal instructions at the conclusion of the trial, but suffice it to say that it is a very heavy burden that the State shoulders whenever it charges somebody with committing a crime.

* * *

> The fifth phase of the trial consists of the legal instructions and that's where I give you the law you apply to the evidence in this case. Any preconceived ideas you have as to what the law is, or what the law should be must be disregarded by you. The only law you apply to the evidence in this case is the law that I give you. (emphasis supplied).

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. This Court should quash this far-reaching misapplication of the law by disapproving Jones and reversing this case.

The Fourth District relied on Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), in finding the statement in Jones to be fundamental error. Id. at 490-91. 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 150), 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 this case and 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, Victor makes clear that Cage 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). Nevertheless, the Fourth District continues to apply the overruled Cage standard. See Bove v. State, 21 Fla. L. Weekly D709, 710 (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.

Jones faults 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.")

In Victor, the 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 facts or circumstances shown by the evidence, or from 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. at 598 (some emphasis added).

The language in this case is not nearly as questionable as that in Victor. Unlike Victor, this case and 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.

Petitioner 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 formal 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., 646 A.2d 331, 336-37 (D.C.App. 1994) (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. This Court should disapprove Jones and reverse this case.

ISSUE II (RESTATED)

THE TRIAL JUDGE'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT FUNDAMENTAL ERROR.

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 149-52). The jury was told that it *must* follow those instructions (R 149, 153). 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 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 prevent the defense from losing 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) and Ruland, 614 So. 2d at 538 (same). It is hardly surprising that Respondent did not object to a comment that helped him during voir dire. He should not be allowed to take advantage of the comment in the trial court and then claim fundamental error on appeal.

In finding *fundamental* error, the Fourth District distinguished Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991) 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 149-52). See McInnis, 21 Fla. L. Weekly at D243 (acknowledging that the standard instructions were given in Jones).

In the area of jury instructions, to be fundamental, "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.

There was no error, fundamental or otherwise, in this case. This Court should reverse this case and disapprove Jones.

CONCLUSION

The number of cases affected by the Fourth District's decision in Jones is huge and continues to grow. The decision is without support in the law. The trial judge's comments were not erroneous. This Court should reverse this case and disapprove the decision in Jones.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Sr. Assistant Attorney General
Florida Bar No. 441510

JAMES J. CARNEY
Assistant Attorney General
Florida Bar #475246
1655 Palm Beach Lakes Blvd.
W. Palm Beach, FL 33401
(407) 688-7759

Counsel for Petitioner

Certificate of Service

I CERTIFY that a true copy has been furnished by courier to Allen DeWeese, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach, FL 33401, this 20 day of May 1996.

Of Counsel