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

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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

The information charged Respondent with burglary of "a structure *or* the curtilage thereof." (R 186). At trial, Officer Donisi testified that the portable classrooms are enclosed by a chain link fence (R 21). Thirty to sixty seconds after seeing the man on the roof, Donisi saw Petitioner (R 22). Petitioner and the person on the portable classroom wore a dark winter style Levi jacket and dark pants (R 22, 23). No one was found inside the fence (R 25). Donisi drew a diagram of where he saw the person on the portable and where he saw Petitioner (R 27-28).

JURISDICTIONAL STATEMENT

Petitioner disagrees that cases that have been denied certiorari review in the United States Supreme Court are necessarily unaffected by this Court's decision. See Morales v. State, 580 So. 2d 788 (Fla. 3d DCA 1991)(declining to enforce mandate where district court opinion was superseded by intervening decision of Florida Supreme Court).

Petitioner respectfully asks that this Court decide this issue as soon as possible given the very large number of cases affected by this claim.

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.

Initially, it is difficult to see how Respondent can disagree (Respondent's brief. p. 2) that the trial judge gave the complete, approved, standard instructions on reasonable doubt in this case (R 149-50). See Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994) (approving the standard jury instruction on reasonable doubt, citing Victor).

Respondent's suggests that the trial court's giving of the standard, approved instruction at the end of trial was meaningless (Respondent's brief p. 8). Such a suggestion is simply without basis in logic or the 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).

In his initial comments, the trial judge incorporated by reference the complete, approved instruction on reasonable doubt (SR 20, 21). The complete, approved instructions on reasonable doubt were given immediately before the jury began deliberations. It is difficult to comprehend a more appropriate time for the jury to hear such an instruction. Interestingly, Respondent

concedes that the trial judge's supposedly improper comments were remediable by a proper curative instruction (Answer brief pp. 8-9). Petitioner does not agree that the trial judge's comments were improper. Still, it is difficult to imagine a better "curative" instruction than the complete, standard, approved instruction on reasonable doubt given at the end of this case and incorporated by reference into the trial judge's comments.

Petitioner relies on its initial brief for further argument on this issue.

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.

Respondent suggests that it improperly reduces the level of proof required, to state that a reasonable doubt is a doubt to which a reason can be attached (answer brief p. 14). Respondent's contention is incorrect. 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 standard jury instructions also make it clear that a reasonable doubt is not a possible, speculative, imaginary, or forced doubt (R 149-50).

Respondent's claim that the trial judge's comment violated judicial neutrality, is ridiculous (answer brief p. 17). The comment was a correct statement of the law. The fact that a correct instruction or statement benefits one party does not make it a violation of judicial neutrality.

Respondent claims that the trial court's statement that nothing is 100 percent certain, destroyed his defense (answer brief p. 18). This claim is without merit. The comment was a correct statement of the law.

Additionally, this was not a close case. Respondent admitted to Officer Brabble that he was the person inside the school compound (R 43-48, 52-55, answer brief p. 2). Officer

Hoelbrandt testified that he never lost sight of the person as he left the top of the portable, jumped over the fence, and was arrested (answer brief p. 2). Brabble identified Respondent as the arrestee (answer brief p. 2). Respondent, apparently not realizing he could be convicted of burglary for being inside the fenced curtilage, admitted at arraignment that he was at the school throwing rocks through the window (answer brief p. 3).

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 as soon as possible.

Respectfully submitted,

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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 18 day of June 1996.

Of Counsel