IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,414

STATE OF FLORIDA,

Petitioner,

v.

JAMES MICHAEL POOLE,
a\k\a
FRANK TILLMAN,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

James Michael Poole a\k\a Frank Tillman 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 any supplemental record will be preceded by "SR."

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with arson of a structure and burglary with intent to commit arson (R 702).

During voir dire, the trial judge told prospective jurors that first cardinal rule was that they must presume Appellant innocent (R 24-25). The second cardinal rule is that the State has the burden to prove the Defendant guilty (R 25). The Defendant does not have to prove anything (R 26).

The trial judge then told the prospective jurors (R 26-28):

> Now, the third cardinal rule is that in order for you the jury to find the defendant guilty you must be satisfied beyond and to the exclusion of every reasonable doubt that the defendant is guilty. And that's a landmark concept that's a bedrock foundation of the American Criminal Juris Prudence System. That is, any time, any jury anywhere in the United States of America in all fifty states, State Court, Federal Court, ever finds the defendant guilty of committing a crime, whether that be stealing a six pack of beer, murder, robbery, rape, arson, drug trafficking, burglary; no matter what the crime is, if any jury finds the defendant guilty that jury in effect is saying it has been convinced beyond and to the exclusion of every reasonable doubt of the defendant's guilt. Now, I'll give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial. Suffice it to say it's a very heavy burden that the State shoulders whenever it charges somebody with

committing a crime. In order to secure a conviction even though it's a very heavy burden I repeat, stress, emphasize the State did not, and does not have to convince you to an absolute certainty of the Defendant's guilt. Nothing is one hundred percent certain in life other than death and taxes. So the point I'm trying to make is that you can still have a doubt as to Mr. Poole's guilt and still find him guilty so long as it's not a reasonable doubt.

A reasonable doubt simply stated is a doubt you can attach a reason to. So if at the conclusion of this trial you have a doubt as to Mr. Poole's guilt to which you can attach a reason to that's a reasonable doubt and you must find the defendant not guilty.

On the other hand if the only kind of doubt at the conclusion of this trial you have as to Mr. Poole's guilt is a possible doubt, a speculative doubt, imaginary doubt, or forced doubt, that's not a reasonable doubt. All elements have been proven to you and you must find the defendant guilty.

The trial judge told prospective jurors that the burden of proof was on the State (R 29, 30). Petitioner's failure to present evidence could not be held against him (R 30). He cannot be presumed guilty because he does not put on evidence (R 30).

The trial judge then said (R 33):

Now, the fifth phase of the trial is what's known as the legal instructions. It's where I give you the law that 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 you should disregard. The

sole law you have to apply to the case is the law that I give you.

At the close of evidence, the trial judge instructed the jury that the burden of proof was on the State and that the Defendant was presumed innocent until every material allegation of the offenses are proved beyond a reasonable doubt (R 659, 664, 668-69),

The trial judge then stated (R 669-70):

> Remember, the defendant is never required to prove anything. Whenever you hear the words reasonable doubt you must consider the following:
>
> A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt or forced doubt. Such a doubt must not influence your 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 was one which is not stable, but one which wavers and vacillates, and [sic] the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because a doubt is reasonable.
>
> It is to the evidence introduced upon this trial, and to it alone that you are to look at [sic] 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, ladies and gentlemen, 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 later told the jurors that they must follow the law as given in these instructions (R 673). The case must be decided only upon the evidence (R 673). The trial judge again reminded the jury that they must follow the law as explained in these instructions just given (R 677).

The jury found Petitioner guilty of both charges (R 588, 589). 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, 663 So. 2d 632 (Fla. Nov. 7, 1995)(copy of opinion in this case attached). This Court then granted Petitioner's motion to stay and ordered briefing on the merits.

JURISDICTIONAL STATEMENT

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, 663 So. 2d 632 (Fla. Nov. 7, 1995) (reversed).

Cifuentes v. State, 21 Fla. L. Weekly D77 (Fla. 4th DCA Jan. 3, 1996) (reversed based on Jones) (pending in this Court, case no. 88,415).

Frazier v. State, 664 So. 2d 985 (Fla. 4th DCA), rev. denied, 666 So. 2d 145 (Fla. 1995) (reversed based on Jones).

Jones v. State, 662 So. 2d 365 (Fla. 4th DCA), rev. denied, 664 So. 2d 249 (Fla. 1995) (reversed based on Jones).

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

McInnis v. State, 671 So. 2d 803 (Fla. 4th DCA 1996) (reversed based on Jones, pending in this Court, case no. 87,915).

Pierce v. State, 671 So. 2d 186 (Fla 4th DCA 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), pending in this Court, case no. 88,414.

Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA), rev. denied,

664 So. 2d 249 (Fla. 1995)(reversed based on Jones).

Reyes v. State, Case No. 88,242 (pending in this Court).

Variance v. State, 21 Fla. L. Weekly D79 (Fla. 4th DCA Jan. 31, 1996) (reversed based on Jones)(jurisdiction accepted by this Court, Case no. 87,916).

Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995) (reversed based on Jones, pending in this Court, case no. 87,575).

Bove v. State, 670 So. 2d 1066 (Fla. 4th DCA 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. This case 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

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 (R 26-28):

> Now, the third cardinal rule is that in order for you the jury, to find the defendant guilty you must be satisfied beyond and to the exclusion of every reasonable doubt that the defendant is guilty. And that's a landmark concept that's a bedrock foundation of the American Criminal Juris Prudence System. That is, any time, any jury anywhere in the United States of America in all fifty states, State Court, Federal Court, ever finds the defendant guilty of committing a crime, whether that be stealing a six pack of beer, murder, robbery rape, arson, drug trafficking, burglary; no matter what the crime is, if any jury finds the defendant guilty that jury in effect is saying it has been convinced beyond and to the exclusion of every reasonable doubt of the defendant's guilt. Now, I'll give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial. Suffice it to say it's a very heavy burden that the State shoulders whenever it charges somebody with committing a crime. In order to secure a conviction even though it's a very heavy burden I repeat, stress, emphasize the State did not, and does not have to convince you to an absolute certainty of the Defendant's guilt. Nothing is one hundred percent

> certain in life other than death and taxes. So the point I'm trying to make is that you can still have a doubt as to Mr. Poole's guilt and still find him guilty so long as it's not a reasonable doubt.
>
> A reasonable doubt simply stated is a doubt you can attach a reason to. So if at the conclusion of this trial you have a doubt as to the Mr. Poole's guilt to which you can attach a reason to that's a reasonable doubt and you must find the defendant not guilty.
>
> On the other hand if the only kind of doubt at the conclusion of this trial you have as to Mr. Poole's guilt is a possible doubt, a speculative doubt, imaginary doubt, or forced doubt, that's not a reasonable doubt. All elements have been proven to you and you must find the defendant guilty (emphasis supplied).

Initially, Petitioner notes that the "instruction" found to be fundamental error in this case and in Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 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 stated that it was a very heavy burden (R 27). 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 (R 28). 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 (R 26, 27). "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, 671 So. 2d 803, 804 (Fla. 4th DCA 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 (R 27):

> Now, I'll give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial. Suffice it to say it's a very heavy burden that the State shoulders whenever it charges somebody with committing

a crime. (emphasis supplied).

The trial judge then said (R 33):

> Now, the fifth phase of the trial is what's known as the legal instructions. It's where I give you the law that 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 you should disregard. The sole law you have to apply to the case is the law that I give you.

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 2078), 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, 670 So. 2d 1066, 1069 (Fla. 4th DCA 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). See also Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (instruction 21)("There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.") and Devitt, Blackmar, Wolff, and O'Malley, Federal Jury Practice and

Instructions, Section 12.10 (1992)("it is not required that the government prove guilt beyond all possible doubt.").

The Fourth District's holding on this subject is an anomaly. This Court should disapprove Jones and reverse this case.

ISSUE II

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 669-70). The jury was told that it *must* follow those instructions (R 673). 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 454-56). See McInnis, 671 So. 2d at 804 (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."

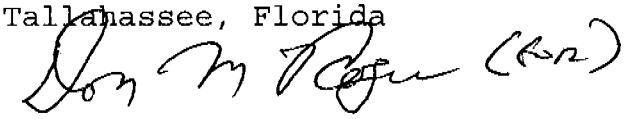
Id. at 1080. This Court found the issue unpreserved because defense counsel never requested or submitted an alternate instruction. This Court went on to hold that the standard jury instruction (the one given here) was proper under Victor. Id. at 1080.

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

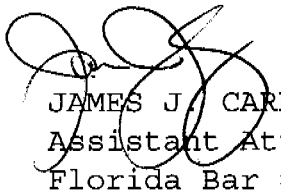
CONCLUSION

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



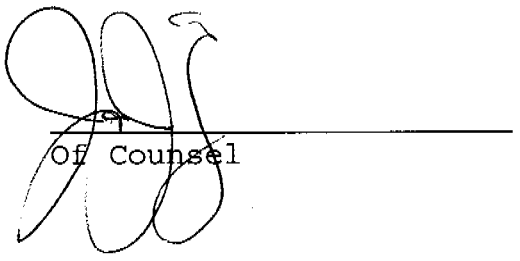
GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510



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 Ian Seldin, Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floord, W. Palm Beach, FL 33401, this 2nd day of August 1996.



Of Counsel

Criminal law—Speedy trial—For speedy trial purposes, defendant who was in custody in Broward County and who was booked and received first appearance in Broward County Circuit Court on charges from Palm Beach County was arrested on those charges on date of that first appearance—Fact that defendant was incarcerated in Broward County did not render him unavailable to the state and did not prevent him from asserting speedy trial rights on the Palm Beach County charges—Writ of prohibition granted where state did not bring defendant to trial within 175 days of arrest

JAMES R. TRAINER, Petitioner, v. HONORABLE VIRGINIA GAY BROOME, Circuit Court Judge, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida and STATE OF FLORIDA, Respondents. 4th District. Case No. 95-3262. L.T. Case Nos. 91-15161CFA02, 91-15257CFA02, 91-14536CFA02. Opinion filed January 24, 1996. Petition for writ of prohibition. Counsel: Richard L. Jorandby, Public Defender, and Andrew M. Pelino, Assistant Public Defender, West Palm Beach, for petitioner. Robert A. Butterworth, Attorney General, Tallahassee, and Elliot Kula, Assistant Attorney General, West Palm Beach, for respondents.

(GUNTHER, C.J.) James R. Trainer, defendant below (Trainer), has petitioned this court for a writ of prohibition alleging a violation of his right to a speedy trial. We grant the petition.

On November 4, 1991, Trainer was arrested in Broward County for robbery with a weapon and violation of probation. Thereafter, in December of 1991, the state filed charges in Palm Beach County against Trainer for three offenses including robbery, false imprisonment and grand theft. Subsequently, on March 26, 1992, the Palm Beach County Sheriff's Office informed the Broward County Sheriff's Office of the three Palm Beach County charges and arrest warrants for Trainer. As a result, while in custody in Broward County, Trainer was booked on the Palm Beach County charges on June 19, 1992, and the next day, Trainer was brought into Broward County Circuit Court for a first appearance on his Palm Beach County charges.

Thereafter, on September 8, 1992, Trainer was sentenced on the Broward charges to twenty years in prison and fifteen years in prison for robbery with a weapon and violation of probation, respectively. On or about March 14, 1995, Trainer filed a notice of expiration of speedy trial on the Palm Beach charges pursuant to Florida Rule of Criminal Procedure 3.191(j). Although he was not brought before the court within five days nor tried within fifteen days of this notice, Trainer was transported from the Charlotte Correctional Institute to the Palm Beach County Jail where he was booked on the Palm Beach County charges. On the day of his arrival at the Palm Beach County Jail, April 1, 1995, the capias warrants for the December 1991 Palm Beach charges were served on Trainer.

After a first appearance in Palm Beach on April 2, 1995, Trainer filed a motion for discharge due to the expiration of speedy trial. Ultimately, the trial court denied Trainer's motion concluding that Trainer was taken into custody for speedy trial purposes when the capias warrants were executed on him in the Palm Beach County Jail on April 1, 1995. Additionally, the trial court determined that up until April 1, 1995, Trainer was incarcerated on the Broward County charges, and the fact that a hold was placed upon him in prison in 1992 did not constitute custody for purposes of speedy trial.

Initially, we note that prohibition is the appropriate remedy to prevent a trial court from proceeding against the accused after a motion for discharge for lack of speedy trial has been erroneously denied. *Vallieres v. Grossman*, 573 So. 2d 196 (Fla. 4th DCA 1991). Florida Rule of Criminal Procedure 3.191(a) provides that "every person charged with a crime by indictment or information shall be brought to trial within ... 175 days if the crime charged is a felony." The time period for speedy trial commences when the individual is taken into custody. Fla. R. Crim. P. 3.191(a). Under the criminal rules, a person is taken into custody

> (1) when the person is arrested as a result of the conduct or criminal episode that gave rise to the crime charged, or
>
> (2) when the person is served with a notice to appear in lieu of physical arrest.

Fla. R. Crim. P. 3.191(d). Moreover, if evidence exists disclosing that an individual was booked into custody for a specific offense, one must presume that the individual was in fact arrested for that offense. *Perkins v. State*, 457 So. 2d 1053, 1055 (Fla. 1st DCA 1984), *rev. denied*, 464 So. 2d 556 (Fla. 1985). Thus, the act of booking or placing a person into custody for an offense clearly implies that an arrest has occurred. *Id.*

In the instant case, it is undisputed that Trainer was booked and received a first appearance on the Palm Beach County charges on June 20, 1992. Thus, Trainer was arrested for speedy trial purposes on the Palm Beach County charges on June 20, 1992. The mere fact that Trainer was incarcerated in Broward County did not render him unavailable to the state and did not prevent him from asserting his speedy trial rights. *Jones v. State*, 573 So. 2d 185 (Fla. 1st DCA 1991); *State v. Dukes*, 443 So. 2d 471 (Fla. 5th DCA 1984). The Palm Beach County authorities obviously had knowledge of Trainer's whereabouts and had the burden of producing him for trial. *Pilgrim v. Swanson*, 558 So. 2d 176 (Fla. 2d DCA 1990); *Walker v. State*, 492 So. 2d 772 (Fla. 1st DCA 1986). Accordingly, Trainer's speedy trial time for the Palm Beach charges commenced when he was booked and had a first appearance on the same on June 20, 1992. Hence, because Trainer was not brought to trial within 175 days of this date, his speedy trial time had expired and his motion to discharge was improperly denied.

Therefore, the petition for writ of prohibition is granted and the trial court is ordered to discharge Trainer.

PETITION GRANTED. (STEVENSON and SHAHOOD, JJ., concur.)

* * *

Criminal law—Trial court committed fundamental error in giving extemporaneous instructions to jury that denigrated reasonable doubt standard

JAMES MICHAEL POOLE, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2731. L.T. Case No. 93-1767CF10A. Opinion filed January 24, 1996. Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge. Counsel: Richard L. Jorandby, Public Defender, and Allen J. DeWeese, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) This case fits squarely within our holding in *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), which controls the outcome here. In *Jones*, as here, the trial court gave extemporaneous instructions to the jury that denigrate the reasonable doubt standard. We held in *Jones* that it was fundamental error to instruct a jury that it could convict on a lesser standard of proof. Accordingly, as we did in *Jones*, we reverse and remand for a new trial. (POLEN, KLEIN and PARIENTE, JJ., concur.)

* * *

Insurance—Personal injury protection—Under statute which provides that PIP insurer shall pay benefits for accidental bodily injury sustained while insured was not an occupant of vehicle if injury is caused by physical contact with the vehicle, insured who was forced to dive out of the way of an errant vehicle and who did not actually touch it could recover PIP benefits—Conflict certified

AMICA MUTUAL INSURANCE COMPANY, Appellant, v. MELVIN CHERWIN, Appellee. 4th District. Case No. 95-0772. L.T. Case No. 94-10223(08). Opinion filed January 24, 1996. Appeal from the Circuit Court for Broward County; Harry G. Hinckley, Jr., Judge. Counsel: Neil Rose, North Bay Village, and Joel Bernstein of Bernstein & Chackman, P.A., Hollywood, for appellant. Lawrence M. Kopelman of Kopelman & Blankman, P.A., Fort Lauderdale, for appellee.

(POLEN, J.) Amica Mutual Insurance Company (Amica) appeals the final judgment in favor of the plaintiff, Melvin Cherwin, on his claim for personal injury protection (PIP) benefits. We affirm.

On February 14, 1994, Melvin Cherwin, while a pedestrian, was approached by an errant vehicle. In an effort to avoid being

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

JAMES MICHAEL POOLE

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 94-02731

L.T. CASE NO. 93-17672 CF10A
BROWARD

June 21, 1996

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed January 30, 1996, for rehearing and rehearing en banc and motion for certification of conflict is hereby denied; further,

ORDERED that appellee's motion filed January 30, 1996, for certification of questions is hereby granted. See Wilson v. State, 21 Fla. L. Weekly D476 (Fla. 4th DCA Feb. 21, 1996).

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

MARILYN BEUTTENMULLER
CLERK

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

/CH

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL

JUN 24 1996

CRIMINAL OFFICE
WEST PALM BEACH

EX. 2