IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,415

STATE OF FLORIDA,

Petitioner,

v.

ROMEO CIFUENTES,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Romeo Cifuentes 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." References to the second supplemental record will be preceded by "SR2."

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with conspiracy to traffick in cocaine and trafficking in cocaine over 400 grams (R 599).

During voir dire, the trial judge told prospective jurors that first cardinal rule was that they must presume Appellant innocent (SR2 20). The second cardinal rule is that the State has the burden to prove the Defendant guilty (SR2 20-21). The Defendant does not have to prove anything ((SR 20-21). The Defendant is presumed innocent (SR2 21).

The trial judge then told the prospective jurors (SR2 21-24):

> Now, the third cardinal rule is that in order for you, the jury, to find the defendant guilty, the State must convince you - the State must convince you beyond and to the exclusion of every reasonable doubt that the defendant is guilty. That's a landmark concept. That's the bedrock foundation of our American criminal jurisprudence system. And that is, any time, any jury, anywhere in the United States of America, in all fifty states, federal court, state court, finds a defendant guilty, no what the charge is, whether it be stealing a six pack of beer, robbery, murder, rape, drug trafficking, arson, burglary, no matter what the charge is, if a jury finds the defendant guilty, that means that jury has indicated that they have 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 means, beyond and to the exclusion of every reasonable doubt, when I give you the legal instructions at the conclusion of the trial. But suffice it to say it's a very heavy burden that the State, represented by Mr. Gallagher, shoulders whenever it charges somebody with committing a crime.

But even though that's a very heavy burden, the State does not, and I repeat, stress and emphasize, the State does not have to convince a jury to an absolute certainty of the Defendant's guilt. In other words, you don't have to be one hundred certain that the Defendant's guilty in order to find him guilty, and that's because nothing is absolutely 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 the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt.

A reasonable doubt, simply stated, is a doubt you can attach a reason to. If at the conclusion of this trial you have a doubt as to the Defendant's guilt as to what 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 you have as to the Defendant's guilt at the conclusion of this trial is a possible doubt, an imaginary doubt, that's not a reasonable doubt. That's not a doubt you can attach a reason to. And if that's the only kind of doubt you have and all the elements of the crime have been proven to you, you

must find the Defendant guilty.

The trial judge told prospective jurors that the burden of proof was on the State (SR2 25). Petitioner's failure to present evidence could not be held against him (SR2 26). He cannot be presumed guilty because he does not put on evidence (SR2 26).

The trial judge then said (SR2 29-30):

> Now, the fifth phase of the trial is jury instructions. 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 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 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 558),

The trial judge then stated (R 558-59):

> Whenever the words reasonable doubt are used, you must consider the following:
>
> A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt. Such a doubt must not influence you to return a verdict of not guilty if, in fact, you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and

you must find the Defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.

A reasonable doubt may arise from the evidence, lack of evidence, or conflict in the evidence.

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 562). The case must be decided only upon the evidence (R 559). The trial judge again reminded the jury that they must follow the law as explained in these instructions just given (R 565).

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). Jurisdictional briefs were filed. 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)(notice to invoke filed).

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 (SR2 21-24):

> Now, the third cardinal rule is that in order for you, the jury, to find the defendant guilty, the State must convince you - the State must convince you beyond and to the exclusion of every reasonable doubt that the defendant is guilty. That's a landmark concept. That's the bedrock foundation of our American criminal jurisprudence system. And that is, any time, any jury, anywhere in the United States of America, in all fifty states, federal court, state court, finds a defendant guilty, no what the charge is, whether it be stealing a six pack of beer, robbery, murder, rape, drug trafficking, arson, burglary, no matter what the charge is, if a jury finds the defendant guilty, that means that jury has indicated that they have 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 means, beyond and to the exclusion of every reasonable doubt, when I give you the legal instructions at the conclusion of the trial. But suffice it to say it's a very heavy burden that the State, represented by Mr. Gallagher, shoulders whenever it charges somebody with committing a crime.

> But even though that's a very heavy burden, the State does not, and I repeat, stress and emphasize, the State does not have to convince a jury to an absolute certainty of the Defendant's guilt. In other words, you don't have to be one hundred certain that the Defendant's guilty in order to find him guilty, and that's because nothing is absolutely 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 the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt.
>
> A reasonable doubt, simply stated, is a doubt you can attach a reason to. If at the conclusion of this trial you have a doubt as to the Defendant's guilt as to what 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 you have as to the Defendant's guilt at the conclusion of this trial is a possible doubt, an imaginary doubt, that's not a reasonable doubt. That's not a doubt you can attach a reason to. And if that's the only kind of doubt you have and all the elements of the crime have been proven to you, 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 (SR2 22, 23). 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 (SR2 23). 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 (SR2 22, 23). "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 (SR2 22):

> Now, I'll give you a more elaborate definition of what that phrase means, beyond and to the exclusion of every reasonable doubt, when I give you the legal instructions at the conclusion of the trial. But suffice it to say it's a very heavy burden that the State, represented by Mr. Gallagher, shoulders whenever it charges somebody with committing a crime. (emphasis supplied).

The trial judge then said (SR2 29-30):

> Now, the fifth phase of the trial is jury instructions. 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 must be disregarded by you. The only law you apply to the evidence in this 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 558-59). The jury was told that it *must* follow those instructions (R 562). 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,
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CERTIFICATE OF SERVICE

I CERTIFY that a true copy has been furnished by courier to Allen DeWeese, Criminal Justice Building, 421 3rd Street, 6th Floor, W. Palm Beach, FL 33401, this 2 day of August, 1996.

Of Counsel

1995. Appeals from the Circuit Court for Dade County. Affirmed. *See State v. Hamilton*, 574 So. 2d 124 (Fla. 1991); *Kelly v. State*, 360 So. 2d 77 (Fla. 4th DCA 1978), *cert. denied*, 364 So. 2d 887 (Fla. 1978); *Ivory v. State*, 330 So. 2d 853 (Fla. 3d DCA 1976), *quashed on other grounds*, 351 So. 2d 26 (Fla. 1977).

CONDINANZO v. CONDINANZO. 3rd District. #95-872. December 27, 1995. Appeal from the Circuit Court for Dade County. Affirmed. *See Orbe v. Orbe*, 651 So. 2d 1295 (Fla. 5th DCA 1995); *Steadman v. Steadman*, 645 So. 2d 581 (Fla. 1st DCA 1994).

AVILA v. STATE. 3rd District. #94-797. December 27, 1995. Appeal from the Circuit Court for Monroe County. Affirmed. *See White v. State*, 377 So. 2d 1149 (Fla. 1979), *cert. denied* 449 U.S. 845, 101 S. Ct. 129, 66 L. Ed. 2d 54 (1980); *Vazquez v. State*, 635 So. 2d 1088 (Fla. 3d DCA 1994); *Rodriguez v. State*, 493 So. 2d 1067 (Fla. 3d DCA 1986), *review denied*, 503 So. 2d 327 (Fla. 1987).

WILLIS v. MEDIDENT CONSTRUCTION, INC. 3rd District. #94-2928. January 3, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *See Fraternal Order of Police v. City of Miami*, 598 So. 2d 89 (Fla. 3d DCA 1992); *Sorren v. Kumble*, 578 So. 2d 836 (Fla. 3d DCA 1991).

PHILIP MORRIS, INC. v. BROIN. 3rd District. #95-86. January 3, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *See Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (Fla. 1995).

CRUDELE v. CRUDELE. 3rd District. #95-601. January 3, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *See Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *England v. England*, 626 So. 2d 330 (Fla. 1st DCA 1993); *Young v. Young*, 606 So. 2d 1267 (Fla. 1st DCA 1992).

CUEVAS v. CUEVAS, JR. 3rd District. #95-1393. January 3, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *Rubin v. Rubin*, 624 So. 2d 366 (Fla. 3d DCA 1993).

COLVIN v. HILTI, INC. 3rd District. #s 94-23 & 94-336. January 3, 1996. Appeal from the Circuit Court of Dade County. Affirmed. *See Gencorp Inc. v. Wolfe*, 481 So. 2d 109 (Fla. 1st DCA 1985), *review denied*, 491 So. 2d 281 (Fla. 1986); *Advance Chem. Co. v. Harter*, 478 So. 2d 444 (Fla. 1st DCA 1985), *review denied*, 488 So. 2d 829 (Fla. 1986).

CHIGIN v. STATE. 3rd District. #95-3155. January 3, 1996. Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County. Affirmed. *Bailey v. State*, 488 So. 2d 532 (Fla. 1986); *Gainer v. State*, 590 So. 2d 1001 (Fla. 1st DCA 1991).

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Errors—Claim that scoresheet included points for prior convictions under an alias never used by defendant not preserved for appellate review where error was not apparent from record and there was no contemporaneous objection to the scoresheet—Record indicates that defendant admitted to all prior crimes when trial court reviewed list of prior criminal offenses with him—Order of restitution stricken where restitution was not orally pronounced at sentencing

CLINTON SEYMORE, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2703. L.T. Case Nos. 93-20479CF10B, 93-12031CF10A. Opinion filed January 3, 1996. Appeal from the Circuit Court for Broward County; Richard D. Eade, Judge. Counsel: Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant appeals his sentence for burglary of a dwelling following his entry of a guilty plea. The assistant public defender filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), together with a supporting brief asserting that he could find no grounds to support an argument on direct appeal that the trial court committed reversible error in the imposition of a guidelines sentence where any error in the guideline scoresheets was not apparent or determinable from the record on appeal. Appellant pro se claims that his sentence was based on a scoresheet that included points for prior convictions under an alias of Carlton Lee Harris, an alias he never used. However, a contemporaneous objection to the scoresheet was required unless the error is apparent from the face of the record, which it is not in this case. *See Peterson v. State*, 651 So. 2d 781 (Fla. 4th DCA 1995). In addition, the record before us indicates that appellant admitted to all of the prior crimes when the trial court reviewed the list of prior criminal offenses with him.

We do agree, as pointed out by appellant's counsel, that the restitution order of $260 should be stricken because it was not orally pronounced at sentencing. *See McBride v. State*, 617 So. 2d 405 (Fla. 4th DCA 1993). Accordingly, we grant the motion to withdraw of the office of public defender pursuant to *Anders*, affirm the sentence, but remand with directions that the order of restitution be stricken.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH DIRECTIONS. (GUNTHER, C.J., PARIENTE and STEVENSON, JJ., concur.)

* * *

Criminal law—Jurors—Voir dire—Jury instructions—Trial court fundamentally erred by giving to venire an extemporaneous jury instruction which minimized the reasonable doubt standard

ROMEO CIFUENTES, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2059. L.T. Case No. 90-2419CF10. Opinion filed January 3, 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 Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

(POLEN, J.) Romeo Cifuentes appeals from a final judgment and sentence convicting him of conspiracy to traffic in cocaine, and trafficking in cocaine over 400 grams. He raises five separate points on appeal, one of which warrants reversal.

Cifuentes argues, and we agree that the following instruction given to the jury venire constitutes fundamental error as it suggests that the state's burden of proof does not require complete certainty before the defendant can be found guilty:

> Now, the third cardinal rule is that in order for you the jury to find the Defendant guilty, the State must convince you—the State must convince you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty. And that's what's known as the standard of proof. That's a landmark concept. That's a bedrock foundation of our American Criminal jurisprudence system. And that is, any time, any jury, anywhere in the United States of America, in all fifty states, federal court, state court, finds a defendant guilty, no matter what the charge is, whether it be stealing a six pack of beer, robbery, murder, rape, drug trafficking, arson, burglary, no matter what the charge is, if a jury finds the defendant guilty, that means that the jury has indicated that they have 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 means, beyond and to the exclusion of every reasonable doubt, when I give you the legal instructions at the conclusion of the trial. But suffice it to say it's a very heavy burden that the State represented by Mr. Gallagher, shoulders whenever it charges somebody with committing a crime.
>
> But even though it's a very heavy burden the State does not, and I repeat, stress, emphasize, the State does not have to convince a jury to an absolute certainty of the Defendant's guilt. In other words, you don't have to be one hundred percent certain that the Defendant is guilty in order to find him guilty, and that's because nothing is certain in life other than death and taxes.
>
> The point I'm trying to make is you can still have a doubt as to the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt.

This court's opinion in *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), is controlling. In *Jones*, we held that the giving of a substantially similar instruction to the venire constituted fundamental error. *Id.* at 489-490. We also specifically concluded that the indispensable reasonable doubt standard, a component of due process of law in criminal proceedings, was abridged when the trial court stated that certitude was not required. This court further noted that this was a minimization of the reasonable doubt standard that violated the due process clause of both the federal and Florida constitutions. *Id.* at 490. We 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 do[redacted] *Id.* at 416. The court noted that no objection was made by the [redacted]endant 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.* Conversely, this court noted in *Jones* that there were insufficient balancing instructions.

At bar, the trial court gave essentially the same instruction to the jury venire as the trial court in *Jones* did. Accordingly, as in *Jones*, this minimization of the reasonable doubt standard resulted in fundamental error as it deprived Cifuentes 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. Accordingly, we reverse the final judgment at bar in accordance with our prior opinion in *Jones*. *See also Rayfield v. State*, 20 Fla. L. Weekly D1907 (Fla. 4th DCA Aug. 23, 1995) (reversing a jury instruction all but identical to the one in *Jones* based on the *Jones* reasoning). (KLEIN and PARIENTE, JJ., concur.)

* * *

Appeals—Non-final orders—Summary judgment on liability is appealable—Order denying motion to amend complaint to add punitive damages claim is not appealable

GERALD KING, Appellant/Cross-Appellee, v. GARY ODLE, Appellee/Cross-Appellant. 4th District. Case No. 94-3631. L.T. Case No. CL 93-4027 AC. Opinion filed January 3, 1996. Appeal and cross-appeal from the Circuit Court for Palm Beach County; James T. Carlisle, Judge. Counsel: Scott S. Warburton of Adams, Coogler, Watson & Merkel, P.A., West Palm Beach, for appellant/cross appellee. David L. Gorman of David L. Gorman, P.A., North Pa[redacted]ach, and James K. Green of James K. Green, P.A., West Palm Beach, fo[redacted]llee/cross-appellant.

(PER CURIAM.) This is an appeal from summary judgment on liability in favor of plaintiff, Gary Odle, against defendant, Gerald King. Although brought as a final appeal, we have jurisdiction to consider it as a non-final order determining liability in favor of a party seeking affirmative relief pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). Accordingly we redesignate this as a non-final appeal. Based on the issues presented in the briefs, we affirm the decision of the trial court.

The plaintiff also filed a cross-appeal from the order of the trial court denying his motion to amend his complaint to add a punitive damages claim. We do not have jurisdiction to consider the merits of this cross-appeal because this order is not an appealable non-final order. *See* Fla. R. App. P. 9.130; *Webb Gen. Contracting, Inc. v. PDM Hydrostorage, Inc.*, 397 So. 2d 1058 (Fla. 3d DCA 1981), *cited in Gwen Fearing Real Estate, Inc. v. Wilson*, 430 So. 2d 589 (Fla. 4th DCA 1983). Moreover, we cannot consider this under our certiorari jurisdiction because it was not brought in a timely fashion. *See* Fla. R. App. P. 9.100(f). Accordingly we dismiss the cross-appeal without prejudice to raising this issue at the time of any plenary appeal. (GUNTHER, C.J., WARNER and PARIENTE, JJ., concur.)

* * *

Criminal law—Probation revocation—Order corrected to eliminate reference to violation which was not supported by evidence

JAMES JENNINGS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-0122. L.T. Case No. 90-891-CF. Opinion filed January 3, 1996. Appeal from the Circuit Court for St. Lucie County; Cynthia G. Angelos, Judge. Counsel: Richard L. Jorandby, Public Defender, and Karen E. El[redacted] Assistant Public Defender, West Palm Beach, for appellant. Robert A. Bu[redacted]orth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm the order revoking appellant's probation, except that we strike the finding that appellant violated condition 14. The evidence does not support this finding. In light of appellant's remaining, numerous violations of the probation order, we find it unnecessary to remand this cause to the trial court. *See Gavins v. State*, 587 So. 2d 487 (Fla. 1st DCA 1991); *Wilson v. State*, 506 So. 2d 1170 (Fla. 3d DCA 1987); *McKeever v. State*, 359 So. 2d 905 (Fla. 2d DCA 1978).

AFFIRMED. (DELL, FARMER and SHAHOOD, JJ., concur.)

* * *

Criminal law—Sentencing—Correction—Allegation that sentence exceeded statutory maximum and that trial court failed to award credit for prison time served on probationary split sentence sufficient to require attachment of portions of record showing no entitlement to relief—Rule 3.800(a) is not appropriate for resolving factual disputes by evidentiary hearing

REGGIE L. JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-2779. L.T. Case Nos. 91-2018CF10A, 91-2988CF10A, 91-3566CF10A, 91-1487CF10A, 91-809CF10A, and 91-584CF10A. Opinion filed January 3, 1996. Appeal of order denying rule 3.800(a) motion from the Circuit Court for Broward County; Richard D. Eade, Judge. Counsel: Reggie L. Johnson, Bowling Green, pro se appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Aubin Wade Robinson, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant filed a motion to correct illegal sentence pursuant to rule 3.800(a), Florida Rules of Criminal Procedure, in which he claimed that his fifteen year sentence for a second degree felony exceeded the statutory maximum under sections 775.082 and 812.13, Florida Statutes, and that the trial court erred in failing to award him credit for prison time served on a probationary split sentence. *Tripp v. State*, 622 So. 2d 941 (Fla. 1993).

The trial court summarily denied the motion, finding it legally insufficient. The court order denying the motion did not attach any portions of the record refuting appellant's sentencing challenges.

In this appeal from the order of summary denial, the state has responded to this court by conceding that the rule 3.800(a) motion was erroneously denied without the necessary attachments of portions of the record refuting appellant's sentencing challenges. It suggested that the proper recourse was to reverse and remand for an evidentiary hearing or attachment of portions of the record refuting appellant's claims. We disagree with the first portion of this suggestion, based on our recent pronouncement in *Fountain v. State*, 660 So. 2d 376 (Fla. 4th DCA 1995), that rule 3.800(a) is not appropriate for resolving factual disputes by evidentiary hearing. However, we also find that the trial court erred in summarily denying the rule 3.800(a) motion without any attachment of portions of the record.

Therefore, we reverse and remand for attachment of portions of the record refuting appellant's sentencing challenges.

REVERSED AND REMANDED. (DELL, WARNER and FARMER, JJ., concur.)

* * *

Criminal law—Sentencing—Correction—Credit for time served—Gain time—Exhaustion of administrative remedies

JAWAN KING, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-3254. L.T. Case No. 88-12584 CF10A. Opinion filed January 3, 1996. Appeal of order denying rule 3.800(a) motion from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge. Counsel: Jawan King, Vernon, pro se appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann Carrion, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) The record before us does not indicate whether appellant has sought administrative relief in his attempt to secure gain time credit from the department of corrections. We affirm the order under review without prejudice to appellant's ability to file a petition for writ of mandamus in the trial court after he exhausts his administrative remedies. *See Barber v. State*, 661 So. 2d 355 (Fla. 3d DCA 1995). (GLICKSTEIN, WARNER, and GROSS, JJ., concur.)

* * *

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

MEO CIFUENTES

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 94-02059

L.T. CASE NO. 90-2419 CF10
BROWARD

June 21, 1996

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed January 10, 1996, for certification of question is hereby granted. See Wilson v. State, 21 Fla. L. Weekly D476 (Fla. 4th DCA Feb. 21, 1996); further,

ORDERED that appellee's motion filed January 10, 1996, for stay of mandate is hereby denied.

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

MARILYN BEUTTENMULLER
CLERK

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

/CH