ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,954

DONNIE DOCTOR,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Petitioner, DONNIE DOCTOR, was the defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbols "R." and "T." will refer to the record on appeal and the transcripts of the proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

The State accepts the Statement of the Case and Facts contained in the initial brief of Petitioner, to the extent that it represents an accurate, non-argumentative synopsis of the course of the proceedings and evidence adduced below, with the following additions and corrections:

After the prospective jurors had been sworn preliminarily but prior to the commencement of questioning during voir dire, the trial judge made the following statement:

> In order to overcome the presumption of innocence that stays with this defendant through this trial and establish guilt it's not enough to furnish evidence tending to prove guilt or prove a mere probability of guilt.
>
> I think he's guilty is not good enough. You must be convinced beyond and to the exclusion of every reasonable doubt. That's the standard of law that we apply to criminal cases.
>
> Unlike Perry Mason, for those of you who grew up with Perry Mason, there is no such concept as beyond a shadow of a doubt. That's something the writers made up because it sounds good.
>
> The government has to prove their case beyond and to the exclusion of a reasonable doubt. It's not beyond all doubt whatsoever. There's nothing in life that is beyond all doubt. It's not to a hundred percent mathematical certainty. 'Cause that's an impossible burden. It's beyond and to the exclusion of a reasonable doubt. And what that means, what the law says a reasonable

> doubt is will be explained to you at the end of the case.
>
> It's not what I think it is or what you think it is, it's what the law says it is. It's part of the law that you will have to use whether or not you agree with it or not.
>
> The term close enough for government work doesn't apply in criminal cases. The State has to meet that burden in order for you as a juror to find the defendant guilty.
>
> If they fall below that burden then you cannot find the defendant guilty by law. But you can't require the State to go over that burden necessarily.
>
> You can't say well you have to prove this case to me beyond all doubt whatsoever or I'm never coming back with a guilty verdict. That's not the standard that applies here.
>
> It's proof beyond and to the exclusion of a reasonable doubt. And it's to the evidence that's introduced into this case and to it alone that you have to look for that proof.

(T. 95-96) During the charge conference after closing arguments, the trial court reviewed the jury instructions with counsel, including the reasonable doubt instruction, with which both sides were satisfied. (T. 475) The jury was later instructed as to the burden of proof, presumption of innocence and ultimately reasonable doubt, with the approved standard jury instruction:

> Whenever the words "reasonable doubt" are used you must consider the following:
>
> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if 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 as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence.
>
> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

(T. 490; R. 48) The trial court subsequently instructed the jury that it must follow the law spelled out in these instructions in deciding the verdict. (T. 498; R. 56)

QUESTIONS PRESENTED

I. **WHETHER THE LOWER COURT ERRED IN FINDING THAT THE TRIAL COURT'S COMMENTS DURING VOIR DIRE CONCERNING REASONABLE** DOUBT **DID NOT CONSTITUTE ERROR?**

SUMMARY OF THE ARGUMENT

This matter is before this Court on conflict with Wilson v. *State*, ***668 So.*** 2d *998* (Fla. 4th DCA 1995). However, this Court quashed that decision in *State* v. *Wilson*, 22 Fla. L. Weekly S2 (Fla. Dec. 26, 1996), holding that the trial court's comments concerning reasonable doubt were not error, were balanced by the reading of the entire standard instruction on reasonable doubt, and could have been cured if the Defendant had objected. As such, this Court should affirm the lower court.

The Defendant's attempt to distinguish *Wilson* is unavailing. The facts relied upon by the Defendant to distinguish the case have nothing to do with the comments during voir dire, the reading of the standard jury instruction on reasonable doubt or any objections to either of these.

ARGUMENT

I. THE LOWER COURT **WAS CORRECT IN FINDING THAT THE TRIAL COURT'S** COMMENTS **ON REASONABLE DOUBT WERE NOT FUNDAMENTAL** ERROR.

The Defendant admits that the cases upon which he based his argument that the trial court's unobjected to comments concerning reasonable doubt have been reversed by this Court. ***State*** v. Wilson, **22 Fla. L.** Weekly **S2** (Fla. Dec. 26, 1996). As such, this Court should affirm the lower court.

The Defendant contends that this Court should not apply *Wilson* because the evidence against the Defendant was not strong. However, in *Wilson,* this Court found no error in the trial court's comments on reasonable doubt because the trial court read the entire standard jury instruction on reasonable doubt at the close of the evidence. Further, this Court stated that an objection was necessary to preserve this issue for review. As there was no error, there was no reason to determine whether the alleged error was harmful in light of the strength of the State's case.

Similarly here, the trial court's comments during voir dire were balanced by the reading of the entire jury instruction on reasonable doubt at the close of the evidence. In fact, the trial court told the venire that reasonable doubt was what the law said

it was during the comments about which the Defendant complains. Further, the Defendant did not object to these comments. As such, the strength of the State's case is irrelevant, and *Wilson* applies.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court affirm the lower court's decision in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of May, 1997, to Rosa C. Figarola, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

SANDRA S. JAGGARD
Assistant Attorney General